

CALIFORNIA COASTAL COMMISSION

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RECORD PACKET COPY**Tu 6b**STAFF REPORT AND RECOMMENDATIONON CONSISTENCY CERTIFICATION

| | |
|------------------------------|------------------|
| Consistency Certification No | CC-030-00 |
| Staff | JRR-SF |
| File Date | 03/09/2000 |
| 90 Days | 06/07/2000 |
| Commission Meeting | 05/09/2000 |

APPLICANT:**Corps of Engineers**DEVELOPMENTLOCATION:

Statewide

DEVELOPMENTDESCRIPTION:

Replace NWP 26 with 5 new and 6 modified NWPs (Exhibit 1)

EXECUTIVE SUMMARY:

The Corps of Engineers (Corps) proposes to replace Nationwide Permit (NWP) 26 with five new and six modified NWPs. NWP 26 authorized the discharge of fill or dredge material into headwaters of streams and isolated wetlands. The Commission has consistently objected to NWP 26. The proposed changes will improve the Corps protection of wetland resources by limiting the types of uses and amount of habitat effected by each permit. NWP 26 originally allowed up to ten acres of wetland fill, which was recently reduced to a maximum of three acres. Most of the proposed replacement NWPs allow a maximum of ½ acre of wetland fill.

(A NWP is a general approval that authorizes discharges and construction in waters of the United States for the activity identified in that permit. The Commission's concurrence with this consistency certification would result in a general approval for all activities described in the NWPs without any further federal consistency review. However, a Commission objection would require the "project proponent" to receive from the Commission either 1) a concurrence with, or 2) a waiver of a consistency certification before the project may go forward under the NWP. However, the Commission's action on the proposed NWPs does not affect its permit or appeal

jurisdiction (or that of a local government pursuant to a certified local coastal program (LCP)).

Although the new and modified NWP's are an improvement over NWP 26, they are not consistent with California Coastal Management Program (CCMP). These NWP's raise issues with respect to the allowable-use, alternatives, and mitigation requirements of Section 30233(a). Additionally, these NWP's have the potential to affect wetland, habitat, sand supply, water quality, stream, and commercial fishing resources of the coastal zone and raise concerns about consistency with Sections 30230, 30231, 30233(c), 30234, 30234.5, and 30236 of the Coastal Act. However, the Commission believes that some of the NWP's can be modified in a manner that brings them into consistency with the CCMP. The following chart summarizes the staff's recommendations before the Commission.

| NWP | RECOMMENDATION | ISSUES | MODIFICATIONS |
|-----|--------------------|--|---|
| 3 | Concur if modified | <ul style="list-style-type: none"> • Sand supply • Habitat | <ul style="list-style-type: none"> • cdp as required by Coastal Act or LCP in coastal zone • Outside coastal zone: <ol style="list-style-type: none"> 1. No riprap 2. No upland restoration 3. No increase in size from repair/replacement 4. Notify Commission |
| 7 | Concur if modified | <ul style="list-style-type: none"> • Water Quality • Habitat • Allowable Use | <ul style="list-style-type: none"> • cdp as required by Coastal Act or LCP in coastal zone • Outside coastal zone: <ol style="list-style-type: none"> 1. No new construction 2. Temporary impacts 3. Restored to original conditions 4. Notify Commission |
| 12 | Object | <ul style="list-style-type: none"> • Habitat • Allowable use • Commercial fishing | |
| 14 | Object | <ul style="list-style-type: none"> • Habitat 1. Allowable Use | |
| 27 | Concur if modified | <ul style="list-style-type: none"> • Habitat | <ul style="list-style-type: none"> • cdp as required by Coastal Act or LCP in coastal zone • Outside coastal zone: <ol style="list-style-type: none"> 1. Notify Commission 2. Only native species 3. Commission Staff review of plan 4. Must maintain acreage and function |
| 39 | Object | <ul style="list-style-type: none"> • Habitat • Water Quality • Allowable Use | |

| NWP | RECOMMENDATION | ISSUES | MODIFICATIONS |
|-----|--------------------|--|--|
| 40 | Object | <ul style="list-style-type: none"> • Habitat • Water Quality • Allowable Use | |
| 41 | Concur if modified | <ul style="list-style-type: none"> • Habitat • Water Quality | <ul style="list-style-type: none"> • cdp as required by Coastal Act or LCP in coastal zone • Outside coastal zone: <ol style="list-style-type: none"> 1. Notify Commission |
| 42 | Object | <ul style="list-style-type: none"> • Habitat • Water Quality • Allowable Use | |
| 43 | Object | <ul style="list-style-type: none"> • Habitat • Water Quality • Sand Supply • Allowable Use | |
| 44 | Object | <ul style="list-style-type: none"> • Habitat • Water Quality • Sand Supply | |

SUBSTANTIVE FILE DOCUMENTS:

1. Final Notice of Issuance and Modification of Nationwide Permits; Notice, Federal Register, March 9, 2000 (Volume 65, Number 47), pp. 12817-12899.
2. Consistency Certification No. CC-13-83 (Corps of Engineers, Authorization of Nationwide Permits).
3. Consistency Certification No. CC-15-84 (Corps of Engineers, Amendment to previously approved Nationwide Permit program).
4. Consistency Certification No. CC-39-91 (Corps of Engineers, Authorization of 36 Nationwide Permits).
5. Consistency Certification No. CC-40-95 (Corps of Engineers, Issuance of a Nationwide Permit for residential structures).
6. Consistency Certification No. CC-147-96 (Corps of Engineers, Re-Authorization of Nationwide Permits).

STAFF SUMMARY AND RECOMMENDATION:

I. Project Description

The Corps of Engineers proposes to replace NWP 26 with five new and six modified NWPs. NWP 26 authorized the discharge of fill or dredged material with up to three acres of impact into headwaters of streams and isolated wetlands. In the final notice published in the Federal Register the Corps describes the proposed changes as follows:

The Corps of Engineers (Corps) is issuing 5 new Nationwide Permits (NWPs) and modifying 6 existing NWPs to replace NWP 26 which expires on June 5, 2000. The Corps is also modifying nine NWP general conditions and adding two new NWP general conditions. The new NWP general conditions will increase protection of designated critical resource waters and waters of the United States within 100-year floodplains. In December 1996, the Corps decided to replace NWP 26, which authorizes discharges of dredged or fill material into headwaters and isolated waters of the United States, with activity-specific NWPs. The new and modified NWPs authorize many of the same activities that NWP 26 authorized, but the new and modified NWPs are activity-specific, with terms and conditions to ensure that these activities result in minimal adverse effects on the aquatic environment. The new and modified NWPs will substantially increase protection of the aquatic environment, while efficiently authorizing activities with minimal adverse effects on the aquatic environment. The maximum acreage limits of most of the new and modified NWPs is ½ acre. Most of the new and modified NWPs require notification to the district engineer for activities that result in the loss of greater than 1/10 acre of waters of the United States.

...

Nationwide Permits

- 3. Maintenance*
- 7. Outfall Structures and Maintenance*
- 12. Utility Line Activities*
- 14. Linear Transportation Crossings*
- 27. Stream and Wetland Restoration Activities*
- 39. Residential, Commercial, and Institutional Developments*
- 40. Agricultural Activities*
- 41. Reshaping Existing Drainage Ditches*
- 42. Recreational Facilities*

43. Stormwater Management Facilities
 44. Mining Activities¹

The following matrix describes all of the new and modified NWP's and their acreage limitations, if any:

| <u>NWP</u> | <u>TITLE</u> | <u>APPLICABLE WATERS</u> | <u>MAXIMUM ACREAGE</u> |
|------------|---|--|---|
| 3 | Maintenance (existing NWP) <ul style="list-style-type: none"> • add removal of accumulated sediment from existing structure • add activities in waters of US associated with replacing uplands lost due to storm | <ul style="list-style-type: none"> • All waters | |
| 7 | Outfall Structures and Maintenance (existing NWP) <ul style="list-style-type: none"> • add removal of accumulated sediments from intakes, outfalls, and canals | <ul style="list-style-type: none"> • All waters • Substations and access roads: non-tidal waters | |
| 12 | Utility Activities (existing NWP) <ul style="list-style-type: none"> • Add access roads normally constructed at grade • Add substations and foundations for overhead lines | <ul style="list-style-type: none"> • Utility lines & foundations: all waters • Substations & access roads: non-tidal waters, excluding adjacent to | <ul style="list-style-type: none"> • ½ acre |
| 14 | Linear Transportation Crossings (existing NWP) <ul style="list-style-type: none"> • no change for private roads and public crossings in tidal and non-tidal wetlands adjacent to tidal waters • add larger crossings for public projects only | <ul style="list-style-type: none"> • All waters | <ul style="list-style-type: none"> • Public in non-tidal waters excluding non-tidal wetlands adjacent to tidal waters: ½ acre • Public in tidal waters and adjacent wetlands & all private: 1/3 acre and does not exceed 200 feet |
| 27 | Stream and Wetland Restoration Activities (existing NWP) <ul style="list-style-type: none"> • Add restoration of non-tidal streams and open waters • Add restoration of former tidal waters | <ul style="list-style-type: none"> • All waters | |

¹ Federal Register, March 9, 2000 (Volume 65, Number 47), p. 12818

| <u>NWP</u> | <u>TITLE</u> | <u>APPLICABLE WATERS</u> | <u>MAXIMUM ACREAGE</u> |
|------------|--|--|--|
| 39 | Residential, Commercial, and Institutional Developments | non-tidal waters, excluding adjacent non-tidal wetlands | <ul style="list-style-type: none"> • ½ acre |
| 40 | Agricultural Activities (existing NWP) <ul style="list-style-type: none"> • no change to farm buildings • NRCS lead for USDA participants | non-tidal waters, excluding adjacent non-tidal wetlands | <ul style="list-style-type: none"> • ½ acre • relocation of 300 feet of drainage ditches |
| 41 | Reshaping drainage ditches <ul style="list-style-type: none"> • Purpose is to improve water quality • Cannot change drainage, flows, or location | non-tidal waters, excluding adjacent non-tidal wetlands | |
| 42 | Recreational Facilities <ul style="list-style-type: none"> • only activities integrated into the natural landscape with low impact (e.g., trails, campgrounds, and environmentally designed golf courses or ski areas) • no playing fields, basketball and tennis courts, race tracks, stadiums, or arenas | Non-tidal waters excluding adjacent to tidal waters | <ul style="list-style-type: none"> • ½ acre • 300 linear feet of stream |
| 43 | <ul style="list-style-type: none"> • Stormwater Management Facilities • No construction in perennial streams | Non-tidal waters excluding adjacent to tidal waters | <ul style="list-style-type: none"> • ½ acre • 300 ft. of stream • no perennial streams (new facilities) |
| 44 | Mining Activities <ul style="list-style-type: none"> • aggregate (sand and gravel and stone) mining • hard rock mining | <ul style="list-style-type: none"> • Aggregate & support activities: isolated waters; headwaters, non-tidal wetlands adjacent to headwaters • Aggregate (no support) activities: perennial streams • Hard Rock & support: isolated waters & non-tidal waters adjacent to headwaters | <ul style="list-style-type: none"> • ½ acre |

II. Applicant's Consistency Certification

The Corps of Engineers certifies that the proposed activity complies with the federally approved California Coastal Management Program (CCMP) and will be conducted in a manner consistent with such program.

III. Staff Recommendation

A. **MOTION:** *I move that the Commission concur with consistency certification CC-030-00 that the project described therein is consistent with the enforceable policies of the California Coastal Management Program (CCMP).*

B. **STAFF RECOMMENDATION:**

Staff recommends a **NO** vote on the motion. Failure of this motion will result in an objection to the certification and adoption of the following resolution and findings. An affirmative vote of a majority of the Commissioners present is required to pass the motion.

C. **RESOLUTION TO OBJECT TO CONSISTENCY CERTIFICATION:**

The Commission hereby objects to the consistency certification by the Corps of Engineers, on the grounds that the project described therein is not consistent with the enforceable policies of the CCMP.

IV. Project modifications

Section 930.64(b) of the federal consistency regulations requires that, if the Commission's objection is based on a finding that the proposed activity is inconsistent with the CCMP, the Commission must identify measures, if they exist, that would bring the project into conformance with the CCMP. That section states that:

(b) State agency objections must describe (1) how the proposed activity is inconsistent with specific elements of the management program, and (2) alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program.²

As described in the findings below, the proposed project is inconsistent with the CCMP. Pursuant to this federal regulation, the Commission is responsible for identifying measures, if they exist, that would bring the project into compliance with the CCMP. The Commission finds that it can concur with some of the NWP's if they are modified through regional conditions as described below:

A. NWP 3 would require the following modifications:

1. A coastal development permit is required for any activity that would otherwise require such a permit pursuant to the Coastal Act, its

² 15 CFR § 930.64(b)

regulations, or a certified Local Coastal Program.

2. For any activity affecting coastal zone resources, this NWP does not authorize placement of riprap, restoration of uplands, or enlargement of the facility.

B. NWP 7 would require the following modifications:

1. A coastal development permit is required for any activity that would otherwise require such a permit pursuant to the Coastal Act, its regulations, or a certified Local Coastal Program.

2. For any activity affecting coastal zone resources, this NWP does not authorize construction of new outfalls.

3. For any activity affecting coastal zone resources, this NWP only authorizes activities that result in temporary impacts to wetland or open water resources and the project must include plans to restore the affected area to its pre-project conditions.

4. For any activity affecting coastal zone resources, the applicant must notify the Commission thirty days prior to implementing the project and may not proceed until the Commission staff agrees that the activity is consistent with this concurrence.

C. NWP 27 would require the following modifications:

1. A coastal development permit is required for any activity that would otherwise require such a permit pursuant to the Coastal Act, its regulations, or a certified Local Coastal Program.

2. For any activity affecting coastal zone resources, this NWP does not authorize the use of non-native vegetation.

3. For any activity affecting coastal zone resources, this Commission staff must review and approve the habitat restoration plan and that plan must demonstrate that the restoration activities will maintain the acreage and function of the habitat.

4. For any activity affecting coastal zone resources, the applicant must notify the Commission thirty days prior to implementing the project and may not proceed until the Commission staff agrees that the activity is consistent with this concurrence.

D. NWP 41 would require the following modifications:

1. A coastal development permit is required for any activity that would

otherwise require such a permit pursuant to the Coastal Act, its regulations, or a certified Local Coastal Program.

2. For any activity affecting coastal zone resources, the applicant must notify the Commission thirty days prior to implementing the project and may not proceed until the Commission staff agrees that the activity is consistent with this concurrence.

E. For NWP's 12, 14, 39, 40, 42, 43, and 44, the Commission finds that there are no alternatives available to allow these NWP's to be authorized in a manner consistent with the California Coastal Management Program (CCMP).

V. Findings and Declarations:

The Commission finds and declares as follows:

A. Relevant Coastal Act Sections. The Coastal Act provides for the protection of wetland, coastal waters, and other coastal resources. Section 30230 of the Coastal Act provides that:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231 of the Coastal Act provides that:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30233 of the Coastal Act provides that:

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less

environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, shall not exceed 25 percent of the degraded wetland.

(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

(5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(7) Restoration purposes.

(8) Nature study, aquaculture, or similar resource dependent activities.

...

(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary.

...

(d) Erosion control and flood control facilities constructed on water courses can impede the movement of sediment and nutrients which would otherwise be carried by storm runoff into coastal waters. To facilitate the continued delivery of these sediments to the littoral zone, whenever feasible, the material removed from these facilities may be placed at appropriate points on the shoreline in accordance with other applicable provisions of this division, where feasible mitigation measures have been provided to minimize adverse environmental effects. Aspects that shall be considered before issuing a coastal development permit for such purposes are the method of placement, time of year of placement, and sensitivity of the placement area.

Section 30234 of the Coastal Act provides that:

Facilities serving the commercial fishing and recreational boating industries shall be protected and, where feasible, upgraded. Existing commercial fishing and recreational boating harbor space shall not be reduced unless the demand for those facilities no longer exists or adequate substitute space has been provided. Proposed recreational boating facilities shall, where feasible, be designed and located in such a fashion as not to interfere with the needs of the commercial fishing industry.

Section 30234.5 of the Coastal Act provides that:

The economic, commercial, and recreational importance of fishing activities shall be recognized and protected.

Section 30236 of the Coastal Act provides that:

Channelizations, dams, or other substantial alterations of rivers and streams shall incorporate the best mitigation measures feasible, and be limited to (1) necessary water supply projects, (2) flood control projects where no other method for protecting existing structures in the floodplain is feasible and where such protection is necessary for public safety or to protect existing development, or (3) developments where the primary function is the improvement of fish and wildlife habitat

Section 30007.5 allows for resolving conflicts between Coastal Act sections. That section provides that:

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources. In this context, the Legislature declares

that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

B. Background. The Commission previously evaluated the Corps' NWP program on four occasions. In its first review, in 1983 and 1984 (CC-15-84 and CC-13-83), the Commission objected to NWP 26, but concurred with most of the remaining NWPs. In its second, third, and fourth review, in 1991, 1995, and 1996, the Commission objected to the entire program (CC-39-91, CC-040-95, and CC-147-96).

In the past, even though the Commission objected to the NWPs, the Corps has issued the NWPs but required individual federal consistency review for all activities within or affecting the coastal zone before the activities covered by any particular NWP could proceed. If the Commission were to concur with this consistency certification, the Corps would issue the NWPs and allow the activity covered by the NWP to proceed without additional federal consistency review. However, the Commission's concurrence would not affect the permit requirements of the California Coastal Act. In other words, if an activity is authorized by a NWP and is development, as defined by the Coastal Act, within the coastal zone, it is subject to the regulatory requirements of the Coastal Act regardless of the Commission actions on this consistency certification. While local governments, pursuant to certified LCPs, issue many coastal development permits, Corps-permitted activities are almost always in areas where the locally issued permit is appealable to the Commission. Additionally, direct federal agency activities are not affected by the Commission's action on the Corps' consistency certification. Direct federal activities automatically require consistency review pursuant to the CZMA, irrespective of any requirement for a federal permit, such as a Corps 404 permit. Therefore, in practical terms, the only activities affected by a Commission concurrence with this consistency certification are non-federal activities outside of the coastal zone.

C. NWP 3, Maintenance of Previously Approved Structures. This NWP would allow an applicant to repair, replace, or modify a facility that is either previously approved by the Corps or is exempt from the Corps' permit authority. It also allows for the removal of sediment accumulated around an existing structure, the placement of riprap to protect an existing structure, and the replacement of uplands lost to storms. Any maintenance activity that results in in-kind replacement or repair of an existing structure outside of the coastal zone is unlikely to affect coastal zone resources and probably would not require federal consistency review. However, if the repair results in an expansion of the structure, the replacement of storm-damaged uplands, and placement of riprap, it could result in impacts to habitat resources in the coastal zone, and would require federal consistency review. NWPs for these activities could not be found consistent with the allowable use policies without identifying the specific use supported by the proposed fill. Additionally, the

Commission would require a project-specific review to determine if the activity is the least environmentally damaging feasible alternative and incorporates feasible mitigation measures. Therefore, the Commission finds that NWP 3 is not consistent with Section 30233(a) of the Coastal Act.

Additionally, some of these activities, including the placement of riprap and storm damaged uplands, are regulated by Section 30236 of the Coastal Act. This section limits these types of activities allowable and requires an alternatives and mitigation analysis. Without a project-specific review, the Commission cannot determine if projects authorized by this NWP are consistent with the Coastal Act. Therefore, the Commission finds that this NWP is inconsistent with Section 30236 of the Coastal Act.

However, if this NWP is modified, through regional conditions, to limit its scope to repair, replacement, and maintenance activities that do not result in the expansion of the existing structure, the Commission could find that activities located outside of the coastal zone and authorized by this NWP do not affect coastal zone resources. Such activities would not require further federal consistency review. Therefore, if this permit were modified, the Commission would find it consistent with the relevant policies of the CCMP.

D. NWP 7, Construction and Maintenance of Outfall Structures. This NWP allows for the construction of outfalls where the discharges have been authorized by an NPDES (National Pollutant Discharge and Elimination System) permit. Since this consistency review is limited to NWPs for activities outside of the coastal zone, maintenance of existing outfalls would not affect coastal zone resources and no further consistency review is necessary. However, construction of a new outfall may affect coastal zone resources. Such an activity would likely be an allowable use as energy or coastal dependent industrial facility (30233(a)(1)) or for incidental public service purposes (30233(a)(5)), which specifically identifies burying pipes and maintenance of outfalls as incidental public services. Even though this activity may be an allowable use, this NWP is not consistent with the CCMP. Construction of a new outfall could result in impacts to habitat. In order to find a new outfall consistent with the CCMP, the Commission would have to determine if it is the least environmentally damaging alternative and that it incorporates feasible mitigation. These findings require a case-by-case review.

Additionally, construction of new outfalls could degrade water quality resources of the coastal zone. Although the Corps has limited this NWP to outfalls where the discharges have been authorized by a NPDES permit, the Commission would not have any review authority over the discharge if it were to concur with this NWP. The NPDES permit would be issued by the State and Regional Water Quality Control Boards, and as a state permit, would not be subject to the consistency requirements of the CZMA. Without the ability to determine if discharges outside of the coastal zone are consistent with the water quality policies of the Coastal Act, the

Commission cannot find that this NWP is consistent with the CCMP. Therefore, the Commission finds that NWP 7 is inconsistent with the wetland fill and water quality policies of the CCMP.

However, if the Corps, through regional conditions, limits this NWP to maintenance activities, it would not have significant impacts on coastal resources and would not require further consistency review.

E. NWP 12, Utility Line Activities. The Corps defines a "utility line" as follows:

[A] pipe or pipeline or 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.³

This NWP would also authorize access roads, substations, and foundations for poles and towers supporting overhead lines. Any cable or pipeline authorized by this NWP is likely to be an allowable use as an energy or coastal dependent industrial facility (30233(a)(1)) or for incidental public service purposes (30233(a)(5)), which specifically identifies burying of pipes and cables as an example of an incidental public service. However, roads, substations, and foundations do not necessarily meet these tests. Additionally, these activities are likely to result in impacts to habitat resources and require the Commission to find that such activities are the least environmentally damaging feasible alternative and incorporate feasible mitigation measures. Such determinations require individual project reviews and the Commission cannot make this determination in its review of the NWP.

In addition, the Commission has recently been involved in a controversy over the placement of fiber optics cables in the marine environment. The Commission's review includes a federal consistency certification for the placement of the cable outside of the coastal zone. In reviewing one of those projects (E-99-011/CC-028-00), the Commission found that the proposed cable affects marine mammals, hard bottom habitat, and commercial fishing, all of which are resources of the coastal zone. In reviewing this project, the Commission conducted extensive negotiations with the applicant in order to design a project that is consistent with the CCMP. Such reviews require project-specific analysis in order to find them consistent with the habitat and commercial fishing policies of the Coastal Act. Therefore, the Commission finds that NWP 12 is not consistent with the wetland fill, habitat, and commercial fishing policies of the CCMP.

³ Federal Register, March 9, 2000 (Volume 65, Number 47), p. 12887.

F. NWP 14, Linear Transportation Crossings. This NWP allows for the construction of public and private roads and other linear transportation facilities that result in dredging, diking, and filling of wetlands, streams, and other coastal waters. These types of activities are not necessarily consistent with the allowable use policy of the Coastal Act. To the degree that such a transportation facility is a necessary part of an energy or coastal dependent industrial facility, it may be an allowable use pursuant to Sections 30233(a)(1). In some, very limited cases, a linear transportation facility may be for incidental public services purposes. However, since most roads have habitat impacts that are not temporary and are the primary purpose of the fill, they do not usually qualify as incidental public services. In past reviews, the Commission has found that incidental public services include activities that have temporary impacts or whose fill is not the primary (hence it is incidental) part of the project. These definitions were developed based on the review of common characteristics found in the examples listed in the Coastal Act's description of incidental public services. The Commission has authorized some fill associated with linear transportation facilities if the project does not increase the traffic capacity of the facility or if there is a conflict between Coastal Act policies and it is, on balance, most protective of coastal resources to approve the transportation facility (as allowed by Section 30007.5). Such conclusions require individual review of each activity in order to determine if it is consistent with the Coastal Act.

Additionally, projects authorized by this NWP are likely to result in impacts to habitat resources and require the Commission to find that the project is the least environmentally damaging feasible alternative and incorporates feasible mitigation. Such conclusions also require an individual review. Therefore, the Commission finds that NWP 14 is inconsistent with the wetland fill policy of the CCMP.

G. NWP 27, Stream and Wetland Restoration Activities. This NWP allows for restoration, enhancement, and creation of habitat resources on private and public land, which is consistent with the allowable use requirement of Section 30233(a) of the Coastal Act. That section allows for the dredging, diking, and filling of wetlands and other coastal waters for restoration purposes. As stated above, any restoration activities within the coastal zone will be subject to the permit requirements of the Coastal Act. For those activities outside of the coastal zone, the proposed NWP will authorize activities that will result in the restoration of habitat resources, and require the Commission to determine if the activity is the least environmentally damaging feasible alternative and incorporates feasible mitigation. Such reviews require an individual analysis of the activity and are not easily approved through the consistency review of the NWP. In addition, this NWP encourages, but does not restrict, the activities to use native vegetation. Since non-native vegetation planted outside of the coastal zone could come into the coastal zone and adversely affect habitat in the coastal zone, the NWP must be limited to native vegetation. Therefore, NWP 27 is not consistent with the wetland policies of the CCMP.

However, since this NWP is designed to encourage restoration of resources and the Commission concurrence would only authorize activities outside of the coastal zone, the Commission could concur with this NWP, if it is limited to restoration activities that clearly maintain or improve the amount, type, and quality of the habitat resources. These restrictions are necessary to insure that the project is for restoration purpose and the least environmentally damaging feasible alternative. In order to ensure that the restoration plan is consistent with these restrictions, it must be submitted to the staff for its review. If the Corps modified this NWP, through regional conditions, and incorporated the requirements to maintain or improve the quality, quantity, and type of aquatic resources and submit the restoration plan for Commission staff review, the Commission could concur with NWP 27.

H. NWP 39, Residential, Commercial, and Institutional Developments.

This NWP allows for the construction of residential, commercial, and institutional developments that result in dredging, diking, and filling of wetlands and other coastal waters. These activities are not allowable pursuant to Section 30233(a) of the Coastal Act. Even if these uses were allowable, the Commission could not find that the NWP authorizes activities that are the least environmentally damaging feasible alternative and incorporates feasible mitigation unless it reviews the individual activity. Therefore, the Commission finds that NWP 39 is not consistent with the wetland policies of the CCMP.

I. NWP 40, Agricultural Activities. This NWP allows for agricultural activities that result in dredging, diking, and filling of wetlands and other coastal waters. These activities are not identified as an allowable use pursuant to Section 30233(a) of the Coastal Act. In addition such activities may result in impacts to habitat resources of the coastal zone and require the Commission to find that the specific activity is the least environmentally damaging feasible alternative and incorporates feasible mitigation. Additionally, such agricultural activities could adversely affect water quality resources of the coastal zone and are potentially inconsistent with Section 30231 of the Coastal Act. Therefore, the Commission finds that NWP 40 is not consistent with the wetland fill and water quality policies of the CCMP.

J. NWP 41, Reshaping Existing Drainage Ditches. The reshaping of drainage ditches authorized by this NWP is limited to activities that do not increase the drainage or flow capacity of the ditch and do not result in the relocation of the ditch. The Corps characterizes the purpose of these types of activities to benefit water quality resources, but does not restrict the purpose of the activity to that benefit. Such activities are not clearly allowable for dredging, diking, or filling of wetlands or other coastal waters. Therefore, the Commission finds that NWP 41 is inconsistent with the wetland policy of the CCMP.

However, if the project benefits water quality and improves coastal resources, the Commission could find that it is an allowable use because it will restore water quality

resources of the coastal zone (30233(a)(7)). Such a determination requires a review of each project to determine if it will benefit water quality resources. For activities outside of the coastal zone, such a review could be conducted at the staff level through the review of a pre-construction notice. Therefore, if the Corps modifies this NWP to incorporate a requirement for any reshaping activity that affects coastal zone resources to notify the Commission staff for its determination that the project will benefit water quality resources, it would be consistent with the CCMP.

K. NWP 42, Recreational Facilities. The final notice for the NWPs, the Corps defines recreational facilities as follows:

For the purposes of this NWP, the term "recreational facility" is defined as a recreational activity that is integrated into the natural landscape and 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) ⁴

Section 30233(a) of the Coastal Act does not allow dredging, diking, or filling of wetlands or other coastal waters for recreational purposes. However, that section identifies "nature study" as an allowable use. Thus, if a recreational facility also

⁴ Federal Register, March 9, 2000 (Volume 65, Number 47), p. 12891.

provides for nature study, it may be allowable. However, such a determination would have to be made on a case-by-case review. Additionally, such activities may adversely affect habitat and water quality resources and would require a specific review to determine if it is the least environmentally damaging feasible alternative and incorporates feasible mitigation. Therefore, the Commission finds that NWP 42 is not consistent with the wetland fill or water quality policies of the CCMP.

L. NWP 43, Stormwater Management Facilities. The Corps describes this NWP as follows:

*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; the 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.*⁵

Stormwater facilities are not identified in Section 30233 as an allowable use. However, such uses are authorized by Section 30236 of the Coastal Act. That section allows the Commission to approve flood control projects if they incorporate the best mitigation measures feasible and where there is no other feasible method for protecting existing structures in the floodplain. Such a determination requires an individual review of each activity. In other words, the Commission cannot make such a determination through its review of an NWP. Therefore, the Commission finds that the NWP 43 is not consistent with the stream alteration policy of the CCMP.

M. NWP 44, Mining Activities. This NWP allows for aggregate and hard rock mining in limited circumstances. Mineral extraction activities are an allowable use pursuant to Section 30233(a)(6), if the site is not an environmentally sensitive habitat area (ESHA). Even though the Coastal Act allows such activities, this NWP is not consistent with other relevant policies of the Coastal Act. Such activities could have significant impacts on habitat resources, water quality, and sand supply. A determination that an individual mining activity is consistent with the Coastal Act requires a specific analysis of the project. Additionally, such activities are not allowed in an ESHA, which would also require a review of the project site to determine if it is an ESHA. Therefore, the Commission finds that NWP 44 is not consistent with the wetland, habitat, water quality and sand supply policies of the CCMP.

⁵ Federal Register, March 9, 2000 (Volume 65, Number 47), pp. 12891-12892.



Federal Register

Thursday,
March 9, 2000

Part III

Department of Defense

Department of the Army, Corps of
Engineers

Final Notice of Issuance and Modification
of Nationwide Permits; Notice

EXHIBIT NO. 1

APPLICATION NO. CC-030-00

Federal Register, in relevant parts.

 California Coastal Commission

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****Final Notice of Issuance and Modification of Nationwide Permits**

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final notice.

SUMMARY: The Corps of Engineers (Corps) is issuing 5 new Nationwide Permits (NWP) and modifying 6 existing NWP to replace NWP 26 which expires on June 5, 2000. The Corps is also modifying nine NWP general conditions and adding two new NWP general conditions. The new NWP general conditions will increase protection of designated critical resource waters and waters of the United States within 100-year floodplains. In December 1996, the Corps decided to replace NWP 26, which authorizes discharges of dredged or fill material into headwaters and isolated waters of the United States, with activity-specific NWP. The new and modified NWP authorize many of the same activities that NWP 26 authorized, but the new and modified NWP are activity-specific, with terms and conditions to ensure that these activities result in minimal adverse effects on the aquatic environment. The new and modified NWP will substantially increase protection of the aquatic environment, while efficiently authorizing activities with minimal adverse effects on the aquatic environment. The maximum acreage limits of most of the new and modified NWP is 1/2 acre. Most of the new and modified NWP require notification to the district engineer for activities that result in the loss of greater than 1/10 acre of waters of the United States. This notice also constitutes the Corps application to States, Tribes, and the Environmental Protection Agency (EPA) for Section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency determinations. These agencies have 90 days to determine if the new and modified NWP meet state or Tribal water quality standards and are consistent with state coastal zone management plans.

DATES: The new and modified NWP and general conditions will become effective on June 5, 2000. The expiration date for NWP 26 is June 5, 2000.

ADDRESSES: HQUSACE, ATTN: CECW-OR, 20 Massachusetts Avenue, NW, Washington, DC 20314-1000.

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**

In the December 13, 1996, issue of the **Federal Register** (61 FR 65874) the Corps reissued NWP 26 for a period of two years and announced its intention to replace NWP 26 with activity-specific NWP. 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. 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. Isolated waters are non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable waters and are not adjacent to such surface tributary systems to interstate or navigable waters.

In the July 1, 1998, issue of the **Federal Register** (63 FR 36040) the Corps published its initial proposal to replace NWP 26, including 6 new NWP, modifying 6 existing NWP, modifying 6 NWP general conditions, and adding one new NWP general condition. In the October 14, 1998, issue of the **Federal Register** (63 FR 55095), the Corps published a supplementary proposal to limit the use of the proposed new and modified NWP in 100-year floodplains, impaired waters, and designated critical resource waters. In the October 14, 1998, **Federal Register** notice, the Corps also announced the withdrawal of the proposed NWP for master planned development activities and the extension of the expiration date of NWP 26 to September 15, 1999. The Corps also announced, in the October 14, 1998, **Federal Register** notice, its intent to solicit additional comments on the proposed new and modified NWP and regional conditions proposed by Corps districts.

As a result of the comments received in response to the July 1, 1998, and October 14, 1998, **Federal Register** notices, the Corps made changes to the proposed NWP and general conditions. The Corps also modified and repropose the three new NWP general conditions to limit the use of NWP in 100-year floodplains, impaired waters, and designated critical resource waters. The draft NWP and general conditions were published in the July 21, 1999, issue of the **Federal Register** (64 FR

39252) for a 45-day comment period. Concurrent with this **Federal Register** notice, Corps districts proposed the latest drafts of their proposed regional conditions for the new and modified NWP. In the September 3, 1999, issue of the **Federal Register** (64 FR 48386), the Corps announced that the comment period for the draft NWP and general conditions was extended an additional 30 days to provide a 75-day comment period. The comment period for the July 21, 1999, **Federal Register** notice ended on October 7, 1999. In the September 3, 1999, **Federal Register** notice, the Corps also announced that the expiration date of NWP 26 was extended to January 5, 2000.

As a result of the number of substantial comments received in response to the July 21, 1999, **Federal Register** notice and the need for additional time to review those comments and develop the final NWP and general conditions, the Corps issued another **Federal Register** notice on December 15, 1999 (64 FR 69994). This **Federal Register** notice announced a revised expiration date for NWP 26 and the process for accepting NWP 26 PCNs. The expiration date for NWP 26 was extended to April 14, 2000.

Since the schedule published in the December 15, 1999, **Federal Register** notice has changed, we are extending the expiration date of NWP 26 to June 5, 2000. NWP 26 PCNs submitted on or before March 9, 2000, (whether required or not) will be reviewed under the existing terms and conditions of NWP. If those activities are authorized by NWP 26, their authorizations will be valid until February 11, 2002. If the activity is under construction or under contract prior to February 11, 2002, the permittee will have 12 additional months to complete the authorized activity. NWP 26 PCNs for activities that require notification which are submitted after March 9, 2000, will be reviewed under the new and modified NWP or other types of DA authorization, such as individual permits. NWP 26 activities that do not require a PCN are authorized by NWP 26 until June 5, 2000. For those NWP 26 activities that do not require notification, the permittee has 12 months to complete the work if construction begins or is under contract before June 5, 2000.

The terms and limits of the new and modified NWP are intended to authorize activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. Most of the new NWP authorize activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The

acreage limit for most of the new and modified NWP's is 1/2 acre. For the new and modified NWP's, the Corps has established pre-construction notification (PCN) thresholds to ensure that any activity that potentially may have more than minimal adverse effects on the aquatic environment is reviewed by a district engineer on a case-by-case basis. Most of the new NWP's require submission of a PCN for discharges of dredged or fill material resulting in the loss of greater than 1/10 acre of waters of the United States. Regional conditions may be added to the NWP's by division engineers to lower notification thresholds.

The new and modified NWP's issued today will become effective on June 5, 2000. This **Federal Register** notice begins the 90-day Clean Water Act Section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency determination processes. Because of the changes to the proposed new and modified NWP's, including the general conditions, we have increased the normal 60-day WQC and CZMA consistency determination processes to 90 days. During this 90-day period, Corps divisions and districts will finalize their regional conditions for the new and modified NWP's.

Discussion of Public Comments

I. Overview

In response to the July 21, 1999, **Federal Register** notice, we received over 1,700 comments. We reviewed and fully considered all of these comments. Most of the commenters expressed opposition to the proposed NWP's, but a few commenters indicated support for these NWP's. One commenter stated that NWP 26 should be retained without any changes. A number of commenters support the current NWP program, because data collected by the Corps during Fiscal Year (FY) 1997 indicates that there are net gains in aquatic resources because of the Corps mitigation requirements. These commenters indicated that the net gain demonstrates that the current NWP program results only in minimal adverse effects on the aquatic environment.

After considering the comments received in response to the July 21, 1999, **Federal Register** notice, we have made several important changes to the new and modified NWP's. For most of these NWP's, we have established a 1/2 acre limit. Notification to the district engineer will be required for most activities that result in the loss of greater than 1/10 acre of waters of the United States. For NWP's 39, 40, 42, and 43, we have imposed a 300 linear foot limit for

filling and excavating stream beds. We have also increased the notification review period to 45 days. We have revised nine general conditions and added two new general conditions. The new NWP general conditions limit activities in designated critical resource waters and fills in waters of the United States within 100-year floodplains. All above-grade fill under NWP's 29, 39, 40, 42, 43, and 44 is prohibited within the FEMA-mapped 100-year floodplain below the headwaters of any stream. Within the headwaters, above-grade fill is prohibited within the FEMA-mapped regulatory floodway, and any above-grade fill in the flood fringe must meet FEMA standards.

These new restrictions on use of the NWP's will substantially increase the protection of the Nation's aquatic environment. These revised NWP's continue a trend by the Corps of Engineers of enhancing the protection of the aquatic environment through the NWP program. In 1977 the predecessor to NWP 26 authorized unlimited fill in headwaters and isolated waters without any notification of the Corps. In 1984 the Corps established a maximum project specific impact limit of 10 acres and a notification of the Corps for any impact greater than 1 acre. In 1996, we reduced these project specific limits to 3 acres maximum and 1/3 acre for notification of the Corps. To further ensure that the NWP program properly protects the aquatic environment, the Corps is conducting a Programmatic Environmental Impact Statement, which will be completed in early 2001. To ensure full protection of endangered species, the Corps is formally consulting with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service on the NWP program.

All of these substantial improvements will increase costs to applicants to some degree and will increase the funding needed by the Corps to maintain our current level of service to the public. Based on a report prepared by the Corps Institute for Water Resources (IWR) in response to the Corps FY 2000 Appropriations Act, the changes to the NWP program announced today will increase direct costs for permit applicants by about \$20 million per year. Further, based on the IWR report, the Corps would need about \$6 million in additional funding to maintain current levels of service to the public. We believe the changes are necessary to ensure the statutory requirement that general permits, including NWP's, will have no more than minimal adverse effects on the aquatic environment.

II. General Comments

In the following discussion, where the comments and responses were the same as for the July 21, 1999, **Federal Register** notice, we referred to the July 21, 1999, **Federal Register** notice instead of repeating those responses.

Many commenters objected to the proposed NWP's for the following reasons: (1) The proposed NWP's are too complex; (2) the proposed NWP's are contrary to the Congressional intent of Section 404(e) of the Clean Water Act; (3) the proposed NWP's are contrary to the Administration's 1993 Wetlands Plan, which states that Federal regulatory programs should be fair, flexible, and effective; (4) the proposed NWP's are contrary to the 1998 Clean Water Action Plan, which states that duplication between Federal, state, and local agencies and Tribal governments should be reduced wherever possible; (5) the conditions of these NWP's will cause many activities with minimal adverse effects on the aquatic environment to be processed as individual permits; and (6) these NWP's will result in unnecessary and costly burdens on the regulated public, increase delays, and increase the Corps workload without providing any benefits.

We have reduced the complexity of these NWP's as much as possible by making the scope of applicable waters for most of the new NWP's the same and establishing similar PCN thresholds. In addition, we have eliminated the indexed acreage limits from NWP's 39 and 40 and established a 1/2 acre limit for these NWP's. However, some complexity is unavoidable because different activities in waters of the United States do not have the same effects on the aquatic environment and each NWP must have different conditions to address those dissimilar impacts. The new and modified NWP's are conditioned to ensure that only those activities that have minimal adverse effects on the aquatic environment are authorized by these permits.

The new and modified NWP's are not contrary to Section 404(e) of the Clean Water Act, because each NWP authorizes activities that are similar in nature, with terms and conditions to ensure that those NWP's authorize only activities with minimal adverse effects on the aquatic environment. These NWP's still provide an expedited authorization process when compared to the standard permit process, because the district engineer must respond to the applicant within 45 days of the receipt date for a complete preconstruction

43. Stormwater Management Facilities
44. Mining Activities

Nationwide Permit General Conditions

1. Navigation
2. Proper Maintenance
3. Soil Erosion and Sediment Controls
4. Aquatic Life Movements
5. Equipment
6. Regional and Case-by-Case Conditions
7. Wild and Scenic Rivers
8. Tribal Rights
9. Water Quality
10. Coastal Zone Management
11. Endangered Species
12. Historic Properties
13. Notification
14. Compliance Certification
15. Use of Multiple Nationwide Permits.
16. Water Supply Intakes
17. Shellfish Beds
18. Suitable Material
19. Mitigation
20. Spawning Areas
21. Management of Water Flows
22. Adverse Effects from Impoundments
23. Waterfowl Breeding Areas
24. Removal of Temporary Fills
25. Designated Critical Resource Waters
26. Fills Within 100-year Floodplains

Further Information

Definitions

- Best Management Practices
- Compensatory mitigation
- Creation
- Enhancement
- Ephemeral stream
- Farm tract
- Flood Fringe
- Floodway
- Independent utility
- Intermittent stream
- Loss of waters of the United States
- Non-tidal wetland
- Open water
- Perennial stream
- Permanent above-grade fill
- Preservation
- Restoration
- Riffle and pool complex
- Single and complete project
- Stormwater management
- Stormwater management facilities
- Stream bed
- Stream channelization
- Tidal wetland
- Vegetated buffer
- Vegetated shallows
- Waterbody

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 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 waters 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 does not authorize the replacement of lands lost through gradual 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). (Sections 10 and 404)

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

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 is 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 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 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 1/2 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 1/2 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.

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. Activities authorized by paragraphs (i) through (iv) may not exceed a total of 1/2 acre loss of waters of the United States. 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 $\frac{1}{10}$ acre of waters of the United States;

(f) Permanent access roads constructed above grade in waters of the United States for a distance of more than 500 feet; or

(g) Permanent access roads constructed in waters of the United States with impervious materials. (Sections 10 and 404)

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.

14. Linear Transportation Crossings. Activities required for the construction, expansion, modification, or improvement of linear transportation crossings (*e.g.*, highways, railways, trails, and airport runways and taxiways) in waters of the United States, including wetlands, provided 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 $\frac{1}{2}$ 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 $\frac{1}{10}$ 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 compensatory 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 of waters of the United States will be minimized to the maximum extent practicable;

d. 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. (Sections 10 and 404)

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).

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 discing 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. NWP 27 can be used to authorize impacts at a mitigation bank, but only in circumstances where it has been approved under the Interagency Federal Mitigation Banks Guidelines.

39. Residential, Commercial, and Institutional Developments. 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 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 the activities meet all of the following criteria:

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

non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

c. 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 $\frac{1}{10}$ 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, below).

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;

e. The discharge is part of a single and complete project;

f. 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. (See General Condition 19.) The notification must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the United States. If an applicant asserts that the adverse effects of the project are minimal without mitigation, then the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration;

g. When this NWP is used in conjunction with any other NWP, any combined total permanent loss of waters of the United States exceeding $\frac{1}{10}$ acre requires that the permittee notify the District Engineer in accordance with General Condition 13;

h. 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);

i. For discharges causing the loss of $\frac{1}{10}$ 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 of

the loss of waters of the United States (e.g., $\frac{1}{12}$ acre of emergent wetlands); and (5) The type and acreage of any compensatory mitigation used to offset the loss of waters of the United States (e.g., $\frac{1}{12}$ acre of emergent wetlands created on-site);

j. 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 next 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

k. 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. The compensatory mitigation proposal required in paragraph (f) of this NWP may be either conceptual or detailed. The wetland or upland vegetated buffer required in paragraph (j) of this NWP will normally be 25 to 50 feet wide on each side of the stream, but the District Engineer may require wider vegetated buffers to address documented water quality concerns. 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 acreage limit for NWP 39 (*i.e.*, the combined acreage loss authorized under NWPs 39 and 40 cannot exceed $\frac{1}{2}$ acre).

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to paragraph (c) 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 $\frac{1}{10}$ 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 $\frac{1}{2}$ acre is not authorized by this NWP, unless the District Engineer exempts a particular subdivision or

parcel by making a written determination that 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. 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: 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 (except for ephemeral waters).

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 a categorical minimal effects exemption, minimal effect exemption, or mitigation exemption from NRCS in accordance with the provisions of the Food Security Act of 1985, as amended (16 U.S.C. 3801 *et seq.*);

(2) The discharge into non-tidal wetlands does not result in the loss of greater than $\frac{1}{2}$ acre of non-tidal wetlands on a farm tract;

(3) The permittee must have an NRCS-certified wetland delineation;

(4) The permittee must implement an NRCS-approved compensatory mitigation plan that fully offsets wetland losses, if required; and

(5) 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., $\frac{1}{3}$ acre of emergent wetlands); and (e) The type, acreage (or square feet), and location of compensatory mitigation (e.g., $\frac{1}{3}$ 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 (or a USDA program participant for which the proposed work does not qualify for authorization under paragraph (a) of this NWP):

(1) The discharge into non-tidal wetlands does not result in the loss of greater than $\frac{1}{2}$ acre of non-tidal wetlands on a farm tract;

(2) The permittee must notify the District Engineer in accordance with General Condition 13, if the discharge results in the loss of greater than $\frac{1}{10}$ acre of non-tidal wetlands;

(3) The notification must include a delineation of affected wetlands; and

(4) 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 $\frac{1}{2}$ 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. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams; and

e. Activities located in 100-year floodplains identified by FEMA's Flood Insurance Rate Maps or FEMA-approved local floodplain maps must comply with General Condition 26.

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. 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 completing required compensatory mitigation are authorized by this NWP. However, total impacts, including other authorized impacts under this NWP, may not exceed the 1/2 acre limit of this NWP. 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 categorical minimal effects exemption, minimal effect exemption, or mitigation exemption from NRCS pursuant to the Food Security Act of 1985, as amended, may be required. Activities authorized by paragraphs (a) through (d) may not exceed a total of 1/2 acre on a single farm tract. Activities authorized by paragraphs (c) and (d) are not included in the 1/2 acre 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 1/2 acre. (Section 404)

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 currently serviceable drainage ditches constructed in these 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 greater than 500 linear feet of drainage ditch will be reshaped. Material resulting from excavation may not be permanently sidecast into waters but may be temporarily sidecast (up to three months) into waters of the United States, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary sidecasting not to exceed a total of 180 days, where appropriate. 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 or expansion of recreational facilities, provided the activity meets all of the following criteria:

a. The discharge does not cause the loss of greater than 1/2 acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

c. For discharges causing the loss of greater than 1/10 acre of non-tidal waters of the United States, the permittee notifies the District Engineer in accordance with General Condition 13;

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;

e. The discharge is part of a single and complete project; and

f. Compensatory mitigation will normally be required to offset the losses of waters of the United States. The notification must also include a compensatory mitigation proposal which provides for 1:1 replacement to offset authorized losses of waters of the United States.

For the purposes of this NWP, the term "recreational facility" is defined as a recreational activity that is integrated into the natural landscape and 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; the 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 the activity meets all of the following criteria:

a. The discharge for the construction of new stormwater management facilities does not cause the loss of greater than 1/2 acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

c. The discharge of dredged or fill material for the construction of new stormwater management facilities in perennial streams is not authorized;

d. 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 1/10 acre of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, 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);

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 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);

f. 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 forebays (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;

g. 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

h. 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 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/or (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 1/2 acre;

b. 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 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);

c. 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;

d. The permittee must implement necessary measures to prevent increases in stream gradient and water velocities and to prevent adverse effects (*e.g.*, head cutting, bank erosion) to upstream and downstream channel conditions;

e. Activities authorized by this permit must not result in adverse effects on the course, capacity, or condition of navigable waters of the United States;

f. The permittee must utilize measures to minimize downstream turbidity;

g. Wetland impacts must be compensated through mitigation approved by the Corps;

h. Beneficiation and mineral processing for hard rock/mineral mining activities 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;

i. All activities authorized by this NWP must comply with General Conditions 9 and 21. Further, the District Engineer may require modifications to the required water quality management plan to ensure that the authorized work results in minimal adverse effects to water quality;

j. Except for aggregate mining activities in lower perennial streams, 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);

k. *Single and complete project:* The discharge must be for a single and complete project, including support activities. Discharges of dredged or fill material into waters of the United States for multiple mining activities on several designated parcels of a single and complete mining operation can be authorized by this NWP provided the 1/2 acre limit is not exceeded; and

l. *Notification:* The permittee must notify the District Engineer in accordance with General Condition 13. The notification must include: (1) A description of waters of the United

States adversely affected by the project; (2) A written statement to the District Engineer detailing compliance with paragraph (b), 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 ensure that the proposed work complies with paragraphs (c) through (f), 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 at 33 CFR 330.2(d) and (e), respectively. For the purposes of this NWP, the term "lower perennial stream" is defined as follows: "A stream in which the gradient is low and water velocity is slow, there is no tidal influence, some water flows throughout the year, and the substrate consists mainly of sand and mud." (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. (a) In certain States and tribal lands an individual 401 water quality certification must be obtained or waived (See 33 CFR 330.4(c)).

(b) 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 or approve a water quality management plan, the permittee must include design criteria and techniques that will ensure that the authorized work does not result in more than minimal degradation of water quality.

An important component of a water quality management plan includes stormwater management that minimizes degradation of the downstream aquatic system, including water quality. Refer to General Condition 21 for stormwater management requirements. Another important component of a water quality management plan is the establishment and maintenance of vegetated buffers next to open waters, including streams. Refer to General Condition 19 for vegetated buffer requirements for the NWPs.

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. As a result of formal or informal consultation with the FWS or NMFS, the District Engineer may add species-specific regional endangered species conditions to the NWPs.

(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 of their world wide web pages at <http://www.fws.gov/r9endspp/endspp.html> and 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

