

## DEPARTMENT OF DEFENSE

## Department of the Army, Corps of Engineers

## Proposal To Issue and Modify Nationwide Permits; Notice

AGENCY: Army Corps of Engineers, DoD.

ACTION: Notice of intent and request for comments.

**SUMMARY:** To improve protection of the aquatic environment, the Corps of Engineers is proposing to issue 5 new Nationwide Permits (NWP) and modify 6 existing NWPs to replace NWP 26 when it expires. The Corps is also proposing to modify 9 NWP general conditions and add three new general conditions. These general conditions will apply to the proposed new and modified NWPs, as well as the NWPs issued on December 13, 1996, when the new and modified NWPs become effective. The proposed new NWPs are activity-specific and authorize activities in all non-tidal waters of the United States, except for non-tidal wetlands adjacent to tidal waters. These proposed new and modified NWPs will allow Corps districts to enhance protection of the aquatic environment, by utilizing the Corps limited resources to review proposed projects, based on the degree of adverse effects on the aquatic environment. The Corps will spend more time on projects with the potential for more environmental damage and less time on projects with minimal adverse effects on the aquatic environment. The Corps has developed, with public and Federal, Tribal, and State agency comments, terms and conditions to ensure that the adverse effects of authorized activities are minimal. A key element of this process by the Corps to develop NWPs with minimal adverse effects on the aquatic environment is regional conditioning developed by district and division engineers. Regional conditioning of NWPs is critical to ensure that the NWPs help the Corps achieve these goals. Regional conditioning of NWPs is necessary to account for differences in aquatic resource functions and values across the country. Regional conditions will be added to the proposed new and modified NWPs by division engineers to ensure that the NWPs authorize only those activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. Concurrent with this **Federal Register** notice, each Corps district will issue a public notice to solicit comments on their final draft

regional conditions for the proposed new and modified NWPs.

The purpose of this **Federal Register** notice is to solicit comments on the final draft of the proposed new and modified NWPs that will replace NWP 26, as well as the NWP general conditions and definitions. Concurrent with this **Federal Register** notice, each Corps district will publish a public notice to solicit comments on their final draft regional conditions for the new and modified NWPs. The comment period for these district public notices will be 45 days. After reviewing the comments received in response to this **Federal Register** notice, the Corps will issue another **Federal Register** notice announcing the issuance of the new and modified NWPs to start the final 60 days for the State and Tribal Section 401 Water Quality Certification and Coastal Zone Management Act consistency determination decisions. After this 60-day period, the new and modified NWPs will become effective as NWP 26 expires.

To improve the implementation of the NWP program, the Corps has combined the NWP general conditions and Section 404 Only conditions into one set of general conditions. The Corps will issue a set of definitions for use with all of the NWPs to provide more consistency in the application of terms commonly used in the NWP program.

Although NWP 26 was scheduled to expire on September 15, 1999, the Corps has extended the expiration date of NWP 26 to December 30, 1999, or until the effective date of the new and modified NWPs, whichever comes first. **DATES:** Comments on the proposed new and modified NWPs must be received by September 7, 1999.

**ADDRESSES:** HQUSACE, ATTN: CECW-OR, 20 Massachusetts Avenue, NW, Washington, DC 20314-1000. Submit electronic comments to [cecwor@hq02.usace.army.mil](mailto:cecwor@hq02.usace.army.mil). See **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing of comments.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Olson or Mr. Sam Collinson at (202) 761-0199 or access the Corps of Engineers Regulatory Home Page at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

**SUPPLEMENTARY INFORMATION:****Background**

On December 13, 1996, the Corps of Engineers (Corps) reissued NWP 26 for a period of two years and announced its intention to replace NWP 26 with activity-specific NWPs prior to the expiration date of NWP 26. In the July

1, 1998, issue of the **Federal Register** (63 FR 36040-36078), the Corps published its proposal to replace NWP 26 by issuing 6 new NWPs, modifying 6 existing NWPs, modifying 6 NWP general conditions, and adding one new NWP general condition. NWP 26 authorizes discharges of dredged or fill material into headwaters and isolated waters, provided the discharge does not result in the loss of greater than 3 acres of waters of the United States or 500 linear feet of stream bed. Isolated waters are non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable waters of the United States and are not adjacent to interstate or navigable waters. Headwaters are non-tidal streams, lakes, and impoundments that are part of a surface tributary system to interstate or navigable waters of the United States with an average annual flow of less than 5 cubic feet per second.

The new and modified NWPs proposed in the July 1, 1998, **Federal Register** notice could authorize many of the same activities with minimal adverse effects on the aquatic environment that are currently authorized by NWP 26. Most of the proposed new and modified NWPs authorize activities in all non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. These proposed NWPs will ensure that the NWP program is based on the types of authorized activities. Regional conditioning of these proposed NWPs will limit or prohibit their use in high quality waters.

The terms and limits of the proposed new and modified NWPs are intended to authorize activities that typically result in minimal adverse effects on the aquatic environment. For these proposed NWPs, the Corps has also established preconstruction notification (PCN) thresholds to ensure that any activity that may potentially have more than minimal adverse effects will be reviewed by district engineers on a case-by-case basis. Most of the proposed NWPs require submission of a PCN for losses of greater than 1/4 acre of waters of the United States. Most of the proposed NWPs require PCNs for filling open waters, including streams, and for certain proposed NWPs a PCN may be required for filling more than 500 linear feet of stream bed. The PCN requirements for filling stream beds may differ, depending on whether a perennial, intermittent, or ephemeral stream bed is filled. For most of these NWPs, there is no PCN requirement for filling ephemeral stream beds. Excavation of stream beds may require a PCN if the excavation activity results

in a discharge of dredged material, including redeposit other than incidental fallback, into waters of the United States. Regional conditions may be added to NWP by district or division engineers to lower notification thresholds or require notification for all activities authorized by an NWP in order to ensure no more than minimal adverse effects on the aquatic environment.

The 5 new NWPs proposed in this **Federal Register** notice will expire 5 years from their effective date. The proposed 6 modified NWPs (i.e., NWPs 3, 7, 12, 14, 27, and 40) will expire on February 11, 2002, with the other NWPs that were issued, reissued, or modified in the December 13, 1996, **Federal Register** notice (61 FR 65874-65922). The proposed new and modified NWPs are scheduled to become effective on December 21, 1999, and we have extended the expiration date of NWP 26 to December 30, 1999, or the effective date of the new and modified NWPs, whichever occurs first. The extension of the expiration date for NWP 26 is discussed in more detail below.

Compensatory mitigation will be required when the District Engineer determines such mitigation is necessary to ensure that the activities authorized by NWPs will result only in minimal adverse effects on the aquatic environment. For a particular project, the District Engineer may determine that compensatory mitigation is not necessary, because the activity will result in no more than minimal adverse effects on the aquatic environment without compensatory mitigation. Some of the NWPs contain requirements for compensatory mitigation for certain activities, particularly for activities that require notification to the District Engineer. Compensatory mitigation will be used to support the goal of no net loss of aquatic resource functions and values by offsetting impacts to the aquatic environment. Compensatory mitigation can be accomplished through the restoration, creation, enhancement, and/or in exceptional circumstances, preservation of aquatic resources either by individual projects constructed by the permittee or the use of mitigation banks, in lieu fee programs, or other consolidated mitigation efforts. For the new and modified NWPs, an important component of compensatory mitigation is the establishment and maintenance of vegetated buffers adjacent to open and flowing waters. Vegetated buffers adjacent to open waters or streams may consist of either uplands or wetlands and help protect and enhance local water quality and aquatic habitat features in the waterbody. Vegetated

buffers can be established by maintaining an existing vegetated area adjacent to open or flowing waters or by planting native trees, shrubs, and herbaceous perennials in areas with little existing perennial native vegetation. The benefits and requirements for vegetated buffers are discussed in further detail below.

During the review of PCNs, district and division engineers can exercise discretionary authority and require an individual permit for those activities that result in more than minimal adverse effects on the aquatic environment. District engineers can also place conditions, including compensatory mitigation requirements, on NWP authorizations on a case-by-case basis to ensure that the activity authorized by the NWP results only in minimal adverse effects on the aquatic environment.

For these NWPs, we are placing greater emphasis on regional conditioning to ensure that the NWPs authorize only activities with minimal adverse effects on the aquatic environment. Regional conditions allow the NWP program to take into account regional differences in aquatic resource functions and values across the country. Each district will identify areas of high value waters that require lower PCN thresholds or notification for all activities in those waterbodies to ensure that the NWPs authorize only activities with minimal adverse effects on the aquatic environment. Division engineers can also suspend or revoke certain NWPs in high value waters if the use of those NWPs would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. The regional conditioning process is discussed in more detail below.

The Corps believes that the new and modified NWPs, with regional conditions, will increase the overall protection of the aquatic environment when compared to the existing NWP program. However, the scope of applicable waters for the proposed NWPs and the proposed NWP General Condition 27, which prohibits the use of certain NWPs to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain, will substantially increase the Corps individual permit workload. The proposed new and modified NWPs, in addition to the existing NWPs, will allow the Corps to efficiently authorize activities with minimal adverse effects on the aquatic environment and focus its efforts on protecting high value aquatic resources. NWPs will be used to authorize most activities in low value

waters. Higher value waters, including wetlands, will receive additional protection through regional conditioning of the NWPs, special conditions on specific NWP authorizations, and case-specific discretionary authority to require an individual permit when necessary. Regional conditions will be required by each district to restrict or prohibit the use of NWPs in high value waters. The Corps will require compensatory mitigation, where appropriate, to ensure that the individual or cumulative adverse effects on the aquatic environment authorized by these NWPs are no more than minimal. NWPs may also be suspended or revoked in some high value waters if the use of those NWPs would result in more than minimal adverse effects on the aquatic environment.

The proposed new and modified NWPs also reflect the Corps increased focus on open or flowing waters. One of the goals of the proposed new and modified NWPs is to improve protection of open waters and streams, especially water quality and aquatic habitat, while continuing to fully protect wetlands. District engineers will not place less consideration on adverse effects to other types of waters for the sake of wetlands, especially low value wetlands. The establishment and maintenance of vegetated buffers adjacent to open waters and streams will protect, restore, and enhance water quality and aquatic habitat. Vegetated buffers can be used to provide out-of-kind compensatory mitigation for wetland impacts where the District Engineer determines that such mitigation for wetland impacts is the best, ecologically, for the aquatic environment.

In addition to regional conditioning of the proposed new and modified NWPs, additional substantial protection of the aquatic environment will result from the modification of two NWP general conditions. We are proposing to modify General Condition 9, Water Quality, to require that postconstruction conditions do not result in more than minimal degradation of downstream water quality. An important component of this general condition is the requirement that, for certain NWPs, the permittee implement a water quality management plan to protect water quality. The water quality management plan may consist of stormwater management facilities or vegetated buffers adjacent to open or flowing waters or wetlands. It is not our intent to replace existing State or local water quality safeguards if those current safeguards are adequate. However, where the State or local program does not ensure that an authorized activity

results in no more than minimal impacts on downstream water quality, the Corps will condition its NWP authorization to contain a water quality management plan. We are also proposing to modify former Section 404 Only condition 6 (now designated as General Condition 21) to require that neither upstream nor downstream areas are subject to more than minimal flooding or dewatering after the project has been constructed and while the authorized activity is operated. General Condition 21 will help ensure that postconstruction effects on local surface water flows are minimal.

On October 14, 1998, the Corps published a supplemental notice in the **Federal Register** (63 FR 55095–55098) requesting comments on additional proposed limitations for the NWP program, including the proposed new and modified NWPs. This **Federal Register** notice also announced the withdrawal of NWP B for master planned development activities from the July 1, 1998, proposal. The additional NWP limitations proposed in the October 14, 1998, **Federal Register** notice, include prohibiting the use of NWPs in certain designated critical resource waters, limiting the use of NWPs in impaired waters, and prohibiting the use of the new NWPs to authorize permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain as mapped by the Federal Emergency Management Agency.

As a result of the proposal published on October 14, 1998, we are proposing to add 3 new NWP general conditions. General Condition 25, Designated Critical Resource Waters, prohibits the use of certain NWPs to authorize discharges of dredged or fill material into designated critical resource waters, including wetlands adjacent to those waters. General Condition 25 also requires notification to the District Engineer for activities authorized by certain other NWPs in Designated Critical Resource Waters. General Condition 26, Impaired Waters, restricts the use of NWPs to authorize discharges of dredged or fill material into waters of the United States designated through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands. General Condition 26 prohibits the use of NWPs to authorize discharges of dredged material resulting in the loss of greater than 1 acre of impaired waters of the United States,

including wetlands adjacent to those impaired waters. For discharges of dredged material resulting in the loss of 1 acre or less of impaired waters of the United States, including adjacent wetlands, General Condition 26 requires the prospective permittee to notify the District Engineer and clearly demonstrate that the project will not result in further impairment of the listed water. General Condition 27, Fills Within the 100-year Floodplain, prohibits or restricts the use of certain NWPs to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

The October 14, 1998, **Federal Register** notice also announced the extension of the expiration date for NWP 26 to September 15, 1999. As a result of the additional time needed to finalize the proposed new and modified NWPs, the Corps has decided to extend the expiration date of NWP 26 to December 30, 1999, or the effective date of the new and modified NWPs, whichever comes first, to ensure that there is no gap between the effective date of the new and modified NWPs and the expiration date of NWP 26. Extending the expiration date of NWP 26 is necessary to ensure fairness to the regulated public by continuing to provide an NWP for activities in headwaters and isolated waters that have minimal adverse effects on the aquatic environment until the new and modified NWPs proposed in this **Federal Register** notice become effective. In response to the July 1, 1998, **Federal Register** notice, many commenters recommended that the Corps extend the expiration date of NWP 26 until the proposed new and modified NWPs are issued and become effective. NWP 26 can continue to be used to authorize activities in headwaters and isolated waters until its expiration date. A permittee who receives an NWP 26 authorization prior to the expiration date will have up to 12 months to complete the authorized activity, provided the permittee commences construction, or is under contract to commence construction, prior to the date NWP 26 expires (see 33 CFR Part 330.6(b)). This provision applies to all NWP authorizations unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the NWP authorization in accordance with 33 CFR Part 330.4(e) and 33 CFR Part 330.5 (c) or (d).

The existing NWPs, with the exception of NWP 26, will remain in effect until they expire on February 11, 2002, unless otherwise modified, reissued, or revoked. Some of the

proposed new and modified NWPs can be used with existing NWPs to authorize activities with minimal adverse effects on the aquatic environment. The use of more than one NWP to authorize a single and complete project is addressed in the proposed modification of General Condition 15, Use of Multiple Nationwide Permits.

The October 14, 1998, **Federal Register** notice also discussed the need for additional opportunities for public comment on the new and modified NWPs and regional conditions. We have modified the process for additional opportunities for public comment to allow for more effective implementation of the proposed new and modified NWPs.

The revised process for issuing the proposed new and modified NWPs is illustrated in Figure 1. Figure 1 does not contain the previous steps in the development of the proposed new and modified NWPs. The revised process starts with today's publication of the draft new and modified NWPs in the **Federal Register** for a 45-day comment period, with concurrent public notices issued by Corps district offices to solicit comments on draft Corps regional conditions for these NWPs. Comments addressing the draft new and modified NWPs, general conditions, and definitions should be sent to HQUSACE, at the address cited in the ADDRESSES section of this **Federal Register** notice. Comments addressing draft Corps regional conditions should be sent to the appropriate Corps district office. After this 45-day comment period, we will review the comments concerning the proposed NWPs that were received in response to this **Federal Register** notice, each district will review the comments concerning their final draft regional conditions that were received in response to their public notices, and Corps divisions will complete the supplemental decision documents for the Corps regional conditions. On October 22, 1999, the Corps will announce the issuance of the final new and modified NWPs in the **Federal Register** to begin the final 60-day State and Tribal Section 401 water quality certification and Coastal Zone Management Act (CZMA) consistency determination processes. Concurrent with the publication of the final new and modified NWPs in the **Federal Register**, each Corps district will publish a public notice announcing their final Corps regional conditions for the new and modified NWPs, so that the 401 and CZMA agencies can make their decisions based on the new and modified NWPs and the Corps regional conditions. After this 60-day 401/CZMA

period, the new and modified NWP  
and Corps regional conditions will  
become effective.

**BILLING CODE 3710-92-P**



The proposed new and modified NWP's will help implement the President's Wetlands Plan, which was issued by the White House Office on Environmental Policy on August 23, 1993. A major goal of this plan is that Federal wetlands protection programs be fair, flexible, and effective. To achieve this goal, the Corps regulatory program must continue to provide effective protection of wetlands and other aquatic resources and avoid unnecessary impacts to private property, the regulated public, and the aquatic environment. The proposed new and modified NWP's will more clearly address individual and cumulative adverse effects on the aquatic environment, ensure that those adverse effects are minimal, address specific applicant group needs, and provide more predictability and consistency to the regulated public. Throughout the development of these NWP's, the Corps recognized the concerns of the natural resource agencies and environmental groups for the potential adverse effects on the aquatic environment resulting from activities authorized by these NWP's and the regulated public's need for certainty and flexibility in the NWP program.

### Electronic Access and Filing Addresses

You may submit comments by sending electronic mail (e-mail) to: [cecwor@hq02.usace.army.mil](mailto:cecwor@hq02.usace.army.mil)

Submit electronic comments as an ASCII file and avoid the use of any special characters and any form of encryption. Identify all electronic comments by including the phrase "Draft 1999 NWP's" in the subject line of electronic mail messages. Comments sent as attachments to electronic mail messages should be in ASCII format to ensure that those attachments can be read by HQUSACE.

### Discussion of Public Comments

#### I. Overview

Approximately 10,000 comments were received in response to the July 1, 1998 **Federal Register** notice, district public notices, and national and regional public hearings. The Corps reviewed and fully considered all comments received in response to the July 1, 1998, **Federal Register** notice. Most of these comments were in opposition to the proposed NWP's. Less than 300 commenters were in favor of the proposed new and modified NWP's. A number of commenters stated that NWP 26 is currently working well and does not need to be replaced. Of the 10,000 comments, approximately 8,000 were form letters and postcards that

provided no substantive or constructive comments. Members of environmental groups and development groups were typically in opposition to the proposed new and modified NWP's. The environmental community opposed the proposed NWP's, asserting they would allow too much impact on the aquatic environment. The development community opposed the proposed NWP's, asserting they are too restrictive on the regulated public. Many commenters provided specific comments, recommending changes to the NWP's, general conditions, and definitions. A few commenters provided comments relating to 33 CFR Part 330, the regulations for the implementation of the NWP program. It should be noted that the proposal published in the July 1, 1998, **Federal Register** was a proposal to issue new and modified NWP's and modify some NWP general conditions. We did not propose any changes to 33 CFR Part 330. We have reviewed these comments, but will not modify 33 CFR Part 330 at this time. Some commenters suggested additional issues for the Corps to consider for the NWP program. These new issues are discussed elsewhere in this **Federal Register** notice.

On August 19, 1998, the Corps held a public hearing in Washington, D.C. on the proposed NWP's. In addition to the national public hearing, Corps division offices held 12 regional public hearings in other parts of the country. The purpose of these public hearings was to provide interested parties with another forum to comment on the proposed new and modified NWP's. Transcripts from these public hearings were also reviewed and considered for changes to the NWP's and general conditions.

The Corps received nearly 1,000 comments in response to the October 14, 1998, **Federal Register** notice. Many commenters objected to the proposed additional restrictions to the NWP and some favored the proposed changes. The comments received in response to the October 14, 1998, **Federal Register** notice are also discussed below.

#### II. General Comments

Most commenters opposed the new and modified NWP's, but many commenters expressed support for the activity-based nature of the NWP's and the balanced approach of the general conditions and preconstruction notification (PCN) requirements. Some commenters stated that the NWP's should be based on impacts, not activities. Some commenters considered the proposed NWP's to be too restrictive, but the majority of commenters believe that the proposed NWP's are too broad

in scope. Many commenters objected to the new and modified NWP's, because they authorize the loss of up to 3 acres of wetlands without the opportunity for public comment. A large number of commenters remarked that the proposed NWP's and general conditions are too complex. Some of these commenters stated that the complexity of the new and modified NWP's is contrary to the goal of streamlining the Corps regulatory program. One commenter stated that the Corps should revise NWP 26 to make it specific to the needs of each state, instead of developing broad NWP's with national applicability. Many commenters requested that the Corps extend the comment period, due to the complexity of the proposal.

Commenters opposed to the issuance of the proposed NWP's stated that the NWP's should be more restrictive. These commenters cited the fact that the new NWP's apply to virtually all non-tidal waters of the United States, which they believe results in less protection of the aquatic environment. Many of these commenters stated that the Corps intent to replace NWP 26 with NWP's that are more protective of the aquatic environment is not accomplished by the proposed NWP's. These commenters requested that the Corps withdraw the proposed new and modified NWP's and develop NWP's that are more protective of aquatic resources. Some commenters said that the environmental protection provided by the NWP's will be reduced by the absence of review by the Corps and the absence of site visits. Many commenters requested that the Corps modify the proposed new NWP's to provide more protection for wetlands and small streams. Several commenters stated that the proposed NWP's help promote sprawl development by making it easier to fill wetlands.

We disagree with the assertion that the proposed new and modified NWP's reduce protection of the aquatic environment. The terms and conditions of these NWP's contain provisions that provide more protection of aquatic resources. For example, NWP's 39 and 43 require that prospective permittees submit a statement with the PCN describing how impacts to waters of the United States have been avoided and minimized and explaining why additional avoidance and minimization cannot be achieved on the project site. In addition, some of the proposed NWP's require compensatory mitigation to ensure that the adverse effects of the authorized work on the aquatic environment are minimal, a water quality management plan to protect the local aquatic environment, especially downstream water quality, and

management of water flows to ensure that downstream flow conditions are maintained and that the authorized work can withstand expected high flows.

For the proposed new and modified NWP, we have directed our district offices to regionally condition these NWP to provide additional protection for high value waters. Most of these NWP do not authorize activities in non-tidal wetlands adjacent to tidal waters.

The proposed new and modified NWP require submittal of a PCN to the Corps for many activities authorized by those NWP. We believe that we have established PCN thresholds that will require Corps review of any activity that has the potential to result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. District engineers will review these activities to ensure that they comply with the terms and conditions of the NWP and result in minimal adverse effects on the aquatic environment. District and division engineers can lower PCN thresholds when necessary to review additional projects. Through the PCN process, district engineers can add case-specific conditions and require compensatory mitigation to further protect the aquatic environment and replace aquatic resource functions and values that are lost as a result of the authorized work. The PCNs will also allow district engineers to monitor the cumulative adverse effects of activities authorized by NWP. The new NWP do not promote sprawl development. Zoning and land use are the responsibilities of State, Tribal, and local governments. If the construction of a new development involves the discharge of dredged or fill material into waters of the United States, the NWP can be used to satisfy Section 404 permit requirements, provided the activity complies with the terms and conditions of the NWP and results in minimal adverse effects on the aquatic environment. If the proposed work does not comply with the NWP, then a regional general permit, if applicable, or an individual permit will be required.

Many commenters objected to the proposed NWP, stating that these NWP are contrary to the Administration's Clean Water Action Plan (CWAP). These commenters cited one of the goals of the CWAP, which is to achieve a net gain of 100,000 acres of wetlands per year by 2005.

This goal of the CWAP will be achieved primarily through other Federal programs, including the Wetland Reserve Program and the

Conservation Reserve Program of the U.S. Department of Agriculture (USDA), the Corps environmental restoration programs, the Department of Interior's Partners for Fish and Wildlife program, and the North American Wetlands Conservation Act. Non-federal programs will also contribute to this goal. USDA's programs are estimated to provide 125,000 to 150,000 acres of wetlands per year and the other Federal programs are expected to provide an additional 40,000 to 60,000 acres of wetlands per year toward this goal. The Corps regulatory program is not expected to contribute substantial additional wetland acreage to this CWAP goal, but the District Engineer may require compensatory mitigation for activities authorized by NWP to offset losses of waters of the United States and ensure that the net adverse effects on the aquatic environment are minimal. The Corps does expect to continue its documented programmatic no net loss of wetlands approach to the Regulatory Program.

A number of commenters stated that the proposed NWP increase the complexity of the NWP program, thereby decreasing efficiency and flexibility. Many commenters assert that the proposed NWP are too restrictive and will increase the burden on the regulated public because of the notification requirements and the difficulty in interpreting these NWP. A number of commenters stated that the proposed NWP will increase the processing time and workload for permit applicants and the Corps.

We recognize that the proposed new and modified NWP increase the complexity of the NWP program, but we believe that this increase in complexity is necessary to protect the aquatic environment while authorizing activities with minimal adverse effects on the aquatic environment in an efficient and effective manner. The proposed new and modified NWP will be used to prioritize workload in non-tidal waters. In high value waters, additional protection will be provided by regional conditioning or suspending or revoking certain NWP if the use of those NWP would result in more than minimal adverse effects on the aquatic environment. The NWP will be used to efficiently authorize activities in low value waters. It is likely that most project proponents will design their projects to comply with the new and modified NWP rather than applying for authorization through the individual permit process. The proposed new and modified NWP, with the three proposed NWP general conditions, will substantially increase processing times

and the Corps workload. Prohibiting the use of NWP 21, 29, 39, 40, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain will result in large increases in the number of individual permit applications processed by the Corps.

Some commenters remarked that the proposed NWP have taken on elements of the individual permit review process, such as Section 404(b)(1) analysis, mitigation sequencing, and no net loss. One of these commenters recommended replacing the proposed NWP with NWP that authorize activities on a generic basis with specific limits but no reporting requirements. One commenter recommended retaining NWP 26, but modifying it to authorize activities below headwaters, because it would be simpler than the proposed NWP.

While there are some similarities between the individual permit review process and the NWP, there are also important differences. General Condition 19 requires that permittees avoid and minimize losses of waters of the United States on the project site to the maximum extent practicable and states that the District Engineer can require compensatory mitigation to offset losses of waters of the United States that result from the authorized work to ensure that the adverse effects on the aquatic environment are minimal. This general condition is similar, but not identical to the Section 404(b)(1) analysis required for Section 404 individual permits. It is important to note that an off-site alternatives analysis is not required for activities authorized by NWP, or any other general permit. The Section 404(b)(1) analysis required for individual permits requires analysis of off-site alternatives to determine if a practicable, less environmentally damaging, alternative exists to the proposed work on the original site.

To replace NWP 26 with NWP that authorize activities on a generic basis would be contrary to Section 404(e) of the Clean Water Act. Activities authorized by general permits, including NWP, must be similar in nature and result only in minimal adverse effects on the aquatic environment, individually or cumulatively. Each of the proposed new and modified NWP is activity-specific, authorizing activities that are similar in nature. Removing the reporting requirements from the new and modified NWP would increase the probability that the NWP would be used to authorize activities that result in more than minimal adverse effects on the aquatic environment. District

engineers utilize the PCN process to review proposed activities to determine if they comply with the terms and conditions of the NWP, including the statutory requirements of Section 404(e). The only way the Corps can issue an NWP without PCN requirements would be to lower the acreage limit to an extremely low level to ensure that all activities authorized by the NWP would result in minimal adverse effects on the aquatic environment. This would substantially reduce the utility of the NWPs, result in unacceptable increases in the number of individual permits for minor activities processed by the Corps, and severely limit the effectiveness and utility of the NWP program.

Modifying NWP 26 to authorize activities below headwaters would not accomplish the intent of the new and modified NWPs because such a modification of NWP 26 may not satisfy the statutory requirements of Section 404(e). One of the criticisms of NWP 26 is that many people believe that it does not satisfy the "similar in nature" requirement of Section 404(e) of the Clean Water Act. We believe that the activity-specific new and modified NWPs clearly satisfy all of the requirements of Section 404(e).

One commenter stated that the proposed NWPs change a goal of the Section 404 program from one of "no net loss" of wetlands to one of "no net loss of aquatic resource functions and values." This commenter also said that focusing on the effects of non-point source discharges on water quality is the responsibility of the states, not the Corps. A couple of commenters stated that, in the July 1, 1998, **Federal Register** notice, the Corps is inappropriately expanding the Administration's "no net loss" goal for wetlands to other types of waters of the United States. These commenters believe that this expansion should be subject to public comment instead of including it with the proposed new and modified NWPs. One of these commenters objected to requiring compensatory mitigation for losses of non-wetland waters of the United States and that the Corps should focus only on achieving the goal of "no net loss" of wetland acreage. This commenter also objected to applying the "no net loss" goal to a watershed basis instead of to the nation as a whole. Some commenters recommended that the final NWPs contain a statement that the "no net loss" principle is applicable only for wetlands and that compensatory mitigation for losses of other types of waters of the United States should only be required to ensure that the authorized work, with compensatory

mitigation, results in minimal adverse effects on the aquatic environment. Another commenter recommended that "no net loss" should be required for the NWP program.

Although one of the Administration's five principles for Federal wetlands policy is the goal of no net loss of wetlands, it is important to consider the functions and values of wetlands, as well as other aquatic resources. The Section 404 program has always regulated activities in all waters of the United States, not just wetlands. Streams and other open water habitats are extremely important components of the aquatic environment, and are as important as wetlands. The proposed new and modified NWPs place a greater emphasis on open waters to provide those areas with the additional protection that we believe is warranted. It is also important to remember the goals of the Clean Water Act and the importance of Section 404 in meeting those goals. Indeed, the Corps authority to regulate and protect open waters is clearer within the statutory framework than our authority to regulate wetlands. For instance, as a condition of a Section 404 permit, the Corps can require vegetated buffers adjacent to streams to offset adverse effects of the authorized activity on water quality.

Although certain statements in the July 1, 1998, **Federal Register** notice appear to expand the Administration's goal of no overall net loss of the Nation's remaining wetlands to other waters of the United States, such as streams, it is important to note that wetlands are only one component of the overall aquatic environment. By requiring compensatory mitigation for activities in other aquatic areas, such as streams, we are providing better overall protection for the aquatic environment. For the NWP program, the purpose of compensatory mitigation is to ensure that the authorized activities result in minimal adverse effects on the aquatic environment, individually or cumulatively, not to achieve "no net loss" of wetland acreage. Compensatory mitigation may be required by district engineers for losses of any type of water of the United States, not just wetlands. Such compensatory mitigation requirements do help contribute to the "no net loss" of wetlands goal, but in some cases district engineers may determine that compensatory mitigation is unnecessary because the adverse effects of the authorized work are minimal, without compensatory mitigation. It is important to note that NWP compensatory mitigation requirements are not driven by the "no net loss" goal, but will help support that

goal. For the NWP program, the need for compensatory mitigation is assessed on a case-by-case basis and a watershed basis, not a national basis, to ensure that the NWPs authorize only those activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. The programmatic goal of no net loss of wetlands is embodied in several Corps guidance documents, including former NWP issuance documents. The underlying principle is that the Corps will require compensatory mitigation to offset functions and values of aquatic resources, including wetlands, that are lost as a result of permit actions. Within the NWP program, the Corps will require compensatory mitigation to offset losses of functions and values of aquatic resources, including wetlands, to the extent that the NWPs authorize activities with no more than minimal adverse effects on the aquatic environment. On a watershed basis, this will normally result in no net loss of any important aquatic functions, not just wetlands.

One commenter requested that the Corps regulations should be consolidated as part of the proposed changes to the NWPs, because the Corps and the regulated public must consult multiple **Federal Register** notices for changes that have occurred over the past 12 years since the last consolidated rule was published. Another commenter stated that the Wetland Delineator Certification Program (WDCP) should be finalized to increase efficiency of the Corps regulatory program. Several commenters objected to the proposed NWPs because they authorize activities that are not water dependent.

The proposal to issue new and modified NWPs and general conditions does not constitute rulemaking. The current NWP regulations were issued on November 22, 1991, and the purpose of the proposal published in the **Federal Register** on July 1, 1998, is merely to issue and modify NWPs in accordance with the regulations at 33 CFR Part 330. The public can obtain a copy of the consolidated Corps regulations at 33 CFR Parts 320 to 330 by purchasing a copy of the appropriate Code of Federal Regulations published annually by the U.S. Government Printing Office or obtain a copy through the Internet at <http://www.access.gpo.gov/nara/index.html#cfr>. The Corps has not finalized the WDCP and has not determined when the program will be implemented.

On a case-by-case basis, NWP activities are not subject to the requirements for a Section 404(b)(1) alternatives analysis, including the



water dependency test. General Condition 19 of the NWP requires permittees to avoid impacts to the aquatic environment on-site to the extent practicable. However, no off-site alternatives test is ever conducted for any general permit activity, including NWPs. In addition, the water dependency test in the Section 404(b)(1) Guidelines does not require that all activities in waters of the United States must be water dependent to fulfill its basic project purpose (see 40 CFR Part 230.10(a)(3)). The vast majority of all activities permitted by the Corps are not water dependent. NWPs can authorize activities in special aquatic sites, provided they result in minimal adverse effects on the aquatic environment, individually or cumulatively, and impacts to the aquatic environment have been avoided on-site to the extent practicable.

One commenter stated that the acreage limits and PCN thresholds for the NWPs should be more consistent. Another commenter recommended that the acreage limits for the NWPs should be  $\frac{1}{2}$  or 1 acre and 200 linear feet of stream bed. A third commenter suggested an acreage limit of  $\frac{1}{4}$  acre for all NWPs. One commenter recommended that the Corps decrease the acreage limits of the new NWPs because permittees will reduce the scope of work to comply with those lower acreage limits, resulting in better protection of the environment and reducing wetland losses.

We disagree that the acreage limits for the NWPs should be the same, but we have made the PCN thresholds more consistent by changing the PCN threshold to  $\frac{1}{4}$  acre for most of the new and modified NWPs. For open and flowing waters, the PCN requirements will still vary among these NWPs. We also disagree with imposing an upper limit for linear feet of stream impacts. We have changed the prohibition against filling greater than 500 linear feet of stream under NWP 26 to a PCN requirement. NWP 39 has a PCN requirement for any discharges into open waters, including streams. The PCN requirement for impacts to stream beds will allow district engineers to review those projects to ensure that they result only in minimal adverse effects on the aquatic environment. Division engineers can also regionally condition NWPs to lower the acreage limits and PCN thresholds. Although many project proponents will design their projects to comply with the terms and conditions of the NWPs, there is a lower limit where such incentives no longer work and it would be more cost effective for the regulated public to pursue

individual permits, which may result in even greater adverse effects on the aquatic environment. With the proposed new and modified NWPs, we believe that we have developed NWPs that balance environmental protection with development activities by providing the districts with the ability to use NWPs to authorize most activities with minimal individual or cumulative adverse effects on the aquatic environment while protecting high value areas with regional conditions.

#### Expiration of Nationwide Permit 26

In the July 1, 1998, **Federal Register** notice, we proposed to change the expiration date of NWP 26 from December 13, 1998, to March 28, 1999. Many commenters objected to the proposed extension of the expiration date for NWP 26. A number of commenters requested that the Corps retain NWP 26 until the proposed new and modified NWPs become effective. Other commenters suggested that the Corps change the expiration date of NWP 26 to February 11, 2002, to continue to authorize projects that will not be authorized by the new and modified NWPs. One commenter expressed concern about confusion resulting from different expiration dates for the NWPs.

Due to changes in the schedule and process for developing and implementing the new and modified NWPs to replace NWP 26, the Corps announced in the October 14, 1998, issue of the **Federal Register** the extension of the expiration date of NWP 26 to September 15, 1999, to allow for additional public comment on the new and modified NWPs, general conditions, and regional conditions. Since the proposed new and modified NWPs and regional conditions will not become effective before September 15, 1999, we have decided to extend the expiration date of NWP 26 to December 30, 1999, or the effective date of the new and modified NWPs, whichever occurs first, to allow the continued use of NWP 26 until the new and modified NWPs become effective. Extending the expiration date of NWP 26 until the effective date of the new and modified NWPs is necessary to ensure fairness to the regulated public by continuing to provide an NWP for activities with minimal adverse effects in headwaters and isolated waters until the new activity-specific NWPs become effective. If the expiration date of NWP 26 is not extended, most project proponents would have to apply for individual permits, although some activities may be authorized by other NWPs or regional general permits. For those activities

with minimal adverse effects on the aquatic environment, it would be unfair and unnecessarily burdensome on the regulated public to require an individual permit.

We will not extend the expiration date of NWP 26 to February 11, 2002, to authorize those activities that do not qualify for the new and modified NWPs. Such action would be contrary to our intent, which is to replace NWP 26 with activity-specific NWPs. However, the Corps does not intend to allow a lapse in time to occur between the effective date of the new and modified NWPs and the expiration date of NWP 26. Activities that were previously authorized by NWP 26, but could not be authorized by the proposed new and modified NWPs may be authorized by individual permits, other NWPs, or regional general permits.

In response to the October 14, 1998, **Federal Register** notice, a large number of commenters supported the extension of the expiration date of NWP 26, but a few commenters objected to the time extension. Several commenters stated that the Corps should not set a specific expiration date for NWP 26, to ensure that it is available until the new and modified NWPs become effective. A number of commenters said that the October 14, 1998, **Federal Register** notice was unclear as to whether the expiration date for NWP 26 is extended to September 15, 1999; it appeared to these commenters that the new expiration date was published for public comment. One of these commenters requested that the Corps clearly state in this **Federal Register** notice the new expiration date for NWP 26. Two commenters expressed concern about the expiration of NWP 26 authorizations for projects which already have been authorized by this NWP.

The expiration date for NWP 26 was changed to September 15, 1999, as announced in the October 14, 1998, **Federal Register** notice. The new expiration date was not subject to public comment in that notice. It is necessary to set a firm expiration date for NWP 26 to minimize confusion for the regulated public during the process of developing and implementing the new and modified NWPs.

In accordance with 33 CFR Part 330.6(b), permittees with a valid NWP 26 authorization have up to one year to complete the authorized work, provided they start the work or are under contract to do the work prior to the expiration of the NWP. This provision of the NWP regulations is not affected by the proposed new and modified NWPs. Any activities authorized by NWP 26 that have not commenced or are not under

contract prior to the expiration of NWP 26 must be reauthorized by another NWP, a regional general permit, or an individual permit. Some of these projects may be authorized by the proposed new and modified NWPs, provided those projects meet the terms and conditions of those NWPs.

#### **State, Tribal, and EPA Section 401 Certification of the NWPs**

One commenter stated that the Corps denial of an NWP authorization based on the denial of the Section 401 water quality certification (WQC) by States, Tribes, or EPA prevents applicants from pursuing an individual permit. According to the commenter, applicants are required to obtain an individual, project-specific WQC. A number of commenters objected to the Corps practice of issuing provisional NWP verifications where WQC has been denied by the State, Tribe, or EPA. One commenter stated that NWPs should not be used in states where WQC has been denied or the NWP activity is determined to be inconsistent with the State's Coastal Zone Management Act (CZMA) plan. These commenters believe that individual permits should be required instead.

Denial of WQC for an NWP should not be the sole reason for requiring individual permit review for activities that would otherwise comply with the terms and conditions of the NWP. A denial of WQC by a State, Tribe, or EPA for an NWP does not mean that the activities authorized by that NWP will result in more than minimal adverse effects on the aquatic environment. The WQC denial only indicates that the NWP activity may not meet the water quality standards for that State or Tribal land in all situations. For specific projects that meet the water quality standards, the 401 agency can issue an individual WQC or waive the WQC requirement. If a specific project does not meet the water quality standards and the 401 agency denies WQC for that project, then that particular project cannot be authorized by an NWP or an individual permit unless the WQC is later issued or waived.

Although the Corps makes every effort to work closely with States, Tribes, or EPA to facilitate Section 401 water quality certification for activities authorized by NWPs, we have an obligation to the regulated public to provide timely NWP authorizations for projects that meet the terms and conditions of the NWPs and result in minimal adverse effects on the aquatic environment, individually and cumulatively. Therefore, if a project qualifies for NWP authorization, we

should issue a provisional NWP verification that is not valid until the permittee obtains an individual WQC or CZMA consistency determination or waiver and a copy is sent to the Corps. These provisional NWP verifications indicate that the permittee cannot commence work until the WQC or CZMA determination is obtained or waived.

The final WQC and CZMA determination processes for the new and modified NWPs will begin with the publication of the **Federal Register** notice announcing the issuance of the NWPs. This **Federal Register** notice is scheduled to be published on October 22, 1999. Concurrent with that **Federal Register** notice, Corps districts will publish public notices announcing their final Corps regional conditions for the new and modified NWPs. The 401 and CZMA agencies will have 60 days from the date of that **Federal Register** notice to make their WQC or CZMA consistency determinations for those NWPs.

#### **Regional Conditioning of the Nationwide Permits**

For the proposed new and modified NWPs, the Corps is placing greater emphasis on regional conditioning. Regional conditioning is necessary to ensure that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment, individually and cumulatively.

A number of commenters supported the increased emphasis on regional conditioning for the new and modified NWPs. Some of these commenters recognize the importance of evaluating wetland impacts on a regional and watershed basis. One commenter stated that since hydrologic, geologic, and other environmental characteristics vary across the country, regional conditions are necessary because an inflexible regulatory approach to managing waters of the United States is ineffective. This commenter said that regional conditions provide the flexibility to effectively manage waters of the United States, based on their particular environmental characteristics.

Many commenters expressed opposition to the increased emphasis on regional conditions for the proposed new and modified NWPs. Some commenters recommended that the Corps eliminate regional conditioning from the NWP program. Two commenters said that regional conditions are unnecessary because the NWPs can only authorize activities with minimal adverse effects on the aquatic environment. Another commenter stated that regional conditions are unnecessary

because district engineers can place special conditions on NWP authorizations on a case-by-case basis. One commenter stated that regional conditions are unnecessary because Federal regulations require that general permits must be based on activities, not types of waters. A couple of commenters objected to the approach presented in the July 1, 1998, **Federal Register** notice, because it treats regional conditioning as the rule, not the exception. One commenter stated that regional conditioning should not be required of all districts, because some districts may not need them.

Regional conditioning of the proposed new and modified NWPs is necessary to ensure that these NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment, a requirement of Section 404(e) of the Clean Water Act. Regional conditions are necessary because the national terms and conditions of the NWPs are established to authorize most activities that result in no more than minimal adverse effects on the aquatic environment, individually or cumulatively. For particular regions of the country or specific waterbodies where additional safeguards are necessary to ensure that the NWPs satisfy the statutory requirements for general permits, regional conditions are the appropriate mechanism. Case-specific discretionary authority or special conditions cannot act as surrogates for regional conditions in many cases, especially for those NWP activities that do not require notification to the District Engineer. For example, regional conditions can restrict the use of NWPs in high value waters for those activities that do not require submission of a PCN. Although the proposed NWPs are activity-specific, regional conditions are necessary to protect high value waters to ensure that the NWPs do not authorize activities that result in more than minimal adverse effects on the aquatic environment. We believe that all districts have high value waters that should be subject to regional conditioning.

A substantial number of commenters asserted that regional conditioning of the NWPs greatly reduces the flexibility of the NWPs, making them more complicated, less useful, and too restrictive. Many of these commenters stated that regional conditioning of the NWPs undermines the intent of Section 404(e) of the Clean Water Act, by making the NWPs more like individual permits. They also said that regional conditions would unnecessarily and substantially increase burdens on the regulated public. A number of

commenters stated that regional conditioning of the NWP offsets any benefits in regulatory streamlining the NWPs are intended to provide. Several commenters stated that regional conditioning of the NWPs will increase the Corps workload, because there will be more projects that cannot qualify for NWP authorization.

Although regional conditions may increase the complexity of the NWPs and reduce their applicability, it is important to remember that NWPs are optional permits, and if the project proponent does not want to comply with all of the terms and conditions of an NWP, including regional conditions, then he or she can apply for authorization through the individual permit process. Regional conditioning of the NWPs is likely to increase the Corps workload, but we believe that such increases are manageable. Division engineers will review the regional conditions proposed by Corps districts and ensure that any regional conditions that are adopted will ensure that the Corps workload will be prioritized to increase protection of the aquatic environment.

A number of commenters objected to the regional conditioning process and wanted to reserve their comments on the proposed new and modified NWPs until they have had the opportunity to review the proposed regional conditions. Many commenters requested that the Corps provide the regulated community an opportunity to comment on the regional conditions after the new and modified NWPs are issued. Several commenters suggested that the Corps allow an additional 60 days to complete the regional conditions to allow full public participation and comment. Some commenters recommended that the Corps publish the regional conditions in the **Federal Register** and provide the public with an additional opportunity to comment on the regional conditions. A number of commenters stated that the process for developing regional conditions is vague and confusing and that clear guidance is needed to assist districts in developing regional conditions. One commenter stated that the national NWP terms and conditions should be established after regional conditioning is completed.

We agree that the public should have another opportunity to comment on the complete NWP package, including the NWPs, general conditions, definitions, and Corps regional conditions. The process for issuing the proposed new and modified NWPs and Corps regional conditions has been changed from the process announced in the October 14, 1998, **Federal Register** notice.

Concurrent with today's **Federal Register** notice, each Corps district will issue a public notice announcing draft regional conditions for a 45-day comment period. Therefore, the public will have 45 days to provide comments on both the draft new and modified NWPs and the draft Corps regional conditions. We have provided Corps divisions and districts with guidance concerning the regional conditioning process to facilitate the development and implementation of regional conditions. We do not agree that the national terms and limits for the NWPs should be established after the Corps regional conditions are finalized because the terms and limits of the NWPs must be first established nationally, so that division engineers can issue Corps regional conditions that account for regional differences in aquatic resource functions and values and provide additional protection for the aquatic environment. Regional conditions make the NWPs more restrictive where necessary to ensure that those NWPs authorize only activities with minimal adverse effects on the aquatic environment.

Several commenters said that division and district engineers should be able to use regional conditioning to make the NWPs less restrictive, as well as more restrictive. Two commenters asserted that the Corps regulations at 33 CFR Part 330.1(d) specifically state that division and district engineers can condition or further restrict NWPs only when they have concerns for the aquatic environment under the Section 404(b)(1) Guidelines or for any other factor of the public interest. Another commenter recommended that the Corps institute a procedure whereby a permit applicant could request Corps headquarters review of a specific regional condition for consistency with general Corps regulatory policy. This commenter expressed concern that the regional conditioning process would create arbitrary inconsistencies in the implementation of the Corps regulatory program between Corps districts. Two commenters stated that Corps regional conditions for the NWPs should not duplicate the states' authority under Sections 401 and 402 of the Clean Water Act. Another commenter expressed concern that the regional conditions would not completely protect waters that need special protection and recommended that the Corps conduct advanced identification of those high value areas. One commenter opposed the principle that regional conditions can restrict the use of NWPs in areas

covered by Special Area Management Plans (SAMPs).

Division and district engineers cannot use regional conditioning to make the NWPs less restrictive. Only the Chief of Engineers can modify an NWP to make it less restrictive, if it is in the national public interest to do so. Such a modification must go through a public notice and comment process. However, if a Corps district believes that regional general permits are necessary for activities not authorized by NWPs, then that district can develop and implement regional general permits to authorize those activities, as long as those regional general permits comply with Section 404(e) of the Clean Water Act. We do not believe that it is necessary to establish a procedure for headquarters review of regional conditions. Division engineers will review proposed regional conditions and approve only those regional conditions that are necessary to ensure that the NWPs authorize only activities with minimal adverse effects on the aquatic environment. We have provided division and district offices with guidance addressing regional conditioning of NWPs. In general, Corps regional conditions should not duplicate State Clean Water Act Section 401 or 402 authorities, but regional conditions can address concerns for the aquatic environment that may also be related to water quality or non-point sources of pollution. The public notice process for regional conditions, especially the process used for the new and modified NWPs, can help the Corps identify specific waterbodies that should be subject to regional conditions. The public had the opportunity, through district public notices, to recommend specific high value waterbodies that should receive additional protection. In some cases, it is appropriate to restrict or prohibit the use of NWPs in areas subject to SAMPs. In areas where SAMPs are conducted, general permits are often developed and issued to provide Section 404 and Section 10 authorization for activities within the area covered by the SAMP. Restricting or prohibiting the use of NWPs within the SAMP area is often necessary to ensure that the SAMP is properly implemented.

Numerous commenters suggested that regional conditions must be consistent between Corps districts within the same state. Another commenter recommended that regional conditions should be consistent between all Corps districts. One commenter observed that regional conditions being developed by districts in initial public notices for the new and modified NWPs are highly variable and emphasized the need for

stronger national terms and conditions. This commenter believes that inconsistencies between Corps districts with regard to regional conditions will be severe and unacceptable. One commenter requested that for companies operating throughout the country, regional conditions must be consistent between districts.

There may be certain regions within a particular state, such as specific high value waterbodies, that warrant regional conditions that are not necessary in other areas of that state. Consistency in regional conditions across the country is contrary to the purpose of the regional conditioning process, which is to consider local differences in aquatic resource functions and values to ensure that the NWP's do not authorize activities with more than minimal adverse effects on the aquatic environment. Companies that work in more than one district will have to comply with the regional conditions established in each district.

The draft regional conditions are currently available for public review on the Internet at the following home pages:

#### North Atlantic Division

Baltimore District: <http://www.nab.usace.army.mil/permits/regionalconditions.htm>

New England District: <http://www.nae.usace.army.mil/envirom/regl.htm>

New York District: <http://www.nan.usace.army.mil/business/buslinks/regulat/index.htm#PNotices>

Norfolk District: <http://www.nao.usace.army.mil/Regulatory/PN/PN.html>

Philadelphia District: <http://www.nap.usace.army.mil/cenap-op/regulatory/regulatory.htm>

#### South Atlantic Division

Charleston District: <http://www.sac.usace.army.mil/permits>

Jacksonville District: <http://www.saj.usace.army.mil/permit/index.html>

Mobile District: <http://www.sam.usace.army.mil/sam/op/reg/almscat.htm>

Savannah District: <http://www.sas.usace.army.mil/regcond.htm>

Wilmington District: <http://www.saw.usace.army.mil/wetlands/regtour.htm>

#### Great Lakes and Ohio River Division

Buffalo District: <http://www.lrb.usace.army.mil/orgs/offices/form.htm>

Chicago District: <http://www.usace.army.mil/lrc/co-r/index.htm>

Detroit District: <http://huron.lre.usace.army.mil/regu/dtwhome.html>

Huntington District: <http://www.lrh-opr-nt.orh.usace.army.mil/permits/Nationwide/nation.html>

Louisville District: <http://www.lrl.usace.army.mil/orf/nw/nw.html>

Nashville District: <http://www.orn.usace.army.mil/cof/notices.htm>

Pittsburgh District: <http://www.LRP.usace.army.mil/OR-F/permits.html>

#### Mississippi Valley Division

Memphis District: [http://www.mvm.usace.army.mil/regulatory/public-notices/public\\_notices.htm](http://www.mvm.usace.army.mil/regulatory/public-notices/public_notices.htm)

New Orleans District: <http://www.mvn.usace.army.mil/ops/regulatory/Rock Island District: http://www.mvr.usace.army.mil/regulatory/nationwidepermits.htm>

St. Louis District: <http://www.mvs.usace.army.mil/permits/pn.htm>

St. Paul District: <http://www.mvp.usace.army.mil/regulatory/regulatory.html>

Vicksburg District: <http://www.mvk.usace.army.mil/odf/regs/nwpcconditions.htm>

#### Southwestern Division

Fort Worth District: <http://155.84.60.1/current/current.htm>

Galveston District: <http://www.swg.usace.army.mil/news.htm>

Little Rock District: <http://www.swl.usace.army.mil/regulatory/ceal.html>

Tulsa District: <http://www.swt.usace.army.mil/whatishot/whatishot.htm>

#### Northwestern Division

Kansas City District: <http://www.nwk.usace.army.mil/conops/regulatory.htm>

Omaha District: <http://www.nwo.usace.army.mil/html/op-r/webpg.htm>

Portland District: <http://www.nwp.usace.army.mil/op/g/regulatory.htm>

Seattle District: <http://www.nws.usace.army.mil/reg/reg.htm>

Walla Walla District: <http://www.nww.usace.army.mil/html/offices/op/rf/cond2.htm>

#### South Pacific Division

Albuquerque District: <http://www.spa.usace.army.mil/reg/localnot.htm>

Los Angeles District: <http://www.spl.usace.army.mil/co/co5.html#reg>

Sacramento District: <http://www.spk.usace.army.mil/cespk-co/regulatory/>

San Francisco District: <http://www.spn.usace.army.mil/regulatory/>

#### Pacific Ocean Division

Alaska District: <http://www.usace.army.mil/alaska/co/conops1.htm>

Honolulu District: <http://www.pod.usace.army.mil/news/newsrel.html>

Please note that the regional conditions posted on these Internet home pages are the current draft Corps regional conditions, and that there are likely to be changes to the Corps regional conditions based on the comments received in response to district public notices.

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

A large number of commenters stated that the proposed NWP's are in violation of Section 404(e) of the Clean Water Act because they believe that the proposed NWP's do not authorize activities that are similar in nature. Section 404(e) stipulates two statutory criteria for general permits, including the NWP's: (1) the activities authorized by a general permit must be similar in nature, and (2) those activities must result in minimal adverse environmental effects, individually or cumulatively. Many of these commenters asserted that the proposed NWP's 39, 42, and 44, as well as additional activities authorized by the proposed modifications of NWP's 12 and 40, violate the provisions of Section 404(e) because they lack precise descriptions of authorized activities and the descriptions for these NWP's included in the July 1, 1998, **Federal Register** notice were too broad to be similar in nature and environmental impact. Many commenters stated that the proposed new and modified NWP's authorize activities with more than minimal adverse effects on the aquatic environment. Some commenters stated that the Corps has not adequately assessed the individual and cumulative adverse environmental effects of the new and modified NWP's in accordance with 33 CFR Part 320 and 40 CFR Part 230.

When considering whether or not an NWP complies with the "similar in nature" criterion of Section 404(e), it is important not to constrain this criterion to a level that makes the NWP program too complex to implement or makes a particular NWP useless because it

would authorize only a small proportion of activities that result in minimal adverse effects on the aquatic environment. Developing NWP's with extremely precise and restrictive language to satisfy the environmental community's definition of the term "similar in nature" would result in a large number of NWP's that would make the NWP program excessively complex and burdensome, without any added protection to the aquatic environment. It appears that most critics of the NWP's believe that activities authorized by an NWP must be identical to each other to satisfy Section 404(e). We believe that the term "similar in nature" is intended to have a more practical definition. The word "similar" does not have the same meaning as the word "identical." We believe that the proposed new and modified NWP's, which are activity-specific, authorize only activities that are similar in nature in the broader, and the more practical, definition of the word "similar." We agree that proposed NWP A may not have satisfied the "similar in nature" requirement of Section 404(e) because of the wide range of authorized activities listed in the text of the proposed NWP. Therefore, we have proposed to modify the description of activities authorized by this NWP (designated as NWP 39) to limit the NWP to the construction of building pads or foundations and attendant features necessary for the operation and use of the building constructed on the pad or foundation. We believe that NWP 39 authorizes only activities that are similar in nature (i.e., the construction of buildings and features necessary for their operation and use) and have minimal adverse effects on the aquatic environment. We believe that each of the other new and modified NWP's proposed in this **Federal Register** notice authorize only activities that are similar in nature.

During the development of these NWP's, the Corps has complied with all applicable laws and regulations, especially 33 CFR Parts 320 through 330 and 40 CFR Part 230. For those new and modified NWP's that are issued, the Corps will prepare Environmental Assessments, Statements of Finding, and, where applicable, Section 404(b)(1) Compliance reviews. These documents will address how these NWP's comply with the public interest review criteria in 33 CFR part 320 and the Section 404(b)(1) impact analysis criteria in 40 CFR part 230. To further ensure that the NWP's authorize only activities with minimal adverse effects on the aquatic environment, the NWP general conditions address specific concerns

relating to the NWP program, such as compliance with the Endangered Species Act and the National Historic Preservation Act. Most NWP's require a Section 401 water quality certification to ensure that the authorized activities meet State or Tribal water quality standards. In coastal areas, most NWP's require a coastal zone consistency determination to comply with Section 307 of the Coastal Zone Management Act. Activities that require a permit pursuant to Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 are not authorized by NWP's.

In accordance with Section 404(e) of the Clean Water Act, the NWP's cannot authorize activities that result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. For those activities that may result in more than minimal adverse effects on the aquatic environment, division or district engineers will assert discretionary authority (see 33 CFR 330.4(e) and 33 CFR 330.5(c) and (d)), and notify the applicant that the proposed activity is not authorized by NWP. Therefore, the NWP's comply with 40 CFR 230.1(c) and 230.7(a)(3). The factual determination requirements of 40 CFR 230.11 will also be addressed in the decision document for each NWP. These decision documents will include estimates of the discharges anticipated to be authorized by the NWP that are required pursuant to 40 CFR 230.7(b)(3).

General Condition 19 of the NWP's satisfies the requirements of 40 CFR 230.10(d). This general condition requires that permittees avoid and minimize adverse effects on the aquatic environment on-site to the maximum extent practicable. If the adverse effects of the proposed work on the aquatic environment are more than minimal, then the District Engineer will exercise discretionary authority and the project cannot be authorized by NWP, unless it is modified to reduce the adverse effects and comply with all of the requirements of the NWP.

One commenter stated that the Corps increased emphasis on regional conditioning of the NWP's is an acknowledgment that activities authorized by NWP have the potential of resulting in more than minimal adverse effects on the aquatic environment. This commenter objected to the Finding of No Significant Impact (FONSI) issued on June 23, 1998, stating that the FONSI is based on regional conditions which have not yet been proposed. Several commenters objected to the position that the adverse effects on the aquatic environment authorized

by the NWP's will be minimal because they authorize only relatively small losses of waters of the United States and in many cases require compensatory mitigation for those losses. These commenters state that small wetlands often have significant values (e.g., prairie potholes provide waterfowl habitat) and that compensatory mitigation is often ineffective in replacing those values. They also stated that there is insufficient qualitative or quantitative analysis concerning environmental consequences of the new and modified NWP's.

The NWP's authorize activities that, under most circumstances, result in minimal adverse effects on the aquatic environment. The Corps has always acknowledged that some activities that could potentially be authorized by NWP's may have more than minimal adverse effects on the aquatic environment. The notification requirements for NWP's allow district engineers the opportunity to review proposed activities that have the potential for exceeding the minimal adverse effect threshold. The provisions in the NWP regulations, specifically 33 CFR 330.4(e) and 33 CFR 330.5(c) and (d), allow district and division engineers to exercise discretionary authority when specific activities result in more than minimal adverse effects on the aquatic environment and require an individual permit for those activities. Discretionary authority also allows division and district engineers to place conditions on NWP's to ensure that the NWP's authorize only those activities that have minimal adverse effects on the aquatic environment. Division engineers can also place regional conditions on the NWP's. In specific high value waterbodies or wetland types, regional conditions can restrict the use of NWP's in those waters by lowering acreage limits or notification thresholds. Regional conditions can also prohibit the use of NWP's in high value waters. District engineers can place case-specific special conditions on NWP authorizations. The FONSI issued on June 23, 1998, merely reiterates the fact that the regional conditioning process helps ensure that the NWP's authorize only those activities that result in minimal adverse effects on the aquatic environment.

We recognize that there has been, and continues to be, substantial interest among the public regarding the potential environmental effects associated with the implementation of the NWP program. With the last reissuance of the NWP's in December 1996, we reemphasized our commitment to improve data collection

and monitoring efforts associated with the NWP program, and NWP 26 in particular. In many instances, these efforts have already provided critical information on the use of the NWPs, overall acreage impacts, affected resource types, the geographic location of the activities, and the type of mitigation provided. This information is critical in our efforts to make well-informed permitting and policy decisions regarding the continued role of the NWP program and to ensure that the program continues to authorize only those activities with minimal individual and cumulative effects.

#### **Compliance With the National Environmental Policy Act**

Many commenters believe that the proposed new and modified NWPs do not comply with the National Environmental Policy Act (NEPA). They disagree with the Corps determination that the NWPs do not constitute a major Federal action that significantly affects the quality of the human environment. These commenters assert that the new and modified NWPs will expand the direct, indirect, and cumulative adverse effects of the NWPs, because these NWPs are applicable in a broader geographic range of waters of the United States than NWP 26.

Many commenters addressed the preliminary environmental assessments (EAs) for the new and modified NWPs and the FONSI issued on June 23, 1998. Several commenters believe that the Corps is making a circular argument when it states that the NWPs do not constitute a major Federal action because, by definition, the NWPs authorize only activities with minimal individual or cumulative adverse effects on the aquatic environment. They believe this conclusion is based on the definition of a general permit, not on data from authorized impacts. They suggest that the Corps consider the loss of wetlands over an extended time period to evaluate the actual adverse effects on the aquatic environment in specific terms, not generalities. One commenter concurred with the Corps determination that the NWPs do not require an Environmental Impact Statement (EIS). One commenter stated that an EIS should be required prior to implementing the new and modified NWPs and the EIS must include an economic analysis of the economic effects of the NWPs. Another commenter said that to comply with NEPA, the Corps must evaluate both wetlands and upland impacts for activities authorized by NWPs.

NEPA requires Federal agencies to prepare an EIS only for major Federal

actions that have a significant impact on the quality of the human environment. Even though we have committed to prepare a Programmatic Environmental Impact Statement (PEIS) for the NWP program, we continue to maintain our position that the NWP program does not constitute a major Federal action significantly affecting the human environment. Therefore, the preparation of an EIS is not required by NEPA. The NWPs authorize only those activities that have minimal adverse environmental effects on the aquatic environment, individually or cumulatively, which is a much lower threshold than the threshold for requiring an EIS. This is not a circular argument. To ensure that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively, there are several safeguards in the NWP program: (1) PCN requirements to allow district engineers to review certain proposed NWP activities on a case-by-case basis; (2) compensatory mitigation requirements for most activities that require a PCN; (3) the ability to impose case-specific conditions on an NWP authorization to protect the aquatic environment; (4) the ability to impose regional conditions on an NWP to protect high value waters; (5) the requirement for water quality certification for activities involving a discharge of dredged or fill material into waters of the United States; (6) the requirement for Coastal Zone Management Act consistency determination in coastal areas; and (7) provisions for discretionary authority to require an individual permit review if the proposed impacts are more than minimal.

The FONSI was issued on June 23, 1998. Copies of the FONSI are available at the office of the Chief of Engineers, at each District office, and on the Corps regulatory home page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>. The EAs for each of the new and modified NWPs will be available on the Corps regulatory home page when the issuance of these NWPs is announced in a future **Federal Register** notice. When regional conditions are added to an NWP, a supplemental decision document containing local analyses will be issued by the Division Engineer. The supplemental decision documents for a district's regional conditions will be available at that district.

For the Corps regulatory program, including the NWP program, the procedures for complying with NEPA are contained in 33 CFR Part 325, Appendix B. The scope of analysis for

NEPA compliance is thoroughly discussed in Appendix B, including the factors to be considered when determining the extent of Federal control and responsibility for a particular project. In most cases, upland impacts are not part of Federal control and responsibility, and should not be included in a general analysis of NEPA compliance for the NWP program.

Many commenters stated that, while they support the Corps intent to prepare a PEIS for the NWP program, the PEIS should be completed prior to the issuance of the new and modified NWPs. Several commenters remarked that the PEIS should have been completed prior to this reissuance of the NWPs in 1996. Some commenters stated that the PEIS should include a comprehensive and accurate accounting of the cumulative impacts authorized by the NWPs in the past. One commenter recommended that the Corps allow full public participation in the preparation of the PEIS through regional meetings. This commenter also suggested that the PEIS address the following alternatives: no action, reduction in scope of authorized activities, reduction in acreage impact limits, and alternative programmatic approaches. One commenter agreed that a PEIS is not required and stated that while the Corps is not legally prevented from producing a PEIS, even if it is not required, the PEIS could have significant effects on the Corps workload and the Corps should not devote resources to the preparation of the PEIS at the expense of its other activities.

We have committed to demonstrating that the NWP program authorizes only those activities with minimal individual and cumulative environmental effects. Consistent with this commitment, the Corps will prepare, through the Institute for Water Resources, a PEIS for the entire NWP program. While a PEIS is not required for the same reasons that an EIS is not required, the PEIS will provide the Corps with a comprehensive mechanism to review the effects of the NWP program on the human environment. The PEIS will be conducted with the participation of other Federal agencies, States, Tribes, and the public. The Corps is scheduled to initiate the PEIS by mid-1999 and complete the PEIS by December 2000. Therefore, the PEIS should be completed prior to the next scheduled reissuance of the NWPs in December 2001. Since the PEIS is not required, we will not delay the issuance of the new and modified NWPs. The PEIS will fully comply with NEPA requirements, including alternatives analyses. There have been meetings to provide other

Federal agencies, states, Tribes, and the public with opportunities to participate in the scoping of the PEIS. These scoping meetings were announced in a **Federal Register** notice published on March 22, 1999 (64 FR 13782).

Some commenters said that the preliminary EAs do not comply with NEPA because they do not adequately address alternatives that are necessary to support the final decision. They believe that failure to consider a "no action" alternative is inconsistent with NEPA and that an alternatives analysis in the EA cannot be replaced with a discussion of the case-specific flexibility provided by the NWP program. Another commenter stated that if the EAs are properly prepared, they would not support the FONSI determination.

In compliance with NEPA, environmental documentation will be prepared for each new and modified NWP. Each document will include an EA, a FONSI, and, where relevant, a preliminary Section 404(b)(1) Guidelines compliance review. Each EA will contain an alternatives analysis for the NWP, including a discussion of the "no action" alternative. The alternatives analysis will also consider national modification alternatives, regional modification alternatives, and case-specific on-site alternatives for the NWP. After the issuance of the new and modified NWPs, copies of these documents will be available for inspection at the office of the Chief of Engineers, at each Corps district office, and at the Corps regulatory home page at the Internet address cited at the beginning of this **Federal Register** notice.

Several commenters stated that the preliminary EAs for the proposed new and modified NWPs are inadequate because they fail to provide an ecological rationale for the proposed acreage limits. These commenters believe that the assessment of individual and cumulative adverse effects relies entirely on conditions that address secondary impacts, future regional conditions, and the discretion of the District Engineer in the PCN process. Another commenter recommended that the Corps revise the EAs once the regional conditions are developed and suggested that the Corps place the revised EAs, with the regional conditions, on public notice in the **Federal Register** to provide an opportunity for public comment.

Where appropriate, each EA will generally consider different acreage limits for each NWP. Acreage limits for each NWP are established to allow the NWPs to authorize most activities that result in minimal adverse effects on the

aquatic environment, individually or cumulatively. The minimal adverse effects determination is based on general consideration of the effects of the authorized activities on the physical, chemical, and biological characteristics of the aquatic environment, as well as human use characteristics. Division engineers can regionally condition an NWP to decrease the acreage limit established nationally for that NWP, if such a regional condition is necessary to ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. When division engineers approve regional conditions for an NWP, they will issue a decision document that will supplement the national EA for that NWP. On a case-by-case basis, it is the responsibility of district engineers to assess and monitor the adverse effects on the aquatic environment that result from activities authorized by NWPs. District engineers review PCNs to assess the foreseeable adverse effects caused by the authorized work. The final EAs for the new and modified NWPs will not be subject to public comment, since they are final decision documents.

#### Scope of the New Nationwide Permits

In the July 1, 1998, **Federal Register** notice, we requested comments on the scope of applicable waters for the new and modified NWPs. In that **Federal Register** notice, we listed five categories of applicable waters for the proposed NWPs. The categories of waters included: (1) all waters of the United States; (2) non-tidal waters; (3) non-tidal waters, excluding non-tidal wetlands contiguous to tidal waters; (4) non-Section 10 waters; and (5) non-Section 10 waters, excluding wetlands contiguous to Section 10 waters.

Most of the commenters objected to the proposed NWPs because they authorize activities in most non-tidal waters of the United States, including non-tidal wetlands adjacent, but not contiguous, to tidal waters. On the other hand, some commenters supported the proposed NWPs because the distinction between non-tidal waters and headwaters and isolated waters was dropped from the NWP program. NWP 26 authorizes activities only in isolated waters and headwaters. A number of commenters expressed concern that the increased scope of applicable waters for the new NWPs provides less protection to the aquatic environment because many of the waters subject to the new NWPs are important for a variety of fish and wildlife and provide important functions and values such as flood control and improvement of water

quality. One of these commenters stated that the increased scope of waters would harm the ecological integrity of watersheds. One commenter remarked that the scope of waters for the new NWPs implies that non-tidal waters are less important than tidal waters.

To increase protection of the aquatic environment, we have modified the applicable waters for the some of the proposed new and modified NWPs (i.e., NWPs 39, 40, 41, 42, and 43) to prohibit the use of these NWPs in non-tidal wetlands adjacent to tidal waters. With the proposed NWPs, the Corps is increasing protection of open and flowing waters, and not focusing only on wetlands, especially low-value wetlands. This approach will enhance protection of the aquatic environment. The proposed NWPs were developed and conditioned to better control and limit adverse effects on the aquatic environment. We are proposing to modify two NWP general conditions to provide greater protection for water quality and maintenance of water flows (General Conditions 9 and 21, respectively). We are also proposing three new NWP general conditions to protect the aquatic environment (General Conditions 25, 26, and 27) by restricting the use of NWPs in designated critical resource waters, impaired waters, and waters of the United States within 100-year floodplains. The proposed general conditions are discussed elsewhere in this **Federal Register** notice. In addition, Corps districts and divisions will regionally condition these NWPs to ensure that they authorize only activities with minimal adverse effects on the aquatic environment.

NWPs 39, 41, 42, and 43 do not authorize activities in non-tidal wetlands adjacent to tidal waters. High value isolated waters identified by districts will be protected through the regional conditioning of the NWPs. Case-specific special conditions and discretionary authority will also be used to protect high value waters when district engineers review PCNs.

Many commenters stated that the five categories of waters of the United States applicable to the new NWPs make the NWP program too complex. One commenter remarked that identifying these waters would not result in a workload savings to the Corps because it will require additional field review. One commenter recommended that the Corps reduce the number of applicable waters from five to three, specifically "all waters," "Section 10 waters," and "non-tidal waters." Another commenter believes that these categories are arbitrary and requested that the Corps



provide justification for these categories of waters. A few commenters asked why "adjacent waters," as used in the context of NWP 26, was dropped from the NWP program. One commenter suggested that NWPs 39, 41, 42, 43, and 44 should be modified to authorize activities only in isolated waters and headwaters.

We recognize that the five categories of waters discussed in the July 1, 1998, **Federal Register** notice can be considered by some members of the regulated public as unnecessarily complex, so we have simplified the applicable waters for the new NWPs. Most of the new NWPs authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The applicable waters for each proposed new and modified NWP are discussed in detail in the preamble discussions of those NWPs.

One commenter objected to the focus on contiguous waters and stated that subsurface connections between waters of the United States are as important as surface connections. Two commenters requested that the Corps specify that for non-contiguous, isolated waters, an interstate or foreign commerce connection must be established for these areas to be considered waters of the United States. One commenter objected to portions of the July 1, 1998, **Federal Register** notice that stated that district engineers can exercise discretionary authority when areas with "significant social or ecological functions and values" may be adversely affected by the work, because the commenter believes that the Clean Water Act does not provide regulatory authority for areas with significant social values. Another commenter objected to the use of the term "ecological functions," stating that it is not a term used to define the scope of authority.

We recognize that subsurface connections between waters of the United States are important, but the Section 404 program focuses on surface waters. It is not necessary for the Corps to specify that isolated waters require an interstate or foreign commerce connection for these waters to be considered waters of the United States, because that requirement can be found in 33 CFR Part 328. Discretionary authority can be exercised by division and district engineers where there are sufficient concerns for the aquatic environment under the Section 404(b)(1) guidelines or any other factor of the public interest. Public interest factors include consideration of waters

with "significant social or ecological functions and values."

A couple of commenters stated that the classification of perennial, intermittent, and ephemeral streams will establish a ranking system, implying that perennial streams are more valuable than ephemeral streams. These commenters believe that the majority of streams in the northwestern, northeastern, and southern United States will receive more protection than those in the western and southwestern United States.

We are classifying streams as perennial, intermittent, and ephemeral for the purposes of the NWPs to evaluate or restrict adverse effects to flowing waters more effectively. For example, in NWP 43 we are proposing to prohibit the construction of new stormwater management facilities in perennial streams. Damming perennial streams to construct stormwater management ponds often has more than minimal adverse effects on the aquatic environment, particularly for aquatic organisms such as fish and invertebrates. Dams in perennial streams may block fish passage to spawning areas and disrupt food webs in streams, reducing the productivity of streams. In many areas, it is more effective to construct stormwater management ponds in ephemeral and low-value intermittent streams, because these facilities, if properly designed, constructed, and maintained, will substantially reduce adverse effects of nearby development on local water quality and water flows. In areas where ephemeral streams are valuable aquatic resources, division and district engineers can regionally condition the NWPs to restrict their use in ephemeral streams or require PCNs for activities in ephemeral streams.

#### **Indexing of the Nationwide Permits To Determine Acreage Limits**

In the July 1, 1998, **Federal Register** notice, we requested comments on the use of indexing to determine acreage limits for NWPs 39 and 40, as well as the proposed NWP B for master planned developments. Most of the commenters who addressed the use of indexing to determine acreage limits for certain NWPs were opposed to the indexing schemes proposed in the July 1, 1998, **Federal Register** notice. A majority of commenters stated that the proposed indexes were too confusing, not scientifically based, burdensome on the regulated public, and would result in a significant workload increase for the Corps. These commenters believe that indexing acreage limits makes the NWPs less efficient and increases the amount

of time spent reviewing activities that have minimal adverse effects on the aquatic environment. Most of these commenters requested that the Corps continue to use simple acreage limits for the NWPs. Some commenters recommended basing the indexed acreage limit on a percentage of parcel size, whereas other commenters suggested basing the indexed acreage limit on a percentage of the total wetland acreage within the parcel, not the total size of the parcel.

Some commenters believe the proposed indexes for these NWPs were too restrictive and that both the maximum acreage loss and PCN thresholds under the NWP should be higher. Other commenters said that the proposed indexes and PCN thresholds would authorize activities with more than minimal adverse effects on the aquatic environment and recommended reducing the acreage limits and PCN thresholds. Several commenters believe that using indexing to determine acreage limits will allow NWPs to authorize activities that result in more than minimal cumulative adverse effects by not addressing avoidance and minimization. A number of commenters were confused as to how the proposed indexes would be interpreted or utilized, particularly where there was overlap between parcel size ranges and acreage limits. For example, the proposed acreage limit index for NWP A had an acreage limit of  $\frac{1}{2}$  acre for parcel sizes of 5 to 10 acres and an acreage limit of 1 acre for parcel sizes of 10 to 15 acres. These commenters were uncertain as to whether the acreage limit for a project constructed on a 10-acre parcel would be  $\frac{1}{2}$  acre or 1 acre.

We believe that indexing acreage limits based on project size or project area is necessary for certain NWPs (*i.e.*, NWPs 39 and 40) to ensure that those NWPs authorize only activities that have minimal adverse effects on the aquatic environment. Instead of using the indexing schemes proposed in the July 1, 1998, **Federal Register** notice, we are proposing indexes based on simple algebraic formulas, using a percentage of project area or farm tract size. The proposed indexed acreage limit for NWP 39 has a minimum acreage limit of  $\frac{1}{4}$  acre for a single and complete project, with the indexed acreage limit increasing by 2% of the project area to a maximum acreage limit of 3 acres. For NWP 40 activities in playas, prairie potholes, and vernal pools, we are proposing a similar indexing formula, with a base acreage limit of  $\frac{1}{10}$  acre and a different percentage of farm tract size (*i.e.*, 1% of farm tract size). For NWP 40 activities in other types of non-tidal



wetlands to increase agricultural production, we are proposing a simple acreage limit of 2 acres, since the average farm tract size in the United States is 275 acres, which means that most agricultural producers would qualify for the maximum acreage limit even if an indexed acreage limit would be used.

The algebraic indexing scheme will be easier to use and less confusing than the indexes proposed in July 1, 1998, **Federal Register** notice. Indexing based on the percentage of project size will avoid the confusion resulting from overlap of parcel size ranges. For example, in the indexing scheme proposed for NWP A in the July 1, 1998, **Federal Register** notice (see 63 FR 36067), a 15-acre parcel would be subject to either a 1 or 2 acre limit. The algebraic index avoids this overlap in acreage limits. We believe that the indexes used for NWPs 39 and 40 will allow the authorization of most activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. Division engineers can regionally condition NWP 39 to make the indexed acreage limit more restrictive, either by reducing the minimum acreage limit, percentage of project area or farm tract size, or maximum acreage limit. For example, NWP 39 can be regionally conditioned to reduce the minimum acreage limit from  $\frac{1}{4}$  acre to  $\frac{1}{10}$  acre or the percentage of project area from 2% to 1%. However, paragraph (a) of NWP 40 cannot be regionally conditioned by division engineers, to ensure consistent implementation of this part of NWP 40 in cooperation with NRCS throughout the country. An activity that exceeds the indexed acreage limit will require authorization by another NWP, a regional general permit, or an individual permit. The use of an indexed acreage limit does not preclude project proponents from complying with General Condition 19, which requires on-site avoidance and minimization of activities in waters of the United States to the maximum extent practicable. If the District Engineer determines that the proposed work will result in more than minimal adverse effects on the aquatic environment, then discretionary authority will be exercised and the applicant will be notified that another form of Corps authorization, such as an individual permit or regional general permit, is required.

Another source of confusion for NWP applicants cited by commenters was the application of PCN thresholds with an indexed acreage limit. For example, the proposed index for NWP 39 had an acreage limit of  $\frac{1}{4}$  acre for activities on

parcels less than five acres in size. The proposed PCN threshold for this NWP was  $\frac{1}{3}$  acre. Some commenters thought that this implied that losses of greater than  $\frac{1}{4}$  acre of waters of the United States would require notification to the Corps, but this requirement was not specifically stated in the NWP.

For NWP 39, the PCN threshold has been changed to  $\frac{1}{4}$  acre. Since this threshold is the same as the minimum acreage limit of  $\frac{1}{4}$  acre in the indexed acreage limit, the PCN requirements for these NWPs should not be confusing. District engineers will not receive PCNs for agricultural activities authorized only by paragraph (a) of NWP 40. Instead, they will receive postconstruction reports from landowners that describe the authorized work.

#### **Workload Implications of the New NWPs**

A number of commenters stated that the complexity of the proposed NWPs will increase the Corps workload for the NWP program. Some of these commenters said that the current staffing level of the Corps is inadequate to implement the proposed new and modified NWPs. One commenter stated that utilization of the NWPs as a tool to prioritize workload is an abdication of the Corps responsibility. This commenter said that the Corps regulatory program can be made more efficient through other means, such as improved technology, the use of private delineators, permit fees, and increased coordination.

For many years, general permits, including NWPs, have been used by the Corps to manage its workload by authorizing activities with minimal adverse effects on the aquatic environment that would otherwise be subject to the more resource-intensive individual permit process. The Corps does not have the resources to review each activity that requires a Section 404 and/or Section 10 permit through the individual permit process. Requiring individual permits for all these activities would also create unnecessary burdens on the regulated public. Most activities authorized by the Corps regulatory program are authorized by general permits. General permits, including NWPs, authorize activities that would usually be authorized through the individual permit process with little or no change in the scope of work. It is inefficient to require an individual permit for activities that have minimal adverse effects on the aquatic environment that the Corps could authorize more effectively through the general permit process. General permits

also benefit the aquatic environment because they provide incentives for landowners and developers to design their projects to reduce adverse effects on the aquatic environment to qualify for the expedited permit process provided by general permits.

The scope of applicable waters for the proposed NWPs and the proposed new NWP general conditions, especially General Condition 27, will cause substantial increases in the Corps workload by requiring individual permits for many activities in designated critical resource waters, impaired waters, and waters of the United States within the 100-year floodplain. The proposed prohibition against using NWPs to authorize certain activities resulting in permanent, above-grade fills in waters of the United States within the 100-year floodplain is expected to result in two to three thousand more individual permits per year added to the Corps workload.

The increase in the Corps workload caused by the proposed NWP general and regional conditions will require that most Corps districts reprioritize their activities. Corps districts will focus their efforts on those actions that provide the most value added to the environment and the public. Inevitably, the substantial increase in workload will result in an increase in permit evaluation time for most permit reviews. At this point, we cannot quantify these impacts.

#### **Preconstruction Notification**

A few commenters recommended that the Corps extend the review period for preconstruction notifications (PCNs) from 30 days to 45 or 60 days, due to the increased complexity of the new and modified NWPs. One commenter expressed support for the 30-day review period for PCNs. Several commenters believe that the PCN thresholds and information requirements are confusing and that the PCN thresholds should be lower for all activities, such as  $\frac{1}{4}$  acre of waters or 100 linear feet of stream bed.

We recognize that the proposed NWPs are more complex than NWP 26 and that a longer PCN period is necessary to effectively review notifications. We are proposing to modify the preconstruction notification process for the NWPs to provide more time for district engineers to review PCNs. District engineers will have 30 days from the date of receipt of a PCN to determine if it is complete. If the PCN is not complete, the District Engineer can make only one request for additional information from the applicant. This request must be made during the initial 30-day period. District

engineers cannot make additional requests for more information to evaluate the PCN. If the applicant has not provided all of the requested information to the District Engineer, then the PCN is not considered complete and the PCN review process will not start until the applicant has provided all of the requested information to the District Engineer. Upon receipt of a complete PCN, the District Engineer has 45 days to determine if the proposed work qualifies for NWP authorization, with or without special conditions, or exercise discretionary authority to require an individual permit. If the District Engineer does not notify the applicant of the outcome of the PCN review prior to the end of the 45-day period, then the proposed work is authorized by NWP and the permittee can begin work provided all of the requisite State and local authorizations, such as WQC, have been obtained. We are proposing to modify General Condition 13 in accordance with the proposed changes to the notification process discussed above.

The Corps has limited the amount of information required to be submitted with a PCN to the minimum necessary to effectively evaluate the potential adverse effects of the proposed work on the aquatic environment and determine if the project complies with the terms and conditions of the NWPs. By providing the required information when the PCN is first submitted to the Corps, the applicant will minimize delays in processing. The Corps has also changed the PCN threshold for many of the proposed NWPs from  $\frac{1}{3}$  acre to  $\frac{1}{4}$  acre to provide more consistency. The proposed PCN thresholds for stream bed impacts are similar to the PCN thresholds proposed in the July 1, 1998, **Federal Register** notice.

Two commenters recommended that PCNs should be required for all activities authorized by the new NWPs. These commenters stated that 15 days is an inadequate length of time for agency technical review of site conditions, mitigation plans, and monitoring plans for activities authorized by these NWPs. These commenters also believe that the lack of agency coordination for PCNs violates the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and the Fish and Wildlife Coordination Act (FWCA). Another commenter stated that the PCN process is illegal.

Requiring PCNs for all activities authorized by NWPs is unnecessary and would substantially reduce the effectiveness of the NWPs. PCN thresholds are established so that only

activities that could potentially result in more than minimal adverse effects on the aquatic environment require notification to the Corps. In addition, the Corps does not have the resources to review PCNs for every activity authorized by NWPs. We are proposing to modify General Condition 13 to provide more time for Federal and State resource agencies to review PCNs. These agencies will have 10 calendar days to notify the District Engineer that they intend to provide substantive, site-specific comments. If these agencies provide such notification, the District Engineer will wait an additional 15 calendar days before making a decision on the PCN. Twenty-five days is an adequate period of time for the Federal and State resource agencies to review PCNs. The intent of agency coordination is to obtain site-specific, substantive comments from these agencies within their area of expertise. Detailed mitigation and monitoring plans are not required for the PCN. The applicant need only propose compensatory mitigation that will offset losses of waters of the United States. The Federal and State resource agencies can comment on the appropriateness of the proposed compensatory mitigation. The District Engineer will determine if the proposed compensatory mitigation is appropriate and incorporate the requirements for compensatory mitigation, including detailed plans and monitoring requirements, into the NWP authorization as special conditions.

The PCN process does not violate ESA, NEPA, or FWCA. General Condition 11 ensures that activities authorized by NWPs comply with ESA. There is no provision in NEPA requiring the Corps to coordinate activities authorized by general permits with other Federal, State, or local agencies. The NWP issuance process satisfies the coordination requirements of FWCA. The PCN process is not illegal; it is merely a mechanism to ensure that the NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment, individually or cumulatively.

Two commenters suggested that the avoidance and minimization statement required for NWPs 39 and 43 should be required for all NWP activities that require a PCN. Another commenter recommended that the minimization and avoidance statement should be limited to one page.

We disagree that the avoidance and minimization statement is necessary for all NWP activities that require a PCN. General condition 19 requires that permittees avoid and minimize impacts to waters of the United States on-site to

the maximum extent practicable. In addition, many activities authorized by NWP must occur in a certain location. For example, repair and maintenance activities authorized by NWP 3 must be in the same location as the existing structure or fill. Bank stabilization activities authorized by NWP 13 must occur at the location of the bank. The statement required for NWPs 39 and 43 is intended to encourage the applicant to consider ways to avoid and minimize impacts to waters of the United States during project planning. It also provides avoidance and minimization information to Corps personnel with the PCN, instead of requiring the District Engineer to ask the applicant if additional avoidance and minimization can be achieved. The avoidance and minimization statement will allow more expeditious review of the PCN.

One commenter stated that a delineation of special aquatic sites should be required for every activity that requires a PCN. Another commenter recommended establishing a notification process for projects that include development on floodplains, so that State and local floodplain management agencies can review the proposed work.

We disagree that a delineation of special aquatic sites is necessary for every activity requiring a PCN. General condition 13, paragraph (b)(4), lists the NWPs that require submission of a delineation of special aquatic sites with the PCN. It is not practical for the Corps to establish a notification process for projects that occur in floodplains. In many parts of the country, there are floodplains that are not waters of the United States. Development activities in floodplains that do not involve discharges of dredged or fill material into jurisdictional wetlands or other waters of the United States do not require a Section 404 permit, even though a Corps permit may be required to cross waters of the United States to provide access to the upland development. Many State and/or local governments currently have programs that address construction in floodplains. Issuance of an NWP authorization for an activity within a floodplain does not preclude the State or local floodplain management agency from denying its authorization. If the State or local regulatory agency does not authorize the proposed work, then the project proponent cannot do the work even though the Corps may have determined that it qualifies for authorization under the NWP program.

In response to the July 1, 1998, **Federal Register** notice, the National Park Service (NPS) requested that they

receive full opportunity to comment on all proposed NWP activities that may impact NPS resources. NPS also requested that they be able to request elevation of specific projects to require review under the individual permit process. Although the Department of the Interior, through the U.S. Fish and Wildlife Service (FWS), has the opportunity to review PCNs that require agency coordination, NPS believes that the 5 day comment period does not provide enough time to allow FWS to consult with NPS.

We do not agree that it is necessary to consult with NPS on every NWP activity. If NPS has specific concerns, they should be addressed at the district level, either through coordination agreements between the District Engineer and the local NPS office or through the regional conditioning process. The proposed modification of the PCN process would allow district engineers to provide up to 25 calendar days for agency comment on a specific NWP activity that requires agency coordination. We believe that this is ample time for FWS to coordinate with NPS.

One commenter recommended that the Corps post PCNs on district Internet home pages to allow the public to provide comments and better track cumulative adverse effects. Another commenter requested that the Corps coordinate with the appropriate agency prior to issuing NWP authorizations in Tribal trust lands to determine if treaty reserved resources would be adversely affected by the work.

The purpose of the PCN process is to provide the Corps with an opportunity to determine if a proposed activity complies with the terms and conditions of the NWPs and results in minimal adverse effects on the aquatic environment, individually or cumulatively. Posting PCNs on the Internet would add no value to the Corps review of the PCN. Cumulative adverse effects on the aquatic environment will continue to be tracked by Corps districts. Corps districts can regionally condition the NWPs to require coordination for activities that may adversely affect treaty reserved resources in Tribal trust lands.

### Compensatory Mitigation

A large number of commenters specifically addressed the compensatory mitigation requirements of the proposed new and modified NWPs. A few commenters stated that the proposed provisions discourage compensatory mitigation, because the requirements are too complex and burdensome. Other commenters assert that the

compensatory mitigation requirements discussed in the July 1, 1998, **Federal Register** notice are not specific enough. Many commenters provided recommendations concerning the size and types of losses authorized by the NWPs for which compensatory mitigation is appropriate. These recommendations included requiring compensatory for: (1) All activities authorized NWPs, (2) activities that require submittal of a PCN, (3) losses of greater than  $\frac{1}{3}$  acre of waters of the United States, or (4) losses of greater than 1 acre of waters of the United States. One commenter suggested that compensatory mitigation should also be required for all impacts to non-wetland aquatic resources. Several commenters stated that the Corps should not require compensatory mitigation for wetlands losses because other State and local regulatory agencies already have such requirements.

We acknowledge that the discussions of compensatory mitigation requirements in the July 1, 1998, **Federal Register** notice contained some inconsistencies. Therefore, we will clarify these requirements in general terms, but permittees must recognize that specific compensatory mitigation requirements for particular projects are established by the District Engineer. Compensatory mitigation will normally be required for NWP activities that require submission of a PCN (e.g., losses of greater than  $\frac{1}{4}$  acre of waters of the United States), and in all cases where compensatory mitigation is necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment. The District Engineer may determine that compensatory mitigation is not necessary for a particular project because the proposed work will result in only minimal adverse effects on the aquatic environment. Activities that do not require notification are presumed to result in minimal adverse effects and would not require compensatory mitigation to bring the adverse effects to the minimal level. District and division engineers can regionally condition an NWP to lower the notification threshold and determine, on case-by-case basis, if compensatory mitigation is necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment.

Although many State and local agencies may require compensatory mitigation for losses of wetlands, we can require compensatory mitigation for losses of other waters of the United States. If the compensatory mitigation requirements of a State or local agency for a particular project adequately

address the Corps concerns or requirements, then that compensatory mitigation can be used to satisfy the Corps compensatory mitigation requirements. However, some State and local governments may not have adequate compensatory mitigation provisions to ensure that activities authorized by NWPs will result in minimal adverse effects on the aquatic environment. Therefore, the Corps can impose its own compensatory mitigation requirements.

Many commenters expressed opposition to the use of compensatory mitigation to offset losses of waters of the United States that result from activities authorized by NWPs. They believe that compensatory mitigation encourages off-site, out-of-kind compensation for losses of waters of the United States. Another objection raised by these commenters is that some wetland types are not easily created. A number of commenters cited studies that evaluated compensatory mitigation projects and found them to be unsuccessful or only partially successful. One commenter stated that only restoration and creation should be used to calculate net gains in wetlands. One commenter recommended limiting preservation only to exceptional quality or unique wetlands.

Compensatory mitigation is often necessary to offset the loss of waters of the United States and ensure that an activity authorized by NWP will result in minimal adverse effects on the aquatic environment. The NWP regulations at 33 CFR Part 330.1(e)(3) allow permittees to provide compensatory mitigation to reduce the adverse effects of the proposed work to the minimal level. The functions and values provided by waters of the United States that are lost due to authorized activities can be replaced by carefully planned and constructed restoration, enhancement, and creation of aquatic habitats. Compensatory mitigation can also protect and enhance important aquatic resource functions and values through the establishment and maintenance of vegetated buffers adjacent to waters of the United States and, in exceptional circumstances, the preservation of high value aquatic habitats. Without compensatory mitigation, the Corps regulatory program would not be able to satisfy a principal goal of the Clean Water Act, which is the restoration and maintenance of the physical, chemical, and biological integrity of the Nation's waters.

Compensatory mitigation requirements should be based on what is best for the aquatic environment, not

inflexible requirements for in-kind and on-site compensatory mitigation that may not successfully replace lost functions and values of aquatic habitats. The primary goal of compensatory mitigation is to replace the functions and values of waters of the United States that are lost due to activities authorized by NWP. It is essential that compensatory mitigation projects that restore, enhance, or create aquatic habitats have a high probability of success. Much of the failure of past compensatory mitigation projects is due to poor site selection, planning, and implementation. On-site compensatory mitigation projects may fail because site conditions, such as local hydrology, are usually substantially changed by the authorized activity. For example, once a residential subdivision is constructed, the on-site hydrology may be altered to the extent that the site cannot support a restored or created wetland. In such cases, it may be better for the aquatic environment to conduct the compensatory mitigation project off-site, in a location with better chances for success within the watershed of the authorized work.

When reviewing compensatory mitigation proposals, district engineers will consider what is best for the aquatic environment, including requiring vegetated buffers to open waters, streams, and wetlands. Wetland restoration, enhancement, creation, and in exceptional circumstances, preservation are not the only compensatory mitigation activities that can be required for an NWP authorization. Stream restoration and enhancement can also provide compensatory mitigation for losses resulting from activities authorized by NWPs. Upland buffers can be considered as out-of-kind compensatory mitigation because they protect local water quality and aquatic habitat. Vegetated buffers reduce adverse effects to water quality caused by adjacent land use. For example, forested riparian buffers provide shade to streams, supporting cold water fisheries. We cannot require compensatory mitigation for upland impacts, but we can require, as compensatory mitigation, upland vegetated buffers that protect water quality and aquatic habitat. It is important to note that the NWPs are optional permits, and if the project proponent does not want to establish and maintain vegetated buffers adjacent to waters of the United States to qualify for an NWP authorization, then he or she can apply for authorization through the individual permit process. The establishment or maintenance of a

vegetated buffer adjacent to waters of the United States can be an important part of the compensatory mitigation required for a Corps permit. District engineers should adjust the amount of "replacement acreage" required for compensatory mitigation by an amount that recognizes the value of the vegetated buffer to the aquatic environment.

We recognize that certain wetland types are not easily restored or created. Past failures to replace certain types of wetlands are not sufficient justification to stop all efforts to replace wetlands lost through the Section 404 program. Some types of wetlands are easily restored or created, although they may take several years to achieve functional equivalence compared to natural wetlands. Preservation is also an important mechanism to protect remaining high value wetland types, particularly those that cannot be easily restored or created. Careful site selection, planning, and construction are essential to achieve greater success for compensatory mitigation projects.

The ability of the Corps to review and monitor compensatory mitigation projects required for NWP authorizations is dependent upon workload and available resources. Increased use of mitigation banks and appropriate in lieu fee programs may make monitoring efforts more manageable, because those efforts can be focused on a smaller number of large sites instead of a large number of small individual mitigation projects. Mitigation banks and appropriate in lieu fee programs may provide better compensatory mitigation because they are often better planned, constructed, and maintained. The goal of compensatory mitigation is to offset losses of waters of the United States authorized by the Corps regulatory program. Because the Corps program causes the avoidance of most high value wetlands, most permitted impacts are to moderate or low value wetlands.

We also received numerous comments concerning the location and types of compensatory mitigation that should be acceptable for the NWP program. Most commenters expressed a preference for restoration, and some commenters oppose the use of enhancement or preservation of aquatic resources to provide compensatory mitigation. Some commenters oppose the use of out-of-kind compensatory mitigation to offset losses of waters of the United States. Several commenters recommended that the Corps require compensatory mitigation at specific ratios, ranging from 1:1 to 5:1. Many commenters stated that compensatory mitigation

projects should be confined to the watershed where the losses resulting from the authorized activity occurred. Most commenters recommended that the NWPs should not express a sequencing preference for on-site mitigation, mitigation banks, or in lieu fee programs. One commenter stated that the NWPs should have a general condition establishing compensatory mitigation performance criteria, to specify basic requirements.

We recognize that restoration is the type of compensatory mitigation with the greatest probability of success and encourage its use wherever possible. Enhancement of aquatic resources improves the functions and values of low-quality waterbodies, but should not be used in high value waters. As stated in the July 1, 1998, **Federal Register** notice, preservation of aquatic resources is estimated to comprise less than 5% of the compensatory mitigation required by the Corps, but it is an important mechanism for protecting high value wetlands and waterbodies.

Out-of-kind compensatory mitigation should not be prohibited because it can provide substantial benefits for the aquatic environment. An important form of out-of-kind compensatory mitigation is the establishment and maintenance of upland vegetated buffers adjacent to open or flowing waters or wetlands. Upland vegetated buffers help protect and enhance the water quality and aquatic habitat features of waters of the United States.

Specific compensatory mitigation requirements, such as replacement ratios, are determined by district engineers on a case-by-case basis. For the NWPs, district engineers determine what compensatory mitigation is necessary to ensure that the adverse effects of the proposed work on the aquatic environment are minimal. The Corps can require compensatory mitigation in excess of a 1:1 ratio of impact acreage to compensatory mitigation acreage in order to adequately replace the lost aquatic resource functions and values. The Corps can also accept out-of-kind compensatory mitigation, if it provides benefits to the aquatic environment. We believe that it is inappropriate, due to the differences in aquatic resource functions and values across the country, to establish national requirements for compensatory mitigation.

One commenter stated that the compensatory mitigation data cited by the Corps in the July 1, 1998, **Federal Register** notice was misleading because many NWP activities do not require reporting to the Corps. Several commenters requested that the Corps

provide accurate data on losses of waters of the United States to allow the public to consider compensatory mitigation requirements and that this data should specify the proportion of compensatory mitigation that is achieved through enhancement of aquatic resources. A number of commenters requested that the Corps modify its data collection efforts to monitor the amount of compensatory mitigation that is accomplished through restoration, enhancement, creation, and preservation, as well as the effectiveness of these activities. Two commenters recommended that the Corps furnish this data to the States on an annual basis.

The compensatory mitigation data cited in the July 1, 1998, **Federal Register** notice is based on the acreage of reported wetland impacts and wetland compensatory mitigation. This data does not include compensatory mitigation for impacts to streams and other types of non-wetland aquatic habitats. Many of the non-reporting NWP activities do not result in filling of wetlands and would not normally require compensatory mitigation to ensure that the adverse effects to the aquatic environment are minimal. For NWP activities that do not require notification to the Corps, many permittees request a written determination from the Corps to ensure that their projects qualify for NWP authorization. The wetland impact acreage for these activities is included in the data compiled by the Corps. District engineers can require compensatory mitigation for these projects to ensure that they result in only minimal adverse effects on the aquatic environment.

The data collection systems for most Corps districts do not currently differentiate between the amounts of compensatory mitigation provided through restoration, enhancement, creation, or preservation. Instead, most districts track only the total amount of compensatory mitigation required for Corps permits. The effectiveness of compensatory mitigation efforts is monitored by district engineers on a case-by-case basis, to the extent allowed by workload and personnel resources. Therefore, we cannot collect this type of information. The data the Corps collects on impacts to waters of the United States and compensatory mitigation is public information.

Support and opposition for the use of mitigation banks and in lieu fee programs to compensate for NWP impacts was equivocal. Many commenters asserted that mitigation banks cannot replace the functions and

values of smaller, scattered wetlands and that the increased use of mitigation banks and in lieu fee programs will not replace local wetland functions and values. A couple of commenters were concerned that consolidation of wetland habitats in a single place could increase the vulnerability of that single ecological wetland unit, and would not allow for a mosaic of wetlands. Others argued that mitigation banks would better compensate for scattered wetland losses by providing consolidated locations for compensatory mitigation, with greater chances of success. Some commenters expressed concern that mitigation banking would disrupt the mitigation sequence process and one commenter specifically requested that the Corps place stronger emphasis upon avoidance and minimization of impacts. Many commenters recommended streamlining the process for establishing mitigation banks, and some commenters requested modification of the NWP terms and conditions to encourage the use of mitigation banks. These commenters also requested that the Corps more clearly establish the policy that on-site compensatory mitigation may not always be the preferred choice. Several commenters suggested that mitigation banks should be established in each watershed. Some commenters expressed concern that mitigation banks, in some cases, utilize preservation of aquatic resources, which does not replace lost wetland functions and values, and does not comply with the goal of "no net loss" of wetlands.

We cannot require the establishment of mitigation banks in a particular watershed or geographic area. Mitigation banks are usually constructed and maintained by entrepreneurs, who locate mitigation banks in areas where they believe the established credits will sell quickly. In the December 13, 1996, **Federal Register** notice (61 FR 65874-65922), we did not direct Corps districts to require permittees to use mitigation banks for offsetting wetland losses due to NWP 26, but suggested that mitigation banks could be used, in addition to in lieu fee programs, to provide compensatory mitigation for impacts below 1 acre.

Consolidated mitigation methods, including mitigation banks and in lieu fee programs, are often an efficient means of compensating for losses of waters of the United States, particularly for multiple small projects, and may confer benefits to the aquatic environment as well (see 61 FR 65892). We recognize that mitigation banks and in lieu fee programs are often more practicable and successful because of the planning and implementation efforts

typically expended on these projects by their proponents. In contrast, individual efforts to create, restore, or enhance wetlands to replace small wetland losses may be unsuccessful because of poor planning and/or construction. Furthermore, consolidated mitigation efforts are often better monitored and maintained and often result in the establishment of a larger contiguous wetland area that benefits the overall local aquatic environment and many of the species that utilize larger aquatic habitats. Although smaller, scattered wetland areas that exist in the landscape as a mosaic provide essential habitat for certain species, the local changes in land use usually makes it impossible to maintain those mosaics in any ecologically functional capacity. Recreating those wetland mosaics is often impractical and it is better to provide compensatory mitigation through consolidated mitigation methods.

As with all other compensatory mitigation, the use of mitigation banks and in lieu fee programs does not eliminate the need to avoid impacts on-site. General Condition 19 of the NWPs requires that permittees avoid and minimize losses of waters of the United States on-site to the maximum extent practicable. If the District Engineer determines that compensatory mitigation is necessary to ensure that the particular NWP activity results only in minimal adverse effects on the aquatic environment, individually or cumulatively, then the District Engineer can require compensatory mitigation to offset the loss of waters of the United States. Mitigation banks and appropriate in lieu fee programs can be used to provide the required compensatory mitigation. The preferred form of compensatory mitigation should be based on what is best for the aquatic environment, whether the compensatory mitigation is on-site, off-site, in-kind, or out-of-kind.

Many of the commenters that were opposed to in lieu fee programs were strongly in favor of mitigation banks. Several of these commenters stated that mitigation banks have distinct advantages over in lieu fee programs, since mitigation banks have specific processes to establish goals, credits, and monitoring. Some commenters believe that in lieu fee programs compete unfairly with mitigation banks, since they are easier to establish and are often less costly than mitigation banks. One commenter requested that in lieu fee programs be prohibited in areas with established and functional mitigation banks with available credits.

Mitigation banks and in lieu fee programs are not common throughout the country. Therefore, it would be impractical to require their use as a preferred or sole means of providing compensatory mitigation for impacts authorized by NWPs. While in lieu fee programs are used in several Corps districts, efforts continue to ensure that in lieu fee programs provide adequate compensatory mitigation. District engineers have the authority to approve or disapprove the use of specific mitigation banks or in lieu fee programs as compensatory mitigation for losses of waters of the United States authorized by NWPs. Permittees should have the flexibility to utilize compensatory mitigation methods that are within their means to accomplish and meet the requirements to offset unavoidable losses of waters of the United States. To the extent practicable, permittees should consider use of approved mitigation banks and other forms of consolidated compensatory mitigation. District engineers will evaluate compensatory mitigation proposals for appropriateness and practicability as indicated in the NWP general conditions.

A number of commenters expressed concern about the effectiveness of in lieu fee programs in providing compensatory mitigation. Many commenters requested the establishment of specific requirements for in lieu fee programs. Two commenters suggested that the Corps establish a data collection system for in lieu fee programs, including payments and program credits, and report this data on an annual basis. Several commenters noted that in lieu fee programs typically do not require completion in advance of utilizing credits, as is the case with mitigation banks. Many commenters stated that payments to in lieu fee programs do not result in replacement of lost wetland functions and values. One commenter suggested limiting the use of in lieu fee programs to compensate for losses of small, low value wetlands and farmed wetlands.

In lieu fee mitigation programs have been effective in some parts of the country. Typically these programs are operated by well-established entities such as State and local government organizations or conservation groups. District engineers review in lieu fee programs to determine if they are appropriate for providing compensatory mitigation for losses of waters of the United States that result from activities authorized by the Corps regulatory program. The District Engineer should have a reasonable amount of confidence

in the operator prior to utilizing such areas for compensatory mitigation. Especially with the NWPs, in lieu fee programs should provide applicants with a compensatory mitigation option that is efficient and appropriate for the authorized work. District engineers use their own methods to track the use of in lieu fee programs. We do not agree that in lieu fee areas should be limited to small areas and farmed wetlands. When evaluating a compensatory mitigation proposal, the Corps should consider the action that is best for the aquatic environment. In some cases, on-site compensatory mitigation may not be a practicable option because there may be a low probability of success or adjacent land uses make any type of on-site compensatory mitigation infeasible. In some locations, an appropriate in lieu fee program may be most appropriate, while in another district or watershed, a mitigation bank would be the best option.

#### **Vegetated Buffers**

Some commenters supported the Corps increased emphasis on vegetated buffers adjacent to waters of the United States, including the use of vegetated buffers as compensatory mitigation for impacts to waters of the United States. A number of commenters objected to the requirements for vegetated buffers, stating that requirements for vegetated buffers, particularly upland buffers, adjacent to open and flowing waters are illegal because the Corps would be expanding its jurisdiction to upland areas. Two commenters said that the vegetated buffers can be used as a form of compensatory mitigation, but could not be required for an NWP authorization. One commenter stated that vegetated buffers should not be considered compensatory mitigation because they do not replace lost wetland acreage, including functions and values. Many commenters requested that the Corps provide a more specific definition and minimum size standards for vegetated buffers. A couple of commenters recommended specific minimum widths for vegetated buffers. One commenter suggested a buffer width of 1 or 2 kilometers from the edge of the wetland to preserve maximum biodiversity. Another commenter recommended a minimum buffer width of 100 feet from the edge of the wetland.

We disagree with the assertion that requiring a vegetated buffer as a condition of an NWP authorization is illegal and an attempt to expand the Corps jurisdictional authority. The Corps currently has regulatory authority through the Clean Water Act to require vegetated buffers as a condition of an

NWP authorization because vegetated buffers, including upland buffers, help prevent degradation of water quality and aquatic habitat. The establishment and maintenance of wetland or upland vegetated buffers adjacent to open waters, streams, or other waters of the United States can be considered compensatory mitigation for losses of waters of the United States authorized by Corps permits. One of the goals of the Clean Water Act is the maintenance and restoration of the chemical, physical, and biological integrity of the Nation's waters. Regulatory agencies can place any conditions on a permit or authorization as long as those conditions are related to the activities regulated by that agency. The Section 404 activities regulated by the Corps usually cause adverse effects on the aquatic environment. To offset these adverse effects, we can require measures, such as vegetated upland buffers adjacent to streams, that prevent or reduce adverse effects on the aquatic environment. Vegetated buffers, including uplands, adjacent to open waters of the United States provide many of the same functions and values of wetlands, such as flood mitigation, erosion reduction, the removal of pollutants and nutrients from water, and support aquatic habitat values. In summary, since vegetated buffers adjacent to open waters, even if they are uplands, help maintain the physical, biological, and chemical integrity of the aquatic environment, the Corps can require these buffers as a condition of a Clean Water Act Section 404 permit. Permit applicants must recognize that NWPs are optional permits and if the applicant believes that the NWPs are too restrictive, then he or she can apply for authorization through the individual permit process.

For the purposes of the Corps regulatory program, vegetated buffers are areas inhabited by woody or herbaceous plants that are adjacent to streams, lakes, ponds, wetlands, or other waters of the United States. Vegetated buffers can be either wetlands or uplands. Mowed lawns are not considered vegetated buffers, because these areas do not provide the same functions as areas inhabited by fully grown woody or herbaceous vegetation. Upland vegetated buffers are generally as effective at protecting open water quality as wetland buffers, and are often the only choice where there are no wetlands adjacent to a stream. Vegetated buffers, including uplands, adjacent to open waters, streams, and wetlands, should be an integral part of the compensatory mitigation requirements

for a particular project. Vegetated buffers can be used as out-of-kind mitigation to offset part of the wetland loss because they provide substantial benefits for the local aquatic environment. Vegetated buffers provide the following functions and benefits to the aquatic environment: (1) Reducing adverse effects to water quality by trapping and removing sediments, pollutants, and nutrients from surface runoff; (2) enhancing infiltration of water into the soil, which allows plants and microbes to remove nutrients and pollutants from water; (3) decreasing storm flows to streams, thereby reducing downstream flooding and degradation of aquatic habitat; (4) decreasing erosion of stream beds and surrounding land by slowing stormwater runoff velocities and increasing infiltration; (5) reducing soil erosion by keeping the soil in place with plant roots; (6) maintaining fish habitat by reducing water temperature changes; (7) providing detritus from riparian vegetation that contributes to the aquatic food web; (8) providing aquatic habitat features such as snags and shade; (9) providing habitat to a wide variety of aquatic and terrestrial species; and (10) providing corridors for movement of many species of wildlife.

For the purposes of the NWP, vegetated buffers should consist mostly of native trees and shrubs. In drier areas of the United States, vegetated buffers can consist of herbaceous vegetation, provided the vegetation is not mowed or removed. Native trees and shrubs should be planted, where possible, to establish a vegetated buffer where one does not exist. If the buffer area is degraded or inhabited by invasive or exotic plant species, then these species should be removed and the area planted with appropriate native species to the extent practicable.

Districts should normally require vegetated buffers that are between 50 and 125 feet wide. For streams, the width of the buffer is measured out from the bank of the stream, not the width across the stream (*i.e.*, the buffer will be 50 to 125 feet wide on each side of the stream channel). For other open waters, the width of the buffer is measured from the bank; if no bank is present, the ordinary high water mark should be used instead. District engineers will use their discretion and judgement to determine appropriate vegetated buffer widths for particular projects. If adequate State or local buffer width requirements already exist, district engineers should utilize the same requirements. The width of the vegetated buffer required as part of the NWP authorization must balance the benefits provided to the aquatic

environment with the uses of the property resulting from the authorized work. Buffer widths should not be excessive, with little additional benefits for the aquatic environment. Buffer width requirements can also depend on the condition of the local watershed. The Corps will determine what is best for the watershed involved, and what is practicable to the applicant.

Conservation easements, deed restrictions, or similar restrictions should be imposed on the vegetated buffer to ensure that the buffer is maintained. Developers should be encouraged to place vegetated buffers in community open space areas, especially when such areas are required by State or local statutes or regulations. Recreational (*e.g.*, hiking, nature, etc.) trails should generally be constructed outside of the vegetated buffer area, but these trails may be constructed within the buffer, provided the buffer is wide enough to accommodate the trail and the trail is constructed in such a manner so that it does not adversely affect the functions of the buffer.

#### **Assessing Cumulative Impacts on a Watershed Basis**

A number of commenters stated that it is difficult to determine when an adverse effect on the aquatic environment is minimal on an individual or cumulative scale. These commenters said that the Corps needs to utilize technological improvements, such as geographic information systems, to make these determinations because they believe the Corps current data collection efforts are inadequate to assess cumulative adverse effects on the aquatic environment. One commenter suggested that permit applicants should be required to identify past and future impacts for projects and that the remaining wetlands on the site should be deed restricted.

In the July 1, 1998, **Federal Register** notice, we discussed our current data collection efforts for NWPs, regional general permits, and standard permits. We are continuously modifying our methods of data collection to improve our ability to assess cumulative adverse effects on the aquatic environment that result from activities authorized by the Corps regulatory program. For each authorized activity, the United States Geological Survey (U.S.G.S.) hydrological unit code is entered in the database to record which watershed the activity is located. This data, along with other data collected for each authorized activity, will be used to assess the cumulative adverse effects on that watershed that result from activities authorized by the Corps.

Since the Corps resources are limited, the amounts and types of data that can be collected must strike a balance between the amount of work required to evaluate permit applications and the usefulness of the data to monitor the cumulative adverse effects of those permitted activities on the aquatic environment. The data collected by the Corps regulatory program is limited to the data necessary to assess cumulative adverse effects so that the Corps can effectively evaluate permit applications and conduct enforcement and compliance activities. The Corps recognizes that there are gaps in the data collection effort because many of the activities authorized by NWPs do not require preconstruction notification to the Corps. However, in many cases where the NWP activity does not require notification to the Corps, permit applicants request that the Corps verify that the proposed work qualifies for authorization under the non-reporting NWP. The impacts from these projects are included in the data collected by the Corps, so the data collection gap is not as great as some critics of the NWP program believe. We do not have the resources to provide field verification of the adverse effects of all activities authorized by NWPs. We also cannot fully monitor all of the compensatory mitigation that is required as special conditions to many NWP authorizations.

For the proposed new and modified NWPs, we will continue to collect data on a watershed basis to ensure that the use of the NWPs does not result in more than minimal adverse effects on the aquatic environment. The Corps will continue to improve its data collection efforts for all types of permits, not just NWPs, to better assess the adverse effects of the Corps regulatory program on the aquatic environment.

When assessing cumulative adverse effects on the aquatic environment, particularly on a watershed basis, it is important to note that we can only assess those adverse effects that result from activities authorized by the Corps pursuant to Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act. The aquatic environment is also adversely affected by activities that do not require a Corps permit. For example, construction of an upland residential development can result in adverse effects on water quality and aquatic habitat due to the removal of woody vegetation in upland riparian zones and surface runoff. Development and landclearing activities in adjacent or nearby uplands can substantially



alter the watershed, adversely affecting the local aquatic environment, but such activities are not regulated under Section 404 of the Clean Water Act.

### Compliance With the Endangered Species Act

A number of commenters indicated that the NWP do not satisfy the requirements of the Endangered Species Act (ESA), especially for those activities that do not require submission of a PCN to the Corps. These commenters expressed concern that NWPs do not provide the necessary coordination required by ESA where proposed activities may adversely affect endangered or threatened species. One commenter stated that an individual permit should be required for activities within critical habitat for Federally-listed endangered and threatened species. Several commenters remarked that the Corps should condition the NWPs to prohibit activities that adversely affect State-listed endangered or threatened species. One of these commenters cited the reference to State-listed endangered or threatened species in the regulations for the Section 404(b)(1) guidelines (40 CFR part 230). A few commenters indicated that the NWPs focus too much on wetlands with little consideration of other aquatic habitats, such as streams and rivers inhabited by salmon and trout. Several commenters stated that the Corps is in compliance with the ESA because the NWPs are conditioned so that no activity authorized by NWPs may jeopardize the continued existence of a listed species or its critical habitat. These commenters assert that the Corps should not conduct programmatic formal consultation for activities that have already been determined not to result in adverse effects on endangered or threatened species.

The NWP program contains provisions to ensure that activities authorized by NWPs comply with the ESA. General Condition 11 ensures that the NWPs do not authorize any activity that is likely to jeopardize the continued existence of a Federally-listed threatened or endangered species or a species proposed for designation as a threatened or endangered species or which is likely to modify the critical habitat or such species. In addition, an NWP authorization does not authorize the "take" of any Federally-listed threatened or endangered species. If any listed species or designated critical habitat may be affected by an activity authorized by NWP, the permittee is not authorized to begin work until the requirements of the ESA have been satisfied. The Corps will conduct the

coordination necessary to ensure that activities authorized by NWPs comply with the ESA.

For activities that occur in the vicinity of endangered or threatened species or their designated critical habitat, division and district engineers can regionally condition the NWPs to require notification to the Corps to allow case-by-case review of these activities and ensure compliance with the ESA. It is unnecessary to require an individual permit for NWP activities that may affect endangered or threatened species or designated critical habitat. If the Corps determines that an NWP activity may affect a Federally-listed endangered or threatened species, then the Corps will request formal consultation unless it is not required by 50 CFR Part 402.14(b). After completion of consultation with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS), the Corps will determine whether or not the proposed work will be in compliance with Section 7(a) of the ESA. After the Corps makes this determination, the project can be authorized by NWP or the Corps will notify the applicant that no permit can be issued.

In the proposed General Condition 25, entitled Designated Critical Resource Waters, we are proposing to prohibit the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 in NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened or endangered species, coral reefs, State natural heritage sites, or outstanding national resource waters officially designated by the state where those waters area located. General Condition 25 also states that discharges are not authorized by NWPs in designated critical habitat for Federally-listed endangered or threatened species, unless the activity complies with General Condition 11 and the FWS or NMFS has concurred in a determination of compliance with this condition. General Condition 25 is discussed in more detail elsewhere in this **Federal Register** notice.

The Corps does consider the effects of NWP activities on State-listed endangered or threatened species within the overall evaluation of the proposed activity. The provisions relating to endangered or threatened species in the Section 404(b)(1) guidelines apply only to species listed under the Federal Endangered Species Act (see 40 CFR 230.10(b)(3)), although there is some discussion of potential impacts to State-listed endangered and threatened species in 40 CFR Part 230.30. To

address local concerns for the aquatic environment, division engineers can regionally condition the NWPs to restrict their use for activities that may adversely affect State-listed species or their designated critical habitat.

Some commenters questioned the Corps ability to issue any NWPs prior to completion of programmatic consultation with the FWS and NMFS. Another commenter recommended that, instead of programmatic ESA consultation for the NWP, the Corps should conduct consultation at a district or regional level to establish programmatic or categorical mechanisms to comply with the ESA. This commenter believes that programmatic consultation will not adequately address specific ESA concerns. One commenter noted that the request for formal ESA consultation cited in the July 1, 1998, **Federal Register** notice is inconsistent with the Corps finding that the NWP program complies with the ESA. Several commenters requested that the Corps conduct an analysis of the cumulative effects of the NWP program on endangered and threatened species and their critical habitat. A commenter stated that the Standard Local Operating Procedures for Endangered Species (SLOPES) established by some districts are inadequate for complying with ESA. Two commenters requested clarification as to whether or not the incidental take provisions under ESA apply to obligate wetland endangered or threatened species.

We believe that the NWP program complies with the ESA and adequately addresses concerns for endangered and threatened species and their designated critical habitat. In spite of the provisions of General Condition 11 and the ESA Section 7(d) determination issued on June 10, 1997, which states that the NWPs do not adversely affect listed species or critical habitat, formal programmatic ESA consultation for the NWP program was initiated with the FWS and NMFS on June 4, 1999. The programmatic consultation will provide additional assurance that the existing NWPs, as well as the proposed new and modified NWPs, have a formal process to develop any necessary additional procedures at the district level. The programmatic consultation will provide further assurance that the NWP program does not jeopardize the existence of any Federally-listed threatened or endangered species. Both the programmatic ESA consultation and the Programmatic Environmental Impact Statement that will be prepared for the NWP program will address potential cumulative effects on endangered and



threatened species and their designated critical habitat. We believe that the SLOPES help ensure compliance with the ESA at the district level. Districts can meet with local offices of the FWS and NMFS to modify or improve their SLOPES.

In addition to NWP General Condition 11, division and district engineers can impose regional conditions on the NWPs and case-specific conditions to address endangered or threatened species or their critical habitat. For example, Corps regional conditions can prohibit the use of NWPs in designated critical habitat for endangered or threatened species or require notification for activities in areas known to be inhabited by threatened or endangered species. Some Corps districts have conducted programmatic consultation on geographic areas. These efforts usually consider the NWP program in that particular area. In summary, General Condition 11, Corps regional conditions, case-specific special conditions, and SLOPES will ensure that the NWP program complies with the ESA. General Condition 11 states that the NWPs do not authorize the "take" of any Federally-listed endangered or threatened species. It does not matter if the species is an "obligate" wetland endangered or threatened species.

#### Additional Issues

In response to the July 1, 1998, **Federal Register** notice, some commenters raised several new issues relating to the NWPs. A large number of commenters believe that the Corps is attempting to expand its jurisdictional authority by requiring upland vegetated buffers adjacent to waters of the United States as a condition of the NWPs. Some commenters stated that the Corps is also trying to expand its jurisdictional authority by applying the NWPs to activities that involve excavation of waters of the United States. Several commenters suggested additional restrictions for the NWPs. Other issues include: the use of multiple NWPs to authorize a single and complete project (often referred to as "stacking" of NWPs), the Corps data collection efforts, the use of NWPs on Tribal lands, compliance with Section 106 of the National Historic Preservation Act, enforcement of the NWPs, property rights issues, and State and local authorities.

**Expansion of Jurisdictional Authority:** Many commenters questioned the Corps authority to require upland vegetated buffers adjacent to open waters, streams, and wetlands, since uplands are not waters of the United States. Some

commenters believe that if vegetated buffers are necessary to protect water quality, then only the appropriate water quality certification agency can require the vegetated buffer. Other commenters stated that the Corps is exceeding its regulatory authority by including excavation activities in the new NWPs.

We have the legal authority to require vegetated buffers adjacent to streams and other waters through the Clean Water Act. The goals of the Clean Water Act include the maintenance of the biological, chemical, and physical integrity of the aquatic environment. The activities regulated by the Corps pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act usually cause adverse effects on the aquatic environment. As compensatory mitigation for losses of waters of the United States, we can require measures, such as vegetated upland buffers adjacent to waters, that offset such adverse effects. Since vegetated buffers adjacent to waters, even if they are uplands, help maintain the physical, biological, and chemical integrity of the aquatic environment, the Corps can require these buffers as a condition of a Clean Water Act Section 404 permit.

Another activity that many commenters believe to be an attempt to expand the Corps regulatory authority is the inclusion of excavation activities in the NWPs, particularly in the definition of "loss of waters of the United States." These commenters cited the recent decision by the United States Court of Appeals for the District of Columbia which upheld the United States District Court for the District of Columbia's decision in the *American Mining Congress v. Corps of Engineers* lawsuit. This lawsuit challenged the Corps and EPA's revised definition of "discharge of dredged material" that was promulgated on August 25, 1993 (58 FR 45008). The revised definition of "discharge of dredged material" was overturned because the District Court held that the rule was outside of the agencies' statutory authority and contrary to the intent of Congress by asserting Clean Water Act jurisdiction over activities where the only discharge associated with the activity is "incidental fallback." These commenters requested that the Corps remove all references to excavation activities from the new and modified NWPs.

Although the revised definition of "discharge of dredged material" published on August 25, 1993, was overturned by these recent court decisions, certain excavation activities are still regulated under Section 404 of

the Clean Water Act and require a Corps permit. Excavation activities that result in redeposits of dredged material into waters of the United States other than incidental fallback require a Section 404 permit. All other excavation activities, if they result in the replacement of an aquatic area with dry land or changing the bottom elevation of a waterbody require a Section 404 permit, and may be authorized by NWPs if they comply with the terms and limits of the NWPs. Excavation activities that result only in discharges classified as "incidental fallback" do not require a Section 404 permit. We have retained the excavation language in the proposed new and modified NWPs and the definition of "loss of waters of the United States" to make it clear that some excavation activities still require a Section 404 permit, and if so, may be authorized by NWPs. A final rule was published in the May 10, 1999, issue of the **Federal Register** (64 FR 25119-25123) with revisions to the Clean Water Act regulatory definition of "discharge of dredged material." The revision clarifies the definition of "discharge of dredged material" by deleting language from the regulatory definition at 33 CFR Part 323.2(d) that was held by the Court to exceed the Clean Water Act statutory authority.

**Proposed Additional Restrictions for NWPs:** In spite of the increased emphasis on regional conditioning for the new and modified NWPs proposed in the July 1, 1998, **Federal Register** notice, many commenters recommended additional restrictions that they believe should be applied to all NWPs. Several commenters recommended prohibiting the use of NWPs to authorize activities in wetlands that cannot be replaced through wetland restoration or creation, such as bogs, fens, forested wetlands, and vernal pools. One commenter advocated prohibiting the use of NWPs to authorize activities in endangered ecosystems, as identified by the National Biological Service. Two commenters recommended excluding NWPs from areas subject to watershed restoration plans, since many of these projects are funded by Federal agencies. One commenter recommended allowing the NWPs to be used only in states that have developed conservation plans that protect water quality, with no net loss of wetland function and acreage as a goal. This commenter described the State conservation plan as requiring a fee system to achieve the no net loss goal through restoration, preservation, and management of wetlands, with the funds from fees being spent only on projects, not overhead. Several

commenters recommended prohibiting the use of NWP in watersheds that have lost more than 50% of their wetlands. A number of commenters recommended excluding NWP in watersheds upstream or within Outstanding National Resources Waters and within critical resource waters. One of these commenters suggested that the Corps solicit public comments to identify critical resource waters. Regional conditions can be used to prohibit or restrict the use of NWP from high value waters, especially if those waters are difficult to restore or create. We do not agree that NWP should be excluded from use in areas under watershed restoration plans. Some activities authorized by NWP may comply with the watershed restoration plan, and some compensatory mitigation required by NWP authorizations for work within that watershed may provide net benefits for the watershed. Prohibiting the use of NWP in watersheds that have lost greater than 50% of their wetlands would be impossible to implement, because we cannot identify with a defensible degree of certainty the extent of jurisdictional wetlands that existed in that watershed. These commenters did not provide any suggestions to determine the historic extent of wetlands in a watershed or recommend a date to determine the historic baseline for wetlands. In the October 14, 1998, **Federal Register** notice, we proposed to exclude the NWP from critical resource waters and requested comments on how to identify those waters for a national NWP general condition. This proposal is discussed elsewhere in this **Federal Register** notice.

Many commenters, notably the Federal Emergency Management Agency (FEMA), recommended restricting the use of NWP within floodplains. FEMA stated that the use of NWP in the 100-year floodplain is contrary to the Administration's goal of reducing natural hazard impacts on citizens because the NWP provide Federal authorization for activities in floodplains. FEMA believes that the Corps should only authorize activities within designated Special Flood Hazard Areas through the individual permit process and that the NWP should contain a provision stating that the NWP program does not usurp State and local floodplain management programs and regulations governing activities within floodplains. A few commenters stated that the NWP should not authorize activities that result in a net loss of flood storage capacity within the 100-year floodplain. Several commenters

recommended excluding the NWP from watersheds or areas upstream of communities that have been designated as flood disaster areas in the past 10 years.

In the October 14, 1998, **Federal Register** notice, we proposed to prohibit the new NWP from authorizing permanent above-grade wetland fills in waters of the United States within the 100-year floodplain, as mapped by FEMA on their Flood Insurance Rate Maps. This proposal is discussed elsewhere in this **Federal Register** notice.

A number of commenters recommended excluding the use of NWP in tributaries identified as impaired through Section 303(d) of the Clean Water Act due to the loss of wetlands. Several commenters suggested restricting the use of NWP in impaired waters and requested that the Corps solicit public comments on how to identify impaired waters. Other commenters recommended suspending the use of NWP in areas designated as source water zones under the Safe Drinking Water Act or prohibiting the use of NWP in drinking supply watersheds.

In the October 14, 1998, **Federal Register** notice, we proposed to limit the use of NWP in waterbodies and aquifers identified by States as impaired due to the loss of wetlands. This proposal is discussed elsewhere in this **Federal Register** notice. Division and district engineers can regionally condition any of the NWP to prohibit or restrict their use in designated source water zones under the Safe Drinking Water Act or drinking water supply watersheds. District engineers can also exercise discretionary authority for activities that may result in more than minimal adverse effects on these areas.

Some commenters requested that the Corps prohibit the use of NWP in waters or watersheds with designated critical habitat for Federally-listed endangered or threatened species. One commenter recommended excluding the use of NWP in habitats designated by the FWS or NMFS as crucial for endangered or threatened species, unless the work is for habitat restoration.

General Condition 11 and SLOPES that are developed by Corps districts adequately address the use of NWP in designated critical habitat for Federally-listed endangered or threatened species. Please also see the discussion of General Condition 25 elsewhere in this **Federal Register** notice.

#### *Use of Multiple Nationwide Permits:*

A number of commenters objected to the use of more than one NWP for a single

and complete project, believing that this practice results in more than minimal adverse effects on the aquatic environment. Several commenters objected to adding any restrictions against the use of more than one NWP to authorize a single and complete project, stating that it does not necessarily result in more than minimal adverse effects on the aquatic environment. One of these commenters believes that the notification process is sufficient to determine when specific projects requiring the use of more than one NWP will result in more than minimal adverse effects on the aquatic environment.

We are proposing to modify General Condition 15 to address concerns for the use of multiple NWP to authorize a single and complete project. The proposed modification of this general condition does not allow more than one NWP to authorize a single and complete project if the acreage loss of waters of the United States exceeds the highest specified acreage limit of the NWP used to authorize that project. In the proposed NWP we have removed the conditions that address the use of specific NWP with those NWP. The proposed modification of General Condition 15 is discussed in further detail below.

*Data Collection:* Several commenters believe that the Corps current data collection efforts fail to effectively monitor both the individual and cumulative adverse effects on the aquatic environment resulting from the use of the NWP. These commenters stated that the Corps does not know how many NWP activities that do not require submission of a PCN occur, the acreage of impact authorized by these non-reporting NWP, and what types of compensatory mitigation, if any, are provided to offset losses of waters of the United States authorized by these NWP. A number of commenters requested that the Corps track losses of waters of the United States authorized by non-reporting NWP. One commenter stated that the Corps should not limit the use of NWP until it knows for certain how many wetlands are lost each year.

For those activities that are reported to the Corps, including activities authorized by NWP, regional general permits, and individual permits, the Corps monitors the individual and cumulative adverse effects on the aquatic environment. The individual adverse effects are evaluated on a case-by-case basis when the Corps reviews the PCN or conducts the public interest review. It should also be noted that many NWP permittees request that the

Corps provide written confirmation that the proposed work is authorized by NWP, even though submission of a PCN to the Corps is not required. This allows the Corps to track many of the activities that are authorized by non-reporting NWPs and include the adverse effects of those activities in its analysis of individual and cumulative adverse effects, plus any compensatory mitigation provided to offset those impacts.

Cumulative adverse effects on the aquatic environment that result from activities authorized by the Corps regulatory program are assessed by district engineers on a watershed or regional basis. District engineers utilize data collected on authorized activities for which the Corps issues general permit authorizations or standard permits, as well as estimates of the number of activities authorized by non-reporting general permits. Based on the actual and estimated impacts to aquatic resources, district engineers determine if the cumulative adverse effects on the aquatic environment resulting from the use of general permits, including NWPs, are more than minimal. Activities authorized by individual permits are not required to result in minimal adverse effects on the aquatic environment because that statutory requirement applies only to general permits. To prohibit the use of general permits in a watershed or other geographic area, the District Engineer must demonstrate that more than minimal cumulative adverse effects on the aquatic environment are caused by the Corps permit decisions. This demonstration must include clear, extensive, and unequivocal evidence that activities regulated pursuant to Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act are causing the cumulative adverse effects on the aquatic environment, not unregulated activities. Activities that are not regulated by the Corps program are not factored into this analysis because they are outside of the purview of the Corps.

Other commenters stated that inconsistencies in data collection efforts exist between Corps districts and that the data collected by the Corps is inaccurate. They said that some districts do not collect the same types of data that other districts collect. These commenters assert that these inconsistencies result in inaccurate data reported at a national level. One commenter stated that the Corps should make all NWP information, such as the number of PCNs, NWP verifications, authorized losses, mitigation, and enforcement actions available on the Internet.

There are standard data collection requirements for the Corps regulatory program. The data collected by each district for both general and individual permits was discussed in the July 1, 1998, **Federal Register** notice. As stated in the July 1, 1998, **Federal Register** notice, data collection requires a balance between the amount of work required to evaluate applications for Corps permits and the usefulness of the collected data to assess adverse effects of those activities on the aquatic environment. The specific types of data collected are limited to data that is necessary to evaluate the cumulative adverse effects on the aquatic environment that result from activities authorized by the Corps, while allowing the district the time and personnel to effectively evaluate permit applications and conduct enforcement activities. There are minimum standards for data collection for the Corps regulatory program, but some districts may collect additional data for their own use, if it is needed to satisfy other requirements. In the future, the Corps may modify its data collection standards to improve its assessment of the adverse effects of regulated activities on the aquatic environment and to provide more information to the public concerning the regulatory program. To make NWP program data, such as the number of PCNs, NWP verifications, authorized losses, mitigation, and enforcement actions, available for public access on the Internet is impractical, since each district maintains its own regulatory database.

**Tribal Issues:** Several comments were received from Native American organizations regarding tribal issues relating to the NWPs. Some of these commenters expressed concern that use of the NWPs would result in adverse effects on water quality and fish habitat, and that the tribes would not receive notification for projects on tribal land. One commenter requested that the Corps add the following sentence at the end of General Condition 8, Tribal Rights: "Nothing in this permit shall be construed to be authority or permission to conduct development, construction, or any other activity in waters of the United States with the exterior boundaries of a Federally-recognized Indian tribe in the absence of prior authority or permission being granted by such Tribal government." According to this commenter, some people believe that an NWP authorization constitutes permission to do work on Tribal lands without prior permission of the Tribe. Another commenter opposes issuance of NWP authorizations for activities within

the boundaries of Tribal lands without the opportunity for public notice and comment. One commenter stated that reservation watersheds should be considered high value waters and receive additional protection and that the Corps should consult with the appropriate Tribal governing authority prior to issuing NWP authorizations for activities in a reservation watershed. One commenter said that the procedures of the Corps Native American Policy must be followed prior to the issuance of the NWPs.

Division engineers can regionally condition the NWPs to prohibit or limit their use in high value waters, including high value waters on Tribal lands. We have provided opportunities to discuss potential regional conditions with Tribes, through district public notices for the new and modified NWPs. Tribes with Section 401 authority can deny water quality certification for the NWPs and require individual 401 certifications, which would allow those Tribes to review all proposed NWP activities and determine if those activities meet their water quality standards.

As with all Corps permits, the NWPs do not convey any property rights or any exclusive privileges (see 33 CFR Part 320.4(g) and the "Further Information" section of the NWPs). Issuance of an NWP authorization does not preclude the permittee from obtaining permission from the appropriate Tribal government, if such permission is necessary. Therefore, it is unnecessary to add the requested language to General Condition 8. Concerns for high value waters that occur on Tribal lands are more appropriately addressed through the regional conditioning process, but we disagree with the assertion that all reservation watersheds are high value waters.

**Compliance with Section 106 of the National Historic Preservation Act:** Several commenters expressed concern regarding how the new and modified NWPs will comply with Section 106 of the National Historic Preservation Act (NHPA) and how the permittee will know if the proposed work will affect a historic resource. Another commenter stated that the NWP program is not in compliance with the NHPA and its implementing regulations at 36 CFR Part 800, because the 5-day agency coordination period for PCNs is too short, since a 30-day comment period is required by 36 CFR Part 800.2.

NWP General Condition 12 addresses compliance with Section 106 of the NHPA. This general condition states that any activity which may affect

historic properties listed, or eligible for listing, in the National Register of Historic Places is not authorized, unless the District Engineer has complied with the provisions of 33 CFR Part 325, Appendix C. For activities authorized by non-reporting NWP, permittees concerned about compliance with General Condition 12 should contact the State Historic Preservation Officer (SHPO) to determine if the proposed work will affect historic properties. For NWP activities that require submission of a PCN to the Corps, the Corps will evaluate the PCN to determine if coordination with the SHPO is necessary to ensure compliance with the NHPA. In areas such as designated historic districts, division engineers can regionally condition the NWPs to require coordination with the SHPO to ensure compliance with the NHPA. The Corps regulations for ensuring compliance with the NHPA are found at 33 CFR Part 325, Appendix C, not 36 CFR Part 800.

**Enforcement:** Several commenters stated that the proposed new and modified NWPs did not mention enforcement. These commenters are concerned that the terms and limits of the NWPs may be largely ignored unless enforcement is specifically addressed in the text of the NWPs. Another commenter said that the discussion of the Corps data collection procedures did not address how many enforcement actions were taken on projects that violated NWP terms and conditions. A number of commenters expressed concern that the requirements for on-site avoidance and minimization are not enforced. Several commenters believe there is a lack of monitoring and enforcement of general permits, including NWPs.

Enforcement of Corps permits, including NWPs, is addressed in 33 CFR Part 326. District engineers use discretion to enforce non-compliance with the terms and conditions of the NWPs, including any regional conditions or case-specific conditions. Although the discussion of the Corps data collection procedures did not specifically address enforcement activities, these activities are included in our data collection systems. We conduct compliance reviews to determine if permittees do the work in accordance with NWP authorizations, including any requirements for avoidance and minimization. Although Corps districts cannot conduct compliance reviews for every activity authorized by NWPs, they will conduct compliance reviews to the extent that their district resources allow. Enforcement activities will be

prioritized by first investigating suspected violations that are reported by citizens and then performing compliance checks on other projects.

**Other Issues:** Two commenters believe that the proposed new and modified NWPs infringe upon individual property rights and that the Corps does not have the authority to require compensatory mitigation that is not directly proportional to the adverse effects of the authorized work. Several other commenters requested that the Corps adopt a separate appeals process for the NWP program, similar to the process currently being developed for individual permits. Several commenters requested that the Corps implement an appeals process for jurisdictional determinations. One commenter requested that all of the NWPs include a condition requiring deed restrictions for all remaining wetlands on the property. One commenter stated that the proposed NWPs are contrary to the Fair Housing Act because the NWPs make it more difficult to build affordable housing.

For certain types of activities, the proposed new and modified NWPs provide property owners and project proponents with an efficient means of obtaining the authorizations necessary to comply with Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, provided those activities result in minimal adverse effects on the aquatic environment, individually or cumulatively. The NWPs allow property owners to use their land in compliance with these Federal laws. District engineers can require compensatory mitigation that is necessary to offset the losses of waters of the United States and ensure that the authorized work, with compensatory mitigation, results in minimal adverse effects on the aquatic environment.

We believe that it is unnecessary to develop a separate appeals process for the NWP program. It is important to recognize that the NWPs are optional permits. If a permittee does not want to comply with the terms and conditions of the NWP authorization, he or she can request authorization through the individual permit process. If the prospective permittee objects to the terms and conditions of the individual permit or is denied an individual permit, then he or she could use the regulatory appeals process, once it is implemented. We are not certain when an appeals process for jurisdictional determinations will become effective.

We cannot condition the NWPs to require deed restrictions on all remaining wetlands on the property for a particular project, unless the deed

restriction is for a compensatory mitigation requirement that is fulfilled through the preservation of wetlands on the property. If there are remaining wetlands on the property after the completion of the authorized work, the landowner must obtain another Section 404 permit to do any further work on the property that involves discharges of dredged material into waters of the United States. Requiring a deed restriction for all remaining waters of the United States on the property may be considered as a taking of private property, unless the waters to be protected by the deed restriction are used to satisfy a compensatory mitigation requirement.

We do not agree that the proposed new and modified NWPs violate the Fair Housing Act. The proposed NWPs will provide developers with an expedited permit process that authorizes activities in waters of the United States that have minimal adverse effects on the aquatic environment. Although the proposed new and modified NWPs contain conditions that provide additional protection for the aquatic environment, which may increase costs for some builders, we still believe that the NWPs are a cost-effective means of complying with the Clean Water Act. It is important to remember that NWPs and other general permits are optional permits, and if the project proponent does not want to comply with all terms and conditions of the NWP, then he or she can apply for an individual permit.

One commenter requested that the new NWPs authorize water impoundments and other water development activities that have minimal adverse effects. Another commenter stated that the NWPs should authorize the construction of water diversion, storage, and reuse facilities. Another commenter suggested that NWP 16 requires revision because the quality of return water from the contained upland disposal site should be addressed through Section 402, not Section 401, of the Clean Water Act.

During the development of the new NWPs to replace NWP 26, we found that the use of NWP 26 to authorize discharges of dredged material into waters of the United States for the construction of water impoundments and water diversion, storage, and reuse facilities was not widespread across the country. We believe that it is more appropriate for Corps districts to develop regional general permits for these activities, where the construction of impoundments occurs regularly with minimal adverse effects on the aquatic environment. The citation in NWP 16 to

Section 401 of the Clean Water Act is correct, because the runoff or overflow from a contained land or water disposal area has been defined as a "discharge of dredged material," which requires a Section 401 water quality certification (see 33 CFR Part 323.2(d)).

#### **General Comments on October 14, 1998, Federal Register Notice**

Many commenters were generally in favor of the proposed restrictions on NWP activities within the 100-year floodplain, designated critical resource waters, and impaired waters published in the October 14, 1998, **Federal Register** notice, but stated that the proposed changes still do not provide enough environmental protection and further restrictions on the NWPs are needed. A large number of commenters objected to the proposed additional restrictions, stating that the proposal contained little factual basis, the proposal was too vague to allow meaningful comment, or the proposal was unsupported because it did not contain an analysis of the potential effects it would have on the regulated public. Several commenters said that this proposal was based on an inadequate administrative record and that there is little or no documentation supporting the need for these additional restrictions. These commenters requested that the Corps demonstrate that the relevant factors have been considered when it makes its final decision concerning these restrictions and supplement its record to justify the need for these limitations if they are adopted. A few commenters requested that the Corps conduct an analysis of the effects of the proposed additional restrictions including: (1) The land area affected by the proposal; (2) the environmental benefits; (3) the costs to the regulated public, including the cost of compliance and potential delays; and (4) the workload implications to the Corps and other agencies. Many of these commenters stated that the proposed restrictions would be too burdensome to the regulated public, with few tangible added environmental benefits. Other objections expressed by many commenters are that the proposed restrictions would result in more activities requiring individual permits, they would remove any streamlining from the permit process provided by the NWPs, and they would result in increased costs and delays to the regulated public.

The NWP restrictions proposed in the October 14, 1998, **Federal Register** notice were intended to solicit comments from the public to provide the Corps with information regarding

their effects on the regulated public, problems with implementation of the proposed restrictions, how to identify the areas that should be subject to the restrictions, and to which NWPs the restrictions should apply. As discussed below, we have thoroughly evaluated all of the comments received in response to the October 14, 1998, **Federal Register** notice and have made some changes to the proposed restrictions based on those comments. These additional NWP restrictions could create substantial burdens for the regulated public, because many project proponents will be required to apply for an individual permit or provide additional information to demonstrate compliance with these new NWP conditions. We believe that the proposed new restrictions will result in better protection of the aquatic environment and are necessary to address certain public interest factors, such as flood hazards, floodplain values, and high value waters.

A couple of commenters requested that the Corps provide the public with another opportunity to comment on the proposed restrictions, based on information provided by comments received in response to the October 14, 1998, **Federal Register** notice. One commenter stated that the proposal violates the Unfunded Mandates Reform Act by not conducting a regulatory assessment for each proposed restriction. Another commenter believes that the proposal is contrary to Section 404(e)(2) of the Clean Water Act, which requires a public hearing before revoking or modifying general permits.

Because of the modified public participation process the public has, with this **Federal Register** notice, another opportunity to comment on the proposed restrictions, with more complete information to evaluate those restrictions. Since the proposed restrictions may be implemented as NWP general conditions and are not new regulations, we are not required to conduct a regulatory assessment pursuant to the Unfunded Mandates Reform Act. The proposed restrictions do not substantially change the NWPs themselves, so we are not required to conduct a public hearing in accordance with Section 404(e)(2) of the Clean Water Act.

A number of commenters stated that the goals of the proposed additional NWP restrictions can be achieved through other means, instead of establishing national conditions for the NWP program. These commenters believe that the use of existing NWP general conditions, regional conditions, revocation of NWPs in certain

geographic regions, preconstruction notifications, avoidance and minimization requirements, and discretionary authority are adequate to ensure that the NWPs do not authorize activities with more than minimal adverse effects to designated critical resource waters and impaired waters. Examples of general NWP requirements cited by some of these commenters include the establishment and maintenance of vegetated buffers adjacent to open waters and streams, water quality management plans, stormwater management, maintenance of water flows, and compensatory mitigation. Some commenters said that the proposed restrictions are more appropriately handled by State and/or local governments. Several commenters stated that the proposed limitations should be done through regional conditions instead of the NWP general conditions.

We agree that some of the goals of proposed restrictions can also be achieved through some of these means, but to ensure that concerns for floodplains, impaired waters, and designated critical resource waters are addressed consistently across the country, we believe that these restrictions should be implemented as NWP general conditions.

Many commenters objected to the proposal because terms such as "critical resource waters" and "impaired waters" were not defined. Other commenters based their objections on estimates that the proposed restrictions would exclude the use of NWPs from the approximately 40% of the Nation's waters that are considered impaired and the 8% of the land area of the continental United States that is within the 100-year floodplain. One commenter believes that the proposed restrictions are unlikely to result in a net increase in wetlands or improve water quality.

One of the objectives of the October 14, 1998, **Federal Register** notice was to solicit public comment on definitions for these terms and criteria to identify critical resource waters and impaired waters. We received many recommendations to help us identify those waters nationally. Each of the proposed restrictions on the NWP program are discussed below in separate sections. The intent of the proposed restrictions is to better protect the aquatic environment, not to produce a net increase in wetlands.

A large number of commenters supported the Corps decision to allow public comment on the final NWPs and final Corps regional conditions. A couple of commenters requested a 60-day comment period instead of a 45-day

comment period. Two commenters asked if the Section 401 agency will have another opportunity to evaluate any changes to the NWP that may occur as a result of comments received in response to that **Federal Register** notice. These commenters stated that the 401 agency should have another period of review to make new Section 401 determinations. Another commenter stated that 60 days is insufficient for Tribes to make Section 401 or CZM determinations on the new NWPs because EPA must approve the Tribes' application to administer Section 401 water quality standards and approve those standards.

We believe that 45 days is an adequate amount of time for the public to comment on the draft new and modified NWPs and Corps regional conditions because of the previous opportunities for public comment. Because of the changes to the issuance process for the proposed new and modified NWPs, the 401 and CZMA agencies will make their determinations based on final NWPs and Corps regional conditions, since those NWPs and regional conditions will be issued before the final 60-day WQC/CZMA determination period begins. If a Tribal agency does not currently have EPA approval to administer Section 401 water quality standards or EPA has not yet approved their water quality standards, then the agency that currently has Section 401 authority must make the determination.

#### **Withdrawal of NWP B**

In response to the October 14, 1998, **Federal Register** notice announcing the Corps withdrawal of the proposed NWP B for master planned development activities, a large number of commenters expressed their support for the withdrawal of that proposed NWP. On the other hand, many commenters objected to the withdrawal of NWP B. A number of commenters believe that the Corps did not consider all comments received in response to the July 1, 1998, **Federal Register** notice and that the decision to withdraw NWP B was premature. These commenters stated that the Corps should have announced its decision to withdraw NWP B when the other proposed NWPs are issued. Several of these commenters requested that the Corps provide documentation explaining this decision. Several commenters recommended that the Corps repropose NWP B.

We fully considered all comments received in response to the proposal to issue NWP B for master planned development activities. The decision to withdraw NWP B from the proposed

new and modified NWPs was discussed in the October 14, 1998, **Federal Register** notice, but we will provide further detail below.

One of the most important factors in the decision to withdraw NWP B is the difficulty in providing a clear, easy to understand, definition for the term "Master Planned Development," to be used in the context of the NWP. Without a clear definition of this term, there will be much confusion for the Corps and the regulated public concerning which developments could be authorized by this NWP. The comments received in response to the July 1, 1998, **Federal Register** notice provide ample evidence of the potential problems with implementing this NWP, because of the difficulty in producing a definition that is easily understood. Many commenters believe that any type of master planned development, particularly those approved by State or local agencies, would qualify for NWP B. This is simply an incorrect assumption which emphasized the difficulties in implementing this NWP. The intent of NWP B was to authorize developments that are designed, constructed, and managed to conserve the functions and values of waters of the United States on the project site. For these developments, the aquatic environment receives equal consideration to the development, and the development is designed to protect the local aquatic environment. We may repropose NWP B when we have formulated a definition that better supports the intent of the NWP and have resolved other concerns associated with the proposed NWP.

#### **Limiting the Use of NWPs Within the 100-Year Floodplain**

In the October 14, 1998, **Federal Register**, we proposed to prohibit the use of the new and modified NWPs to authorize permanent, above-grade wetland fills in the 100-year floodplain as mapped by the Federal Emergency Management Agency (FEMA) on its Flood Insurance Rate Maps. We also requested comments regarding the applicability of this restriction to existing NWPs, as well as the proposed new and modified NWPs.

Nearly all of the correspondence received in response to the October 14, 1998, **Federal Register** notice commented on this proposed restriction. Most of the proponents stated that the restriction should be expanded to apply to all 100-year floodplains, not just the 100-year floodplains mapped by FEMA, because further restriction is necessary to safeguard wetlands for protection against floods. One commenter said that the condition should be expanded to

include riparian buffers of 300 feet from all rivers and streams and should address any uses of NWPs in these areas, not merely above-grade fills in waters of the United States. A few of the commenters recommended specific NWPs to be included in this condition. Collectively, every NWP was recommended for inclusion. Many commenters objecting to the proposed restriction included State and local flood control agencies that voiced their concern that essential public facilities may need to be sited within the floodplain in order to properly function. They stated that all municipalities need the ability to build and maintain their urban drainage infrastructure without undue delay and expense so that it operates as originally designed for flood control and/or water quality enhancement purposes. Specifically, they said that the use of NWPs 3 and 31 to maintain these facilities should be exempt from this condition.

We are proposing to add General Condition 27 to the NWPs to restrict or prohibit the use of NWPs 12, 14, 21, 29, 39, 40, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain. For these NWPs, prospective permittees must notify the District Engineer in accordance with General Condition 13. For NWPs 21, 29, 39, 40, 42, 43, and 44, the notification must include documentation that the proposed project will not involve discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills in waters of the United States within the FEMA-mapped 100-year floodplain. If the FEMA map is out of date or the 100-year floodplain is not mapped, the documentation should be from the local floodplain authority. This general condition is not restricted to 100-year floodplains mapped by FEMA on its Flood Insurance Rate Maps. Instead, this general condition would apply to all 100-year floodplains, except in 100-year floodplains at the point in the watershed where the drainage area is less than 1 square mile. In those areas where no FEMA maps exist, or the FEMA maps are out-of-date, the prospective permittee must submit documentation to the District Engineer from the local official with authority to issue development permits for activities in the 100-year floodplain that the proposed work is outside of the 100-year floodplain.

Proposed General Condition 27 also contains a presumption that NWP 12 and 14 activities resulting in permanent, above-grade fills in waters of the United States within the 100-year floodplain

will cause more than minimal adverse effects. However, this presumption is rebuttable and the proposed work can be authorized by NWP 12 or 14 if the prospective permittee clearly demonstrates to the District Engineer that the proposed work and associated mitigation will not decrease the flood-holding capacity of the waterbody and will not cause more than minimal changes to the hydrology, flow regime, or volume of waters associated with the 100-year floodplain. The documentation rebutting this presumption must include proof that FEMA, or a state or local floodplain authority through a licensed professional engineer, has approved the proposed project and provided a statement that the project does not increase flooding or more than minimally alter floodplain hydrology or flow regimes.

Expanding proposed General Condition 27 to prohibit the use of all NWPs within the 100-year floodplain, regardless of whether or not the authorized activity would result in above-grade wetland fills, would unnecessarily prohibit NWP activities that have little or no effect on floodplain functions or values. While a 300-foot buffer may be within the 100-year floodplain of some waterbodies, this would be an excessive requirement for waterbodies with narrow floodplains. We believe that certain NWP activities which result in permanent, above-grade fills in waters of the United States within the 100-year floodplain have the potential to impact water quality, especially during flood events, and therefore should be subject to the restrictions of this condition. We concur with the flood control agencies contentions that municipalities need the ability to build and maintain their urban drainage infrastructure without undue delay and expense so that those facilities operate as originally designed for flood control and/or water quality enhancement purposes. Lacking general support for including the existing NWPs in this proposed condition, and acknowledging that not all activities authorized by the existing NWPs will result in more than minimal adverse effects to 100-year floodplains, we are proposing to include NWPs 12, 14, 21, 29, and 40 in General Condition 27, as well as NWPs 39, 42, 43, and 44. Furthermore, we have determined that the proposed NWP 41, which authorizes reshaping existing drainage ditches, would not result in any appreciable adverse impacts to the floodplain and are proposing to exclude this NWP from General Condition 27.

Many commenters stated that FEMA maps are inaccurate and incomplete,

mapping mostly urban areas and leaving rural areas unprotected. Others were concerned about what information will be used to determine whether a project is within the 100-year floodplain. Many commenters also stated that the condition will result in greatly increased numbers of individual permits and that the area of land encompassed by the 100-year floodplain prohibition is so extensive as to make use of NWPs with this condition extremely prohibitive. Additionally, the Corps has provided no evidence to support their notion that use of any particular NWP to authorize fills in floodplains has contributed to, or threatens to contribute to, the frequency or severity of flood events. They state the burden is on the Corps to develop a factual record to justify its proposed regulatory actions.

FEMA maps are available for review at local FEMA or Corps offices for determining the applicability of this condition to the applicant's proposed project. We agree that applying General Condition 27 to NWPs 12, 14, 21, 29, 39, 40, 42, 43, and 44, will significantly increase the number of individual permit applications processed by the Corps. Additionally, we have determined that this condition covers approximately 55 million acres of wetlands which fall within the 100-year floodplain, a large amount of wetlands regulated under Section 404 of the Clean Water Act.

In response to the July 1, 1998, **Federal Register** notice, FEMA provided the following comments: (1) the replacement NWPs cover a much greater geographical area than the existing NWP 26 and therefore need to consider project impacts within the 100-year floodplain; (2) when flood capacity within the floodplain is diminished due to authorized or unauthorized construction in wetland areas, flooding in other areas is likely to increase; and (3) it is the responsibility of the Corps under Executive Order 11988, entitled Floodplain Management, to evaluate all activities in or affecting floodplains. Based upon these premises, the Corps feels it is necessary to impose this condition on those specific NWPs, which could potentially impact the flood capacity of the floodplains.

Most of those opposed to the proposed general condition stated that it does not fulfill the congressional intent to implement a streamlined permitting process for activities resulting in minimal adverse environmental effects on the aquatic environment. They also state that the Corps is not authorized by Congress to become a regulatory authority with regards to controlling

floodplain activities. A large number of commenters stated that the condition provides for dual regulation of the 100-year floodplains, through the Corps and FEMA. These commenters said that floodplain management, which FEMA administers, and water quality management, administered by the Corps under Section 404 of the Clean Water Act, should be regulated separately. A couple of commenters stated that if FEMA wants to restrict construction in floodplains to reduce flood damage then they should do so under their own authority.

We believe that the proposed condition does fulfill the congressional intent inasmuch as the NWP process provides for a less rigorous review of proposed projects with decisions being rendered in a much more timely manner than the individual permit process. Also, conditioning the NWP fulfills the requirement to minimize adverse impacts to the aquatic environment. Additionally, in accordance with Executive Order 11988, the district engineers are directed to avoid authorizing floodplain developments whenever practicable alternatives exist outside of the floodplain. We believe that we are authorized to regulate waters of the United States for water quality management and many wetlands within the 100-year floodplain fall within the "adjacency clause." Therefore, wetlands in the 100-year floodplain are within the Corps regulatory jurisdiction. To reiterate, the Corps recognizes that it does not regulate any activity in the 100-year floodplain that does not occur within a water of the United States; these upland areas would be regulated by FEMA. It is not the intent of the Corps to duplicate FEMA and State and local flood control agencies, but rather to rely on these agencies to assert their jurisdiction to minimize impacts to aquatic resources within the 100-year floodplain.

Most of the commenters indicated that the proposed condition is overly restrictive, unnecessary, and causes the process to be burdensome to both Corps regulators and the taxpayers. These commenters also indicated that it is both expensive and time-consuming without providing commensurate benefits for wetlands. Many said the proposal is not warranted and obviated by the many environmentally protective conditions already in place, including State and local regulations. Many of the opponents included state and local transportation departments who indicated that this condition would prevent them from fulfilling their mandate of ensuring public safety and that widening roadways, some within



wetlands within the 100-year floodplain, is often required and the condition would put an unnecessary burden on their departments while delaying their projects. They recommended exempting NWP 14 from this condition. Few of the objectors recommended which specific NWPs, existing or proposed replacements, should be excluded from this condition. Collectively, every NWP was recommended for exclusion.

To reiterate, in accordance with Executive Order 11988, district engineers should avoid authorizing floodplain developments whenever practicable alternatives exist outside of the floodplain. The proposed General Condition 27 prohibits the use of certain NWP activities that could result in more than minimal adverse impacts to the aquatic environment, as well as the 100-year floodplain. We believe that, with proper planning, transportation departments will have ample time to attain a permit through the individual permit process without undue delays and excessive risks to public safety. In the event of a "wash-out" due to a storm event, NWP 3 can be used to repair public and private roadways.

#### **Limiting the Use of the NWPs in Designated Critical Resource Waters**

We proposed in the October 14, 1998, **Federal Register** notice, to limit the use of NWPs in critical resource waters designated by State or Federal agencies. Many of the comments we received addressed proposed restrictions on the applicability of the NWPs in critical resource waters. Most of those comments generally supported the adoption of such restrictions, and they focused on suggestions for defining critical resource waters. These suggestions advocated the inclusion of the following waters as critical resource waters: waters that have any kind of special value designation by Federal, State, or local governments; sensitive and specially valuable waters; habitat of endangered, threatened, or sensitive species; source waters for drinking water; groundwater recharge zones; rare and irreplaceable wetlands that cannot be mitigated with current technologies; and waters declared as impaired under Section 303(d) of the Clean Water Act. We have considered each of these recommendations, as discussed below.

*Waters that have any kind of special value designation by Federal, State, or local governments:* For waters that have received a Federal designation of special value, we agree that the use of NWPs should be restricted to the extent that their applicability is reasonably certain to jeopardize any essential functions

which confer the recognized special value to these waters. We are proposing to add a new NWP general condition (General Condition 25) to address the use of NWPs in designated critical resource waters. Proposed General Condition 25, entitled Designated Critical Resource Waters, prohibits the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity in the following critical resource waters including wetlands adjacent to these waters: NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened and endangered species, coral reefs, State natural heritage areas, or outstanding national resource waters officially designated by the State where those waters are located. Outstanding national resource waters and other waters having particular environmental or ecological significance must be officially designated through an official State process (e.g., adopted through regulatory or statutory processes, approved through State legislation, or designated by the Governor). In those circumstances where a waterbody has been designated by the State, the District Engineer will publish a public notice advising the public that such waters will be added to the list of designated critical resource waters. The District Engineer may, on his own, designate critical resource waters after notice and opportunity for public comment. For activities authorized by NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, proposed General Condition 25 requires the prospective permittee to notify the District Engineer in accordance with General Condition 13 for any activity proposed in these designated critical resource waters, including adjacent wetlands. This general condition also prohibits discharges in designated critical habitat for Federally-listed endangered or threatened species unless the activity complies with General Condition 11 and the U.S. FWS or the NMFS has concurred in a determination of compliance with this condition.

We believe that special value designations promulgated solely by State or local agencies without the approval of the governor or State legislature are not appropriate bases for the imposition of restrictions on the use of these Federal permits. We believe that restrictions which are necessary to support the other State and local special value designations should be effected through relevant State and local processes.

Several commenters suggested that Wild and Scenic Rivers, blue-ribbon trout fisheries, and American Heritage Rivers were all examples of waters that have been designated as having special value, and that these particular categories of waters should be categorically excluded from NWP eligibility. Since there is no official Federal designation of any waters as blue-ribbon trout fisheries, we do not agree that these waters should be excluded from this Federal program. The NWP general conditions already impose restrictions on NWP eligibility in waters that are components of Wild and Scenic River Systems, and on any river officially designated by Congress as a "study river" for possible inclusion in such systems. Since this general condition imposes restrictions that achieve the goals of adequately protecting special values, and of maximizing NWP utility, we do not believe that further restriction is appropriate or necessary. American Heritage Rivers may be likely candidates for inclusion as critical resource waters but it is difficult to identify any possible adverse effect that would result from NWP eligibility in these waters. It is particularly difficult to identify such effects from a national perspective.

We believe that the imposition of any restriction imposed to protect Critical Resource Waters must be precise in its scope, in order to provide all reasonable and necessary protection of the factors conferring special value, without unnecessarily limiting the utility of the NWPs. Since we believe that these two goals are equally important, we have concluded that it would be too broad a restriction to eliminate the applicability of any NWP in special value waters without a prior Corps determination that the NWP in question posed some reasonable likelihood of adverse effect on the recognized special value. Our consideration of the comments received and our concern about undue restrictions on the NWPs, lead us to conclude that we are unable to make additional determinations from a national perspective. As a result, we believe that any such determination of other types of waters would most appropriately be made at the district or, in some cases, at the division level, and that as a practical matter, the necessity of further restriction to protect waters that have a Federal special value designation must be determined by the Corps district or division and implemented as regional conditions on the NWPs, as necessary.

*Sensitive and specially valuable waters:* There is no official Federal designation of any waters as sensitive or



specially valuable waters, therefore there is no Federal definition of such waters. We believe that the inclusion of such arbitrary terms in the definition of Critical Resource Waters would be counterproductive, and we do not agree that introduction of additional ambiguity is appropriate. We further believe that the use of any NWP in waters identified by the Corps, on a case-by-case basis, as having some particular sensitivity or special value that is susceptible to degradation by the activity authorized by the NWP, can be adequately protected by the Corps use of its discretionary authority to require an individual permit review, as necessary.

*Habitat of endangered, threatened, or sensitive species:* Federal protection for the critical habitat of Federally-listed threatened and endangered species is provided in all Corps permit actions through compliance with the requirements of the Endangered Species Act, with the regulations promulgated pursuant to that Act, and through NWP General Condition 11. General Condition 25 contains a provision stating that discharges are not authorized in designated critical habitat for Federally listed threatened or endangered species unless the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has concurred in a determination of compliance with this condition. Since "sensitive species" is a term that is not defined in the Endangered Species Act or in any other applicable Federal law, we believe that including the habitat of such "sensitive species" would promote confusion rather than provide clarity in the definition of critical resource waters, and we do not believe that such inclusion is appropriate.

*Source waters for drinking water:* We do not believe that any of the activities authorized by the NWPs pose any inherent threat to drinking water or to the source waters for drinking water, but it may be possible for such adverse effects to occur in certain circumstances. However, we believe that the specification of all such source waters as critical resource waters would impose a restriction on the utility of the NWPs that is not warranted by the limited extent of potential adverse effects. In light of this, we believe it is more appropriate to rely on the Corps use of its discretionary authority, on a case-by-case basis, to ensure against adverse effects on drinking water.

*Groundwater recharge zones:* We agree that any activity that significantly impairs groundwater recharge functions of wetlands must be avoided. However, such significant impairment does not

inherently result from the kinds of activities authorized by the NWPs. As such, we believe that any restriction on the authorization of an activity should be based on the effects that are expected to occur as a result of a specifically proposed activity. Since we do not expect the majority of activities authorized by the NWPs to adversely affect groundwater recharge, we believe that our ability to assert discretionary authority to require an individual permit in lieu of any NWP, for cause, provides ample protection for groundwater recharge zones.

*Rare and irreplaceable wetlands that cannot be mitigated with current technologies.*

As with many of the other types of wetlands suggested for inclusion as critical resource waters, the term "rare and irreplaceable wetlands that cannot be mitigated with current technologies" is undefined, and the general nationwide specification of such wetlands as critical resource waters would be a continuing source of debate and, therefore, impractical. However, we acknowledge that many wetlands systems may qualify as "rare and irreplaceable" because of their location in the landscape of a particular region. We believe that such locally rare and irreplaceable wetlands are critical resource waters because of their local importance. We believe that as such wetlands are recognized by Corps district and division offices, the revocation of any NWP that poses a threat to these systems, or the imposition of regional conditions to avert such threats, should be considered.

*Waters declared as impaired under Section 303(d) of the Clean Water Act:* "Impaired waters," as defined in Section 303(d) of the Clean Water Act, are addressed as a separate issue in the next section of this **Federal Register** notice, and as such, we do not believe it is appropriate to include these waters in the definition of critical resource waters.

Proposed General Condition 25 prohibits the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity in certain Federally- and State-designated critical resource waters, including wetlands adjacent to those waters, with the exceptions discussed above. For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required for activities in designated critical resource waters and adjacent wetlands, to allow the district engineer to determine if the proposed work will result in more than minimal adverse effects on those waters. Activities

authorized by the NWPs not listed in General Condition 25 would not be subject to these requirements. Corps districts may also consider the use of regional general permits for those activities prohibited by General Condition 25, if the District Engineer determines after public notice and opportunity for public comment that on a regional basis, such activities will not result in more than minimal adverse effects on the aquatic environment, individually or cumulatively.

#### **Limiting the Use of the NWPs in Impaired Waters**

In the **Federal Register** notice published on October 14, 1998, we requested comments on restricting or prohibiting the use of the NWPs in impaired waters, including how to identify impaired waters for the purposes of the NWPs, and which NWPs should be subject to this limitation. We received a large number of comments supporting the proposed limitation and a large number of comments objecting to the proposed limitation.

Some commenters stated that the proposed exclusion should apply to the use of NWPs in all wetlands and other waters within the watersheds of impaired waters. Other commenters recommended that the use of NWPs should be excluded from wetlands or waters upstream or adjacent to impaired waters. Two commenters stated that NWPs should be excluded from use in wetlands in impaired waters, even if the historic loss of wetlands within the watershed is not the cause of impairment, because those wetlands are of high value in that watershed. In contrast, several other commenters agreed with the Corps proposal to restrict the use of NWPs only in those watersheds that are considered impaired as a result of historic wetland losses. These commenters recommended that the exclusion apply only to "State-designated impaired waters which are determined to be impaired as a result of the historic loss of wetlands." Several commenters supported the proposed exclusion, provided the restriction applies only to those projects that will result in further degradation of the waterbody based on the applicable 303(d) parameter; if the proposed work will have no effect on the 303(d) parameter, then the project could be authorized by NWP.

In the October 14, 1998, **Federal Register** notice, we stated that the impairment of certain open waters such as lakes, rivers, and streams is directly related to the historic loss of wetlands in the watershed. Although not

explicitly stated in the October 14, 1998, **Federal Register** notice, the intent of the proposal was to restrict the use of NWP in waterbodies that are impaired due to the loss of wetlands. This remains our intent, but we are also proposing to add several other causes of impairment that will be considered as part of the restriction. The additional causes of impairment include: nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, and turbidity. These additional sources of impairment may be related to activities regulated under Section 404 of the Clean Water Act. We are proposing to incorporate this restriction into the NWP program as General Condition 26, entitled Impaired Waters.

We believe that discharges of dredged or fill material into impaired waters of the United States and adjacent wetlands may cause further impairment of those waters. Proposed General Condition 26 prohibits the use of NWPs to authorize discharges resulting in the loss of greater than 1 acre of impaired waters of the United States, including wetlands adjacent to those waters, except for activities authorized by NWP 3. Activities authorized by NWP 3 that occur in impaired waters and adjacent wetlands require notification to the District Engineer in accordance with General Condition 13, who will determine if the proposed work will result in further impairment of the waterbody. For activities resulting in the loss of 1 acre or less of impaired waters of the United States, including adjacent wetlands, the prospective permittee must notify the District Engineer in accordance with General Condition 13 and the work authorized by NWP must not result in further impairment of the waterbody. The notification must include a statement from the permittee that clearly explains how the proposed work, excluding mitigation, will not further impair the waterbody. The District Engineer will determine if the prospective permittee has clearly demonstrated that the proposed work will not result in further impairment of the waterbody. For discharges resulting in the loss of greater than 1/4 acre of impaired waters, including adjacent wetlands, the District Engineer will coordinate with the State 401 agency in accordance with the procedures in paragraph (e) of General Condition 13. The District Engineer will consider any comments received from the State 401 agency to determine if the proposed work will not result in further

impairment of the listed waterbody. If the District Engineer determines that the proposed activity will not result in further impairment of the waterbody by providing additional inputs of the listed pollutant (i.e., nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and loss of wetlands), then the project can be authorized by NWP if it meets all of the other terms and conditions of the NWPs. If the District Engineer determines that the proposed activity will result in further impairment of the waterbody by contributing more of the listed pollutant to the impaired waterbody, then the project cannot be authorized by NWP and the project proponent must apply for authorization either through the individual permit process or obtain authorization through an appropriate regional general permit, if available.

For the purposes of this proposed general condition, impaired waters are those waters of the United States that have been identified by States or Tribes through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and the historic losses of wetlands. The Corps will defer to states to identify these waters under the Section 303(d) process, because states are responsible for implementing Section 303 of the Clean Water Act, specifically the Total Maximum Daily Load (TMDL) program overseen by EPA. TMDL standards must be approved by EPA after a formal public notice and comment period. States must submit lists of impaired waters to EPA every two years. The authorized activity itself can result in net improvement of the aquatic ecosystem. For example, NWP 13 can be used to authorize bank stabilization activities in a waterbody that has been identified as impaired due to sedimentation, because the bank stabilization activity reduces the amount of sediment entering the waterbody, thereby improving water quality. Compensatory mitigation can be used to offset losses of waters of the United States authorized by NWPs and reduce the sources of pollution causing impairment of the local aquatic environment. The establishment and maintenance of vegetated buffers adjacent to open and flowing waters is a type of compensatory mitigation than can help improve the impaired

waterbody by restoring aquatic habitat, removing nutrients from surface runoff and groundwater flowing into waterbodies, trapping sediments, and moderating changes in water temperatures.

Several commenters believe that the use of NWPs in impaired waters is a violation of the Clean Water Act and that individual permits must be used instead to authorize Section 404 activities. A number of commenters objected to the proposed exclusion because they believe that concerns for impaired waters should be addressed by states or Tribes under Sections 101(b) and 401 of the Clean Water Act. Several of these commenters stated that the proposed exclusion duplicates State efforts and is unnecessary for the NWP program, because states currently consider the effects of development projects on impaired rivers. A number of commenters expressed concern that excluding the use of NWPs from impaired waters will result in additional pressures on average quality waters.

The use of NWPs in impaired waters is not a violation of the Clean Water Act, particularly when a State, Tribe, or EPA issues a Section 401 water quality certification either for the NWP itself or for a case-specific NWP authorization. If the 401 agency determines that a project does not meet the water quality standards of the State or Tribe, resulting in further impairment of the waterbody, they can deny water quality certification for that particular activity. The requirements of proposed General Condition 26 will not place additional pressures on impaired waters, because most project proponents are unlikely to relocate their projects to areas adjacent to or in unimpaired waters. It is important to remember that NWPs are optional permits, and the project proponent can apply for authorization through the individual permit process if he or she cannot meet the terms and conditions of an NWP. They are much more likely to request an individual permit for a project rather than relocating the project to try to obtain an NWP authorization.

Many commenters objected to restricting or eliminating the use of NWPs in impaired waters. Reasons for their objections include: (1) Eliminating the use of NWPs in impaired waters is illogical and will not provide any environmental benefits; (2) the Corps does not explain how eliminating the use of NWPs in impaired waters will repair or fix the impairment; (3) no information is provided in the October 14, 1998, **Federal Register** notice to support that impairment is due to historic losses of wetlands in the

watershed, since few states have identified waters where the impairment is due to loss of wetlands; (4) historic wetland loss is an insignificant source of impairment for most waterbodies; (5) no clear definition of "impaired waters" was provided in the October 14, 1998, **Federal Register** notice; (6) many State Section 303(d) lists have not been approved by EPA; and (7) the Corps provided no justification for making this a Federal exclusion.

Restricting the use of NWP in waters that are impaired because of nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and historic losses of wetlands in the watershed will benefit the local aquatic environment by preventing additional impairment of the waterbody and improving the waterbody through compensatory mitigation and best management practices. It is important to note that impaired waters are identified by evaluating open waters and segments of streams and rivers, not the entire watershed. Proposed General Condition 26 will apply only to those waterbodies, or segments of waterbodies, that have been assessed by states under the TMDL program. In addition, proposed General Condition 26 will apply only to wetlands adjacent to those waterbodies or segments of waterbodies. The Corps will not identify impaired waterbodies. As more waterbodies are surveyed by states under the TMDL program, there may be additional waters subject to General Condition 26. In the October 14, 1998, **Federal Register** notice, we requested suggestions for identifying impaired waters, and cited the Section 303(d) process as an example. Based on the comments received in response to the October 14, 1998, **Federal Register** notice, we have determined that the Section 303(d) program is the most appropriate way to identify impaired waters. We can add the requirements of proposed General Condition 26 to the NWP program because those requirements are directly related to the goals of the Clean Water Act.

A couple of commenters questioned how the Corps will define the phrase "identified with waters and aquifers that have been identified by states as impaired," and asked if stream flow data, hydrologic data, or geographic proximity will be used as criteria.

Some commenters said there is no indication as to the number of waters that are impaired due to activities authorized by NWPs. Many commenters objected to the proposed exclusion, stating that it would substantially

reduce the amount of geographic area where NWPs could be used. Several of these commenters stated that the proposed exclusion would prohibit the use of NWPs in 36% of the rivers and 39% of the lakes in the United States. Because of the large amount of waters that are considered impaired through the Section 303(d) process, a number of commenters stated that prohibiting the use of NWPs in impaired waters will result in a substantial increase in the number of individual permits processed by the Corps, increasing its workload.

Since proposed General Condition 26 will apply only to activities in waterbodies (and wetlands adjacent to those waterbodies) that are identified by State Section 303(d) programs as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and historic losses of wetlands in the watershed, and the proposed general condition requires that the NWP activity cannot further impair the waterbody, the number of activities for which the NWPs cannot be used is not likely to be substantial. Therefore, we anticipate only a relatively minor increase in the number of activities requiring individual permits as a result of proposed General Condition 26. According to EPA's "National Summary of Water Quality Conditions" for 1996, only 19% of the river and stream miles in the United States have been surveyed for TMDLs. For other waterbodies, 40% of the lakes, ponds and reservoirs and 72% of the square miles of estuaries have been surveyed for TMDLs. Of the river miles surveyed, 18% are impaired due to siltation, 14% are impaired due to nutrients, 10% are impaired due to oxygen depleting substances, 7% are impaired due to habitat alteration, and 7% are impaired due to suspended solids. Of the pond, lake, and reservoir acres surveyed, 20% are impaired due to nutrients, 10% are impaired due to siltation, 8% are impaired due to oxygen-depleting substances, and 5% are impaired due to suspended solids. For ponds, lakes, and reservoirs, habitat alteration was not listed as a source of impairment in the 1996 EPA report cited above. Of the square miles of estuaries surveyed, 22% are impaired due to nutrients, 12% are impaired due to oxygen-depleting substances, and 6% are impaired due to habitat alterations. There may be some overlap in these percentages, because more than one pollutant may impair a particular waterbody or river segment. If, in the

future, states identify, through the Section 303(d) process, additional waters as impaired due to the causes listed in proposed General Condition 26, then those waters and any adjacent wetlands will be subject to this general condition.

A few commenters objected to the reference to aquifers in the October 14, 1998, **Federal Register** notice. Some of these commenters stated that Section 404 of the Clean Water Act does not provide the Corps with the authority to regulate groundwater. They said that regulation of groundwater should be left to the states, who have the legal authority. Other commenters requested guidance or definitions to identify impaired aquifers.

We agree that Section 404 of the Clean Water Act does not provide us with the authority to directly regulate activities that affect groundwater, but since the quality of groundwater is often affected by activities in surface waters, we can consider the adverse effects of work authorized under Section 404 on water supplies.

Many commenters discussed potential problems with the proposed limitation, especially if the Section 303(d) process is used to identify impaired waters for the purposes of the proposed exclusion. A large number of commenters stated that waters included on the Section 303(d) lists for specific water quality criteria are not necessarily affected by activities regulated under Section 404 of the Clean Water Act. Many commenters recommended that the proposed exclusion should not apply to waters that are considered impaired due to toxic discharges, nutrient runoff, organic pollutants, fecal coliform, and sediment loads. Another commenter objected to the proposed exclusion because impairment of waters may be due to activities outside of the watershed and not directly in the impaired waterbody. A couple of commenters objected to using the Section 303(d) process to identify impaired waters because EPA is currently attempting to refine the entire Section 303(d) program and is planning to issue proposed rules and guidance with specific requirements for developing Section 303(d) lists. Another objection is that the Section 303(d) lists are subject to review every two years, which may result in uncertainty for the regulated public. Some commenters oppose the use of Section 303(d) lists because a state often uses only one data point to make a Section 303(d) determination and the criteria are often applied inconsistently between states. Some State lists are better developed

than others, resulting in inconsistent standards between states.

The impairment of waterbodies due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and the historic loss of wetlands, may be related to activities regulated under Section 404 of the Clean Water Act. The requirements of General Condition 26 will ensure that the activities authorized by NWP will not result in further impairment of the waterbody, so that the NWPs will authorize only activities with minimal adverse effects on the aquatic environment. Impairment due to other causes, such as metals, toxic discharges, organic pollutants, and fecal coliform, will not be subject to this general condition. We recognize that the Section 303(d) lists are subject to change every 2 years and that many waters have not been surveyed to determine if they comply with State TMDL criteria. If additional waters are identified as impaired due to the causes listed in General Condition 26, then they will be subject to that general condition. We also recognize that there may be some inconsistencies between states, but these inconsistencies should be resolved by EPA, which provides Federal oversight for the Section 303(d) program and its implementation by states.

A number of commenters proposed alternatives to prohibiting the use of NWPs in impaired waters. Several commenters stated that concerns for impaired waters should be addressed through either regional conditions, case-specific discretionary authority, or revocation of certain NWPs in specific geographic areas. Other commenters suggested addressing concerns for impaired waters in the same way that the Corps addresses endangered species and historic property issues, by adding a general condition to the NWPs requiring notification to the District Engineer for activities that affect impaired waters and allowing the District Engineer to determine if the proposed activity will result in further impairment of the waterbody. If the proposed work would result in no further impairment of the waterbody, then the activity could be authorized by NWP. Another commenter suggested that compensatory mitigation could be required for NWP activities to replace lost wetlands and increase the acreage of wetlands in the vicinity of the impaired waterbody. A few commenters recommended allowing the use of NWPs in impaired waters where the authorized activity does not result in a permanent loss of pollution control

features or does not cause permanent adverse effects to water quality, citing as examples stream restoration projects, utility line backfills, and temporary impacts to waters of the United States. Another commenter stated that the use of NWPs in impaired waters should not be restricted or prohibited when the objective of the proposed work is to restore wetlands, aquatic habitat, or water quality, or to conduct activities that will remove the waterbody from the Section 303(d) list.

We agree that an NWP general condition addressing the use of NWPs in waterbodies designated, through the Section 303(d) process, as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and the historic loss of wetlands is appropriate. Proposed General Condition 26 requires that activities authorized by NWPs in impaired waterbodies and adjacent wetlands will not result in further impairment of the waterbody. Compensatory mitigation, if required to ensure that the authorized work results in minimal adverse effects on the aquatic environment, should also help reduce inputs of the pollutants that are causing the impairment. Such compensatory mitigation may include: offsetting the authorized loss of wetlands, establishing and maintaining a vegetated buffer that reduces the input of nutrients, organic matter, and sediments into the waterbody, and reestablishing aquatic habitat adjacent to the waterbody. NWP activities that restore or enhance impaired waters are not prohibited by proposed General Condition 26.

In response to the October 14, 1998, **Federal Register** notice, we received many suggestions for NWPs that should not be subject to the proposed exclusion. Some commenters cited specific types of activities that should not be prohibited from NWP authorization in impaired waters. One commenter suggested that the exclusion should not apply to the maintenance of transportation projects. Other commenters suggested that flood control activities and the maintenance of flood control projects should be exempt from this exclusion. Some commenters said that the exclusion should apply only to those NWP activities that have a direct effect on a Section 303(d) parameter.

We believe that proposed General Condition 26 should apply to all NWPs that authorize discharges of dredged or fill material into waters of the United States identified as impaired due to the

causes listed in the general condition. Proposed activities that result in further impairment of the listed waterbody or result in the loss of greater than 1 acre of impaired waters and adjacent wetlands (except for activities authorized by NWP 3 as discussed above) are not authorized by NWPs. Prospective permittees are required to notify the District Engineer in accordance with General Condition 13, and the District Engineer will determine whether or not proposed work will result in further impairment of the waterbody. For proposed activities resulting in the loss of greater than 1/4 acre of impaired waters and adjacent wetlands, the District Engineer will coordinate with the State 401 agency in accordance with paragraph (e) of General Condition 13. Proposed General Condition 26 does not apply to activities in impaired waters that are subject only to Section 10 of the Rivers and Harbors Act, if there is no related Section 404 activity. Maintenance activities for transportation projects and flood control projects that do not result in discharges of dredged or fill material are not subject to the requirements of proposed General Condition 26.

### *III. Comments and Responses on Specific Nationwide Permits*

#### **3. Maintenance**

In the July 1, 1998, **Federal Register** notice, the Corps proposed to modify this NWP to authorize the removal of accumulated sediments in the vicinity of existing structures. We also proposed to authorize activities in waters of the United States associated with the restoration of uplands lost as a result of a storm, flood, or other specific event. These additional activities are authorized by paragraphs (ii) and (iii) of the NWP.

*General Comments on this NWP:* The original terms and conditions of NWP 3 are in paragraph (i) of this NWP. In the July 1, 1998, **Federal Register** notice, we proposed minor changes to the original text of NWP 3. In the July 1, 1998, **Federal Register** notice, we proposed to add a notification requirement for all work authorized by paragraph (i) of the proposed modification of NWP 3 except for the replacement of the structure. We also inserted the phrase "or damaged" after the word "destroyed." We also received some comments concerning the provisions of NWP 3 as published in the December 13, 1996, issue of the **Federal Register** (61 FR 65874-65922).

Some commenters recommended removing the PCN requirement from paragraph (i) whereas other commenters suggested modifying the NWP to require

PCNs for all activities authorized by NWP 3. Many commenters stated that a replacement project generally results in greater impacts than repair and rehabilitation activities, but notification should be required only if the repair and rehabilitation activity exceeds the "minor deviations in the structure's configuration or filled area" provision of the NWP. One commenter stated that it was unclear whether repair and rehabilitation activities require notification. We have removed the PCN requirement from paragraph (i) of this NWP, since we do not believe it is necessary to require notification for the repair, replacement, or rehabilitation of a previously authorized structure or fill.

Two commenters suggested that the definition of the phrase "minor deviations in the structure's configuration" should be made more compatible with modern design standards and another suggested that the definition of "currently serviceable" should be expanded to cover all structures which have been destroyed in a catastrophic event, such as a hurricane.

This NWP authorizes repair, rehabilitation, and replacement activities with minor deviations necessary to comply with modern design standards. Previously authorized structures or fills that have been damaged by catastrophic events can also be repaired, rehabilitated, or replaced under this NWP. We do not need to change the definition of the term "currently serviceable."

General comments addressing this NWP include: (1) Prohibiting its use in watersheds with substantial historic aquatic resource losses; (2) prohibiting its use in regionally identified tidal waters to ensure effective protection of their unique and difficult to replace functions; (3) prohibiting its use in certain stream segments to ensure minimal cumulative adverse effects; (4) prohibiting its use in watersheds identified as having water quality problems; and (5) requiring the permittee to perform the work during low flow conditions.

We believe that these restrictions are unnecessary since NWP 3 authorizes maintenance activities, which are unlikely to result in more than minimal adverse effects on the aquatic environment. However, division engineers can regionally condition NWP 3 to restrict or prohibit its use in high value waters. Division engineers can also regionally condition NWP 3 to reduce the distance from the existing structure that accumulated sediment can be removed or reduce the amount of fill that can be discharged into waters of

the United States for activities associated with the repair of uplands damaged as a result of storms or other discrete events.

Many commenters suggested additional conditions, which would allow minor deviations necessary to incorporate best management practices. Again, this is the intent of the phrase "minor deviations in the structure's configuration or filled area" in paragraph (i). It was also suggested that the repair and installation of scour and bank protection should be included in the NWP, as long as the applicant provides documentation of the original construction, including but not limited to, "as-built" plans. Another suggested activity to be added to NWP 3 was the removal of beaver dams and associated debris to restore the "natural" hydrology or functions of an area.

Paragraph (ii) of the proposed modification of NWP 3 authorizes the installation of scour protection necessary to protect or ensure the safety of the structure. If bank protection is necessary, it may be authorized by NWP 13, a regional general permit, or an individual permit. The removal of a beaver dam may or may not require a Section 404 permit, depending on whether the removal of the beaver dam results in a discharge of dredged or fill material into waters of the United States. If the beaver dam can be removed without any discharges into waters of the United States or the discharge consists only of incidental fallback, no Section 404 permit is required. If the removal of the beaver dam involves discharges into waters of the United States, then a Section 404 permit is required. If a Section 404 permit is required, the removal of a beaver dam may be authorized by another NWP such as NWP 18, a regional general permit, or an individual permit.

*Removal of Accumulated Sediments in the Vicinity of Existing Structures:* A large number of commenters recommended limits for paragraph (ii) of NWP 3. Recommended limits ranged from 20 to 300 cubic yards of excavated material and 25 to 500 linear feet of direct impacts upstream and/or downstream of the structure. The commenters recommending lower limits believe that higher limits for this NWP would cause more than minimal adverse effects on the aquatic environment. The commenters suggesting higher limits contend that higher limits are necessary to authorize sediment removal when accumulation of sediments occurs for greater distances (e.g., in flat terrain or alluvial out-wash areas). Another commenter recommended imposing 1/3-

acre and 200 linear foot limits in paragraph (ii) if the project is in woodlands or special aquatic sites. Several commenters believe that there should be no restrictions because review of the PCN allows the District Engineer to limit the work to the minimum necessary to maintain the function of the structure. One commenter stated that the NWP should be conditioned to prohibit stream bed "clean-outs." Another commenter requested a narrower definition of the term "vicinity."

We believe that the 200 linear foot limit authorizes removal of accumulated sediments from the vicinity of an existing structure that, under most circumstances, results only in minimal adverse effects on the aquatic environment, individually or cumulatively. Division engineers can regionally condition this NWP to decrease the 200-foot limit or impose limits on the quantity of excavated material that can be removed. Since paragraph (ii) of the proposed modification of NWP 3 requires notification to the District Engineer for every activity, district engineers can exercise discretionary authority and require an individual permit for those activities that result in more than minimal adverse effects on the aquatic environment. Paragraph (ii) of the proposed modification does not authorize stream "clean out" activities, unless sediments have accumulated in the vicinity of an existing structure, such as a bridge or culvert. Sediment removal to deepen a stream channel is not authorized by this NWP. District engineers will determine what constitutes the "vicinity" for the purposes of paragraph (ii) of this NWP.

One commenter recommended that the NWP prohibit the removal of accumulated sediments in special aquatic sites. Another commenter stated that compensatory mitigation should be required if aquatic habitat is removed. Some commenters suggested modifying paragraph (ii) to authorize the removal of sediment deposits and associated vegetation from the structures themselves and require testing of sediments in areas of suspected contamination to ensure that the adverse effects of the work are minimal.

We do not believe that it is necessary to exclude special aquatic sites from paragraph (ii) of the proposed modification of NWP 3. Sediment accumulation can occur in riffle and pool complexes and can also result in vegetated bars which may be considered wetlands. However, these areas are constantly changing due to sediment transport within the waterbody. Under

these circumstances, the removal of accumulated sediments, even if they are vegetated, typically results in minimal adverse effects on the aquatic environment. District engineers can require compensatory mitigation, if they believe it is necessary to ensure that the authorized work results only in minimal adverse effects, but in most situations compensatory mitigation is unnecessary due to the dynamic nature of the affected area and the minor impacts to the aquatic environment. In fact, removal of accumulated sediments in the vicinity of structures may improve the aquatic environment by removing barriers to fish passage. It is likely that sediments will repeatedly accumulate in the area and will have to be removed on a regular basis. The phrase "in the vicinity of existing structures" includes removal of accumulated sediments, including any vegetation that may be growing on those accumulated sediments, in and near the structures. However, we will clarify the phrase to read "\* \* \* in the vicinity of, and within, existing structures \* \* \*" In areas where accumulated sediments may be contaminated, district engineers can exercise discretionary authority to require an individual permit and require testing to determine if special techniques are required for the excavation and disposal of the accumulated sediment.

Some commenters objected to modifying this NWP to authorize sediment removal in the vicinity of existing structures, especially in docking areas. One commenter requested that the NWP include a definition of the term "structure" to clarify whether or not maintenance dredging of marina basins and boat slips is authorized by this NWP. One commenter suggested that the provision for removing accumulated sediment in front of existing structures appears to conflict with the prohibition against maintenance dredging in paragraph (i) of the proposed modification to this NWP. Several commenters also recommended that the Corps limit the number of times this permit could be used to prevent the cumulative impacts of multiple sediment removal projects. One commenter stated that removal of sediment from a drainage ditch in the vicinity of an existing structure would be considered maintenance of an existing drainage ditch and would be exempt from Section 404 permit requirements in accordance with 33 CFR Part 323.4(a)(3).

We have changed the text of the proposed modification of NWP 3 to clarify that maintenance dredging for the primary purpose of navigation is not

authorized by this NWP, unless it is specifically authorized by paragraphs (ii) and (iii) of the NWP for other purposes. For example, this NWP can authorize the removal of accumulated sediment from a water intake structure in a marina basin. Maintenance dredging of existing marina basins or boat slips may be authorized by NWP 35, NWP 19, regional general permits, or individual permits. We believe that it is unnecessary to limit the number of times this NWP can be used to remove accumulated sediments in the vicinity of existing structures. The removal of accumulated sediments in the vicinity of existing structures is unlikely to result in more than minimal cumulative adverse effects on the aquatic environment. District engineers can determine, through their review of notifications, if repeated removal of accumulated sediments at a particular site results in more than minimal cumulative adverse effects on the aquatic environment. For the purposes of this NWP, the term "structure" does not include unconfined waterways and channelized streams, except where the channelized stream consists of a concrete-lined channel. Although the maintenance of existing drainage ditches is exempt under Section 404(f), paragraph (ii) of NWP 3 authorizes the removal of accumulated sediments in the vicinity of existing structures that does not qualify for a Section 404(f) exemption. Maintenance activities that are eligible for Section 404(f) exemptions do not require the use of this NWP.

Some commenters stated that the placement of rip rap to protect the structure should be removed from this NWP because this activity can be authorized by other NWPs. One commenter believes that the placement of rip rap should not be authorized by this NWP except in areas where it is clearly necessary to protect public structures. Other commenters recommended prohibiting the placement of rip rap in areas inhabited by submerged aquatic vegetation.

It is our intent to authorize under paragraph (ii) all related activities for a single and complete project that have minimal adverse effects on the aquatic environment, rather than require the use of multiple NWPs to authorize those activities. The placement of rip rap at the foot of the structure is often necessary to protect the structure from scour. If sediments are accumulating in the vicinity of the structure, it is likely that the structure is subject to scouring by the sediment load of the waterbody. In areas with substantial movement of sediment, it is unlikely that large

populations of submerged aquatic vegetation will become established, because the movement of sediments in the bed of the waterbody often will not allow submerged aquatic vegetation to take root and grow in the waterbody. Furthermore, the PCN requirement in paragraph (ii) allows district engineers to review all proposed removal of accumulated sediments to ensure that the adverse effects on the aquatic environment are minimal. If a substantial population of submerged aquatic vegetation inhabits the vicinity of the structure, district engineers can exercise discretionary authority if the adverse effects of sediment removal and the placement of rip rap will be more than minimal.

Some commenters stated that the removal of accumulated sediments from publicly-owned transportation facilities should be exempt from notification requirements, and no PCN should be required for sediment removal after heavy storms or floods, because it is too time consuming to obtain the required cultural and biological clearances.

We believe that the adverse effects on the aquatic environment are the same, regardless of whether or not a transportation crossing is privately or publicly owned. The PCN requirement is necessary to allow district engineers to determine if the adverse effects of the proposed work on the aquatic environment will be minimal and ensure that prospective permittees will not remove more sediment than necessary. In the event of a heavy storm, flood, or other natural disaster, the Corps has emergency procedures in place for expediting permit issuance for activities related to repairing storm or disaster damage.

Some commenters recommended authorizing the use of minor cofferdam systems in the NWP, without a PCN requirement, when removing accumulated sediments and debris in accordance with paragraph (ii) and for activities in waters of the United States associated with restoring damaged uplands in paragraph (iii).

We disagree that this NWP should include the use of cofferdams, because NWP 33 can be used to authorize temporary construction, access, and dewatering activities that may be associated with the activities authorized by this NWP. Combining NWP 3 with NWP 33 for a single and complete project is not contrary to General Condition 15, provided the adverse effects on the aquatic environment are minimal.

*Activities Associated with Restoration of Uplands:* Paragraph (iii) of the proposed modification of NWP 3

authorizes discharges of dredged or fill material into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event. Many commenters stated that the restoration of uplands should be removed entirely from this NWP because it has nothing to do with the maintenance of currently serviceable structures and the Corps does not have jurisdiction over any activity in uplands. Many of these commenters believe that the Corps is asserting jurisdiction over uplands and requested the removal of paragraph (iii) from NWP 3. One commenter suggested that instead of authorizing the project proponent to rebuild an upland area to "pre-event" conditions, the permittee should only be authorized to stabilize the remaining uplands. Another commenter objected to modifying NWP 3 to authorize the restoration of eroded banks because bank erosion is a natural process and there are no limits in the NWP. This commenter believes that an individual permit should be required, with conditions requiring the use of coarse woody debris or other bioengineering methods to prevent further erosion of the bank.

The purpose of paragraph (iii) of this NWP is to authorize those activities in waters of the United States that are associated with the restoration of uplands damaged by a storm or other discrete event. The restoration of uplands lost as a result of a discrete natural event does not require a Section 404 permit, because that activity is subject to the Clean Water Act Section 404(f) exemptions. However, some work in waters of the United States may be necessary to complete the restoration work. It is this associated work in waters of the United States that is authorized by this NWP. For example, the permittee may want to install structures to protect the restored uplands or remove obstructions in waters of the United States in the vicinity of the affected uplands. Through paragraph (iii) of this NWP, we are not attempting to regulate activities in uplands. We agree that paragraph (iii) requires clarification as to the extent of the Corps jurisdiction for upland restoration activities and we have rewritten paragraph (iii) to state that NWP 3 authorizes discharges " \* \* \* into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event \* \* \* ". Paragraph (iii) of the proposed modification does not authorize activities in waters of the United States

associated with the replacement of uplands lost through gradual erosion processes; the loss of uplands must be due to a specific event, such as a hurricane or flood. Permittees are encouraged, but not required, to utilize bioengineering methods to stabilize the restored bank.

One commenter objected to the proposed paragraph (iii) of the NWP, stating that previous conditions of the site are too difficult to document. Some commenters recommended that the Corps require the use of field evidence to estimate the prior extent of uplands, such as contours adjacent to the damaged areas, or as-built plans for the waterway to determine the extent of activities authorized by this NWP. Two commenters suggested that paragraph (iii) of NWP 3 should be applicable for smaller events over a specific time period (e.g., one year) rather than one catastrophic event.

We have made the requirement for the prospective permittee to provide evidence to the District Engineer to justify the extent of the proposed restoration less stringent, to allow the District Engineer more flexibility to determine if a proposed activity can be authorized by paragraph (iii) of this NWP. Evidence of the pre-event extent of uplands can be provided by a recent topographic survey or photographic evidence. District engineers may also assess the surrounding landscape, including field evidence, to evaluate the extent of the proposed restoration and determine if it complies with the NWP. The location of the ordinary high water mark that existed prior to the storm event may be obvious when visiting the site. We realize that most property owners will not have a recent topographic survey showing the extent of the uplands on their property.

Paragraph (iii) of the proposed modification of NWP 3 specifically does not authorize the reclamation of lands lost over an extended period of time due to normal erosion processes. If the land is subject to normal erosion processes, the landowner can prevent or reduce further erosion through bank stabilization measures, many of which are authorized by NWP 13. If the proposed bank stabilization measure does not qualify for authorization under NWP 13, then the landowner can apply for authorization by another NWP, a regional general permit, or an individual permit. We will retain the provision of the NWP to authorize only activities in waters of the United States for restoration of uplands lost due to specific events, such as storms and floods, and specifically exclude lands lost through normal erosion processes.

For paragraph (iii) of the NWP, PCN thresholds of 1/4 acre, 10 cubic yards, and up to 200 linear feet of stream bed were suggested by commenters and some commenters recommended requiring notification only for activities in special aquatic sites. One commenter recommended notification and agency coordination for all activities authorized under paragraph (iii).

In the July 1, 1998, proposal to modify NWP 3, there was an inconsistency in the notification requirements. In subparagraph (c) of the proposed modification, notification was required for activities affecting greater than 1/3 acre of waters of the United States. Subparagraph (e) of the proposed modification stated that notification is required for all activities associated with the restoration of uplands. We have determined that notification should be required for all activities authorized under paragraph (iii) of this NWP, and have modified the NWP to state that notification is required for all activities authorized by paragraph (iii) of NWP 3.

One commenter suggested that the Corps reduce the amount of time required to submit a PCN from one year after the date of the damage to two or three months. They believe that two or three months is sufficient time for the landowner to realize that damage to uplands has occurred due to a discrete event and determine if restoration of the uplands will be done by the property owner. Another commenter suggested that while a 12-month time limit after the damage event may be enough time to plan restoration, it does not provide enough time to obtain financing for the restoration effort. Some commenters recommended requiring compensatory mitigation at a 1:1 ratio for activities authorized by paragraph (iii) of this NWP.

Although landowners are usually immediately aware that they have lost uplands due to a storm, flood, or other discrete event, we believe that they should be allowed one year to determine if they want to restore the lost uplands and submit a notification to the District Engineer. After a catastrophic event, many landowners require time to recover from the event and conduct repairs to their homes and other structures. Restoration of their land is often less urgent and the landowners should be allowed adequate time to carefully plan their upland restoration efforts. It should also be noted that the one year deadline in paragraph (iii) of the NWP applies only to the notification requirement and that the permittee has two years to start the restoration work or execute a construction contract. Two



years should be an adequate amount of time to conduct the upland restoration activity.

Since the purpose of paragraph (iii) is to authorize activities in waters of the United States associated with the restoration of uplands lost due to a storm event, in most cases compensatory mitigation should not be required because the purpose of the work is to return the area to approximately the same conditions that existed prior to the storm event. Activities in waters of the United States associated with the restoration of uplands typically do not result in more than minimal adverse effects on the aquatic environment and should not require compensatory mitigation. Carefully planned and implemented restoration efforts may benefit the overall aquatic environment by repairing the damaged areas and reducing sediment loads to the waterbody, thereby improving water quality. As with all NWP, district engineers may require compensatory mitigation to ensure that the adverse effects of the work on the aquatic environment are minimal, but we believe that compensatory mitigation should not be required in most cases.

To make NWP 3 easier to understand, we are proposing to combine all of the conditions in subparagraphs (a) through (e) and subparagraph (h) of paragraph (iii) to form a single paragraph. We have also added a note at the end of this NWP to clarify that NWP 3 authorizes repair, rehabilitation, or replacement activities that do not qualify for the Section 404(f) exemption for maintenance.

This NWP is subject to the requirements of proposed General Conditions 25 and 26. General Condition 25 requires the prospective permittee to notify the District Engineer in accordance with General Condition 13 for activities in designated critical resource waters, including wetlands adjacent to those waters. The District Engineer may authorize NWP 3 activities in designated critical resource waters and adjacent wetlands if the adverse effects on the aquatic environment are no more than minimal. General Condition 26 does not prohibit the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. However, NWP 3 activities in impaired waters and adjacent wetlands require notification to the District Engineer in accordance with General Condition 13. The proposed work can be authorized by NWP 3 if the permittee demonstrates to the District Engineer that the work will not result in further impairment of the waterbody.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. This NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

#### 7. Outfall Structures and Maintenance

In the July 1, 1998, **Federal Register** notice, the Corps proposed to modify this NWP to authorize the removal of accumulated sediments from outfall and intake structures and associated canals. All of the original terms and limitations of NWP 7 have been retained. Numerous commenters expressed their support for the proposed modifications to NWP 7. A number of commenters objected to the inclusion of excavation activities in associated canals and impoundments and questioned whether such activities are related and similar in nature. A couple of commenters questioned the need for the proposed modification. Some commenters requested acreage and cubic yardage limits for the additional activities authorized by the proposed modification of NWP 7. Several commenters recommended restricting excavation in wetlands.

Outfalls, intakes, and associated canals accumulate sediment and require periodic excavation or maintenance dredging to restore flow capacities to the facility. Most of the dredging is required in the vicinity of intake structures and their canals because circulation patterns result in the deposition of sediment in these areas. This sediment must be removed to ensure that the facility has an adequate supply of water for its operations. Water discharged from outfall structures usually has little or no sediment load and maintenance dredging is not often required in these areas. In situations where a utility company's intake or outfall canal is also used by barges to travel to the utility facility, part (ii) of the proposed modification of NWP 7 will allow continued access by those barges because the removal of accumulated sediments will return the intake or outfall canal to its originally designed dimensions and restore its navigable capacity.

We believe that authorizing some dredging or excavation to maintain the effectiveness of the outfall or intake structure is necessary and an integral part of this NWP. This NWP is conditioned to authorize only the minimum work necessary to maintain the facility, and requires the prospective

permittee to provide the District Engineer with information on the design capacities and configuration of the intake or outfall structure, impoundment, or canal. The prospective permittee will also be required to submit a delineation of affected special aquatic sites with the PCN to allow district engineers to better assess potential adverse effects on the aquatic environment, especially in vegetated shallows that may occur in the canal or in the vicinity of the intake or outfall structure. No acreage limits have been placed upon this NWP. Most activities authorized by this NWP will take place in existing canals, which have been repeatedly dredged and maintained and often support some kind of industrial or commercial activity for public benefit. Furthermore, existing deposit areas for the dredged or excavated sediment will typically be present and available for use. Where maintenance dredging or excavation is proposed, notification is required and the District Engineer can exercise discretionary authority if the adverse effects on the aquatic environment will be more than minimal. Compensatory mitigation will also be required where appropriate, but in most cases we believe that compensatory mitigation should not be required for activities authorized by part (ii), since it is a maintenance activity. Division engineers can also impose regional conditions on this NWP to add limits to the NWP or restrict or prohibit its use in certain waterbodies.

Several commenters supported the proposed notification requirements. Several commenters recommended requiring notification for all activities whereas other commenters suggested specific distance and acreage thresholds for notification.

We are proposing to retain the notification requirement to allow district engineers to review all activities authorized by this NWP. Evidence of the original design capacity and configuration of the facility must be submitted with the notification. This information allows district engineers to review the proposed work to ensure that the removal of sediment is for maintenance, not new dredging or excavation.

Two commenters stated that irrigation and farm ponds should be removed from the proposal as they are not related to outfalls, while many commenters objected to the inclusion of excavation in small impoundments under this NWP. Another commenter stated that the maintenance of water treatment facilities, irrigation ponds, and farm



ponds, is exempt from Section 404 permit requirements.

In the July 1, 1998, **Federal Register** notice, we stated that the proposed modifications to NWP 7 could be used to authorize the removal of accumulated sediments from intake and outfall structures in small impoundments, such as irrigation ponds and farm ponds. This statement is in error, since the construction and maintenance of farm, stock, and irrigation ponds does not require a Section 404 permit (see 33 CFR Part 323.4(a)(3)), provided the work does not trigger the recapture provision of Section 404(f)(2) of the Clean Water Act (see 33 CFR Part 323.4(c)). The removal of sediments from small impoundments is limited to the excavation of sediment around the intake or outfall structure, if that activity is not exempt under Section 404(f). Water treatment facilities may be constructed in waters of the United States, and possibly Section 10 waters. The proposed modification of NWP 7 authorizes removal of accumulated sediments in the vicinity of intake and outfall structures constructed in waters of the United States for water treatment facilities.

One commenter opposed modifying NWP 7 to authorize activities in non-tidal waters, believing that this would open up thousands of acres of wetlands and streams to destruction. One commenter stated that since the proposed modification had no quantitative limits for impacts, this NWP could cause significant and unmitigated individual and cumulative adverse impacts. Two commenters stated that no activities in tidal areas or areas adjacent to, or contiguous with, tidal waters should be authorized by this NWP. Two commenters further requested that outfall structures associated with large facilities, such as aquaculture facilities or power plants, should be reviewed under an individual permit.

NWP 7 is applicable in all waters of the United States, including navigable waters. The proposed modification of NWP 7 authorizes only the construction of outfall structures and associated intake structures and maintenance dredging or excavation of accumulated sediments in the vicinity of outfall and intake structures and associated canals. These activities will not result in the destruction of thousands of acres of wetlands and streams, because most outfall structures are fairly small and the authorized excavation or dredging activities are only for maintenance. The removal of accumulated sediments from an existing intake or outfall structure or canal will not open up thousands of

wetlands and streams to destruction. Furthermore, since the authorized removal of accumulated sediment will be limited to the minimum necessary to restore the facility to its original design capacity, the adverse effects on the aquatic environment will usually be minimal. The District Engineer will have the opportunity to review all proposed NWP 7 activities on a case-by-case basis and will be able to add any necessary conditions, including compensatory mitigation requirements, to ensure that this NWP authorizes only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively. For those activities that may result in more than minimal adverse effects on the aquatic environment, district engineers will exercise discretionary authority. This NWP can be utilized for outfalls associated with aquaculture or power plants. All outfalls proposed under this NWP must be authorized, exempted, or otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program.

Several commenters suggested adding restrictions during fish spawning and nesting periods. One commenter recommended adding two additional conditions because of potential impacts to manatees. Another commenter recommended that this permit contain a condition requiring that shorelines affected by activities authorized under this permit should be revegetated.

General Condition 20 states that activities including structures and work in navigable waters of the United States or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. This condition further states that activities that physically destroy important spawning areas are not authorized. In addition, limitations in specific waters for certain species are more appropriately addressed as regional conditions or case-specific special conditions. Activities that may affect Federally-listed endangered or threatened species or designated critical habitat must comply with General Condition 11. Districts are encouraged to establish local operating procedures to provide better protection for these species and their critical habitat.

General Condition 3, Soil Erosion and Sediment Control, requires the permittee to utilize appropriate soil erosion and sediment controls during construction and permanently stabilize the site at the earliest practicable date. This requirement may be fulfilled through vegetative stabilization

methods. In addition, following project completion, some areas may naturally revegetate. We do not believe that it is necessary to incorporate an additional requirement into the NWP. Where necessary, revegetation can be required by district engineers on a case-by-case basis through special conditions or regional conditions. In some cases, mitigation requirements may also address this issue, particularly where the permittee is required to establish and maintain a vegetated buffer.

One commenter stated that NWP 7 should clearly state that it authorizes removal of accumulated sediment in and around intake pipes and not just around intake pipes. Several commenters requested that this NWP authorize removal of accumulated sediment in the vicinity of intake and outfall structures for engineered flood control facilities, including dams, flood control facilities, and large reservoirs. One commenter asked why NWP 7 does not authorize the construction of intake structures only, because they result in similar adverse effects on the aquatic environment as outfalls.

The proposed modification of this NWP authorizes the removal of sediments blocking or restricting outfall or intake structures. This includes sediment removal from inside of the intake structure. This NWP does not authorize the construction of new canals or the removal of sediment from the head works of large dams, flood control facilities, or large reservoirs. Individual permits, regional general permits, or other NWPs such as NWPs 19 or 31, may authorize these activities. NWP 7 does not authorize the construction of intake structures without associated outfall structures because of the potential for more than minimal adverse effects on the aquatic environment where an intake structure may be constructed in a waterbody to withdraw water. If the water is not returned to the waterbody through an outfall structure, there may be more than minimal adverse effects to aquatic organisms and local water supplies, especially in arid regions of the country.

This NWP is subject to proposed General Conditions 25 and 26, which will reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 7 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent

wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

## 12. Utility Line Activities

In the July 1, 1998, **Federal Register** notice, we proposed to modify this NWP to authorize activities commonly associated with utility lines, such as the construction of electric or pumping substations, foundations for overhead utility line towers, poles, and anchors, and access roads. Many of these activities may have been authorized by NWP 26.

*General comments:* We received many comments addressing the proposed changes to NWP 12. Some commenters suggested leaving NWP 12 unchanged. Other comments ranged from supporting the issuance of the proposed modifications of NWP 12 to recommending the revocation of NWP 12. Many commenters concurred with the proposed acreage limits and PCN thresholds for the additional activities included in this NWP. Some commenters proposed higher acreage limits and PCN thresholds. Other commenters recommended lower acreage limits and PCN thresholds for the additional activities. Many commenters stated that the proposed changes would improve the efficiency of the NWP program and prevent the increase of regulatory burdens, without causing more than minimal adverse effects on the aquatic environment.

Many commenters expressed opposition to the expansion of NWP 12 to authorize utility line substations, foundations for utility towers, and permanent access roads. These commenters stated that this proposal would be a major expansion of the limits of NWP 12, resulting in significant losses of wetlands and other waters of the United States. Several commenters stated that there would no longer be any incentive to locate these facilities in uplands because the proposed modification would authorize their construction in wetlands. Some commenters believe that concerns regarding individual and cumulative

adverse effects on the aquatic environment resulting from the modification of NWP 12 could be addressed through the regional conditioning process.

We believe the NWP terms, limits, and notification requirements, will help to ensure that the proposed modification of NWP 12 authorizes only those utility activities with minimal adverse effects on the aquatic environment. The review of PCNs by district engineers and the regional conditioning process will ensure that the NWP authorizes only those activities with minimal adverse effects on the aquatic environment and will address regional and watershed concerns. The notification provisions of NWP 12 will allow district engineers to exercise discretionary authority for those utility line activities that may result in more than minimal adverse effects on the aquatic environment.

One commenter recommended combining utility lines with roads and other linear projects into one NWP permit and authorizing other utility line activities that are not linear in nature, such as substations and foundations for overhead utility lines, by another NWP because they are more similar in nature.

We believe that utility line substations, foundations for utility line towers, and permanent access roads for utility line maintenance are more appropriately authorized by NWP 12, instead of a separate NWP for these activities, because these activities are integral to single and complete utility line projects and the adverse effects for these activities should be considered under one NWP. All of the activities identified in NWP 12 are associated with typical utility projects and are similar in nature to other utility projects. We have changed the title of this NWP from "Utility Activities" to "Utility Line Activities" to better reflect the related nature of these activities for utility line construction, maintenance, and operation. We also believe that most of these projects, when conducted within the specified limits of the NWP, will have no more than minimal adverse impact on the aquatic environment. Finally, in those cases where proposed activities may have more than minimal adverse effects on the aquatic environment, we believe that the notification and regional conditioning processes will serve to ensure that the NWP authorizes only utility line activities with minimal adverse effects on the aquatic environment.

One commenter made the following recommendations concerning NWP 12: (1) The NWP should apply only to previously developed areas and well-

established utility corridors; (2) the clearing of forested wetlands should be excluded from this NWP; (3) the NWP should be excluded from wetlands in migratory corridors or near wetlands heavily used by migratory birds; and (4) the NWP should contain a provision requiring the planting of native species in disturbed areas and the removal of noxious and invasive plant species. Another commenter recommended excluding the use of NWP 12 in special aquatic sites and endangered species habitat.

We do not agree with the recommendations in the previous paragraph. NWP 12 authorizes only those utility activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. It is unnecessary and impractical to limit NWP 12 only to activities in existing utility corridors. If the proposed utility line will result in more than minimal adverse effects on the aquatic environment, district engineers can exercise discretionary authority and require an individual permit. Regional conditioning or case-by-case discretionary authority is the best mechanism to address potential adverse effects to wetland habitat. Regional conditions can also address concerns for revegetating areas temporarily affected by the authorized work. District engineers can add special conditions to NWP 12 authorizations to specify certain plant species to be planted in disturbed areas. General Condition 11 adequately addresses potential effects of the use of NWP 12 on Federally-listed endangered or threatened species or designated critical habitat.

*Utility lines:* One commenter recommended limiting NWP 12 to utility lines that are less than 10 miles in length and six inches in diameter, with an acreage limit of 2 acres. Other recommended acreage limits included 1 acre and  $\frac{1}{3}$  acre. One commenter expressed concern about allowing sidecast material to remain in waters of the United States for up to six months, particularly in tidally influenced waters. To minimize adverse effects to marine fisheries, this commenter recommended conditioning NWP 12 to require the permittee to leave gaps in sidecast material at minimum intervals of 500 feet and prohibiting the placement of sidecast material in a manner that blocks natural surface water flows. Another commenter recommended prohibiting sidecasting of material during utility line maintenance activities to protect unique wetland functions. Some commenters questioned the requirement that excess material

must be removed to upland areas immediately upon completion of construction and one recommended that, in light of the recent Fifth Circuit Court of Appeals ruling in *American Mining Congress, et al. v. Corps of Engineers*, the Corps move the sentence concerning excess material to paragraph (i) of NWP 12. This commenter also stated that they assume that this requirement is intended to apply only to soil or other material that is dredged or excavated in significant quantities and redeposited at another location within a water of the United States, and not to clearing vegetation above ground.

Regional conditioning is the best mechanism for placing acreage limits on utility line construction, if division engineers believe that the cumulative adverse effects of utility line construction may result in more than minimal adverse effects on the aquatic environment within a particular region. Regional conditions are also the best way to address concerns regarding the maximum amount of time sidecast material should remain in waters of the United States and whether or not gaps or culverts should be placed in the temporary piles of excavated material to maintain surface water flows. In addition, General Condition 21, Management of Water Flows, requires that the permittee conduct the work so that preconstruction water flow patterns are maintained to the maximum extent practicable after completion of the authorized work.

The requirement for removing excess fill materials upon completion of construction will be retained in this NWP. This NWP authorizes temporary fills to install the utility line, such as sidecasting into waters of the United States during installation, provided the permittee backfills the trench. Any excavated material placed in waters of the United States that is not used to backfill the trench must be removed upon completion of the work or it will be considered a permanent fill requiring a separate Section 404 permit. An important requirement to ensure that activities authorized by NWP 12 will have no more than minimal adverse effects on the aquatic environment is the requirement to maintain preconstruction contours and elevations as close as possible after completion of the authorized work. Clearing vegetation by cutting it above the soil surface does not require a Section 404 permit, as long as there is no discharge of dredged or fill material into waters of the United States. In addition, if the proposed work is in a forested wetland, any mechanized landclearing which results in a discharge of dredged or fill material

will require a PCN. The Corps believes it is necessary to retain this provision to ensure that this NWP authorizes activities with only minimal adverse effects on the aquatic environment.

One commenter recommended that the NWP contain a requirement that all wastewater lines have no-seam pipes beneath perennial or intermittent streams to reduce the potential for untreated wastewater leaking into these streams. Another commenter recommended conditioning NWP 12 to require the installation of anti-seep collars at the downstream wetland boundary and every 150 feet up the gradient until the utility line exits the wetland at the upstream or up-slope end to prevent the lateral draining of the wetland caused by the gravel bed beneath the utility line. One commenter recommended requiring perpendicular (between 75 and 105 degrees) stream crossings.

General Condition 2, Proper Maintenance, requires that permittees maintain all authorized structures or fills to ensure public safety. Permittees must also comply with Section 402 of the Clean Water Act, which requires a permit for the discharge of effluent into waters of the United States. Wastewater lines must be designed and maintained so that they do not leak untreated wastewater into waters of the United States. NWP 12 also includes a requirement that a utility line may not be constructed in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, which may create a french drain effect, and failing to take appropriate measures to prevent the lateral draining of a wetland).

We believe that perpendicular stream crossings are environmentally preferable in many situations. However, these types of crossings are not always feasible and we have determined that it is better to require notification where a utility line is proposed to be placed within a water of the United States and runs parallel to a stream bed within that jurisdictional area. These projects will be reviewed on a case-by-case basis to determine if the activities would have more than minimal adverse effects on the aquatic environment. In addition, regional conditions can address concerns about certain activities and/or impacts to certain waters of the United States.

Many commenters concurred with the statement in the preamble that the installation of subaqueous utility lines in waters of the United States should not be considered as resulting in a loss of waters of the United States if the area impacted by installation of the utility

line is the minimum necessary and preconstruction contours and elevations are restored after construction. A number of commenters expressed concern about adverse effects associated with utility projects and believe that compensatory mitigation should be required to offset those adverse effects. Some commenters also questioned why the term "loss" only applies to permanently affected waters of the United States. One commenter stated that the term "loss" should apply to the clearing of forested wetlands for the construction of overhead power transmission lines where the forest will not be allowed to grow back.

We believe that the installation of utility lines that results only in temporary adverse effects on waters of the United States should not be considered a loss if preconstruction contours and elevations are restored after construction and there are no permanent adverse effects to the aquatic environment resulting from the activity. While temporary adverse effects to water quality, fish and wildlife habitat, and other components of the aquatic environment may result, the areas typically return to preconstruction conditions if the terms and conditions of the NWP are met. In these cases, compensatory mitigation should not be required. However, should the installation of a utility line result in the permanent conversion of a forested wetland to another wetland type in a permanently maintained right-of-way, compensatory mitigation may be required by the District Engineer if it is necessary to ensure that the authorized work will result in minimal adverse effects on the aquatic environment. Finally, in those cases where the proposed work may result in more than minimal adverse impact on the aquatic environment, we believe the notification and regional conditioning processes will ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. In addition, compensatory mitigation can be required for any NWP 12 activity requiring a PCN to ensure that the adverse effects of the authorized work on the aquatic environment are minimal, individually or cumulatively. The NWP already contains provisions addressing the clearing of forested wetlands. District engineers will determine if compensatory mitigation should be required for the conversion of a forested wetland to an emergent or scrub-shrub wetland in a maintained utility line corridor.

In the first sentence of paragraph (i), we have stated that NWP 12 authorizes the maintenance and repair of utility

lines in addition to their construction. Since NWP 12 can be used to authorize the construction of utility lines in both Section 10 and Section 404 waters, we have added the phrase "in all waters of the United States" to the text of paragraph (i).

**Utility line substations:** Some commenters recommended that the Corps withdraw this part of the proposed modification of NWP 12. Many commenters recommended higher acreage limits, ranging from 2 to 3 acres. A number of commenters recommended lower acreage limits. One commenter requested that the Corps clarify what is meant by the term "pumping substations" and suggested using the term "compressor station" instead.

We believe that the 1 acre limit for the construction of utility line substations is appropriate to authorize the construction of most utility line substations with minimal adverse effects on the aquatic environment. However, we have lowered the PCN threshold for the construction of utility line substations to  $\frac{1}{4}$  acre, to make it more consistent with the other proposed new and modified NWPs. We also agree that some clarification is appropriate to specify the types of utility line substations are authorized by paragraph (ii). The term "utility line substations" includes power line substations, lift stations, pumping stations, meter stations, compressor stations, valve stations, small pipeline platforms, and other facilities integral to the operation of a utility line.

For the proposed modification of NWP 12, the construction or expansion of utility line substations in waters of the United States is limited to non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters. We have added this language to paragraph (ii) to clarify the applicable waters for utility line substations authorized by NWP 12, and to make those applicable waters consistent with most of the other proposed NWPs.

**Foundations for overhead utility line towers, poles, and anchors:** One commenter recommended eliminating the requirement to use separate footings for utility line towers where feasible. Another commenter noted that in certain situations where hurricanes, high winds, and lightning occasionally cause damage to power line structures and conductors, it is better to construct a single pad beneath the footings. The commenter requested modification of the NWP to allow single pad fills as long as they result in the loss of less than  $\frac{1}{3}$  acre of waters of the United States.

We have decided to retain the proposed language because it provides

flexibility. The phrase "where feasible" does not prohibit the construction of a single pad to support the utility line tower; it merely encourages the construction of separate footings. This phrase provides district engineers with the flexibility to use NWP 12 to authorize the construction of single pads where there are concerns due to hurricanes, high winds, and other dangerous conditions. District engineers can require the permittee to provide justification as to why a single pad should be constructed instead of separate footings. The only requirement is that the pads result in minimal adverse effects on the aquatic environment. District engineers can require compensatory mitigation for the losses of waters of the United States resulting from the construction of single pads for overhead utility line towers.

Since the proposed modification of NWP 12 can be used to authorize the construction of foundations for overhead utility line towers, poles, and anchors in both Section 10 and Section 404 waters, we have added the phrase "in all waters of the United States" to the text of paragraph (iii).

**Access roads:** Many commenters recommended increasing the acreage limit for permanent access roads to 2 or 5 acres. One commenter recommended limiting permanent access roads to  $\frac{1}{3}$  acre of loss of waters of the United States and a maximum width of 15 feet. Several commenters recommended excluding permanent access roads from this NWP. One of these commenters objected to the inclusion of permanent utility access roads because access roads fragment the landscape, which can adversely affect fish and wildlife habitat and the water quality functions of many wetland ecosystems. Another commenter requested that the NWP contain a provision requiring the permittee to submit justification explaining why permanent access roads are needed. One commenter suggested that the PCN contain a requirement for the submission of an engineering analysis demonstrating that the culvert size for the permanent access road is adequate, based on watershed acreage and the appropriate rainfall coefficient. One commenter expressed concern about inconsistent statements in paragraph (iv) and the preamble discussion relating to the effects of the access roads on subsurface flows. This commenter questioned whether the Corps had the authority to regulate subsurface waters. A commenter asked the Corps to clarify the meaning of "minimum width necessary" as well as the acceptable length of road, and questioned who would make such

determinations. Further, this commenter asked who decides whether preconstruction contours are maintained as near as possible. One commenter recommended adding a term to the NWP requiring that access roads be constructed with pervious surfaces.

We believe that the 1 acre limit for permanent access roads is appropriate to ensure that the NWP authorizes only those permanent access roads that result in minimal adverse effects on the aquatic environment. The PCN threshold remains the same as proposed in the July 1, 1998, **Federal Register** notice. The construction of permanent access roads for utility line maintenance has the same effects on landscapes as the construction of utility line right-of-ways because the access roads are usually constructed within the right-of-way. We do not believe that it is necessary for the applicant to provide justification for the construction of permanent access roads or an engineering analysis demonstrating the appropriateness of the culvert size. For those activities that require notification, district engineers will review the PCN and determine if the construction of permanent access roads will result in more than minimal adverse effects on the aquatic environment. Division engineers can also regionally condition NWP 12 to ensure that the construction of permanent access roads will result in minimal adverse effects.

We agree that we do not have the authority under Section 404 of the Clean Water Act to regulate groundwater flows. Therefore, we have deleted the reference to subsurface flows in paragraph (iv). The District Engineer determines if the access road is the minimum width necessary, as well as the appropriate length of access road, and if the access road will result in minimal adverse effects on the aquatic environment. Division engineers can regionally condition NWP 12 to specify maximum widths and lengths of permanent access roads that can be authorized by this NWP. In cases where a PCN is required, the Corps will review the proposed work for compliance with the terms and conditions of the NWP. If a certain activity does not meet the terms and conditions of the NWP, another form of authorization must be obtained.

For the proposed modification of NWP 12, the construction of permanent access roads for the construction or maintenance of utility lines in waters of the United States is limited to non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. We have added this language to paragraph (iv) to clarify the applicable

waters for utility line access roads authorized by NWP 12. We have also added a provision stating that permanent access roads must be constructed with pervious surfaces.

**Notification Requirements:** Many commenters recommended eliminating the PCN requirement for mechanized landclearing in forested wetlands. One commenter questioned the requirement for notification in forested wetlands and requested an explanation for that requirement. Several commenters said that the PCN requirements for access roads should be consistent with the PCN requirements for roads under NWP 14. One commenter recommended decreasing the PCN threshold for utility lines installed in waters of the United States from 500 linear feet to 300 linear feet. Several commenters supported a minimum notification threshold of  $\frac{1}{3}$  acre. Several commenters requested reduced thresholds for notification to ensure minimal impacts.

The PCN requirement for mechanized landclearing in a forested wetland has not been changed. This requirement was originally incorporated into NWP 12 for the December 13, 1996, reissuance of this NWP. The purpose of this notification requirement is to ensure that only minimal adverse effects on the aquatic environment will occur when the installation of a utility line occurs in forested wetlands. In the proposed modification of NWP 12 published in the July 1, 1998, **Federal Register**, we proposed to modify this notification requirement by limiting the circumstances requiring notification only to the establishment of the utility line right of way in a forested wetland, so that PCNs would not be required for any utility activity that involves mechanized landclearing of a forested wetland, such as the construction of a utility line substation. We are proposing to retain this requirement.

We disagree that the notification requirements for permanent access roads authorized by NWP 12 and linear transportation crossings authorized by NWP 14 should be the same. NWP 12 and NWP 14 authorize different types of roads utilized for different purposes. Permanent access roads authorized by NWP 12 must be constructed as close to preconstruction contours as possible and at the minimum width necessary. We expect most permanent access roads for utility lines to be a maximum of 15 feet wide. Because of construction and safety standards, many roads authorized by NWP 14 are likely to be wider than 15 feet, resulting in greater impacts to waters of the United States. We are proposing to retain the PCN thresholds for the construction of utility lines in

waters of the United States and the construction of access roads as proposed in the July 1, 1998, **Federal Register** notice.

Two commenters requested that the District Engineer, instead of the prospective permittee, notify the National Ocean Service (NOS) in cases where the utility line is to be constructed or installed in navigable waters of the United States.

We agree that it is more appropriate for the District Engineer to provide NOS with a copy of the PCN and NWP authorization, since the requirement at 33 CFR Part 325.2(a)(9)(iii) is to provide NOS with a copy of the permit for utility lines in navigable waters of the United States. We are proposing to add a note (Note 3) to the end of the text of NWP 12, reminding the District Engineer to send copies of the PCN and the NWP 12 authorization to NOS if the utility line is constructed in navigable waters of the United States.

Some commenters stated that the Corps should not require a delineation of special aquatic sites, including wetlands, as part of the NWP 12 PCN, or at least apply that requirement only to those projects that are subject to an acreage limitation. Some commenters recommended using simpler methods to delineate special aquatic sites. Other commenters suggested that the Corps adopt a procedure requiring Corps approval of a delineation of special aquatic sites within a reasonable period of time.

We disagree with the first comment in the previous paragraph because it is important to identify the limits and amounts of special aquatic sites that might be lost as a result of the proposed work to determine if additional on-site avoidance and minimization is possible and if the proposed project would have more than minimal adverse effects on the aquatic environment. The only approved method of determining the extent of wetlands is by the procedures in the 1987 *Corps of Engineers Wetlands Delineation Manual* (Technical Report Y-87-1). Other special aquatic sites are identified through other methods. For activities requiring notification, district engineers have 45 days from the date of receipt of a complete PCN to determine if the proposed work qualifies for NWP authorization. During the 45-day period, the District Engineer must determine if the delineation is accurate. District engineers cannot consider a PCN incomplete solely because they have not verified the delineation of special aquatic sites.

**Other issues:** One commenter recommended that the Corps add language to NWP 12 to waive the PCN

requirement for cases where a prospective permittee is working under a valid NPDES stormwater management permit.

We disagree, since the NPDES permit does not satisfy the permit requirements of Section 404 of the Clean Water Act. Review by the District Engineer is necessary to ensure that the authorized work complies with the terms and conditions of NWP 12 and results in minimal adverse effects on the aquatic environment.

Some commenters objected to compensatory mitigation requirements for public utility projects and others suggested that mitigation should only be required to the extent necessary to ensure that an activity has minimal adverse effects on the aquatic environment. Other commenters recommended requiring complete or partial restoration of areas altered by mechanized landclearing.

Public projects may have more adverse effects on the aquatic environment than private projects since they may be larger in size. Project proponents will be required to provide compensatory mitigation, if necessary, to ensure that the authorized work results in minimal adverse effects on the aquatic environment regardless of whether the project is for public or private purposes. For activities that require notification, compensatory mitigation may be required by district engineers to ensure that the net adverse effects to the aquatic environment are minimal, individually and cumulatively. Utility line right-of-ways in waters of the United States can be cleared for the construction, maintenance, or repair of utility lines, but the cleared area must be the minimum necessary and preconstruction contours must be maintained as close as possible. Wetland vegetation will grow back if the right-of-way is constructed in wetlands and preconstruction contours and elevations are restored after construction. However, the plant community may be maintained as shrubs or herbaceous plants, to prevent damage to the utility line and facilitate repairs. We believe that the conditions of NWP 12 adequately address temporary impacts to waters of the United States and that additional restoration requirements are not necessary.

Some commenters emphasized the importance of the regional conditioning process to address regionally significant resources such as vernal pools, headwater springs, prairie potholes, certain coastal wetlands to ensure protection of unique wetland functions.

Many commenters made recommendations for regional conditions.

We recognize that the regional conditioning process is a very important element in the implementation of the new and modified NWP but that specific recommendations for regional conditions must be addressed by division and district engineers.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 12 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. General Condition 27 prohibits the use of NWP 12 to authorize permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain, unless the prospective permittee clearly demonstrates that the project and associated mitigation will not decrease the flood-holding capacity and no more than minimally alter the hydrology, flow regime, or volume of waters associated with the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

#### 14. Linear Transportation Crossings

In the July 1, 1998, **Federal Register** notice, we proposed several changes to this NWP. We proposed to modify this NWP to have a larger acreage limit for public transportation crossings, such as roads, railroads, and airport runways, in non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters. We also requested comments on whether the acreage limit for public transportation crossings in non-tidal waters should be 1 or 2 acres. For private crossings and public linear transportation crossings in tidal waters, or non-tidal wetlands

contiguous to tidal waters, we did not propose to change the original acreage limits of NWP 14.

One commenter stated that the NWP should not authorize public transportation crossings. A number of commenters said that the distinction between public and private transportation crossings is unnecessary. Many commenters requested that the Corps clarify what is meant by private and public transportation crossings. Several commenters asked whether roads to residential developments would be considered public or private.

NWP 14 previously authorized both public and private road crossings. Due to public interest factors, we proposed to increase the acreage limit for public transportation crossings for this NWP, with acreage limits based on the types of waters affected by the work. For the purposes of this NWP, a private crossing is restricted to the use of a particular person or group, and is not freely available to the public. An example is a driveway crossing a stream to provide access to a single family residence. A public crossing is a crossing which is intended to serve all citizens, rather than a specific limited group. As further clarification, if the responsibility for the highway or road maintenance and repair is a county, state, or government entity, the road will be considered public. To increase protection of the aquatic environment, we are proposing to change the applicable waters for linear transportation crossings as follows: (1) Public linear transportation crossings constructed in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, (2) public linear transportation crossings constructed in tidal waters and non-tidal wetlands adjacent to tidal waters, and (3) private linear transportation crossings constructed in all waters of the United States.

Many commenters requested that NWP 14 remain unchanged. Several commenters suggested that the acreage limit for public projects should be limited to 1 acre and the length of the crossing to no more than 200 feet. Other commenters stated that the proposed 2 acre limit for public transportation crossings is too low and would prefer the original 10 acre limit that NWP 26 had prior to December 1996. Many commenters said that 2 acres is sufficient for public highways, which often have 2 to 4 lanes. Several commenters stated that public linear transportation crossings should have no acreage limit while others said the limit is too high and that the proposed modification should be withdrawn. Another commenter recommended

removing the 200 linear foot limit for private crossings and replacing it with a 500 linear foot limit.

We have carefully considered all comments on the proposed acreage limits. The existing limit for private crossings is retained at  $\frac{1}{3}$  acre and 200 linear feet. For public projects in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, we have decided the proposed 1 acre limit for public linear transportation crossings is appropriate to authorize most public linear transportation crossings that have minimal adverse effects on the aquatic environment in non-tidal waters. It is important to note that each crossing of a separate waterbody is a single and complete project (see 33 CFR Part 330.2(i)). The  $\frac{1}{3}$  acre and 200 linear foot limits will be retained for private linear transportation crossings and public linear transportation crossings in tidal waters and non-tidal wetlands adjacent to tidal waters.

Some commenters asked why the acreage limit for public projects was higher than the acreage limit for private projects. Many objected to the differences in acreage limits. Several commenters were concerned that the proposed modification establishes different thresholds based upon whether a project is private or public.

During our review of transportation projects authorized by NWP 26, we found that there were a substantial number of public linear transportation crossings with minimal adverse effects on the aquatic environment. Approximately 90% of the transportation projects authorized by NWP 26 during 1997 resulted in the loss of less than 1 acre of non-tidal waters. The proposed modification of NWP 14 is intended to authorize these types of projects, since NWP 26 will be replaced by the proposed new and modified NWPs announced in this **Federal Register** notice. Public linear transportation crossings need to be larger, because they must have larger capacities. Private crossings, on the other hand, are typically small. Public linear transportation crossings also fulfill a greater proportion of public interest factors, and the government entities that typically sponsor or build these projects have the resources and experience necessary to design these projects and provide necessary compensatory mitigation to ensure that these projects have minimal adverse effects on the aquatic environment. Consequently, these projects are less likely to be contrary to the public interest. Public transportation projects often require detailed planning

processes to document compliance with NEPA, Section 404 of the Clean Water Act, and many other applicable laws. As a result, we have decided that it is appropriate to impose a higher acreage limit for public linear transportation projects in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

Public roads serve the general public and allow access for entire communities. Other transportation facilities, such as municipal airport runways or railroads are constructed for public transportation needs, and are considered public if they are accessible to the public as a whole. Railroad crossings may be constructed by private entities, but may be used by public transportation agencies for mass transit, such as commuter rail services. As long as these transportation facilities are used by the general public, providing a means of transportation for an entire community, these linear transportation crossings will be considered public for the purposes of this NWP.

Many comments were received regarding PCN thresholds. Several commenters suggested that notification should be required for all projects authorized by this NWP. Some commenters stated that the proposed notification requirements were too stringent and some wetland impacts should be authorized without any PCN requirements. These commenters stated that the PCN requirement should be consistent with the notification requirements of NWP 12, and recommended that notification should be required if the activity results in the loss of more than  $\frac{1}{3}$  acre of non-tidal wetlands or the impact exceeds 500 linear feet in waters of the United States. Another commenter said that the PCN threshold should be raised to  $\frac{1}{2}$  acre. One commenter stated the notification requirements for public and private linear transportation projects should be the same. Another commenter wanted to know how Corps Districts would identify areas of high value that could trigger lower PCN thresholds.

To make the PCN thresholds of NWP 14 more consistent with the new NWPs, the proposed notification threshold has been modified. The proposed PCN thresholds for public and private linear transportation crossings are the same. Notification will be required for activities that result in the loss of greater than  $\frac{1}{4}$  acre of waters of the United States. Notification will also be required for all activities that result in a discharge into special aquatic sites, including wetlands. We do not agree that the PCN thresholds of NWP 14 should be the same as the PCN

thresholds of NWP 12 because the activities authorized by these NWPs have different adverse effects on the aquatic environment. High value waters will be identified through the regional conditioning process. Division engineers can regionally condition this NWP to lower the PCN threshold or require notification for all activities in specific high value waters.

Numerous commenters requested clarification concerning what constitutes a single and complete linear project. Several commenters recommended that the Corps eliminate the practice of piecemealing road projects so that NWP 14 authorizes each separate wetland or stream impact along the construction corridor. Another commenter suggested that the Corps consider allowing the use of this NWP for multiple crossings provided the "no net loss" goal is met.

Our NWP regulations already address linear projects and what constitutes a single and complete linear project (see 33 CFR Part 320.2(i)). In paragraph (h) of the proposed modification of this NWP, we have provided additional clarification concerning when discretionary authority may be exercised for road segments with multiple crossings of streams.

Many commenters believe that airports and runways should not be authorized by this NWP. Several commenters suggested that the secondary impacts of airport runway construction, such as chemicals and pollutants, are a serious concern. Several commenters questioned whether railroads are considered public entities.

The construction, improvement, and expansion of airport runways can be authorized by this proposed modification of this NWP, provided the adverse effects on the aquatic environment are minimal. These facilities are often subject to additional rigorous regulation by other State and Federal agencies. Airports will have existing stormwater and water quality management plans, and are likely to be closely regulated with regard to air quality, noise pollution, point and non-point source pollution, and hazardous and toxic substances. Since this NWP requires a PCN for most projects, district engineers will have the opportunity to review the impacts of the proposed activity. If a project will have more than minimal adverse effects on the aquatic environment, the District Engineer will assert discretionary authority and require an individual permit. Railroads will typically be considered public transportation because, as previously discussed, a railroad may be constructed by a private entity, but the tracks are

often utilized by the general public for public transportation. As long as these facilities are generally accessible to the public, by providing a means of mass transit or services for a community, railway crossings will be considered public.

One commenter stated that regional conditions should prohibit the disruption of water flows by requiring culverts, bridges, etc. Another commenter asked for clarification of the terms in paragraph (g) of the proposed NWP 14 modification. Another commenter requested that applicants provide detailed engineering information on the crossings to ensure that they are designed properly.

General Condition 21, Management of Water Flows, requires NWP activities to be designed and constructed to maintain preconstruction downstream flow conditions, to the maximum extent practicable. Activities authorized by this NWP should not result in more than minor changes to the hydraulic flow of a stream and should not result in an increase in flooding upstream or downstream of the crossing. Proposed General Condition 27 also applies to activities authorized by this NWP. To construct the crossing, some work in the stream channel is necessary. Examples include bank stabilization, the placement of fill and culverts, depressing the culvert into the stream bed, etc. All of this work should take place only in the immediate vicinity of the crossing. The construction of the crossing should result in only minor impacts to the hydraulic characteristics of the stream. General Condition 9, Water Quality, requires the permittee to implement a water quality management plan to ensure the work does not cause more than minimal adverse effects to the downstream aquatic system. In general, where a state or tribal entity requires such a plan, this requirement will be considered fulfilled. If a water quality management plan is not required by the state, the District Engineer must decide if one is needed for the proposed activity. We do not agree that applicants should be required to provide detailed engineering information concerning the crossing. It is incumbent upon the permittee to ensure that the crossing is designed so that it complies with all of the conditions of the NWP, especially General Condition 21.

One commenter questioned why a mitigation plan was required for public linear transportation projects but not for private crossings. Several commenters asked whether compensatory mitigation would be required for all crossings.

We have modified this provision of NWP to require a mitigation proposal



for both public and private linear transportation crossings. Paragraph (c) of the proposed modification of NWP 14 requires the prospective permittee to submit a mitigation proposal to offset permanent losses of waters of the United States and a statement describing how temporary losses will be minimized to the extent practicable.

Many commenters objected to the inclusion of attendant features to the linear transportation project, such as interchanges, stormwater detention basins, rail spurs, or water quality enhancement measures in the NWP. Many commenters approved the inclusion of such features, and a couple of commenters requested that the NWP authorize non-linear features such as vehicle maintenance or storage buildings, parking lots, train stations, and hangars. One commenter said that this NWP should not authorize new transportation facilities, which typically result in significant indirect and cumulative impacts.

Features integral to the crossing, such as interchanges, rail spurs, stormwater detention basins, and water quality enhancement measures are authorized by this NWP. This requirement will help ensure that the adverse effects of the entire single and complete project are considered. The attendant features must be integral to the crossing, however, and the combined loss of waters of the United States for a single and complete project cannot exceed the acreage limit of this NWP. We are not proposing to modify NWP 14 to authorize non-linear transportation activities, because these activities have greater potential to result in more than minimal adverse effects on the aquatic environment.

The proposed modification of this NWP can authorize the construction of new linear transportation crossings, provided the proposed work results in minimal adverse effects on the aquatic environment. The notification requirements, the District Engineer's ability to impose special conditions on a particular activity, and the District Engineer's ability to exercise discretionary authority and require an individual permit will ensure that the activities authorized by this NWP result in minimal adverse effects on the aquatic environment.

Several commenters recommended adding conditions that appear to apply to specific regions. One commenter requested that: this NWP should be prohibited in watersheds with substantial aquatic resource losses and in watersheds which have impervious surfaces over a substantial percentage of the landscape; the acreage limits be

modified to protect regionally significant resources; linear foot limitations should be imposed on activities in streams with regionally important resources; kick-out provisions should be provided for Federal agencies; and compensatory mitigation should be required to fully offset all impacts to ensure no net loss of aquatic resources. Another commenter requested that this NWP: prohibit activities below the existing water level of the stream, limit work affecting water quality between March 15 and June 15, prohibit the use of stream bed material for erosion control, limit the use of rip rap, limit clearing of forested stream corridors to the minimum necessary, require revegetation of disturbed areas to reduce erosion, require culverts for temporary rock stream crossings higher than 18 inches, maintain stream bed gradient during construction, and size and place culverts to avoid creating a drop between the downstream end of the culvert and the downstream water surface elevation.

All of the recommendations cited in the previous paragraph are best addressed as regional conditions and case-specific special conditions for an NWP authorization.

A couple of commenters requested that this NWP authorize some stream channelization. Several commenters requested that this NWP prohibit stream channelization.

Paragraph (f) of the proposed modification of NWP 14 states that this NWP cannot be used to channelize a stream, but some channel modification in the immediate vicinity of the crossing can be conducted to ensure that water flow through the crossing does not result in additional flooding, erosion, or other adverse impacts that may compromise public safety.

One commenter was confused about the manner in which the authorized activities and applicable waters were described. We have clarified this section, with the acreage limits for each category of activities and applicable waters.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. Due to the requirements of General Condition 26, NWP 14 activities resulting in the loss of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of

the waterbody. General Condition 27 prohibits the use of NWP 14 to authorize permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain, unless the prospective permittee clearly demonstrates that the project and associated mitigation will not decrease the flood-holding capacity and no more than minimally alter the hydrology, flow regime, or volume of waters associated with the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

#### 27. Stream and Wetland Restoration Activities

In the July 1, 1998, **Federal Register** notice, we proposed to modify NWP 27 to authorize the restoration of non-Section 10 streams, in addition to the wetland and riparian restoration and enhancement activities already authorized by this NWP.

Some commenters supported the proposed modifications. Other commenters said that no restrictions should be placed on the NWP. Several commenters stated that the NWP meets the criteria for minimal effects. One commenter supported modification of NWP 27 to authorize activities on private property. Several commenters opposed the proposed modifications to NWP 27 because they believe that wetlands and streams would be adversely affected by the proposed changes.

The purpose of the proposed modification of NWP 27 is to authorize the restoration of non-tidal streams. NWP 27 previously authorized only the restoration former non-tidal wetlands and riparian areas, the enhancement of degraded wetlands and riparian areas, and the creation of wetlands and riparian areas. We are also proposing to modify NWP 27 to authorize the restoration of tidal waters. Currently, NWP 27 only authorizes the restoration of non-tidal wetlands and riparian areas. The enhancement of degraded wetlands and riparian areas and the creation of wetlands and riparian areas is authorized in all waters of the United States, including tidal waters. We believe, that by adding stream and tidal wetland restoration activities to this NWP, that the overall aquatic

environment will benefit by providing an efficient means of authorizing the restoration and enhancement of these areas.

One commenter recommended eliminating wetland restoration activities from this NWP and limiting it only to enhancement activities. This commenter believes that restoration activities do not require a Section 404 permit because the project area is not currently a wetland. Another commenter asked if NWP 27 applies to the restoration of riparian zones outside of wetlands and other waters of the United States.

Many wetland restoration activities require a Section 404 permit because there are discharges into waters of the United States that are necessary to conduct the restoration activity, such as connecting the restored wetland to other waters of the United States. The same principle applies to wetland creation activities. NWP 27 authorizes the restoration of riparian zones that are waters of the United States (e.g., wetlands adjacent to a stream) and activities in waters of the United States associated with the restoration of upland riparian zones. For example, to establish a vegetated upland riparian zone, some bank stabilization activities in waters of the United States may be necessary, such as the planting of willows along the bank. If the proposed riparian zone restoration activity is conducted entirely outside of waters of the United States, then no Corps permit is required.

One commenter requested the inclusion of more examples of stream restoration and enhancement activities, such as the addition of spawning gravel and the removal of accumulated sediment from ponds to prevent sediments from being washed downstream. Another commenter stated that the list of examples of authorized activities in the NWP is too inclusive and vague. Other commenters expressed concern that activities not directly related to the restoration of ecological values or aquatic functions could be authorized by this NWP. Several commenters recommended excluding the placement rip rap from NWP 27 and that the appropriate use of biological materials should be encouraged.

The list of activities in the paragraph following paragraph (c) of the proposed modification of NWP 27 is intended only to provide examples and is not a complete list of activities authorized by this NWP. The next paragraph in NWP 27 lists activities that are not authorized by the NWP. If the prospective permittee has questions about a particular stream and wetland

restoration or enhancement activity, then he or she should contact the District Engineer to determine if the proposed work can be authorized by NWP 27. For those projects requiring notification, the District Engineer will determine if the proposed work satisfies the terms and conditions of NWP 27 and will exercise discretionary authority if the proposed work will result in more than minimal adverse effects on the aquatic environment. Division engineers can also regionally condition this NWP to exclude certain activities or prohibit its use in specific waterbodies or geographic regions. We do not agree that the use of rip rap should be excluded from this NWP, because rip rap provides habitat for many aquatic organisms and can help reduce adverse effects to water quality resulting from soil erosion on the project site.

A number of commenters were confused about the scope of this NWP and asked which types of waters are subject to this NWP. Several commenters recommended expanding the applicable waters for this NWP to include Section 10 waters. Other commenters suggested excluding tidal wetlands from this NWP. One commenter stated that the NWP should be used only in small lengths of streams or small wetland areas.

We have modified the first paragraph of the proposed modification of this NWP to clarify the scope of applicable waters for this NWP. Since its issuance in 1991, NWP 27 has authorized wetland and riparian restoration, enhancement, and creation activities in Section 10 waters, although certain activities were restricted to non-tidal Section 10 waters. This NWP authorizes activities that restore former waters, including tidal and non-tidal wetlands, enhance degraded tidal and non-tidal wetlands and riparian areas, create tidal and non-tidal wetlands and riparian areas, and restore and enhance non-tidal streams and non-tidal open waters. This NWP can be used to restore and enhance Section 10 streams and open waters, as long as they are non-tidal. Other Section 10 activities authorized by this NWP include the restoration of former non-tidal wetlands in Section 10 waters, the enhancement of degraded wetlands in navigable waters, and the creation of wetlands in navigable waters.

Restricting the use of this NWP to small segments of streams and small wetlands is unnecessary because this NWP authorizes only those activities that improve the aquatic environment. Adding such a restriction is also likely to discourage larger stream and wetland restoration and enhancement projects by

requiring prospective permittees to go through a more complicated and expensive permit process.

Many commenters recommended conditioning this NWP to prohibit conversion and alteration of habitat. One of these commenters recommended prohibiting the conversion of one aquatic habitat type to another type unless the intent of the conversion is to restore the area to an aquatic habitat type that historically existed on that site. One commenter recommended including a provision in the NWP to allow the construction of small impoundments in ephemeral and/or intermittent reaches of streams to benefit water quality and waterfowl.

The proposed modification of this NWP prohibits the conversion of natural streams or wetlands to another aquatic use, unless the permittee recreates similar aquatic habitat types in a different location on the project site and the project results in aquatic resource functional gains. However, only non-tidal waters can be converted to other types of aquatic habitat. We are proposing to modify the text of the NWP to specify that any relocated non-tidal aquatic habitat type must be created on the project site, so that the relocation is not limited to creating the aquatic habitat type in adjacent uplands. We have added a prohibition against converting tidal waters, including tidal wetlands, to other aquatic uses or relocating tidal waters. We do not believe that is necessary to limit the conversion to aquatic habitat types that historically existed on the project site, because the permittee may want to conduct activities that provide more benefits to the aquatic environment than the historic aquatic habitat type provided. This NWP can authorize small impoundments in ephemeral and/or intermittent streams, provided those aquatic habitat types are recreated on the project site, the adverse effects on the aquatic environment are minimal, and there are net functional gains.

Several commenters expressed concern with the use of this NWP with other permits. Other commenters were uncertain as to whether General Condition 15 applies to NWP 27.

NWP 27 may be used with other NWPs to authorize a single and complete project, provided the authorized work results in minimal adverse effects on the aquatic environment, individually or cumulatively. For example, NWP 33 may be used to provide temporary access to the construction site for activities authorized by NWP 27. The proposed modification of General

Condition 15 applies to NWP 27 and all other NWPs.

We have also been made aware of situations where participants in wetland restoration programs, such as the U.S. Department of Agriculture's Wetlands Reserve Program, want to revert their land back to its prior condition. If the land was prior converted cropland before the implementation of the wetland restoration activity, and no associated discharge of dredged or fill material into waters of the United States was required to conduct the wetland restoration activity, the landowner did not require a Section 404 permit. If the landowner wants to revert the land back to its prior condition, he or she could not utilize the reversion provision of NWP 27, because NWP 27 was not needed to restore wetlands on the prior converted wetland. To address this issue, we are proposing to add a provision to NWP 27 that allows the landowner to revert the land back to its prior condition using NWP 27, even though no Section 404 permit was needed to conduct the wetland restoration activity, provided the prior-converted cropland has not been abandoned. We believe this provision is necessary to provide equity for landowners. This provision may encourage more landowners to restore wetlands on prior converted cropland because they will not have to apply for an individual permit at a later date to revert the land back to its prior condition.

Several commenters stated that notification to the resource agencies should be required for all activities authorized by this NWP. One commenter recommended requiring agency coordination for all activities authorized under part (iv) of this NWP. This commenter also recommended that project proponents for stream restoration activities should be required to coordinate with the Corps and Federal and State fish and wildlife agencies prior to submitting a PCN under part (iv). Many commenters suggested PCN thresholds, ranging from  $\frac{1}{10}$  acre to 1 acre. One commenter stated that downstream landowners should be notified of proposed stream restoration projects.

To clarify the notification requirements of this NWP, we are proposing to restructure NWP 27 to make it easier to understand which activities require notification to the District Engineer. Notification is not required for: (1) activities on public or private land where the landowner has an agreement with the FWS or NRCS, (2) activities on Federal land, or (3) activities on reclaimed surface coal

mined land in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining or the applicable state agency. Notification is also required if a permittee wants to use NWP 27 to authorize the construction of a compensatory mitigation site (see the Note at the end of NWP 27). We disagree that agency coordination should be conducted for all activities authorized by this NWP, because this NWP authorizes activities that benefit the aquatic environment. Corps district personnel possess the knowledge and experience to assess the environmental effects, both beneficial and adverse, of those activities requiring notification. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the District Engineer will exercise discretionary authority and require an individual permit. Requiring project proponents to coordinate with the Corps and fish and wildlife agencies prior to submitting a PCN is unlikely to provide any benefits for the aquatic environment, and will serve only to discourage stream restoration projects because the authorization process will become too burdensome for many landowners. For many of the reasons cited above, we do not believe it is necessary to place a PCN threshold based on acreage on this NWP, or to notify downstream landowners of proposed stream restoration projects.

Several commenters stated that the NWP is too vague and is vulnerable to abuse. A number of commenters requested the inclusion of narrow definitions of authorized activities in the NWP. Two commenters asked how the Corps will assess functional gains. One commenter stated that NWP 27 should authorize only ecological-based stream restoration. One commenter asked if NWP 27 was intended to apply to the compensatory mitigation requirements of other Corps permits. Another commenter recommended that the NWP require the planting of native species at the site.

No activities or discharges not directly related to the restoration of ecological values or aquatic functions are authorized by this NWP. This NWP can be used to authorize wetland and stream restoration activities required by other Corps permits. The intent of the proposed modification of this permit is to facilitate the restoration of degraded or altered streams and wetlands. The goals of the proposed activities must be based upon the enhancement, restoration, or creation of the ecological conditions that existed, or may have existed, in the stream or wetland prior

to disturbance, or to otherwise improve the aquatic functions and values of such areas. The activities may include, but are not limited to, the modification of the hydrology, vegetation, or physical structure of the altered or degraded stream or wetland. If additional protection is necessary, division engineers can add regional conditions to this NWP. We have added a provision to the proposed modification of NWP 27 that requires the permittee to utilize native plant species if he or she is vegetating the project site. We are limiting this requirement to plant species installed by the permittee, because non-native plant species may naturally colonize the project site and we cannot require the permittee to remove those plants.

Some commenters recommended requiring binding agreements for activities authorized by this NWP. One commenter stated that management plans were needed in all cases. One commenter recommended requiring detailed restoration plans. One commenter recommended prohibiting future fills in areas that have reverted to prior condition under parts (ii) and (iii). Another commenter stated that wetland and stream restoration and enhancement activities by State resource management agencies should be included in NWP.

We do not believe that binding agreements or detailed restoration plans are necessary in all cases. Where the NWP authorizes reversion of the created or restored wetlands to its non-wetland state (*i.e.*, in those cases involving private parties entering into contracts or agreements with, or documentation of prior condition by, the NRCS or FWS under special wetland programs or an Office of Surface Mining (OSM) or applicable state program permit), then a binding agreement, documentation, or permit by NRCS, FWS, or OSM or applicable state agency which clearly documents the prior condition is required. This reversion can only occur when these instruments clearly document the prior condition. In all other cases where the reversion opportunity is not included, a Corps permit would be required for alteration of the site. Therefore, no binding agreement, detailed restoration plan, or documentation of the prior conditions will be required. Because the permit is limited to restoration, enhancement, and creation activities and because authorizations for those projects do not provide the opportunity for reversion, except as noted above, without a permit from the Corps, we believe that a management plan would be unnecessarily burdensome without

additional environmental benefits. Activities by State natural resource management agencies are already authorized by this NWP, but may require notification to the Corps unless those activities are in the categories described by paragraphs (a)(1), (a)(2), or (a)(3).

One commenter stated that evaluation of upstream and downstream impacts should be conducted. Another commenter stated that NWP 27 should not authorize activities that impede fish passage. A couple of commenters requested that the NWP should not be allowed in exceptional use waters and wild and scenic rivers.

All activities authorized by this NWP must comply with General Condition 21, Management of Water Flows. Compliance with this condition will ensure that the authorized activity results in minimal adverse effects on hydrology upstream and downstream of the project site. Similarly, all activities authorized by this NWP must comply with General Condition 4, Aquatic Life Movements, to ensure that the authorized work results in no more than minimal adverse effects on aquatic life movements. The requirement to comply with General Condition 7 will ensure the proper coordination to prevent adverse impacts to Federally-designated wild and scenic rivers. In addition, districts have coordinated with Federal and State natural resource agencies to discuss appropriate regional conditioning for the NWPs. Proposed General Condition 25 requires notification to the District Engineer if the proposed activity will occur in NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened or endangered species, coral reefs, State natural heritage sites, and outstanding national resource waters or other waters officially designated by a State. Restricting the use of NWP 27 in exceptional use waters will also be considered at the district level.

This NWP is subject to the requirements of proposed General Conditions 25 and 26. General Condition 25 requires the prospective permittee to notify the District Engineer in accordance with General Condition 13 for activities in designated critical resource waters, including wetlands adjacent to those waters. The District Engineer may authorize NWP 27 activities in these waters if the adverse effects are no more than minimal. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including

adjacent wetlands. NWP 27 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody.

In the proposed modification of NWP 27, we are proposing to add a note to the NWP to clarify the compensatory mitigation is not required for activities authorized by this NWP, provided the work results in a net increase in aquatic resource functions and values in the area. The note also states that NWP 27 can be used to authorize compensatory mitigation projects, including mitigation banks, as long as the project includes compensatory mitigation for any losses of waters of the United States that may occur as a result of constructing the compensatory mitigation project. The proposed note also states that NWP 27 does not authorize reversion of sites used as compensatory mitigation projects to prior conditions.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

#### 39. Residential, Commercial, and Institutional Developments

This NWP was proposed as NWP A in the July 1, 1998, **Federal Register** notice. NWP 26 has been used extensively to authorize discharges of dredged or fill material into waters of the United States for residential, commercial, industrial, and institutional development activities. Based on the comments received in response to the July 1, 1998, **Federal Register** notice, we have made changes to the proposed NWP, which are discussed in further detail below. We are proposing to use an index to determine the acreage limit for this NWP. The index will be based on a percentage of the project area, with a  $\frac{1}{4}$  acre base limit. The maximum acreage loss that can be authorized by this NWP is 3 acres. We are also proposing to restrict the list of activities authorized by this NWP to building pads, building foundations, and attendant features for residential, commercial, and institutional development activities. We have reduced the PCN threshold from  $\frac{1}{3}$  acre to  $\frac{1}{4}$  acre. A PCN will be required for

all activities that involve discharges of dredged or fill material into open waters. We believe that these changes will ensure that this NWP authorizes only those development activities that are similar in nature and have minimal adverse effects on the aquatic environment, individually or cumulatively. In addition, to further ensure that the NWP authorizes activities with only minimal adverse effects on the aquatic environment, most, if not all, Corps districts will impose regional conditions on this NWP.

*General:* Nearly 350 comments were received that specifically addressed this NWP. Many commenters opposed the issuance of this NWP, but a few favored its issuance. Many of the commenters who objected to the issuance of this NWP believe that it authorizes activities with more than minimal impacts, resulting in excessive cumulative adverse effects on the aquatic environment. Several commenters stated that the types of activities authorized by this NWP should be subject to the individual permit process and public comment. Another commenter stated that this NWP is essentially the same as NWP 26, with an expanded scope of waters where it can be used.

NWPs can only authorize activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. We have established PCN thresholds to allow district engineers to review all activities authorized by this NWP that could potentially result in more than minimal adverse effects on the aquatic environment. We believe that, in most cases, residential, commercial, and institutional development activities that result in the loss of less than  $\frac{1}{4}$  acre of wetlands have minimal adverse effects on the aquatic environment. In watersheds or waterbodies where losses of less than  $\frac{1}{4}$  acre of waters of the United States may result in more than minimal adverse effects, division engineers can regionally condition this NWP to lower the notification threshold or require notification for all activities. This NWP can also be revoked by division engineers in those watersheds or geographic regions where use of the NWP will cause more than minimal cumulative adverse effects on the aquatic environment. By restricting the proposed NWP to the construction of building pads, building foundations, and attendant features, we are limiting the use of this NWP to the development activity, which is much narrower than the scope of activities that could be authorized by NWP 26.

*Types of Waters Affected:* Several commenters objected to this NWP because it authorizes residential, commercial, and institutional development activities in all non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters. They believe that the scope of applicable waters for this NWP will increase wetland destruction. In contrast, two commenters stated that this NWP should be applicable in all non-tidal waters, including non-tidal wetlands contiguous to tidal waters. Another commenter recommended that wetlands and waters adjacent to tidal waters should be excluded from the use of this NWP as are contiguous wetlands. Two commenters stated that this NWP should authorize only activities in isolated wetlands less than 1 acre in size.

To increase protection of the aquatic environment, we are proposing to change the applicable waters of this NWP to: non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters. This change in applicable waters will reduce the geographic extent in which NWP 39 can be used. High value isolated waters can receive additional protection through regional conditions to restrict or prohibit the use of this NWP in those waters.

Another commenter stated that the expansion of applicable waters from headwaters and isolated wetlands will result in degradation of water quality by destroying wetlands which trap sediments and take up pollutants. This commenter also stated that the NWP does not specify stormwater management requirements needed to prevent water quality degradation.

We are proposing to modify General Condition 9, Water Quality, to require a water quality management plan for activities authorized by this NWP. The purpose of the water quality management plan is to ensure that the activities authorized by this NWP result in only minimal degradation of downstream water quality. The permittee must utilize stormwater management techniques and vegetated buffers to ensure that the project complies with this condition and does not result in substantial degradation of downstream water quality. The requirements of proposed General Condition 26 will also prevent further degradation of impaired waters by limiting the use of this NWP to authorize discharges in impaired waterbodies and adjacent wetlands.

*Types of Activities Authorized:* Many commenters stated that this NWP does not comply with Section 404(e) of the Clean Water Act, which requires

activities authorized by general permits to be "similar in nature." They believe that this NWP authorizes a wide variety of activities and does not comply with this requirement. One commenter recommended that the Corps develop a more limited list of activities authorized by this NWP. Another commenter suggested that a separate NWP should be developed for each category of activities. Several other commenters objected to this NWP because they believe that it authorizes activities that are not water dependent and that these activities should not be authorized in wetlands. One commenter suggested that the NWP should authorize only the construction of buildings and attendant features and should not authorize ball fields and golf courses.

In response to these comments, we have restricted the list of activities authorized by the proposed NWP to building pads, foundations, and attendant features constructed for residential, commercial, and institutional purposes. A structure must be built on the building pad or foundation to qualify for authorization under this NWP. Attendant features, as defined for the purposes of this NWP, are those features necessary for the use, operation, and maintenance of the residential, commercial, or institutional building. District engineers will determine whether or not a particular attendant feature can be authorized by this NWP. Attendant features can include, but are not limited to: roads constructed within the development project area, parking lots, storage buildings, garages, physical plant, sidewalks, stormwater management facilities, utilities, lawns and landscaped features, and recreational facilities such as playgrounds for schools and day care centers. We do not believe that it is necessary to develop a separate NWP for each category of activity because limiting the proposed NWP to building pads and attendant features necessary for the operation and use of those buildings complies with the similar in nature requirement of Section 404(e) of the Clean Water Act. The purpose of the building and attendant features (i.e., whether it is for residential, commercial, industrial, or institutional purposes) is usually irrelevant in terms of adverse effects on the aquatic environment. The construction of a building pad or foundation for a residential, commercial, or institutional building has the same effects on aquatic habitat because it replaces an aquatic area with a building. Issuing a separate NWP for each type of development activity

would also result in a much more complex NWP program with a substantially larger number of NWPs. Authorization of the necessary attendant features with the building pad or foundation will help ensure that the NWP authorizes all activities associated with a single and complete project and avoid piecemealing of projects. In addition, by authorizing the entire development project with one NWP, we will be better able to assess the adverse effects of the entire development on the aquatic environment.

Residential developments include single and multiple unit developments. A residential subdivision may be authorized by this NWP as a single and complete project. This NWP also authorizes the construction of apartment complexes. Developers and speculative builders can use this NWP to construct single family residences. We have removed the language from the proposed NWP A published in the July 1, 1998, **Federal Register** notice that prohibited the use of this NWP to authorize the construction of a single family residence and attendant features for personal residence for the permittee. Although this change results in some overlap between this NWP and NWP 29 because they both can authorize single family residences, we believe that this overlap does not result in less protection of the aquatic environment. The construction of a single family residence, whether it is constructed by the property owner who will live in the residence or by a contractor or speculative builder who will later sell the completed residence, has the same adverse effects on the aquatic environment. Although NWP 39 may have a higher indexed acreage limit than NWP 29, the geographic scope of applicable waters for NWP 39 is much less than the scope of applicable waters for NWP 29. NWP 39 cannot be used to authorize discharges into non-tidal wetlands adjacent to tidal waters, but NWP 29 can authorize discharges in those non-tidal wetlands. NWP 39 has a more stringent avoidance and minimization requirement than NWP 29 because it requires the permittee explain, in the notification submitted to the District Engineer, how avoidance and minimization was achieved on the project site. District engineers will receive PCNs for activities that result in the loss of greater than 1/4 acre of waters of the United States or involve discharges into open waters, such as streams. Based on the review of the PCN, the District Engineer will determine if the proposed work results in minimal adverse effects on the

aquatic environment and qualifies for authorization under NWP 39. We also believe that prohibiting the use of NWP 39 to authorize the construction of a single family home for the property owner, but allowing a contractor or speculative builder to use NWP 39 to construct a single family residence, is unfair to the regulated public because it places different restrictions based solely on who the applicant is (i.e., whether the applicant will be the resident of the home or if the applicant is a contractor or a speculative builder will sell the completed home at a later time to a future occupant). Such inequities are likely to lead to selective use of these two NWPs. A property owner can ask a contractor to apply for NWP 39 authorization for a higher acreage limit, instead of applying for an NWP 29 authorization. Since NWPs can authorize only those activities that result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, we believe this overlap between NWPs 29 and 39 is not contrary to Section 404(e) of the Clean Water Act.

Commercial developments authorized by this NWP include, but are not limited to, retail and wholesale stores, shopping centers, industrial facilities, malls, restaurants, hotels, business parks, and other buildings for the production, distribution, and selling of goods and services, as well as attendant features for those buildings. Institutional developments include, but are not limited to, schools, police stations, fire stations, government office buildings, libraries, courthouses, public works buildings, college or university buildings, hospitals, and places of worship. This NWP does not authorize the construction of new ski areas or the installation of oil or gas wells.

One commenter stated that the term "infrastructure" is poorly defined in the NWP. Another commenter suggested that infrastructure should be authorized by a separate NWP. Three commenters recommended that this NWP authorize the roads constructed by State or local governments to the development, not just the roads within the development.

For the purposes of the proposed NWP, infrastructure includes attendant features necessary for the operation of the residential, commercial, or institutional development or building, such as utilities, roads, and stormwater management facilities. Utilities that are not an integral part of the development, but are shared with other developments, may be authorized by other NWPs, such as NWP 12, regional general permits, or individual permits. The proposed NWP authorizes only those roads within the

project area (e.g., the subdivision). Roads leading to the project area, including those roads constructed by State or local governments, may be authorized by NWP 14, another NWP, regional general permit, or individual permit. These roads typically serve other areas and may be considered as separate single and complete projects.

The proposed NWP does not authorize discharges of dredged or fill material into waters of the United States for the construction or expansion of golf courses unless the golf course is an integral part of a residential subdivision. However, this NWP may be used to authorize the clubhouse, storage buildings, or garage for a golf course. A golf course that is not an integral part of a residential subdivision may be authorized by proposed NWP 42, Recreational Facilities, provided the golf course is designed and constructed in a manner that complies with the terms of that NWP. Golf courses as primary projects are not authorized by this NWP because they do not require building pads or foundations to fulfill their primary purpose. Rather, the clubhouse, storage building, or garage is an attendant feature of the golf course, not vice versa. Golf courses can also be authorized by other NWPs, regional general permits, or individual permits.

One commenter requested that the Corps develop a separate NWP for shopping centers because shopping centers differ from residential, commercial, and institutional developments. Another commenter stated that institutional facilities should include reuse plants, wastewater treatment facilities, and water treatment plants. One commenter stated that community recreation activities should not be authorized by this NWP.

We do not believe it is necessary to issue a separate NWP for shopping centers because shopping centers are a specific type of commercial development. The adverse effects on the aquatic environment resulting from the construction and use of shopping centers are similar to the impacts of other types of commercial developments. Reuse plants, wastewater treatment facilities, and water treatment plants may be authorized by this NWP, at the discretion of the District Engineer. We cannot list every type of residential, commercial, or institutional development that is authorized by the proposed NWP because such a list would be impractical and unnecessarily restrict the use of this NWP for other development activities that have minimal adverse effects on the aquatic environment. For those discharges that require notification the District Engineer

will determine if the proposed activity qualifies for authorization under this NWP. For discharges that do not require notification, a permittee can contact the appropriate Corps district office to determine if his or her development activity is eligible for this NWP.

A commenter requested that the NWP explicitly authorize all commercial and industrial activities because this NWP could be interpreted as not authorizing general industry construction. This commenter stated that there is no difference between commercial developments and general industrial developments. Another commenter requested clarification as to whether the term "institutional developments" includes government facilities.

We agree with these commenters and have stated in the text of the proposed NWP that industrial facilities and government office building pads, foundations, and attendant features may be authorized by this NWP.

We do not agree that community recreation activities should not be authorized by this NWP, because NWP 39 authorizes attendant features associated with a residential, commercial, or institutional development. These attendant features may include playgrounds and playing fields, provided those facilities are constructed in conjunction with a residential subdivision or school building. Excluding these features would be contrary to the purpose of the proposed NWP, which is to authorize all necessary attendant features associated with the buildings as part of a single and complete project. This NWP does not authorize discharges of dredged or fill material into waters of the United States for the construction of recreational facilities unless those recreational facilities are attendant features for residential, commercial, or institutional buildings. However, the building need not be constructed in waters of the United States for the attendant features to be authorized by NWP 39. Recreational facilities not constructed with residential, commercial, or institutional buildings may be authorized by proposed NWP 42, other NWPs, regional general permits, or individual permits.

Several commenters stated that rechannelization of streams should not be authorized by this NWP. One commenter said that stream rechannelization would not comply with the proposed modifications to General Conditions 21 and 9 because rechannelization causes more than minor changes in flow characteristics and could measurably degrade water quality. Another commenter stated that

the list of authorized activities should include drainage facilities, culverts, and drainage ditches.

To address concerns regarding stream channelization associated with residential, commercial, and institutional development projects, we have added paragraph (j) to proposed NWP 39. Paragraph (j) prohibits the channelization or relocation of stream beds downstream of the point on the stream where the average annual flow is 1 cubic foot per second. Therefore, only small streams can be channelized or relocated by this NWP. We believe that this restriction will help ensure that residential, commercial, and institutional development activities will result in minimal adverse effects on the aquatic environment. It should also be noted that notification is required for all discharges resulting in the loss of open waters, which allows district engineers to review all proposed activities in streams and other open waters. Division engineers can also regionally condition this NWP to prohibit the channelization or relocation of high value streams with average annual flows of 1 cubic foot per second or less. Channelization or relocation of stream segments with average annual discharges of greater than 1 cubic foot per second may be authorized by regional general permits or individual permits. The construction or maintenance of drainage facilities, culverts, and drainage ditches may be authorized by this NWP only if they are attendant features necessary for the residential, commercial, or institutional building. Drainage facilities and ditches may be part of a stormwater management facility or road. Culverts may be used to construct road crossings in the residential, commercial, or institutional development.

**Acreage Limit:** In the July 1, 1998, **Federal Register** notice, we requested comments on whether a simple acreage limit should be used for this NWP or whether the acreage limit should be indexed or based on a sliding scale. We proposed options for a simple limit of 3 acres and an indexed acreage limit based on parcel size. Many commenters said that a simple acreage limit should be used instead of indexing or a sliding scale. A few commenters stated that the 3 acre limit is adequate. Many commenters believe that the proposed acreage limit is too high. A number of commenters recommended an acreage limit of 1 acre. Other commenters proposed limits of  $\frac{1}{2}$  acre and 2 acres. One commenter recommended acreage limits of 2 acres of isolated wetlands and  $\frac{1}{3}$  acre of headwater wetlands. Numerous commenters said that the 3 acre limit is too low and that the acreage

limit should be 5 acres. They believe that the NWPs should be more flexible and should authorize all activities that result in minimal adverse effects. They recommended that PCNs should be used to determine whether or not a particular project would result in more than minimal adverse effects. Two commenters recommended a 10-acre limit and another commenter suggested a 25-acre limit for this NWP. Some commenters remarked that the acreage limit should be higher because the Corps has not demonstrated that higher acreage limits will result in significant direct or cumulative adverse effects.

Many of the commenters who stated that the 3 acre limit is too high referred to the recent United States District Court decision in the District of Alaska on NWP 29. They cited this court decision as evidence that the acreage limit for NWP 39 is too high because the Corps was enjoined from accepting NWP 29 preconstruction notifications after June 30, 1998. Two commenters stated that the acreage limits and PCN thresholds of this NWP and NWPs 29 and 40 should be similar.

In its decision, the District Court did not rule that the acreage limit for NWP 29 (i.e.,  $\frac{1}{2}$  acre of non-tidal waters) was too high. The District Court merely required the Corps to consider lower acreage limits and the exclusion of high value waters in its environmental assessment.

For activities in non-tidal wetlands, NWPs 39 and 40 have different acreage limits. NWP 39 utilizes an indexed acreage limit, as does NWP 40 for discharges into playas, prairie potholes, and vernal pools. NWP 40 utilizes a simple acreage limit of 2 acres for discharges into other types of non-tidal wetlands. We are not proposing an indexed acreage limit for discharges authorized by NWP 40 into non-tidal wetlands because the national average for farm tract size is approximately 275 acres, which means that most agricultural producers would qualify for the maximum acreage limit of 2 acres. However, we are proposing to utilize an indexed acreage limit for discharges into playas, prairie potholes, and vernal pools. Most residential, commercial, and institutional developments, on the other hand, would be subject to the indexed acreage limit since most of these developments occur on relatively small parcels of land and the indexed acreage limit would encourage avoidance and minimization of impacts to waters of the United States. It would be impractical for this NWP to have the same acreage limit as NWP 29 because these NWPs fulfill different purposes. NWP 29 applies solely to the

construction of a single family residence whereas NWP 39 may be used to authorize the construction of a large residential subdivision, a commercial development, or an institutional development. The PCN requirements of NWPs 29 and 39 are different. NWP 29 requires notification for all activities authorized by that NWP. NWP 39 requires notification for activities resulting in the loss of greater than  $\frac{1}{4}$  acre of non-tidal waters and any discharges resulting in the loss of open waters.

Several commenters favored the use of a sliding scale or indexing to determine the acreage limit for this NWP. A few commenters noted that the sliding scale is too complex to implement. Some of the commenters endorsing the use of a sliding scale recommend basing the indexing on a percentage of the development size. One commenter suggested that the acreage limit should be based on 10% of the parcel size, another commenter suggested that the maximum acreage should be 5% of the parcel size, several commenters recommended an acreage limit 2% of the parcel size, and two commenters recommended using 1% of the parcel size as the acreage limit. Another commenter recommended a minimum acreage limit of  $\frac{1}{3}$  acre plus 10% of the wetlands on the parcel for this NWP.

One commenter stated that a percentage of parcel size should be used as the basis for the index because if the indexing scheme proposed in the July 1, 1998, **Federal Register** is used, a small increase in parcel size could allow a much larger loss of wetlands. For example, a parcel size of 14.4 acres would have an acreage limit of 1 acre whereas a 15.1 acre parcel would have an acreage limit of 2 acres. In contrast, an index based on the percentage of parcel size or project area would result in a small increase in the acreage limit with a small increase in parcel size or project area.

Other commenters remarked that the indexing scheme proposed in the July 1, 1998, **Federal Register** notice has acreage limits so low for each size category that it is useless. If indexing is used to determine the acreage limit, these commenters requested that the Corps base the index on higher acreage limits. In contrast, some commenters stated that the indexing should be based on lower acreage limits. One commenter recommended an indexed acreage limit of  $\frac{1}{4}$  acre for every 5 acres of parcel size.

In response to these comments, we have decided to utilize an indexed acreage limit for this NWP. The



proposed index begins with a base acreage limit of  $\frac{1}{4}$  acre and increases as 2% of the project area, in acres. The maximum acreage limit for this NWP is 3 acres of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The acreage limit for this NWP is calculated as follows:

Acreage limit =  $\frac{1}{4}$  acre + 2% of the project area (in acres) For example if the project area is 5 acres, the acreage limit would be 0.35 acres. If the project area is 80 acres, the acreage limit would be 1.85 acres. With this indexed acreage limit, the maximum limit of 3 acres is reached at a project area of 137.5 acres. If the project area is greater than 137.5 acres, the acreage limit is 3 acres.

Two commenters said that indexing should be based on the quality or values of the aquatic resource lost due to the authorized work. They stated that such a basis for indexing would ensure that only projects with minimal adverse effects are authorized.

We believe that using functions and values of aquatic resources to determine the maximum acreage limit for an NWP is impractical because we do not currently have a standard method for measuring or assessing aquatic resource functions and values.

One commenter stated that indexing duplicates requirements for avoidance and minimization, including the statement required in paragraph (f) of the proposed NWP A. Two commenters believe that indexing is counter to the requirements for avoidance and minimization and provides incentives for developers to build larger projects.

We disagree with these comments, because the purpose of using an indexed acreage limit for this NWP is to have a proportionally smaller acreage limit for smaller projects, which reduces the potential for losses of waters of the United States. An indexed acreage limit encourages avoidance and minimization because it imposes smaller acreage limits on smaller projects rather than a single larger acreage limit. With an indexed acreage limit, NWP applicants are still required to avoid and minimize impacts to waters of the United States on-site to the maximum extent practicable (see General Condition 19).

Another commenter asserted that project proponents will attempt to get around indexing requirements by artificially defining the parcel as larger than it really is to avoid going through the individual permit process. Two commenters remarked that developers may phase projects so that they can build projects with higher impact acreage limits using the indexing scheme proposed in the July 1, 1998,

**Federal Register** notice. In this case, the Corps would have to determine if phasing meets the criteria for a single and complete project. They believe that the use of a sliding scale will encourage piecemealing of projects. One commenter recommended that the term "parcel size" used in the proposed indexing scheme should be replaced with the term "single and complete project," as defined by subdivision criteria.

We are proposing to base the indexed acreage limit on a percentage of project area, not parcel size, to ensure that the NWP authorizes only single and complete projects. Basing the indexed acreage limit on project area will result in an acreage limit that reflects the actual size of the proposed activity, which cannot be artificially inflated in an attempt to get a higher acreage limit. Using the project area to determine the acreage limit, a particular parcel could have separate projects built upon it, with acreage limits based on the size of each project, as long as each separate project has independent utility. If the separate projects do not have independent utility, then the acreage limit would be determined by the sum of the project areas for each dependent component of the entire single and complete project.

Two commenters said that the proposed acreage limit will allow long segments of streams to be impacted. Some commenters recommended limits for the amount of linear feet of stream bed that may be filled or excavated under this NWP. Commenters recommended limits of 50, 100, or 150 linear feet of stream bed.

It should be noted that the proposed NWP has a PCN requirement for any loss of open waters, including streams. By reviewing the PCN, district engineers will be able to determine if the loss of stream bed will result in more than minimal adverse effects. If the stream bed impacts are more than minimal, discretionary authority will be exercised by the District Engineer, and the applicant will have to apply for authorization through another permit process or modify the project to comply with the NWP. Therefore, we do not believe that it is necessary to impose a limit on the quantity of stream bed that can be filled or excavated under this NWP.

**Preconstruction Notification:** We received a variety of comments concerning the notification requirements for this NWP. A couple of commenters supported the proposed PCN threshold of  $\frac{1}{3}$  acre. Several commenters stated that the PCN threshold should be  $\frac{1}{4}$  acre. Two

commenters recommended a  $\frac{1}{2}$  acre PCN threshold. Two commenters believe that the PCN threshold should be 1 acre and a few commenters stated that a PCN should be required for all activities authorized by this NWP.

We believe that the PCN threshold should be  $\frac{1}{4}$  acre, to be consistent with the other new NWPs.

For this NWP, we also proposed to require notification for all activities that involve filling or excavating open waters, such as perennial or intermittent streams and lakes. One commenter stated that this PCN requirement is excessive and would mean that a PCN will be required for virtually all projects. This commenter also stated that this PCN requirement implies that open waters are more important than special aquatic sites and is contrary to the Section 404(b)(1) guidelines. The commenter recommended that the Corps establish other PCN thresholds for open water impacts instead, such as a 500 linear foot PCN threshold for intermittent stream impacts, and require a PCN for all perennial stream impacts. Another commenter recommended using the size of the drainage area to determine when a PCN is required for open water impacts. This commenter recommended requiring a PCN when the drainage area is 1 square mile or greater. Another commenter believes that the PCN requirement for open waters demonstrates a lack of understanding that not all significant wetlands have open waters and that this PCN requirement redefines wetlands.

We disagree with the assertion that this PCN requirement is excessive and would result in PCNs for nearly all projects authorized by this NWP. Many development projects authorized by this NWP would only impact wetlands and would require notification only for those activities that result in the loss of greater than  $\frac{1}{4}$  acre of wetlands. In addition, most residential, commercial, or institutional development projects can be designed to avoid impacts to open waters. Road crossings of streams that are constructed with culverts would require submittal of a PCN. The purpose of this PCN requirement is to allow district engineers to review residential, commercial, and institutional development activities that result in a loss of open waters, such as streams, and ensure that activities in these waters will result only in minimal adverse effects on the aquatic environment. We are proposing to add Note 2 to the text of this NWP to help the regulated public identify those areas that require submission of a PCN for discharges into open waters.

We are proposing to add the PCN requirement for discharges into open waters to provide district engineers with the opportunity to review activities in open waters and ensure that the authorized work results in minimal adverse effects on the aquatic environment. One intent of the proposed new and modified NWP is to provide equal consideration for open and flowing waters and wetlands. The proposed NWP focuses on the aquatic environment as a whole, not just wetlands. Streams and other open waters are extremely important components of the overall aquatic environment. The proposed PCN requirement does not redefine wetlands; it merely places additional emphasis on other types of waters of the United States, such as lakes and streams. High value wetlands and other waters will receive additional protection through regional conditions and the use of discretionary authority where discharges into high value waters may result in more than minimal adverse effects on the aquatic environment.

Several commenters stated that the PCN process for this NWP does not provide the Federal and State resource agencies the opportunity to comment on projects that adversely affect less than 1 acre of waters of the United States. These commenters believe that these agencies should be allowed the opportunity to comment on these projects. One commenter supported Corps-only review of projects that adversely affect between  $\frac{1}{3}$  acre and 1 acre of waters of the United States. One commenter recommended agency coordination for activities resulting in the loss of greater than  $\frac{1}{2}$  acre of waters of the United States.

We are proposing to modify General Condition 13 to require agency coordination for NWP 39 activities that result in the loss of greater than 1 acre of waters of the United States. PCNs for activities that result in the loss of  $\frac{1}{4}$  acre to 1 acre of waters of the United States will be reviewed solely by the Corps. Agency coordination for smaller projects is costly to the Corps and provides little value added in determining whether or not the work will result in minimal adverse effects on the aquatic environment. Corps district personnel are highly experienced in reviewing PCNs to assess the environmental effects of the proposed work and recommending special conditions or requiring compensatory mitigation to ensure that the adverse effects on the aquatic environment are minimal. If the District Engineer determines that the adverse effects are more than minimal, discretionary

authority will be exercised and the applicant will be notified that another form of Corps authorization, such as an individual permit, is required for the proposed work.

A few commenters stated that the PCN should include detailed plans and schedules for compensatory mitigation. Another commenter recommended that the PCN should include baseline data for stream flows and a detailed analysis of stormwater standards to ensure compliance with paragraph (g) (formerly paragraph (i) of NWP A) of the proposed NWP.

We believe that it is unnecessary to require detailed plans and schedules for compensatory mitigation with the PCN to ensure that the adverse effects of the authorized work on the aquatic environment are minimal. Requiring the submission of detailed compensatory mitigation plans with the PCN will increase the amount of time required to review the PCN. For the PCN, the applicant need only provide a conceptual proposal for compensatory mitigation that will offset the loss of aquatic resource functions and values. However, a detailed mitigation plan may be submitted with the PCN if the applicant chooses to submit such a plan. The District Engineer will evaluate the compensatory mitigation proposal to determine if it is adequate to ensure that the adverse environmental effects of the proposed work are minimal. Detailed plans for project-specific compensatory mitigation projects are usually required as special conditions of the NWP authorization. If the proposed compensatory mitigation is provided through payment to an approved mitigation bank or in lieu fee program, detailed plans are not required because the Corps may have previously reviewed the plans for the mitigation bank or in lieu fee site. It should be noted that Corps must finish its review of the PCN within 45 days of receipt of a complete PCN; such a time limit makes it difficult to thoroughly review and approve detailed compensatory mitigation plans and schedules.

District engineers will determine compliance with paragraph (g) of NWP 39 through qualitative methods or defer to State or local regulatory agencies, who may require quantitative analyses to ensure that the project does not result in more than minimal adverse effects to water quality or surface water flows.

**Statement of Avoidance:** Paragraph (f) of the proposed NWP requires the applicant to submit a statement with the PCN which demonstrates that discharges into waters of the United States were avoided and minimized to the maximum extent practicable and

that additional avoidance and minimization cannot be achieved. One commenter favored this requirement, but a few commenters remarked that the requirement is unnecessary and recommended that it be removed. One commenter stated that the NWP regulations already require on-site avoidance and minimization and that this requirement increases the burden on the landowner and provides no environmental benefit. This commenter went on to say that the **Federal Register** notice does not provide any guidance as to what information is necessary to fulfill this requirement. Another commenter stated that this requirement will be impossible to implement. Several commenters stated that this requirement is insufficient, and that projects should be subject to more comprehensive alternatives analysis.

This requirement (now in paragraph (e) of NWP 39) is similar to the requirements of General Condition 19, Mitigation. It merely requires that the applicant provide a statement explaining how he or she is complying with this general condition. We disagree that it will create an additional burden on the project proponent because it will provide the Corps with the relevant avoidance and minimization details early in the PCN review process. In fact, submission of such a statement with the PCN is likely to benefit project proponents because the Corps personnel evaluating the PCN will not have to ask during the PCN review period if additional avoidance and minimization can be achieved. We believe that this requirement will save time and make the PCN process more effective. This requirement will also encourage project proponents to think more carefully about how to further avoid and minimize adverse effects to waters of the United States on the project site.

To require a more comprehensive alternatives analysis is contrary to the NWPs. NWPs authorize activities with minimal adverse effects on the aquatic environment, and if the proposed work meets the terms and limits of the NWP, the applicant cannot be required to consider off-site alternatives. If the adverse effects of a particular project are more than minimal the District Engineer will exercise discretionary authority and require an individual permit for the proposed work. The individual permit process requires a full alternatives analysis, including the consideration of off-site alternatives.

Since the avoidance and minimization requirement and the compensatory mitigation requirement of the NWP are related, we have combined paragraphs (f) and (g) of proposed NWP

A into paragraph (e) of NWP 39. Compensatory mitigation requirements for this NWP are discussed below.

*Compensatory Mitigation:* Paragraph (g) of the proposed NWP A stated that the permittee must submit a mitigation proposal to offset the loss of waters of the United States for activities that require notification. One commenter recommended changing this requirement to specify that the losses of wetland functions and values should be offset, not just the acreage loss. This commenter stated that the proposed wording is unclear and subject to various interpretations and should be consistent with the mitigation memorandum of agreement (MOA) signed in 1990.

This requirement has been incorporated into paragraph (e) of NWP 39. The purpose of compensatory mitigation is to offset losses of functions and values of waters of the United States and ensure that the net adverse effects on the aquatic environment are minimal. However, it is important to allow district engineers the flexibility to require compensatory mitigation that provides more benefits to the aquatic environment. Out-of-kind compensatory mitigation, such as the establishment and maintenance of vegetated buffers adjacent to streams, may provide more benefits to the local aquatic environment than replacing the wetland filled by the authorized work. It is also important to note that compensatory mitigation may be required for losses of other types of waters of the United States, not only wetlands. District engineers can require a greater acreage of compensatory mitigation to replace the aquatic resource functions and values lost due the authorized work if the compensatory mitigation cannot readily replace the lost functions and values. On the other hand, if the waters of the United States lost as a result of the authorized work are low value, providing few functions and values, a smaller acreage of compensatory mitigation may be appropriate to offset the lost functions and values of that area.

The mitigation process, as defined in the Council on Environmental Quality's regulations at 40 CFR Part 1508.20, includes avoidance, minimization, and compensation. Therefore, we are providing further clarification for this requirement by inserting the word "compensatory" in front of the word "mitigation" to state that the type of mitigation required by the District Engineer is compensation to replace losses of functions and values of waters of the United States.

Two commenters support the requirement for compensatory mitigation for losses that require a PCN. Several commenters objected to this NWP because this condition does not specifically require compensatory mitigation for losses of less than  $\frac{1}{3}$  acre, which they believe will result in substantial cumulative adverse effects on the aquatic environment. Another commenter suggested that compensatory mitigation should be required for impacts to perennial streams. One commenter stated that mitigation proposals should be subject to agency review. A commenter recommended modifying this paragraph to allow the permittee the opportunity to justify why compensatory mitigation should not be required for a particular project.

It should be noted that paragraph (e) only requires the submission of a compensatory mitigation proposal to the District Engineer with the notification, and is not a requirement for compensatory mitigation. The prospective permittee may submit either a conceptual or detailed compensatory mitigation proposal. District engineers will determine on a case-by-case basis if compensatory mitigation is necessary to ensure that the proposed activity will result in minimal adverse effects on the aquatic environment, individually or cumulatively. However, in most cases, compensatory mitigation will be required for activities that require notification to ensure that those activities result only in minimal adverse effects on the aquatic environment. In paragraph (e), we have stated that compensatory mitigation will normally be required to offset losses of waters of the United States, but if the applicant believes that the adverse effects of the project on the aquatic environment are minimal without compensatory mitigation, then the applicant can provide justification with the PCN for the District Engineer's consideration.

Compensatory mitigation is not required for activities that do not require preconstruction notification, because the adverse effects on the aquatic environment caused by those activities are minimal. In watersheds where small losses of waters of the United States have greater potential for more than minimal adverse effects, division engineers can regionally condition the NWP to lower the notification threshold, which will allow district engineers to require compensatory mitigation for losses of less than  $\frac{1}{4}$  acre of waters of the United States. For activities that require Corps-only review of the PCN, agency review is not required to review the compensatory mitigation proposal

because the District Engineer will determine whether or not the proposed mitigation is appropriate. For PCNs subject to agency coordination, Federal and State resource agencies will have the opportunity to review the compensatory mitigation proposal submitted with the notification.

One commenter stated that buffers adjacent to any waters of the United States, not just open water, should be part of any required compensatory mitigation.

We concur with this comment and have stated elsewhere in this notice that district engineers can consider the establishment and maintenance of vegetated buffers adjacent to waters of the United States, including wetlands, as compensatory mitigation for losses of waters of the United States. Vegetated buffers adjacent to waters of the United States, including open waters and wetlands, can be considered as out-of-kind compensatory mitigation because vegetated buffers are important components of the aquatic environment due to the functions they provide, especially for maintaining water quality and habitat for aquatic organisms. Vegetated buffers reduce adverse effects to local water quality caused by adjacent land use. Forested riparian buffers provide shade to streams, supporting cool water fisheries. When determining the appropriate amount of compensatory mitigation required for particular projects, district engineers should reduce the amount of "replacement acreage" required as compensatory mitigation by an amount that recognizes the value of the vegetated buffer to the aquatic environment.

One commenter recommended that on-site mitigation should be considered before off-site mitigation and that off-site mitigation should be accepted only if on-site mitigation is not environmentally beneficial. Two commenters oppose the use of mitigation banks and in lieu fee programs to provide compensatory mitigation for activities authorized by this NWP. Another commenter recommended that where compensatory mitigation is required, it should be done in a State-sponsored mitigation bank within the same drainage basin.

The sequencing requirements for compensatory mitigation recommended in the previous paragraph have limitations. Compensatory mitigation projects, whether they are individual projects that restore, enhance, or create aquatic areas or are payments to mitigation banks or in lieu fee programs, should be selected on the basis of their chance for success and their

effectiveness at offsetting authorized losses of waters of the United States. In-kind and on-site requirements for compensatory mitigation should be considered, but not to the exclusion of what is best for the aquatic environment. If off-site compensatory mitigation will provide more benefits to the local aquatic environment, then that form of compensatory mitigation should be selected. On-site wetland creation projects are often unsuccessful because of changes to local hydrology caused by the authorized activity, which may prevent the development of a functional replacement wetland. On-site restoration may have a better chance of success, but success may not be achieved because of changes in land use in the vicinity of the authorized work. It is often better to utilize off-site wetland creation, restoration, and enhancement projects, including mitigation banks and in lieu fee programs, if they are appropriate and available. The use of mitigation banks to provide compensatory mitigation for losses of waters of the United States authorized by NWP should not be limited to State-sponsored mitigation banks. Permittees should be allowed to use any mitigation bank in the area that replaces functions and values of waters of the United States, including wetlands, lost due to the authorized work. When reviewing compensatory mitigation proposals, district engineers will consider what is best for the aquatic environment, including requiring vegetated buffers to open and flowing waters and wetlands.

One commenter recommended that the NWP contain a provision requiring all remaining wetlands on the parcel to be protected by a conservation easement to prohibit any future development on the property.

We disagree, because such a requirement can be considered a taking of private property, unless the applicant agrees to preserve the remaining wetlands on the property as compensatory mitigation for authorized losses of waters of the United States. If there are any streams or other open waters on the project site, the District Engineer can require the permittee to establish and maintain vegetated buffers adjacent to those waters as compensatory mitigation. The vegetated buffers should be protected by a conservation easement, deed restriction, or other legal means.

*Use of This NWP With Other NWPs:* Paragraph (h) of the proposed NWP A addressed the use of this NWP with other NWPs. This paragraph has been changed to paragraph (f), and only addresses the PCN threshold when this

NWP is used with other NWPs. The use of NWP 39 with other NWPs is addressed in the proposed modification of General Condition 15. Paragraph (f) has been modified to reflect the changes in the PCN threshold discussed above.

One commenter supported this requirement of paragraph (h) of the proposed NWP A. Another commenter stated that this NWP should not be stacked with other NWPs because this NWP authorizes all activities associated with the single and complete project. One commenter said that this NWP should not be combined with other NWPs to authorize permanent, above-grade fills. One commenter stated that this NWP should not be combined with other NWPs.

Although the proposed NWP 39 authorizes the construction of building pads, foundations, and attendant features for a single and complete residential, commercial, or institutional development, there may be circumstances where other NWPs are necessary to authorize discharges of dredged or fill material into waters of the United States for related activities that occur in types of waters not covered by this NWP. It is important to consider these additional activities as part of the single and complete project. For example, a community boat ramp that can be authorized by NWP 36 may be constructed in tidal waters for a new residential subdivision that is authorized by NWP 39. In this situation, when NWP 39 is combined with NWP 36, the total loss of waters of the United States cannot exceed the indexed acreage limit for NWP 39. The use of more than one NWP to authorize a single and complete project is addressed in the proposed modification of General Condition 15.

One commenter stated that the stacking limitation assumes that projects with greater than 3 acres of impact to waters of the United States exceed the minimal adverse effects threshold and that it is illogical for the Corps to assume that each NWP, if used alone, will result in minimal impacts, but if used with other NWPs will result in more than minimal adverse effects. This commenter asserted that the Corps has no evidence to support its contention that NWP stacking in excess of 3 acres will result in more than minimal impacts and recommended that the Corps eliminate this condition of the NWP because the PCN requirement is sufficient to ensure that the NWP authorizes only those activities with minimal adverse effects. This commenter also stated that the stacking restriction is contrary to 33 CFR Part 330.6(c).

For the NWPs, we establish acreage limits that will ensure that the authorized activities will not result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. There may be some circumstances (e.g., projects in low value waters of the United States) where larger impacts result in minimal adverse effects. If a particular district has a large number of these types of projects, then that district can develop a regional general permit to authorize those activities. When more than one NWP is used to authorize a single and complete project, the District Engineer must consider the additive adverse effects on the aquatic environment. Each NWP has an acreage limit based on a minimal adverse effects determination made only for that NWP. By combining NWPs, the sum of the acreage losses and the sum of the adverse effects of those losses on the aquatic environment increases the probability that the minimal adverse effects threshold will be exceeded. Since the NWPs can authorize only those activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively, a prohibition against stacking NWPs to exceed a specified acreage limit is necessary. General Condition 15 is not contrary to 33 CFR Part 330.6(c) because this regulation does not eliminate the need to comply with Section 404(e) of the Clean Water Act and 33 CFR Part 323.2(h).

Two commenters stated that any stacking that occurs with this NWP should have an acreage limit equal to the lower acreage limit for any of the NWPs involved. Another commenter suggested that any stacking that occurs with this NWP should have an acreage limit equal to the higher acreage limit for any of the NWPs involved. Two other commenters stated that paragraph (h) of the proposed NWP A should be revised to specify that total acreage cannot exceed 3 acres or the indexed acreage limit of the NWP, whichever is less. One commenter recommended that this NWP should not be stacked with NWP 29.

We disagree with the first comment in the previous paragraph because it would render this NWP useless in most situations. For example, NWP 36 limits the construction of boat ramps to a maximum width of 20 feet and a maximum discharge of 50 cubic yards. By requiring a combination of this NWP and NWP 36 to be subject to the lesser acreage limit of NWP 36, NWP 39 would essentially authorize no residential, commercial, or institutional development activities when combined with NWP 36. We are proposing to

modify General Condition 15 to allow the use of more than one NWP to authorize a single and complete project, as long as the acreage loss does not exceed the highest specified acreage limit of the NWPs used to authorize that activity. The statement in paragraph (f) regarding the PCN threshold has been changed to include the PCN threshold of  $\frac{1}{4}$  acre.

We believe that prohibiting the use of NWP 29 with NWP 39 is unnecessary and have not added it to the NWP. NWPs 29 and 39 are used by different groups of landowners. NWP 29 can be used only by the present or future occupants of the single family residence. NWP 39, on the other hand, can be used by others, such as contract builders and developers, to construct single family residences. Paragraph (d) states that only single and complete projects can be authorized by NWP 39. If the District Engineer establishes an exemption to the subdivision provision of this NWP, NWP 29 may be used by an owner of a subdivided parcel to construct a single family residence. If the construction of another single family residence on the property has independent utility and is not part of the previously authorized single and complete project, then either NWP 29 or NWP 39 may be used to authorize that single family residence, provided the authorized work results in minimal adverse effects on the aquatic environment.

*Other comments:* A few commenters recommended that the Corps add a definition of the term "single and complete project" to the NWP.

The Corps has defined the term "single and complete project" in the regulations governing the NWP program (see 33 CFR 330.2(i)). This definition applies to all of the NWPs, including the new NWPs proposed today. This definition is repeated in the "Definitions" section of the NWPs. For NWP 39, the acreage limit is based on the size of the single and complete project (i.e., the footprint or areal extent of the project). For the purposes of this NWP, a definition of "project area" is included in the "Definitions" section. The concepts of "single and complete project" and "project area" must also be considered in the context of the subdivision provision of this NWP. In the July 1, 1998, **Federal Register** notice, we proposed General Condition 16, entitled "Subdivisions." The purpose of proposed General Condition 16 was to define, for proposed NWPs A and B, the single and complete project in terms of land parcels. Since proposed NWP B was withdrawn, we have determined that a separate general

condition addressing subdivision of land is unnecessary since it would only apply to NWP 39. Therefore, we have incorporated the text of proposed General Condition 16 into the text of NWP 39, with some minor changes. The term "parcel" is used in the subdivision provision of NWP 39 to determine the aggregate total loss authorized by the NWP and the appropriate NWP acreage limit. The project area may be the same as the size of the parcel, but more than one single and complete project may be built on a single parcel.

Multi-phase projects may be considered as separate single and complete projects depending on whether or not one phase has independent utility from another phase. If a phase of a multi-phase project has independent utility from the other phases, then that independent phase can be considered as a separate single and complete project and may be eligible for the maximum acreage limit as determined by the project area. Each phase of a project can be authorized with the maximum acreage, provided each phase has independent utility from the other phases and the work results only in minimal adverse effects on the aquatic environment. Multiple parcels can also be combined for a larger single project. The acreage limit for a combined larger project is based on the indexed acreage limit for the project area.

Two commenters suggested that authorizing the expansion of projects with this NWP is contradictory since this NWP is applicable only for single and complete projects.

We disagree, since a project proponent can expand an existing single and complete project provided the terms and limits of the NWP are not exceeded and the adverse effects on the aquatic environment are minimal. When evaluating such requests for NWP authorization, we add the previously authorized impacts to the proposed impacts to determine if the proposed expansion exceeds the acreage limit. If the PCN threshold is exceeded, the applicant is required to notify the District Engineer. The District Engineer reviews the PCN and determines if the proposed work is authorized by NWP.

One commenter expressed concern that a subdivision developer could construct the project, sell the lots, and the new owners would be eligible for NWP authorization to do further work on their lots. Another commenter stated that after a project is authorized by this NWP, further development on the property should be prohibited.

We are proposing to add a subdivision provision to this NWP to prevent

piecemealing of projects that exceed the acreage limit. For real estate subdivisions created or subdivided after October 5, 1984, the aggregate loss of waters of the United States authorized by this NWP cannot exceed the acreage limit based on the index in paragraph (a). If the owners of the property want to do additional work that would exceed the indexed acreage limit under paragraph (a), then they must obtain another type of Corps permit, such as an individual permit or a regional general permit, unless the additional work has independent utility. We cannot prohibit additional activities on the project site unless it is in the public interest to do so.

Three commenters believe that this NWP would authorize considerable impacts to floodplains and riparian zones and should not authorize activities in these areas, or should be limited to those activities with unavoidable impacts that provide essential public services. One commenter stated that a net gain in wetlands cannot be achieved if residential, commercial, and institutional development activities are authorized in wetlands.

In the October 14, 1998, **Federal Register** notice we requested comments on limiting the use of the NWPs to authorize activities in the 100-year floodplain as mapped by the Federal Emergency Management Agency (FEMA) on its Flood Insurance Rate Maps. In response to the October 14, 1998, **Federal Register** notice, proposed General Condition 27 has been added to the NWPs. General Condition 27 prohibits the use of NWP 39 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

Property owners are entitled to reasonable use of their property, the Corps cannot prohibit all of these activities in wetlands. However, NWP applicants are required to avoid and minimize adverse effects to waters of the United States on-site to the maximum extent practicable (see General Condition 19). For those unavoidable impacts, we can require compensatory mitigation to ensure that the adverse effects on the aquatic environment are minimal. In the July 1, 1998, **Federal Register** notice, we cited data from the past use of NWP 26, which demonstrates that during the period of May 1, 1997, through December 31, 1997, more than 3 acres of compensatory mitigation was required for every acre of wetland lost as a result of residential, commercial, and institutional development activities.

One commenter stated that the term "measurably degrade" in paragraph (i) of the proposed NWP A needs to be defined. Another commenter said that this term is unnecessary because any measurable degradation of water quality would occur after the work is completed. This commenter went on to say that this condition implies that if the degradation is not measurable, then it is authorized by the NWP.

We have rewritten this condition (now in paragraph (g)) to replace the term "measurably degrade" with language that is more consistent with General Condition 9. The intent of this condition is to ensure that the authorized work does not result in more than minimal degradation of local water quality. Vegetated buffers adjacent to open or flowing waters and wetlands and adequate stormwater management facilities can minimize the adverse effects of the development on local water quality.

One commenter stated that the preamble for this NWP in the July 1, 1998, **Federal Register** notice contains several conditions that are not included in the text of the NWP and that these conditions should be consistent with the final NWP.

In the preamble discussion of the proposed NWP, we did not include conditions that were not incorporated into the text of the NWP itself. In the preamble for the NWP, we reiterated some of the terms and conditions of this NWP, with discussions of the intent and meaning of those conditions.

A commenter stated that the eight months of data presented by the Corps in the July 1, 1998, **Federal Register** notice is inadequate to assess the adverse effects that may result from the use of this NWP. The commenter recommended that at least one and a half years of data should be used.

We have collected additional data since the July 1, 1998, **Federal Register** notice for the use of NWP 26 for activities that could be authorized by this NWP. We have collected this data for over a year and will consider this data in our Environmental Assessment for NWP 39. This data will be used to estimate the potential losses of waters of the United States that will result from the use of this NWP. This data will include the losses of waters of the United States authorized by NWP 26, as well as the gains provided by compensatory mitigation.

One commenter requested that this NWP require the establishment and maintenance of vegetated buffers adjacent to open waters and streams, and that these vegetated buffers should be protected by deed restrictions,

conservation easements, or other legal means.

We concur with this comment, and have added a new paragraph (i) to NWP 39 to require, to the maximum extent practicable, the establishment and maintenance of vegetated buffers adjacent to open waters and streams, if those types of waters of the United States are present on the project site. Paragraph (i) also requires the protection of these vegetated buffers by deed restrictions, conservation easements, or other legal methods. For activities requiring notification, the composition of the vegetated buffer, in terms of plant species, and the appropriate width of the vegetated buffer, are determined by the District Engineer. For activities authorized by this NWP that do not require notification, the permittee should establish and maintain vegetated buffers that are wide enough to protect water quality and are comprised of native plant species. Division engineers can also regionally condition this NWP to prescribe vegetated buffer requirements for activities that do not require notification.

One commenter stated that this NWP would be overly burdensome to builders. Another commenter believes that authorizing residential, commercial, and institutional development activities in all non-tidal waters of the United States will result in too much workload for Corps districts.

The purpose of the proposed NWP is to efficiently authorize residential, commercial, and institutional development activities that result in minimal adverse effects on the aquatic environment. NWP 26 authorized many of these same activities in isolated waters and headwaters. The proposed NWP authorizes these activities in all non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. Proposed General Condition 27 prohibits the use of NWP 39 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain, which will further limit the use of NWP 39 in non-tidal waters. It is our experience that many builders design their projects to comply with the NWPs, rather than construct larger projects that require individual permits. Although the proposed NWP has additional conditions that were not previously included with NWP 26, these conditions are intended to reduce adverse effects on the aquatic environment. Developers should be able to design their projects to comply with these conditions and qualify for NWP authorization. Another important point to consider is that

NWPs are optional permits. If the permittee does not want to comply with all of the terms and conditions of an NWP, then he or she may request authorization through the individual permit process or apply for authorization by a regional general permit, if such a general permit is available.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 39 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all discharges into impaired waters and their adjacent wetlands. General Condition 27 prohibits the use of NWP 39 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

We believe that the terms and conditions of the proposed new and modified NWPs, especially the requirements of the three new NWP general conditions, will result in a substantial increase in the number of individual permits processed by our district offices. Districts will use the proposed new and modified NWPs, with regional conditions, to prioritize their workload in non-tidal waters. In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. Proposed NWP A is designated as NWP 39, with the modifications discussed above.

#### 40. Agricultural Activities

In the July 1, 1998, **Federal Register** notice, we proposed to modify this NWP, which originally authorized only the construction of foundations or building pads for farm buildings in farmed wetlands, to authorize discharges into non-tidal wetlands for the purposes of increasing agricultural

production. As a result of the comments we received concerning this NWP, we have substantially changed the proposed modification of NWP 40 to authorize the following activities: (1) Discharges into non-tidal wetlands, excluding other waters of the United States (e.g., open or flowing waters) and non-tidal wetlands adjacent to tidal waters, conducted by participants in U.S. Department of Agriculture (USDA) programs to increase agricultural production, (2) discharges into non-tidal wetlands, excluding other waters of the United States (e.g., open or flowing waters) and non-tidal wetlands adjacent to tidal waters, conducted by agricultural producers that are not participants in USDA programs to increase agricultural production; (3) discharges into farmed wetlands for the construction of building pads for farm buildings, and (4) the relocation of existing serviceable drainage ditches constructed in non-tidal streams. For activities authorized by paragraph (a) of this NWP, the Natural Resources Conservation Service (NRCS) will determine if the proposed work meets the terms and conditions of NWP 40, unless the permittee also proposes to construct building pads for farm buildings or relocate greater than 500 linear feet of existing serviceable drainage ditches constructed in non-tidal streams. For discharges resulting in the loss of greater than  $\frac{1}{4}$  acre of non-tidal wetlands by non-participants in USDA programs to increase agricultural production, the construction of building pads for farm buildings, and/or the relocation of greater than 500 linear feet of existing serviceable drainage ditches constructed in non-tidal streams, the Corps will determine if the proposed work is authorized by NWP 40. Division engineers will not regionally condition paragraph (a) of this NWP, to ensure that this NWP is consistently applied by NRCS and agricultural producers across the country. These proposed changes are discussed in more detail below.

**General Comments:** Many commenters objected to the proposed modification and only a few supported the proposed modification of NWP 40. Of those who objected to the proposed modification, the reasons for their objections include: (1) The NWP would authorize substantial cumulative losses of wetlands, especially in the prairie pothole region; (2) the use of the NWP would result in substantial degradation of water quality; (3) the NWP does not comply with Section 404(e) of the Clean Water Act; (4) the NWP delegates some of the Corps responsibilities to NRCS, which lacks the resources to implement

the statutory requirements of the Clean Water Act; (5) the NWP is contrary to Swampbuster; and (6) the proposed modification is contrary to the goals of programs that restore and enhance wetlands, such as the Conservation Reserve Program (CRP) and the Wetlands Reserve Program (WRP).

This NWP complies with the requirements of Section 404(e) of the Clean Water Act because it authorizes activities that are similar in nature and will result in minimal adverse effects on the aquatic environment. As with all other NWPs, district engineers will monitor the use of NWP 40 on a watershed basis to determine if the use of NWP 40 and other NWPs results in more than minimal cumulative adverse effects on the aquatic environment, including degradation of local water quality. States, Tribes, and EPA will also make local determinations for compliance with Section 401 of the Clean Water Act and determine if activities authorized by NWP 40 will violate local or State water quality standards. If the cumulative adverse effects within a particular watershed are more than minimal, then the District Engineer will suspend or revoke the use of the NWPs in accordance with 33 CFR Part 330.5. For activities in non-tidal wetlands by USDA program participants to increase agricultural production, NRCS will review the proposed work and determine if it is authorized by NWP 40. In these cases, each landowner must submit a report to the District Engineer so that the use of NWP 40, the losses of waters of the United States, and compensatory mitigation can be monitored. For activities that require notification to the District Engineer (i.e., discharges resulting in the loss of greater than  $\frac{1}{4}$  acre of non-tidal wetlands by non-participants in USDA programs to increase agricultural production, discharges into farmed wetlands for the construction of pads for farm buildings, or the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams), the District Engineer will review the PCN and determine if the adverse effects on the aquatic environment resulting from the proposed work will be minimal. If the proposed work involves both activities in non-tidal wetlands to increase agricultural production and either the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams or the construction of pads for farm buildings, the landowner must submit a PCN to the Corps, and the District Engineer will determine if the proposed work is authorized by NWP

40. For those activities that require notification, the District Engineer will determine if the proposed work will result in minimal adverse effects on the aquatic environment. If the proposed work will result in more than minimal adverse effects on the aquatic environment, discretionary authority will be exercised and an individual permit will be required.

One of the goals of the proposed modification of this NWP is to reduce duplication between the Corps and NRCS, reduce confusion, and provide some regulatory relief to agricultural producers. This is one of the goals of the Administration's wetlands plan, which is to make the wetlands regulatory program fair, flexible, and effective. This NWP does not delegate the Corps responsibilities under Section 404 of the Clean Water Act to NRCS, but allows activities with minimal adverse effects on the aquatic environment to proceed without duplicate review by two Federal agencies. This NWP does not require NRCS to implement the Clean Water Act. It merely addresses certain situations where the Clean Water Act and Swampbuster have duplicate requirements. District engineers will monitor the use of NWP 40 to assess the cumulative adverse effects on the aquatic environment, through reports submitted by landowners and those activities reviewed by the Corps on a case-by-case basis.

This proposed modification of NWP 40 is not contrary to the CRP and the WRP, which are voluntary programs. Participation in these programs by agricultural producers is not mandatory. Although the CRP and WRP are important conservation programs, it is important to note that agricultural producers may need to alter their land to increase production and remain competitive with other agricultural producers. NWP 40 authorizes activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to allow agricultural producers to increase production, as long as those activities have minimal adverse effects on the aquatic environment, individually or cumulatively. Both the Corps and NRCS can require compensatory mitigation to offset losses of waters of the United States authorized by this NWP to ensure that the adverse effects on the aquatic environment are minimal. It is important to note that draining and filling wetlands to increase agricultural production is often reversible. Agricultural lands that were previously wetlands are often the easiest to restore because they require less effort and expense to restore than wetlands that



were filled to create residential subdivisions or commercial facilities. Although this NWP may be used to fill a particular area to increase agricultural production, that area may be restored at a later time.

A commenter stated that the proposed modification is too restrictive and should be equitable with other NWPs, because agricultural activities and other more potentially destructive activities, such as the construction of residential, commercial, and institutional developments, should be held to the same standard. One commenter requested that the preamble to the NWP state that the use of the NWP will help achieve the goal of the Clean Water Action Plan of "no net loss" and ensure consistency with the Federal Agriculture Improvement and Reform Act of 1996, which exempts wetland conversions from the Swampbuster provisions of the Food Security Act as long as wetland functions, values, and acreage are fully offset. One commenter recommended modifying the NWP to be consistent with the limits associated with the minimal effects criteria regionally established under the Farm Bill. A number of commenters believe that the proposed modification of NWP 40 is unnecessary because ongoing farm operations in farmed wetlands are exempt under Section 404(f) of the Clean Water Act.

We agree that the modifications to NWP 40 proposed in the July 1, 1998, **Federal Register** notice placed greater restrictions on agricultural producers than proposed NWP A (now designated as NWP 39) did on residential, commercial, and institutional developers. We have attempted to make NWPs 39 and 40 more equitable in terms of applicable waters and determining what constitutes a single and complete project for these NWPs. Both NWPs 39 and 40 authorize activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. We have retained the separate provisions for playas, prairie potholes, and vernal pools from NWP 40, with an indexed acreage limit and a maximum limit of 1 acre, which is achieved for farm tracts 90 acres or greater in size. For proposed NWP 39, the single and complete project will be based on project area. For the proposed modification of NWP 40, a single and complete project will be based on farm tract size. Farm tracts will be identified by the Farm Service Agency. The definition of the term "farm" based on reporting to the Internal Revenue Service has been removed. In the "Definitions" section of the NWPs, the term "farm" has been

replaced with "farm tract." The definition of the term "farm tract" has been taken from the Farm Service Agency regulations at 7 CFR Part 718.2.

In accordance with the provisions of the Food Security Act, compensatory mitigation will be required for activities authorized by paragraph (a) of this NWP to fully offset losses of non-tidal wetlands. District engineers will determine on a case-by-case basis if compensatory mitigation is necessary to offset losses of waters of the United States resulting from activities authorized by paragraphs (b), (c), and (d) of this NWP to ensure that those activities result in minimal adverse effects on the aquatic environment. NRCS and the Corps, in cooperation with EPA, FWS, and NMFS, will develop joint compensatory mitigation guidance to provide consistency in compensatory mitigation requirements necessary for the implementation of NWP 40. Since the proposed modification of NWP 40 is intended to have national applicability, it is impractical to modify the NWP to be consistent with local minimal effects criteria established regionally under the Farm Bill. This NWP is applicable in all non-tidal wetlands, not just farmed wetlands. The conversion of waters of the United States to another use is not exempt under Section 404(f) of the Clean Water Act, which makes these modifications to NWP 40 necessary to satisfy the requirements of Section 404.

**Activities Authorized by NWP 40:** One commenter supported the intent of the proposed modification, but stated that the additional activities should be authorized by another NWP, not by modifying the existing NWP 40. Another commenter stated that a separate NWP should be issued to authorize the installation of drainage tiles and drainage ditches, and that the structure of this new NWP should be more like the proposed NWP for residential, commercial, and institutional activities. A commenter suggested that NWP 39 should be used instead of NWP 40 to authorize discharges in waters of the United States to increase agricultural production. One commenter recommended limiting the NWP to maintaining farm acreage, not expanding productive farm area. Two commenters requested the removal of mechanized landclearing from the list of activities authorized by the NWP, stating that only activities in cropland should be authorized by the NWP. Two commenters stated that mechanized landclearing should be considered exempt under Section 404(f)(1) of the Clean Water Act and not included in the NWP. One commenter stated that the

proposed modification to NWP 40 illegally brings two Farm Bill exemptions into the Federal wetlands program, namely "categorical minimal effects" and "minimal effects mitigation."

We disagree that there should be a separate NWP for activities that increase agricultural production. We believe that it is more appropriate to modify NWP 40, which previously authorized only the construction of building pads and foundations for farm buildings in farmed wetlands. The purpose of the proposed modification of NWP 40 is to authorize all activities for increasing agricultural production and constructing farm buildings. By including all of these activities in a single NWP, there will be less confusion for the regulated public and district engineers will be better able to assess the adverse effects on the aquatic environment for single and complete projects. We are proposing to make the modifications to NWP 40 similar to the proposed NWP 39 by utilizing indexed acreage limits and by making both NWPs applicable to non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters. The indexed acreage limit for NWP is applicable only for discharges resulting in the loss of playas, prairie potholes, and vernal pools, with a maximum acreage limit of 1 acre. We are proposing to utilize a simple 2 acre limit for discharges into other types of non-tidal wetlands to increase agricultural production. The proposed modification of NWP 40 has a smaller maximum acreage limit (*i.e.*, 2 acres) than NWP 39 (*i.e.*, 3 acres). The lower maximum acreage limit for NWP 40 is necessary to ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment, because district engineers will not receive notifications for many activities authorized by this NWP. Division and district engineers cannot impose regional or case-specific conditions on paragraph (a) of this NWP, so that NRCS can implement this part of NWP 40 consistently throughout the country. In addition, district engineers cannot revoke authorizations for activities authorized by paragraph (a) of NWP 40 on a case-by-case basis, but division engineers can revoke the provisions of paragraph (a) of NWP 40 within a state, geographic region, or a particular waterbody. However, regional conditions can be added to paragraphs (b), (c), and (d) of NWP 40, since the Corps is responsible for reviewing these activities. We have changed the applicable waters for the proposed modification of NWP 40 to be consistent

with most of the new NWP. Proposed NWP 39 cannot be used to increase agricultural production instead of NWP 40, because NWP 39 specifically authorizes only building pads and attendant features for residential, commercial, and institutional developments. Activities that increase agricultural production are not included in NWP 39, although the construction of a farm house used as a residence on a farm may be authorized by NWP 39.

Mechanized landclearing may result in a discharge of dredged or fill material into waters of the United States and require a Section 404 permit. We disagree that the NWP should be limited to areas currently used as cropland. It would be inequitable to agricultural producers to limit use of the NWP only to those areas currently used for agricultural production. Mechanized landclearing is not exempt under Section 404(f)(1) if it converts a water of the United States into a use to which it was not previously subject, such as the mechanized landclearing of a forested wetland to convert it into cropland (see Section 404(f)(2) of the Clean Water Act).

Categorical minimal effect determinations and minimal effects mitigation are provisions of the 1996 Farm Bill and 1985 Food Security Act. The categorical minimal effects determination is not an exemption from the permit requirements of Section 404 of the Clean Water Act. It merely allows the landowner to maintain USDA farm program eligibility for activities that convert a wetland to increase agricultural production, provided the activity has minimal effects on the hydrological and biological functions of the wetlands in the vicinity.

One commenter requested clarification of the NWP to state that it authorizes activities for the purposes of improving production on existing agricultural land, because the commenter believes that the proposed wording of the NWP allows conversion of land not previously used for agricultural purposes. Another commenter recommended that, in addition to activities regulated under the National Food Security Act Manual (NFSAM), those activities considered exempt under NFSAM (*i.e.*, where the land is not currently in agricultural production) such as the construction of grassed waterways, storage facilities, and impoundments should be authorized by the NWP. One commenter recommended that the NWP authorize the construction of farm ponds, when they are subject to the recapture provision of Section 404(f)(2) and are not exempt from the Clean Water Act.

The proposed modification of NWP 40 authorizes discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the purpose of increasing agricultural production, including areas not currently used for agricultural production. This NWP authorizes the construction of grassed waterways, storage facilities, and impoundments in non-tidal wetlands, provided their purpose is to increase agricultural production. In certain circumstances, the construction of farm ponds is exempt from Section 404 permit requirements. The proposed modification of this NWP authorizes the construction or expansion of farm ponds used for agricultural purposes (*e.g.*, irrigation ponds) that are not eligible for the Section 404(f) exemption, if the farm ponds are constructed in non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters, and do not involve discharges of dredged or fill material into stream beds or other open waters. The only activity authorized by this NWP in open waters is the relocation of non-tidal streams that have been channelized as drainage ditches. The construction of farm ponds in stream beds or the construction of ponds for purposes other than increasing agricultural production may be authorized by other NWPs, a regional general permit, or an individual permit.

*Scope of the NWP:* A number of commenters recommended limiting the NWP only to wetlands that are currently frequently cropped. Two commenters suggested that the NWP should authorize discharges only in isolated wetlands and should not authorize draining of wetlands. Several commenters stated that agricultural activities in naturally vegetated playas, prairie potholes, and vernal pools should not be included in the NWP.

Limiting the scope of applicable waters of the proposed modification of this NWP only to frequently cropped or farmed wetlands would be inequitable to farmers, when compared to the applicable waters for NWP 39. District engineers will monitor the use of this NWP to ensure that it authorizes only those agricultural activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, that result in minimal cumulative adverse effects on the aquatic environment. District engineers will receive notification for discharges into non-tidal wetlands by non-participants in USDA programs if the discharge results in the loss of greater than 1/4 acre of non-tidal wetlands, the construction of building pads for farm

buildings, and/or the relocation of greater than 500 linear feet of existing serviceable drainage ditches constructed in non-tidal streams. These notifications will be reviewed by District Engineers to ensure that the proposed work will result in minimal adverse effects on the aquatic environment. We have not removed the specific provisions relating to playas, prairie potholes, and vernal pools to ensure that discharges into those types of non-tidal wetlands do not result in more than minimal adverse effects on the aquatic environment. To ensure that the provisions for playas, prairie potholes, and vernal pools are implemented accurately for those wetland types, we are proposing definitions for these terms in the "Definitions" section of the NWPs. The proposed definitions are based on geographic, hydrological, and vegetation characteristics. The proposed definitions were derived from information from technical sources on identifying and delineating wetlands. We are proposing to modify the applicable scope of waters for NWP 40 from all non-tidal waters of the United States, as proposed in the July 1, 1998, **Federal Register** notice, to non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, to make it consistent with most of the new NWPs.

*Acreage limits:* Comments on acreage limits for the proposed modification of this NWP are divided into two categories. One category addresses the basis for determining acreage limits for a single and complete project (*i.e.*, whether NWP 40 should apply to one entire farm or to a single farm tract). The other category of comments addresses the maximum acreage loss authorized by this NWP.

Two commenters favored the use of the term "farm" to define the single and complete project for the NWP. One commenter objected to the use of "farm" in the NWP, stating that a person who owns more than one farm could use the NWP at each farm for the maximum acreage limit. One commenter stated that the proposed definition of "farm" is confusing and would unfairly restrict the use of NWP 40. A few commenters stated that acreage limits should not be linked to farm size. One of these commenters objected to basing the acreage limit on the Internal Revenue Service's definition of a "farm" because NRCS personnel would have to review copies of the landowner's tax returns to verify the number of tracts with the farm. This commenter recommended that the Corps determine single and complete projects for NWP 40 based on "farm tracts" as identified by the Farm Service Agency. Other commenters

suggested applying the acreage limit to the individual USDA field number or the individual parcel. One commenter requested that the aggregate acreage limit apply only to the property, not the farmer. One commenter advocated the use of "farm tracts" for this NWP because the farm tract, not the farm, is the basic unit of land ownership. This commenter stated that many farms consist of different tracts geographically separated from each other. Farm tracts remain constant in size and configuration, but may be sold, leased, or traded between farms. A couple of commenters opposed the use of "farm tracts" to determine the acreage limit of NWP 40. One of these commenters reasoned that the use of farm tracts would result in substantial losses of wetlands because of multiple use of the NWP by a large farm operation that owns many farm tracts. One commenter stated that impacts to waters of the United States are not dependent on farm size.

One of the objectives of the Administration is to make the Federal wetlands programs fair, flexible, and effective. Basing the single and complete project on Internal Revenue Service reporting of farms for the proposed modification of NWP 40 results in unfair restrictions on agricultural producers compared to residential, commercial, and institutional developers. Developers often own more than one parcel of land and may have several development projects occurring at the same time. The Corps considers each development a single and complete project, as long as each development has independent utility. Each development can qualify for separate NWP authorization even though the land may be owned by the same developer, if the proposed work meets the terms and conditions of the NWP and if the individual or cumulative adverse effects on the aquatic environment are minimal. We are proposing to base the single and complete project and indexed acreage limit of NWP 40 on farm tract size, instead of farms. The use of farm tracts for NWP 40 provides equitable treatment to agricultural producers, and each farm tract would be considered a single and complete project for the purposes of the NWPs.

Several commenters stated that the proposed acreage limits are too high. Suggested acreage limits were 1,  $\frac{1}{3}$ ,  $\frac{1}{4}$ , and  $\frac{1}{10}$  acre. A few commenters suggested higher acreage limits. Several commenters stated that the proposed 3 acre limit is adequate. In the July 1, 1998, **Federal Register** notice, we requested comments on the use of a

simple acreage limit versus a sliding scale for this NWP. Most commenters opposed the use of a sliding scale or indexing to determine the acreage limit for this NWP. One of these commenters stated that the indexing scheme proposed in the July 1, 1998, **Federal Register** notice is too burdensome, confusing, and without ecological justification. Two commenters favored the use of a sliding scale, but recommended basing the sliding scale on a percentage, either as 5% of the wetlands on a farm regardless of farm size or 2% of the project size, if the project is greater than 5 acres in size.

A number of commenters stated that the acreage limit for NWP 40 should be the same as for the NWP for residential, commercial, and institutional development activities (*i.e.*, NWP 39). One of these commenters stated that the acreage limits proposed in the July 1, 1998, **Federal Register** notice are inequitable compared to the acreage limits developers are subject to in NWP 39, particularly to farmers who own smaller farms. This commenter also said that using acreage limits and farm size as a substitute to determine minimal adverse effects has not been applied in a consistent manner between similar activities, such as development or agricultural projects.

Based on our review of comments received in response to the July 1, 1998, **Federal Register** notice, and to provide agricultural producers and residential, commercial, and institutional developers with equitable NWPs, we are proposing to utilize a simple 2-acre limit for discharges into non-tidal wetlands and an indexed acreage limit for discharges into playas, prairie potholes, and vernal pools that are authorized by paragraphs (a) (for USDA program participants) or (b) (for non-participants in USDA programs) of NWP 40. The indexed acreage limit for playas, prairie potholes, and vernal pools has a maximum limit of 1 acre per farm tract. A lower maximum acreage limit (*i.e.*, 2 acres per farm tract) was selected to ensure that the NWP authorizes activities only with minimal adverse effects on the aquatic environment because preconstruction notification to the District Engineer is not required for activities authorized by paragraph (a) of this NWP (unless the project proponent is also requesting authorization for the construction of foundations for farm buildings or the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams). We are proposing a 2-acre limit for discharges into non-tidal wetlands (except for playas, prairie potholes, and vernal pools) to increase production.

For the proposed modification of NWP 40, the indexed acreage limit for discharges into playas, prairie potholes, and vernal pools is based upon 1% percent of the farm tract size, with a base limit of  $\frac{1}{10}$  acre. The maximum acreage limit of 1 acre is achieved for farm tracts 90 acres or greater in size. We believe that the formula for the indexed acreage limit will be easy to use. An indexed acreage limit helps encourage avoidance and minimization of losses of waters of the United States.

One commenter opposed the use of an aggregate acreage limit for NWP 40, stating that the requirement for mitigation replaces the need for an acreage limit for activities authorized by the NWP. A couple of commenters said that the Corps cannot enforce the acreage limits of this NWP because land is reapportioned among farm tracts on an annual basis and the Corps does not have access to the farm tract history necessary to ensure compliance with the acreage limits.

The acreage limit for NWP 40, as for all other NWPs, is based on a national determination that the NWP will authorize most activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. For certain activities, preconstruction notification is required to allow district engineers to review these activities on a case-by-case basis and determine if they will result in minimal adverse effects on the aquatic environment, individually or cumulatively. Compensatory mitigation cannot be used to increase the acreage limit for an NWP, but discharges of dredged or fill material into waters of the United States to construct compensatory mitigation are not included in the calculation of acreage loss of waters of the United States to determine if the single and complete project exceeds the acreage limit of NWP 40. It is our understanding that farm tract designations change only when the land is subject to a real estate transaction, such as when a farmer subdivides a farm tract to sell a part of that farm tract to another person.

Paragraph (a) of the proposed NWP 40 modification published in the July 1, 1998, **Federal Register** notice authorized activities that qualify for a minimal effects exemption under the Food Security Act and National Food Security Act Manual, provided the discharge does not cause the loss of greater than 1 acre of non-tidal wetlands or greater than  $\frac{1}{3}$  acre of playas, prairie potholes, and vernal pools. One commenter supported the inclusion of minimal effects determinations in NWP 40. Two commenters opposed this

provision of the NWP. One commenter stated that the farm owner should not have to obtain an authorization from both the Corps and NRCS for work in wetlands. This commenter believes that the Corps should make the minimal effects determination and that USDA program participants should get an NWP authorization before they can get a minimal effects determination. Another commenter requested that the minimal effects determination should include non-participants in USDA programs. One commenter stated that it is inappropriate for the Corps to apply acreage limits under this part of the NWP to activities that receive minimal effects determinations. Another commenter recommended that this portion of the NWP should be removed and replaced with regional conditions. One commenter believes that NRCS does not currently monitor the indirect or cumulative adverse effects of projects that are eligible for minimal effects determinations, and that this is contrary to the Clean Water Act's general permit criteria. This commenter stated that the minimal effects determination does not assess the value for a watershed. Three commenters recommended that NRCS should receive concurrence from the FWS and/or NMFS prior to issuing a minimal effects determination.

We are proposing to modify this NWP to authorize discharges in non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters, by USDA program participants and non-participants in USDA programs to increase agricultural production on a farm tract. For USDA program participants, the permittee must obtain an exemption or minimal effects with mitigation determination from NRCS and implement an NRCS-approved compensatory mitigation plan that fully offsets wetland losses. For non-participants in USDA programs, notification to the District Engineer is required for discharges resulting in the loss of greater than 1/4 acre of non-tidal wetlands to increase agricultural production. The District Engineer will determine on a case-by-case basis if the activities authorized by paragraph (b) will result in minimal adverse effects on the aquatic environment. Compensatory mitigation will normally be required for activities that require notification to ensure that they result in minimal adverse effects on the aquatic environment. The 2 acre limit for discharges into non-tidal wetlands and the indexed acreage limit for discharges into playas, prairie potholes, and vernal pools will ensure that the NWP authorizes only activities with minimal

adverse effects on the aquatic environment. District engineers will monitor the use of this NWP through postconstruction reports and preconstruction notifications submitted to the District Engineer. If the activities authorized by NWP 40 result in more than minimal cumulative adverse effects on the aquatic environment, division engineers can suspend the use of this NWP in the watershed or Corps district.

Paragraph (b) of the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** authorized activities in non-tidal wetlands, except for naturally vegetated playas, prairie potholes, and vernal pools for the purposes of increasing agricultural production. Two commenters recommended using a simple acreage limit, but two other commenters favored using a sliding scale. Two commenters opposed the proposed 3 acre limit, because they believe it is too high. One commenter stated that the proposed indexed acreage limit was too low, especially if mitigation is required. One commenter recommended a 1 acre limit and another commenter recommended a 1/3 acre limit. One commenter recommended basing the acreage limit on a sliding scale of 2% of the entire property, with a maximum of 3 acres. One commenter stated that this part of the NWP should apply to all non-tidal wetlands, with no exclusions for playas, prairie potholes, and vernal pools.

We are proposing to modify NWP 40 to authorize agricultural activities in all non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters. For discharges into non-tidal wetlands to increase production, we are proposing a simple acreage limit of 2 acres and an indexed acreage limit for discharges into playas, prairie potholes, and vernal pools. The indexed acreage limit for discharges into playas, prairie potholes, and vernal pools will have a maximum acreage limit of 1 acre. The acreage limit for the proposed modification of this NWP will be based on farm tracts.

Paragraph (c) of the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** authorized activities in naturally vegetated playas, prairie potholes, and vernal pools for the purposes of increasing agricultural production. Two commenters concurred with the proposed acreage limit of 1 acre. One commenter objected to the lower acreage limit for activities in playas, prairie potholes, and vernal pools. One commenter stated that this portion of the NWP should apply only to frequently cropped playas, prairie potholes, and vernal pools and that

naturally-vegetated wetlands should not be included in the NWP. Another commenter recommended including pocosins in this paragraph of the NWP. A commenter stated that the proposed 1 acre limit is too high. One commenter believes that a higher acreage limit should be used because the permittee is required to provide mitigation. Two commenters recommended using a simple acreage limit instead of a sliding scale acreage limit.

As previously discussed, we are proposing to modify NWP 40 to include playas, prairie potholes, and vernal pools with an indexed acreage limit.

#### *Construction of Farm Buildings:*

Paragraph (d) of the proposed modification of NWP 40 contained the original provisions of NWP 40 and authorized discharges into wetlands, excluding playas, prairie potholes, and vernal pools, that were in agricultural production prior to December 23, 1985, for the construction of building pads for farm buildings, with an acreage limit of 1 acre.

One commenter recommended increasing the acreage limit to 2 acres. Another commenter recommended an acreage limit of 1/4 acre, to be consistent with the acreage limit proposed for NWP 29 in the July 1, 1998, **Federal Register** notice. One commenter stated that non-agricultural buildings such as houses should not be authorized by this NWP. Three commenters stated that the December 23, 1985, date should be removed from this part of the NWP, based on the rationale that any area under agricultural production prior to that date should not be considered a jurisdictional wetland and subject to the limitations of the NWP.

We are proposing to remove the exclusion for playas, prairie potholes, and vernal pools from this part of NWP 40. This provision is now in paragraph (c) of the proposed modification of this NWP, with a requirement that the permittee notify the District Engineer in accordance with General Condition 13. We are proposing to maintain the 1 acre limit for this activity. One acre is adequate for the construction of most farm buildings. This acreage limit need not be consistent with the acreage limit of NWP 29, since farm buildings are constructed for the operation of the farm, not for residences. Farm buildings, such as barns, usually must be larger than houses to fulfill their purposes. In addition, this paragraph of NWP 40 encompasses a much smaller geographic scope than the other provisions of NWP 40, since it is limited to farmed wetlands. Paragraph (c) of NWP 40 authorizes discharges only in farmed

wetlands for the construction of building pads for farm buildings, whereas NWP 29 authorizes discharges of dredged or fill material into all non-tidal wetlands. This NWP does not authorize the construction of non-agricultural buildings, such as residences. We do not agree that the December 23, 1985, date should be removed from the NWP because there are jurisdictional wetlands that have been used for agricultural production since that date. Although they are considered farmed wetlands, they are still waters of the United States and subject to Clean Water Act Section 404 permit requirements.

*Drainage Ditch Relocations:*

Paragraph (e) of the proposed NWP 40 modification published in the July 1, 1998, **Federal Register** notice authorized the relocation of existing serviceable drainage ditches and previously substantially manipulated intermittent and small perennial streams. Two commenters supported the proposed provision of the NWP. Several commenters opposed this provision. Two commenters stated that the relocation of streams or drainage ditches may result in substantial adverse effects on the aquatic environment. One commenter recommended modification of this provision to limit the work only to the relocation of currently serviceable drainage ditches or manipulated streams that are not so degraded as to require reconstruction. Another commenter stated that it is unclear which other waters of the United States are included in this paragraph of the NWP. Two commenters suggested that this condition should not apply to perennial streams. Two commenters requested that the Corps define the term "substantially manipulated stream."

The purpose of this provision of the proposed modification of NWP 40 is to authorize relocation of drainage ditches constructed in waters of the United States to increase agricultural production. Based on comments received in response to our proposed definition of the term "drainage ditch," and in an effort to clarify this provision of NWP 40, we are changing the language of this paragraph and designating it paragraph (d). Paragraph (d) of the proposed modification of NWP 40 authorizes discharges of dredged or fill material to relocate existing serviceable drainage ditches constructed in non-tidal streams. The relocation of existing serviceable drainage ditches constructed in non-tidal wetlands can be authorized by paragraphs (a) or (b) of this NWP. Notification to the District Engineer is required for the relocation of greater

than 500 linear feet of drainage ditches constructed in non-tidal streams. Since drainage ditches can be constructed in wetlands or by channelizing perennial, intermittent, or ephemeral stream beds to improve drainage, we have removed the phrase "\* \* \* and previously substantially manipulated intermittent and perennial streams" and replaced it with "\* \* \* constructed in non-tidal streams" to reflect the fact that drainage ditches may have been constructed in streams. As a result of this change, it is unnecessary to provide a definition for the term "substantially manipulated stream." Relocation of drainage ditches constructed in uplands does not require a Section 404 permit because these ditches are not waters of the United States, except in certain circumstances.

We do not believe that the relocation of existing serviceable drainage ditches constructed in waters of the United States will result in more than minimal adverse effects on the aquatic environment. The term "existing serviceable drainage ditches" adequately describes the limitation of paragraph (d) to only those drainage ditches that do not require reconstruction due to abandonment and neglect.

One commenter asked why this provision was included in the NWP, since ditch maintenance is exempt under Section 404(f) of the Clean Water Act. One commenter stated that other NWPs should be used to authorize work in rivers and streams on agricultural lands. One commenter said that a provision should be added to this paragraph requiring the land to remain in agricultural use if the ditches are maintained. Another commenter recommended adding a 500 linear foot limit to this part of the NWP.

The Section 404(f) exemption for drainage ditch maintenance does not apply to the relocation of drainage ditches. To qualify for the exemption, the landowner cannot change the location of the drainage ditch or modify it beyond the original design dimensions and configuration. Since the relocation of drainage ditches constructed in non-tidal streams can increase agricultural production, it would be inappropriate to require the use of other NWPs to authorize this activity. Other activities in waters of the United States on agricultural lands, such as bank stabilization, may be authorized by other NWPs, regional general permits, or individual permits. We cannot add a provision to paragraph (d) requiring the landowner to keep the land in agricultural use if the ditches are relocated because such a provision is beyond the Corps regulatory authority

and unenforceable. We do not believe that is necessary to impose a 500 linear foot limit on relocating drainage ditches constructed in waters of the United States because district engineers will receive a PCN for the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams to determine if the proposed work will result in minimal adverse effects on the aquatic environment and can qualify for authorization under this NWP.

*Notification:* We proposed requiring notification for activities that cause the loss of greater than  $\frac{1}{3}$  acre of non-tidal wetlands or the relocation of greater than 500 linear feet of drainage ditches and previously substantially manipulated intermittent and small perennial streams. One commenter recommended a 1 acre PCN threshold. Another commenter recommended a  $\frac{1}{4}$  acre PCN threshold, with agency coordination. One commenter requested that PCNs should be required for all activities authorized by this NWP. Another commenter stated that the PCN requirements for NWP 40 should be the same as for NWP 39. For ditch and stream relocations, recommended PCN thresholds included 150, 200, and 3,000 linear feet. One commenter requested agency coordination for all wetland losses of greater than  $\frac{1}{3}$  acre and all ditch and stream relocations.

Notification to the District Engineer is required for discharges by non-participants in USDA programs to increase agricultural production that result in the loss of greater than  $\frac{1}{4}$  acre of non-tidal wetlands, the construction of building pads for farm buildings, and for the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams. For USDA program participants, notification to the District Engineer is required if the proposed work involves activities in non-tidal wetlands and the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams or the construction of building pads for farm buildings, agency coordination will be conducted for activities requiring notification to the District Engineer if the proposed work results in the loss of greater than 1 acre of waters of the United States.

*Mitigation:* Paragraphs (b) and (c) of the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** notice required submission of a mitigation plan to fully offset wetland losses. One commenter stated that the Corps should not require avoidance and minimization for potential losses of frequently cropped, previously altered farmed wetlands, because mitigation sequencing is not required under the

Farm Bill. In other words, the 404(b)(1) guidelines are not applicable to farmed wetland conversions and compensatory mitigation will be required by NRCS. A few commenters recommended that both the Corps and NRCS approve the required compensatory mitigation. Two commenters stated that the required compensatory mitigation should be reviewed by all agencies, not just NRCS. One commenter requested that any compensatory mitigation requirements for this NWP be the same as for all Corps permits.

Although mitigation sequencing may not be required under the 1996 Farm Bill, discharges of dredged or fill material into waters of the United States, including farmed wetlands, require a Section 404 permit, which may be authorized by NWPs. General Condition 19 of the NWPs requires the permittee to avoid and minimize impacts to waters of the United States on-site to the maximum extent practicable. Compensatory mitigation is required for all activities authorized by paragraph (a) of this NWP. For activities requiring notification to the District Engineer, compensatory mitigation may be required to ensure that activities authorized by this NWP result in minimal adverse effects on the aquatic environment. For the purposes of this NWP, compensatory mitigation used to satisfy the requirements of NRCS will be accepted by the Corps. To provide consistency for compensatory mitigation requirements and reduce confusion, NRCS and the Corps will develop, in cooperation with EPA, FWS and NMFS, joint mitigation guidance for this NWP.

One commenter expressed concern that compensatory mitigation requirements will decrease the available amount of farm land and requested that the Corps annually report the amount of farm land used as compensatory mitigation. Two commenters supported the requirement to fully offset losses of waters, but stated that the NWP should require a minimum 1:1 replacement ratio. Another commenter said that compensatory mitigation should be limited to the enhancement, restoration, and creation of aquatic resources and exclude preservation, because the Farm Bill does not authorize preservation and NRCS policy does not allow preservation for Swampbuster purposes.

We do not believe that the compensatory mitigation requirements of this NWP will substantially decrease the amount of available farm land because landowners have the option of avoiding impacts to waters of the United States, which would decrease the amount of land needed for wetland restoration and creation. In addition,

compensatory mitigation is often conducted on farm land with marginal productivity, due to soil characteristics or wetness, that has the highest potential for wetland restoration. We disagree that preservation should be prohibited as a means of providing compensatory mitigation for activities that require notification to the Corps. Preservation is an extremely important method for protecting rare and high value waters of the United States from future losses.

*Use of NWP 40 with Other NWPs:* One commenter stated that the portion of the preamble to the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** that prohibits the future use of NWP A (i.e., NWP 39) if the farm is developed by the farmer or sold, should be included in the text of NWP 40. However, this commenter questions the Corps ability to monitor compliance with this provision. Another commenter suggested that NWP 40 should not be used with NWPs 39 or 44. One commenter recommended a 3 acre stacking limit. Another commenter suggested that any use of this NWP with other NWPs should be subject to the lowest acreage limit allowed for any of the NWPs.

We have incorporated into NWPs 39 and 40 the provision addressing the future use of NWP 39 on the farm if that farm or portions of the farm are converted to residential, commercial, or institutional developments by the farmer or sold to a developer. The indexed acreage limit of paragraph (a) of NWP 39 cannot be exceeded, based on the project area and the subdivision provision of NWP 39. The Corps will rely on its records to track the use of NWPs 39 and 40 for a particular parcel of land. The use of more than one NWP for a single and complete project is addressed in the proposed modification of General Condition 15.

*Other Comments:* A number of commenters objected to allowing the use of NWP 40 on a farm every 5 years, because it would result in substantial cumulative losses of waters. One commenter recommended that the NWP should be used only once per project and if the land is no longer used for agricultural production the fill should be removed and the new use re-permitted. Several commenters believe that NWP 40 should be subject to the same conditions as the NWP for residential, commercial, and institutional development activities and the NWP for mining activities. One commenter recommended including a reference to the Memorandum of Agreement between the Corps and NRCS concerning wetland delineations.

One commenter objected to this NWP, stating that it does not address indirect impacts to waters caused by converting wetlands to agricultural use and cited water quality problems that can be caused by ditching activities. Another commenter recommended that the NWP include a requirement for vegetated buffers around streams on farm land, to filter out pollutants and nutrients and prevent erosion.

We have removed the provision allowing the use of NWP 40 on a farm every five years, to make it more consistent with other NWPs. Restricting the use of NWP 40 to a single and complete farm operation will avoid substantial losses that could occur due to repeated use of this NWP every 5 years. We disagree with the recommendation that land no longer in agricultural use should be restored and any new uses re-permitted. Such a requirement is impractical, places unnecessary burdens on the regulated public and the Corps, and provides no benefits to the aquatic environment. Former wetlands on agricultural lands may be used for aquatic habitat restoration, including mitigation banks and in lieu fee programs.

We have attempted to provide consistency between proposed NWPs 39, 40, and 44, but due to the differences in the types of activities authorized by these NWPs and their potential adverse effects on the aquatic environment, it is impractical to make the conditions for these NWPs identical. We do not believe that it is necessary to cite the Memorandum of Agreement between the Corps and NRCS concerning wetland delineations in this NWP, partly because it is currently undergoing revisions and it is not essential to the implementation of NWP 40. In accordance with the proposed modification of General Condition 9, district engineers can require a water quality management plan for activities authorized by this NWP, if the 401 certification does not require such a plan or address potential adverse effects to water quality. Both the water quality management plan and General Condition 19 allow the District Engineer to require, as compensatory mitigation, the establishment and maintenance of vegetated buffers adjacent to streams.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1

acre of impaired waters, including adjacent wetlands. NWP 40 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates that the activity will not result in further impairment of the waterbody. General Condition 27 prohibits the use of NWP 40 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. To allow NRCS to implement paragraph (a) of this NWP consistently throughout the country, division engineers cannot add regional conditions to paragraph (a) of NWP 40. However, division engineers can add regional conditions to paragraphs (b), (c), and (d) of NWP 40, since the Corps is responsible for reviewing these activities.

#### 41. Reshaping Existing Drainage Ditches

In the July 1, 1998, **Federal Register** notice, we proposed a new NWP (designated as NWP F) to authorize discharges of dredged or fill material into non-Section 10 waters of the United States for reshaping existing drainage ditches constructed in waters of the United States by altering the cross-section of the ditch to benefit the aquatic environment.

Comments both in support and in opposition of this NWP were received, but most commenters recommended conditions to minimize potential impacts. Those in support of the NWP believe that it would be acceptable with regional conditions or Section 401 water quality certification conditions and that it will provide oversight or enforcement in order to reduce abuse in rural areas. Comments opposing the NWP ranged from no permit should be required at all, as this is an activity which is exempt from Section 404 regulation, to all activities in all ditch types should be prohibited in order to prevent degradation of aquatic resources. One commenter stated that Corps regulation of wet weather conveyances would be a huge paperwork burden contributing little to environmental quality. Several commenters stated that it is not always in the overall best interest of the aquatic resource to attempt to achieve improvements in water quality by simply reshaping the banks of the drainage ditch. Many commenters who expressed opposition to the proposed new and modified NWPs in general

stated that this NWP was an exception because it would meet the minimal effect requirement.

Many comments regarding jurisdiction were received. One commenter requested a discussion on jurisdiction as some Corps personnel take jurisdiction over upland ditches based on wetland parameters. Some commenters requested the Corps further clarify the distinction between maintenance work and work that would be authorized by this permit. Some commenters recommending modifying the text of the NWP to exclude ditch maintenance projects while others recommended the new NWP include all ditches that are man-made, regardless of whether or not maintenance has been performed. One commenter suggested that permits should never be required for minor drainage activities on agricultural land and for the maintenance of drainage ditches. Several commenters stated that roadside ditches are not waters of the United States even if they contain wetland vegetation. Many believe this permit authorizes work that is actually exempt from regulation. Other commenters proposed that the NWP should be applicable in Section 10, including tidal waters, as well. One commenter suggested that all natural perennial streams, channelized perennial streams, and/or rechannelized perennial streams should be excluded from this permit. Some commenters said that the permit should authorize the reconversion of abandoned ditches, while others stated that the Corps should stress that abandoned ditches may not be reconverted. Several commenters stated that this permit should provide authorization for reshaping obstructed channels. One commenter said that the permit should be rewritten to clarify that open drainage ditches, including channelized streams, cannot be considered abandoned as long as the maintenance authority exists and as long as all cropland draining to the ditch has not been abandoned. Another stated that this permit should not be used for streams that are called "ditches" or in channelized portions of streams that convey surface runoff and/or groundwater.

Several commenters believe the NWP should be more inclusive and should allow some realignment of the waterway if it is beneficial to the aquatic environment. One group recommended that ditch relocation should be allowed because when shopping centers are renovated or expanded, because the relocation of ditches is often the only activity regulated by the Corps. Several commenters recommended the permit

should allow for a change in centerline location when the activity pertains to roadside ditches where transportation agencies are flattening the side slopes for safety purposes. Additionally, minor relocation of the ditch could have as much or more of a benefit on improving water quality and should be allowed under this permit. Some commenters requested that deepening of ditches should be included because some ditches were originally dug without enough grade to keep them from accumulating excess sediment. Other commenters stated that deepening of drainage ditches should not be allowed beyond the original configurations due to the resultant additional wetland drainage. One commenter suggested that this permit should not be used to authorize diversion or drainage of wetlands or the expansion of the drainage ditch size. And lastly, one commenter recommended that this permit be broadened to include all reshaping that might not be exempt as maintenance.

Discharges associated with the maintenance of drainage ditches constructed in waters of the United States are exempt from regulation under Section 404, provided the drainage ditch is returned to its original dimensions and configuration (see 33 CFR Part 323.4(a)(3)). However, the modification or new construction of drainage ditches in waters of the United States requires a Section 404 permit. Since the maintenance of drainage ditches to their original dimensions and configurations is exempt from Section 404 permit requirements, the purpose of the proposed NWP is to encourage reshaping of ditches in a manner that provides benefits to the aquatic environment. This NWP is limited to reshaping currently serviceable drainage ditches constructed in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not change the capacity or location of the drainage ditch. We have changed the applicable waters for this NWP to make it more consistent with most of the proposed NWPs. The centerline of the reshaped drainage ditch must be in essentially the same location as the centerline of the existing ditch. The proposed NWP does not authorize reconstruction of drainage ditches that have become ineffective through abandonment or lack of regular maintenance. This NWP authorizes discharges to grade the banks of ditches at a gentler slope than they were originally constructed for the purpose of reducing erosion and decreasing sediment transport down the ditch by



trapping sediments. Shallower slopes may increase the amount of vegetation along the bank of the ditch, which can decrease erosion, increase nutrient and pollutant uptake by plants, and increase the amount of habitat for wildlife. We believe that the deepening and/or widening of a ditch, allowing the centerline to be relocated, and allowing abandoned ditches to be reconverted could result in more than minimal adverse effects on the aquatic environment.

Several commenters suggested this permit should be removed from consideration until questions concerning the Tulloch Rule are resolved, because a landowner does not know if he or she is required to obtain a permit for excavation activities or reshaping existing ditches in wetlands that involve only "incidental fallback." The intent of this NWP is to authorize a certain activity that does not qualify for the maintenance exemption and is not for the purpose of increasing drainage capacity. We believe that this NWP should not be made more inclusive. The intent of this NWP is to authorize those ditch reshaping activities that involve more than "incidental fallback."

The proposed NWP may not be used to relocate drainage ditches or to modify drainage ditches to increase the area drained by the ditch (e.g., by widening or deepening the ditch beyond its original design dimensions or configuration) or to construct new drainage ditches if the previous drainage ditches have been neglected long enough to require reconstruction. This NWP does not authorize the channelization or relocation of streams to improve capacity of the streams to convey water. An individual permit, another NWP, or a regional general permit may authorize the construction of new drainage ditches or the reconstruction of drainage ditches. The proposed NWP does not authorize the maintenance or reshaping of drainage ditches constructed in navigable waters of the United States (non-tidal wetlands that are adjacent to tidal waters are also excluded). A Section 10 permit is required for the maintenance or modification of drainage ditches constructed in navigable waters of the United States. We believe that modifying this permit to authorize work in Section 10 waters could result in the authorization of activities that have more than minimal adverse effects on the aquatic environment.

One commenter recommended that NWP 27 should be expanded to include this activity while another suggested that it should be authorized under NWP

3. We do not agree that this activity is similar enough to the activities authorized by NWP 27 to warrant its inclusion in NWP 27. The purpose of NWP 27 is to restore, enhance, and create wetland and riparian areas and restore and enhance non-tidal streams and open waters. The purpose of proposed NWP 41 is to improve water quality. NWP 3 does not currently authorize reshaping of drainage ditches constructed in waters of the United States because this activity is not maintenance or repair. NWP 3 authorizes only maintenance activities with minor deviations from the previously authorized configuration; reshaping drainage ditches typically involves more than minor deviations in ditch cross sectional shape.

Many commenters believe that this NWP will result in the destruction of riparian habitat, specifically adjacent plant communities, and degrade water quality through the sidecasting of excavated material into wetlands. One commenter stated that the permit would prevent the natural process that increases wetland acreage through natural deposition of detritus and sediment in natural cycles that create wetlands. Other commenters believe that this NWP would cause the degradation of salmon and other fisheries habitat through the removal of woody debris and that this permit would authorize activities that reduce the geomorphic "complexity" of a stream causing it to become more uniform and adversely affect some fisheries. One commenter said that activities authorized by this NWP will have a detrimental effect on water quality due to a decrease in the velocity of the stream and it is possible that the stability of the stream could be compromised due to an unbalanced width/depth ratio. Several commenters stated that the permit would result in more rapidly draining farm files in the Midwest, which would increase scouring of banks and waterways and degrade water quality. One commenter said that the permit should be modified to state that channel reshaping cannot change the discharge rate or volume of the ditch.

To address concerns for vegetation adjacent to drainage ditches that may be removed as a result of the authorized activity, we have added a second notification requirement to the proposed NWP. The prospective permittee must notify the District Engineer if more than 500 linear feet of drainage ditch is to be reshaped. District engineers can review the proposed work and determine if the clearing of adjacent vegetation will result in more than minimal adverse

effects on the aquatic environment. We do not agree that the activities authorized by this NWP will disrupt the natural creation of wetlands or result in substantial degradation of aquatic habitat in streams. It is important to note that drainage ditch maintenance is exempt under Section 404(f). If a stream was channelized to improve drainage, the maintenance of the drainage ditch constructed in the stream is an exempt activity. The purpose of this NWP is to encourage landowners to maintain the drainage ditches constructed in waters of the United States in a manner that benefits the aquatic environment in most cases. Reshaping the drainage ditch with flatter side slopes will improve water quality and decrease the velocity of water flowing through the ditch. This NWP does not authorize modifications to the configuration of the drainage ditch to increase the area drained by the ditch. We believe that the proposed NWP adequately states this requirement. For those activities that require notification, district engineers can impose special conditions on the NWP authorization to ensure that the work results in minimal adverse effects or exercise discretionary authority and require an individual permit.

Some commenters noted that over time, through natural processes, the side slopes of ditches often become flatter than they were originally. In those cases, they say, it would not make sense to require a permit to maintain existing slopes, even if they are not the original slopes. This NWP does not require the landowner to maintain existing slopes, if they have eroded naturally.

Many commenters stated that this NWP contains vague language and that many terms require clear definition in the context of this permit, especially "maintenance," "modification," "reconstruction," "regular maintenance," "abandonment," and "loss of serviceability." One commenter stated the phrase "reshaping to benefit the aquatic environment" means significantly different things in different parts of the country.

We do not agree that definitions of the terms "maintenance," "modification," "reconstruction," and "regular maintenance," need to be provided with the proposed NWP. For the purposes of this NWP, the definitions of these terms are the same as the definitions in common usage today. District engineers will determine which ditch reshaping activities constitute maintenance and which activities constitute reconstruction. District engineers will determine when a particular drainage ditch is considered abandoned. Loss of

serviceability is considered to be the point at which a ditch no longer functions as a drainage ditch, and reconstruction is needed.

Several commenters asked how the original ditch conditions would be determined and how the Corps would distinguish between "reconstruction" and "maintenance to original dimensions." Some asked on what basis it would be determined that the proposed project would improve water quality and how the area of wetland drained by the original ditch would be determined. Also, some commenters questioned how one would determine that the proposed channel shape would not change discharge rate or volume. These commenters also asked who would be responsible for making these determinations.

District engineers will determine which activities constitute maintenance, reshaping, or reconstruction. They will use any available information to make these determinations, including field evidence. In general, changing the configuration of the drainage ditch to slow water flow and increase vegetation in the ditch will help improve water quality because the plants and microbes in the ditch will have more contact with the water and remove more nutrients and other compounds from the water. Slower water flow rates will also decrease the sediment load of the water. The area drained by the ditch can be determined by using available models, which consider factors such as soil type, ditch depth, ditch width, etc. The permittee may be required by the District Engineer to demonstrate that the proposed ditch reshaping activity will not increase the area drained by the ditch.

Another subject that generated many comments is the definition of a drainage ditch. One commenter stated that while some drainage ditches were clearly excavated, either through uplands or wetlands, for the purpose of creating a drainage channel where one did not exist previously, in many other cases, natural streams or drainageways were excavated to increase drainage capacity. In many instances, this took place decades ago and the waterway has been considered a "ditch" by adjacent landowners since that time. Some commenters believe that channelized streams should not be considered ditches and that this NWP should apply only to ditches constructed in uplands and wetlands. Others, however, noted that in some parts of the country, most functioning ditches were once natural waterways.

Understanding the differences in definitions of a ditch across the county,

we have included a definition of the term "drainage ditch" in the "Definitions" section of the NWP. This definition recognizes that drainage ditches may be constructed in uplands or waters of the United States, including wetlands and streams. A stream which has been channelized to improve surface drainage is considered a drainage ditch, for the purposes of the NWP program. District engineers will use judgement to determine whether a stream is a drainage ditch and eligible for the Section 404(f) exemption.

Some commenters stated that, to meet minimal adverse effect criteria, this NWP should have acreage and/or stream length limits. The recommended acreage limits ranged from  $\frac{1}{10}$  to 1 acre. Stream length limits ranged from zero to one mile. There were recommendations for compensatory mitigation requirements, such as requiring compensatory mitigation for impacts greater than 1 acre. Some commenters suggested PCN thresholds. Some commenters cautioned that when a PCN is not required, conditions are often ignored and that a PCN should always be required for work in drainage ditches. Other commenters stated that the NWP should not authorize discharges of excavated material into waters of the United States. One commenter believes the NWP should be conditioned to allow its use only once per watershed and should not be used in any area identified as having water quality problems or in any outstanding resource waters. At least one commenter stated that public review should be required for all work on public storm drain systems because they directly affect the public and are paid for with public funds.

We have determined that no acreage limit is necessary for the proposed NWP, because the authorized work is intended to benefit the aquatic environment, by changing the shape of the drainage ditch to improve water quality and other aspects of the aquatic environment. Notification will be required when excavated material is sidecast into waters of the United States or greater than 500 linear feet of drainage ditch is reshaped. The latter PCN requirement was added to address concerns for adverse effects to riparian areas adjacent to ditches constructed in waters of the United States. District engineers will review the PCNs to determine if the proposed work will result in minimal adverse effects on the aquatic environment. Prohibiting the sidecasting of excavated material into waters of the United States would discourage ditch reshaping activities because the Section 404(f) exemption for ditch maintenance allows

sidecasting. Such a prohibition would cause many landowners to maintain the ditch at its originally designed configuration to qualify for the exemption. Since the purpose of the proposed NWP is to encourage ditch maintenance activities that improve the aquatic environment, it would be counterproductive to limit its use to only once per watershed or require public review.

Some commenters recommended that compensatory mitigation be required for all activities authorized by this NWP. Other commenters asked for clarification that compensatory mitigation is not required. One commenter believes that the applicants should be required to provide documentation regarding the scope and effect of the existing drainage ditch before and after the reshaping activity. Another commenter stated that the applicant should be required to obtain a minimal effect determination and certification from NRCS stating that best management practices have been employed. One commenter suggested that the Corps should require the submittal and review of an erosion and sediment control plan prior to authorizing use of this NWP because these conditions are generally ignored when placed on the permit itself. Another commenter suggested that a minimum riparian buffer should be established or maintained as part of the authorization. Several commenters believe that revegetation of ditch banks with tree or shrub species should be required after construction to minimize loss of riparian habitat and reduce the potential for increasing water temperatures within the ditch. Another commenter recommended: (1) Conditioning the NWP to prohibit alteration or replacement of one type of stream substrate with another type; (2) the NWP should not authorize more than minimal adverse effects to riparian corridors during construction activities; (3) the NWP should require the replacement of riparian corridors when they are destroyed during construction; and (4) the NWP should not authorize the sidecasting of material in such a manner that the material would block or impede overland surface flows into any jurisdiction water of the United States, including wetlands.

We have determined that compensatory mitigation will normally not be required for the work authorized by this NWP because the purpose of the proposed NWP is to authorize ditch reshaping activities that improve water quality and aquatic habitat. If the project proponent did the work to qualify for the Section 404(f) exemption,

compensatory mitigation would not be required since the activity is exempt. Requiring compensatory mitigation for modifying the cross-sectional configuration of the ditch may encourage maintenance to the original dimensions and configuration and discourage reshaping the ditch to benefit the aquatic environment. We do not agree that permittees should be required to provide a statement discussing the effects of ditch reshaping or that they should be required to obtain a certification from NRCS. Compliance with any required sediment and erosion control plan is the responsibility of the permittee. Permittees are encouraged to maintain a vegetated buffer along one side of the ditch, but regular maintenance activities will prevent the development of a woody vegetated buffer along the side of the ditch used by equipment to perform the excavation.

Several commenters presented a variety of potential problems and concerns about this NWP. Some commenters believe that this permit will be very difficult to implement and will require substantial coordination with the Corps that previously was not required and will delay implementation of projects. Many commenters requested assurance that it would be used strictly and successfully for water quality improvement. They believe the existing drainage ditch exemption is often abused, resulting in the reditching of long-abandoned ditches, the excavation of natural streams, and the expansion of ditches beyond their original dimensions. They envision abuse of this NWP by applicants stating a water quality improvement purpose, but really intending to remove woody vegetation from the stream bank or increase channel capacity to drain a new area. This group of commenters was concerned that adverse effects on the aquatic environment resulting from activities authorized by this NWP would be more than minimal and could result in loss of important riparian habitat bordering naturalized drainage ditches. They were also concerned about filling and permanent loss of wetlands as a result of sidecasting. Several of these commenters pointed out that many of the conditions of this NWP are very difficult to measure, such as determining if the drainage area has been increased and determining the changes in ditch configuration without altering capacity. They caution that some channel reshaping projects might not be beneficial or would involve a complex trade-off between various environmental values including habitat, flood control, and water quality. One

commenter said the permit should have language which encourages retaining the structure and functions of the wetland and stream habitats.

In response to the comments in the previous paragraph, we must reiterate that the proposed NWP is intended to encourage ditch maintenance activities that benefit the aquatic environment. This NWP authorizes activities that are exempt from Section 404 permit requirements if those activities were done strictly as maintenance to the original ditch design configuration. Although the ditch may be a channelized stream, excavation activities to maintain the drainage ditch do not require a Section 404 permit. We believe that a drainage ditch can be reconfigured to provide water quality benefits without increasing the area drained by the ditch. The removal of riparian vegetation from uplands adjacent to a channelized stream is not regulated by the Corps under Section 404. Sidecasting of excavated material into waters of the United States is exempt from Section 404 permit requirements if the activity is associated with ditch maintenance. We believe that conditioning this NWP to prohibit the sidecasting of excavated material into waters of the United States would severely limit the use of this NWP and encourage exempt maintenance activities. Likewise, conditioning this NWP to require the permittee to maintain the wetlands and stream habitat in the project area would encourage exempt maintenance activities that have more adverse effects on the aquatic environment.

This NWP is subject to proposed General Condition 26, which will reduce its applicability. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 41 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all activities authorized by this NWP in impaired waters and wetlands adjacent to those impaired waters.

Division engineers can regionally condition this NWP to exclude certain waterbodies or require notification when waters or unique areas that provide significant social or ecological functions and values may be adversely affected by the work. Activities authorized by this NWP will have

minimal adverse effects on the aquatic environment, since it is limited to existing drainage ditches and activities that improve water quality. District engineers can exercise discretionary authority when very sensitive or unique areas, such as salmonid habitat mentioned by several commenters, may be adversely affected by these activities. The PCN requirement allows Corps districts, on a case-by-case basis, to add appropriate special conditions to ensure that the adverse effects are minimal. The District Engineer can also assert discretionary authority to require an individual permit for any activity that may have more than minimal adverse effects. Proposed NWP F is designated as NWP 41, with the proposed modifications discussed above.

#### 42. Recreational Facilities

In the July 1, 1998, **Federal Register** notice, we proposed an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, for the construction or expansion of passive recreational facilities.

Several commenters were concerned about the title of this NWP. Some commenters expressed confusion at the definition of passive recreational facilities. Other commenters were interested in exactly what activities were authorized. One commenter suggested that the Corps clarify what is meant by the term "open space" and when a recreational facility is considered to have a substantial amount of buildings and other impervious surfaces. Several commenters suggested defining the wording "substantially" when considering the amount of grading necessary for a particular activity.

To help reduce confusion, we have eliminated the word "passive" from this NWP and changed the title of the proposed NWP to "Recreational Facilities." The definition of the term "recreational facilities," as used for this NWP, and the types of activities authorized by this NWP have not been modified. For the purposes of this NWP, recreational facilities are defined as low-impact recreational facilities that are constructed so that they do not substantially change preconstruction grades or deviate from natural landscape contours. Low-impact recreational facilities include, but are not limited to, bike paths, hiking trails, campgrounds, and running paths. The construction of golf courses or the expansion of golf courses and ski areas, can be authorized by this NWP, provided these facilities are integrated into the existing landscape, do not require substantial

amounts of grading or filling, and adverse effects to wetlands and riparian areas are minimized to the extent practicable.

The term "open space" refers to areas not disturbed by the construction or expansion of the recreational facility, such as forests, fields, riparian areas, etc. Open spaces do not contain any buildings. District engineers will determine when a proposed activity involves a substantial amount of buildings, concrete, asphalt, or other impervious surfaces. The land area for the recreational facility authorized by the proposed NWP should consist only of a small proportion of impervious surface. District engineers will also determine when the amount of grading is substantial.

One commenter stated that facilities for walking, biking, and running require substantial filling and grading if they are located in hydric soils. One commenter suggested that gravel paths are pervious and should qualify for authorization under this NWP. A couple of commenters suggested that roads are not pervious features and should be excluded from authorization by this permit. Several commenters recommended expanding this permit to include other activities that are beneficial to the community, such as playgrounds, pools, and ball fields, suggesting that these activities are no more harmful to the environment than ski areas or golf courses. Many commenters objected to the inclusion of golf courses, campgrounds, and ski areas in this NWP, stating that these activities are not consistent with the concept of passive recreational facilities and do not have low impacts on aquatic resources.

Walking, running, and biking trails do not necessarily require substantial grading or filling of hydric soils. These trails can be constructed by placing a layer of gravel or crushed stone on the trail or placing a thin layer of asphalt on the soil surface. In some situations, a footer may be excavated to construct a base for the gravel or asphalt trail. District engineers will determine when the construction of a trail involves substantial grading or filling. Timber decks and walkways should be used where possible to minimize losses of waters of the United States. Gravel paths and roads are considered pervious. The proposed NWP can authorize the construction of roads to provide access to the recreational facility, including support buildings. However, the roads must be constructed at grade with pervious materials. Other types of roads to provide access to the recreational facility can be authorized by other

NWPs, such as NWP 14, as long as the permittee complies with General Condition 15. The construction of substantial amounts of roads within the recreational facility is not authorized, since this NWP does not authorize recreational facilities for use by motor vehicles.

Pools, playing fields, and arenas are not authorized by this NWP. These activities typically involve substantial grading and filling and the use of impervious materials for construction. Recreational facilities can be either public or private and will not have a substantial amount of buildings and other impervious surfaces, such as concrete or asphalt. The proposed NWP also authorizes the construction or expansion of small support facilities such as office buildings, maintenance buildings, storage sheds, and stables, but does not authorize the construction of associated hotels or restaurants. The construction or expansion of campgrounds can be authorized by this NWP, provided they are integrated into the existing landscape. These campgrounds should have few impervious surfaces (e.g., concrete or asphalt) and should consist of small cleared areas for tents and picnic tables connected by dirt or gravel trails or roads.

The proposed NWP does not authorize the construction or expansion of campgrounds for mobile homes, trailers, or recreational vehicles. This NWP does not authorize the construction of playing fields, basketball or tennis courts, racetracks, stadiums, or arenas. Recreational facilities not authorized by this NWP may be authorized by another NWP, a regional general permit, or an individual permit. Playing fields, playgrounds, and other golf courses may be authorized by NWP 39 if they are attendant features of residential, commercial, or institutional developments. For example, NWP 39 can authorize the construction of a golf course, provided the golf course is an attendant feature of a residential subdivision. The construction of hotels and conference centers that are sometimes associated with recreational facilities are not authorized by this NWP, but may be authorized by NWP 39, a regional general permit, or an individual permit.

Many commenters objected to the inclusion of support facilities or buildings in this permit. Several commenters wanted clarification on how much and what type of support buildings are authorized.

This NWP authorizes only small support facilities that are essential to the operation of the recreational facility.

District engineers will determine what constitutes a "small" support facility. Support facilities typically include maintenance buildings, storage buildings, and stables, but may also include buildings that store equipment (e.g., bicycles and canoes) that can be rented by users of the recreational facilities, and small offices. We anticipate that these structures will be small and typically have minimal adverse effects on the aquatic environment. Therefore, it is appropriate to include these structures in the NWP. We have modified the text of this NWP to specify that the NWP only authorizes small support facilities. The fact that these buildings must be directly related to the recreational activity, along with the acreage limit and PCN thresholds, will ensure that such support facilities are carefully considered and will have only minimal adverse effects on the aquatic environment.

A couple of commenters objected to the inclusion of golf courses and ski areas in this NWP because these facilities also require intensive maintenance activities, including the application of fertilizers and pesticides, as well as utility and road maintenance. Additionally, some ski areas may hydrologically alter certain areas as artificial snow is created, affecting water flow and adversely impacting trout streams. One commenter suggested that this permit should only allow limited size play throughs, and filling of only small isolated wetlands. This commenter and others further stated that this permit should focus on preserving natural systems and landscape features, and incorporating them into the design for the course. Several commenters objected to the authorization of these types of activities due to their impacts on the environment, suggesting that such activities do not have to be located in wetlands.

The proposed NWP authorizes the construction and expansion of golf courses and the expansion of ski areas, provided they are integrated into the existing landscape. The construction of new ski areas is not authorized by this NWP. These facilities may also require some support buildings with some minor grading and filling for building pads and foundations. Golf courses may require the placement of crushed stone or gravel for cart paths or some minor fill for greens and associated construction activities. We believe it is appropriate to include these activities in this NWP.

Golf courses and expanded ski areas authorized by this NWP should be

subject to careful environmental design and planning. For example, features to control surface runoff, buffers established and maintained adjacent to open waters, integrated pest management, and careful fertilizer and pesticide application, are examples of maintenance and operation activities which reduce the impacts of these facilities on the aquatic environment. These types of features and practices may be part of the water quality management plan required by the proposed modification of General Condition 9. A well-designed golf course authorized by this NWP will have avoided most of the wetlands on the site, incorporated stormwater management facilities into the course to protect local water quality, and established and maintained vegetated buffers adjacent to open or flowing waters.

One commenter asked why a project proponent would request authorization under this NWP when a larger golf course could be authorized by NWP 39. Another commenter questioned the statement in the proposed NWP suggesting that commercial recreational facilities may be authorized by NWP 39. Several commenters stated that the Corps will subject golf courses to more restrictions and that those restrictions should be stated in the NWP.

Proposed NWP 39 authorizes the construction of building pads, foundations, and attendant features for residential, commercial, and institutional developments. NWP 39 does not authorize the construction of golf courses on its own, unless those golf courses are attendant features of developments. However, NWP 39 can be used to authorize support buildings for a golf course, such as equipment storage buildings and clubhouses. Other recreational facilities can be authorized by NWP 39, such as playgrounds or playing fields associated with schools, provided those recreational facilities are attendant features of the school buildings. We have adequately discussed the restrictions on golf courses in the text of NWP 42. Division engineers can regionally condition this NWP to impose additional restrictions on this NWP and ensure that it authorizes only activities with minimal adverse effects on the aquatic environment. District engineers can exercise discretionary authority if the proposed work may result in more than minimal adverse effects or place case-specific special conditions on an NWP authorization to ensure that the authorized work results in minimal adverse effects on the aquatic environment.

Several commenters supported the proposed 1 acre limit for this NWP. One commenter suggested that the NWP should authorize the loss of no more than  $\frac{1}{4}$  acre of waters of the United States or 20 linear feet of stream. Another commenter suggested that the NWP should have an acreage limit of 1 acre or 20 percent of the total wetland area on the site, with a prohibition against filling fens, seeps, springs, sand ponds, or bogs. One commenter suggested that this permit should not authorize activities within 200 feet of streams or rivers that contain habitat for salmon. One commenter requested that this permit authorize only up to  $\frac{1}{3}$  of an acre of impacts for linear impact recreational facilities such as hiking, and biking trails. One commenter recommended that stream bed impacts should not be authorized by this permit since a passive recreational facility "does not substantially change preconstruction grades or deviate from natural landscape contours."

We believe that a 1 acre limit for recreational facilities is appropriate. This limit, with the notification requirements, will ensure that only activities with minimal adverse effects on the aquatic environment are authorized by this NWP. With regard to limiting the use of the proposed NWP in certain aquatic habitat types, we believe that these issues are more appropriately addressed at the regional level where division engineers can impose regional conditions to restrict the use of this NWP in high value waters, or prohibit its use in certain waterbodies. To make this NWP consistent with most of the other proposed NWPs, we are proposing to change the applicable waters for this NWP to "non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters." We disagree that the NWP should not include impacts to stream beds. The recreational facility may require crossings over streams or bank stabilization activities.

One commenter suggested significantly reducing the proposed PCN thresholds of  $\frac{1}{3}$  acre and 500 linear feet of stream bed. A couple of commenters suggested that a PCN should be required for all activities authorized by this NWP, because passive recreational facilities are usually built in areas that are recognized as environmentally sensitive. One commenter requested that Federal agencies should be provided the authority to reject an activity for consideration under this permit.

To make the PCN thresholds of the proposed NWP consistent with the PCN thresholds of the other new NWPs, we have reduced the PCN threshold to  $\frac{1}{4}$

acre. The PCN requirement for activities causing the loss of greater than 500 linear feet of perennial and intermittent stream bed will be retained. These PCN requirements will help ensure that the activities authorized by this NWP result in minimal adverse effects on the aquatic environment. Since this NWP has a 1 acre limit, there will be no agency coordination for PCNs. In addition, we do not believe that agency coordination is necessary, since this NWP authorizes only those recreational facilities that are integrated into the natural landscape and consist primarily of open space.

A commenter suggested that trails resulting in the loss of less than one acre of non-tidal waters of the United States should be exempt from the requirements of General Condition 9, especially the requirement for a water quality management plan.

The District Engineer will determine if the proposed recreational facility requires a water quality management plan to comply with General Condition 9. Small trails may not require such a plan. However, where there are water quality concerns due to the construction and use of the facility, vegetated buffers may be required. Stormwater management facilities may also be required.

One commenter said that features such as roads, buildings, and golf courses result in significant indirect and cumulative impacts in watersheds by inducing growth in surrounding areas and increasing runoff and hydrologic modifications. This commenter further suggested that regionally significant resources should be excluded from this NWP or impacts to such resources limited. Many commenters focused on the requirement that this permit should preserve natural systems and that the authorized facilities must be integrated into the natural landscape. One commenter stated that this permit is not consistent with sound watershed management. One commenter stated that the NWP encourages the removal of trees and other vegetation adjacent to waters of the United States, which would increase stream bank erosion, and that the Corps should establish explicit general conditions which prohibit activities that result in removal of stream bank vegetation within riparian areas.

The potential for activities authorized by this NWP to induce growth in surrounding areas is outside of the Corps scope of analysis, unless the induced growth involves activities regulated by the Corps. These low-impact recreational facilities may also be constructed in areas already subject

to increasing populations. The recreational facilities authorized by the proposed NWP are low-impact, and will not cause significant hydrological modifications because the facilities authorized by this NWP consist mostly of open space, with a small proportion of impervious surface. The requirements of General Conditions 9 and 21 will also ensure that the authorized activities do not cause substantial hydrological modifications. The recreational facilities authorized by this NWP will help preserve open space if they are constructed in the vicinity of urbanizing areas. The construction of low-impact recreational facilities is consistent with sound watershed management practices. The NWP does not encourage the removal of riparian vegetation. This NWP, like the other new NWPs, require the establishment and maintenance of vegetated buffers adjacent to waters of the United States to the maximum extent practicable (see General Condition 9).

Many commenters requested that mitigation should be required for activities authorized by this NWP. One commenter opposed the use of in lieu fee or mitigation banking programs to serve as mitigation for losses of waters of the United States authorized by this permit. Another commenter recommended that mitigation should be required for losses of less than  $\frac{1}{3}$  acre, either through mitigation banks or in lieu fee programs. One commenter stated that preservation of adjacent green space is not acceptable as mitigation. This commenter further stated that the NWP indicates that buffer zones may be required, but there is not an explicit requirement for vegetated buffers and the benefit of such buffers is questionable. One commenter said that the remaining wetlands on the site should be protected from further development through deed restrictions. Another commenter requested that the Corps require monitoring and evaluation standards for mitigation plans.

District engineers may require compensatory mitigation for activities authorized by this NWP to ensure that the net adverse effects to the aquatic environment are minimal. Mitigation banks and in lieu fee programs can be appropriate methods to provide compensatory mitigation for activities authorized by this NWP. The preservation of wetlands or vegetated buffers on the site can satisfy compensatory mitigation requirements, especially if there are high value waters on the project site that should be protected. The establishment and maintenance of vegetated buffers

adjacent to waters of the United States can be an important part of the compensatory mitigation required by district engineers. We cannot require the permittee to preserve the remaining waters on the site, unless the preservation satisfies a compensatory mitigation requirement. Otherwise, such a preservation requirement could be considered a taking of private property. Through special conditions, district engineers can require compensatory mitigation, including monitoring plans and evaluation standards.

Several commenters were concerned with the use of this NWP with other NWPs to authorize activities with larger impacts to the aquatic environment.

We are proposing to modify General Condition 15 to address the use of more than one NWP to authorize a single and complete project. In accordance with the proposed modification of General Condition 15, this NWP can be used with other NWPs to authorize a single and complete project, as long as the activity does not cause the loss of waters of the United States in excess of the highest specified acreage limit of the NWPs used to authorize that project. Although this NWP is intended to authorize all activities associated with a single and complete recreational facility, there may be some related activities, such as bank stabilization in tidal waters, that cannot be authorized by NWP 42 but can be authorized by other NWPs.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. In accordance with General Condition 26, recreational activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, cannot be authorized by NWP 42 unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. General Condition 27 prohibits the use of NWP 42 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these

activities. Proposed NWP D is designated as NWP 42, with the proposed modifications discussed above.

#### 43. Stormwater Management Facilities

This NWP was proposed in the July 1, 1998, **Federal Register** as NWP C to authorize the discharges of dredged or fill material into non-Section 10 waters of the United States, including wetlands, for the construction and maintenance of stormwater management (SWM) facilities.

A large number of comments were received in response to the proposed NWP, many commenters supporting the NWP and other commenters opposing the issuance of this NWP. Those commenters supporting the NWP stated that it would greatly enhance low-value wetland areas and attenuate the effects of flood waters. Some commenters requested the withdrawal of this NWP. Commenters opposing the issuance of this NWP stated that its use will result in more than minimal adverse effects on the aquatic environment. A number of commenters stated that the NWP would be difficult for the Corps to implement. One commenter said that there is no need for this NWP, because SWM facilities can be authorized by NWP 39 as a part of the residential, commercial, and institutional development. Several commenters were concerned about the possible use of this NWP with other NWPs, if SWM facilities are required as part of the development. One commenter stated that the NWP will reduce incentives to locate SWM facilities in uplands. Many of those opposing this NWP believe that the permit only benefits developers who want to develop the entire upland parcel and locate the SWM facility in wetlands and that mitigation sequencing (*i.e.*, avoidance, minimization, and compensatory mitigation) would not take place.

The proposed NWP and the NWP general conditions contain provisions to help ensure that the NWP does not authorize activities in waters of the United States with more than minimal adverse effects on the aquatic environment, individually or cumulatively. The notification requirements will allow district engineers to review certain stormwater management activities on a case-by-case basis and exercise discretionary authority in those cases where the adverse effects on the aquatic environment are more than minimal. Division and district engineers can add regional or case-specific conditions to this NWP to ensure that the NWP authorizes only activities with minimal

adverse effects on the aquatic environment. An important provision of the proposed NWP is that it does not authorize the construction of new SWM facilities in perennial streams, which will protect habitat for fish and other aquatic organisms.

Although an SWM facility can be authorized by NWP 39 as an attendant feature of a single and complete development project, there are circumstances that warrant a separate NWP for SWM facilities. For example, some SWM facilities may be constructed by a local government as part of a watershed plan, not for a particular development. SWM facilities may also be required for transportation projects or upland development activities. This NWP will not reduce incentives to locate SWM facilities in uplands, because the permittee is still required to comply with General Condition 19 and provide with the notification, a written statement to the District Engineer explaining why the SWM facility must be constructed in waters of the United States and why additional minimization cannot be achieved (see paragraph (d) of the proposed NWP). General condition 19 requires that the permittee avoid and minimize work in waters of the United States on-site to the maximum extent practicable.

A number of commenters stated that SWM facilities should not be constructed in waters of the United States. One commenter said that SWM facilities should not be constructed in waters of the United States adjacent to perennial streams. Many commenters indicated that stormwater should be treated in uplands before it is discharged into waters of the United States. One commenter stated that SWM facilities can only increase wetland functions and values when they are constructed in non-wetland areas. A commenter recommended modifying the NWP to allow the use of wetland systems for passive treatment of stormwater runoff. Many state agencies said that they do not allow the treatment of stormwater in wetlands. One commenter stated that the use of the NWP in waters of the United States should be limited only to receiving stormwater runoff, which will not permanently change the waters of the United States, and proposed a 1/3-acre limit for structures, such as outfalls. Another commenter stated that the NWP should not authorize SWM facilities in waters of the United States, unless the project results in enlargement and enhancement of existing wetlands. One commenter stated that an NWP authorizing SWM facilities in wetlands is contrary to EPA's 1990 guidance on

wetlands and non-point source pollution control programs and requested clarification regarding what constitutes "in certain circumstances," as cited in the preamble discussion concerning the placement of SWM facilities in waters of the United States in the July 1, 1998, **Federal Register** notice. This commenter also objected to the proposed NWP because it authorizes SWM facilities in streams and said that these activities will result in the destruction of stream morphology and destabilize the stream bed, reducing water and habitat quality. One commenter stated that stormwater management ponds constructed in wetlands actually encourage a slower decomposition of toxins, and locating an SWM facility in wetlands creates greater potential for toxic pollution if the pond containment structure or fill fails or the pond is overfilled. A commenter recommended prohibiting the construction of stormwater detention facilities in waters of the United States within 150 feet of the ordinary high water mark.

The construction of SWM facilities in waters of the United States is often necessary, and may provide more protection to the aquatic environment. SWM facilities located in waters of the United States are often more effective than SWM facilities constructed in uplands, because storm runoff flows to streams and wetlands, making these areas better able to trap sediments and pollutants than upland areas. The local aquatic environment benefits from more efficient SWM facilities. Low value wetlands and low value ephemeral and intermittent streams may be the best places to locate SWM facilities, to reduce adverse effects to higher value waters by attenuating storm flows and preventing pollutants from further degrading those areas. The proposed NWP authorizes the construction of SWM facilities in waters of the United States, particularly low value waters, provided that adverse effects on the aquatic environment are minimal. Division engineers can regionally condition this NWP to prohibit its use in high value waters. For those activities that require notification, discretionary authority will be exercised by district engineers on a case-by-case basis where the adverse effects on the aquatic environment are more than minimal. We do not agree that the NWP should be limited only to those projects that enlarge or enhance existing wetlands. In addition, we do not agree that the construction of stormwater management facilities should be prohibited in waters of the United States within 150 feet of

the ordinary high water mark because this requirement would prevent district engineers from using this NWP to authorize many effective SWM facilities with minimal adverse effects on the aquatic environment.

Through the notification process, district engineers will determine which SWM facilities can be authorized by this NWP. Locating SWM facilities in ephemeral and intermittent streams will help reduce degradation of perennial stream morphology by reducing the velocity of surface water flows during storm events. Adequately designed stormwater detention and retention ponds, particularly those ponds constructed in locations where they most effectively capture runoff (*i.e.*, in ephemeral and intermittent stream beds), will help prevent stormwater flows from entering perennial streams with velocities high enough to erode the stream banks and downcut the stream bed. These ponds will also trap sediments, which will help maintain the substrate of the stream bed and reduce water quality degradation. Permittees are required to maintain authorized SWM facilities to prevent the entry of pollutants in the waterway if the pond fills with sediment or the pond containment structure deteriorates. Paragraph (c)(1) of the proposed NWP requires prospective permittees to submit a maintenance plan, if required, with the PCN. The maintenance plan will ensure that the SWM facility will retain its effectiveness at trapping sediments and pollutants and attenuating flood waters.

Many commenters expressed concern for adverse effects to wetlands that may result from changing from one wetland type to another or from adverse effects caused by secondary impacts due to flooding, excavation, or drainage. One commenter stated that this NWP allows the replacement of a natural SWM facility with a concrete facility, thereby increasing the possibility of downstream flooding. A commenter advocated the preservation of natural landscapes for flood control purposes by promoting the use of non-structural alternatives for SWM. Some commenters said that this NWP should not authorize stream relocation or the construction of ponds in wetlands and that the Corps should not encourage other changes to natural drainage systems or diversions of watercourses.

The proposed NWP authorizes the construction of SWM facilities, which may result in wetland conversion and the flooding, excavation, or draining of wetlands. Some relocation of intermittent or ephemeral streams may be necessary to construct the SWM



facility. For those activities that require notification, district engineers will review the proposed work to determine if the proposed work will result in more than minimal adverse effects on the aquatic environment. Division engineers can regionally condition this NWP lower the notification thresholds or restrict the use of the NWP to ensure that it authorizes only those SWM activities with minimal adverse effects on the aquatic environment. Although we encourage the use of non-structural methods for SWM, structural practices are often the only practicable methods, and should be authorized by NWP if they result only in minimal adverse effects on the aquatic environment.

Many of the commenters supporting the proposed NWP requested that the Corps expand the scope of the NWP to include perennial streams and Section 10 waters, including tidal waters. One commenter requested that the NWP authorize sediment basins in perennial streams if sedimentation is a problem in the area. One commenter stated that outfall structures may need to be constructed in Section 10 waters, especially rivers. Another commenter requested that the Corps clarify whether the NWP authorizes discharges into wetlands adjacent to perennial streams. One commenter stated that design criteria should be included in the NWP.

In the July 1, 1998, **Federal Register** notice, we proposed to limit this NWP to non-Section 10 waters, including wetlands. To simplify the scope of applicable waters for the proposed NWPs, we are proposing to limit this NWP to activities in non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters. However, this NWP is still limited to Section 404 waters and does not authorize SWM activities in non-tidal Section 10 waters. The construction of new SWM facilities in perennial streams is not authorized by this NWP. We believe that expanding the scope of applicable waters for this NWP to tidal waters and perennial streams would be contrary to the minimal adverse effects requirement of the NWPs, because such an expansion of scope would substantially increase the potential for more than minimal adverse effects on the aquatic environment, individually or cumulatively. Project proponents who need to construct SWM facilities in perennial streams, tidal waters, or Section 10 waters can request authorization through the individual permit process or utilize regional general permits, if available. This NWP authorizes discharges into wetlands adjacent to perennial streams, but does not authorize discharges into the

perennial stream bed. Outfall structures associated with an SWM facility that must be constructed in Section 10 waters may be authorized by NWP 7, provided the single and complete project complies with General Condition 15. We do not agree that design criteria should be included in the NWP. Specific design criteria vary across the country and are more appropriately evaluated by district engineers on a case-by-case basis. Regional conditions can prohibit certain stormwater management activities from authorization by this NWP.

Several commenters addressed jurisdictional issues related to this NWP. One commenter said that no permit is required for these activities. Several commenters stated that all references to excavation and other activities that do not result in a discharge of material into waters of the United States in accordance with the Tulloch Rule decision should be deleted from the NWP. A few commenters emphasized the need to clearly identify the Corps jurisdiction as it relates to stormwater retention and detention facilities. Other commenters questioned the need for a permit to maintain SWM facilities which were constructed entirely in uplands.

The construction and maintenance of SWM facilities require a Section 404 permit if the activity results in a discharge of dredged or fill material into waters of the United States. SWM facilities require a Section 10 permit if they involve any work in navigable waters of the United States. Excavation activities in waters of the United States require a Section 404 permit, if those excavation activities result in more than incidental fallback of excavated material. District engineers will determine, on a case-by-case basis, if a specific SWM facility contains waters of the United States. If the SWM facility was constructed entirely in uplands, and does not expand the reach of waters of the United States, then that SWM facility is not a water of the United States (see 33 CFR Part 328.5). Maintenance of SWM facilities constructed entirely in uplands does not require a Section 404 permit, provided the construction of that SWM facility did not expand the reach of waters of the United States.

Proposed NWP C had a 2 acre limit for the construction of new SWM facilities, but no acreage limit for maintenance activities. In response to the July 1, 1998, **Federal Register** notice, commenters recommended acreage limits for the construction of new SWM facilities, which ranged from 1 to 5 acres. Several commenters

supported no acreage limit for the maintenance of existing SWM facilities. Commenters recommended acreage limits of  $\frac{1}{3}$  acre and 1 acre for maintenance activities. One commenter stated that the proposed 2 acre limit for construction was too high. One commenter asked the Corps to clarify whether the 2 acre limit applies to each individual facility, or whether it applies to the watershed. A number of commenters recommended limits for impacts to stream beds, ranging from no impacts to stream beds to a 500 linear foot limit. One commenter supported the PCN threshold for stream bed impacts, rather than a linear foot limitation. A couple of commenters stated that the 2 acre limit is too low and the acreage limit should be based site-specific criteria, such as the quality of affected waters. Another commenter recommended basing the acreage limit on regional conditions, with a national PCN threshold of  $\frac{1}{3}$  acre. One commenter suggested that temporary impacts could result in adverse effects, depending on the duration of flooding, and that impacts due to flooding should be considered in the acreage limit of the NWP.

Based on our review of these comments, we are proposing to retain the 2 acre limit for the construction of new SWM facilities, with no limit on maintenance activities provided the maintenance activity is conducted in accordance with an approved maintenance plan. The 2 acre limit applies to each single and complete project, not the watershed. We believe that the proposed NWP should not have a limit for activities resulting in the loss of intermittent stream bed; the PCN threshold of 500 linear feet is adequate to allow district engineers to determine if the proposed work will result in more than minimal adverse effects on the aquatic environment. For activities resulting in the loss of ephemeral stream bed, there is no PCN threshold. Division engineers can regionally condition this NWP to establish limits for stream bed impacts or lower PCN thresholds. Division engineers can also regionally condition this NWP to add PCN thresholds for activities resulting in the loss of ephemeral stream bed.

A simple 2 acre limit is much easier to implement than an acreage limit based on the quality of affected waters. A simple acreage limit is less confusing to the regulated public, because there are no standard, widely accepted methods available to establish acreage limits for stormwater management facilities based on the quality of affected waters. In areas where the 2 acre limit is too low, the Corps district can

develop regional general permits to authorize these activities. District engineers will determine when adverse effects due to flooding result in permanent, not temporary, losses of waters of the United States and should be counted toward the 2 acre limit for this NWP.

Numerous comments were received regarding the PCN thresholds for the proposed NWP. Some commenters believe that PCNs should not be required for any activity authorized by this NWP. Other commenters recommended requiring PCNs for all activities authorized by this NWP because SWM facilities are public facilities built with public funds. Suggested PCN thresholds included  $\frac{1}{4}$ ,  $\frac{1}{3}$ , and  $\frac{1}{2}$  acre. One commenter recommended requiring agency coordination for all activities authorized by this NWP to provide an opportunity to assist in the planning of the facility. Recommended PCN thresholds for stream bed impacts ranged from 150 to 1,000 linear feet.

The notification process is necessary to ensure that the proposed NWP authorizes only those activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. It is unnecessary to require PCNs for all activities authorized by this NWP, unless the division engineer has specific concerns for the aquatic environment in a particular geographic area and regionally conditions the NWP to lower the notification thresholds. Stormwater management activities resulting in the loss of less than  $\frac{1}{4}$  acre of non-tidal waters of the United States, the loss of less than 500 linear feet of intermittent stream bed, or the loss of ephemeral stream bed are unlikely to result in more than minimal adverse effects on the aquatic environment. To be consistent in the PCN thresholds for the other proposed NWPs, we have lowered the PCN threshold from  $\frac{1}{3}$  acre to  $\frac{1}{4}$  acre. Agency notification will be conducted for activities that result in the loss of greater than 1 acre of waters of the United States.

We received many comments regarding maintenance requirements and maintenance limits for the proposed NWP. Some commenters stated that a permit should not be required for maintenance as long as there are no impacts beyond the originally approved facility. Other commenters said that this NWP is unnecessary because the maintenance can be authorized by NWP 3. Some commenters stated that maintenance is poorly defined and should not be authorized by this NWP. They state that maintenance activities

can be just as destructive of wetlands as the initial construction of the facility. Several commenters requested a limit on the maintenance of SWM facilities, while some commenters recommended no limit to ensure that the design capacity is maintained. One commenter stated that a second review for maintenance of the facility is unnecessary because wetland impacts at the time of the original construction have already been considered.

Some commenters were concerned with the requirement for submitting a maintenance plan as part of the notification package. A number of commenters asked how a prospective permittee would comply with this requirement for the maintenance of an SWM facility that does not have a maintenance plan. Other commenters asked who would approve the maintenance plan if State and local entities did not require such a plan. Many commenters requested guidance as to what information would be required for the maintenance plan.

We are proposing to adopt a tiered approach when assessing the need for, and the amount of, maintenance at the facility. First, if a State or locally approved plan currently exists, that plan must be submitted as part of the notification package. If a plan does not exist, drawings of the original design capacities and design configurations should be submitted. Finally, if no plan and/or drawings exist, the best professional judgment of the Corps, with input from the manager of the facility, will be used to determine if the maintenance activity is authorized by this NWP. As for the content of the maintenance plan, if existing State or local requirements are in place regarding the development of such a plan, their standards will normally be accepted. If there are no such requirements, the plan should generally discuss the frequency and amount of maintenance which is required to ensure the facility functions as designed. If no plan currently exists, a new plan should be submitted for any requests for maintenance under this NWP.

A number of commenters requested that the Corps add a condition to this NWP requiring a statement from the applicant that explains how losses of waters of the United States were avoided and minimized on-site and why additional minimization cannot be achieved. Some commenters stated that compensatory mitigation should be required for all SWM facilities and some suggested that the mitigation proposal should be part of the PCN. One commenter said that compensatory

mitigation should not be allowed in designated facility maintenance areas. Several commenters urged the Corps to reiterate that no compensatory mitigation is required for losses resulting only from maintenance excavation. Other commenters stated that compensatory mitigation should not be required for SWM facilities in areas that may provide more environmentally sensitive planning and benefits to the aquatic environment than placing those facilities in uplands. Other commenters asked whether mitigation credits can be gained through the use of bioengineering techniques and aquatic benches.

We have added a provision to the proposed NWP (paragraph (d)), requiring the prospective permittee to submit a written statement explaining how avoidance and minimization, to the maximum extent practicable, was achieved on the project site. Paragraph (c)(3) requires the prospective permittee to submit, with the notification, a compensatory mitigation proposal to offset losses of waters of the United States resulting from activities authorized by this NWP. Maintenance activities typically do not result in losses of waters of the United States if they are conducted in designated maintenance areas. Therefore, compensatory mitigation for maintenance activities within a currently serviceable SWM facility will not be required in most circumstances. Compensatory mitigation areas within an SWM facility should be designated as non-maintenance areas. If maintenance is required in a designated non-maintenance area used for compensatory mitigation, then the permittee may be required to provide compensatory mitigation for that maintenance activity. District engineers will determine if compensatory mitigation is necessary to ensure that the authorized work results only in minimal adverse effects on the aquatic environment. If the SWM facility is not currently serviceable and requires reconstruction, compensatory mitigation may be required if the District Engineer determines that it is necessary to ensure that the adverse effects on the aquatic environment are minimal.

Compensatory mitigation can be located within an SWM facility, provided it is not located in designated maintenance areas. It is at the discretion of the District Engineer to determine if it is appropriate to include compensatory mitigation (*i.e.*, wetland restoration, creation, or enhancement) within a particular SWM facility. Designated maintenance areas include sediment forebays designed to capture

the sediment in a specific area of the SWM facility. Where the SWM facility provides substantial environmental benefits and/or improves the aquatic environment, compensatory mitigation may not be required. Any future maintenance of the SWM facility conducted in designated maintenance areas identified in the maintenance plan will not require additional compensatory mitigation. It is at the discretion of district engineers whether to allow mitigation credits to become established at a SWM facility constructed with bioengineering techniques and aquatic benches. However, since SWM facilities must be regularly maintained to retain their effectiveness, they should not be used to establish mitigation credits for permanent losses of waters of the United States.

Many commenters recommended conditions to be added to the proposed NWP. One commenter suggested prohibiting discharges into fish habitat and requiring riparian buffers. Another commenter recommended prohibiting use of the NWP within 200 feet of streams or rivers that contain habitat for salmon. One commenter stated that intermittent streams provide valuable salmon habitat and should receive the same protection as perennial streams. One commenter requested that the NWP contain a condition prohibiting construction and maintenance during the spring and summer nesting periods of birds protected under the Migratory Bird Treaty Act and prohibiting work in streams during anadromous fish migration periods. A commenter requested a condition to require maintenance of base flows of streams during low flow periods to protect aquatic species. One commenter recommended adding a condition requiring the project proponent to demonstrate that environmental enhancement throughout the life of the project will result from the SWM project.

Conditions for specific fisheries and migratory bird concerns are best addressed through the regional and case-specific special conditions. This NWP can be regionally conditioned to prohibit the construction of SWM facilities in intermittent streams that support important fisheries. General Condition 21 requires the permittee to maintain, to the maximum extent practicable, preconstruction downstream flow rates, including stream base flows. It is unnecessary to require the permittee to demonstrate that the SWM facility will enhance the aquatic environment throughout the life of the project. The purpose of SWM is

to prevent or reduce further degradation of the aquatic environment, especially water quality. District engineers will review PCNs for certain SWM activities to determine if the proposed work will result in minimal adverse effects on the aquatic environment. If the adverse effects are more than minimal, discretionary authority will be exercised and an individual permit will be required.

One commenter stated that the NWP should specifically authorize sediment control structures. Another commenter requested clarification as to whether or not this NWP authorizes in-stream sediment retention and detention basins. One commenter suggested prohibiting construction of concrete or rip rap-lined channels. A commenter asked for a definition for water control structures and emergency spillways and to delete the word "emergency" in the introductory paragraph of the NWP. One commenter recommended requiring best management practices to prevent downstream impacts of stormwater ponds, including retention facilities, such as holding and treating "first flush" from impervious surfaces.

The proposed NWP does not authorize sediment control structures (e.g., silt fences and check dams) unless they are a part of an SWM facility. The intent of the opening paragraph of this NWP is to provide examples of authorized activities, not an inclusive list. For activities that require notification, district engineers will determine which SWM facilities are authorized under this NWP. Water control structures control the flow of water and may impound a certain volume of water. It is unnecessary to delete the word "emergency" as a modifier of the word "spillways," because the purpose of emergency spillways is to provide an outlet for larger volumes of water and prevent an emergency situation from developing due to a large amount of water placing pressure on the dam, which may cause the dam to fail. Best management practices to prevent downstream adverse water quality effects of SWM ponds are best addressed through the 401 water quality certification.

A few commenters requested that the Corps expand the NWP to authorize the construction of flood control facilities. One commenter requested that the NWP authorize the construction of drainage conveyances such as culverts, canals, and ditches, as well as dam and/or weir construction. One commenter stated that the Corps needs to distinguish between SWM facilities authorized by this NWP and the flood control facilities authorized by NWP 31.

SWM facilities are constructed to control stormwater quantity and quality. SWM facilities provide some flood control for certain storm events. NWP 43 can authorize the construction of certain SWM facilities that also control flooding during small storm events, but larger flood control facilities constructed in waters of the United States must be authorized by other NWPs, regional general permits, or individual permits. Drainage facilities are not authorized by this NWP, unless they are part of an SWM facility. NWP 31 authorizes the maintenance of flood control facilities, not the construction of new flood control facilities.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 43 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all discharges into impaired waters and their adjacent wetlands. General Condition 27 prohibits the use of NWP 43 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP, proposed as NWP C in the July 1, 1998, **Federal Register** notice, is designated as NWP 43, with the proposed modifications discussed above.

#### 44. Mining Activities

During the 1996 NWP reissuance process, we proposed an NWP for Mining Operations. Based upon comments and information gathered during this process, we decided to encourage the development of regional general permits, rather than develop specific limits to meet the minimal

adverse effects requirement of Section 404(e). As a part of the initiative to replace NWP 26, the aggregate and hard rock/mineral mining industries provided information and proposed draft NWPs that they believed would satisfy the minimal adverse effect criterion. We evaluated that information and in the July 1, 1998, **Federal Register** notice, proposed NWP E for aggregate and hard rock/mineral mining activities. As a result of the comments we received in response to the July 1, 1998, **Federal Register** notice, this NWP has been substantially modified. Many commenters stated that the proposed NWP E was too complex, difficult to understand, and too confusing. A number of commenters expressed uncertainty about the applicable waters for the NWP, the limits of work, and which activities could be conducted under the NWP.

**General Comments:** Many commenters expressed opposition to the proposed NWP. Numerous commenters objected to the proposed NWP because they believe that it authorizes activities with more than minimal adverse effects on the aquatic environment, especially water quality, aquatic habitat, fish and shellfish populations, and hydrology, as well as adjacent landowners. A large number of commenters stated that aggregate and hard rock/mineral mining activities should be subject to the individual permit process and public interest review. Other commenters said that the NWP should not be issued because it authorizes activities that are not similar in nature. Two commenters recommended that regional general permits should be developed in each state instead of an NWP. Several commenters objected to the proposed NWP because they believe it is too complex. A commenter objected to the proposed NWP because the commenter believes that the preamble fails to explain why a mining NWP is needed. A number of commenters recommended that the Corps issue a separate NWP for aggregate mining activities. One commenter suggested that the Corps issue a separate NWP for crushed stone operations.

We believe that certain aggregate and hard rock/mineral mining activities can be authorized by NWP if that NWP is properly conditioned to protect the aquatic environment. The scope of this NWP has been reduced from the proposed NWP E published in the July 1, 1998, **Federal Register**. We have also substantially restructured the proposed NWP to make it easier to understand. The activities authorized by this NWP are similar in nature, and focus on the mining activity and support activities.

This NWP may be suspended or revoked in certain areas, particularly those areas inhabited by economically important fish, such as salmonids. Division engineers can regionally condition this NWP to protect locally important aquatic resources. It is unnecessary and impractical to withdraw this NWP and direct our districts to develop regional general permits. A large number of regional general permits for mining activities would create confusion for the regulated public, especially for those companies that have mining operations across the country. This NWP is necessary because aggregate mining and hard rock/mineral mining have been authorized by NWP 26 in the past. We do not believe it is necessary to develop separate NWPs for aggregate mining and crushed stone mining activities.

**Scope of waters:** In the July 1, 1998, **Federal Register** notice, we structured the proposed NWP E based on the types of waters impacted by either aggregate or hard rock/mineral mining activities. There were several categories of waters in the proposed NWP. Those categories of waters included: lower perennial riverine systems, intermittent and ephemeral streams, intermittent and small perennial stream relocations, isolated wetlands, wetlands above the ordinary high water mark in non-Section 10 waters, and dry washes and arroyos. Many commenters supported the expanded scope of waters, compared to the applicable waters for NWP 26. Two commenters objected to this NWP because it was applicable to all non-tidal waters, instead of only headwaters and isolated waters. One commenter stated that the July 1, 1998, **Federal Register** notice did not clearly explain why sand and gravel mining, crushed and broken stone mining, and hard rock/mineral mining were authorized in different types of waters. One commenter recommended that this NWP authorize mining activities only in large river systems to protect small streams and creeks. One commenter suggested that all of the types of applicable waters for NWP E should be based on a standard classification system, such as the Cowardin classification system, so that there will be more consistent implementation of the NWP. One commenter stated that this NWP should not authorize work in streams, especially those streams that support fish spawning areas.

As a result of our review of the comments received in response to the July 1, 1998, **Federal Register** notice, we have reduced the applicable waters for the proposed NWP by excluding certain waters from this NWP. The reduced scope of waters will help ensure that the

authorized activities will result in minimal adverse effects on the aquatic environment and simplify the NWP to make it easier to understand. We have limited the types of waters where mining activities can occur under this NWP to: lower perennial streams (*i.e.*, lower perennial riverine subsystems as defined by the Cowardin classification system for wetlands and deep water habitats), isolated waters, streams where the average annual flow is 1 cubic foot per second or less, and non-tidal wetlands adjacent to headwater streams. Aggregate mining is not authorized in waters of the United States within 100 feet of the ordinary high water mark of streams where the average annual flow is greater than 1 cubic foot per second. This NWP does not authorize hard rock/mineral mining activities in streams, or in waters of the United States within 100 feet of the ordinary high water mark of headwater streams. Aggregate and hard rock/mineral mining are not authorized in non-tidal wetlands adjacent to streams where the average annual flow is greater than 5 cubic feet per second.

There are different applicable waters for different types of mining activities because not all types of materials are found in the same waters. For example, the substrate of lower perennial riverine subsystems, by definition, contains mostly mud and sand. To obtain larger aggregates, the mining operation must go upstream to upper perennial streams, as well as intermittent and ephemeral streams. We do not believe that it is practical or necessary to restrict the proposed NWP only to large riverine systems. We have reduced the applicability of this NWP in smaller streams to ensure that the adverse effects of these mining activities will be minimal. Notification is required for all activities authorized by this NWP. If a district engineer reviews a PCN and determines that the proposed work will result in more than minimal adverse effects on the aquatic environment, then discretionary authority will be exercised and an individual permit will be required. We are not aware of a classification system that will allow district engineers to better control adverse effects on the aquatic environment and make the NWP easier to implement. For example, the Cowardin classification system is based on a scale that is too large for the purposes of this NWP. The scale of the upper perennial riverine subsystem is too broad to provide district engineers with the type of control that is necessary for this NWP. We believe that our approach is better because the smaller

scale allows us to better control impacts to the aquatic environment.

We have reduced the applicability of the proposed NWP in streams, to better protect those streams that support fish spawning areas. The proposed NWP E authorized discharges into intermittent and ephemeral streams, and authorized the relocation or diversion of intermittent and small perennial streams. In the proposed NWP 44, aggregate mining activities can occur in lower perennial streams or streams where the average annual flow is 1 cubic foot per second or less. Intermittent streams with average annual flows of greater than 1 cubic foot per second cannot be mined for aggregates under this NWP. Hard rock/mineral mining is not authorized in streams.

One commenter stated that the NWP should authorize hard rock mining activities in other waters of the United States, in addition to dry washes and arroyos. Three commenters requested that definitions of the terms "dry washes" and "arroyos" should be included in the NWPs. One commenter said that ephemeral streams, dry washes, and arroyos should not be included in the NWP because of the recent *United States v. James J. Wilson*, 133 F. 3d 251 (4th Cir. 1997) decision.

We do not agree that hard rock/mineral mining activities should be authorized in streams because the potential for more than minimal adverse effects on the aquatic environment is too great. To further protect streams from the adverse effects of hard rock/mineral mining activities, we are proposing to add a condition to this NWP requiring that beneficiation and mineral processing cannot occur within 200 feet of the ordinary high water mark of any open waterbody. Since we have removed the terms "dry washes" and "arroyos" from the NWP, we do not need to include definitions of these terms. It is important to note that the *United States v. James J. Wilson* decision applies only to the states in the 4th Circuit (*i.e.*, Maryland, West Virginia, Virginia, North Carolina, and South Carolina). Other areas of the country are not subject to this decision.

**Authorized Activities:** One commenter stated that several paragraphs of NWP E appear to duplicate each other and should be combined to simplify the NWP. Another commenter said that the types of mining authorized by this NWP generally result in similar impacts and do not need to be distinguished between each other in the NWP. A large number of commenters stated that the term "filling" should be used where

appropriate when describing the authorized activities and the acreage limits for those activities. One commenter recommended that the NWP clearly define what types of activities are considered to be mining activities, because many mining sites are managed for multiple land uses. This commenter stated that the NWP should not allow use of this NWP for the mining activity and another NWP for another activity on that parcel of land. One commenter recommended that the NWP include a condition addressing mechanized landclearing when that activity results in a deepening of waters of the United States instead of replacing those areas with dry land. One commenter stated that this NWP should be limited to authorizing access corridors for mining drag lines and prospecting activities, not the actual mining activity.

We have removed the duplication within the proposed NWP to make it simpler and easier to understand. In this NWP, we use the term "discharges of dredged or fill material" instead of "filling" because it is the standard terminology for the Section 404 program. "Filling" is not the only activity that can result in a discharge into waters of the United States. In certain circumstances, excavating, draining, or flooding waters of the United States can be considered as discharges regulated under Section 404 of the Clean Water Act. On a case-by-case basis, district engineers will determine what constitutes "mining" for the purposes of this NWP. If a tract of land is managed for multiple uses, district engineers must determine if each land use constitutes a separate single and complete project (*i.e.*, each activity has independent utility from the other activities on the parcel). If an activity on the land tract has independent utility and constitutes a separate single and complete project, another NWP can be used to authorize that activity, if it meets the terms and conditions of that NWP. Mechanized landclearing that changes the use of a water of the United States must be calculated in the acreage loss for the mining activity, but we do not believe that it is necessary to add a condition to this NWP to address this specific situation. Limiting this NWP to the construction of access corridors for mining draglines and prospecting activities rather than the mining activity is illogical, because Section 404 authorization is still likely to be required for the mining activity itself. If an individual permit is required for the mining activity, that permit would authorize the construction of the access

corridor, if it is constructed in waters of the United States.

One commenter suggested that aggregate mining activities authorized by this NWP should include the mining of fill dirt, shell, and clay, including Fuller's earth and kaolin. Another commenter recommended that NWP E should be modified to authorize the mining of fill material for levee and embankment construction, reconstruction, and repair.

We do not agree that clay mining should be included in the NWP, because it is a mining activity that is best addressed at a district level through regional general permits. The excavation of fill dirt from waters of the United States, particularly wetlands, is likely to result in more than minimal adverse effects on the aquatic environment, because fill dirt for construction, including the construction and repair of levees, can be easily obtained from upland areas, and authorizing the extraction of soil from wetlands to construct levees and embankments by an NWP is unwarranted. If fill material cannot be obtained from upland areas, then the removal of soil from waters of the United States to provide fill material can be authorized by another NWP, such as NWP 18, a regional general permit, or an individual permit.

The mining of shell is also inappropriate for authorization by this NWP, because the potential impacts of this type of mining activity may be more than minimal, especially in estuarine waters where areas of fossil shell provide valuable habitat for fish. Proponents of shell mining can obtain authorization through the individual permit process or other available general permits.

Two commenters objected to the exclusion of hard rock/mineral mining from intermittent and ephemeral streams. Two commenters objected to prohibiting hard rock/mineral mining activities in lower perennial riverine systems. Another commenter requested clarification as to which types of hard rock/mineral mining activities are authorized by this NWP and the categories of waters in which those activities can take place. One commenter suggested that the NWP prohibit beneficiation and mineral processing in waters of the United States, to minimize potential spills and releases of toxic substances.

Hard rock/mineral mining activities have greater potential for more than minimal adverse effects on the aquatic environment than aggregate mining activities. There are considerable differences in the impacts associated with extracting and processing these

materials. Hard rock/mineral mining activities require processing that may result in discharges of chemical compounds in the water column, which can substantially alter water quality. Hard rock/mineral mining activities often require a Section 402 National Pollution Discharge Elimination System permit for effluent discharges associated with ore processing techniques. Hard rock/mineral mining is authorized only in isolated waters and non-tidal wetlands adjacent to headwater streams (i.e., streams where the average annual flow is less than 5 cubic feet per second). No hard rock/mineral mining is authorized in waters of the United States within 100 feet of ordinary high water mark of streams. The proposed NWP does not authorize hard rock/mineral mining, including place mining, in any streams, including lower perennial riverine systems. To protect streams and other open waters, we are proposing to condition this NWP to prohibit beneficiation and mineral processing within 200 feet of the ordinary high water mark of any open waterbody.

One commenter stated that the NWP should not authorize discharges of fill material into waters of the United States for support features such as haul roads, crushers or other ore processors, and berms. Two commenters requested clarification concerning which stormwater management facilities can be authorized as mining support activities and which stormwater management facilities can be authorized under the new NWP for stormwater management facilities.

Support facilities are essential components of a mining operation and should be authorized as part of the single and complete mining project. Support facilities authorized by this NWP include berms, access and haul roads, rail lines, dikes, road crossings, settling ponds and settling basins, ditches, stormwater and surface water management facilities, head cut prevention, sediment and erosion controls, and mechanized landclearing. District engineers will review preconstruction notifications for mining activities authorized by this NWP to determine if the mining activity, and any associated support activities in waters of the United States, will result in more than minimal adverse effects on the aquatic environment. Stormwater management facilities that are required for a mining activity can be authorized by this NWP as a support activity. District engineers will determine on a case-by-case basis which types of stormwater management facilities may be authorized by this NWP. Due to the

proposed modification of General Condition 15, this NWP usually would not be combined with NWP 43 for stormwater management facilities, since the maximum acreage loss cannot exceed the acreage limit of the NWP with the highest specified acreage limit. Since NWP 44 has a limit of 1 acre for support activities, including stormwater management facilities, NWP 43 cannot be used with NWP 44 to authorize a stormwater management facility that results in the loss of greater than 1 acre of waters of the United States.

Several commenters objected to the provision in this NWP that requires measures to prevent adverse effects to groundwater resources, stating that protection of groundwater is the responsibility of the states. We agree with this comment, and have removed this provision from the proposed NWP.

A large number of commenters stated that stream relocation and diversion activities for aggregate mining activities should be authorized in ephemeral and intermittent streams and small perennial streams. One commenter requested that the Corps clarify whether the phrase "small perennial stream relocations" refers to the size of the stream to be relocated or the amount of stream to be relocated. One commenter stated that channel relocation should not include decreasing the length of the stream channel. Another commenter requested that the Corps explain why other mining activities cannot be conducted in intermittent and small perennial streams, other than relocation and diversion. One commenter suggested that the Corps specify whether or not the discharge of dredged or fill material into ephemeral or intermittent streams is authorized by the stream relocation/diversion provisions of the NWP. One commenter recommended prohibiting stream relocation and diversion activities, as well as the construction of berms, from this NWP.

Due to the potential for more than minimal adverse effects on the aquatic environment, especially fish habitat, we have removed stream relocation and diversion as a specific activity authorized by this NWP. For the proposed NWP, in-stream aggregate mining activities are limited to lower perennial streams (i.e., lower perennial riverine subsystems described in the Cowardin classification system) and streams where the average annual flow is 1 cubic foot per second or less. This NWP does not authorize hard rock/mineral mining activities in streams, including stream diversion or relocation. In stream segments where the average annual flow is 1 cubic foot

per second or less, the stream channel may be excavated by the aggregate mining activity.

**Acreage Limits:** In the July 1, 1998, **Federal Register** notice, we requested comments on the proposed acreage limit for this NWP. We proposed 2 acre and 3 acre limits for the NWP. Two commenters supported the 3 acre limit. Many commenters recommended the 2 acre limit. Several commenters stated that a 3 acre limit is too high. Two commenters suggested a limit of  $\frac{1}{4}$  acre. Many commenters said that the 3 acre limit is too low. One commenter suggested an acreage limit of 5 acres, stating that mine operators are proficient at site reclamation and wetland construction. Several commenters recommended a 10 acre limit for this NWP. A large number of commenters advocated the use of a sliding scale to determine the acreage limit for this NWP. Many commenters recommended the use of a sliding scale similar to the one proposed for NWP B for master planned development activities.

To ensure that this NWP authorizes only those mining activities that result in minimal adverse effects on the aquatic environment, we are proposing a 2 acre limit for a single and complete mining project. We do not believe that it would be practical to utilize a sliding scale to determine the acreage limit for this NWP, because a primary purpose of a sliding scale is to encourage the prospective permittee to further avoid and minimize losses of waters of the United States. For aggregate and hard rock/mineral mining activities, on-site avoidance and minimization is more difficult to accomplish because the miners need to extract materials from specific areas (i.e., where sufficient aggregates have accumulated or where the densest deposits of ore are located) and in quantities sufficient to make the mining activity economically feasible.

One commenter stated that different acreage limits for different types of waters is too confusing and suggested a single acreage limit for the NWP. One commenter recommended that impacts to lower perennial riverine systems, isolated wetlands, and dry washes and arroyos should be limited to 1 acre. Another commenter suggested an average 1 acre limit for each type of water listed in the NWP. One commenter asked why the acreage limits for losses of open waters and wetlands was 2 acres but the loss of intermittent and ephemeral stream bed was limited to 1 acre. Several commenters supported a higher acreage limit for activities in ephemeral streams. One commenter stated that the 1 acre limit for support

activities is too low for the permit to be useful.

We are proposing a single acreage limit for this NWP (*i.e.*, 2 acres for a single and complete project, including a maximum of 1 acre for support activities). We have also simplified the applicable waters for the proposed NWP. The acreage limit applies to all of the activities authorized by this NWP, for a single and complete project. We believe that the 1 acre limit for support activities is adequate. If the project proponent requires additional impacts for support activities, the mining activity may be authorized by another NWP, a regional general permit, or an individual permit.

A commenter stated that the NWP should have similar acreage limits to the other new NWPs, because there is no justification for more restrictive limits. A number of commenters suggested imposing linear limits on stream impacts. One commenter recommended a 250 linear foot limit whereas another commenter recommended a 500 linear foot limit. A few commenters supported the lack of a linear limit for stream impacts.

We believe that an acreage limit is more appropriate for mining activities because the proposed NWP substantially limits the amount of in-stream mining that can be authorized by this NWP. For aggregate mining activities in streams where the average annual flow is 1 cubic foot per second or less, the adjacent land will usually be mined with the stream bed. This is another reason to use an acreage limit instead of a linear foot limit. In addition, the use of acres instead of linear feet to determine the limit for this NWP allows consistent application of the NWP limits across the different categories of applicable waters. Aggregate mining activities in lower perennial streams are adequately assessed on an acreage basis since lower perennial streams tend to have large channels.

One commenter stated that acreage limit calculations should be based solely on the direct effects of the dredging or filling activities, not indirect effects. One commenter said that a relocated stream channel which duplicates the functions and values of the original stream channel should not be considered a loss and should not be counted towards the acreage limit of the NWP.

The acreage loss of waters of the United States that results from filling, excavating, draining, or flooding is used to determine whether the proposed work exceeds the terms and limits of the NWP (see the definition of "loss of

waters of the United States" in the "Definitions" section of the NWPs). This is the standard definition used in the NWP program. Although stream relocation and diversion activities no longer constitute a specific part of the proposed NWP, these activities may occur in aggregate mining operations in streams where the average annual flow is 1 cubic foot per second or less, because the adjacent land will usually be mined with the stream bed. The stream channel may be reestablished in a different location after the mining activity is completed. Stream relocation and diversion activities that fill and excavate the stream bed cause the loss of waters of the United States. It may take years before the relocated or diverted stream channel achieves similar aquatic functions to the original stream channel. Any stream relocation and diversion activities are included in the acreage loss measurement for this NWP.

**Notification Thresholds:** In the proposed NWP, preconstruction notification (PCN) was required for all authorized activities. One commenter concurred with this notification threshold. Several commenters recommended imposing notification thresholds similar to the other proposed NWPs. Two commenters suggested that PCNs should be required for activities impacting 150 linear feet or more of stream bed or  $\frac{1}{3}$  acre or greater of wetlands. One commenter proposed that PCNs should be required only for activities impacting 1 acre or more of waters of the United States. A number of commenters suggested that the PCN threshold for activities in dry washes and arroyos should be higher than for activities in other types of waters. One of these commenters recommended a 5 acre PCN threshold for activities in ephemeral streams, with agency coordination for the loss of 10 acres or greater of ephemeral stream bed. One commenter suggested agency notification for mining activities impacting greater than  $\frac{1}{3}$  acre. Another commenter suggested extending the agency coordination period to 30 days to allow those agencies to conduct a more thorough review of potential water quality impacts.

We are proposing to retain the original PCN threshold for this NWP, which requires preconstruction notification for all activities authorized by this NWP. District engineers will review proposed mining activities, including measures to minimize or avoid adverse effects to waters of the United States and reclamation plans. This PCN requirement is necessary to ensure that the NWP authorizes only

those activities with minimal adverse effects on the aquatic environment, individually or cumulatively. Agency coordination will be conducted for mining activities resulting in the loss of greater than 1 acre of waters of the United States. Compliance with General Condition 9, including the proposed requirement for a water quality management plan, will help ensure that the authorized work will not result in more than minimal adverse effects on local water quality.

**Notification Requirements:** In the proposed NWP E, the notification was required to include a description of all waters of the United States impacted by the project, a discussion of measures taken to minimize or prevent adverse effects to waters of the United States, a description of measures taken to comply with the conditions of the NWP, and a reclamation plan.

One commenter supported the requirement that the applicant must submit a reclamation plan with the PCN. A couple of commenters recommended that the applicant should submit a statement from the agency approving the reclamation plan. One commenter requested that the Corps define the term "reclamation plan" and several commenters asked the Corps to specify what should be included in the plan. One commenter asked if the requirement for a reclamation plan refers to the complete plan for the entire mining site that may be required by law or a plan for restoring affected waters of the United States and providing compensatory mitigation for the losses authorized by the NWP. Several commenters stated that the requirement for a reclamation plan should be eliminated. A number of commenters said that the reclamation plan requirement is redundant with other Federal and state laws and should not be included in the NWP.

The requirement for submission of a reclamation plan with the PCN is not intended to supersede other Federal or State requirements. The District Engineer will not require reclamation *per se*, but will review the reclamation plan to determine if compensatory mitigation is required to offset losses of waters of the United States and ensure that the individual or cumulative adverse effects of the mining activity on the aquatic environment are minimal. The prospective permittee may submit a statement from the Federal or State agency that approves the reclamation plan, with a brief description of reclamation plan, especially the type and quantity of aquatic habitats such as wetlands and streams that will be restored, enhanced, created, and/or



preserved for the mined land reclamation. If there are no Federal or State requirements for a reclamation plan for a particular mining activity, the applicant should state that fact in the PCN. The District Engineer may require compensatory mitigation for that project, to ensure that the adverse effects on the aquatic environment are minimal. If the reclamation plan required by Federal or State law adequately addresses compensation for losses of waters of the United States, then the District Engineer will not require additional compensatory mitigation, unless there are additional concerns for the aquatic environment.

A large number of commenters stated that the reclamation plan requirement needs to be changed because some mining activities, such as in-stream dredging, do not require reclamation. In addition, these commenters were unsure if this requirement applies to mining activities outside of the Corps jurisdiction. For land-based aggregate mining, reclamation may be required at the end of the mining activity, but the mining activity may occur for many years. These commenters expressed concern that when a prospective permittee applies for authorization under NWP E, reclamation for previously authorized mining activities may not be completed. One commenter said that the NWP should contain more specific reclamation requirements. This commenter believes that the mining company should be required to submit a reclamation plan for each phase of a large mining operation, as each phase proceeds. This commenter also recommended that the mining site should be restored within a year after operations cease, if possible. One commenter stated that the Corps ability to deny NWP authorization based on failure to complete reclamation for previously authorized activities exceeds the Corps authority because it is not reasonably related to water quality or the discharge of dredged or fill material. One commenter said that a mining activity that may be eligible for authorization by NWP may not have done any reclamation, but is still in compliance with its reclamation plan. This commenter said that it is unreasonable to require the submission of a separate reclamation plan because of the regulatory oversight by other agencies.

For those mining activities that do not require reclamation, the applicant should include a statement in the PCN that neither State nor Federal regulations require reclamation for the proposed mining activity. If there are portions of a mining activity outside of

the Corps jurisdiction (e.g., mining of upland areas), it is unnecessary for the prospective permittee to submit a reclamation plan for those activities. Long-term single and complete mining projects may be authorized by this NWP, provided terms and conditions of the NWP are met. The applicant can submit a conceptual reclamation plan with the PCN or a statement describing the reclamation plan and intended schedule, if the reclamation will not take place until after the long-term mining activity. The Corps can deny NWP authorization if the prospective permittee has not complied with the terms and conditions of previous Corps permits, such as requirements to restore affected waters of the United States.

*Conditions of the NWP:* One commenter stated that the measures to minimize stream impacts are too vague and inadequate to protect stream stability and integrity. A commenter objected to this NWP, stating that the authorized work results in significant changes in stream morphology and the NWP should require specific measures to prevent those significant changes. Another commenter recommended modifying the prohibition against excavating fish spawning areas or shellfish beds to require avoidance of activities causing degradation of these habitats through excavation, filling, sedimentation caused by upstream work, or other harmful activities. One commenter recommended adding the phrase "where practicable" in the requirement for necessary measures to prevent increases in stream gradient for mining activities in dry washes and arroyos. Another commenter stated that the conditions of this NWP are unenforceable, because field verification of spawning areas must be done by agency personnel with expertise in that area. One commenter stated that the use of NWP E would result in non-compliance with Section 402 of the Clean Water Act.

The conditions of the proposed NWP that require measures to minimize stream impacts will help ensure that the aggregate mining activities authorized by this NWP will result in minimal adverse effects on the aquatic environment. The size of streams in which this NWP can be used has been substantially reduced, which will also protect the stability and integrity of streams. For example, paragraph (e) of the proposed NWP requires the permittee to implement measures to prevent increases in stream gradient and water velocities to prevent adverse effects to channel morphology. This requirement allows the aggregate miner to remove only the upper surface of the

stream bed to extract the sand, gravel, and crushed and broken stone. Aggregate mining is authorized only in lower perennial streams or those stream segments where the average annual flow is 1 cubic foot per second or less. In lower perennial streams, larger amounts of sand can be removed without substantially altering stream gradient and water velocities because these streams tend to occur on land with gentler slopes. Paragraph (e) requires the permittee to conduct the mining activity so that the authorized work does not have more than minimal adverse effects on channel morphology downstream of the site of the in-stream mining activity.

Paragraph (d) of the proposed NWP states that the authorized activity must not substantially alter the sediment characteristics of concentrated shellfish beds or fish spawning areas, either through discharges of dredged or fill material or sediment that was suspended in the water column by work upstream of the shellfish bed or fish spawning area. We are proposing to modify General Condition 20, Spawning Areas, to require that activities authorized by NWP cannot physically destroy important spawning areas by smothering those areas with suspended sediment generated upstream. In other words, an in-stream mining activity authorized by this NWP must be conducted so that it does not generate a cloud of suspended sediment that will move downstream and smother important spawning areas.

District engineers will rely on local knowledge, including any available documented locations of important spawning habitat and concentrated shellfish beds to ensure compliance with paragraph (d) and General Conditions 17 and 20. Federal and State natural resource agencies may have maps of these areas that district engineers can use during their review of PCNs for these activities. Division engineers can also regionally condition this NWP to restrict or prohibit its use in designated waterbodies that contain important fish spawning areas or shellfish beds. Authorization of mining activities by this NWP does not preclude the permittee from complying with the requirements of Section 402 of the Clean Water Act.

*Use of this NWP with other NWPs:* Many commenters supported the use of this NWP with other NWPs because of the acreage limits of NWP 44. One commenter recommended that the use of NWP E with other NWPs should be allowed without imposing an acreage limit.

NWP 44 can be used with other NWPs, such as NWP 33, provided the

NWPs authorize a single and complete project and comply with the proposed modification of General Condition 15, Use of Multiple Nationwide Permits.

**Mitigation Requirements:** Some commenters said that the compensatory mitigation requirements for this NWP were unclear in the July 1, 1998, **Federal Register** notice. A number of commenters suggested the NWP should require restoration when the mining activity is complete. A couple of commenters said that on-site mitigation should be preferred since the mining industry has demonstrated its ability to perform successful mitigation. A few commenters stated that requiring compensatory mitigation for these activities replicates State law and exceeds the mitigation requirements for other activities. A couple of commenters stated that the NWP should include a requirement that the permittee avoid or minimize impacts. A commenter suggested that mitigation plans should include monitoring and evaluation standards to assist agencies in evaluating the effectiveness of the mitigation. Three commenters stated that lands which were not previously waters of the United States and which develop wetland characteristics as a result of mining reclamation should be eligible for compensatory mitigation credit.

The July 1, 1998, **Federal Register** notice contained a general statement that compensatory mitigation would normally be required for NWP activities that require notification to the District Engineer. For this NWP, compensatory mitigation may be provided through the reclamation of the mined site, if reclamation is required by other Federal or State laws. If reclamation is not required, the District Engineer can require compensatory mitigation to offset losses of waters of the United States resulting from the authorized work and ensure that the adverse effects on the aquatic environment are minimal. Compensatory mitigation can be provided through the establishment and maintenance of vegetated buffers adjacent to streams and other open waters, especially in the 100-foot wide zone where no aggregate or hard rock/mineral mining activities can occur (see paragraph (k) and the last paragraph of proposed NWP 44).

We are proposing to add a condition to this NWP requiring the permittee to avoid and minimize discharges into waters of the United States to the maximum extent practicable and to include a statement detailing compliance with this condition with the PCN (see paragraph (c)). Compensatory mitigation requirements, including

monitoring and evaluation standards, are at the discretion of district engineers. Mine operators that create wetlands in uplands as part of a reclamation plan can use those created wetlands as compensatory mitigation for other activities that result in the loss of wetlands, if those created wetlands are self-sustaining and the land will not be reverted to uplands in the future. However, it is at the discretion of the District Engineer to determine, on a case-by-case basis, if those areas can be used as compensatory mitigation.

A couple of commenters said that mitigation requirements for activities in ephemeral streams should be less because these areas provide minimal aquatic resources. Another commenter stated that compensatory mitigation requirements should specify in-kind stream replacement. One commenter said that compensatory mitigation in excess of a 1:1 ratio is unfair. Another commenter stated that mitigation requirements should be the same as for proposed NWPs A and B. One commenter expressed concern that mining activities will result in substantial cumulative impacts, and recommended that the Corps encourage mining companies to create on-site mitigation banks to compensate for losses of waters of the United States before they occur as a result of the mining activity. A couple of commenters believe that mine reclamation results in waters with higher value than the impacted waters and that it is counterproductive to place restrictive conditions on this NWP. Two commenters suggested that the creation of vegetated littoral shelves should count towards satisfying mitigation requirements.

Specific compensatory mitigation requirements will be determined on a case-by-case basis by district engineers. We do not believe that it is practical to require mining companies to create on-site mitigation banks to compensate for losses of waters of the United States before the mining activity is conducted. Mined land reclamation, if required, can address compensation for losses of waters of the United States, if the District Engineer determines that the reclamation adequately offsets losses of waters of the United States.

**Clarification of Jurisdiction:** In the July 1, 1998, **Federal Register** notice, we requested comments on a position intended to clarify a long-standing jurisdictional debate as to what areas should be considered waters of the United States as a result of mining, processing, and reclamation activities. In the July 1, 1998, **Federal Register**

notice, we proposed the following position:

"Water-filled depressions and pits, ponds, etc., created in any area not a 'water of the United States,' as a result of mining, processing, and reclamation activities, shall not be considered 'waters of the United States' until one of the following occurs:

(1) All construction, mining, or excavation activities, processing activities and reclamation activities have ceased and the affected site has been fully reclaimed pursuant to an approved plan of reclamation; or

(2) All construction, mining, or excavation activities, processing activities and reclamation activities have ceased for a period of fifteen (15) consecutive years or the property is no longer zoned for mineral extraction, the same or successive operators are not actively mining on contiguous properties, or reclamation bonding, if required, is no longer in place; and the resulting body of water and adjacent wetlands meet the definition of 'waters of the United States' (33 CFR 328.3 (a))."

We received many comments concerning the proposed position. Many commenters supported the proposed position, including the 15-year term. One commenter recommended incorporating that text into NWP E. Another commenter supported the proposed position, but suggested that the text include a provision stating that water-filled depressions will not be considered waters of the United States as long as the area is actively mined, including reclamation activities.

We do not believe it is necessary to incorporate the text of this position into the text of NWP 44. The position clearly requires that the mining activity must have stopped, and the reclamation completed, before the area can be considered a water of the United States.

Several commenters opposed this clarification, because borrow pits can be idle for many years before they are used again for mining activities. One commenter objected to the proposed position, stating that it is a constitutional taking of property, especially since the Corps has taken the position that water-filled depressions on landfill caps are not waters of the United States. One commenter believes that the proposed position is too restrictive. Another commenter objected to the proposed position, stating that these water-filled depressions become valuable habitats and help compensate for mining damages. A commenter opposed this position because it contradicts the national goal of net wetland gains advocated in the Clean Water Action Plan. One commenter stated that the Corps should assert jurisdiction over areas subject to voluntary abandoned mine land

reclamation only when they are accepted by the Corps as compensatory mitigation for unavoidable impacts and losses caused by mining activities.

The purpose of imposing a specific time period in the text of this position is to ensure that it is consistently applied throughout the country and provide certainty for the regulated public. This position is not contrary to the Clean Water Action Plan. It is intended to comply with the Administration's wetlands plan by providing fairness to the regulated public. By stating a specific time period, mining companies can anticipate when the water-filled depressions they have created can be considered waters of the United States, if the area meets the definition of "waters of the United States" at 33 CFR Part 328. The development of water-filled depressions on landfill caps and the creation of water-filled depressions as a result of mining activities are completely different situations, and have substantially different public interest and health implications. Water-filled depressions on landfill caps are not waters of the United States, as stated elsewhere in this **Federal Register** notice. The repair of the landfill cap is necessary to reduce air and groundwater pollution. In contrast, water-filled depressions created by mining activities can develop into waters of the United States, and provide valuable functions, such as waterfowl habitat. Activities that create aquatic habitats from upland areas are not limited to compensatory mitigation activities.

Two commenters said that the water-filled depressions should be considered waters of the United States 2 years after the mining operation ceases. A number of commenters recommended a 5 year period before those areas are considered waters of the United States. Two of these commenters said that a 5 year period is consistent with the current regulatory interpretations of "normal circumstances." One commenter expressed concern that the 15 year period is too long, and would set an inappropriate precedent for the rest of the regulatory program. One commenter suggested that there should be no time limit.

For the purpose of consistency in the regulatory program, we are proposing to change the time period from 15 years to 5 years. The 5-year time period was chosen because a 5-year period is used by the Natural Resources Conservation Service to determine if an area has been abandoned for the purposes of making a wetland determination. If prior converted cropland has not been maintained for a 5 year period and

wetland characteristics have developed, then that site is no longer considered prior converted cropland. Therefore, for both agricultural and mining activities, if the area has not been used for any of those purposes for 5 years or longer, it can be considered abandoned, and if the area has developed characteristics of waters of the United States, including wetlands, during that period of abandonment, the area will be subject to Section 404.

One commenter was uncertain whether the proposed position is intended to be prospective, retroactive, or both. A commenter suggested modifying the definition of "waters of the United States" to include water-filled depressions created as a result of any extraction activities. A commenter stated that the zoning of the land, the mine operator, and reclamation bonding are irrelevant to the status of the mining pits as waters of the United States. One commenter requested that paragraph (1) contain the phrase " \* \* \* reclamation bond release has been obtained, if such bond exists \* \* \*" after the phrase " \* \* \* site has been fully reclaimed \* \* \*." This commenter also recommended adding a definition of the word "cease" to the text, because there may be different interpretations as to when the 15-year period started. This commenter also stated that not all property is zoned for mining and this requirement may cause confusion if zoning is necessary to determine if an area is a water of the United States. Another commenter stated that paragraph (2) is difficult to understand and should be rewritten to make it clearer. One commenter recommended that the 15-year time period should apply to mining sites requiring reclamation as well as those mining sites that do not require reclamation.

This proposed position will take effect on the effective date of this NWP. If a jurisdictional determination is conducted on an area that was previously mined, then this position will be used to help determine if the area can be considered a water of the United States or is part of an on-going mining operation and not a water of the United States. This position is applicable only to mining activities, not other types of extraction activities. The preamble to 33 CFR Part 328.3 in the November 13, 1986, **Federal Register** notice (51 FR 41206-41260) adequately addresses water-filled depressions created by other extraction activities. We do not believe it is necessary to add language addressing the release of the bond, because the important criterion is whether the site has been fully reclaimed. A definition of the term

"cease" is not needed, because it is the same definition in common usage. The 5-year period will start when all construction, mining, extraction, processing, and reclamation activities have stopped. The zoning of the land is only one criterion that may be used to determine if a site will continue to be mined. The zoning classification is not necessary to determine if an area is a water of the United States. If a tract of land was previously zoned for mining, and that zoning classification was changed to residential, then the District Engineer would use that information to determine that the mining activity has ceased. This position applies to all mining sites, whether or not reclamation is required.

One commenter stated that voluntary abandoned mined land reclamation and remining can facilitate abandoned mined land reclamation and result in water quality improvements in the watershed. This commenter believes that if the Corps considers artificial waters constructed for voluntary abandoned mined land reclamation and remining to be waters of the United States, it would deter voluntary reclamation and/or remining because of permit burdens and mitigation costs. Two commenters suggested that the Corps assert jurisdiction over water-filled depressions only when they have been accepted as compensatory mitigation. One commenter recommended that NWP 21 contain this position statement.

We do not believe that the proposed position will discourage voluntary abandoned mined land reclamation, especially if such reclamation can be used as a mitigation bank. NWP 27 can be used to authorize wetland enhancement, restoration, and creation activities in waters of the United States in areas that may have been previously mined. We do not agree that only areas accepted as compensatory mitigation should be considered waters of the United States. District engineers can use this position to determine if an area is a water of the United States in conjunction with mining activities authorized by NWP 21.

Based on the comments discussed above, we are proposing to modify the position to make it easier to read, as follows:

"Water-filled depressions (e.g., pits, ponds, etc.) created in any area not previously considered a "water of the United States," as a result of mining, processing, and reclamation activities, shall not be considered "water of the United States" until one of the following situations occurs:

(1) All construction, mining, excavation, processing, and reclamation activities have

ceased and the affected site has been fully reclaimed pursuant to an approved reclamation plan; or

(2) The resulting body of water and adjacent wetlands meet the definition of "waters of the United States" (see 33 CFR Part 328.3 (a)), and any one of the following criteria are met:

(a) all construction, mining, excavation, processing, and reclamation activities have ceased for a period of five (5) consecutive years; or

(b) the property is no longer zoned for mineral extraction; or

(c) the same or successive operators are not actively mining on contiguous properties; or

(d) reclamation bonding, if required, is no longer in place."

The only substantive change in the position is changing the time period from 15 years to 5 years, as discussed above.

**Recommended Additional Conditions:** Several commenters suggested additional conditions to incorporate into this NWP. Many of these suggestions are best addressed through the regional conditioning process, so we will only address those recommendations that have national applicability in this section.

One commenter suggested that the NWP should not be used in watersheds with substantial historic aquatic resource losses. Another commenter recommended that the NWP should contain a condition addressing the disposal of dredged or excavated material, wastes from washing minerals, and resuspension of stream bed materials that may be contaminated. One commenter suggested prohibiting the NWP in areas inhabited by State-listed endangered or threatened species, species of special concern, or wild trout. A commenter recommended that the NWP contain a provision requiring zero pollutant runoff or groundwater contamination from the site, as well as a bond to cover expenses incurred by surrounding communities if the mine is abandoned. One commenter recommended adding a condition to the NWP requiring that the current mine site must be successfully reclaimed prior to receiving another Section 404 permit for another mining activity in the same stream reach, and limiting the losses within that stream reach to 2 acres.

Division and district engineers can condition this NWP to prohibit or restrict its use in areas where the individual and cumulative adverse effects of Section 404 activities on the aquatic environment may be more than minimal. A Section 402 permit, if required, should address discharges of wastes from washing materials and runoff from processing areas. District

engineers can exercise discretionary authority to restrict or prohibit the use of this NWP to conduct mining activities that will result in the suspension of contaminated sediments in the water column. This issue can also be addressed in the water quality management plan required for activities authorized by this NWP (see General Condition 9). District engineers will review PCNs for proposed mining activities to determine which mining activities constitute separate single and complete projects with independent utility.

**Additional Issues:** A number of commenters recommended removing all references to excavation from the NWP. Another commenter stated that the proposed NWP appears to violate the invalidation of the Tulloch rule. One commenter suggested that the final NWP clarify that proposed mining activities will be reviewed on a case-by-case basis to determine if there is a discharge regulated under Section 404 of the Clean Water Act.

Excavation activities can result in discharges of dredged or fill material into waters of the United States. Many of these activities were regulated under Section 404 of the Clean Water Act prior to the implementation of the Tulloch rule in 1993. Therefore, we have not removed references to excavation from this NWP. District engineers will review PCNs to determine if the proposed mining activity requires a Section 404 permit.

A number of commenters said that this NWP should contain a provision requiring the prospective permittee to demonstrate that the work complies with the National Historic Preservation Act. One of these commenters objected to the proposed NWP, stating that mining activities have resulted in the destruction of numerous archeological sites eligible for listing in the National Register of Historic Places.

General Condition 12 already addresses this issue. This general condition requires compliance with the requirements of the National Historic Preservation Act prior to commencing the authorized activity.

A number of commenters stated that the NWP 26 data collected by the Corps for mining activities is misleading because the data has been collected for only a short time, the 500 linear foot limit for filling or excavating stream beds in NWP 26 made many mining activities ineligible for NWP 26 authorization, and the Tulloch decision and enforcement policy has been inconsistently implemented.

Although data concerning mining activities authorized by NWP 26 has

been collected for only a short period of time, we believe that this data can be used to provide estimates of the potential losses of waters of the United States that may be authorized by this NWP, since the scope of applicable waters is more restrictive than for NWP 26 (with the exception of aggregate mining activities in lower perennial streams). In our environmental assessment for this NWP, we will consider additional sources of information to estimate future impacts.

One commenter recommended that this NWP should include a definition of a single and complete project. Another commenter suggested that the term "mining" should be clarified, since mining in Florida refers to the excavated material leaving the mining site; under Florida's definition the extraction of material for on-site grading and filling would not be considered mining. One commenter recommended that the Corps develop a separate NWP for reclamation projects authorized under Title IV Abandoned Mine Land Program of the Surface Mining Control and Reclamation Act of 1977 or equivalent State laws.

The term "single and complete project" is already defined at 33 CFR Part 330.2(i). The District Engineer will determine if the proposed activity constitutes mining for the purposes of this NWP. This NWP authorizes reclamation activities in waters of the United States associated with the mining activity.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 44 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all discharges into impaired waters and their adjacent wetlands. General Condition 27 prohibits the use of NWP 44 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

The proposed NWP will be used to authorize aggregate and hard rock/mineral mining activities in certain waters of the United States, including

wetlands. In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. Proposed NWP E is designated as NWP 44, with the modifications discussed above.

#### *IV. Comments and Responses on Nationwide Permit Conditions*

##### **A. Consolidation of General Conditions and Section 404 Only Conditions**

In an effort to ensure consistent application of the conditions for the NWPs, we proposed in the July 1, 1998, **Federal Register** notice to consolidate the "General Conditions" and "Section 404 Only" conditions into one set of general conditions for the NWPs. This consolidation is practical because most of the Section 404 Only conditions apply to activities in Section 10 waters. This consolidation does not increase the scope of analysis for determining if a particular project qualifies for authorization under the NWP program. As a result of the number of comments we received in favor of this consolidation, all of the NWP conditions will be combined into one "General Conditions" section in the NWPs. The opening language of former Section 404 Only conditions 1, 2, 3, 4, 5, 7, and 8 (now designated as General Conditions 16, 17, 18, 19, 20, 22, and 23, respectively) has been modified to read "activity [or activities], including structures and work in navigable waters of the United States and discharges of dredged or fill material," to reflect their application in Section 10 waters. Due to the changes in the NWP general conditions discussed below, the numbers of some general conditions differ from the numbering scheme in the July 1, 1998, **Federal Register** notice.

##### **B. Comments on Specific General Conditions**

In response to the July 1, 1998, **Federal Register** notice we received many comments on specific NWP general conditions. As a result of our review of those comments, we are proposing some changes to the NWP general conditions, as discussed below. Any changes made to the NWP general conditions will apply to all of the NWPs, including the existing NWPs issued in the December 13, 1996, **Federal Register** notice (61 FR 65874–

65922), when the proposed new and modified NWPs become effective.

**4. Aquatic Life Movements:** One commenter requested that we eliminate the word "substantially" from Condition 4. Another commenter recommended replacing the phrase "substantially disrupt" with "more than minimally disrupt."

We recognize that most work in waters of the United States will result in some disruption of movement of those aquatic species that are indigenous to, or pass through, those waters. District engineers will determine if an NWP activity results in substantial disruption of the movement of aquatic organisms. The word "substantially" has been retained in this general condition. We are also proposing to add a sentence to this general condition to require that if culverts are placed in a stream as part of the authorized work, they must be installed so that low stream flows will continue to flow through the culverts.

**9. Water Quality:** In the July 1, 1998, **Federal Register** notice, we proposed to modify General Condition 9 by changing its title from "Water Quality Certification" to "Water Quality" and changing the text of the general condition to require a water quality management plan for activities authorized by existing NWPs 12, 14, 17, 18, 21, 32, and 40 and the new NWPs 39, 42, 43, and 44 (proposed as NWPs A, D, C, and E, respectively; NWP B was later withdrawn from the new and modified NWPs) if such a plan is not required by the State or Tribal 401 water quality certification. The purpose of the water quality management plan is to ensure that the project will have minimal adverse effects on the aquatic environment, especially by preventing or reducing adverse effects to downstream water quality and aquatic habitat. An important part of a water quality management plan can be the establishment and maintenance of vegetated buffers adjacent to waters of the United States.

The majority of the commenters asserted that the Corps had no statutory authority to impose Section 401 and Section 402 requirements for water quality and storm water management plans and stated that these requirements overlap or duplicate, and often conflict with, State water quality certification and National Pollutant Discharge Elimination System (NPDES) programs. One commenter stated that the Section 401 water quality certification must be issued prior to initiating the work under the NWP, which makes the Corps imposition of these additional requirements under this general condition redundant and unnecessary.

Another commenter stated that these requirements would significantly add to the regulatory burden of permit applicants and increase the Corps workload. Several commenters stated that requiring a water quality management plan would increase the scope of the NWP program beyond the expertise of Corps regulatory personnel.

A goal of the Clean Water Act, which provides the Corps with its authority to regulate discharges of dredged or fill material into waters of the United States, is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. We believe that the requirement for a water quality management plan to prevent or reduce adverse effects to water quality as a result of work authorized under Section 404 of the Clean Water Act is within our statutory authority. However, the terms of the proposed modification of this general condition are not intended to replace existing State or Tribal Section 401 requirements, if those programs adequately address water quality concerns. Instead, the requirements of the general conditions provide the Corps the opportunity to protect or improve local open water quality. In states with strong water quality programs, district engineers will defer to State and local requirements and will not require water quality management plans as special conditions of NWP authorizations. If the 401 agency does not require adequate measures to protect downstream water quality, we have the authority to require measures, including the construction of stormwater management facilities or the establishment or maintenance of vegetated buffers adjacent to waters of the United States, that will minimize adverse effects to downstream water quality. If the adverse effects to local water quality resulting from the proposed work are minimal without the need for the implementation of a water quality management plan, then such a plan is not required. This general condition is not an absolute requirement because the criterion is minimal degradation, not no degradation. If a project proponent does not want to implement a water quality management plan, and the plan is necessary to ensure that the NWP authorizes only minimal adverse effects on the aquatic environment, then he or she can apply for an individual permit.

The language of the proposed modification of this general condition is intended to allow flexibility and minimize the amount of information necessary to determine compliance with its requirements. District engineers will use their discretion to qualitatively

determine if a particular project complies with this general condition and will not require extensive analysis or review. Detailed studies will not be required. If a water quality management plan is unnecessary due to the nature of the work and the surrounding area, then the plan is not required. For example, the District Engineer may determine that a water quality management plan is not required for an activity in a watershed that is not substantially developed. If a water quality management plan is required by the District Engineer for a particular NWP authorization, it does not increase the Corps scope of analysis. For example, if the permit area includes an entire subdivision, the District Engineer will determine if a water quality management plan is necessary to address impacts to water quality resulting from the construction and use of the subdivision. However, if a Corps permit is required only for a small portion of the development, such as a single road crossing to provide access to an upland development, the water quality management plan will not apply to the entire project site. District engineers cannot require a water quality management plan for a poorly designed upland development. By limiting our analysis to the qualitative assessment of compliance with this general condition, the increase to the Corps workload will be minor and compliance will be easily assessed by Corps regulatory personnel.

Many commenters recognized the importance of vegetated buffers and agreed that they should be required. One commenter stated that the general condition should not require the establishment of vegetated buffers. Another commenter stated that this general condition would needlessly take private property without compensation. One commenter stated that this condition would cause unreasonable financial burdens on NWP applicants and that future landowners cannot be expected to know if areas adjacent to waters of the United States are upland mitigation areas required for the NWP authorization or the proper width of the buffers. One commenter asked if drainage districts would be allowed to clear the buffer areas and to place excavated material on these areas during future ditch maintenance activities.

We are proposing to modify the general condition to provide district engineers with the flexibility to determine whether or not the establishment or maintenance of a vegetated buffer adjacent to open waters is necessary. The requirement for a water quality management plan does not constitute a taking of private property. It is merely an NWP condition that will

help ensure that the authorized activity causes only minimal adverse effects to water quality. This requirement still allows the landowner viable economic use of his or her property. If the District Engineer determines that a water quality management plan is necessary to ensure that the activities authorized by NWPs result only in minimal adverse effects on water quality, and the landowner or developer does not want to implement the water quality management plan, then he or she can request authorization through the individual permit process. NWPs are optional permits, and anyone who does not want to comply with the terms and limits of the NWPs can request authorization through either a regional general permit, if available for the proposed activity, or an individual permit. We disagree that the requirement for a water quality management plan will result in unnecessary financial burdens on the regulated public.

Project-specific requirements for vegetated buffers adjacent to waters of the United States should be incorporated into NWP authorizations as special conditions, based on site conditions. Vegetated buffer requirements may also be regional conditions of the NWPs. The vegetated buffer requirements will be included in the NWP authorization issued to the project proponent, either as special or regional conditions. The NWP authorization will include a description of the width and composition of the vegetated buffer and may contain a plan of the project site showing the location and extent of those buffers. These documents will ensure that the permittee knows the location and extent of those buffers. Since the establishment and maintenance of vegetated buffers adjacent to waters of the United States can be considered as a form of out-of-kind compensatory mitigation for authorized losses of waters of the United States, district engineers may require the protection of vegetated buffers by conservation easements, deed restrictions, or other forms of legal protection.

If a drainage district needs to periodically remove sediments from a waterway where vegetated buffers were established as a condition of an NWP authorization, and those vegetated buffers are protected by a conservation easement or other legal means, the drainage district must notify the District Engineer of its intent to remove the vegetated buffer to conduct the maintenance activity. The drainage district may be required to reestablish of the vegetated buffer upon completion of the maintenance work.

One commenter recommended modifying the general condition to require vegetated buffers adjacent to all waters of the United States, not just open waters, because of the scientific support for buffers adjacent to wetlands and open water as essential for maintaining aquatic functions. One commenter requested a definition of the term "vegetated buffer" and that the Corps specifically state the width required for the buffer zone. Two commenters suggested changing the term "vegetated buffer" to "permanently vegetated buffer." Some commenters recommended requiring vegetated buffers to be composed of native species. Another commenter recommended making this general condition applicable to NWPs 19, 25, 33, 34, and 36. One commenter stated that the concept of a wetland buffer is better suited for large open space projects than it would be for linear road projects and recommended eliminating buffer requirements from road projects within existing right-of-ways. A commenter requested a definition of the term "to the maximum extent practicable" for the vegetated buffer requirement. This commenter also stated that the vegetated buffer requirement is inconsistent with channel relocation authorized by NWP 40 and the removal of undesirable species in NWP 27.

The purpose of the vegetated buffer requirement in this general condition is to prevent more than minimal degradation of the water quality of streams and other open waters. For that reason, we have not included a requirement for vegetated buffers adjacent to wetlands. This does not prevent district engineers from requiring the establishment and maintenance of vegetated buffers adjacent to wetlands as conditions of NWP authorizations. The width and species composition of the required vegetated buffer is at the discretion of the District Engineer. In a previous section of this **Federal Register** notice, we recommend minimum widths for vegetated buffers, as well as the plant sizes and species that should be used. These recommendations are merely guidance; it is the District Engineer's decision as to what constitutes an adequate vegetated buffer for the purposes of a specific NWP authorization. Vegetated buffers should be as wide as possible. The phrase "to the maximum extent practicable" provides district engineers with flexibility. The vegetated buffer requirement is not inconsistent with NWPs 40 and 27, because vegetated buffers can be established by planting

appropriate species after drainage ditch or channel relocation activities and the removal of undesirable plant species, such as noxious weeds or invasive species. We have removed NWP 21 from the list of NWPs that may require a water quality management plan, because Title V of the Surface Mining Control and Reclamation Act already has a similar requirement.

**11. Endangered Species:** In the July 1, 1998, **Federal Register** notice, we did not propose any changes to this general condition. In response to this **Federal Register** notice, one commenter requested that the Corps define the phrase "in the vicinity" and another commenter recommended deleting this phrase from the general condition.

The definition of this term is at the discretion of the District Engineer for a particular Federally-listed endangered or threatened species. The area defined as the "vicinity" varies from species to species. For example, the "vicinity" of an endangered bird species will be different from the "vicinity" of an endangered species of orchid. The Standard Local Operating Procedures for Endangered Species established between most Corps districts and the FWS and NMFS will provide more effective protection of endangered and threatened species and their critical habitat, and can provide local definitions of the term "vicinity." General Condition 11 contains provisions requiring notification for activities in designated critical habitat. We are proposing to modify General Condition 11 to clarify that the notification is required for any NWP activity proposed in designated critical habitat. We are proposing to add a provision to General Condition 13, Notification, to require the prospective permittee to provide the name(s) of the Federally-listed endangered or threatened species that may be adversely affected by the proposed work.

**12. Historic Properties:** In the July 1, 1998, **Federal Register** notice, the Corps did not propose any changes to this general condition. Several commenters believe that General Condition 12 adequately address the Corps responsibilities under Section 106 of the National Historic Preservation Act (NHPA). One commenter recommended that the Corps require that prospective permittees submit with the PCN either an inventory of historic properties prepared by a qualified individual, a letter from the State Historic Preservation Officer (SHPO) concerning potential impacts to historic properties, or some other evidence that demonstrates that the requirements of

NHPA have been satisfied. One commenter requested that the notification contain a statement concerning potential effects to historic property. Another commenter stated that General Condition 12 should include a requirement that the permittee notify the District Engineer of the discovery of any artifacts or deposits that may constitute an eligible property while the authorized work is in progress and take steps to protect those potentially eligible properties until the requirements of NHPA are fulfilled. One commenter suggested that if the permittee avoids adverse effects to historic properties by incorporating those properties into "open space" or greenbelts on the project site, then those historic properties must be protected by deed restrictions, protective covenants, or other legal means as a condition of the NWP authorization. Another commenter expressed concern as to how Tribal coordination is conducted for potential effects to Tribal cultural or historic resources.

We believe that the current wording of General Condition 12 adequately addresses compliance of the NWP program with NHPA. In 33 CFR Part 325, Appendix C, the Corps has established the procedures necessary to ensure compliance with Section 106 of the NHPA. This general condition already requires that the prospective permittee notify the District Engineer if the proposed work may affect historic properties listed in, or may be eligible for listing in, the National Register of Historic Places. The District Engineer will review the notification and conduct any necessary coordination with the SHPO to ensure compliance with NHPA. The prospective permittee cannot commence work until the requirements of NHPA have been fulfilled. If the permittee discovers previously unknown historic properties during the course of conducting the authorized work, he or she must stop work and notify the District Engineer of the presence of previously unknown historic properties. Work cannot continue under the NWP until the requirements of NHPA have been fulfilled.

If the permittee avoids adverse effects to historic properties, we cannot require the permittee to preserve those properties in open space with a conservation easement or deed restriction. Tribal cultural resources are subject to the same requirements as other cultural and historic resources. The original wording of General Condition 12 will be retained as published in the December 13, 1996, **Federal Register** (61 FR 68574-65922).

We are proposing to add a provision to General Condition 13, Notification, to require the prospective permittee to state, in the PCN, which historic property may be affected by the proposed work or to include a vicinity map indicating the location of the historic property.

**13. Notification:** In the July 1, 1998, **Federal Register** notice, we proposed to require notification for all of the new and modified NWPs, with various notification thresholds, but in general most of these NWPs had a PCN threshold of  $\frac{1}{3}$  acre. We also proposed to conduct agency coordination for discharges authorized by proposed NWPs A, B, C, E, and 40 that result in the loss of greater than 1 acre of waters of the United States. Notifications for activities that result in the loss of 1 acre of waters of the United States or less would be subject to Corps-only review. In this section, we will address only those comments relating to the notification process; comments concerning PCN thresholds for specific NWPs are addressed in the preamble discussions for each NWP.

Several commenters stated that one PCN threshold should be applied to all of the NWPs. We disagree, because one of the purposes of the PCN process is to provide district engineers the opportunity to review specific NWP activities to ensure that they will result only in minimal adverse effects on the aquatic environment. There is a wide range of activities that are authorized by the existing NWPs and the proposed NWPs. Each of these activities may require different PCN thresholds because they can have different adverse effects on the aquatic environment. We have attempted to make the PCN thresholds for the proposed NWPs as consistent as possible. Most of the proposed NWPs require submission of a PCN for losses of greater than  $\frac{1}{4}$  acre of waters of the United States, but PCN thresholds for steam impacts vary for these NWPs.

One commenter believes that notification should not be required for projects where the Corps accepts compensatory mitigation plans for less than 1 acre of wetland impact, for activities exempt under Section 404(f)(1) of the Clean Water Act, or for the removal of accumulated sediments at stream crossings. Another commenter recommended that notification should be required for all NWP activities where the State has not issued an unconditional WQC. One commenter suggested that all activities impacting stream beds or riparian zones should require a PCN with agency coordination.



We disagree with these recommendations. We require notification for NWP activities that may result in more than minimal adverse effects on the aquatic environment. Activities that are exempt under Section 404(f)(1) of the Clean Water Act do not require a Section 404 permit and are not subject to PCN requirements. For the proposed modification of NWP 3, we are proposing to require notification for all removal of accumulated sediments in the vicinity of existing structures (see the preamble discussion for NWP 3). If an unconditional WQC has not been issued for the NWP by the Section 401 agency, the State or Tribe will have the opportunity to review each activity and determine if it complies with State or Tribal water quality standards. Notification to the Corps is unnecessary unless the Division Engineer regionally conditions the NWP to require notification. The District Engineer will review the PCN to determine if the proposed work complies with the terms of the NWP and if any compensatory mitigation is necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment.

Several commenters addressed the 30-day PCN time period in paragraph (a)(3) of General Condition 13. Two commenters supported the 30-day PCN time period for the new NWPs. One commenter recommended deleting the 30-day time period because the project proponent should not have to wait 30 days to receive an NWP authorization. One commenter stated that the 30-day time period is unjustified and is contrary to the intent of the NWP program. One commenter said that PCN time period should be reduced from 30 days to 15 days. Three commenters stated that the 30-day PCN time period is too short to conduct an adequate review of the proposed work. One of these commenters recommended a 60-day time period and another commenter suggested a 45-day time period.

The PCN time period provides fairness to the regulated public by requiring the Corps to respond to PCNs in a timely manner. Due to the higher workloads that are expected to result from the proposed new and modified NWPs, we are proposing to change paragraph (a) of General Condition 13 by increasing the PCN review period to 45 days for a complete notification. The District Engineer will have 30 days from the PCN receipt date to request additional information that is necessary to make the PCN complete and begin the PCN review process. If the PCN is incomplete, the District Engineer can make only one request for additional

information necessary to make the PCN complete. If the applicant does not supply the requested information, the District Engineer will not proceed with the PCN review and the applicant cannot assume that the project is authorized by the NWP 45 days later. If the applicant does not provide all of the requested information, the District Engineer may notify the applicant, either by letter or telephone, that the PCN is not complete and that the PCN review process will not begin until all of the requested information is furnished to the Corps. Upon receipt of a complete PCN, the District Engineer has 45 days to determine if the proposed work qualifies for authorization under the NWP or exercise discretionary authority to require a standard permit. If the District Engineer does not respond to the PCN within 45 days of receipt of a complete application, then the proposed activity is authorized by NWP unless the District Engineer modifies, suspends, or revokes the default NWP authorization in accordance with 33 CFR Part 330.5(d)(2).

Many commenters believe that the information requirements for PCNs are too extensive and confusing. They requested that the Corps provide a checklist to simplify the notification process. Three commenters requested that the requirement for submission of a delineation of special aquatic sites for certain NWPs be deleted from General Condition 13. One of these commenters specifically recommended excluding NWP 12 activities that are not subject to an acreage limit from the delineation requirement. Another commenter stated that wetland delineations are too costly to be required for PCNs.

The format of General Condition 13 clearly outlines the information required for the notification process. Corps districts can, if they choose to do so, provide a checklist with their permit applications to help prospective permittees ensure that they have provided all the required information. The proposed modifications to NWP 12 require the submission of a delineation of special aquatic sites. We are proposing to add NWP 7 to the list of NWPs that require submission of delineations of special aquatic sites with the PCN. NWP 7 was added because there may be some intake or outfall maintenance activities that could adversely affect submerged aquatic vegetation beds.

A few commenters believe that the prospective permittee should not be required to notify the National Ocean Service (NOS) for the construction or installation of utility lines in navigable waters and that this provision should be

removed from General Condition 13. We concur with this comment and are proposing to modify NWP 12 to require the Corps to provide NOS with a copy of the PCN and NWP authorization, so that NOS can chart the utility line to protect navigation.

We received many comments concerning interagency coordination of PCNs. Some commenters stated that the Corps should not consider agency comments for NWP activities. Other commenters suggested that agencies should have the opportunity to comment on every PCN. One commenter recommended that agency coordination should be conducted for all activities authorized by NWPs. Several commenters pointed out discrepancies between different discussions of the agency coordination process in the July 1, 1998, **Federal Register** notice. In the preamble discussion for the proposed modifications of General Condition 13, we proposed to conduct agency coordination for NWPs authorizing discharges resulting in the loss of greater than 1 acre of waters of the United States. However, in the proposed revisions General Condition 13, we specifically stated that agency coordination would be conducted only for NWPs A, B, C, E, and 40, where the loss of waters of the United States is greater than 1 acre and for NWPs 12, 21, 29, 33, 37, and 38, regardless of the acreage loss. Many commenters stated that the agency coordination period should be greater than 5 calendar days and some of these commenters said that the Corps should provide responses to agency comments. One commenter recommended that Tribes implementing the Section 401 program should be included in the agency coordination process. Two commenters requested that the Corps put the optional agency coordination process back into General Condition 13, to allow the Regional Administrator of EPA or the Regional Directors of FWS or NMFS to request agency coordination for activities authorized by certain NWPs.

We are proposing to modify the agency coordination thresholds in paragraph (e) to require agency coordination for any NWP activity requiring notification to the District Engineer that results in the loss of greater than 1 acre of waters of the United States. Because of the proposed modification of NWP 40, we have removed the provision for coordination with the FWS for NWP 40 activities resulting in the loss of greater than  $\frac{1}{3}$  acre of playas, prairie potholes, and vernal pools. We have not put the optional agency notification process

back into General Condition 13. We believe that agency coordination is unnecessary for NWP activities resulting in the loss of 1 acre or less of waters of the United States. Due to the increase complexity of the NWPs, we have modified the time periods for agency coordination. With the exception of NWP 37, these agencies will have 10 calendar days from receipt of the PCN to notify the District Engineer that they intend to provide substantive, site-specific comments within their area of expertise. If so notified, the District Engineer will wait an additional 15 calendar days before making a decision on the PCN. Therefore, these agencies have up to 25 days to provide comments on a PCN. Districts will involve any Tribes with Section 401 programs in the agency notification process, if the proposed activity occurs in an area subject to a Tribal Section 401 program.

One commenter recommended that the mitigation requirements in paragraph (g) should explicitly state that compensatory mitigation must fully offset permanent, temporary, and secondary losses of functions, values, and acreage of aquatic resources to satisfy the "no net loss" goal of the Section 404 program. One commenter asked which functional assessment method would be required for mitigation to determine compliance with paragraph (g) of General Condition 13. A commenter requested that the Corps provide compensatory mitigation guidelines for permit applicants to help them better understand and comply with compensatory mitigation requirements. One commenter suggested that the Corps provide guidance for appropriate mitigation ratios. Another commenter asked how the requirements of paragraph (g) of this general condition differ from the analysis required by the Section 404(b)(1) Guidelines. One commenter stated that vegetated buffers should not be considered as compensatory mitigation. This commenter also said that in lieu fee programs should not be used as compensatory mitigation.

For those NWP activities that require notification, district engineers will determine if the proposed compensatory mitigation adequately offsets losses of waters of the United States. To determine if the proposed compensatory mitigation is appropriate, district engineers will consider what is best for the local aquatic environment. The District Engineer is not required to utilize a formal assessment method. It would be inappropriate to issue national standards for compensatory mitigation, because of the regional differences in aquatic resource functions and values

across the country. Nationwide permittees are not required to fully offset losses of aquatic resource functions, values, and acreage resulting from permanent, temporary, or secondary impacts. For the NWP program, compensatory mitigation is necessary only to ensure that the adverse effects of the authorized work on the aquatic environment are minimal, individually or cumulatively. The "no net loss" goal is not a statutory requirement of the Section 404 program. Other Federal wetlands programs, such as the Wetland Reserve Program, help increase the quantity of the Nation's wetlands and achieve the "no net loss" goal. Compensatory mitigation requirements are established by district engineers on a case-by-case or district-wide basis. Therefore, we will not establish national compensatory mitigation guidelines. Compensatory mitigation requirements are addressed in more detail elsewhere in this **Federal Register** notice. Vegetated buffers are an important type of out-of-kind compensatory mitigation that helps protect the quality of the local aquatic environment, especially water quality. District engineers will consider vegetated buffers as part of the compensatory mitigation required for activities authorized by Section 404 permits. In paragraph (g) of General Condition 13, we have specified that in lieu fee programs, mitigation banks, and other consolidated mitigation approaches are preferred methods of providing compensatory mitigation. In lieu fee programs are an important means of providing consolidated compensatory mitigation projects, especially in areas where mitigation banks are uncommon.

For the NWP program, permittees are only required to avoid and minimize impacts on-site to the maximum extent practicable. Off-site alternatives analyses cannot be required for activities authorized by NWPs because the NWPs authorize only those activities with minimal adverse effects on the aquatic environment. If the adverse effects on the aquatic environment are more than minimal, then the District Engineer will exercise discretionary authority and require an individual permit for the proposed work. In accordance with 40 CFR Part 230.7, each NWP is subjected to a Section 404(b)(1) Guidelines analysis before it is issued, but that analysis is not conducted for each activity authorized by the NWP.

One commenter recommended modification of General Condition 13 to require, in addition to preconstruction notification, postconstruction

notification for all NWPs. Another commenter requested modification of General Condition 13 to include requirements for the prospective permittee to apply for water quality certification (WQC), in those instances where WQC has been denied, once the notification process has been completed.

We do not agree that postconstruction notification should be required for all activities authorized by NWPs. We believe that General Condition 9, Water Quality, adequately addresses the WQC requirements for the NWPs.

**14. Compliance Certification:** We did not propose any changes to this general condition, but one commenter recommended that this general condition specify that the Corps will verify the certification by a site visit within 90 days of receipt of the certification from the permittee.

We disagree with this recommendation and will not incorporate it into this general condition. Corps districts will review compliance certifications at their discretion.

**15. Use of Multiple Nationwide Permits:** Although we did not propose any changes to this general condition, we received many general comments opposing the use of more than one NWP to authorize a single and complete project. We also received comments opposing the provisions of this general condition. One commenter recommended a prohibition against the use of more than one NWP to authorize a single and complete project that results in above-grade wetland fills. Another commenter stated that the use of multiple NWPs for a project should be unrestricted because of the low acreage limits of the NWPs and the unlikely probability that projects authorized by more than one NWP would result in significant adverse effects on the aquatic environment.

We are proposing to modify General Condition 15 to prohibit the use of more than one NWP to authorize a single and complete project, except when the acreage loss of waters of the United States is less than the highest specified acreage limit for the NWPs used to authorize the activity. For example, NWP 13 may be used with NWP 39 to authorize bank stabilization in unvegetated tidal waters at the project site for the construction of a 100-acre residential subdivision that will result in the filling of non-tidal wetlands. In this case, the acreage loss of waters of the United States cannot exceed the indexed acreage limit under NWP 39. Since the project area is 100 acres, the maximum acreage loss for this

particular project is 2.25 acres, and includes the subdivision, attendant features, and bank stabilization.

We are also proposing to modify the title of this general condition to more accurately describe its purpose. The previous title, "Multiple Use of Nationwide Permits" implied that the general condition addresses the use of an NWP more than once for a single and complete project. By changing the title to "Use of Multiple Nationwide Permits," we believe that the title more accurately reflects its purpose, which is controlling the use of more than one NWP to authorize a single and complete project.

**17. Shellfish Beds:** We did not propose any changes to this general condition, except to change it from a "Section 404 Only" condition to a general condition and include activities in Section 10 waters, as discussed above. During our review of the comments received in response to the July 1, 1998, and October 14, 1998, **Federal Register** notices, we determined that this general condition requires clarification to ensure that the NWPs do not authorize activities that may result in more than minimal adverse effects on shellfish. In the text of the general condition we are proposing to change the word "production" to "populations" because the word "production" is too limiting and the condition should apply to all areas of concentrated shellfish populations, not just where shellfish are harvested commercially. This general condition was previously entitled "Shellfish Production." We are proposing to modify the title of this general condition to "Shellfish Beds" to reflect the proposed change in the general condition.

**18. Suitable Materials:** We did not propose any changes to this general condition, except to include activities in Section 10 waters of the United States, as discussed above. One commenter requested that the general condition prohibit the use of asphalt, tires, and construction and demolition debris. Another commenter supported the current wording of the general condition, provided it does not authorize the use of fill that contains deleterious materials, such as trash. One commenter recommended modifying this general condition to state that materials used in construction must not be cumulatively toxic, even though they may not be toxic in the amounts discharged for the project.

This NWP condition already contains examples of material that are considered unsuitable, such as trash, debris, car bodies, and asphalt. It is impractical to provide a comprehensive list of

unsuitable materials. District engineers will determine on a case-by-case basis which materials are unsuitable. Division engineers can regionally condition the NWPs to prohibit the use of certain materials, if those materials are commonly used in a particular geographic region and are considered toxic. We do not believe that it is necessary to specify that discharged materials must not be cumulatively toxic, because the discharge of toxic pollutants is addressed under Section 307 of the Clean Water Act. We are proposing to retain this general condition as published in the July 1, 1998, **Federal Register** notice.

**19. Mitigation:** In the July 1, 1998, **Federal Register** notice, we proposed to modify this former Section 404 Only condition by deleting the words "\* \* \*" unless the District Engineer approves a compensation plan that the District Engineer determines is more beneficial to the environment than on-site minimization and avoidance measures." We also proposed to modify this general condition to require restoration, creation, enhancement, or preservation of aquatic resources to offset losses of functions and values of waters of the United States due to authorized impacts and to include the establishment of vegetated buffers as part of a compensatory mitigation plan.

A few commenters stated that mitigation is defined too narrowly in the general condition, and should include avoidance and minimization. Some commenters stated that compensatory mitigation should not be required for activities authorized by NWPs because the adverse effects of those activities on the aquatic environment can only be minimal. Other commenters stated that compensatory mitigation should be required for all NWP activities that require a PCN. Some commenters said that compensatory mitigation should be required for all impacts to the aquatic environment. A few commenters stated that compensatory mitigation should not be used to "buy down" losses of waters of the United States authorized by NWPs to ensure that the adverse effects on the aquatic environment are minimal.

The text of General Condition 19 includes all three steps of the mitigation process (i.e., avoidance, minimization, and compensation). Permittees are required to avoid and minimize impacts to the aquatic environment on-site to the maximum extent practicable. The consideration of off-site alternatives cannot be required for activities authorized by NWPs. For NWP activities that require notification to the District Engineer, compensatory mitigation may

be required to ensure that the net adverse effects on the aquatic environment are minimal, individually or cumulatively. However, if the adverse effects on the aquatic environment are minimal, without compensatory mitigation, the District Engineer may determine that compensatory mitigation is unnecessary and authorize the activity with the NWP. The use of compensatory mitigation to reduce the adverse effects of the authorized work to the minimal level is an essential component of the NWP program, and included in the NWP regulations at 33 CFR Part 330.1(e)(3).

One commenter stated that the NWP program has become a way to avoid an alternatives analysis, but another commenter views the NWPs as similar to the individual permit process because it requires an on-site alternatives analysis. One commenter said that the avoidance requirement of this general condition is meaningless because the resource agencies do not have enough time to review the applicant's avoidance analysis in the PCN. One commenter recommended removing the avoidance requirement from this general condition because there are currently no standards for determining if the requirement has been met.

General Condition 19 requires the consideration of on-site alternatives, including changes to the proposed work to avoid and minimize adverse effects to waters of the United States. District engineers will review the PCN to determine if additional avoidance and minimization is practicable and necessary. If the proposed work meets the terms and conditions of the NWP and results in minimal adverse effects on the aquatic environment (with or without any compensatory mitigation required by the District Engineer) it is not necessary to require additional avoidance and minimization.

Two commenters believe that the requirement for restoration, creation, enhancement, or preservation of aquatic resources to offset authorized impacts to ensure that the adverse effects of the work are minimal is a major change to the NWP program and does not accurately reflect the concept of using compensatory mitigation to ensure that the adverse effects on the aquatic environment caused by activities authorized by NWPs are minimal. Another commenter stated that this requirement is problematic because it requires compensatory mitigation for any activity that requires a PCN even if the adverse effects of the activity on the aquatic environment are minimal. This commenter recommended changing this part of the general condition to read

“\* \* \* of other aquatic resources only as necessary to offset authorized impacts to the extent that adverse environmental effects to the aquatic environment otherwise would be minimal.” Two commenters objected to the inclusion of preservation as a form of compensatory mitigation.

We believe that this part of the general condition accurately reflects 33 CFR Part 330.1(e)(3), which is the section of the NWP regulations that allows the District Engineer to require compensatory mitigation to offset losses of waters of the United States authorized by NWPs, to ensure that the adverse effects on the aquatic environment are minimal. The phrase “at least to the extent that adverse environmental effects to the aquatic environment are minimal” provides district engineers with the flexibility to determine that compensatory mitigation is unnecessary if the authorized adverse effects on the aquatic environment are already minimal. If no compensatory mitigation is necessary to reduce the adverse effects on the aquatic environment to the minimal level, then the District Engineer does not need to require compensatory mitigation. Preservation of aquatic resources is an important type of compensatory mitigation, because it can be used to augment the restoration, creation, and enhancement of aquatic habitats. Preservation can also be used to protect rare or high-value aquatic resources.

Several commenters requested that the Corps not delete the language from the original version of Section 404 Only condition 4 published in the December 13, 1996, issue of the **Federal Register**. This language allowed the District Engineer to determine that off-site compensatory mitigation is more beneficial to the aquatic environment, because of the flexibility allowed by this wording. One commenter objected to the use of the term “aquatic environment” in the general condition and stated that the 1990 Memorandum of Agreement (MOA) between the Corps and EPA on mitigation only refers to wetlands. Two commenters recommended that the Corps emphasize that compensatory mitigation may be required for impacts to other aquatic resources, not just wetlands. Other commenters stated that the Corps needs to provide guidelines for replacement ratios, functional assessment methods, and monitoring requirements.

The proposed changes to this general condition do not prohibit the District Engineer from considering and approving off-site compensatory mitigation to offset the adverse effects of the authorized work on the aquatic

environment. Off-site and out-of-kind compensatory mitigation can be used to offset losses of waters of the United States, if such compensation is beneficial to the aquatic environment. Mitigation banks, in lieu fee programs, and other consolidated mitigation approaches are also important sources of compensatory mitigation. The 1990 mitigation MOA applies only to the evaluation of standard Corps permits, not general permits such as the NWPs. With the proposed new and modified NWPs, we are placing more emphasis on other types of aquatic resources, such as streams. Vegetated buffers adjacent to open or flowing waters are an excellent form of compensatory mitigation to offset adverse effects on the aquatic environment caused by the activities authorized by the NWPs. Restoration of degraded streams can be used as compensatory mitigation for stream impacts. It is important to note that compensatory mitigation is not necessary for all activities authorized by NWPs. The District Engineer will determine, on a case-by-case basis, if compensatory mitigation is necessary to ensure that the adverse effects on the aquatic environment are minimal for activities authorized by NWPs. We disagree that the NWPs should contain guidance for replacement ratios, functional assessment methods, and monitoring requirements for compensatory mitigation. District engineers will decide the appropriateness of compensatory mitigation on a case-by-case basis, using any replacement ratios, functional assessment methods, or monitoring requirements they believe are appropriate.

Several commenters addressed the use of vegetated buffers as compensatory mitigation. Some commenters stated that the Corps lacks the legal authority to require vegetated buffers, particularly upland buffers, and recommended that the Corps delete the reference to vegetated buffers from the general condition. A commenter objected to use of vegetated buffers as compensatory mitigation for impacts to waters of the United States, particularly as a substitute for the restoration and creation of aquatic habitats. Another commenter recommended using upland vegetated buffers as compensatory mitigation only after the permittee has conducted a one-to-one replacement of aquatic habitats. One commenter recommended modifying the general condition to require planting the vegetated buffer with native vegetation. One commenter said that vegetated buffers should be required adjacent to

all open waters. Two commenters recommended including specific width requirements for vegetated buffers in the general condition.

Our legal authority to require vegetated buffers adjacent to waters of the United States is discussed in a previous section of this **Federal Register** notice. Vegetated buffers adjacent to open waters or streams can provide more benefits to the local aquatic environment than wetland creation efforts. District engineers will determine how much the vegetated buffer will count towards any compensatory mitigation requirements. We are proposing to add text to this general condition stating that the vegetated buffer should consist of native species. However, if the vegetated buffer is already inhabited by trees and shrubs, it should be maintained, even if some of the plant species are not native to the region. If the vegetated buffer is inhabited by woody non-native species that do not provide habitat for locally important aquatic species, district engineers can condition the NWP authorization to require the removal of those non-native species and the planting of beneficial native species.

Since two general conditions address mitigation requirements for the NWPs, we are proposing to add a sentence General Condition 19, referring to the additional information concerning mitigation requirements in paragraph (g) of General Condition 13. We are also proposing to add a similar sentence to paragraph (g) of General Condition 13, referring to the mitigation requirements of General Condition 19.

**20. Spawning Areas:** One commenter suggested that we remove the word “important” from General Condition 20 to prohibit activities in any fish spawning area. Two other commenters objected to the addition of this word to the general condition because it does not define what an “important” spawning area is and would result in subjective determinations by Corps personnel. Another commenter recommended that the word “structures” be added to the examples of activities that can physically destroy a spawning area.

We added the word “important” to this general condition to limit the prohibition to spawning areas used by species that are harvested commercially for human consumption. Spawning areas used exclusively by other aquatic species are not subject to this general condition. We are proposing to retain the word “important” in this general condition. Division engineers can add regional conditions to the NWPs to prohibit the use of NWPs (or require

notification for NWP activities) in known locations of important spawning habitat. We do not believe it is necessary to include the placement of structures in this general condition as an example of an activity that physically destroys a spawning area because the general condition already clearly states that authorized activities, including structures in navigable waters, cannot result in the physical destruction of important spawning areas.

21. *Management of Water Flows:* In the July 1, 1998, **Federal Register** notice, we proposed to modify this former Section 404 Only general condition and change the title of the condition from "Obstruction of High Flows" to "Management of High Flows." We proposed to modify this NWP to require permittees to design their projects to maintain, to the maximum extent practicable, preconstruction downstream flow conditions and reduce impacts such as flooding or draining, unless the primary purpose of the project is to impound water or reestablish drainage.

Several commenters fully supported the proposed modification to this general condition. Another commenter stated that the general condition should also include water quality control. A number of commenters requested clarification of the proposed general condition. One commenter stated that the condition should be modified to include functionally related components, such as outfalls and developed flows, with the project. Another commenter stated that the condition should be clarified to allow impoundment of water for beneficial use if that is the primary purpose of the project. Many commenters requested clarification of terms used in the preamble discussion relating to this general condition, including "as close as feasible" and "more than minimally flooded or dewatered." Other commenters asked if the Corps is relating the preconstruction flows to particular events, such as 50- or 100-year storm flows, or all flows. A commenter requested clarification as to whether the general condition requires on-site detention, if watershed detention is a better solution.

The NWPs are already conditioned to address water quality concerns resulting from activities authorized by NWPs. General Condition 9 requires that the permittee obtain a water quality certification and, for certain NWP activities, develop and implement a water quality management plan to prevent more than minimal degradation of downstream water quality. We do not agree that General Condition 21 requires

modification to include outfalls and developed flows with the project because this condition applies to general flow patterns of waters of the United States in the vicinity of the project, not to any specific part of the project. The proposed modification of this condition already contains language allowing the impoundment of water, if that is the primary purpose of the authorized activity. The phrase "as close as feasible" as used in the preamble is synonymous with the phrase "to the maximum extent practicable," which is used throughout the text of the general condition. The phrase "more than minimally flooded or dewatered" used in the preamble relates to the requirement that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment. District engineers will determine if any changes to surface water flows resulting from the authorized work exceeds the requirements of this general condition.

This general condition applies to the general flow patterns of surface waters over the course of a year, not to any specific storm event. For example, a project authorized by NWP may not cause more than minimal increases in downstream water flows that result in downcutting of the stream bed and substantial increases in stream bed and bank erosion. This general condition does not require any particular method to achieve compliance with the requirements of the general condition. We are proposing to modify the text of the general condition to require the permittee to maintain, to the maximum extent practicable, surface water flow conditions from the site that are similar to preconstruction flow conditions. The text in the July 1, 1998, **Federal Register** notice required the establishment of flow rates similar to preconstruction conditions.

Some commenters stated that the management of water flows is the responsibility of State or local agencies that regulate stormwater management. A number of commenters asked if the Corps or the permittee will be responsible for ensuring compliance with this condition, and what will be required in terms of design and documentation. A couple of commenters asked what type of hydraulic analysis will be required to verify compliance with this condition. Some commenters believe that the Corps should develop consistent standards, guidance, and training programs for the practicable measures that should be incorporated into project plans to comply with this general condition. One commenter requested

that the Corps modify the language of the condition to state that project modifications that decrease water supply yield or substantially increase the cost of the water supply yield are not considered practicable for the purposes of the general condition. A commenter recommended modifying the condition to state that practicability determinations will include consideration of costs, benefits, and technical feasibility.

The purpose of the proposed modification of this general condition is to improve protection of the aquatic environment and private property by preventing substantial changes to local surface water flow patterns, as a result of activities authorized by NWPs. If State or local agencies have adequate requirements to manage water flows that accomplish the goals of this general condition, district engineers will normally defer this issue to those agencies. To determine compliance with General Condition 21, district engineers will use discretion, based on general knowledge of local water flow patterns, and will not require a detailed hydrologic analysis or engineering study. The language of this general condition provides district engineers with flexibility to determine if a particular project complies with the general condition. This general condition is not an absolute requirement for maintaining identical preconstruction and postconstruction water flow patterns. In addition, it does not require that the project be designed or constructed to have no effect on water flows. The general condition requires that postconstruction water flow patterns are not more than minimally different from preconstruction water flow patterns.

One commenter stated that the general condition should be modified to allow additional runoff where it can be demonstrated that the increased runoff can be collected by the receiving waterbody and the permittee has received permission from the local flood control agency to add this runoff to the waterbody. For the maintenance of ditches and channelized streams, another commenter recommended modifying this general condition to specify that the flow patterns in the restored ditch will be used to define the preconstruction flow pattern. This commenter said that the deteriorated ditch should not be used to establish the preconstruction flow pattern. A commenter requested modification of this general condition so that it would apply only to off-site areas, not the project site.

If the primary purpose of the proposed work does not include impounding water, and the activity will increase flooding, then the proposed work does not comply with General Condition 21. The project proponent can apply for authorization through the individual permit process or request a regional general permit authorization, if applicable. The maintenance of ditches, including the maintenance of channelized streams used as drainage ditches, may be exempt under Section 404(f) and not require a Section 404 permit. General Condition 21 does not apply to activities exempt from Section 404 permit requirements. Modifying this general condition to allow increases in downstream flows on-site, but prohibiting increases in downstream flows off-site, is impractical. Unless the project site is extremely large, it is likely that any increases in downstream water flows on the project site will extend to off-site areas.

A number of commenters objected to the proposed modifications to this condition. Some commenters stated that the Corps failed to demonstrate the need for the proposed modification. A few commenters said that the Corps does not have the authority to require this condition under the Clean Water Act. Several commenters stated that the Corps does not possess the expertise to enforce this condition and should not regulate activities within floodplains. A commenter believes that the proposed changes to this general condition are contrary to the Corps goal of streamlining the regulatory process. A number of commenters stated that the proposed changes to this general condition would make most projects ineligible for NWP authorization.

Some activities in waters of the United States result in adverse effects on local surface water flow patterns, including increased flooding upstream and downstream of the project site. The purpose of the proposed modifications to General Condition 21 is to require permittees to design and construct their projects to maintain preconstruction downstream flow conditions, unless the primary purpose of the fill is to impound water. Large changes to surface water flow patterns can result in substantial adverse effects on the aquatic environment, by destroying aquatic habitat and impairing water quality. Higher rates of surface runoff caused by increases in the amount of impervious surface in a watershed can create substantial changes in stream morphology, affecting the quality of aquatic habitat and species inhabiting the stream. Water quality will be degraded by increasing the amount of

suspended sediment in the water column. For example, the construction of a commercial development, including buildings and parking lots, near a stream can increase storm flows to local streams, which can result in downcutting of the stream bed and increases in bank erosion, destroying aquatic habitat. The proposed modification of this general condition is intended to address these types of changes to surface water flows.

The Clean Water Act provides the Corps with the authority to require this condition, because it is related to the activities regulated under Section 404 of the Clean Water Act. Corps personnel will qualitatively evaluate proposed NWP activities to determine if they comply with this condition. This condition does not expand the Corps regulatory authority to include activities in floodplains; it merely addresses adverse effects to surface water flows that may result from activities in waters of the United States. The proposed modification of General Condition 21 is not contrary to the Corps goal of streamlining the regulatory process, because it requires only a qualitative analysis, not a detailed hydraulic or engineering study, to determine compliance. The phrase "to the maximum extent practicable" is used throughout the general condition, and provides district engineers with the flexibility to determine if a particular project complies with this condition. Since this general condition is not an absolute requirement to maintain preconstruction flows, we do not agree that the requirements of this general condition will result in a substantial number of projects becoming ineligible for NWP authorization. We are proposing to modify the last sentence of this general condition to clarify its requirements.

**23. Waterfowl Breeding Areas:** Although we did not propose any changes to this general condition in the July 1, 1998, **Federal Register** notice, except to consolidate it with the other general conditions, one commenter recommended changing the title of this condition to "Migratory Bird Breeding Areas" and adding the phrase "other migratory birds" after the phrase "migratory waterfowl."

We do not agree with this recommendation, because the inclusion of other migratory birds is outside the scope of the Corps regulatory authority. A goal of the Corps regulatory program is to maintain the quality of the aquatic environment. Including other migratory birds in this general condition would result in an inappropriate increase in the Corps scope of analysis because

many migratory bird species are not dependent on wetlands and other waters of the United States. We are not proposing any changes to this general condition.

**Proposed General Condition 16, Subdivisions:** In the July 1, 1998, **Federal Register** notice, we proposed a new general condition, General Condition 16, entitled "Subdivisions" to ensure that only single and complete projects are authorized by the proposed NWPs for residential, commercial, and institutional activities and master planned development activities (i.e., proposed NWPs A and B). A few comments were received in response to this proposed general condition. A commenter remarked that the subdivision date is arbitrary and could allow the NWPs affected by the proposed general condition to authorize activities with more than minimal adverse effects on the aquatic environment. Another commenter stated that subdivisions created after October 5, 1984, should be allowed to use proposed NWP A only once. One commenter recommended that single and complete projects should be determined by the subdivision date, not any phasing schedule for the development. Another commenter stated that the acreage limits for subdivisions should be consistent with regional EPA requirements.

Since the proposed NWP for master planned developments was withdrawn in the October 14, 1998, **Federal Register** notice, we are withdrawing the proposed general condition and placing a modified version of the text in proposed NWP 39, since NWP 39 is the only NWP for which this subdivision provision is currently applicable. NWP 29 has its own subdivision provision. The October 4, 1984, subdivision date is not arbitrary, but this date was chosen to be consistent with the subdivision provision for NWP 26. The reasons for adding a subdivision provision to NWP 26 were addressed in the November 22, 1991, **Federal Register** notice for the reissuance of NWP 26 (see 56 FR 59114). The October 5, 1984, date was selected because it was the date the 1-acre and 10-acre limits were added to NWP 26. A subdivision date was incorporated into NWP 26 to address the issue of single and complete projects, recognizing that most subdivisions are actually individual projects with interrelated components. To provide fairness to the regulated public, we will utilize the same subdivision date for NWP 39.

**25. Designated Critical Resource Waters:** In response to the comments received in response to the October 14,

1998, **Federal Register** notice concerning the use of NWP in designated critical resource waters, we are proposing a new NWP general condition that addresses this issue. The proposed general condition prohibits the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity in the following critical resource waters, including wetlands adjacent to these waters. Activities authorized by NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38 can be conducted in these designated critical resources, including adjacent wetlands, provided the permittee notifies the District Engineer in accordance with General Condition 13 and the proposed work will result in minimal adverse effects on the aquatic environment. For the purposes of proposed General Condition 25, no additional notification is required for activities in designated critical resource waters and adjacent wetlands that are authorized by NWPs not listed in the text of this general condition, although notification may be required by other conditions.

For the purposes of the proposed general condition, designated critical resource waters include: NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened or endangered species, coral reefs, State natural heritage sites, or outstanding national resource waters officially designated by the state where those waters are located. Outstanding national resource waters and other waters having particular environmental or ecological significance must be officially designated through an official State process (e.g., adopted through regulatory or statutory processes, approved through State legislation, or designated by the Governor). In those circumstances where a waterbody has been designated by the State, the District Engineer will publish a notice advising the public that such waters will be added to the list of designated critical resource waters. The District Engineer may designate additional critical resource waters after notice and opportunity for public comment.

Paragraph (a) of General Condition 25 refers to General Condition 7 for activities in National Wild and Scenic Rivers. General Condition 25 also states that the NWPs cannot authorize discharges in designated critical habitat for Federally-listed threatened or endangered species unless the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has

concurred in a determination of compliance with that general condition.

The comments received in response to the October 14, 1998, **Federal Register** notice related to this new general condition are discussed in detail in a previous section of this **Federal Register** notice.

**26. Impaired Waters:** As a result of the comments received in response to the October 14, 1998, **Federal Register** notice concerning the use of NWPs in impaired waters, we have proposed a new NWP general condition that restricts the use of NWPs in waterbodies that have been designated as impaired through the Clean Water Act Section 303(d) process. This proposed general condition also applies to wetlands adjacent to those impaired waterbodies. For the purposes of this general condition, "impaired waters" are defined as those waters of the United States that have been identified by States or Tribes through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands.

General Condition 26 is based on a presumption that discharges into an impaired waterbody, or wetlands adjacent to that impaired waterbody, will result in further impairment of the waterbody. NWPs cannot be used to authorize discharges of dredged or fill material that result in the loss of greater than 1 acre of impaired waters of the United States and wetlands adjacent to those impaired waters. For activities authorized by NWP 3, this prohibition does not apply, provided the prospective permittee notifies the District Engineer in accordance with General Condition 13 and demonstrates that the work will not result in further impairment of the waterbody. For discharges of dredged or fill material resulting in the loss of 1 acre or less of impaired waters of the United States, including adjacent wetlands, this presumption can be refuted by clear evidence that the proposed project will not further impair the waterbody. To refute this presumption and qualify for NWP authorization, the prospective permittee must submit a notification to the District Engineer in accordance with General Condition 13. The notification must contain a statement explaining how the proposed work will not result in further impairment of the waterbody. Any compensatory mitigation required to offset the losses of impaired waters of the United States, including adjacent

wetlands, and ensure that the work results in minimal adverse effects on the aquatic environment should be designed to contribute to the reduction of sources of pollution contributing to the impairment. For example, the establishment and maintenance of a vegetated buffer adjacent to a stream impaired due to nutrients will reduce nutrient inputs to that stream (the functions and values of vegetated buffers are discussed in a previous section of this **Federal Register** notice). That vegetated buffer would be considered as compensatory mitigation for a loss of wetlands adjacent to that impaired stream.

If the proposed discharge will result in the loss of greater than  $\frac{1}{4}$  acre of impaired waters and adjacent wetlands, then the District Engineer will coordinate with the State 401 agency in accordance with the procedures in paragraph (e) of General Condition 13. The District Engineer will consider any comments provided by the 401 agency to determine if the proposed work, excluding mitigation, will result in further impairment of the waterbody.

The comments received in response to the October 14, 1998, **Federal Register** notice are discussed in detail in an earlier section of this **Federal Register** notice.

**27. Fills Within the 100-year Floodplain:** In response to the comments received in response to the October 14, 1998, **Federal Register** notice concerning the use of NWPs to authorize permanent, above-grade fills in waters of the United States within 100-year floodplains, we have proposed NWP General Condition 27. The comments received in response to the 100-year floodplain restriction proposed in the October 14, 1998, **Federal Register** notice are discussed in detail in a previous section of this **Federal Register** notice.

General Condition 27 is based on a presumption that certain NWP activities resulting in permanent, above-grade fills in waters of the United States within 100-year floodplains will cause more than minimal adverse effects on surface hydrology and the functions and values of 100-year floodplains. General Condition 27 prohibits the use of NWPs 21, 29, 39, 40, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within 100-year floodplains. For NWPs 12 and 14, this presumption can be refuted if the prospective permittee clearly demonstrates to the District Engineer that the proposed work and associated mitigation, not decrease the flood-holding capacity of the waterbody and its 100-year floodplain and the proposed



work will not result in more than minimal adverse effects on hydrology, flow regimes, or volumes of water associated with the 100-year floodplain. This demonstration must include proof that the Federal Emergency Management Agency (FEMA) or a state or local flood control authority through a licensed professional engineer, has approved the proposed project and provided a statement that the activity will not increase flooding or result in more than minimal adverse effects to floodplain hydrology or flow regimes. The other NWP's are not subject to the requirements of General Condition 27.

To implement General Condition 27, FEMA's Flood Insurance Rate Maps (FIRMs) will be used to identify 100-year floodplains, provided those maps reflect the current extent of 100-year floodplains. If there are no FIRMs published for the project area, or if the latest FIRM does not represent the current 100-year floodplain, information from the appropriate local floodplain authority will be used to determine the boundaries of the 100-year floodplain. Projects located in a 100-year floodplain at the point in the watershed that has a drainage area of less than 1 square mile are not subject to General Condition 27.

General Condition 27 prohibits the use of NWP's 21, 29, 39, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within 100-year floodplains. For activities authorized by these NWP's, the prospective permittee must notify the District Engineer in accordance with General Condition 13. The notification must include documentation that the proposed work will not be located in the 100-year floodplain or will not result in permanent, above-grade fills in waters of the United States within the 100-year floodplain. Activities authorized by NWP's 21, 29, 39, 42, 43, and 44 that occur within 100-year floodplains but do not result in permanent, above-grade fills in waters of the United States within the 100-year floodplain are not subject to General Condition 27. The term "permanent above-grade fill" is defined in the "Definitions" section of the NWP's. The District Engineer will make the final determination as to whether a project is actually located in the 100-year floodplain or whether the project results in permanent, above-grade fills in waters of the United States.

General Condition 27 does not prohibit the use of NWP's 12 and 14 to authorize discharges into waters of the United States resulting in permanent, above-grade wetland fills in waters of the United States within 100-year floodplains, provided the prospective permittee clearly demonstrates to the

District Engineer that the activity will not decrease flood-holding capacity and will not result in more than minimal modifications of hydrology, flow regime, or volume of waters associated with the 100-year floodplain. The prospective permittee must notify the District Engineer in accordance with General Condition 13 if the proposed work will result in permanent, above-grade wetland fills in waters of the United States within the 100-year floodplains. The notification must include documentation that clearly demonstrates that the project will not increase flooding or result in more than minimal changes to floodplain hydrology or flow regimes. This documentation must include proof that FEMA, or a state or local flood control authority through a licensed professional engineer, has approved the proposed project and provided a statement that the project does not increase flooding or cause more than minimal alterations to floodplain hydrology or flow regimes. Activities authorized by NWP's 12 and 14 that occur within 100-year floodplains but do not result in permanent, above-grade fills in waters of the United States within the 100-year floodplain are not subject to General Condition 27.

#### *V. Comments and Responses on Nationwide Permit Definitions*

##### *General*

In the July 1, 1998, **Federal Register** notice, we proposed to add a definition section to the NWP's to promote consistency in the implementation of the NWP's. We requested comments on the definitions presented in the **Federal Register** notice. Approximately 45 commenters addressed the proposed definitions.

One commenter stated that the Corps has replaced a simple measurement of 5 cubic feet per second for headwaters determinations for the purposes of NWP 26 with confusing terms and conditions for the new and modified NWP's. This commenter believes that requiring permit applicants to distinguish between perennial, intermittent, and ephemeral streams, contiguous and noncontiguous wetlands, non-tidal wetlands and tidal wetlands, and Section 10 and non-Section 10 waters is too confusing and will undermine the NWP program. One commenter asked if it is the intent of the Corps to expand the applicability of the new NWP's to non-contiguous but adjacent waters.

We believe that the terms used with the proposed new and modified NWP's will promote consistency in the NWP program, make the NWP program easier

to implement, and provide District personnel with the means to better assess impacts to the aquatic environment. These terms help Corps personnel to classify some types of aquatic resources and make determinations of minimal adverse effects. The three types of streams cited in the **Federal Register** notice are generally accepted stream types, based on the duration of water flow in the stream channel. We have modified the applicable waters for most of the proposed new NWP's to prohibit their use in non-tidal wetlands adjacent to tidal waters. Non-tidal and tidal wetlands have some different functions and values. For years, Corps personnel have had to distinguish between tidal and non-tidal wetlands and between Section 10 and non-Section 10 waters. Corps personnel have had to identify these types of waters to determine which type of authorization a particular project may require.

In the July 1, 1998, **Federal Register** notice, we proposed definitions for the three different types of streams. One commenter suggested that the Corps provide clarification or a definition to help determine when a stream has sufficient flow to be considered a "water of the United States." This commenter recommended that a stream should be considered a water of the United States only if it is shown as a perennial or intermittent stream on a United States Geological Survey (U.S.G.S.) quadrangle map. Two commenters stated that many perennial, intermittent, and ephemeral streams are perched above the water table and that the definitions of these stream types should be based on flow hydrographs measured over the course of a year, not the relationship between the stream bed and the water table. One commenter said that the different stream types cannot be differentiated in the field and asked whether perennial, intermittent, and ephemeral streams have identifiable beds and banks.

The Corps regulations state that non-tidal waters of the United States, including perennial, intermittent, and ephemeral streams, are waters of the United States up to the ordinary high water mark (see 33 CFR Part 328.4(c)). These three stream types typically have a bed and bank, but the presence of a bed and bank should not be used to identify streams; a gully created by erosion can also be considered to have a bed and bank. If a landscape feature with a bed and bank does not have an ordinary high water mark, it is not a water of the United States unless it contains jurisdictional wetlands. We do not agree that U.S.G.S. maps should be used to determine the limits of

intermittent and perennial streams. The upper reaches of streams are often inaccurately mapped on U.S.G.S. quadrangles. These maps typically do not accurately depict the location and extent of intermittent or ephemeral streams. They are useful for identifying perennial streams, but they should be used with caution. Distinguishing between these three stream types will often require field observations.

Stream beds can be located above or below the water table. Influent streams contribute water to the groundwater because their beds are usually located above the water table. Groundwater provides flowing water to effluent streams because the beds of effluent streams are located below the water table. The interaction between groundwater and stream flows also depends on local geologic features. Perennial streams are mostly effluent streams, flowing even during dry periods. Intermittent streams can be either effluent or influent, depending on the time of year and local precipitation patterns. During wetter months, when the water table is high or at normal elevations, intermittent streams are usually effluent. Intermittent streams are also effluent during short dry periods. During substantial dry periods, intermittent streams are usually influent. Ephemeral streams are always influent, because their beds are located above the water table year round.

Although the focus of the definitions of these stream types is the duration of flowing water over the course of a year, it is important to consider the source of the water flowing in the channel. We believe that it is appropriate to consider the source of water when classifying streams as ephemeral, intermittent, or perennial. However, as with any classification scheme for natural systems, there are exceptions. For example, in some mountain ranges there may be streams with flowing water almost year round due to snow melt. Some of these stream channels may receive no water from groundwater; the only source of water is melting snow. In these areas, stream channels with flowing water year round due to snow melt should be considered perennial. If flowing water is present in the channel for long periods of time due to snow melt, but water flow is not year round, those streams should be considered intermittent.

Artificial sources of water should not affect determinations of stream types. For example, pumping water into an ephemeral stream channel for a long period of time should not cause that stream to be classified as an intermittent stream. We recognize that the

definitions proposed in the July 1, 1998, **Federal Register** notice do not completely address all possible factors that can influence the classification of stream types based on duration of flow, but by basing the definitions of perennial, intermittent, and ephemeral streams on the contribution of groundwater to flow patterns, Corps district personnel can consistently apply these definitions in a simple and effective manner in most parts of the country, without the need to do extensive hydrology studies. District engineers will use their discretion to distinguish between ephemeral, intermittent, and perennial streams. These determinations should be based on their general knowledge of flow patterns in the area. District engineers can consider any additional information the permit applicant provides, based on actual measurements or modeling.

It is also important to note that, with the exception of proposed NWP 43, classifying streams as perennial, intermittent, or ephemeral is used only to determine whether or not a PCN is required. For example, proposed NWP 42 requires a PCN for discharges causing the loss of greater than 500 linear feet of perennial or intermittent stream bed. NWP 43 does not authorize the construction of stormwater management facilities in perennial streams. District engineers can regionally condition the NWPs to require notification for certain stream types and exercise discretionary authority when a particular activity may result in more than minimal adverse effects on the aquatic environment.

A commenter stated that the boundary between tidal waters and non-tidal wetlands is not well-defined or readily discernible in some parts of the country and that it will be difficult to determine the precise landward limits of tidal influence and which NWP is applicable. Another commenter said that the proposed definitions of tidal and non-tidal wetlands appear to exclude freshwater wetlands.

The boundary between tidal wetlands and non-tidal wetlands can be estimated by identifying the species of plants inhabiting the area. Tidal wetlands often have a different plant species composition than non-tidal wetlands, which may be used as an indicator of the extent of tidal waters. In most cases, judgement will be required to estimate the location of the high tide line. Wrack lines can be used to locate the high tide line. However, it is not our intent to require permit applicants to conduct land surveys or utilize tide gages to determine the limit of tidal waters. The definitions of tidal and non-tidal wetlands do not exclude freshwater

wetlands. Tidal wetlands can be inundated by saline (*i.e.*, marine or estuarine) water or freshwater. Non-tidal wetlands are mostly freshwater wetlands, but there are non-tidal saline marshes in some parts of the country.

#### *Specific Definitions*

The following paragraphs discuss the comments received in response to the July 1, 1998, **Federal Register** notice concerning the proposed definitions for the NWPs.

**Aquatic Bench:** Two commenters stated that the definition of this term should not be limited to stormwater management facilities. They said that these areas are found in natural waterbodies, such as ponds or lakes.

This term is defined for the purposes of NWP 43, Stormwater Management Facilities. It refers to a specific type of area within a stormwater management facility that is constructed for the purpose of providing a substrate in water depths shallow enough to support populations of emergent aquatic vegetation that may enhance the functions of the stormwater management facility. Although these types of areas can be found naturally in ponds and lakes, we would simply consider them to be wetlands. Aquatic benches constructed in stormwater management facilities may or may not be considered waters of the United States for the purposes of Section 404, depending on the circumstances in which they are found. If they are constructed wetlands intended to improve the quality of water retained in the stormwater management facility, they are not considered jurisdictional wetlands. We are proposing to retain this definition as originally proposed.

**Best Management Practices:** No comments were received concerning this term. We are proposing to retain this definition as originally proposed.

**Channelized stream:** We received several comments concerning the proposed definition of this term. One commenter said that not all stream channelization results in increases in flow rate or water capacity. Another commenter stated that a channelized stream has been manipulated to fix the channel location, not to increase conveyance, and that the definition should focus on the fixed nature of stream channels, not water flow rates. One commenter asked whether the proposed definition includes transportation activities that change the channel cross-section or other aspects of channel geometry of a stream. This commenter stated that construction of a road embankment may require filling some stream bed and moving the stream

channel to protect the embankment. According to this commenter, this work does not increase conveyance of water, but changes the channel geometry. This commenter wanted assurance that these types of activities are exempt from Section 404 permit requirements. Another commenter recommended that the Corps add a statement to the definition to clarify that stream channelization requires a Section 404 and/or Section 10 permit from the Corps.

Changing the morphology of the stream channel to increase the rate of flow through the stream channel constitutes stream channelization. Relocating the stream channel is not necessarily "stream channelization" unless the relocation is intended to increase the rate of water flow through the stream channel. Streams can be relocated, with natural morphology such as meanders, with little or no changes in water flow rates. Stabilizing stream banks near a road crossing (either a bridge or culvert) is not considered stream channelization, unless the stream bed is armored and/or excavated for a substantial distance from the road crossing to increase the rate of water flow. Stream bank stabilization does not necessarily result in channelization, even though it may fix the position of the stream bed in the landscape. If only one bank is covered with rip rap to reduce or prevent bank erosion, then we do not consider that activity as stream channelization. However, lining the stream bed and banks with concrete to increase the rate of water flow through the stream channel is a method of stream channelization that does not necessarily change the location of the stream bed. For the purposes of NWP 14 and other NWPs that can be used to authorize road crossings, stabilizing stream banks near culverts or bridge abutments to prevent erosion near the road crossings, is not considered stream channelization. The construction of a road embankment by filling some of the stream and/or relocating the stream bed is not exempt from Section 404 permit requirements, because these activities are not included in Section 404(f) of the Clean Water Act and they involve discharges of dredged or fill material into waters of the United States. We do not believe it is necessary to include a sentence in the definition stating that a Section 404 or Section 10 permit is required for stream channelization activities.

One commenter requested clarification as to whether stream channelization, when done in conjunction with the construction of a road crossing, is part of the road

crossing or requires separate authorization. Another commenter requested that the definition clarify whether the use of culverts to construct a road crossing results in a channelized stream. This commenter stated that some Corps districts consider culverts as channel modifications, while others do not.

Channel modifications in the immediate vicinity of a stream crossing that are conducted to allow the water to flow more efficiently through the crossing or prevent erosion of the soil near the crossing are not considered stream channelization and are part of the single and complete road crossing project. Channel modifications outside of the immediate vicinity of the crossing may constitute stream channelization, and may require a separate authorization at the discretion of the District Engineer. When stream channelization is performed with the construction of a road crossing, both activities should be considered as a single and complete project, which may be authorized by NWPs or another form of authorization, such as a regional general permit or an individual permit. The installation of a culvert in a stream bed does not channelize the stream, provided the length and width of the culvert is limited to the minimum necessary to construct the road crossing and the amount of rip rap placed to protect the culvert is the minimum necessary.

One commenter objected to the last sentence of the proposed definition, stating that this sentence is contrary to the Section 404(f) exemption for drainage ditches. We concur with this comment and have removed the last sentence from this definition.

In the proposed new and modified NWPs, we used different terms relating to stream channelization. For consistency, we will use the term "stream channelization" throughout the proposed new and modified NWPs. Stream channelization results from modifications to increase the rate of water flow through the stream channel. Placing rip rap along a stream bank to stabilize the bank and reduce erosion does not necessarily constitute stream channelization, but lining the stream bed and bank with concrete or rip rap to increase the rate of water flow through the stream channel is stream channelization.

We are proposing to replace the term "channelized stream" with "stream channelization" and modify the definition as discussed above.

**Contiguous wetland:** We received many comments concerning the proposed definition of this term. Some

commenters stated that the definition is unclear. Another commenter stated that the geographic scope of new NWPs is confusing and that the definition appears to provide inconsistent guidance describing when a non-tidal wetland is contiguous to tidal waters. Two commenters requested that the Corps utilize the term "adjacent" instead of "contiguous" to limit the use of the new NWPs. One commenter expressed concern that the term "surface waters" would exclude wetlands that are inundated or saturated primarily by groundwater. This commenter recommended the inclusion of groundwater to establish the contiguous connection.

One commenter requested that the Corps clarify the phrase "normally contiguous to the nearest open water," as contained in the proposed definition. Another commenter questioned why a wetland can act as a surface water connection for a contiguous wetland but a channel cannot, even though a stream channel contains a surface water. One commenter recommended that this definition should state that culverts and tide gates constitute a surface water connection and that the definition is confusing and should be field tested in different areas of the country. This commenter also stated that it is difficult enough to distinguish between tidal and non-tidal areas of a channel without having to worry about small tributaries or sloughs draining into the larger waterbody. The commenter requested that the Corps clarify the definition to state whether the required surface water connection has to be present at low, normal, or high flows or associated with a certain size flood event. Another commenter asked if tide gates break up the contiguous connection. One commenter stated that the proposed definition appears to be a significant change for the purpose of circumventing the decision in the United States Court of Appeals for the Fourth Circuit decision in the *United States v. Wilson*, 133 F. 3d 251 (4th Cir. 1997). This commenter believes that the proposed definition will result in the regulation of all isolated waters and wetlands, regardless of the type of connection, and that the definition must be clarified to recognize the different connections between waters of the United States to determine if a particular wetland is isolated. The commenter also believes that the proposed definition eliminates the distinction between natural streams and man-made connections to waters of the United States.

To increase protection of the aquatic environment, we are proposing to prohibit the use of most of the new

NWPs in non-tidal wetlands adjacent to tidal waters instead of prohibiting the use of those NWPs in non-tidal wetlands contiguous to tidal waters. Therefore, the definition of the term "contiguous wetland" has been removed from the "Definitions" section of the NWPs.

*Drainage ditch:* We received a variety of comments concerning the proposed definition of this term. One commenter supported the proposed definition. Another commenter agreed that drainage ditches constructed in uplands are not waters of the United States. A commenter stated that a drainage ditch is not a stream and that all activities associated with drainage ditches should be exempt from all permits. A number of commenters stated that channelized streams are not drainage ditches and that the Corps should retain that part of the proposed definition. A commenter requested that the Corps identify methods that will be used to distinguish between a drainage ditch constructed in wetlands and a channelized stream. Two commenters opposed the exclusion of channelized streams in the definition and stated that the proposed definition is contrary to the 404(f)(1) exemption, which considers streams that are channelized to improve drainage to be drainage ditches. Another commenter stated that some drainage ditches are constructed in intermittent and ephemeral streams.

We concur with the last two comments in the previous paragraph, and have removed the last two sentences from the proposed definition. Channelized streams that are maintained as drainage ditches are waters of the United States, but maintenance of these drainage ditches is exempt from Section 404 permit requirements as long as the maintenance activity does not exceed the original drainage ditch design and configuration.

One commenter stated that the portion of the proposed definition that includes the phrase "otherwise extends the ordinary high water line of existing waters" is not clear and that this part of the proposed definition could expand the Corps jurisdiction into waters that have always been thought of as man-made extensions which were not considered by some Corps districts as jurisdictional.

This part of the proposed definition is consistent with 33 CFR 328.5, which states that man-made changes may affect the limits of waters of the United States, but "permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer." Therefore, activities that extend the

ordinary high water mark may, at the discretion of the District Engineer, expand waters of the United States.

We are proposing to modify the definition of the term "drainage ditch" as discussed above.

*Ephemeral stream:* Two commenters stated that the proposed definition is too broad and subject to various interpretations. One of these commenters recommended that the Corps develop a more specific definition of the limits of jurisdiction, such as drainage area. One commenter suggested that the definition should be changed to exclude drainage ditches.

Using drainage area to differentiate between stream types is not practical because there are many factors, in addition to drainage area, that influence the duration of water flow in streams channels. It is not appropriate to change the definition to specifically exclude drainage ditches, because some drainage ditches may be channelized streams, which are waters of the United States.

A number of commenters disagreed that ephemeral streams are waters of the United States. One of these commenters requested that the Corps specify the circumstances under which ephemeral streams are, or are not, waters of the United States. One commenter requested that the Corps issue guidance to its districts to identify ephemeral streams and provide prospective permittees with maps of streams that require PCNs under the NWP program.

Ephemeral streams are waters of the United States as long as an ordinary high water mark is present and the waterbody meets the criteria in 33 CFR Part 328. If there is no ordinary high water mark, and there are no adjacent wetlands, the area is not a water of the United States. The limit of non-tidal waters of the United States is discussed at 33 CFR Part 328.4(c). It would be too resource intensive to provide maps of streams that require a PCN for the purposes of the NWPs. Instead, districts will determine on a case-by-case basis whether or not a particular stream is ephemeral, intermittent, or perennial. We are proposing to retain the definition.

*Farm:* For the purposes of the proposed modification of NWP 40, we proposed a definition of the term "farm" to help determine what constitutes a single and complete project. Two commenters stated that the proposed definition is too narrow and will add unnecessary complexity for farmers, because using Internal Revenue Service (IRS) tax criteria to identify farms is too complicated.

Because of the changes to the modification of NWP 40, we will use the

term "farm tract" instead of "farm" to determine what constitutes a single and complete project for the purposes of NWP 40. Farm tract determinations are not based on IRS criteria. The Farm Service Agency of the U.S. Department of Agriculture identifies farm tracts. The rationale for basing the single and complete project on farm tracts for NWP 40 is discussed in more detail in the preamble for NWP 40. In the "Definitions" section of the NWPs, we are proposing to use the Farm Service Agency's definition of the term "farm tract," as found at 7 CFR Part 718.2, to replace the proposed definition for "farm."

*Intermittent stream:* We received similar comments to those received for the proposed definition of "ephemeral stream," which were discussed above. A number of commenters stated that it is difficult for permit applicants to distinguish between intermittent and ephemeral streams and requested further clarification. One of these commenters recommended that the Corps utilize the ordinary high water mark to distinguish between intermittent and ephemeral streams: if an ordinary high water mark (OHWM) is present, the stream is intermittent; if an OHWM is absent, the stream is ephemeral. Two commenters recommended that the definition distinguish between intermittent streams and man-made ditches. Another commenter stated that intermittent streams should be excluded from the NWPs because under the proposed definition, a swale in a pasture would qualify as a stream.

The proposed definition is adequate to differentiate between intermittent and ephemeral streams. Determinations as to whether a particular stream is perennial, intermittent, or ephemeral will be made by district engineers on a case-by-case basis. These determinations should be based on their general knowledge of flow patterns in the area. District engineers will consider any additional information the permit applicant provides based on actual measurements or modeling. Using the OHWM to distinguish between ephemeral and intermittent streams would be contrary to 33 CFR Part 328. The limit of jurisdiction for intermittent and ephemeral streams is the OHWM. If no OHWM is present, then that channel is not a water of the United States. We do not agree that it is necessary to distinguish between intermittent streams and man-made ditches. An intermittent stream may have been channelized to improve local drainage. Man-made ditches can be constructed in wetlands and other waters of the United

States, such as perennial and intermittent streams, as well as uplands. Man-made ditches constructed in waters of the United States are still considered waters of the United States. If a swale possess an OHWM, it would be considered a water of the United States, if it meets the criteria in 33 CFR Part 328. If a swale lacks an OHWM, but possess wetland hydrology, hydric soils, and a hydrophytic plant community, it may be considered a jurisdictional wetland, unless the swale was constructed in uplands and has not been abandoned. A swale that lacks an OHWM or does not exhibit wetland characteristics is not a water of the United States.

Another commenter requested further clarification to address situations where there is extensive groundwater pumping for crop irrigation. Except in extremely wet years, this activity causes some streams to dry up entirely; without groundwater pumping for irrigation, many of these streams would have flowing water during most of the year or year round.

Adjacent land use changes can affect water flow patterns of streams. Removal of large amounts of groundwater can decrease the duration of water flow through the stream channel over the course of a year. District engineers should base their stream classification determinations on normal circumstances and whether or not the region is experiencing normal rainfall patterns. For example, if the stream has flowing water for only part of a typical year due to normal pumping of groundwater for irrigation or domestic uses, then that stream should be classified as "intermittent," even though it may have been a perennial stream prior to the introduction of the activities that changed the flow pattern. We are proposing to retain this definition.

*Loss of waters of the United States:* A number of commenters objected to the proposed definition because it includes excavation. These commenters cited the recent decisions by the United States District Court for the District of Columbia in *American Mining Congress v. United States Army Corps of Engineers* and the United States Court of Appeals for the District of Columbia Circuit in *National Mining Association et al. v. U.S. Army Corps of Engineers*. In these decisions, the District Court overturned the Corps and EPA's revisions to the definition of "discharge of dredged material," which were promulgated on August 25, 1993 (see 58 FR 45008) and the Court of Appeals affirmed the District Court's decision. These commenters said that the definition should not include

excavation. Three commenters asserted that the definition should not include, in addition to excavation activities, flooding and draining activities. A number of commenters stated that the definition does not contain any discussion concerning what constitutes an adverse effect.

These recent court decisions do not affect the definition of the term "loss of waters of the United States." Because of these decisions, the Corps does not regulate excavation of waters of the United States under Section 404 of the Clean Water Act if the excavation activity results only in incidental fallback of excavated material. Excavation activities that result in more than incidental fallback of dredged material into waters of the United States require a Section 404 permit and may be authorized by NWP. District engineers will determine whether or not a particular excavation activity requires a Section 404 permit based on the degree of the discharge associated with the excavation activity. In summary, if the discharge resulting from the excavation activity is only incidental fallback, then no Section 404 permit is required. We believe that retaining excavation activities in this definition will reduce confusion for the regulated public because some excavation activities in waters of the United States are still regulated under Section 404 and to exclude excavation activities from this definition would be misleading.

Since the Corps and EPA's revisions to the definition of "discharge of dredged material" promulgated on August 25, 1993, were overturned, the criteria concerning what constitutes an adverse effect for the purposes of Section 404 of the Clean Water Act has become narrower in scope. Regulatory Guidance Letters 90-5 and 88-06 were issued prior to the August 25, 1993, rule and provide guidance relevant to this issue. An activity that converts a wetland to another use can be considered a loss of waters of the United States and regulated under Section 404 if that activity causes the loss of, or substantially modifies, waters of the United States by eliminating or greatly reducing the principal valuable functions of those waters. Losses of waters of the United States can occur either by direct impacts (e.g., covering by fill) or by closely-related indirect impacts (e.g., the changes in vegetation that occur after a swamp is flooded by constructing a dam, killing all of the trees in the flooded area). Any indirect adverse effects factored into the acreage measurement of "loss of waters of the United States" must eliminate or substantially impair the principal

valuable functions that the waterbody provided prior to conducting the activity. Indirect adverse effects such as backwater flooding and dewatering are more strongly related to the discharge and should be included in the loss of waters of the United States if they result in substantial, long-term adverse effects on the aquatic environment. Excavation activities that result only in incidental fallback and waters affected by that excavation activity should not be calculated into the acreage loss unless the permittee cannot conduct the excavation activity without the associated discharge that is regulated under Section 404.

For the purposes of the proposed NWP notification thresholds, we have modified the sentence addressing the loss of stream bed by adding the phrase "perennial and intermittent" before the word stream, because the proposed NWPs require notification only for those activities that result in the discharge of dredged or fill material into waters of the United States due to filling or excavating perennial or intermittent stream beds.

One commenter requested that the definition of "loss of waters of the United States" include the effects of habitat fragmentation, which could adversely affects some functions and values of waters of the United States.

We disagree, because this effect is beyond the Corps scope of analysis for Section 404 activities. Many activities that result in habitat fragmentation do not result in a discharge of dredged or fill material into waters of the United States, and are not regulated under Section 404 of the Clean Water Act.

We have added sentences to this definition to differentiate between permanent and temporary losses of waters of the United States. Temporary losses of waters of the United States are not included in the measurement of loss of waters of the United States. We are proposing to modify the definition of the term "loss of waters of the United States" as discussed above.

*Noncontiguous wetland:* In response to the proposed definition, we received comments that were similar to the comments received for the proposed definition of "contiguous wetland," which were discussed above. Several commenters stated that the proposed definition is unclear. A commenter stated that noncontiguous wetlands are isolated wetlands. Another commenter recommended that the break between contiguous and non-contiguous waters should be based on topography or hydrologic influence, not the type of channel between the wetland and the waterbody. Another commenter stated

that the part of the definition referring to "a linear aquatic system with a defined channel to the otherwise contiguous wetland" needs to be clarified and that the term "linear aquatic system" needs to be defined. This commenter also recommended that the Corps include examples and explanatory statements to describe how contiguous and noncontiguous wetlands differ from each other. One commenter recommended that the definition should state that noncontiguous wetlands do not share a common groundwater connection with other waters of the United States.

To increase protection of the aquatic environment, we are proposing to prohibit the use of most of the new NWP in non-tidal wetlands adjacent to tidal waters instead of prohibiting the use of these NWPs in non-tidal wetlands contiguous to tidal waters. Therefore, the definition of the term "noncontiguous wetland" has been removed from the "Definitions" section of the NWPs.

**Non-tidal wetland:** No comments were received on the proposed definition. We are proposing to retain this definition.

**Perennial stream:** One commenter requested that the Corps, in the definition of this term, distinguish between perennial streams and drainage ditches. Another commenter stated that the definition should be based on the duration of flow, not on the position of stream bed relative to the water table.

The definition of this term should not distinguish between perennial streams and drainage ditches because some streams have been channelized to improve local drainage. These streams, which are still waters of the United States, are considered drainage ditches for the purposes of Section 404(f). The maintenance of these channelized streams as drainage ditches is exempt from Section 404 permit requirements. As previously discussed in this section, we believe that it is appropriate to consider the source of water when classifying streams as ephemeral, intermittent, or perennial. The definitions for these stream types focus on how long flows in the channel over the course of a year, but the source of the flowing water is also important. It is important to distinguish between natural and artificial sources of water when classifying stream types for the purposes of the NWPs. We have modified the second sentence of the definition, to make it clearer that the water in the stream channel is due to the relative position of the water table (*i.e.*, groundwater flows into the stream channel, because the water table is

above the stream bed). We are proposing to modify the definition of this term as discussed above.

**Riffle and pool complexes:** One commenter questioned whether or not riffle and pool complexes are limited to perennial streams. Another commenter stated that the definition should include a reference to 40 CFR Part 230.45. One commenter remarked that the word "of" should be removed from before the word "movement." Two commenters stated that riffle and pool complexes are not limited to perennial streams but may occur in intermittent and ephemeral streams. One commenter agreed that the definition should be limited to perennial streams and suggested that the definition should recognize that riffle and pool complexes are often important spawning habitats. A commenter requested that the definition provide a minimum threshold for the ratio of riffles, pools, and flats that would be considered as riffle and pool complexes because some Corps districts consider all ratios except 100% flat as riffle and pool complexes.

We agree that the definition should be the same as the definition in 40 CFR Part 230.45 and have replaced the proposed definition with the definition found at 40 CFR Part 230.45. We cannot provide a minimum threshold for the ratio of riffles, pools, and flats to be considered as a riffle and pool complex. District engineers will determine which segments of streams contain riffle and pool complexes. We are proposing to modify the definition of this term as discussed above.

**Stormwater management:** One commenter recommended that the definition should include replenishment of groundwater as one of the purposes of stormwater management. Another commenter stated that the definition should specifically refer to changes in water turbidity. Two commenters said that the definition should not be limited to the mitigation of negative impacts resulting from urbanization, but should recognize that stormwater management is used to mitigate land modification, such as the construction of roads in rural areas. One commenter suggested that the definition state that stormwater management reduces adverse impacts on aquatic resources.

The primary purposes of stormwater management are to reduce degradation of water quality and aquatic habitat quality and reduce flooding. Although certain stormwater management techniques are used to increase infiltration of stormwater into the soil, it is not our intent to list every function provided by stormwater management in

the definition. Stormwater infiltration techniques are often used to offset losses of local infiltration due to increases in the amount of impervious surface in the project area, so that increases in stormwater runoff do not increase downstream erosion, water quality degradation, and flooding.

We disagree that the definition should specifically reference changes in water turbidity. Turbidity is simply one measure of water quality, and is already adequately addressed in the definition. We concur that the definition should not be limited to urbanization, and will replace this word with the phrase "changes in land use." We will add the phrase "on the aquatic environment" to the end of the definition to provide further clarification of the purpose of stormwater management. We are proposing to modify the definition of this term as discussed above.

**Stormwater management facilities:** One commenter stated that the proposed definition is far more limited and does not include the full description provided in text of the NWP for stormwater management facilities. This commenter recommended that the definition include the following stormwater management activities: water control structures, outfall structures, emergency spillways, constructed wetland basins, wetland bottom channels, filter basins, infiltration basins, channels, and ditches. Another commenter recommended that the definition should also include debris basins and dams, storm drains, levees, and channels. A third commenter suggested that the definition include retarding basins.

It is not our intent to include a comprehensive list of stormwater management techniques, practices, or structures in the definition. The inclusion of stormwater retention and detention ponds and best management practices in the definition is intended only to provide examples. We are proposing to retain this definition.

**Tidal wetland:** One commenter stated that the definition at 33 CFR Part 328.3(d) does not include the qualification that the high tide line must be inundated by tidal waters at least 2 times per month and recommended that this part of the proposed definition should be eliminated from the definition because of the great differences in daily tide heights. Two commenters said that tidal waters occur only below the mean high water line and that the Corps is attempting to extend its jurisdictional authority by defining tidal waters to include spring high tides. One of these commenters stated that the proposed definition is

contrary to Section 10 of the Rivers and Harbors Act.

The definition proposed in the July 1, 1998, **Federal Register** notice is not contrary to current Corps regulations and definitions. All waters subject to the ebb and flow of the tide are waters of the United States, including spring high tides. Spring high tides occur two times per lunar month when the sun, moon, and earth are aligned with each other and exert the greatest gravitational influence on tidal waters, resulting in the highest and lowest tides that occur during the tidal cycle. It is important to recognize that spring high tides occur only two times per lunar month to differentiate between high tides regularly caused by gravitational interactions of the sun, moon, and earth and storm surges of tidal waters caused by atmospheric phenomena. To provide further clarification, we will insert the word "lunar" before the word "month" in the last sentence of this definition.

Tidal waters extend landward of the mean high tide line. The "mean high tide line" is an average of tidal heights over the course of a complete monthly tidal cycle. Therefore, half of the monthly tides will be landward of the mean high tide line and half of the monthly tides will be channelward of the mean high tide line. Tidal waters landward of the mean high tide line are waters of the United States, but they are not navigable waters of the United States. Therefore, tidal waters landward of the mean high tide line are subject to Section 404 of the Clean Water Act, but not Section 10 of the Rivers and Harbors Act. See 33 CFR 329.12 for a discussion of the geographic and jurisdictional limit of oceanic and tidal waters relative to Section 10 of the Rivers and Harbors Act. The definition of this term has been modified as discussed above.

**Vegetated shallows:** No comments were received concerning the proposed definition of this term. We are proposing to retain this definition.

**Waterbody:** One commenter is unsure why a definition is required for this term because, according to the commenter, the definition does not appear anywhere else in the Corps regulatory program. This commenter also stated that wetlands are waterbodies, but often do not have discernible high water marks. This commenter recommended the elimination of this term from the "Definitions" section of the NWP. Another commenter stated that the proposed definition does not have a frequency threshold for the establishment of an ordinary high water mark (OHWM) and recommended that the definition include such a threshold.

One commenter stated that the Corps should clarify how the definition relates to open waters and that the definition should clarify that waterbodies may or may not be regulated under Section 404 of the Clean Water Act. Another commenter recommended that the definition exclude farm ponds.

The word "waterbody" was used throughout the July 1, 1998, **Federal Register** notice for the proposed new and modified NWP. It is also used in the NWP regulations issued on November 22, 1991 (56 FR 59110–59147), particularly for the definition of the term "single and complete project" at 33 CFR Part 330.2(i). This word is also used in NWP 29 and General Condition 4. The intent of the definition is to ensure consistent application of the term for the NWP.

Waterbodies consist of open and flowing waters, as well as contiguous wetlands. We will modify this definition to include contiguous wetlands, which may not have an OHWM. For example, a lake may be surrounded by a wetland fringe inhabited by emergent wetland vegetation. The OHWM may or may not be the same as the wetland boundary, which may extend beyond the OHWM. Wetlands contiguous to open or flowing waters should be considered as part of the same waterbody. A wetland can be considered a waterbody if it is inundated with flowing or standing water.

To provide further clarification to distinguish between wetlands and open and flowing waters, we have added a definition for the term "open water," which is often used in these NWP. We are proposing to modify this definition as discussed above.

**Additional Definitions:** In response to the July 1, 1998, **Federal Register** notice, we received several comments requesting definitions of additional terms used in the NWP program. Some of these terms will be added to the definition section of the NWP, as discussed below.

For the purposes of NWP 27 and the NWP conditions addressing compensatory mitigation, we are proposing to add definitions of the terms "compensatory mitigation," "restoration," "creation," "enhancement," and "preservation." The definitions for these terms that were developed for the "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks," published in the November 28, 1995, issue of the **Federal Register** (60 FR 58605–58614) will be used in the "Definitions" section of the NWP.

Two commenters requested that the Corps include a definition of the word "aquatic" in the NWP. They believe that the Corps should include a definition of this word that reflects the limits of its regulatory authority or replace this word with the phrase "waters of the United States" or "navigable waters."

We believe that it is not necessary to include a definition of this word for the NWP program. If an aquatic area is not a water of the United States, then it is not subject to either Section 404 or Section 10.

In response to comments received in response to our proposed definition of the term "waterbody," we are proposing to add a definition of the term "open water" because this term is used in NWP 27 and 39 and General Conditions 9 and 19.

One commenter requested a definition of the phrase "projects that may have more than minimal adverse effects on the aquatic environment." This commenter believes that a definition is necessary to provide clarification to district engineers and regulated public.

We disagree with this comment. For every request for NWP authorization, district engineers must determine whether or not that particular project will result in more than minimal adverse effects. This determination is made on a case-by-case basis, and depends on many factors which cannot be captured in a simple definition. Therefore, we will not include a definition of this phrase.

Another commenter suggested including a definition of "region," because division and district engineers should utilize this term consistently.

We do not agree that it is necessary to define the term "region" for the NWP, because no specific definition is required. A region is simply a geographic area. For the purposes of regional conditioning or revocation of the NWP, a region may be a waterbody, watershed, sub-watershed, county, state, or Corps district. Corps districts review cumulative adverse effects on the aquatic environment on a watershed basis. Division or district engineers can determine which scale of region is appropriate. If cumulative adverse effects are more than minimal in a single sub-watershed, then it would be appropriate to suspend or revoke NWP only in that sub-watershed. If the cumulative adverse effects on the aquatic environment due to an NWP are more than minimal in an entire state, then the appropriate region would be the state. For these reasons, we will not add a definition of the term "region" to the NWP.



One commenter requested that we add a definition of the term "restored channel" to the NWP.

We disagree that such a definition is necessary because "restoration," as presently used for wetland compensatory mitigation projects, can apply to streams as well. The restoration of a stream channel reestablishes the stream channel where it previously existed.

Two commenters recommended that we include a definition of the term "single and complete project" with the NWPs. One commenter stated that the definition in 33 CFR Part 330.2(i) is confusing and difficult to implement, especially with respect to the cumulative adverse effects that occur when a linear project crosses single waterbody several times. Another commenter requested a definition of this term that would include all current and future phases of development of land under a single common ownership which has been subdivided or transferred to facilitate development.

We believe that this term does not need to be redefined. For convenience, we are proposing to add a definition of the term "single and complete project" to the "Definitions" section of the NWPs, which paraphrases the definition at 33 CFR Part 330.2(i). For linear projects, district engineers will continue to assess cumulative adverse effects on the aquatic environment to determine if the project can be authorized by NWPs. If the adverse effects on the aquatic environment are more than minimal, individually or cumulatively, the District Engineer will exercise discretionary authority and require an individual permit for the project. For subdivisions, the subdivision provision of proposed NWP 39 as well as 33 CFR Part 330.2(i) will be used to determine acreage limits for particular subdivisions. In addition, district engineers will consider whether or not each phase of a multi-phase project can be considered as a separate single and complete project. If each phase has independent utility, then each phase can be considered a separate single and complete project.

One commenter requested that the definition of the term "small perennial stream," which was used in NWPs 40 and 44, should be included in the "Definitions" section of the NWPs.

We have deleted the reference to small perennial streams from NWPs 40 and 44. Therefore, no definition of this term is needed.

One commenter recommended that the Corps include a definition of the term "stream" in the NWPs. Another commenter requested the inclusion of a

definition of "stream bed" because the definition on page 36042 of the July 1, 1998, **Federal Register** notice is a definition of "stream," not "stream bed." The term "stream bed" is also used throughout the NWPs.

We agree that the definition on page 36042 of the July 1, 1998, **Federal Register** notice is actually a definition of the term "stream" and believe that it is unnecessary to include a definition of "stream" in the NWPs since the term "stream bed" is used throughout the NWPs, particularly in the context of the 500 linear foot notification requirement. Therefore, we are proposing to add a definition of the term "stream bed" to the "Definitions" section of the NWPs. The limits of the stream bed are identified by the location of the ordinary high water marks on either side of the stream bed. Any wetlands contiguous to the stream bed, but outside of the ordinary high water mark, are not part of the stream bed.

Due to changes in the NWPs made in response to the comments received in reply to the July 1, 1998, **Federal Register** notice, we are proposing to add definitions for several more terms used in the NWPs. These terms include: "project area" and "independent utility." We are also proposing to add a definition of the term "permanent above-grade fill" to the "Definitions" section since this term is used in proposed General Condition 27.

One commenter requested that the Corps include definitions of "important spawning areas" and "water quality management plan" in this section.

We disagree that definitions of these terms are necessary. District engineers will determine which areas are important spawning areas. The content of the water quality management plan, if required by General Condition 9, is also at the discretion of the District Engineer.

#### *VI. Comments on Other Issues in July 1, 1998, Federal Register Notice*

##### *Other Suggested NWPs*

In response to the December 13, 1996, **Federal Register** notice, several commenters recommended additional replacement NWPs. We do not believe that development of more new NWPs is warranted at this time. Some of the recommended NWPs are for activities in areas that are not considered waters of the United States and others are for activities that are exempt from permit requirements of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

*Maintenance of Landfill Surfaces:*  
Most commenters agreed with the

statement that routine maintenance of landfill surfaces does not require a Section 404 permit. Several commenters requested that we reiterate such language in the final **Federal Register** notice for the NWPs, and further requested that the Corps also include a discussion of the 9th Circuit decision in the *Resource Investment Incorporated (RII) v. Corps of Engineers* case. One commenter disagreed with the statement that most landfills are constructed in uplands, stating that there are a number of landfills constructed on wetlands.

Ponded areas that develop on landfill surfaces are not waters of the United States. Although a landfill may be constructed in wetlands, the landfill replaces the waterbody with dry land. Therefore, that area is no longer a water of the United States. The landfill cap may develop ponded areas that may be inhabited by wetland vegetation, but these areas must be repaired to prevent additional air and water pollution. These maintenance activities do not require a Section 404 permit because these ponded areas are not waters of the United States. The preamble to 33 CFR Part 328 in the November 13, 1986, **Federal Register** (51 FR 41217, Section 328.3) states that "water filled depressions created in dry land incidental to construction activity \* \* \*" are not considered waters of the United States " \* \* \* until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States." The landfill is not abandoned because of the routine maintenance required by law to keep the landfill surface at the designed grade. Since routine maintenance of landfill surfaces does not require a Section 404 permit, we will not be developing an NWP for this activity. With regard to requests to include a discussion of the RII case, this matter is still in litigation and such a discussion is inappropriate at this time.

##### *Maintenance and Filling of Ditches Adjacent to Roads and Railways*

Although a few commenters requested a new NWP authorizing the maintenance and filling of ditches adjacent to roads and railways, such a NWP is not necessary. In response to the July 1, 1998, **Federal Register** notice, most commenters stated that this activity is exempt from regulation or is outside of the Corps jurisdiction. One commenter stated that wet weather conveyances should not be regulated because it would greatly increase the Corps workload. Another commenter noted that, to meet safety design standards, transportation agencies often

widen and flatten side slopes of the embankment by adding fill to one side of the ditch.

The maintenance of roadside or railroad ditches constructed in uplands does not require a Section 404 permit since these ditches are not waters of the United States, even though they may support wetland vegetation. The preamble to 33 CFR Part 328.3, as published in the November 13, 1986, issue of the **Federal Register** (51 FR 41217), states that "non-tidal drainage or irrigation ditches excavated on dry land" are generally not considered to be waters of the United States. Filling these ditches to widen the road or railroad bed does not require a Section 404 permit.

If these roadside or railroad ditches are constructed in waters of the United States, the maintenance of these ditches is exempt from Section 404 permit requirements (see CFR Part 323.4(a)(3)), provided the ditch is restored to its original dimensions and configuration. However, the construction of these ditches in waters of the United States requires a Section 404 permit and may be authorized by an NWP, an individual permit, or a regional general permit. A Corps permit is required to widen the road or railroad bed if the ditches adjacent to the existing road or railroad bed were constructed in waters of the United States. The construction or maintenance of roadside and railroad ditches in navigable waters of the United States requires a Section 10 permit. Furthermore, if the maintenance of a roadside ditch includes reconfiguring that ditch, the activity does not qualify for the exemption at 33 CFR Part 323.4(a)(3).

#### Maintenance of Water Treatment Facilities

A commenter requested that the Corps consider a new NWP for the maintenance of water treatment facilities, such as the removal of material from constructed settling lagoons and associated constructed wetlands, maintenance and de-watering of stock ponds for livestock, and maintenance of recharge ponds for water supplies. One commenter said that the Corps description on page 36063 of the July 1, 1998, **Federal Register** notice characterizing exempt activities related to stock ponds contained errors (e.g., water quality benefits "test").

Water treatment facilities constructed in uplands do not require a Section 404 permit for maintenance activities. We do not generally consider "[a]rtificial lakes or ponds created by excavating and/or diking dry land to collect and

retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing" to be waters of the United States. (Refer to the preamble for 33 CFR Part 328.3, as published in the November 13, 1986, issue of the **Federal Register** (51 FR 41217).)

The proposed modifications to NWP 3 and NWP 7, which authorize the removal of accumulated sediment in the vicinity of existing structures, should address some of these issues. Removal of sediments from detention and settling basins constructed with a Section 404 permit may be authorized by NWP 7 as long as the maintenance activity is associated with an intake or outfall structure. Maintenance of recharge ponds constructed in uplands does not require a Section 404 permit, but the maintenance of these ponds constructed in waters of the United States may be authorized by existing NWPs, such as NWPs 3, 13, or 18. Therefore, these activities have not been specifically included in the proposed NWPs.

With regard to comments relating to stock pond exemptions, we provide the following clarification: The construction of stock ponds is an exempt activity; thus, activities necessary for the construction and maintenance of stock ponds are exempt from Section 404 permit requirements. Maintenance activities, such as the deepening of a stock pond, do not require a Section 404 permit provided the activity does not increase in the lateral extent of the pond. Additionally, the construction or maintenance activity may not bring a water into a use to which it was not previously subject and it may not impair the flow or circulation or reduce the reach of such waters.

**NWP 31:** In the July 1, 1998, **Federal Register** notice, we responded to a request to expand the scope of NWP 31 to authorize other maintenance activities associated with flood control and maintenance of water supply facilities. In response to this part of the July 1, 1998, **Federal Register** notice, several commenters addressed issues related to NWP 31. Two commenters suggested that routine maintenance activities should be omitted from the requirements of the Corps regulatory program. Another requested that the Corps explain why a single activity may be authorized by three different NWPs, in this case NWP 3, 7, or 18 to authorize removal of accumulated sediments.

Any maintenance activity that involves a discharge of dredged or fill material into waters of the United States requires a Section 404 permit, unless that activity qualifies for the exemption under Section 404(f). We cannot expand

the exemptions in Section 404(f); adding other maintenance activities to Section 404(f) requires modification of the Clean Water Act through the legislative process. Therefore, routine maintenance activities cannot be omitted from the Corps Regulatory Program.

NWPs 3, 7, and 18 were developed to authorize specific activities. Although we are proposing to modify both NWPs 3 and 7 to authorize the removal of accumulated sediments, this activity is subject to different terms in these NWPs, based on the nature of the work. The removal of accumulated sediments in the vicinity of existing structures authorized by paragraph (ii) of NWP 3 will allow permittees to restore the waterway in the immediate vicinity of structure and protect that structure with rip rap. The purpose of part (ii) of NWP 7 is to restore outfalls, intakes, small impoundments, and canals to original design capacities design configurations. NWP 7 authorizes maintenance dredging or maintenance excavation of canals associated with intakes and outfalls; paragraph (ii) of NWP 3 does not authorize that activity. NWP 18 authorizes minor discharges, which is not the same as the activities authorized by NWPs 3 and 7.

We continue to believe that NWP 31 does not require further modification at this time, for the same reasons discussed in the July 1, 1998, **Federal Register** notice.

*Regional Conditioning of Nationwide Permits:* Concurrent with this **Federal Register** notice, District Engineers are issuing local public notices. Division and district engineers have proposed regional conditions or revocation of some or all of the NWPs contained in this **Federal Register** notice. Regional conditions may also be required by State Section 401 water quality certification or Coastal Zone Management Act consistency determinations. District engineers will announce regional conditions or revocations by issuing local public notices. Information on regional conditions and revocation can be obtained from the appropriate District Engineer, as indicated below or at the District's Internet home page. Furthermore, this and additional information can be obtained on the Internet at the Corps Regulatory Home Page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

#### ALABAMA

Mobile District Engineer, ATTN: CESAM-OP-S, 109 St. Joseph Street, Mobile, AL 36602-3630

## ALASKA

Alaska District Engineer, ATTN: CEPOA-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-P, 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: CESPA-CO-R, 4101 Jefferson Plaza NE, Room 313, Albuquerque, NM 87109

## CONNECTICUT

New England District Engineer, ATTN: CENAE-OD-R, 696 Virginia Road, Concord, MA 01742-2751

## DELAWARE

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## GEORGIA

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Walla Walla District Engineer, ATTN: CENWW-OP-RF, 210 N. Third Street, City-County Airport, Walla Walla, WA 99362-1876

## ILLINOIS

Rock Island District Engineer, ATTN: CEMVR-RD, P.O. Box 004, Rock Island, IL 61204-2004

## INDIANA

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## KANSAS

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

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## MISSOURI

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New England District Engineer, ATTN: CENAE-OD-R, 696 Virginia Road, Concord, MA 01742-2751

## NEW JERSEY

Philadelphia District Engineer, ATTN: CENAP-OP-R, Wannamaker Building, 100 Penn Square East, Philadelphia, PA 19107-3390

## NEW MEXICO

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

## NEW YORK

New York District Engineer, ATTN: CENAN-OP-R, 26 Federal Plaza, New York, NY 10278-9998

## NORTH CAROLINA

Wilmington District Engineer, ATTN: CESAW-CO-R, P.O. Box 1890, Wilmington, NC 28402-1890

## NORTH DAKOTA

Omaha District Engineer, ATTN: CENWO-OP-R, 215 North 17th Street, Omaha, NE 68102-4978

## OHIO

Huntington District Engineer, ATTN: CELRH-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: CENWP-PE-G, 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 District Engineer, ATTN: CENAE-OD-R, 696 Virginia Road, Concord, MA 01742-2751

## SOUTH CAROLINA

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

## SOUTH DAKOTA

Omaha District Engineer, ATTN: CENWO-OP-R, 215 North 17th Street, Omaha, NE 68102-4978

## TENNESSEE

Nashville District Engineer, ATTN: CELRN-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 95814-2922

## VERMONT

New England District Engineer, ATTN: CENAE-OD-R, 696 Virginia Road, Concord, MA 01742-2751

## VIRGINIA

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

## WASHINGTON

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

## WEST VIRGINIA

Huntington District Engineer, ATTN: CELRH-ORF, 502 8th Street, Huntington, WV 25701-2070

## WISCONSIN

St. Paul District Engineer, ATTN: CEMVP-CO-R, 190 Fifth Street East, St. Paul, MN 55101-1638

## WYOMING

Omaha District Engineer, ATTN: CENWO-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: CEPOH-ET-PO, Building 230, Fort Shafter, Honolulu, HI 96858-5440

## PUERTO RICO &amp; VIRGIN ISLANDS

Jacksonville District Engineer, ATTN: CESAJ-CO-R, P.O. Box 4970, Jacksonville, FL 32202-4412

Dated: July 13, 1999.

Approved:

**Hans A. Van Winkle,**  
Brigadier General, U.S. Army, Deputy  
Commander for Civil Works.

**Authority**

Accordingly, we are proposing to issue new NWP, modify existing NWP, and add conditions and to add NWP definitions 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 (33 U.S.C. 403).

# **Nationwide Permits, Conditions, Further Information, and Definitions**

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## *B. Nationwide Permits and Conditions*

### *3. Maintenance.* Activities related to:

(i) 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 adverse 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 nationwide permit authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(ii) Discharges of dredged or fill material, including excavation, into all waters of the United States to remove accumulated sediments and debris in the vicinity of, and within, existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional rip rap to protect the structure, provided the permittee notifies the District Engineer in accordance with General Condition 13. The removal of sediment is limited to the minimum necessary to

restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. The placement of rip rap must be the minimum necessary to protect the structure or to ensure the safety of the structure. All excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the District Engineer under separate authorization. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the District Engineer.

(iii) Discharges of dredged or fill material, including excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event, including the construction, placement, or installation of upland protection structures and minor dredging to remove obstructions in a water of the United States. (Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a Section 404 permit provided the uplands are restored to their original pre-event location. This NWP is for the activities in waters of the United States associated with the replacement of the uplands.) The permittee must notify the District Engineer, in accordance with General Condition 13, within 12 months of the date of the damage and the work must commence, or be under contract to commence, within two years of the date of the damage. The permittee should provide evidence, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. The restoration of the damaged areas cannot exceed the contours, or ordinary high water mark, that existed prior to the damage. The District Engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this permit. Minor dredging to remove obstructions from the adjacent waterbody is limited to 50 cubic yards below the plane of the ordinary high water mark, and is limited to the amount necessary to restore the pre-existing bottom contours of the waterbody. The dredging may not be done primarily to obtain fill for any restoration activities. The discharge of dredged or fill material and all related work needed to restore the upland must be part of a single and complete project. This permit cannot be used in conjunction with NWP 18 or NWP 19 to

restore damaged upland areas. This permit cannot be used to reclaim historic lands lost, over an extended period of time, to normal erosion processes.

Maintenance dredging for the primary purpose of navigation and beach restoration are not authorized by this permit. This permit does not authorize new stream channelization or stream relocation projects. Any work authorized by this permit must not cause more than minimal degradation of water quality, more than minimal changes to the flow characteristics of the stream, or increase flooding (See General Conditions 9 and 21).

**Note:** This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Section 404(f) exemption for maintenance. For example, the repair and maintenance of concrete-lined channels are exempt from Section 404 permit requirements. (Sections 10 and 404)

**7. Outfall Structures and Maintenance.** Activities related to: (i) 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), and (ii) maintenance excavation, including dredging, to remove accumulated sediments blocking or restricting outfall and intake structures, accumulated sediments from small impoundments associated with outfall and intake structures, and accumulated sediments from canals associated with outfall and intake structures, provided that the activity meets all of the following criteria:

- a. The permittee notifies the District Engineer in accordance with General Condition 13;
- b. The amount of excavated or dredged material must be the minimum necessary to restore the outfalls, intakes, small impoundments, and canals to original design capacities and design configurations (*i.e.*, depth and width);
- c. The excavated or dredged material is deposited and retained at an upland site, unless otherwise approved by the District Engineer under separate authorization; and
- d. Proper soil erosion and sediment control measures are used to minimize reentry of sediments into waters of the United States.

The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure. For

maintenance excavation and dredging to remove accumulated sediments, the notification must include information regarding the original design capacities and configurations of the facility and the presence of special aquatic sites (*e.g.*, vegetated shallows) in the vicinity of the proposed work. (Sections 10 and 404)

**12. Utility Line Activities.** Activities required for the construction, maintenance and repair of utility lines and associated facilities in waters of the United States as follows:

(i) **Utility lines:** The construction, maintenance, or repair of utility lines, including outfall and intake structures and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, 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 (see Note 1, below). 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 District Engineer may extend the period of temporary side casting not to exceed a total of 180 days, where appropriate. In wetlands, the top 6" to 12" of the trench should normally be backfilled with topsoil from the trench. Furthermore, the trench cannot be constructed in such a manner as to drain waters of the United States (*e.g.*, backfilling with extensive gravel layers, creating a french drain effect). For example, utility line trenches can be backfilled with clay blocks to ensure that the trench does not drain the waters of the United States through which the utility line is installed. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

(ii) **Utility line substations:** The construction, maintenance, or expansion of a substation facility associated with a power line or utility line in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not result in the loss of greater than 1 acre of non-tidal waters of the United States.

(iii) **Foundations for overhead utility line towers, poles, and anchors:** The construction or maintenance of

foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

(iv) **Access roads:** The construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1 acre of non-tidal waters of the United States. Access roads shall be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes the adverse effects on waters of the United States and as near as possible to preconstruction contours and elevations (*e.g.*, at grade corduroy roads or geotextile/gravel roads). Access roads constructed above preconstruction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows. All access roads will be constructed with pervious surfaces.

The term "utility line" does not include activities which drain a water of the United States, such as drainage tile, or french drains; however, it does apply to pipes conveying drainage from another area. For the purposes of this NWP, the 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. Waters of the United States temporarily affected by filling, flooding, excavation, or drainage, where the project area is restored to preconstruction contours and elevations, are not included in the calculation of permanent loss of waters of the United States. This includes temporary construction mats (*e.g.*, timber, steel, geotextile) used during construction and removed upon completion of the work. Where certain functions and values of waters of the United States are permanently adversely affected, such as the conversion of a forested wetland to a herbaceous wetland in the permanently maintained utility line right-of-way, mitigation will be required to reduce the adverse effects of the project to the minimal level.

Mechanized landclearing necessary for the construction, maintenance, or repair of utility lines and the construction, maintenance and expansion of utility line substations, foundations for overhead utility lines,

and access roads is authorized, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as near as possible. The area of waters of the United States that is filled, excavated, or flooded must be limited to the minimum necessary to construct the utility line, substations, foundations, and access roads. Excess material must be removed to upland areas immediately upon completion of construction. This NWP may authorize utility lines in or affecting navigable waters of the United States, even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322).

**Notification:** The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

- (a) Mechanized land clearing in a forested wetland for the utility line right-of-way;
- (b) A Section 10 permit is required;
- (c) The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet;
- (d) The utility line is placed within a jurisdictional area (*i.e.*, a water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area;
- (e) Discharges associated with the construction of utility line substations that result in the loss of greater than  $\frac{1}{4}$  acre of waters of the United States; or
- (f) Permanent access roads constructed above grade in waters of the United States for a distance of more than 500 feet.

**Note 1:** Overhead utility lines constructed over Section 10 waters and utility lines that are routed in or under Section 10 waters without a discharge of dredged or fill material require a Section 10 permit; except for pipes or pipelines used to transport gaseous, liquid, liquefiable, or slurry substances over navigable waters of the United States, which are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material associated with such pipelines will require a Corps permit under Section 404.

**Note 2:** Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work and the area restored to preconstruction contours, elevations, and wetland conditions. Temporary access roads for construction may be authorized by NWP 33.

**Note 3:** Where the proposed utility line is constructed or installed in navigable waters of the United States (*i.e.*, Section 10 waters), copies of the PCN and NWP verification will be sent by the Corps to the National Oceanic

and Atmospheric Administration, National Ocean Service, for charting the utility line to protect navigation. (Sections 10 and 404)

**14. Linear Transportation Crossings.** Activities required for the construction, expansion, modification, or improvement of linear transportation crossings (e.g., highways, railways, trails, airport runways, and taxiways) in waters of the United States, including wetlands, provided that the activity meets the following criteria:

a. This NWP is subject to the following acreage and linear limits:

(1) For *public linear transportation projects* in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1 acre of waters of the United States;

(2) For *public linear transportation projects* in tidal waters or non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than  $\frac{1}{3}$  acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet; or

(3) For *private linear transportation projects* in all waters of the United States, provided the discharge does not cause the loss of greater than  $\frac{1}{3}$  acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet;

b. The permittee must notify the District Engineer in accordance with General Condition 13 if any of the following criteria are met:

(1) The discharge causes the loss of greater than  $\frac{1}{4}$  acre of waters of the United States; or

(2) There is a discharge in a special aquatic site, including wetlands;

c. The notification must include a mitigation proposal to offset permanent losses of waters of the United States to ensure that those losses result only in minimal adverse effects to the aquatic environment and a statement describing how temporary losses will be minimized to the maximum extent practicable;

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of the affected special aquatic sites;

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

f. This permit does not authorize stream channelization, and the authorized activities must not cause more than minimal changes to the hydraulic flow characteristics of the stream, increase flooding, or cause more than minimal degradation of water

quality of any stream (see General Conditions 9 and 21);

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

h. The crossing is a single and complete project for crossing a water of the United States. Where a road segment (*i.e.*, the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of streams (several single and complete projects) the Corps will consider whether it should use its discretionary authority to require an individual permit.

**Note:** Some discharges for the construction of farm roads, forest roads, or temporary roads for moving mining equipment may be eligible for an exemption from the need for a Section 404 permit (see 33 CFR 323.4). (Sections 10 and 404)

**27. Stream and Wetland Restoration Activities.** Activities in waters of the United States associated with the restoration of former waters, the enhancement of degraded tidal and non-tidal wetlands and riparian areas, the creation of tidal and non-tidal wetlands and riparian areas, and the restoration and enhancement of non-tidal streams and non-tidal open water areas as follows:

(a) The activity is conducted on:

(1) Non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or creation agreement between the landowner and the U.S. Fish and Wildlife Service (FWS) or the Natural Resources Conservation Service (NRCS) or voluntary wetland restoration, enhancement, and creation actions documented by the NRCS pursuant to NRCS regulations; or

(2) Any Federal land; or

(3) Reclaimed surface coal mined lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining or the applicable state agency (the future reversion does not apply to streams or wetlands created, restored, or enhanced as mitigation for the mining impacts, nor naturally due to hydrologic or topographic features, nor for a mitigation bank); or

(4) Any private or public land;

(b) **Notification:** For activities on any private or public land that are not described by paragraphs (a)(1), (a)(2), or (a)(3) above, the permittee must notify the District Engineer in accordance with General Condition 13; and

(c) Only native plant species should be planted at the site, if permittee is vegetating the project site.

Activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or creation of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or create stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; activities needed to reestablish vegetation, including plowing or disking for seed bed preparation; mechanized landclearing to remove undesirable vegetation; and other related activities.

This NWP does not authorize the conversion of a stream to another aquatic use, such as the creation of an impoundment for waterfowl habitat. This NWP does not authorize stream channelization. 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. However, this NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands, on the project site provided there are net gains in aquatic resource functions and values. For example, this NWP may authorize the creation of an open water impoundment in a non-tidal emergent wetland, provided the non-tidal emergent wetland is replaced by creating that wetland type on the project site. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

**Reversion.** For enhancement, restoration, and creation projects conducted under paragraphs (a)(2) and (a)(4), this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion. For restoration, enhancement, and creation projects conducted under paragraphs (a)(1) and (a)(3), this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (*i.e.*, prior to the restoration,

enhancement, or creation activities) within five years after expiration of a limited term wetland restoration or creation agreement or permit, even if the discharge occurs after this NWP expires. This NWP also authorizes the reversion of wetlands that were restored, enhanced, or created on prior-converted cropland that has not been abandoned, in accordance with a binding agreement between the landowner and NRCS or FWS (even though the restoration, enhancement, or creation activity did not require a Section 404 permit). The five-year reversion limit does not apply to agreements without time limits reached under paragraph (a)(1). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate State agency executing the agreement or permit. Prior to any reversion activity the permittee or the appropriate Federal or State agency must notify the District Engineer and include the documentation of the prior condition. Once an area has reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. (Sections 10 and 404)

**Note:** Compensatory mitigation is not required for activities authorized by this NWP, provided the authorized work results in a net increase in aquatic resource functions and values in the project area. This NWP can be used to authorize compensatory mitigation projects, including mitigation banks, provided the permittee notifies the District Engineer in accordance with General Condition 13, and the project includes compensatory mitigation for impacts to waters of the United States caused by the authorized work. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition.

**39. Residential, Commercial, and Institutional Developments.** Discharges into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not

authorized by this NWP. Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The activities listed above are authorized, provided that the activities meet all of the following criteria:

a. The acreage limit for this NWP is determined by using the following index (see Note 1, below):

Acreage limit =  $\frac{1}{4}$  acre + 2% of the project area (in acres)

The maximum acreage limit for this NWP is 3 acres of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters. This acreage limit is achieved for a project area of 137.5 acres or more.

b. The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

(1) The discharge causes the loss of greater than  $\frac{1}{4}$  acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters; or

(2) The discharge causes the loss of any open waters, including perennial or intermittent streams, below the ordinary high water mark (see Note 2, below).

c. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands;

d. The discharge is part of a single and complete project;

e. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification, when required, must include a written statement explaining how avoidance and minimization of losses of waters of the United States were achieved on the project site.

Compensatory mitigation will normally be required to offset the losses of waters of the United States. The notification, when required, must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the United States. If an applicant believes that the project impacts are minimal without mitigation, then the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration;

f. When this NWP is used in conjunction with any other NWP, any



combined total permanent loss of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, exceeding  $\frac{1}{4}$  acre requires that the permittee notify the District Engineer in accordance with General Condition 13;

g. Any work authorized by this NWP must not cause more than minimal degradation of water quality or more than minimal changes to the flow characteristics of any stream (see General Conditions 9 and 21);

h. For discharges causing the loss of  $\frac{1}{4}$  acre or less of waters of the United States, the permittee must submit a report, within 30 days of completion of the work, to the District Engineer that contains the following information: (1) The name, address, and telephone number of the permittee; (2) The location of the work; (3) A description of the work; (4) The type and acreage (or linear feet) of the loss of waters of the United States (e.g.,  $\frac{1}{10}$  acre of emergent wetlands and 50 linear feet of stream bed); and (5) The type and acreage (or linear feet) of any compensatory mitigation used to offset the loss of waters of the United States (e.g.,  $\frac{1}{10}$  acre of emergent wetlands created on-site);

i. If there are any open waters or streams within the project area, the permittee will establish and maintain, to the maximum extent practicable, wetland or upland vegetated buffers adjacent to those open waters or streams consistent with General Condition 19. Deed restrictions, conservation easements, protective covenants, or other means of land conservation and preservation are required to protect and maintain the vegetated buffers established on the project site; and

j. Stream channelization or stream relocation downstream of the point on the stream where the annual average flow is 1 cubic foot per second is not authorized by this NWP.

Only residential, commercial, and institutional activities with structures on the foundation(s) or building pad(s), as well as the attendant features, are authorized by this NWP. For the purposes of this NWP, the term "project area" is defined in the definition section of the NWPs. The compensatory mitigation proposal required in paragraph (e) of this NWP may be either conceptual or detailed. The wetland or upland vegetated buffer required in paragraph (i) of this NWP will normally be 50 to 125 feet wide, but the District Engineer will determine the appropriate width of the vegetated buffer. The required wetland or upland vegetated buffer is part of the overall compensatory mitigation requirement for this NWP. If the project site was

previously used for agricultural purposes and the farm owner/operator used NWP 40 to authorize activities in waters of the United States to increase production or construct farm buildings, NWP 39 cannot be used by the developer to authorize additional activities in waters of the United States on the project site in excess of the indexed acreage limit for NWP 39 (i.e., the combined acreage loss authorized under NWPs 39 and 40 cannot exceed the indexed acreage limit based on project area in paragraph (a), above).

**Subdivisions:** For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to paragraph (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  $\frac{1}{4}$  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 the indexed acreage limit based on project area as determined by paragraph (a) is not authorized by this NWP; unless the District Engineer 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 July 21, 1999, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate the property owner's 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 39. For the purposes of NWP 39, 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. (Sections 10 and 404)

**Note 1:** For example, if the project area is 15 acres, the acreage limit for a single and complete project under this NWP is 0.55 acres. For any project area of 137.5 acres or more, the acreage limit under this NWP is 3

acres of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

**Note 2:** Areas where there is no wetland vegetation are determined by the presence or absence of an ordinary high water mark or bed and bank. Areas that are waters of the United States based on this criteria would require a PCN even though water is infrequently present in the stream channel.

**40. Agricultural Activities.** Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the purpose of improving agricultural production and the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized landclearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities, provided the permittee complies with the following terms and conditions:

a. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is a USDA program participant:

(1) The permittee must obtain an exemption or a minimal effects with mitigation determination from NRCS in accordance with the provisions of the Food Security Act (16 U.S.C. 3801 *et seq.*) and the National Food Security Act Manual (NFSAM);

(2) The discharge into non-tidal wetlands does not result in the loss of greater than 2 acres of non-tidal wetlands on a farm tract;

(3) The discharge into playas, prairie potholes, and vernal pools does not exceed the acreage limit as determined by the following index (see Note, below):

Acreage limit =  $\frac{1}{10}$  acre + 1% of farm tract size (in acres)

The maximum acreage loss of playas, prairie potholes, and vernal pools authorized by this NWP is 1 acre;

(4) The permittee must have an NRCS-certified wetland delineation;

(5) The permittee must implement an NRCS-approved compensatory mitigation plan that fully offsets wetland losses; and

(6) The permittee must submit a report, within 30 days of completion of the authorized work, to the District Engineer that contains the following information: (a) The name, address, and telephone number of the permittee; (b) The location of the work; (c) A description of the work; (d) The type and acreage (or square feet) of the loss of wetlands (e.g.,  $\frac{1}{2}$  acre of emergent wetlands); and (e) The type, acreage (or

square feet), and location of compensatory mitigation (e.g.,  $\frac{3}{4}$  acre of emergent wetlands on the farm tract); or

b. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is not a USDA program participant:

(1) The discharge into non-tidal wetlands does not result in the loss of greater than 2 acres of non-tidal wetlands on a farm tract;

(2) The discharge into playas, prairie potholes, and vernal pools does not exceed the acreage limit as determined by the following index (see Note, below):

Acreage limit =  $\frac{1}{10}$  acre + 1% of farm tract size (in acres)

The maximum acreage loss of playas, prairie potholes, and vernal pools authorized by this NWP is 1 acre;

(3) The permittee must notify the District Engineer in accordance with General Condition 13, if the discharge results in the loss of greater than  $\frac{1}{4}$  acre of non-tidal wetlands, including playas, prairie potholes, and vernal pools;

(4) The notification must include a delineation of affected wetlands; and

(5) The notification must include a compensatory mitigation proposal to offset losses of waters of the United States; or

c. For the construction of building pads for farm buildings, the discharge does not cause the loss of greater than 1 acre of non-tidal wetlands that were in agricultural production prior to December 23, 1985, (i.e., farmed wetlands) and the permittee must notify the District Engineer in accordance with General Condition 13; or

d. Any activity in other waters of the United States is limited to the relocation of existing serviceable drainage ditches constructed in non-tidal streams. For the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams, the permittee must notify the District Engineer in accordance with General Condition 13.

The term "farm tract" refers to a parcel of land identified by the Farm Service Agency. The Corps will identify other waters of the United States on the farm tract. For the purposes of this NWP, the terms "playas," "prairie potholes," and "vernal pools" are defined in the "Definitions" section. NRCS will determine if a proposed agricultural activity meets the terms and conditions of paragraph (a) of this NWP, except as provided below. For those activities that require notification, the District Engineer will determine if a proposed agricultural activity is authorized by paragraphs (b), (c), and/or

(d) of this NWP. USDA program participants requesting authorization for discharges of dredged or fill material into waters of the United States authorized by paragraphs (c) or (d) of this NWP, in addition to paragraph (a), must notify the District Engineer in accordance with General Condition 13 and the District Engineer will determine if the entire single and complete project is authorized by this NWP. Discharges of dredged or fill material into waters of the United States associated with the construction of the compensatory mitigation are authorized by this NWP, but are not calculated in the acreage loss of waters of the United States. This NWP does not affect, or otherwise regulate, discharges associated with agricultural activities when the discharge qualifies for an exemption under Section 404(f) of the Clean Water Act, even though a minimal effect/mitigation determination by NRCS pursuant to the Food and Security Act may be required. Activities authorized by paragraphs (c) and (d) are not included in the indexed acreage limit for the farm tract. If the site was used for agricultural purposes and the farm owner/operator used either paragraphs (a), (b), or (c) of this NWP to authorize activities in waters of the United States to increase agricultural production or construct farm buildings, and the current landowner wants to use NWP 39 to authorize residential, commercial, or industrial development activities in waters of the United States on the site, the combined acreage loss authorized by NWPs 39 and 40 cannot exceed the indexed acreage limit based on project area for a single and complete project in paragraph (a) of NWP 39. (Section 404)

**Note:** For example, under paragraphs (a)(3) or (b)(2) above, for a 20-acre farm tract, the maximum acreage loss authorized for playas, prairie potholes, and vernal pools on the farm tract under this NWP is 0.3 acre. For any farm tract 90 acres or more in size, the acreage limit of this NWP is 1 acre of playas, prairie potholes, and vernal pools.

**41. Reshaping Existing Drainage Ditches.** Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of existing serviceable drainage ditches constructed in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The reshaping of the ditch cannot increase drainage capacity beyond the original design capacity or expand the area drained by the ditch as originally designed (i.e., the capacity of the ditch must be the same as originally designed and it cannot drain additional wetlands

or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality (e.g., by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, increase uptake of nutrients and other substances by vegetation, etc.). The permittee must notify the District Engineer in accordance with General Condition 13, if material excavated during ditch reshaping is proposed to be sidecast into waters of the United States or if greater than 500 linear feet of drainage ditch is to be reshaped. This NWP does not apply to reshaping drainage ditches constructed in uplands, since these areas are not waters of the United States, and thus no permit from the Corps is required, or to the maintenance of existing drainage ditches to their original dimensions and configuration, which does not require a Section 404 permit (see 33 CFR 323.4(a)(3)). This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects. (Section 404)

**42. Recreational Facilities.** Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction of expansion of recreational facilities, provided the activity meets all of the following criteria:

a. The discharge does not cause the loss of greater than 1 acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. For discharges causing the loss of greater than  $\frac{1}{4}$  acre of non-tidal waters of the United States, or the loss of greater than 500 linear feet of perennial or intermittent stream bed, the permittee notifies the District Engineer in accordance with General Condition 13;

c. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites, including wetlands; and

d. The discharge is part of a single and complete project.

For the purposes of this NWP, the term "recreational facility" is defined as a recreational activity that has low-impact on the aquatic environment, is integrated into the natural landscape, and consists primarily of open space that does not substantially change

preconstruction grades or deviate from natural landscape contours. For the purpose of this permit, the primary function of recreational facilities does not include the use of motor vehicles, buildings, or impervious surfaces. Examples of recreational facilities that may be authorized by this NWP include: hiking trails, bike paths, horse paths, nature centers, and campgrounds (excluding trailer parks). The construction or expansion of golf courses and the expansion of ski areas may be authorized by this NWP, provided the golf course or ski area does not substantially deviate from natural landscape contours and is designed to minimize adverse effects to waters of the United States and riparian areas through the use of such practices as integrated pest management, adequate stormwater management facilities, vegetated buffers, reduced fertilizer use, etc. The facility must have an adequate water quality management plan in accordance with General Condition 9, such as a stormwater management facility to ensure that the recreational facility results in no substantial adverse effects to water quality. This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity. This NWP does not authorize other buildings, such as hotels, restaurants, etc. The construction or expansion of playing fields (e.g., baseball, soccer, or football fields), basketball and tennis courts, racetracks, stadiums, arenas, and the construction of new ski areas are not authorized by this NWP. (Section 404)

**43. Stormwater Management Facilities.** Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction and maintenance of stormwater management facilities, including activities for the excavation of stormwater ponds/facilities, detention basins, and retention basins; installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins provided that the activity meets all of the following criteria:

a. The discharge or excavation for the construction of new stormwater management facilities does not cause the loss of greater than 2 acres of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge of dredged or fill material for the construction of new stormwater management facilities in perennial streams is not authorized;

c. For discharges or excavation for the construction of new stormwater management facilities or for the maintenance of existing stormwater management facilities causing the loss of greater than  $\frac{1}{4}$  acre of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, or causing the loss of greater than 500 linear feet of intermittent stream bed, the permittee notifies the District Engineer in accordance with General Condition 13. In addition, the notification must include:

(1) A maintenance plan. The maintenance plan should be in accordance with State and local requirements, if any such requirements exist;

(2) For discharges in special aquatic sites, including wetlands and submerged aquatic vegetation, the notification must include a delineation of affected areas; and

(3) A compensatory mitigation proposal that offsets the loss of waters of the United States. Maintenance in constructed areas will not require mitigation provided such maintenance is accomplished in designated maintenance areas and not within compensatory mitigation areas (i.e., district engineers may designate non-maintenance areas, normally at the downstream end of the stormwater management facility, in existing stormwater management facilities). (No mitigation will be required for activities which are exempt from Section 404 permit requirements);

d. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition (i.e., why the discharge must occur in waters of the United States and why additional minimization cannot be achieved);

e. The stormwater management facility must comply with General Condition 21 and be designed using best management practices (BMPs) and watershed protection techniques. Examples may include forbays (deeper areas at the upstream end of the stormwater management facility that would be maintained through excavation), vegetated buffers, and siting considerations to minimize adverse effects to aquatic resources. Another example of a BMP would be bioengineering methods incorporated

into the facility design to benefit water quality and minimize adverse effects to aquatic resources from storm flows, especially downstream of the facility, that provide, to the maximum extent practicable, for long term aquatic resource protection and enhancement;

f. Maintenance excavation will be in accordance with an approved maintenance plan and will not exceed the original contours of the facility as approved and constructed; and

g. The discharge is part of a single and complete project. (Section 404)

**44. Mining Activities.** Discharges of dredged or fill material into: (i) Isolated waters, streams where the annual average flow is 1 cubic foot per second (cfs) or less, and non-tidal wetlands adjacent to headwater streams, for aggregate mining (i.e., sand, gravel, and crushed and broken stone) and associated support activities; (ii) lower perennial streams, excluding wetlands adjacent to lower perennial streams, for aggregate mining activities (support activities in lower perennial streams or adjacent wetlands are not authorized by this NWP); and (iii) isolated waters and non-tidal wetlands adjacent to headwater streams, for hard rock/mineral mining activities (i.e., extraction of metalliferous ores from subsurface locations) and associated support activities, provided the discharge meets the following criteria:

a. The mined area within waters of the United States, plus the acreage loss of waters of the United States resulting from support activities, cannot exceed 2 acres;

b. The acreage loss of waters of the United States resulting from support activities cannot exceed one acre;

c. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition (i.e., why the discharge must occur in waters of the United States and why additional minimization cannot be achieved);

d. In addition to General Conditions 17 and 20, activities authorized by this permit must not substantially alter the sediment characteristics of areas of concentrated shellfish beds or fish spawning areas. Normally, the mandated water quality management plan should address these impacts;

e. The permittee must implement necessary measures to prevent increases in stream gradient and water velocities, to prevent adverse effects (e.g., head cutting, bank erosion) on upstream and downstream channel conditions;

f. Activities authorized by this permit must not result in adverse effects on the course, capacity, or condition of navigable waters of the United States;

g. The permittee must utilize measures to minimize downstream turbidity;

h. Wetland impacts must be compensated through mitigation approved by the Corps;

i. Beneficiation and mineral processing may not occur within 200 feet of the ordinary high water mark of any open waterbody. Although the Corps does not regulate discharges from these activities, a Clean Water Act Section 402 permit may be required;

j. All activities authorized by this NWP must carefully adhere to General Conditions 9 and 21. Further, if determined necessary by the District Engineer, the Corps may require modifications to the required water quality management plan;

k. No aggregate mining can occur within stream beds where the average annual flow is greater than 1 cubic foot per second or in waters of the United States within 100 feet of the ordinary high water mark of headwater stream segments where the average annual flow of the stream is greater than 1 cubic foot per second (aggregate mining can occur in areas immediately adjacent to the ordinary high water mark of a stream where the average annual flow is 1 cubic foot per second or less), except for aggregate mining in lower perennial streams;

l. *Single and complete project:* The discharges must be for a single and complete project, including support activities. Multiple mining activity discharges into several designated parcels of a mining project may be included together as long as the 2 acre limit is not exceeded; and

m. *Notification:* The permittee must notify the District Engineer in accordance with General Condition 13. The notification must include: (1) A description of measures proposed to minimize or prevent adverse effects (e.g., head cutting, bank erosion, turbidity, water quality) to waters of the United States; (2) A written statement to the District Engineer detailing compliance with paragraph (c), above (i.e., why the discharge must occur in waters of the United States and why additional minimization cannot be achieved); (3) A description of measures taken to meet the criteria associated with the discharge being permitted (i.e., how the proposed work complies with paragraphs (d) through (g), above); and (4) A reclamation plan (for aggregate mining in isolated waters and non-tidal

wetlands adjacent to headwaters and hard rock/mineral mining only).

This NWP does not authorize hard rock/mineral mining, including placer mining, in streams. No hard rock/mineral mining can occur in waters of the United States within 100 feet of the ordinary high water mark of headwater streams. The terms "headwaters" and "isolated waters" are defined in 33 CFR Parts 330.2(d) and (e), respectively. For the purposes of this NWP, the term "lower perennial streams" is the same as the lower perennial riverine subsystem described in the Cowardin classification system of wetlands and deepwater habitats of the United States. (Sections 10 and 404)

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

The following general conditions must be followed in order for any authorization by an 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. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date.

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. Culverts placed in streams must be installed to maintain low flow conditions.

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 with any case specific conditions added by the Corps or by the State or tribe in its Section 401 water quality certification and Coastal Zone Management Act consistency determination.

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 affect 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, U.S. Fish and Wildlife Service).

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

9. Water Quality. In certain States and tribal lands an individual 401 water quality certification must be obtained or waived (See 33 CFR 330.4(c)). For NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44 where the State or tribal 401 certification (either generically or individually) does not require/approve a water quality management plan, the permittee must include design criteria and techniques that provide for protection of aquatic resources. The project must include a method for stormwater management (whether required by the State or not) that minimizes degradation of the downstream aquatic system, including water quality. To the maximum extent practicable, a vegetated buffer zone (including wetlands, uplands, or both) adjacent to open waters of the river, stream, or other open waterbody will be established and maintained, if the project occurs in the vicinity of such an open waterbody. The District Engineer will determine the proper width of the buffer and in which cases it will be required. Normally, the vegetated buffer will be 50 to 125 feet wide.

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. (a) 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 will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat 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. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work.

(b) Authorization of an activity by a nationwide permit does not authorize the "take" of a threatened or endangered species as defined under the Federal Endangered Species Act. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, both lethal and non-lethal "takes" of protected species are in violation of the Endangered Species Act. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. Fish and Wildlife Service and National Marine Fisheries Service or their world wide web pages at <http://www.fws.gov/r9endspp/endspp.html> and [http://www.nfms.gov/prot\\_res/esahome.html](http://www.nfms.gov/prot_res/esahome.html), respectively.

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 Part 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)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

13. Notification. (a) Timing: Where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the notification is complete within 30 days of the date of receipt and can request additional information necessary for the evaluation of the PCN only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the notification is still incomplete and the PCN review process will not commence until all of the requested information has been received by the District Engineer. The prospective permittee shall not begin the activity:

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

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

(3) Unless 45 days have passed from the District Engineer's receipt of the complete notification and the prospective permittee has not received written 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 numbers 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 7, 12, 14, 18, 21, 34, 38, 39, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (e.g., submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

(5) For NWP 7, Outfall Structures and Maintenance, the PCN must include information regarding the original design capacities and configurations of those areas of the facility where

maintenance dredging or excavation is proposed.

(6) For NWP 21, Surface Coal Mining Activities, the PCN must include an Office of Surface Mining (OSM) or State-approved mitigation plan.

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

(i) Any past use of this NWP by the individual permittee and/or the permittee's 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  $\frac{1}{2}$  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  $\frac{1}{2}$  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 the prospective permittee's 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;

(8) For NWP 31, Maintenance of Existing Flood Control Projects, the prospective permittee must either notify the District Engineer with a PCN prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

(i) Sufficient baseline information so as 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.

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

(10) For NWPs 39, 43, and 44, the PCN must also include a written statement to the District Engineer

explaining how avoidance and minimization of losses of waters of the United States were achieved on the project site and either a compensatory mitigation proposal that offsets unavoidable losses of waters of the United States or justification explaining why compensatory mitigation should not be required.

(11) For NWP 40, Agricultural Activities, the PCN must include information regarding the past use of this NWP on the farm.

(12) For NWP 43, Stormwater Management Facilities, the PCN must include, for the construction of new stormwater management facilities, a maintenance plan (in accordance with State and local requirements, if applicable) and a compensatory mitigation proposal to offset losses of waters of the United States.

(13) For NWP 44, Mining Activities, the PCN must include a description of all waters of the United States adversely affected by the project, a description of measures taken to minimize adverse effects to waters of the United States, a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for all aggregate mining activities except for aggregate mining activities in lower perennial streams and any hard rock/mineral mining activities).

(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)–(7) of General Condition 13. A letter containing the requisite information may also be used.

(d) District Engineer's Decision: In reviewing the PCN for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may, optionally, submit a proposed mitigation plan with the PCN to expedite the process and the District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment 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 on the aquatic environment are minimal, the District Engineer will notify the

permittee and include any conditions the District Engineer deems necessary.

Any compensatory mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the District Engineer will expeditiously review the proposed compensatory mitigation plan. The District Engineer must review the plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant stating 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 submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the District Engineer determines that mitigation is required in order to ensure no more than minimal adverse effects on the aquatic environment, the activity will be authorized within the 45-day PCN period, including the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the United States will occur until the District Engineer has approved a specific mitigation plan.

(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.

For activities requiring notification to the District Engineer that result in the loss of greater than 1 acre of waters of the United States, the District Engineer will, upon receipt of a notification, provide immediately (e.g., via 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 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(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 1/2 acre 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 45-day period 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 necessary to offset impacts on the aquatic environment that are more than minimal 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 the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or

upland vegetated buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed;

(ii) To the extent appropriate, permittees should consider mitigation banking and other appropriate forms of compensatory mitigation. If the District Engineer determines that compensatory mitigation is necessary to offset the losses of waters of the United States and ensure that the net adverse effects of the authorized work on the aquatic environment are minimal, mitigation banks, in lieu fee programs, and other consolidated mitigation approaches will be the preferred method of providing compensatory mitigation, unless the District Engineer determines that activity-specific compensatory mitigation is more appropriate, based on what is best for the aquatic environment. These types of mitigation are preferred because they involve larger blocks of protected aquatic environment, are more likely to meet the mitigation goals, and are more easily checked for compliance. If a mitigation bank, in lieu fee program, or other consolidated mitigation approach is not available in the watershed, the District Engineer will consider other appropriate forms of compensatory mitigation to offset the losses of waters of the United States to ensure that the net adverse effects of the authorized work on the aquatic environment are minimal. In addition, compensatory mitigation must address wetland impacts, such as functions and values, 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 NWP (e.g., for NWP 14, 1/2 acre of wetlands cannot be created to change a 3/4-acre loss of wetlands to a 1/4 acre loss; however, 1/2-acre of created wetlands can be used to reduce the impacts of a 1/3-acre loss of wetlands). If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. (Refer to General Condition 19 for additional information concerning mitigation requirements for the NWPs.)

14. Compliance Certification. Every permittee who has received a Nationwide permit verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter and will include: (a) A statement that the authorized work was done in accordance with the Corps authorization, including any general or

specific conditions; (b) A statement that any required mitigation was completed in accordance with the permit conditions; and (c) The signature of the permittee certifying the completion of the work and mitigation.

15. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3 acre.

16. Water Supply Intakes. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

17. Shellfish Beds. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. Suitable Material. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

19. Mitigation. Activities, including structures and work in navigable waters of the United States or 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). Furthermore, the District Engineer will require restoration, creation, enhancement, or preservation of other aquatic resources in order to offset the authorized impacts, at least to the extent that adverse environmental effects to the aquatic environment are minimal. An important element of any mitigation plan for projects in or near streams or other open waters is the requirement of vegetated buffers (wetland, upland, or both) adjacent to the open water areas. The vegetated buffer should consist of

native species and will constitute a portion, as determined by the District Engineer, of the required compensatory mitigation. The District Engineer will determine the proper width of the vegetated buffer and in which cases it will be required. Normally, the vegetated buffer will be 50 to 125 feet wide. (Refer to paragraph (g) of General Condition 13 for additional information concerning mitigation requirements for the NWPs.)

20. Spawning Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. Management of Water Flows: To the maximum extent practicable, the project must be designed to maintain preconstruction downstream flow conditions (e.g., location, capacity, and flow rates). Furthermore, the project must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The project must provide, to the maximum extent practicable, for retaining excess flows from the site and for maintaining surface flow rates from the site similar to preconstruction conditions. To the maximum extent practicable, the authorized work must not increase water flows from the project site, relocate water, or redirect water flow beyond preconstruction conditions, to reduce adverse effects such as flooding or erosion downstream and upstream of the project site.

22. Adverse Effects From Impoundments. If the activity, including structures and work in navigable waters of the United States or discharge of dredged or fill material, creates an impoundment of water, adverse effects 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.

23. Waterfowl Breeding Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

24. Removal of Temporary Fills. Any temporary fills must be removed in their



entirety and the affected areas returned to their preexisting elevation.

25. Designated Critical Resource Waters. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, State natural heritage sites, and outstanding national resource waters or other waters officially designated by a State as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the United States are not authorized by NWP 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the United States may be authorized by the above NWPs in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has concurred in a determination of compliance with this condition.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWPs only after he determines that the impacts to the critical resource waters will be no more than minimal.

26. Impaired Waters. Impaired waters are those waters of the United States that have been identified by States or Tribes through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands. For the purposes of this general condition, the impaired waterbody includes any adjacent wetlands.

(a) Discharges of dredged or fill material causing the loss of more than one acre of impaired waters of the

United States, including adjacent wetlands to such impaired waters, except for activities authorized by NWP 3 in such waters, are not authorized by nationwide permit.

(b) For discharges of dredged or fill material causing the loss of less than one acre of impaired waters of the United States, including adjacent wetlands to such impaired waters, or any activity authorized by NWP 3 in such waters, it is presumed that the project will, unless clearly demonstrated otherwise, directly or indirectly result in the further impairment of the listed water. Such activities in an impaired water or adjacent wetlands will be not be authorized by nationwide permit, unless the District Engineer determines that the prospective permittee has clearly demonstrated that the authorized project will not result in the further impairment of the listed water. For such discharges, the prospective permittee must notify the District Engineer in accordance with General Condition 13. In the notification to the District Engineer, the prospective permittee must submit a statement explaining how the proposed project, excluding mitigation, will not result in further impairment. Also, in accordance with the procedures in paragraph (e) of General Condition 13, the District Engineer will coordinate with the State 401 agency for NWP activities resulting in the loss of greater than  $\frac{1}{4}$  acre of impaired waters of the United States. In addition, mitigation for any permitted discharges in impaired waters or their adjacent wetlands should be designed to offset impacts to aquatic functions and values being impacted by the project, as well as contribute to the reduction of sources of pollution contributing to the impairment (e.g., by restoring wetlands that intercept non-point sources of sediment or nutrient laden runoff).

27. Fills Within the 100-year Floodplain. The 100-year floodplain will be defined by an up to date Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map, or in the absence of such map, the appropriate local floodplain authority through a licensed professional engineer.

(a) Except as provided below, discharges of dredged or fill material into waters of the United States resulting in permanent above-grade fills in the 100-year floodplain are not authorized by NWPs 21, 29, 39, 40, 42, 43, and 44. Prospective permittees must notify the District Engineer in accordance with General Condition 13, of any discharge of dredged or fill material in 100-year floodplains as

defined above. The notification must include documentation that the proposed project will not involve discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills in waters of the United States within the FEMA mapped 100-year floodplain. For those areas where no FEMA map exists or the map is out of date (e.g., the map no longer reflects current flooding conditions), the documentation should be from the local floodplain authority (or local official with authority to issue development permits within the floodplain). Based on such documentation, the District Engineer will make the final determination as to whether the proposed project is actually located within the 100-year floodplain.

(b) For NWPs 12 and 14, where there are discharges of dredged or fill material resulting in permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain, it is presumed that such discharges will result in more than minimal adverse effects. Such discharges are not authorized by NWPs 12, and 14, unless the District Engineer determines that the prospective permittee has clearly demonstrated that the project, and associated mitigation, will not decrease the flood-holding capacity and no more than minimally alter the hydrology, flow regime, or volume of waters associated with the floodplain.

Prospective permittees attempting to rebut this presumption must notify the District Engineer in accordance with General Condition 13. The notification must include documentation, which demonstrates that the project will not result in increased flooding or more than minimally alter floodplain hydrology or flow regimes. This documentation must include proof that FEMA, or a state or local floodplain authority through a licensed professional engineer, has approved the proposed project and provided a statement that the project does not increase flooding or more than minimally alter floodplain hydrology or flow regimes.

(c) Notwithstanding (a) and (b) above, projects located in the 100-year floodplain at a point in a watershed which drains less than one square mile are not subject to this condition.

#### *D. Further Information*

1. District engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other Federal, State, or local permits, approvals, or authorizations required by law.

3. NWP's do not grant any property rights or exclusive privileges.

4. NWP's do not authorize any injury to the property or rights of others.

5. NWP's do not authorize interference with any existing or proposed Federal project.

#### E. Definitions

**Aquatic bench:** Aquatic benches are those shallow areas around the edge of a permanent pool stormwater management facility that support aquatic vegetation, both submerged and emergent.

**Best management practices:** Best Management Practices (BMPs) are policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural. A BMP policy may affect the limits on a development.

**Compensatory mitigation:** For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

**Creation:** The establishment of a wetland or other aquatic resource where one did not formerly exist.

**Drainage ditch:** A linear excavation or depression constructed for the purpose of conveying surface runoff or groundwater from one area to another. An "upland drainage ditch" is a drainage ditch constructed entirely in uplands (*i.e.*, not waters of the United States) and is not a water of the United States, unless it becomes tidal or otherwise extends the ordinary high water line of existing waters of the United States. Drainage ditches constructed in waters of the United States (*e.g.*, by excavating wetlands or stream channelization) remain waters of the United States even though they are heavily manipulated to increase drainage. A drainage ditch may be constructed in uplands or wetlands or other waters of the United States.

**Enhancement:** Activities conducted in existing wetlands or other aquatic resources which increase one or more aquatic functions.

**Ephemeral stream:** An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round.

Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

**Farm tract:** A unit of contiguous land under one ownership which is operated as a farm or part of a farm.

**Independent utility:** A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent utility.

**Intermittent stream:** An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

**Loss of waters of the United States:** Waters of the United States that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage as a result of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and values. The loss of stream bed includes the linear feet of perennial or intermittent stream that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.

**Non-tidal wetland:** A non-tidal wetland is a wetland (*i.e.*, a water of the United States) that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (*i.e.*, spring high tide line).

**Open water:** An area that, during a year with normal patterns of

precipitation, has standing or flowing water for sufficient duration to establish an ordinary high water mark. Aquatic vegetation within the area of standing or flowing water is non-emergent, vegetated shallows, sparse, or absent. This term includes rivers, streams, lakes, and ponds.

**Perennial stream:** A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

**Permanent above-grade fill:** A discharge of dredged or fill material into waters of the United States, including wetlands, that results in a substantial increase in ground elevation and permanently converts part or all of the waterbody to dry land. Structural fills authorized by NWP's 3, 25, 36, etc. are not included.

**Playa:** A type of marsh found on the high plain of northern Texas and eastern New Mexico that is characterized by small, seasonally flooded basins with clay or fine sandy loam hydric soils and emergent hydrophytic vegetation.

**Prairie pothole:** A type of marsh found on glacial till in Minnesota, Iowa, North Dakota, South Dakota, and Montana that is characterized by small seasonally or permanently flooded depressions and emergent hydrophytic vegetation.

**Preservation:** The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the overall aquatic ecosystem.

**Project area:** The acreage of land, including waters of the United States and uplands, utilized for the single and complete project. The acreage is determined by the amount of land cleared, graded, and/or filled to construct the single and complete project, including any buildings, utilities, stormwater management facilities, roads, yards, and other attendant features. The project area also includes any other land that is used in conjunction with the single and complete project, such as open space. Roads constructed by State or local governments for general public use are not included in the project area.

**Restoration:** Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.

**Riffle and pool complex:** Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a streaming flow, a smooth surface, and a finer substrate.

**Single and complete project:** The term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers (see definition of independent utility). For linear projects, the "single and complete project" (*i.e.*, a single and complete crossing) will apply to each crossing of a separate water of the United States (*i.e.*, a single waterbody) at that location. An exception is for linear projects crossing a single waterbody several times at separate and distant locations: Each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies.

**Stormwater management:** Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and

flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

**Stormwater management facilities:** Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and BMPs, which retain water for a period of time to control runoff and/or improve the quality (*i.e.*, by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

**Stream bed:** The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

**Stream channelization:** The manipulation of a stream channel to increase the rate of water flow through the stream channel. Manipulation may include deepening, widening, straightening, armoring, or other activities that change the stream cross-section or other aspects of stream channel geometry to increase the rate of water flow through the stream channel. A channelized stream remains a water of the United States, despite the modifications to increase the rate of water flow.

**Tidal wetland:** A tidal wetland is a wetland (*i.e.*, a water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b)

and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line (*i.e.*, spring high tide line) and are inundated by tidal waters two times per lunar month, during spring high tides.

**Vegetated shallows:** Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

**Vernal pool:** A type of marsh found in Mediterranean-type climates (*i.e.*, wet winters and dry summers), especially on coastal terraces in southwestern California, the central valley of California, and areas west of the Sierra Mountains, that is characterized by shallow, seasonally flooded wet meadows with emergent hydrophytic vegetation.

**Waterbody:** A waterbody is any area that in a normal year has water flowing or standing above ground to the extent that evidence of an ordinary high water mark is established. Wetlands contiguous to the waterbody are considered part of the waterbody.

[FR Doc. 99-18292 Filed 7-20-99; 8:45 am]

BILLING CODE 3710-92-P