PROGRAMMATIC ENVIRONMENTAL ASSESSMENT OF THE IMPACTS OF THE SECTION 404 NATIONWIDE PERMIT PROGRAM ON CACTUS FERRUGINOUS PYGMY-OWL IN ARIZONA

Submitted to

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Finding of No Significant Impact (FONSI)

Having reviewed the information provided in our assessment of environmental impacts contained in this document, I have determined that implementation of Alternative 4 (Nationwide Permits issued March 18, 2002 including the 27 general conditions, 3 regional conditions applicable within the State of Arizona, and project specific special conditions) within the geographic scope of analysis will not have a significant impact on and will not adversely modify any previously designated or future designated critical habitat of the cactus ferruginous pygmy owl.

Richard G. Thompson

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Colonel, Corps of Engineers
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13 June 2002
Date

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EXECUTIVE SUMMARY

The Arizona District Court ordered the U.S. Army Corps of Engineers to prepare a regionally based, programmatic impact analysis of Nationwide Permits (NWP) 13, 14, and 26 on the Cactus Ferruginous Pygmy Owl (CFPO, *Glaucidium brasilianum cactorum*) (*Defenders of Wildlife, et al. v. Ballard, CIV 97-794 TUC ACM*, Order, October 8, 1999).

The Corps expanded the scope of the document to consider all of the NWPs and their effect on the CFPO and its former designated critical habitat. The geographic scope of analysis (GSOA) of the document has been defined as survey zones 1, 2, and 3 as defined by the U.S. Fish and Wildlife Service (FWS), excluding the Tucson Urban Exclusion Area and lands above 4,000 feet in elevation. The GSOA includes seven former critical habitat units which were originally designated by the FWS on July 12, 1999 but which were set aside by a federal judge in September, 2001 (*National Ass'n of Homebuilders v Norton, 00-903-PHX-SRB,* D, Ariz).

The Corps' purpose and need for the action is the continued implementation of the NWP program within the GSOA. To that end, the Corps developed six alternatives and conducted an analysis of direct, indirect, and cumulative impacts on the CFPO of each alternative. The Corps' database system was used to determine the historic use of NWPs in the GSOA. Each of the alternatives was assessed in terms of direct, indirect, and cumulative impacts on the CFPO and its habitat. The Corps' NWP program, currently and in the past, has required that projects, whether "notifying" or "nonnotifying", comply with the Endangered Species Act (ESA) and do not result in an effect to a threatened or endangered species or modification to designated critical habitat. The study determined there are many factors outside of the regulatory control of the Corps such as grazing pressures, recreation of public lands, unregulated wildcat development, and legal clearing of private land outside of washes which contribute to the cumulative loss of CFPO habitat. The Corps determined implementation of the current 43 NWPs, 27 general conditions, 3 regional conditions applicable to Arizona, and case-specific special conditions (which often require mitigation) provides the greatest degree of protection to the CFPO and will result in no significant impact to the CFPO or its former or future designated critical habitat.

CHAPTER 1

PURPOSE AND NEED FOR ACTION

1.1 INTRODUCTION

This Environmental Assessment (EA) analyzes the potential direct, indirect, and cumulative effects of the U.S. Army Corps of Engineer's (COE's) Section 404 Nationwide Permit (NWP) program in Arizona on the cactus ferruginous pygmy-owl (CFPO, *Glaucidium brasilianum cactorum*), a bird listed as endangered by the U.S. Fish and Wildlife Service (FWS). This EA has been prepared under the authority of the National Environmental Policy Act (NEPA), whose implementing regulations are promulgated at 40 Code of Federal Regulations (CFR) 1500-1508, and COE regulations at 33 CFR 325 Appendix B. NEPA requires that federal actions, such as issuance of NWPs by the COE, be analyzed and the potential impacts of such actions be disclosed to the public before decisions are made (see 40 CFR 1500.1[a]). In this case, the COE is not analyzing the effects of any one specific permit activity; rather, COE is programmatically assessing the impacts of the NWP program itself on the CFPO. This document has been prepared to comply with an order issued by the Arizona District Court requiring the COE to conduct a regionally based, programmatic impact analysis of NWPs 13, 14, and 26 on CFPO (Defenders of Wildlife, et al. v. Ballard, CIV 97-794 TUC ACM, Order, October 8, 1999). The COE has extended this programmatic analysis beyond the three NWPs listed in the Arizona District Court's order to include 41 additional NWPs.

The COE regulates the discharge of dredged and fill material into waters of the U.S. (WUS), including adjacent wetlands, under Section 404 of the Clean Water Act (CWA). The COE issues authorizations under Section 404 in the form of a Department of the Army permit. Permit decisions are based upon consideration of environmental, cultural, and other public interest concerns. As part of the public interest review for the Section 404 program, the COE must balance the benefits that reasonably may be expected to accrue from a proposed regulated activity against its reasonably foreseeable detriments. All relevant public interest factors, including their possible cumulative effects, must be considered: among these are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and the general needs and welfare of the people. The Section 404 regulatory program applies to regulated activities regardless of land ownership status, including all private, state, federal, or tribal-administered lands.

Under the Section 404 permit program, individual or general permits are available depending on the nature and extent of the activity and other factors. NWPs are one type of Section 404 general permit. They authorize a category of specified activities nationwide (Section 404(e), 33 U.S.C. Section 1344a) that have minimal individual or cumulative adverse effects on the aquatic environment. NWPs are valid only if their terms and conditions, including any applicable regional or special conditions, are met. Periodically, the COE updates,

revises, and modifies the NWP program to ensure that only minimal individual and cumulative adverse effects result from the COE's authorization of projects under the program. The COE's NWP program in Arizona would consist of 43 different NWPs that cover a range of activities that may affect the nation's aquatic resources (see Appendix A).

1.2 PURPOSE AND NEED FOR ACTION

The action being analyzed is the continued implementation of the NWP program within the geographic scope of analysis (GSOA, as defined below). The NWP program is a vital component of the COE's overall Section 404 regulatory framework. The COE estimates that, nationwide, NWPs are used to authorize 80 percent of the activities it regulates (Federal Register, Vol. 61, No. 241, p. 65874). Within the GSOA, this percentage is even higher: approximately 88 percent (565) of the COE's 640 permits issued during a six-year period (1994-2000) were NWPs (COE Phoenix Branch RAMS2 database).

NWPs "are designed to regulate with little, if any, delay or paperwork, certain activities having minimal impacts" (33 CFR 330.1(b)). Therefore, the purpose and need for the action is to provide a streamlined regulatory mechanism for the COE to use within the GSOA when authorizing activities having minimal impacts to the nation's aquatic resources and to CFPO.

1.3 GEOGRAPHIC SCOPE OF ANALYSIS

The geographic scope of analysis (GSOA) for this regionally-based programmatic EA has been defined as survey zones 1, 2, and 3 as defined by the FWS, excluding the Tucson Urban Exclusion Area and lands above 4,000 feet in elevation (see Figure 1-1). The total land area within the GSOA is approximately 12,639,000 acres[1].

The GSOA also includes seven former critical habitat units that were originally designated by the FWS on July 12, 1999 (Federal Register 1999) but which were set aside by a federal judge in September 2001 (*National Ass'n of Homebuilders v. Norton, 00-903-PHX-SRB*, D, Ariz.). Combined, these units include approximately 733,727 acres of riverine, riparian, and upland habitat within the three survey zones and cover portions of Pima, Cochise, Pinal, and Maricopa Counties in Arizona (see Figure 1-1). These units were originally designated as critical habitat because they either (1) represent areas containing most of the verified pygmy-owl occurrences, especially recently identified locations, or (2) provide corridor areas that allow movement between areas supporting pygmy-owls. Corridor areas, while supporting some habitat suitable for nesting, contain more foraging, perching, and roosting habitat than actual breeding habitat. Excluded from designated critical habitat are all areas above 4,000 feet, areas not containing or capable of developing

1 This acreage calculation was computed using GIS software and has been rounded off to the nearest 1,000 acres.

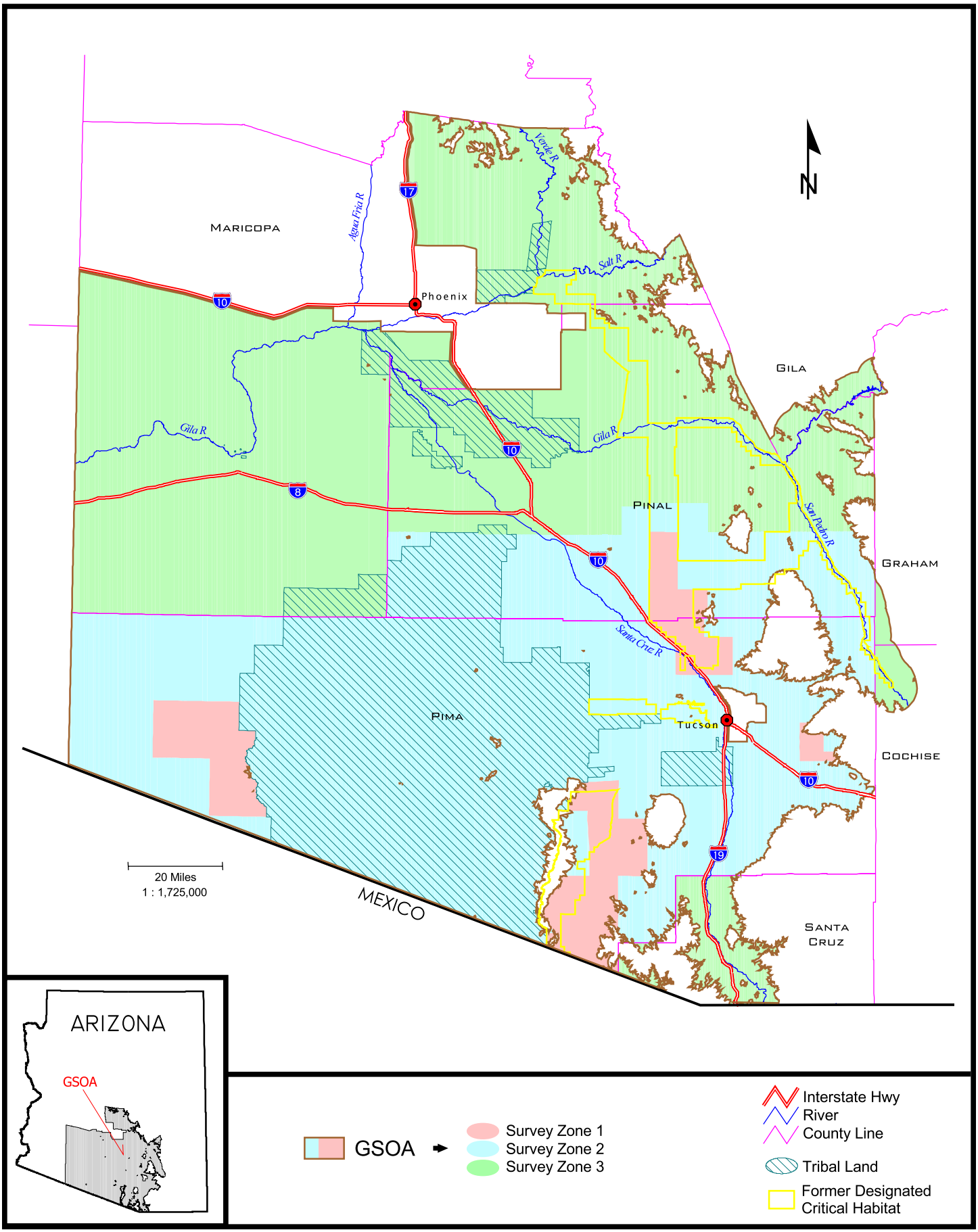

Figure 1-1. The Geographic Scope of Analysis (GSOA).

constituent elements of CFPO habitat (e.g., saguaros, large diameter trees, etc.), existing features and structures (e.g., roads, buildings, etc.), and areas not requiring special management (e.g., national parks, tribal lands, etc.) (Federal Register 1999). A brief description of each former critical habitat unit is provided below.

- Unit 1. This unit is located in the Altar Valley between Buenos Aires National Wildlife Refuge and the Tohono O'odham Nation. This area was chosen because it provides suitable habitat for nesting and dispersal. There are several occupied CFPO sites and the area provides opportunities for interchange between CFPO populations in Mexico and the United States.

- Unit 2. This unit is located west of Tucson between the Tohono O'odham Nation, Saguaro National Park West, and Tucson Mountains County Park and was chosen primarily as a corridor area for movement and dispersal, but also contains suitable nesting habitat. There currently are no known CFPO sites in this unit.

- Unit 3. This narrow unit is located northwest of Tucson between Saguaro National Park and Unit 4 and was chosen as a corridor area for movement and dispersal. A CFPO was reportedly detected recently in this unit west of Interstate 10.

- Unit 4. This unit is located in the northwest portion of the Tucson metropolitan area north of Interstate 10. Although Unit 4 contains high quality nesting habitat, in recent years (e.g., 2001) more CFPO were found in Unit 1 and in the area encompassed by Organ Pipe Cactus National Monument (OPCNM) and Cabeza Prieta National Wildlife Refuge (CPNWR).

- Unit 5a and 5b. This unit consists of two corridors located north of Tucson and connects habitat in Unit 4 to riparian areas to the north on the Gila River (5a) and to the east on the San Pedro River (5b). This unit was chosen as a corridor area for movement and dispersal and because it contains suitable nesting habitat. The unit includes recent CFPO occurrences in southern Pinal County as well as historical locations.

- Unit 6. This unit includes the riparian woodlands of the middle and lower San Pedro River and a portion of the Gila River. The area was chosen because of the potential importance, based on historic records, of riparian woodland habitat, the presence of suitable nesting habitat, and as a corridor for movement. Four CFPO were reportedly documented in this unit in the mid-1980s from the lower San Pedro River.

- Unit 7. This unit connects Unit 6 with upland habitats and with riparian woodland habitat along the Salt River and was chosen as a corridor for movement and dispersal between riparian woodland habitats along the Gila and Salt rivers and for its suitable upland nesting habitat. The most recent CFPO record in this unit was in the early 1970s along the Salt River.

These seven former critical habitat units are encompassed within three survey zones for CFPO identified by the FWS to provide guidance to land owners and managers as to levels of survey effort for ESA compliance. The three zones have been defined based on the degree of potential risk for a private or Federal entity to "take" a pygmy-owl (see Figure 1-1). Zones 1 and 2 include areas that are considered to be within the current range of CFPO while Zone 3 is considered to be within the historic range of CFPO (FWS 2000b). Zone 1 encompasses

all recent (since 1 January 1993) CFPO locations (FWS 2000b) and is therefore the zone where development activities pose the highest risk to CFPO. Although there apparently are no recent CFPO records in Zone 2, this zone was included in the current range of CFPO based on its relative proximity to known recent sites in Zone 1 (M. Wrigley, FWS, email to K. Kertell, SWCA, dated 28 Dec. 2000). Zone 3 was delineated based on the historic[2] distribution of CFPO and the presence of "suitable" habitat as defined by FWS (FWS 2000b). Because areas in this zone are farther from recent CFPO locations than areas in Zone 2, development activities in this zone pose the lowest potential risk to CFPO.

Because an assessment of cumulative impacts on CFPO from NWP activities under the COE's jurisdiction necessarily must account for direct and indirect effects, the GSOA for this document represents a broader geographic area than areas defined by FWS as 'suitable habitat'[3] for CFPO.

1.4 ISSUES TO BE ADDRESSED

The COE has identified the following issues of concern to be addressed in this EA:

- What are the direct and indirect impacts to CFPO resulting from past and future activities authorized by NWPs within the GSOA?

- What are the cumulative impacts to CFPO resulting from past and foreseeable future activities authorized by NWPs within the GSOA in light of other federal and non-federal activities?

1.5 DECISION TO BE MADE

Based on this analysis of direct, indirect, and cumulative impacts, the District Engineer (DE) of the COE's Los Angeles District will select one of the following six alternatives:

2 The FWS provides no definition of "historic".

3 The FWS (2000a) defines "suitable" habitat for CFPO as being below 4,000 feet elevation in one or more of the following vegetation communities: (1) Riparian Vegetation (such as cottonwoods, willows, mesquites, ash, or other trees growing along watercourses); or (2) Sonoran Desertscrub (particularly areas containing saguaro cactus or other columnar cactus [8 feet or taller], or with ironwood, mesquites, paloverde or other trees in association with at least some shrubs [acacia, prickly pear, desert hackberry, graythorn, etc.] and ground cover [triangle-leaf bursage, burro weed, grasses, etc.]); or (3) Semidesert Grassland with drainages containing mesquite, hackberry, cottonwood, willow, ash, etc. Any of these areas with or without saguaros, but which contain the appropriate trees and lower-level cover, are considered suitable if there are individual trees with a trunk diameter of 6 inches or greater measured at 4.5 feet above the ground. Urban areas within Tucson and Phoenix and areas currently devoid of saguaros, other columnar cacti, and/or trees (such as agricultural fields) are excluded.

- Do not apply the NWP program within the GSOA and issue Individual Permits only; or
- Implement 43 NWPs and 27 general conditions within the GSOA; or
- Implement 43 NWPs, 27 general conditions, and 3 regional conditions within the GSOA; or
- Implement 43 NWPs, 27 general conditions, 3 regional conditions, and case-specific conditions within the GSOA; or
- Implement 43 NWPs, 27 general conditions, 3 regional conditions, case-specific conditions within the GSOA, and establish a new regional condition requiring notification for all regulated activities as determined by the programmatic Section 7 consultation; or
- Revoke 43 NWPs and 27 general conditions and develop a Section 404 Regional General Permit (RGP) for use within the GSOA.

The remainder of this assessment comprises three chapters. Chapter 2 describes the alternatives considered, including the "No Action" alternative and alternatives eliminated from detailed consideration and the rationale for doing so. Chapter 3 presents the background and baseline conditions within the GSOA that provides context for assessing impacts of the NWP program on CFPO. Chapter 4 describes the direct, indirect, and cumulative impacts of the alternatives considered, in light of procedural safeguards to minimize impacts, mitigation measures and requirements, and other regulatory factors that may have mitigating effects upon the impacts of the NWP program on CFPO within the GSOA.

CHAPTER 2

ALTERNATIVES CONSIDERED

2.1 ALTERNATIVES CONSIDERED

This chapter presents the range of reasonable alternatives considered to achieve the purpose and need for action presented in Chapter 1. As required by NEPA (40 CFR 1502.14[d]), the range of alternatives includes a No Action alternative. At the end of this chapter, comparative summaries of the alternatives and their respective potential impacts are provided based on the analysis completed in Chapter 4.

2.1.1 Alternative 1 (No Action): Do not apply the NWP program within the GSOA.

Under the No Action alternative, the nationwide permits (NWPs) and all general conditions as issued and corrected in the January 15 and February 13, 2002 Federal Register notices, respectively, would not be applied within the GSOA and instead Individual Permits (IPs) would be issued regardless of the extent of the impact to aquatic resources. Unlike NWPs, IPs are applied on a case-by-case basis and are processed individually through the public interest review procedures of applicable COE regulations which typically require public notification and opportunity for comments.

Processing an IP involves evaluation of individual, project-specific applications in what can be characterized as three steps: (1) pre-application consultation (for major projects); (2) formal project review; and (3) decision-making. The pre-application process is designed to provide the applicant with a realistic assessment of the viability of some of the more obvious alternatives available to accomplish the project purpose and to discuss measures for reducing the impacts of the project early in the planning process. Once an application submittal is determined to be complete by the COE, the formal IP review process begins. The COE project manager prepares and publishes a public notice; evaluates the potential impacts, including those to listed and proposed species and/or designated critical habitat, of the project, and considers all comments received per NEPA requirements; negotiates with the applicant any necessary project modifications if warranted; determines appropriate mitigation; and prepares a Statement of Findings (SOF) to support a recommended permit decision. The permit decision document includes a discussion of the potential environmental impacts of the project, the findings of the public interest review process, and other special evaluations such as compliance with the Section 404(b)(1) Alternatives Analysis guidelines and compliance with the Endangered Species Act. Once the application has been deemed complete, the COE can generally process an IP in approximately 4 - 18 months.

2.1.2 Alternative 2: Implement the 43 NWPs and 27 general conditions.

Under this alternative, the COE would implement the 43 NWPs and 27 general conditions within the GSOA. These 43 NWPs authorize specific activities in WUS that have minimal adverse effects on the aquatic environment. If all terms and 27 general conditions for use of a NWP are met (see Appendix B), the specified activity may occur without the need for an IP. No regional or case specific conditions would be issued under this alternative.

2.1.3 Alternative 3: Implement 43 NWPs, 27 general conditions, and 3 regional conditions.

This alternative is the same as Alternative 2 except the COE would also implement the regional conditions published in the April 19, 2002 Special Public Notice issued by the Los Angeles District (LAD). The proposed regional conditions are intended to provide additional environmental safeguards beyond those of the general conditions to further ensure impacts to the aquatic environment authorized by the NWPs are minimal, both individually and cumulatively. Of the nine approved regional conditions, three would pertain to projects within the GSOA (Regional Conditions 2, 3, and 4). Regional Condition 2 would prevent the use of NWPs, with numerous exceptions[4], to authorize the discharge of dredged or fill material into a jurisdictional Special Aquatic Site (SAS).[5] Regional Condition 3 would require applicants to submit recent, pre-impact color photographs of the project area for all projects proposed for authorization by a NWP where a PCN to the COE is mandated. Regional Condition 4 would require a PCN, pursuant to General Condition 13, for all projects in SASs and in perennial watercourses or water bodies.

2.1.4 Alternative 4: Implement 43 NWPs, 27 general conditions, 3 regional conditions, and case-specific special conditions.

This alternative is the same as Alternative 3 but with the addition of case-specific special conditions. Special conditions, applied at the discretion of the COE, could include, but would not be limited to, those which are a result of consultations under Section 7 of the Endangered Species Act or Section 106 of the National Historic Preservation Act, and any other conditions needed to minimize adverse impacts to the aquatic environment or other protected resources.

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[4] Exceptions are the following NWPs: 1 (Aids to Navigation), 2 (Structures in Artificial Canals), 3 (Maintenance), 4 (Fish and Wildlife Harvesting), 5 (Scientific Measurement Devices), 6 (Survey Activities), 9 (Structures in Fleeting and Anchorage Areas), 10 (Mooring Buoys), 11 (Temporary Recreational Structures), 20 (Oil Spill Cleanup), 22 (Removal of Vessels), 27 (Stream and Wetland Restoration Activities), 30 (Moist Soil Management for Wildlife), 31 (Maintenance of Existing Flood Control Projects), 32 (Completed Enforcement Actions), 35 (Maintenance Dredging of Existing Basins), 37 (Emergency Watershed Protection and Rehabilitation), and 38 (Cleanup of Hazardous and Toxic Waste) or other nationwide or regional general permits that specifically authorize maintenance of previously authorized structures or fill.

[5] SASs are defined by the Section 404(b)(1) Guidelines as sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, and riffle-and-pool complexes.

2.1.5 Alternative 5: Implement 43 NWPs, 27 general conditions, 3 regional conditions, case-specific conditions, and include a new regional condition requiring notification for all regulated activities in areas as determined by a programmatic Section 7 consultation.

This alternative is the same as Alternative 4 but an additional regional condition would be developed requiring notification to the COE for all regulated activities, regardless of impact acreage, in areas as determined by programmatic Section 7 consultation. Within the GSOA, three survey zones have been identified by FWS based on the relative suitability of habitat: Zone 1 is considered to have the highest potential to support CFPO and its habitat and encompasses all recent (since 1 January 1993) CFPO locations. By requiring notification within certain areas for any regulated activities, this alternative seeks to minimize the potential for adverse impacts to CFPO by significantly expanding agency review and scrutiny of each permit action within areas having the highest potential to support CFPO (see review requirements for General Condition 13, Notification (33 CFR 330, Appendix A (C)(13) (d)). The notification regional condition under this alternative would require notification procedures identical to those described under the current General Condition 13 (Federal Register, January 15, 2002) and any additional notification requirements as required by a programmatic Section 7 consultation.

2.1.6 Alternative 6: Revoke the replacement NWPs and establish a Regional General Permit (RGP) that authorizes permanent impacts in WUS of up to 3 acres within the GSOA.

Under this alternative, the COE would revoke the 43 NWPs and instead establish a Regional General Permit (RGP) which would authorize up to three (3) acres of permanent impacts to WUS for similar kinds of activities as allowed by NWPs as well as other activities (e.g., maintenance of some kinds of flood control channels). An RGP is used by the COE to authorize activities in a limited geographic area that the COE has identified as being uniform or substantially similar in nature and causing only minimal individual and cumulative environmental impacts.

Although an RGP is a category of General Permit, the process to establish an RGP for the GSOA would be similar to the process for issuing an IP (see Alternative 1, No Action). Once an RGP is established, individual activities falling within those categories authorized under the RGP and meeting its terms and conditions still must be verified by the COE unless notification is not a condition of the RGP. Establishment of an RGP for the GSOA would be coordinated with all concerned resource agencies and the public at large; programmatic consultations with Fish and Wildlife Service (under Section 7 of the Endangered Species Act), with the State Historic Preservation Office (under Section 106 of the National Historic Preservation Act) would be completed prior to issuance of the RGP.

The moratorium on developing RGPs similar in nature to the NWPs (see CECW-OR [1145], Memorandum for Major Subordinate Commands and District Commands, December 7, 2000) expired on June 7, 2001. This alternative would be expected to take approximately 6-10 months to establish, and may only apply to a portion of the GSOA (for those areas in which FWS would issue a programmatic Section 7 permit) after which the RGP would be effective for up to five years and may be renewed.

CHAPTER 3

BASELINE CONDITIONS WITHIN THE GSOA

This chapter presents baseline conditions (background on the biology of CFPO and existing land use conditions, both within and outside of COE control) within the GSOA. This information provides important context for the assessment of the potential impacts of the alternatives on CFPO as presented in Chapter 4.

3.1 TAXONOMY, DISTRIBUTION, AND BIOLOGY OF CACTUS FERRUGINOUS PYGMY-OWL

3.1.1 Taxonomy

Recent genetic studies (Proudfoot and Slack 2001) suggest that ferruginous pygmy-owl populations in southern Arizona and southern Texas are distinct subspecies, and that there is no genetic isolation between populations in the United States and those immediately south of the international border in northwestern or northeastern Mexico (ibid.). Results also indicate a comparatively low haplotypic diversity in the Northwest Tucson population, suggesting that it may be recently separated from those in the Altar Valley, Arizona, and in Sonora and Sinaloa, Mexico.

3.1.2 Range and Distribution

The current range of CFPO is believed to extend from lowland southern Arizona south through western Mexico to the states of Colima and Michoacan, and from southern Texas south through the Mexican states of Tamaulipas and Nuevo Leon (Federal Register 1997). Previously, it had been suggested that CFPO may be absent, rare, or uncommon in Sonora, Mexico (Federal Register 1997). Initial results of a recent two-year survey effort in Sonora, however, indicate that it is comparatively abundant there, with approximately 280 CFPO within 150 miles of the Arizona border (FWS 2001a; Baucom and Flesch 2000). In 2001, 55 nests were located in Sonora, all within about 60 miles of the U.S./Mexico border, during only 32 field days of effort (A. Flesch, University of Arizona Researcher, pers. comm., 28 August 2001).

3.1.2.1 Historical Range and Distribution in Arizona. The historic range of CFPO in Arizona reportedly extended from the U.S./Mexico border north to south-central Arizona at New River (about 35 miles north of Phoenix), west to Agua Caliente (near Gila Bend) and Cabeza Prieta Tanks, and east to Tucson and perhaps the San Pedro River (FWS 2000c) (see Figure 3-1). At New River, Arizona, Fisher (1893) reportedly found CFPO in thickets of intermixed mesquite and saguaro cactus. The Museum of Vertebrate Zoology contains a clutch of four eggs collected by G.F. Breninger on May 18, 1898, in Phoenix, Maricopa County (FWS

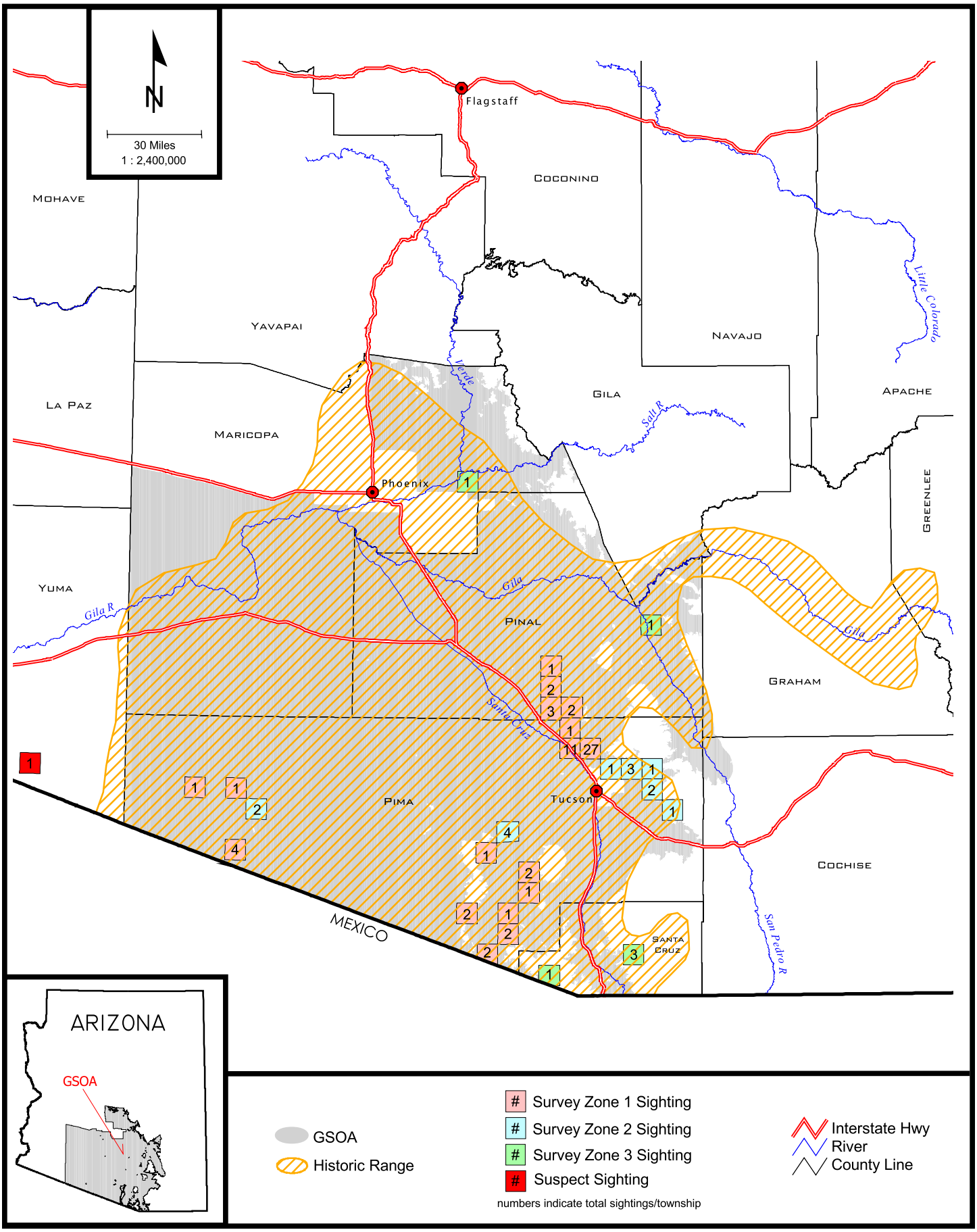

Figure 3-1. Sightings (1897-2001; source: AGFD) and historic range of the Cactus Ferruginous Pygmy-Owl (source: USFWS).

2000c). One additional record exists for this northern portion of the CFPO's range, and is filed under R.D. Lusk with the United States National Museum Smithsonian Institution. This record indicates that five eggs and a skin were collected at Cave Creek on April 12, 1895 (FWS 2000c). CFPO reportedly also were detected in south-central Arizona at the Blue Point Cottonwoods area, at the confluence of the Salt and Verde Rivers in 1897, 1949, 1951, and 1964 (AGFD 1999a, Phillips et al. 1964), and at Dudleyville on the San Pedro River as recently as 1985 and 1986 (AGFD 1999a, Hunter 1988). Records from the eastern portion of the range include an 1876 record from Camp Goodwin (nearby current day Geronimo) on the Gila River, and a 1978 record from Gillard Hot Springs, also on the Gila River (FWS 2000c). CFPO was reportedly found as far west in Arizona as the Cabeza Prieta Tanks in 1955 (Monson 1998). It is difficult to evaluate the species' historic abundance in Arizona, as most early reports are anecdotal.

3.1.2.2 Current Distribution and Abundance in Arizona. The majority of Arizona CFPO detections in the last seven years have been from the northwest Tucson area in Pima County, southern Pinal County, at OPCNM, CPNWR, Buenos Aires National Wildlife Refuge (BANWR), and on the Coronado National Forest (FWS 2001b)[6]. Provided below are the results of recent survey efforts in Arizona (from FWS 2001b).

Between 1990, the first year data were available from formal CFPO surveys, and 1997, a total of 31 detections were made in the Tucson Basin and at OPCNM, ranging from single juveniles and adults to nesting pairs with fledglings (Table XX). This summary includes no detections in 1991 because no surveys were reported to a high of 12 detections in 1996.

Table 3-0. Summary of CFPO Detections in Arizona from 1990-1997 (from FWS 2001c)

Survey Year	Detections
1990	1 detected at OPCNM
1991	No survey effort reported
1992	3 singles detected at OPCNM
1993	1 detected in Tucson Basin
1994	1 pair and 1 single (3 total) detected in Tucson Basin
1995	5 adults and 1 juvenile detected, including 1 nest, in Tucson Basin
1996	12 detected, including 1 nesting pair and 2 fledglings, in Tucson Basin; 3 confirmed and 3 unconfirmed at OPCNM
1997	5 detected, including 1 nesting pair and 2 fledglings, in Tucson Basin; 2 detected at OPCNM

[6] Few surveys have been conducted on tribal lands in southern Arizona, such as the Tohono O'odham Reservation, suggesting that there may be additional concentrations in the state.

Survey effort for CFPO increased dramatically in 1998, the year after the species was formally listed as endangered. A summary of results from 1998-2001 is provided below (FWS 2001c).

In 1998, a total of 35 CFPO were reported, including 11 juveniles in the Tucson Basin, and five juveniles at OPCNM. Three adults also were reported in southern Arizona (Altar Valley), two adults in Pinal County, and one adult in eastern Tucson.

The 1999 survey season resulted in a total of 41 adult CFPO reports for Arizona. Statewide, a total of 28 CFPO sites were documented, 10 of which had nesting confirmed and which produced 33 young, although only 16 juveniles were known to successfully fledge (i.e., juveniles known to have successfully dispersed from their natal area). Results from the 1999 survey season were 17 adults at 11 sites in the Tucson Basin, 18 adult at 14 sites in the Altar Valley, and adults at three sites at OPCNM.

Surveys conducted during the 2000 survey season resulted in reports of 24 CFPO sites with 35 adults. Ten sites with 14 adults were reported in the Tucson Basin, six sites with nine adults in the Altar Valley, six sites with eight adults at OPCNM, and two sites with four adults in south-central Arizona.

A total of 47 adult CFPO reports at 29 sites in Arizona were reported from the 2001 surveys. There were also several other unconfirmed sites that are not included in these totals. Nesting was documented at 17 sites and it is unknown at this time how many young have successfully fledged. The following regions of the state are currently known to have CFPOs:

- **Tucson Basin** (northwest Tucson and southern Pinal County) - A total of 8 adults (3 pairs and 2 single resident males) were confirmed at 5 sites, all in Pima County. For the first time in 3 years, no CFPOs were documented in southern Pinal County. Three nests in northwest Tucson were confirmed, all with young.

- **Altar Valley** - A total of 18 adult CFPOs were documented at 12 sites. As a result of increased access to portions of the valley, the number of known owls increased to 7 pairs and 4 resident single owls. A total of 7 nests were confirmed.

- **OPCNM and CPNWR** - Twelve adult CFPOs were confirmed at 8 sites. Three nests were active. Two new sites were documented on the CPNWR and one north of OPCNM near Ajo.

- **Other** - A total of 9 adults, consisting of 4 pairs and one single CFPO at 5 sites, were documented elsewhere in southern Arizona; however, precise location data is not provided. Nesting was confirmed at 4 of these sites. It is unknown how many of these young successfully dispersed. There were several other possible CFPO detections reported elsewhere in the state, but they were not confirmed.

3.1.3 Habitat

3.1.3.1 General Characteristics. CFPO are currently found in Sonoran Desertscrub and Semidesert Grassland vegetation communities at elevations below 4,000 feet. Both of these communities include xeroriparian vegetation, defined as thickets bordering dry desert washes. There have been no recent records of CFPO in broadleaf riparian communities. In the Sonoran Desertscrub community, xeroriparian vegetation consists of palo verde (*Cercidium* spp.), mesquite (*Prosopis* spp.), catclaw and whitethorn acacia (*Acacia* spp.), and columnar cacti (FWS 2001b), often with ironwood (*Olneya tesota*) and/or exotic landscaping supported by irrigation (Abbate et al. 1996). The mid- and lower-stories of these drainages are usually comprised of graythorn *(Zizyphus obtusifolia*), bursage (*Ambrosia dumosa*), cholla *(Opuntia* spp.), prickly pear *(Opuntia* spp.), and annual and perennial grasses and forbs (FWS 2000a). Within the Semidesert Grassland community, CFPO are typically found in xeroriparian washes with hackberry (*Celtis* spp.), mesquite, and ash *(Fraxinus velutina*). Uplands in this community primarily consist of grasslands with dispersed mesquite trees and a limited number of saguaro cacti (FWS 2001b).

The FWS (2000b) defines "suitable" habitat for this owl as being below 4,000 feet elevation in one or more of the following vegetation communities:

- *Riparian vegetation*, such as cottonwoods, willows, mesquites, ash, or other trees growing along watercourses;

- *Sonoran Desertscrub,* particularly areas containing saguaro cactus or other columnar cactus (8 feet or taller), or within ironwood, mesquites, paloverde or other trees in association with at least some shrubs (acacia, prickly pear cactus, desert hackberry, graythorn, etc.): or

- *Semidesert Grassland* with drainages containing mesquite, hackberry cottonwood, willow, ash, etc. Any of these areas with or without saguaros, but which contain the appropriate trees and lower-level cover, are considered suitable if there are individual trees with a trunk diameter of 6 inches or greater measured at 4.5 feet above the ground.

Urban areas within Tucson and Phoenix, as delineated by FWS, and areas currently devoid of saguaros, other columnar cactus, or trees (such as agricultural fields) are excluded.

3.1.3.2 Vegetation Structure. It has been suggested that vegetation structure is more important than composition for CFPO (Cartron et al. 2000). However, in Arizona little is known about the vegetation structure of habitats used by CFPO (FWS 2001b) and the density of trees and the amount of canopy cover preferred by CFPO remains unclear (FWS 2000a). While plant species composition differs between the Sonoran Desertscrub and Semidesert Grassland vegetation communities, habitat descriptions in areas with the highest concentrations of CFPO are most commonly characterized by semi-open or open woodlands, often in proximity to denser woodlands or woodland patches (FWS 2001b). Where CFPO are found in densely wooded areas, they are typically observed along edges or in openings rather than deep in the woodland itself (Binford 1989 and Sick 1993, cited in FWS 2001b). However, this may also result from the increased ability of observers to view them in more open areas (FWS 2001b). Based on a recent study of 18 perch sites and

three nest sites in the Tucson area (AGFD 1999b), occupied sites showed a good distribution of litter, well-developed vegetation structure, and a relatively even distribution of cover at all levels. In the Altar Valley, occupied sites were described as being associated with well-developed woody vegetation along washes, with occupied patches being more structurally developed and of larger size than unoccupied sites (Flesch 1999). Preliminary results from a habitat selection study in Arizona suggest that nest sites tend to have a higher degree of canopy cover than random sites (AGFD 1999b). Adequate vegetation structure in mid- and lower-stories is believed to be important because it likely provides protection from predators and a higher density of prey items including lizards, small birds and mammals, and insects (Abbate et al. 1996, AGFD 1999b).

3.1.3.3 Riparian versus Upland Vegetation Communities. The importance of riparian versus upland vegetation communities as habitats for the CFPO is not well understood (FWS 2001b). Historically, CFPO in Arizona were reportedly associated with cottonwood forests, mesquite-cottonwood woodlands, and mesquite bosques along the Gila, Salt, Verde, San Pedro, and Santa Cruz rivers and various tributaries (Breninger 1898, cited in Bent 1938; Gilman 1909 and Swarth 1914, cited in FWS 2001b). In Arizona, riparian systems generally support a higher volume of woody vegetation compared to uplands (FWS 2000a) and this, in turn, may attract a disproportionate amount of prey species important to CFPO compared to adjacent uplands (Carothers et al. 1977, Hubbard 1977, Pase and Layser 1977). On the other hand, a disproportionately low number of historical records from upland habitats may be due to the focus of early collection efforts along rivers where humans tended to concentrate, while the upland areas received less survey effort (FWS 2001b).

In areas where early CFPO sightings occurred away from broadleaf riparian communities, they appear to have been more common in xeroriparian habitats along washes than in more open desert uplands (Monson and Phillips 1981, Johnson and Haight 1985, Johnson-Duncan et al. 1988, Millsap and Johnson 1988, Davis and Russell 1990). During recent surveys in Arizona, all documented pygmy-owls have been associated with Sonoran Desertscrub, Semidesert Grassland, and xeroriparian habitats (Federal Register 1999). There have been no recent records in broadleaf riparian communities. In the Altar Valley, nesting opportunities for CFPO are considered generally greater in xeroriparian wash habitats versus uplands because of a higher incidence of large diameter trees that may provide cavities for nesting (Federal Register 1999). The presence of more potential nest sites and the greater abundance of potential prey in xeroriparian versus upland habitats likely make these areas more attractive to CFPO throughout its range.

3.1.3.4 Developed versus Undeveloped Areas. Current information suggests that CFPOs can successfully live and breed in areas having at least some degree of human development, although more CFPO sites in Arizona are now known to occur in undeveloped areas (20 sites) than developed areas (8 sites) (FWS 2001b). To determine the level of vegetation disturbance pygmy-owls may be able to tolerate, members of the CFPO Recovery Team completed an analysis of seven known existing owl sites in northwest Tucson (FWS 2000a). Currently, all known CFPOs within northwest Tucson are located in areas containing low-density housing developments adjacent to undeveloped tracts of land (FWS 2000a). The Recovery Team calculated the amount of vegetation disturbance within a 280-acre area (estimated home range) at each owl site. Disturbed areas included any areas where native vegetation had been removed or altered (e.g., roads, buildings, horse corals and pastures, parking lots, golf courses, etc.). Levels of vegetation disturbance were then grouped according to their percentage of disturbance (i.e. 0 - 5, 5 - 10, 10 - 15, etc.). The amount of vegetation disturbance in five of the seven CFPO home ranges was between 20 - 25 percent. One of the remaining two sites contained 17

percent disturbance and the other site had 33 percent disturbance. Based on this analysis, the FWS has concluded that development within specific areas, such as those identified as Special Management Areas (SMAs) within Recovery Areas, should be limited to 20 percent to provide for the survival and recovery of the CFPO (FWS 2000a).

3.1.4 Biology

3.1.4.1 Migration. CFPO is considered by most authors to be non-migratory throughout its range (FWS 2001b). Birds have been reported during the winter months in several locations, including recently at OPCNM, and historically along Rillito Creek and Sabino Canyon. These winter records demonstrate that at least some CFPO are found within Arizona throughout the year and do not appear to migrate south to warmer climates during winter (FWS 2001b). However, Russell and Monson (1998) postulated that they may be migratory in the northern portion of their range.

3.1.4.2 Nesting. CFPO nests in natural cavities or cavities made by other species, particularly by Gila woodpeckers *(Melanerpes uropygialis*), in a tree or large columnar cactus. Historically, nests were reportedly found in cavities of cottonwood, willow, or mesquite. Most recent nests (14 of 16 from 1996-1999) have been located in saguaro cavities (Abbate et al. 1996, FWS 2001b); two nests in 1999 were located in cavities of other tree species (one each in an ash and a eucalyptus).

Average CFPO clutch size was 3.5 and 4.8 based on two studies (FWS 2000a). There is little specific information on CFPO nesting chronology due to limited opportunities for study and the secretive nature of CFPO (FWS 2000c). Data generated from nest box studies in Texas and research conducted in Arizona indicate that CFPO lay eggs from mid- to late-April. Incubation lasts for 23 to 28 days (Proudfoot 1996, cited in FWS 2000c). Fledging occurs 26 to 29 days after hatching is complete (Proudfoot 1996, cited in FWS 2000c). In Arizona differences in nest initiation dates may vary by as much as two months (Abbate et al. 1996, FWS 2000c). As with other avian species, this may be the result of a second brood or a second nesting attempt following an initial failure (Abbate et al. 1996).

In both Texas and Arizona, observations indicate that the female incubates the eggs and attends hatchlings, while the male provides food to the female and young (FWS 2000c). In Texas, males provided all of the food for approximately the first week following hatching (Proudfoot 1996, cited in FWS 2000c). In Arizona, the majority of hunting activity and prey captures by male CFPO was conducted away from the nest site and, consequently, out of sight of nest observers (Abbate et al. 1996).

3.1.4.3 Home Range Size. Information on the amount of suitable habitats required to support pygmy-owls in Arizona is incomplete (FWS 2000c). Abbate et al. (1996) estimated a breeding season home range size of one adult pair and one fledgling at a 1996 nest site in Arizona based on visual and auditory detections. The adult female was observed to use an area approximately 0.5 acres in size during the pre-fledgling and nesting stages. However, this area expanded to approximately 35 acres at post-fledging. This 35-acre area was also used by the fledgling (Abbate et al. 1996). Following dispersal of the fledgling, it is believed that the area used by the adult CFPOs expanded beyond 35 acres (Abbate et al. 1996). The Working Draft Recovery Plan (FWS

2000a), citing Abbate et al. (1999), indicates that CFPOs monitored during nesting used from 5-50 acres, while an unpaired male used about 217 acres. In Texas, Proudfoot (1996) noted that, while CFPOs used between 3 and 57 acres during the incubation period, they may defend areas up to 279 acres in the winter. Therefore, the FWS considers a 280-acre home range necessary for CFPOs (FWS 2001b). Initial results from ongoing studies in Texas indicate that the home range of CFPOs may also expand substantially during dry years (G. Proudfoot unpubl. data, cited in FWS 2001b).

3.1.4.4 Dispersal. According to studies conducted in Texas, juveniles remained within approximately 165 feet of adults until dispersal. Dispersal occurred approximately 63 days after the young first left the nest. Dispersal distances (straight line) of 20 juveniles in Texas, monitored from their natal sites to nest sites the following year, averaged five miles (range 0.75 miles to 19 miles) (FWS 2001b). In Arizona, first dispersal of fledglings was July 24 (FWS 2001b). One banded juvenile from Arizona was observed approximately 2.4 miles from its nest site following dispersal (FWS 2001b). Radio telemetry studies conducted in Arizona in 1998 by AGFD showed that the straight-line dispersal of five young fitted with transmitters ranged from 2.17 miles to 6.5 miles (mean 3.6 miles) (Abbate et al. 1999, cited in FWS 2001b). Telemetry studies of six juveniles in Arizona 1999 resulted in generally greater straight-line distances, ranging from 1.4 miles to 12.9 miles (mean 6.2 miles) (FWS 2001b). Juveniles that dispersed from natal areas in July did not appear to defend a territory until September (FWS 2001b). There reportedly is documented movement by owls between southern Pinal County and northwest Pima County (FWS 2001b).

3.1.4.5 Mortality/Survival Rates. Little is known about the rate or causes of mortality of CFPO in Arizona (Cartron et al. 2000). Mortality due to natural causes (e.g., predation) has been documented for a number of fledglings in Arizona (FWS 2001b). It is unclear what the survival rate for CFPO is; however, as with other owls and raptors, a high mortality (50 percent or more) of young is typical during the first year of life. Of the 33 young recorded in 1999 in Arizona, only 16 were documented as surviving until dispersal, and the fates of several others were unknown (FWS 2001b). Raccoon and bullsnake predation on nestlings is reportedly common in Texas, and there apparently is an instance of a domestic cat killing an adult and fledgling owl (Cartron et al. 2000). In Texas, there are reported cases of adults and fledglings being preyed upon by great-horned owl, Harris' hawk, and Cooper's hawk (Cartron et al. 2000). In Arizona, Scott Richardson (AGFD unpubl. data) apparently has documented two separate instances where an adult CFPO has been severely injured or died as a direct result of a collision with a window or fence.

3.1.5 Cactus Ferruginous Pygmy-Owls Within Survey Zones

As described in the GSOA (defined in Chapter 1), the FWS has identified three survey zones for CFPO based on the degree of potential risk for a private or Federal entity to "take" a pygmy-owl. Degree of risk is directly correlated with the number of recent, and to some extent historic, CFPO records within each survey zone, with the greatest potential risk and most CFPO records in Zone 1 and the lowest risk and fewest CFPO records in Zone 3.

Based on CFPO records compiled in the Heritage Data Management System (HDMS)[7] for the period 1970 to 2001, the vast majority of occurrences in Arizona are in Zone 1, as expected (see Table 3-1). Because CFPO records in the HDMS are indexed only by Township-Range, a 36-square-mile block, the information displayed in Figure 3-1 is a summary of records within each Township-Range block and not a depiction of individual CFPO locations[8]. Note that the number of records within each geographic block does not necessarily represent the number of individual CFPO detected but in some cases may represent repeat detections of the same pygmy-owl. This may be particularly true for Zone 1, the area with the highest number of detections of owls. Consequently, the information in Table 3-1 is useful only for showing the relative abundance, not the absolute number, of CFPO in each survey zone.

Table 3-1. Number of Cactus Ferruginous Pygmy-Owl Records (1970-2001) by Survey Zone

Survey Zone	Number of CFPO Records	Percentage of Total Records
1	73	87
2	5	7
3	6	6
Total	**84**	**100**

3.1.6 Suitable Habitat Within Survey Zones

FWS (2000b) defines suitable habitat as for CFPO as riparian vegetation, Sonoran Desertscrub, and Semidesert Grassland biomes. Habitats in these vegetation communities are considered suitable for CFPO if they are below 4,000 feet and provide multi-story cover, and saguaros or trees of the appropriate species and size. Table 3-2 summarizes a GIS-based acreage estimation of suitable habitat within the GSOA by Survey Zone. Although no currently active sites are located in broadleaf riparian woodland in Arizona (areas with cottonwoods, willows, mesquites, ash, or other trees growing along watercourses) (Federal Register 1999), this habitat type is still considered suitable by FWS based on historical records. All recent records in riparian areas have been associated with xeroriparian vegetation. The jurisdictional portion of a wash is defined by the boundaries of ordinary high water; xeroriparian vegetation used by CFPO typically develop adjacent to but outside of the jurisdictional portion of a WUS. The acreage projections provided in Table 3-2 are gross

[7] The HDMS database is maintained by the Arizona Game and Fish Department. The index of records provided to SWCA is dated March 21, 2000.

[8] Due to the absence of precise CFPO locations within each Township-Range block, a given block was considered to be within a survey zone when any portion of the block overlapped the survey zone boundary.

estimates based on the portion of Sonoran Desertscrub and Semidesert Grassland habitats (mapped per Brown 1994) below 4000' elevation within the GSOA and would include the area within ordinary high water as well as the adjacent xeroriparian areas.

Table 3-2. Approximate Acreage of Suitable CFPO Habitat by Survey Zone within the GSOA as Represented by Sonoran Desertscrub and Semidesert Grassland Biomes.

Survey Zone	Total Acreage in Zone	Acreage of Suitable Habitat[9]	Suitable Habitat Acreage as a Percent of Zone[10]
1	710,000	598,000	84%
2	5,680,000	3,970,000	70%
3	6,249,000	2,862,000	46%
Total	**12,639,000 (GSOA)**	**7,430,000**	**59%**

3.2 COE-CONTROLLED FACTORS POTENTIALLY AFFECTING CFPO

As part of the baseline context for understanding the effects of the NWP program alternatives in Arizona on CFPO, there are numerous factors operating within the geographic scope of analysis that may also potentially affect CFPO. This section identifies and briefly describes those factors under the control of the Corps of Engineers as part of their Clean Water Act regulatory program. The last section in this chapter, Section 3.3, identifies and briefly describes other factors within the GSOA that are outside of COE control but that may also affect CFPO.

3.2.1 Past Use of NWPs within the GSOA

The COE maintains a database of information (RAMS2) on the use of NWPs and other permits. The RAMS2 database was used for this analysis; the data include Section 404 permit information from December 12, 1994, when CFPO was proposed for listing as endangered, through December 11, 2000, a period of six years. During this six-year period, two reauthorizations of the NWP program occurred, one in December 1996 and the second in March 2000.

[9] Acreage has been rounded to the nearest 1,000 acres due to scale of sources for elevation and Brown, Lowe, and Pase overlays (1:250,000).

[10] Acreage has been rounded to the nearest 1,000 acres due to scale of sources for elevation and Brown, Lowe, and Pase overlays (1:250,000).

During this period, approximately 640 verifications and permits (NWPs, Letters of Permission [LOPs], and Individual Permits [IPs]) under Section 404 of the Clean Water Act were issued within the GSOA by the COE Regulatory Branch office in Phoenix, Arizona[11]. Of these, 565 (roughly 88 percent) verifications were issued for compliance with a NWP. Table 3-3 below summarizes the distribution of types of Section 404 permits issued during this period within the GSOA.

Table 3-3.Distribution of Section 404 Permits Issued within the GSOA between 1994-2000

Permit Type	Number Issued	Percent
Individual	65	10
LOP	10	2
NWP	565	88
TOTAL	**640**	**100**

This document focuses only on the NWP verifications issued within the GSOA. For the purposes of this document, it is useful to group/categorize the 44 NWPs by frequency of use within the GSOA. Based on frequency of use data retrieved from the RAMS2 database, four groups of NWPs have been identified[12]. These are described below in order of increasing frequency of use and are listed in Table 3-4.

Group A: This group comprises NWPs that have never been issued within the GSOA because a) the permit only applies to waters subject to Section 10 of the River and Harbor Act rather than Section 404 of the Clean Water Act; or b) the activity is extremely unlikely to occur within the GSOA (e.g., cranberry production, hydropower projects, surface coal mining, etc.). Much of the analysis in Chapter 4 does not pertain to this group, since these permits were never issued within the GSOA between 1994-2000.

[11] Data from RAMS2 database maintained by the COE.

[12] Groups are based on natural breaks using the Jenk's optimization method, which minimizes variance within classes (ESRI, Inc., 1996). Single and complete projects for which multiple permits were issued (i.e., NWPs 12 or 14) are included in the database as a single permit. Note that because replacement permits were only in existence for a small portion of the temporal scope of the RAMS2 data used in this analysis (i.e., from June 7 to December 11, 2000), NWPs 39-44 have been assigned a frequency of use category based on Corps' personnel's expectations of frequency of use.

Table 3-4. Four Groups of NWPs by Frequency of Use within the GSOA between 1994-2000.

Group	NWPs	Frequency of Use (no. verifications issued in 6-yr period)
Group A	1, 2, 4, 5, 8, 9, 10, 11, 15, 16, 17, 19, 20, 21, 22, 23, 24, 28, 29, 30, 31, 34, 35, 36, 38	Never (0)
Group B	3, 6, 7, 12, 13, 18, , 25, 27, 32, 33, 37, 40-44	Rarely-Occasionally (1- 54)
Group C	14	Regularly (55 – 126)
Group D	26, 39	Frequently (127 - 302)

Group B: This group includes NWPs that are rarely to occasionally issued within the GSOA, defined as having been issued between 1- 54 times within the past six years. (Note: large linear projects receiving multiple NWP 12s were only counted as one NWP 12.)

Group C: This group includes NWPs that are issued regularly within the GSOA, defined as having been issued between 55 - 126 times within the past six years.

Group D: This group includes NWPs that are issued frequently within the GSOA, defined as having been issued between 127 - 302 times within the past six years.

It is important to note that, in addition to the 640 verifications/permits issued, an unknown number of NWP verifications that did not require notification to the COE would also have been authorized under the NWP program during this period. Activities that typically did not require COE notification during this period included:

- Road fill impacts of up to 1/3 acre and not within a special aquatic site;
- Fills in headwaters and isolated waters less than 1 acre and not within a special aquatic site;
- Minor discharges below 10 cubic yards;
- Activities qualifying for NWPs 3, 6, 12, 19, 25, and 27.

The NWPs recently issued on January 15, 2002, include more stringent notification requirements. Currently, most projects that impact more than 0.1 acre now require notification to the Corps prior to onset of the activity.

The Los Angeles District of the COE has no record or estimate of the number of times each NWP with a non-notification provision was used within the GSOA. Only activities that met all of the terms and General Conditions were pre-authorized under the non-notifying provision of a NWP. However, the RAMS2 database includes numerous instances of NWP verifications that qualified as non-notification verifications, but the applicant nevertheless sought a letter of verification and notified the COE. In fact, as reported in the Programmatic Draft EIS (PDEIS) (COE 2001), the COE estimates that the actual percentage of NWPs in the RAMS2 database that qualified as non-notifying permits "probably approaches 87 percent" and "appeared mostly to be associated with nationwide permit 26" (COE 2001; p. 5-20 and 5-21). It is important to note NWP 26 has expired and been replaced with more stringent notification requirements.

3.2.2 Procedural Safeguards Associated with NWPs

The NWP program includes several procedural safeguards to ensure that not more than minimal impacts occur to aquatic resources. These include general conditions, regional conditions, and at the discretion of the District Engineer, special conditions that can be required of the permit applicant. Each of these is described in greater detail below.

3.2.2.1 General Conditions. General conditions are a series of conditions that an applicant must meet for a NWP to be valid. With regard to protection of CFPO and its critical habitat, the key general conditions are "No. 9, Water Quality Certification", "No. 11, Endangered Species", "No. 13, Notification", "No. 19, Mitigation", and "No. 25, Critical Resource Waters", which are briefly described below (see also Appendix B).

- **General Condition 9, Water Quality.** In Arizona, including tribal lands, an individual 401 Water Quality Certification must be obtained or waived. An important component of water quality management includes storm water management that minimizes degradation of the downstream aquatic system, including water quality. Another important component of water quality management is the establishment and maintenance of vegetated buffers nest to open waters, including streams. Currently, the Arizona Department of Environmental Quality (ADEQ) administers the Section 401 State Water Quality Certification program and has determined which of the 43 NWPs will be certified, conditionally certified, or must be individually certified (ADEQ, 2002). EPA administers the Water Quality Certification program on tribal land except for the White Mountain Apache Reservation and Ft. Apache Reservation, which are administered by the White Mountain Apache Tribe.

- **General Condition 11, Endangered Species.** General Condition 11 addresses impacts to endangered species as follows:

> (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

is likely to destroy or adversely modify the designated critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or critical habitat may be affected or are in the vicinity of the project, and shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. Federal permittees must undertake their own Section 7 consultation as the lead agency.

(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.

- **General Condition 13, Notification.** Where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible (e.g., if protected species or eligible cultural resources may be affected by the permit activity). For activities that may adversely affect federally-listed endangered or threatened species, the PCN must include the name(s) of those species that may be affected by the proposed action or use the designated critical habitat that may be affected by the proposed action. In reviewing the PCN, the District Engineer will determine whether the activity will result in more than minimal individual or cumulative adverse environmental effects. Depending on the level of environmental impact, the District Engineer may: (1) impose special conditions (see Section 4.1.3); (2) require that the applicant seek authorization under an individual permit; or (3) request that the applicant submit a mitigation proposal to reduce the adverse effects on the aquatic environment to the minimal level.

- **General Condition 19, Mitigation.** Section 404(b)(1) guidelines state that no discharge of dredged or fill material in WUS may be permitted unless appropriate and practicable steps have been taken to minimize all adverse impacts associated with the discharge. To this end, a mitigation sequence is established, under which compensatory mitigation is required for all wetland impacts requiring a PCN to offset or replace aquatic resource functions and values that are adversely impacted by a proposed project after all appropriate and practicable steps have been taken to first avoid and then minimize such impacts. Mitigation may be accomplished on-site or off-site depending on the nature of the project. Compliance with these mitigation-sequencing requirements is the responsibility of the permit applicant.

- **General Condition 25, Critical Resource Waters.** Critical resource waters include a variety of aquatic habitats but in particular with regard to this analysis, critical habitat for Federally listed threatened and endangered species. This condition does not authorize discharges under NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting critical resource waters or wetlands adjacent to such waters unless the activity complies with General

Condition 11and the FWS or National Marine Fisheries Service has concurred in a determination of compliance with this condition. For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification in accordance with General Condition 13 is required and activities may be authorized only after the District Engineer determines that the impacts to critical resource waters will be no more than minimal.

3.2.2.2 Regional Conditions. In addition to the NWP general conditions, District Engineers are authorized to add regional conditions specific to the needs and/or requirements of a particular region or state. Regional conditions represent another important mechanism available to the COE to ensure that impacts to the aquatic environment authorized by the NWPs are minimal, both individually and cumulatively. Regional conditions cannot be used to make the NWPs less restrictive. District Engineers may also suspend or revoke specific NWPs in certain geographic areas or high-value aquatic systems or other resource types where impacts authorized by those NWPs may be more than minimal.

Among the factors considered by the COE in issuing regional conditions are potential impacts to endangered species. Actions proposed for authorization under the new NWPs, and/or subject to the proposed modifications and/or conditions, may, in certain circumstances, affect federally-listed endangered and threatened species or their designated critical habitat. Formal consultation for the proposed NWPs or regional condition(s) pursuant to Section 7 of the ESA may occur and potentially lead to one or more specific or programmatic biological opinions.

Nine regional conditions issued by the Los Angeles District became effective on April 19, 2002 (Special Public Notice, April 19, 2002). Of these, regional conditions 2, 3, and 4 are applicable to the GSOA and serve to 1) restrict the use and scope of certain NWPs within special aquatic sites, and 2) require notification for impacts to perennial watercourse or water bodies in Arizona and other areas. A copy of the regional conditions for the Los Angeles District is included in Appendix D (February 15, 2002 Regional Conditions).

3.2.2.3 Special Conditions. In addition to the general and regional conditions that provide procedural protections for CFPO during the NWP permit process, the COE may issue a NWP with special conditions. District Engineers may also add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy a public interest factor. Special conditions for a NWP verification will be directly related to the potential impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable. Legal requirements which may be satisfied by means of COE permit special conditions include compliance with the 404(b)(1) guidelines, the Endangered Species Act, and requirements imposed by conditions on state Section 401 water quality certifications. Where appropriate, the District Engineer may take into account the existence of controls imposed under other federal, state, or local programs which would achieve the objective of the desired condition, or the existence of an enforceable agreement between the applicant and another party concerned with the resource in question, in determining whether a proposal complies with the 404(b)(1) guidelines and other applicable statutes, and is not contrary to the public interest. In such cases, the Department of the Army permit will be conditioned to state that material changes in, or a failure to implement and enforce such program or agreement, will be grounds for modifying, suspending, or revoking the permit. If the District Engineer determines that special conditions are necessary to

insure that the proposal will not be contrary to the public interest, but that those conditions would not be reasonably implementable or enforceable, he or she can deny the permit.

Some typical special conditions used in the past within the GSOA include, but are not limited to, limiting all or some of the permitted activity to a period outside of key breeding or migrating seasons; requiring additional surveys prior to the onset of surface disturbing activities; and monitoring of sensitive biological or cultural resources during construction, etc.

3.2.3 Mitigation Requirements

Compensatory mitigation is an important component of the COE's regulatory program and is considered only after avoidance and minimization have been accomplished. Compensatory mitigation often is required for unavoidable permanent impacts and, within the GSOA, compensatory mitigation may consist of enhancement, creation, or restoration of aquatic or riparian habitats, in-lieu fee payments, or some combination thereof.

Until the March 2000 proposed regulations, most nationwide permit activities were not conditioned with compensatory mitigation requirements (PDEIS 2001 5-10). In Arizona, this is also the case, as evidenced by RAMS2 data, in which the ratio of WUS impacts to mitigation for all NWPs within the GSOA is about 3.5 acres to 1.0 acre. However, the March 2000 regulations both lowered the impact threshold for notification for numerous NWPs and increased compensatory mitigation requirements for activities requiring notification, therefore it is expected that the ratio of impacts to mitigation will decrease.

3.2.4 Discretionary Authority

The COE's regulations allow District Engineers to assert their discretionary authority "to review certain nationwide permit activities that may result in more than minimal adverse effects on the aquatic environment through the standard permit process" (PDEIS 2001, p. 5-3). It should be noted that "the decision to assert discretionary authority is based on concerns for the aquatic environment...and should not be used merely because a project is controversial" (ibid.). Thus, the COE has the option of elevating any NWP to an IP should there be concerns about the magnitude of potential impacts on aquatic and other resources.

3.2.5 Waters of the United States within the GSOA

The term "Waters of the United States" applies to the jurisdictional limits (the area within the Ordinary High Water Mark" [OHWM]) of the COE's authority under the Clean Water Act (see Figure 3-2). WUS are defined at 33 CFR 328.3 and generally include interstate waters, interstate wetlands, rivers, streams,

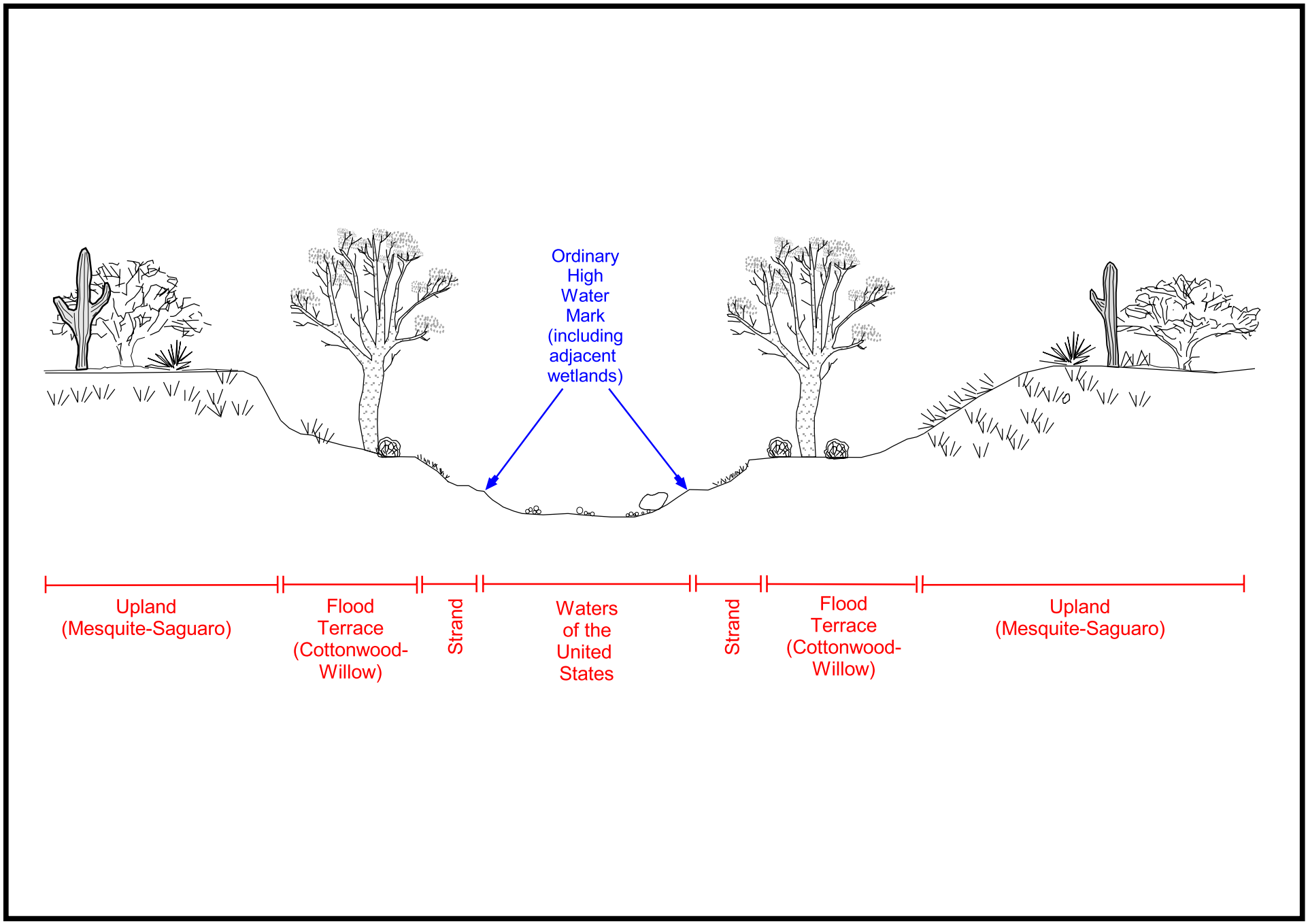

Figure 3-2. Illustration of "ordinary high water mark" and Waters of the United States.

mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, impoundments of waters, tributaries of waters, the territorial seas, and wetlands adjacent to waters, among others.

Although the COE maintains copies of aerial photographs or maps delineating WUS for project areas for which permit applications or notifications have been made, no COE-approved, comprehensive delineation of all WUS within the GSOA exists. Therefore, existing available data sources were used to provide a reasonable estimate of the distribution and total acreage of potential WUS for the entire GSOA by CFPO Survey Zone. Appendix C provides detail as to how this estimation was developed for the GSOA. Maps prepared to calculate this estimate using GIS software are maintained at the COE's office in Phoenix.

The estimation procedure described in Appendix C projects a total of 344,400 acres of WUS or approximately 2.72 percent of the 12.6 million-acre GSOA. A breakdown of this projection, by CFPO Survey Zone, is provided in Table 3-5.

Table 3-5. Projection of Acres of WUS by Survey Zone within the GSOA.

Zone	Zone Acreage	Projected WUS (ac)	WUS as Percent of Zone	Notes
1	710,000	20,267	2.85%	+/- 4,800 ac at 90% confidence interval
2	5,680,000	100,982	1.77%	+/- 29,282 ac at 90% confidence interval
3	6,249,000	223,151	0.03%	+/-213,782 ac at 90% confidence interval
TOTAL	**12,639,000 (GSOA)**	**344,400**	**2.72% (of GSOA)**	+/- 215,832 ac at 90% confidence interval

3.2.6 Data on Impacts to WUS and Impacts to Potentially Suitable CFPO Habitat

Based on data from the RAMS2 database, the acres of impact by the three frequency-of-use permit groups (B, C, and D) within each survey zone is provided below in Table 3-6 (note: these data do not account for mitigation requirements which would serve to ultimately reduce the permanent impact by some amount). Note

that survey zones 2 and 3 sustain the majority of impacts to WUS within the GSOA (111.41 + 85.21 = 196.66/224.69 = about 88 percent of total impacts), whereas survey zone 1, which contains habitat considered most important to CFPO, sustains the least (28.07/224.69 = about 12 percent of all WUS impacts). By extrapolation, it is likely then that indirect development impacts generally associated with 404 permitting are occurring in areas within the GSOA that are least likely to affect the areas most important to CFPPO. It is also important to note that overall impacts to WUS permitted in zones 1-3 between 1994-2000 represent an extremely small fraction (0.065%) of the total WUS projected to exist within the GSOA.

Table 3-6. Impacts to WUS in Acres and as a Percent of Projected WUS by Frequency-of-Use Groups B, C, and D and by Survey Zone (1994-2000).

	Impacts to WUS			
Freq. of Use Group	**Zone 1**	**Zone 2**	**Zone 3**	**Total**
B (rarely)	4.99 (0.024%)	16.42 (0.016%)	12.98 (0.005%)	34.39 (0.009%)
C (occasionally)	2.53 (0.012%)	7.30 (0.007%)	3.95 (0.001%)	13.78 (0.004%)
D (frequently)	20.55 (0.10%)	87.69 (0.086%)	68.28 (0.030%)	176.53 (0.051%)
TOTAL	**28.07 (0.138%)**	**111.41 (0.110%)**	**85.21 (0.038%)**	**224.69 (0.065%)**

3.2.7 Habitat Restoration Projects within the GSOA

In 1999, Pima County and the COE Los Angeles District entered into discussions regarding cooperative habitat restoration efforts. As a result of these discussions, Pima County is currently pursuing three riparian restoration projects in partnership with the COE: Paseo de las Iglesias, Rillito River Habitat Restoration, and Ajo Detention Basin (see http://www.co.pima.az.us/cmo/sdcp/sdcp2/reports/ER2.html). The feasibility of a fourth project along the Santa Cruz River, El Rio Antiguo, is under study. Brief descriptions of these projects are provided below (see http://www.co.pima.az.us/cmo/sdcp/sdcp2/plan/rippres.html).

- Paseo de las Iglesias (Walk of the Churches) is the name given to the recent plan to restore the Santa Cruz River between the San Xavier Mission, the San Augustin Mission, and the Convento site at the base of Sentinel Peak. The project provides potential recharge opportunities for CAP water, native farming restoration opportunities on the Tohono O'odham Reservation, preservation of an area rich in history and culture, and completion of missing trail links along the Santa Cruz River Park. The Juan Bautista de Anza National Trail, along the traditional route of the Camino Real, closely follows the

western edge of the river. Paseo de las Iglesias will provide low-flow bank protection for erosion threatened neighborhoods along the Santa Cruz River. The implementation of this type of flood control will allow for the restoration of the riparian habitat that once existed along the river.

- The proposed Rillito River Habitat Restoration Project would help restore the water table along Rillito Creek, which will benefit existing riparian areas along the Rillito River, Tanque Verde Creek, and lower Pantano Wash. Wetlands and riparian habitat will be restored along the south bank of the Rillito River west of Swan Road. A park will be constructed on the north bank of the River. Water supply for the project will consist of reclaimed treated wastewater transported from the Roger Road Treatment Plant. The water will be obtained from a reclaimed water pipeline that will be constructed along the Alamo Wash from the City of Tucson's reclaimed water distribution system to the wetland areas. This water will cycle through wetlands before being recharged in the riverbed. On-site storm water runoff will be directed to the wetlands as well as vegetated areas around them.

- The Ajo Detention Basin Project will restore 27 acres of wetlands and riparian habitat to a 120-acre flood control basin. The project will also extend the Tucson Diversion Channel, or Julian Wash River Park. In the final phase, the wetlands will be surrounded by an 18-hole golf course. The Ajo Detention Basin is located just north of Ajo Way and west of Country Club Road. The basin partially surrounds Sam Lena Park. The project will capture normally lost urban storm water within the project water features and will use this water for turf irrigation, thereby becoming an important water conservation project.

- The El Rio Antiguo Feasibility Study will assess ecosystem, recreation, and flood control opportunities and constraints within the Rillito Creek from Craycroft Road to Campbell Avenue.

3.2.8 Reasonable and Prudent Alternatives from FWS Biological Opinion on Section 7 Consultation

The COE, after preparation of this document, intends to enter into Section 7 consultation with the FWS for impacts of the NWP program in the GSOA on CFPO. The FWS' Biological Opinion may include reasonable and prudent alternatives (RPAs) to the Proposed Action (i.e., the NWP Program). It is possible that RPAs different than the alternatives considered in this document and developed as part of the Section 7 consultation may be considered and/or implemented by the COE.

3.3 FACTORS OUTSIDE OF COE CONTROL POTENTIALLY AFFECTING CFPO AND ITS HABITAT

3.3.1 Designated Critical Habitat

Section 7 of the ESA prohibits destruction or adverse modification of designated critical habitat by any activity funded, authorized, or carried out by any Federal agency. Activities on federal lands, and activities on private or state lands funded by a federal agency or requiring a permit from a federal agency, such as a permit from the COE under Section 404 of the Clean Water Act or a Section 402 permit from the Environmental Protection Agency, that occur within designated critical habitat are subject to the Section 7 consultation process. Activities on private lands within designated critical habitat but otherwise without a federal nexus are subject to Section 10 process under the ESA if they may affect CFPO.

According to the Federal Register (1999), "Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to the extent that the value of critical habitat for both the survival and recovery of CFPO is appreciably diminished." In a recent ruling by the Fifth Circuit Court of Appeals, however, the definition of destruction or adverse modification of critical habitat was found to be inconsistent with the ESA (Sierra Club v. Fish and Wildlife Service, 00-30117). The Court concluded that the ESA requires consultation where an action may affect the species' recovery alone; it is not necessary that an action also affect the survival of a species. This ruling will likely mean that federal agencies will be required to consult with FWS more frequently than if the impact standard were defined in terms of both survival and recovery.

On July 12, 1999, FWS designated critical habitat for CFPO (Federal Register 1999) and on September 21, 2001, this designation was overturned in Arizona District Court (see National Association of Homebuilders v. Norton, 00-903-PHX-SRB, Dist. Arizona). The former critical habitat units are contained entirely within the GSOA (Table 3-7, see also Figure 1-1). FWS is expected to redesignate critical habitat within the GSOA by early 2003 (Tucson Citizen, 11/20/01, "Owl habitat could double as a result of ruling").

Table 3-7. Approximate Acreage of Formerly Designated Critical Habitat within the GSOA by Survey Zone (rounded to the nearest 100 acres).

Survey Zone	Total Acreage of Critical Habitat	Percentage of Total Acreage
1	235,300	32
2	264,000	36
3	234,400	32
Total	**733,700**	**100**

3.3.2 Sonoran Desert Conservation Plan

Pima County is currently preparing the Sonoran Desert Conservation Plan (SDCP), a regional multi-species habitat conservation plan. A draft plan has been completed and adoption of the final SDCP is anticipated in 2002 (http://www.co.pima.az.us/info.html). The purpose of the habitat conservation planning process and subsequent issuance of incidental take permits is to authorize the incidental take of threatened and endangered species, not to authorize activities that result in take. The process ensures that the effects of the authorized incidental take will be minimized and mitigated to the maximum extent possible. Section 10(a)(2)(A) of the ESA requires an applicant filing for an incidental take permit to submit a "conservation plan" that specifies, among other things, the impacts that are likely to result from the taking and the measures the permit applicant will undertake to minimize and mitigate such impacts.

The ultimate biological goal of the SDCP is to ensure the long-term survival of the full spectrum of plants and animals indigenous to Pima County through maintaining or improving the habitat conditions and ecosystem functions necessary for their survival (http://www.co.pima.az.us/info.html). Among the objectives inherent within this biological goal is to promote the recovery of federally-listed, -proposed, and candidate species to the point where their continued existence is no longer at risk. To this end, Pima County is identifying priority vulnerable species and conservation areas upon which these species depend. These efforts have focused on CFPO (and other species), riparian resources, and critical and sensitive habitats with connecting corridors.

3.3.3 Growing Smarter Plus Legislation and Comprehensive Land Use Plan

The Growing Smarter Act is a comprehensive, statewide growth management plan that consists of a number of statutory changes designed "to further the best interests of our citizens by protecting our natural heritage and wisely managing the growth of our communities" (http://www.pr.state.az.us/partnerships/growingsmarter/growing.html). The Act, passed by Arizona voters in November 1998, established the Growing Smarter Grants program, which provides $20 million per year for 11 years beginning in state fiscal year 2001 to award grants for the acquisition of State Trust Lands. The goal of these grants is "to conserve open spaces in or near urban areas and other areas experiencing high growth pressures." Conservation may occur through permanent or temporary acquisitions, such as leases of up to 50 years in length, purchases of a parcel's development rights, or "fee simple" purchase of a parcel. Grants may be made by the Arizona State Parks Board for up to 50 percent of the appraised value of a land parcel. Eligible applicants include:

- State agencies;
- Political subdivisions of the state, defined per Arizona Revised Statutes §§ 38-431, and including without limitation all: counties, incorporated cities or towns, school districts, special districts; and
- Non-profit organizations that are exempt from federal income taxation under Section 501(c) of the Internal Revenue Code and that have the purpose of preserving open space.

As part of its compliance with this legislation, Pima County developed, and the Pima County Board of Supervisors recently adopted, a Comprehensive Land Use Plan that includes elements of the resource/habitat protection component of the Sonoran Desert Conservation Plan. While the specifics of these resource protection elements of the plan are fluid, it is anticipated that some increased level of protection for resources important to sensitive and protected species such as CFPO will be mandated by the Plan.

3.3.4 CFPO Draft Recovery Plan-Special Management Areas

A Recovery Plan for CFPO is currently being prepared by the FWS. In the most recent version of the Draft Recovery Plan (FWS 2001d), FWS has identified eight CFPO Recovery Areas in Arizona. Although the size, shape, and geographic locations of these Recovery Areas generally follow former designated critical habitat units, Recovery Areas also include additional areas.

Within these Recovery Areas, FWS has identified five areas of particular concern, called Special Management Areas (SMAs) (Figure 3-3). Guidelines for development activities within Recovery Areas and SMAs are described in the Draft Recovery Plan. These guidelines apply equally to capitol improvement projects (e.g., road construction, drainage projects, or flood control facilities). Development guidelines for Recovery Areas in general are:

- Development activities should not occur within 0.25 miles of an active nest site during the most sensitive period of the breeding and fledging season (February 1 through July 31). Development proposed within 330 feet of a known CFPO nest site should be evaluated on a site-specific basis, and significant modification of habitat within this area should be restricted year-round.

- Year-round restrictions should be placed on human activities within 330 feet of a CFPO nest. Proposed activities within this area should be evaluated on a case-by-case basis.

Development within SMAs is subject to more restrictive guidelines than Recovery Areas. With the exception of the Silverbell and Superstition SMAs, where FWS is recommending that areas of existing CFPO habitat remain undeveloped and areas not currently considered suitable be restored, the following two options are available for development actions that are smaller than the estimated CFPO home range (approximately 280 acres). These two options do not apply to large-scale projects with phased development.

- Development within the project boundaries should not exceed 20 percent of the land base and remaining open space should be configured to retain the highest quality CFPO habitat, as well as drainages or other linkages to adjacent suitable habitat; or

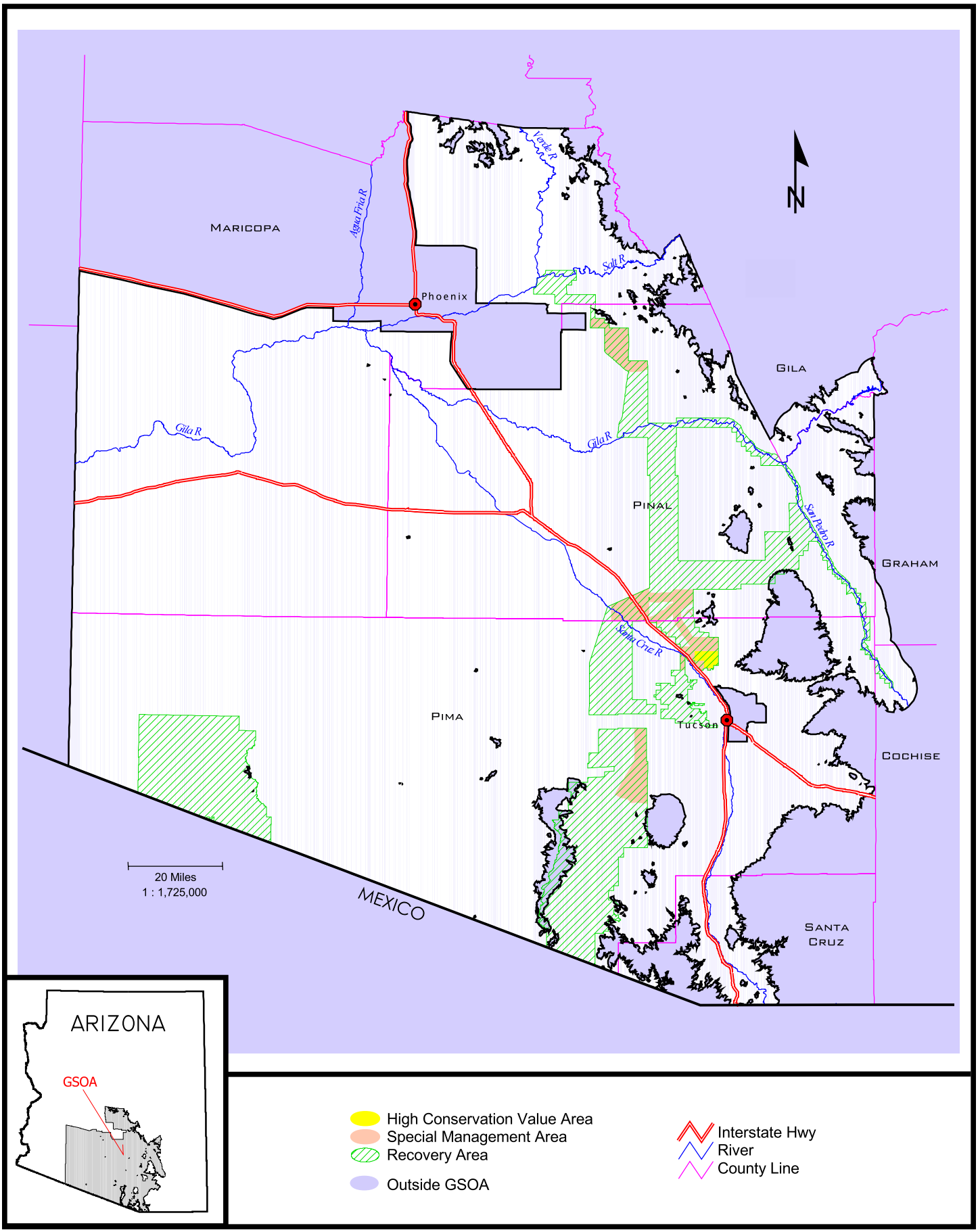

Figure 3-3. Regulatory units from USFWS Draft Recovery Plan (2001).

- Development within the project area may exceed 20 percent if the best CFPO habitat and linkages to adjacent habitat are maintained and if off-site conservation land is acquired so that disturbance related to the project is less than or equal to 20 percent within both the project area and off-site conservation areas.

3.3.5 Projects without a Federal Nexus

Within the GSOA, it is likely that many individual undeveloped parcels did not or will not in the foreseeable future require a federal permit or have a federal nexus (e.g., parcels zoned SR). A significant amount of private land within the GSOA can be, has been, and will continue to be developed as single-family residences, small commercial sites, or other developments without being subject to consultation under the ESA. The number of new construction permits[13] issued by Pima County, by CFPO survey zone, is provided in Table 3-8 (excludes tribal lands).

Table 3-8. New Construction Permits Issued by Pima County (1-1-97 to 12-11-00) by Survey Zone.

Survey Zone	Number of Housing Permits	Percentage of Total Permits
1	2,184	9
2	10,385	41
3	12,569	50
Total	**25,138**	**100**

During a recent 12-month period, the FWS has provided technical assistance regarding potential impacts to CFPO to approximately 500 individual projects without a federal nexus (e.g., single family residences, churches, fire stations, etc.) on individual lots (FWS 2001c).

3.3.6 Wildcat Subdivisions/Zoning

Another potential land use factor that may affect CFPO, particularly in the rural areas within the GSOA, is a phenomenon known as "wildcat" subdivisions – "sprawling tracts of land divided by a succession of owners in a way that leaves them exempt from basic county building requirements, such as putting in roads, sewers, and

[13] Includes single-family residences.

sidewalks" (*Wall Street Journal*, 1/30/01). Four out of 10 new homes (40 percent) in Pima County in 1999 were built on wildcat lots; this phenomenon also plagues Pinal and Santa Cruz Counties (ibid.), all of which are included wholly or in part within the GSOA. In 1994, the State of Arizona's regulations on subdividing were loosened to allow a landowner in unincorporated areas to divide a rural lot and sell the smaller parcels without state or even county authorization. Therefore, this type of land development triggers no local, state, or federal oversight, although it should be noted that 404 permit requirements would apply to such subdivisions if development by subsequent landowners affects WUS.

Zoning is also a factor outside of COE control that may contribute to the potential for cumulative impacts to CFPO and its habitat. Approximately 1.3 million acres[14] of the GSOA is zoned for residential development. Because the activities to construct a single-family residence may only rarely trigger Section 404 permitting, may never trigger Section 402 general construction compliance, and because individual homeowners may also be unaware of the Section 404 requirements, it is possible that a large portion of the GSOA could be developed for residential use without any need for a federal permit.

3.3.7 Grazing and Public Lands Recreation

A significant portion of the GSOA, about 8.9 million acres[15] or 71percent, is estimated to be subject to grazing and public lands recreation, two historic and current land uses that have the potential to contribute to impacts to CFPO and its habitat (see Figure 3-4). About 3,525,700 acres or about 28 percent of the GSOA is administered and managed by federal agencies (Forest Service, Bureau of Land Management, National Park Service, FWS, Bureau of Reclamation, etc., excluding military). The next largest land administrator is the Arizona State Lands Department, which oversees roughly 2,382,000 acres of land, or 19 percent within the GSOA. Both land management agencies generally make large tracts of public lands available for grazing leases and public recreation. In addition, about 3,402,000 acres of land, or 27 percent of the GSOA, is tribal lands, much of which is also used for grazing, hunting, and wood collecting by tribal members or other authorized entities. Some private lands within the GSOA are also grazed, particularly those adjacent to ASLD lands.

To estimate the approximate intensity of grazing on these lands, data on grazing in Animal Units per year per section of land (cows grazed per square mile for one year) were collected from ASLD and from BLM for portions of their lands within the GSOA. Within portions of the GSOA, BLM and ASLD lands are grazed by an average of 5.2 to 7.4 cattle per square mile of land per year, respectively (see Table 3-9). To put this grazing density into context, grazing on BLM lands generally ranges from two Animal Units per year in poor quality habitats to as much as 13 Animal Units per year for areas such as the Sonoita Grasslands (G. Drennan, BLM Tucson Field Office, pers. comm.), where higher rainfall supports more forage per acre of land.

[14] This number, which excludes tribal lands within Pima County, represents 24 percent of the GSOA. The actual proportion of the GSOA that is zoned for residential development is expected to be higher if zoning data for residential areas in other counties within the GSOA could have been obtained.

[15] This number includes portions of ASLD, BLM, FS, tribal, and private lands within the GSOA.

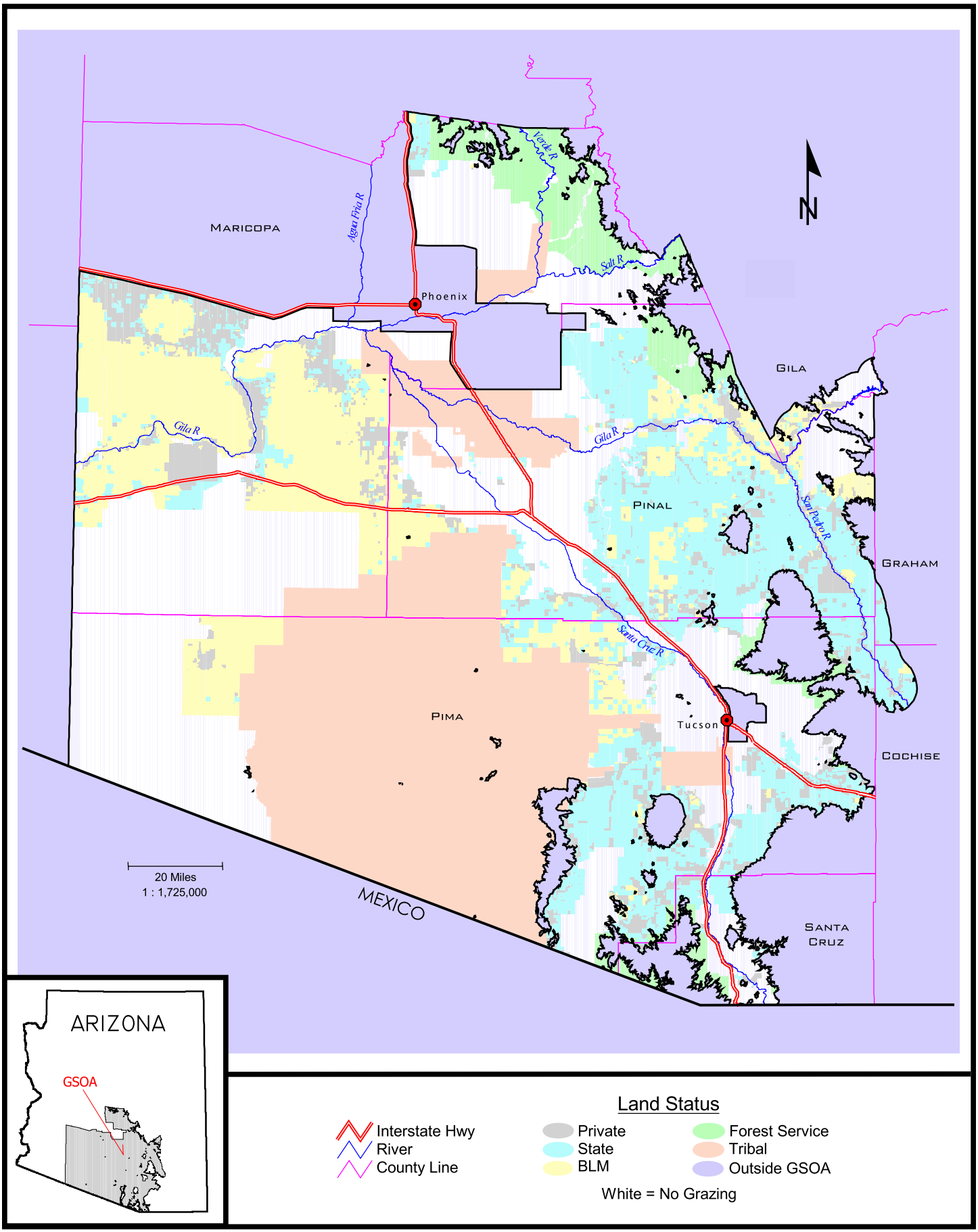

Figure 3-4. Lands available for grazing in the GSOA.

Table 3-9. Grazing Levels on ASLD and BLM Lands within the GSOA

Land Management Agency	Acres Grazed	Animal Units (AUs)[3] per year	Ave. No. Cows per Section (640 acres)
ASLD Pima County[1]	864,000	10,000	7.40
ASLD Pinal County[1]	1,210,000	14,000	7.40
BLM Tucson District (Pima and Pinal Counties)[2]	574,000	4,700	5.24

[1] Steven Williams, Range Specialist ASLD, personal communication.

[2] Grant Drennen, Range Specialist, BLM Tucson Field Office, personal communication.

[3] On AU is the amount of forage needed to support one cow and one calf in an average year.

Whereas stock grazing, *per se*, is unlikely to directly impact CFPO or nest sites, heavy grazing is widely recognized as common cause of degradation of watersheds and riparian habitat in Arizona (Final Rule, Federal Register 1997). Changes in watershed hydrology from overgrazing are often linked to subsequent changes in riparian plant community structure, species composition, relative species abundance, and plant density (ibid.) and "are likely to affect the habitat characteristics critical to the pygmy-owl" (ibid.).

It has been suggested that recreational activities are now the second- most pervasive impact upon threatened and endangered species in the western United States (Nabhan and Holdsworth 1999). According to the Draft Recovery Plan for CFPO (FWS 2001d), CFPO inhabit areas used for a variety of recreational purposes. These activities include bird watching, hiking, unmanaged target shooting, off-highway vehicle use, and other events or activities that concentrate human activity. Some of these activities could disturb CFPO, especially during the breeding and fledging season, or could possibly result in direct mortality.

3.3.8 Tribal Lands and Administration

Tribal lands constitute a significant portion of the GSOA (27%). This factor is an important consideration in the assessment of cumulative impacts to CFPO in that the principle and practice of Native American tribal sovereignity affords tribes much control over land use activities that may affect CFPO.

Within the GSOA, the seven tribal reservations include those of the Pascua Yaqui Tribe of Arizona, the Tohono O'odham Nation, the Gila River Indian Community, the Salt River-Maricopa Indian Community, Fort McDowell/Mohave-Apache Community, the Ak Chin Indian Community, and the San Carlos Apache Tribe. None of the tribal lands has been included in any of the survey zones or in formerly designated critical habitat, however, much of the CFPO's historic range in Arizona includes all or most of these tribal areas. It is also

likely that a good portion of potentially suitable habitat for CFPO lies within the undeveloped portions of the Tohono O'odham Nation lands and that the proximity of these areas to potential habitat in Mexico, where good numbers of CFPO have been documented (Baucom and Flesch 2000), increases the likelihood that CFPOs use these areas. Records of CFPO observations on tribal lands are largely anecdotal, as the tribes are not obligated to report survey results unless a federal nexus exists, but according to Dr. Roy Johnson (CFPO Recovery Team, 2002 unpubl. data), CFPO have been found there during surveys and Tohono O'odham Nation lands likely support the largest single concentration of CFPO in Arizona.

3.3.9 State/Local/Municipal Ordinances

Within the GSOA, several local and municipal ordinances are in effect that may protect or otherwise affect constituent elements of CFPO habitat. Selected ordinances that affect key portions of the GSOA are described below.

3.3.9.1 Arizona Native Plant Law. The Arizona Department of Agriculture (ADA) administers the Arizona Native Plant Law (ANPL), and lists the plants protected under this legislation. The ANPL protects plants, including plant species considered to be elements of suitable habitat for CFPO, at some level on all lands in Arizona regardless of ownership. Exceptions exist for maintenance of existing developed properties less than 10 acres, maintenance of existing utilities and their associated rights-of-way, and for emergencies. The law categorizes protected plants as highly safeguarded, salvage restricted, salvage assessed, and harvest restricted. No collection of highly safeguarded plants is allowed. Salvage restricted plants, such as saguaros and native trees, may be collected and transported off the property with a permit from ADA. Harvest restricted plants are those considered by the ADA to be subject to excessive harvesting or overcutting because of their intrinsic value. Destruction of salvage restricted and salvage assessed plants on private lands requires submission to ADA of a notice to clear land. For areas from one acre to 40 in size, a written notice of intent (NOI) must be submitted 30 days prior to destruction of any protected species. For areas greater than 40 acres, the NOI must be submitted to the ADA 60 days prior to destruction of any protected species. Following confirmation from the ADA, a salvage permit and tags are required before any plants are salvaged or removed from the area. Salvage and removal are generally restricted to those individual plants judged to be of medium-to-high quality and possessing moderate-to-high transplant potential.

3.3.9.2 Pima County Watercourse and Riparian Habitat Protection and Mitigation Requirements. Article X of the "Pima County Floodplain and Erosion Hazard Management Ordinance" entitled, Watercourse and Riparian Habitat Protection and Mitigation Requirements" was amended and adopted by the Pima County Board of Supervisors on July 14, 1998, for the purpose of enhancing wildlife values by preserving riparian vegetation along watercourses and floodplains.

Riparian habitat is defined as plant communities occurring in association with any spring, cienega, lake, watercourse, river, stream, creek, wash, arroyo, or other body of water, either surface or subsurface, or channel having banks and bed through which waters flow at least periodically. These habitats are generally characterized or distinguished by a difference in plant species composition or an increase in the size and/or

density of vegetation as compared to upland areas. These communities represent a continuum of plant species' response to available moisture and can be subdivided into hydroriparian, mesoriparian, and xeroriparian.

As part of the floodplain use permit process for a property subject to the provisions of this ordinance, the proposed development is reviewed for impacts to existing riparian habitat. A floodplain use permit shall be required:

- When a total of one third (1/3) acre of the riparian area of a subject property is to be altered; or
- When any hydroriparian and/or mesoriparian habitat is to be altered; or
- When, in order to avoid such alteration of the riparian habitat area on the subject property, a modification of development standards under Section 18.07.080 of the Pima County Zoning Code is necessary.

3.3.9.3 Pima County Native Plant Preservation Ordinance. The purpose of this ordinance is to promote the preservation of individual plants and plant communities of protected and primarily upland plant species native to Pima County, Arizona, by adopting comprehensive requirements for preservation-in-place, transplantation on-site, and mitigation. The following general requirements apply to all development:

- No person shall destroy, mutilate, remove from a site, or relocate on a site any native plant, except in conformance with the requirements of this chapter.
- Grubbing, grading, or clearing permits shall not be issued, and no person may grub, grade, or clear a site or any portion of a site having one or more native plants existing prior to the effective date of this chapter, except in conformance with an approved grading plan and after the preservation plan approval requirements in this chapter have been met, and the required permits have been issued.
- No plans for a site with one or more native plants shall be approved and no permits shall be issued by Pima County for any development prior to submittal and approval of a preservation plan except as provided in Subsections 18.72.050 B and C of the ordinance.
- A preservation plan and its implementation shall comply with this ordinance, the preservation manual, and the Arizona Native Plant Statute.

3.3.9.4 City of Tucson Native Plant Preservation Ordinance. Similar to the Pima County ordinance, this ordinance is intended to encourage preservation-in-place of healthy native plants through sensitive site design which minimizes the disruption of areas within the site containing native plants, while allowing for salvage and transplanting plants on the site that are likely to survive. The ordinance also provides for replacement of plants that are removed for development at ratios to assure site revegetation and to compensate for probable loss of transplanted and replacement plants. Mitigation credits are offered to encourage preservation-in-place. Mature trees and saguaros are given particular consideration for preservation-in-place. When preservation-in-place is not possible, emphasis is next given to plant salvage for use elsewhere on the site, and lastly, if plants are

removed from the site, the revegetation concept emphasizes the recreation of the natural character and plant distribution similar to the undisturbed vegetation on and adjacent to the subject site.

3.3.9.5 Others Ordinances within the GSOA. Some other ordinances within the GSOA that may provide direct or indirect protections for CFPO and its habitat are listed below. These ordinances may or may not represent the entire range of ordinances within the GSOA that may potentially affect CFPO and its habitat.

- **Town of Oro Valley Native Plant Preservation Ordinance.** This ordinance is designed to provide standards for the protection of native plants, which provide habitat for native wildlife, site stabilization and revegetation for all development projects within Oro Valley so as to enhance and promote the native landscape character of the Town. A site resource inventory and Native Plant Preservation, Salvage and Mitigation Plan, must be submitted in conjunction with a preliminary plat or development plan submittal. This plan emphasizes the preserving and protecting of in-place vegetation and the salvage of protected species by preserving and protecting the existing Sonoran Desert landscape, including riparian areas, organic and inorganic materials, rock outcroppings and associated vegetation; preserving native vegetation, which stabilizes desert soils and is an important habitat component by providing cover, food and nesting sties for numerous desert wildlife species; preserving under-story vegetation that is a significant component of the vegetative community; mitigating the impact of development on significant vegetation; promoting the design of developments that incorporate the existing natural environment and, enhance the existing native vegetation; and requiring salvage and use of native vegetation, which is drought tolerant, requires less maintenance and uses less water.

- **Town of Oro Valley Grading Permit.** The purpose of this ordinance is to provide for the public health, safety, and general welfare and to protect and preserve the aesthetics of the natural environment through regulation of all types of excavation and earthwork on private and/or public land. Among the stated purposes of this ordinance is to preserve the native vegetation and the visual character of the site. Grading Permits are required for a variety of activities including single family residential development where clearing vegetation will encompass an area of 1,000 square feet or more, residential developments consisting of more than two platted lots, construction of any new public or private street or roadway, and construction of commercial, office or resort developments. Grading permits require the submission of a grading plan which contains among other things, the extent and manner of preserving, relocation, clearing and disposing of vegetation.

- **Town of Oro Valley Riparian Habitat Protection Overlay District.** The purpose of this Article is to protect and enhance riparian areas by instituting standards for preservation of riparian habitats associated with watercourses and significant stands of native vegetation in order to protect the valuable, limited and endangered natural riparian habitat resources of the Town of Oro Valley; provide an ecologically sound transition between riparian habitat communities and developed/developing areas; assure the continuation of existing or natural functions, values and benefits provided by riparian habitat resources; protect aesthetic and environmental values of riparian habitats for the enjoyment of citizens and visitors; and maintain linear continuity for riparian habitat.

Maps delineating areas designated as Riparian Habitat within the Town of Oro Valley are available in the Oro Valley Planning and Zoning Department. Identified riparian areas must be protected from development, in accordance with the policies set forth in the Riparian Habitat Protection Overlay District, the General Plan and other adopted plans and policy documents of the Town of Oro Valley. If it is determined that encroachment into identified riparian areas is to occur, a Riparian Habitat Study and Mitigation Plan must be prepared.

- **Town of Marana Protection of Native Plants.** The Town of Marana's Native Plant Program is similar to other native plant plans used by various municipalities and Pima County in its intent to preserve and protect native vegetation. The ordinance states that "No person shall destroy, mutilate, remove from the premises or relocate to another place on the premises any cacti, indigenous trees and shrubs which are four inches or greater in caliper, and all plants listed in the endangered species act as threatened, endangered, and species which are included in the listing of significant native vegetation...without first applying for and obtaining a native plant permit from the Town..."

  To obtain a Native Plant Permit the applicant must submit a Native Plant Program, which specifies the proposed treatment of protected native plants that will be disturbed. Among other things, the Native Plant Program must provide a vegetation inventory and analysis that lists the type of vegetation, its condition and salvageability. The proposed program should protect vegetation along rivers and washes by limiting encroachment of streams and washes to 10 feet per one hundred cubic feet per second maximum reported flow rate measured from the centerline of the river channel or wash.

3.3.10 EPA's Section 402 National Pollutant Discharge Elimination System (NPDES) Permit

In addition to the COE's Section 404 permit program, the U.S. Environmental Protection Agency (EPA) administers a federal permit program that applies to surface-disturbing construction activities that could potentially affect CFPO and its habitat. Section 301(a) of the Clean Water Act provides that the discharge of any pollutant to WUS is unlawful except in accordance with an NPDES permit. Section 402 of the CWA establishes the NPDES program, which is designed to limit the discharge of pollutants into WUS, from point sources, non-point sources, and from general construction. While the EPA has delegated responsibility for this permit to some state agencies, administration of this permit program in Arizona currently is maintained by EPA's Region IX office.

Regardless of land ownership status, operators of construction sites where five or more acres are disturbed, smaller sites that are part of a larger common plan of development of cumulative disturbance of five acres, or any site designated by the EPA must submit a Notice of Intent for Storm Water Discharges Associated with Construction Activity (NOI) to obtain coverage under a NPDES Stormwater Construction General Permit (33 USC 1251 et seq.). This self-regulating permit program relies on construction site operators to accurately complete an NOI, including questions about compliance with the provisions of the ESA (i.e., Are there any listed endangered or threatened species, or designated critical habitat in the project area? Do you certify that you meet one the following criteria such that you are eligible for coverage under this permit?). Although

considered a federal nexus, issuance of this permit in the past has been subject infrequently to Section 7 consultations in Arizona, either because another federal nexus was readily available (generally, a COE Section 404 permit), the applicant either was not aware of the obligation of the EPA to be the lead agency if such a consultation was warranted, and/or the applicant chose to enter directly into consultation with FWS (E. Bromley, EPA, pers. comm.).

At this time, the Arizona Department of Environmental Quality (ADEQ) is in the process of seeking authority from the EPA to administer the NPDES program; EPA expects this transfer to take place in summer 2002 (ibid.). In addition, EPA is planning to reduce the threshold for Notification from five acres to one acre sometime in 2003 (ibid.).

3.3.11 Groundwater Pumping in the Tucson Basin

Another factor outside of COE control that, at least historically, affected CFPO and its habitat is groundwater pumping in the Tucson basin. Significant volumes of groundwater have been and are currently pumped for municipal and private potable water supplies, agriculture, and mining. Within the Tucson area in the GSOA, approximately 6 to 8 million acre-feet or roughly 9 to 11 percent of the total aquifer volume, has been pumped from the Tucson Basin and Avra Valley Basin aquifers since 1940 (Water in the Tucson Area: Seeking Sustainability, p. 18). These "stored groundwater supplies have not been substantially renewed for many years" (ibid.). Presently, depths to water in the greater Tucson metropolitan area range from less than 50 feet to more than 900 feet (ibid.). "Between the 1940s and 1995, groundwater levels declined over 150 feet northwest of the Green Valley/Sahuarita area as a result of pumping by copper mines. Water levels declined more than 200 feet in parts of the Central Wellfield and over 100 ft in the Southside Wellfield due to pumping by the City of Tucson. With retirement of some agricultural lands, the availability of Central Arizona Project water for drinking, industrial, and commercial uses, and effluent recharge efforts, groundwater level declines have slowed or have stopped in some parts of the GSOA (ibid.).

To the degree that mesquite bosques and cottonwood/willow forests historically provided habitat for CFPO, groundwater pumping and the subsequent drawdown of the water table has in the past and continues to represent a threat to these habitats (see Figure 3-5, which depicts all wells within the GSOA registered with Arizona Department of Water Resources). With typical depths to groundwater of less than 5 m for cottonwood and willow forests (Stromberg 1993b) and generally not more than 15 m for mesquites (Stromberg 1993a), groundwater withdrawal within parts of the GSOA has likely degraded historical CFPO habitats by causing "reduced growth and survivorship of trees, reduced riparian stand area, and composition shifts toward more xeric species" (ibid.).

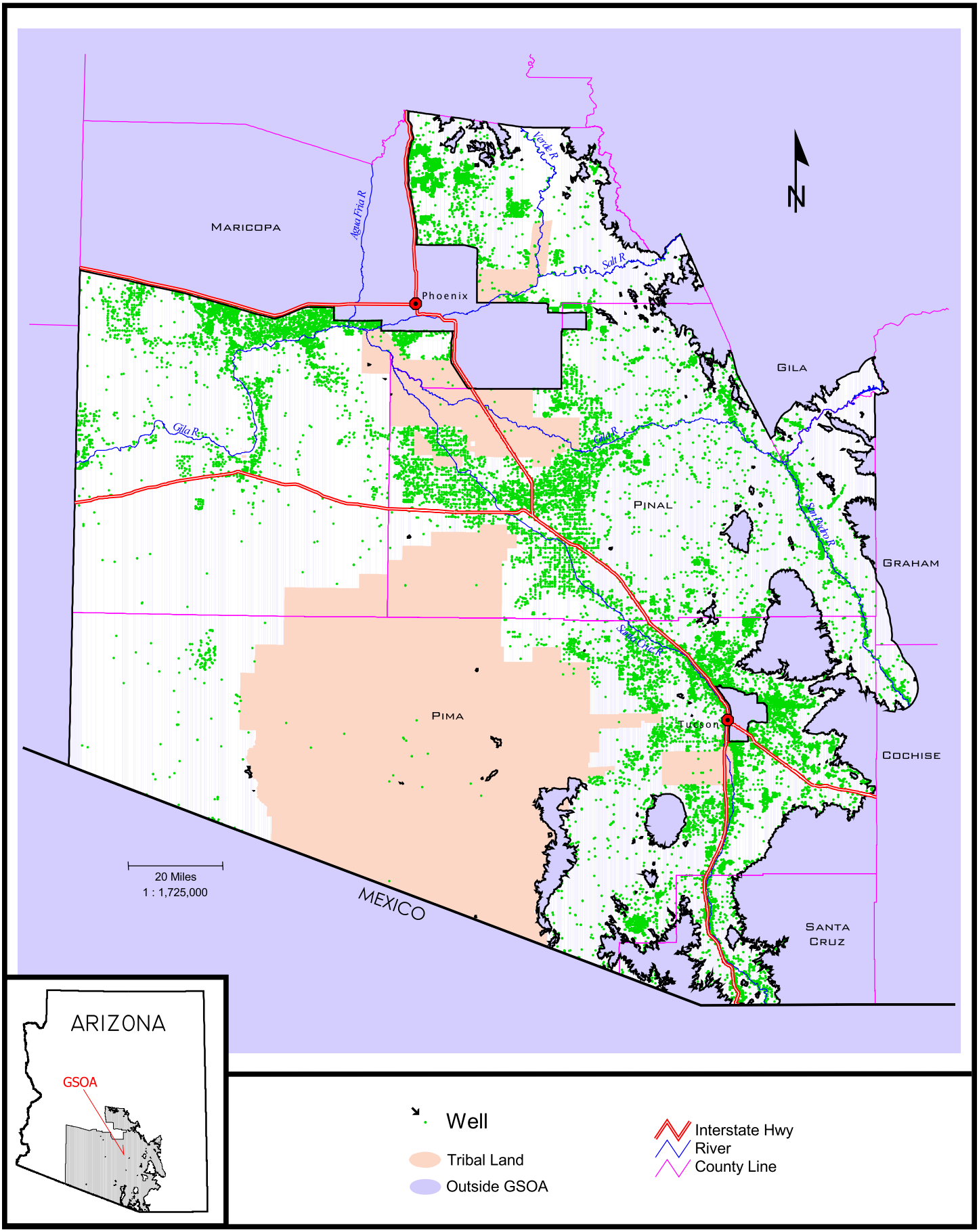

Figure 3-5. Distribution of the 32,930 wells in the GSOA (source: AZ Dept. of Water Resources, 2001; incomplete for tribal land).

CHAPTER 4

ENVIRONMENTAL CONSEQUENCES OF ALTERNATIVES ON CFPO

4.1 INTRODUCTION

This chapter assesses the direct, indirect, and cumulative impacts of the six alternatives described in Chapter 2 on CFPO and its habitat within the GSOA. The six alternatives are:

Alternative 1 (No Action): Do not apply the NWP program within the GSOA.

Alternative 2: Implement 43 NWPs and 27 general conditions.

Alternative 3: Implement 43 NWPs and 27 general conditions with regional conditions.

Alternative 4: Implement 43 NWPs and 27 general conditions with regional and case-specific special conditions.

Alternative 5: Implement 43 NWPs and 27 general conditions with regional and case-specific special conditions and include a new regional condition requiring notification for all regulated activities as determined by the programmatic Section 7 consultation.

Alternative 6: Revoke all 43 NWPs and 27 general conditions; establish a Section 404 Regional General Permit within the GSOA that authorizes permanent impacts in WUS of up to 3 acres.

4.2 TYPES OF EFFECTS ANALYZED AND KEY ASSUMPTIONS

Three types of effects are evaluated in this chapter. A **direct effect** is *caused* by the action and occurs at the same time and same place as the action. An **indirect effect** is also caused by the action, but occurs later in time or is farther removed in distance from the action (40 CFR 1508.8). A **cumulative effect** on a resource results from the incremental impacts of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or non-Federal) or person undertakes such actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time (40 CFR 1508.7).

The analysis is based on several key assumptions, as listed below.

- An action having no impact on a resource cannot contribute to cumulative impacts to that resource. Therefore, the 24 NWPs that have not been used or are extremely unlikely to be issued in the future within the GSOA (see Table 3-4, Category A permits) are not expected to contribute to direct, indirect, or cumulative impacts to CFPO and its habitat and therefore are excluded from these analyses.

- Direct impacts from COE-permitted activities are limited to those impacts that occur within their jurisdictional area, i.e., within the boundaries of the Ordinary High Water Mark (OHWM). Direct effects may also include temporary impacts outside of the OHWM associated with the actual construction of the proposed project (i.e., dust, noise, and human-related disturbance).

- Indirect impacts from COE-permitted activities may include those that occur later in time or are farther removed in distance (e.g., upland clearing for residential development, mining, utilities installation, etc.; permanent/long-term noise, dust, and human activity associated with residential, commercial, or industrial developments; and unmitigated downstream dewatering, scouring, or flooding). The COE expands its scope of analysis to include consideration of indirect impacts outside of OHWM only when it has sufficient control and responsibility to warrant Federal review.

- The degree to which the indirect impacts listed above can be attributed to COE-permitted activities is highly debatable, as numerous other federal, state, and local approvals and authorizations are also necessary to implement most types of land development that may affect CFPO and its habitat. Furthermore, as described in Chapter 3, there are a variety of factors outside of COE control that may cumulatively affect CFPO and its habitat within the GSOA, regardless of COE permit actions.

- For proposed permit activities of any magnitude, the COE makes a case-by-case determination whether the proposed activity 'may affect' CFPO or its habitat. For those projects that the COE determines 'may affect' the CFPO or its habitat, the COE conducts a Section 7 consultation with FWS. The Section 7 consultation may result in mitigation measures for potential impacts to CFPO and its habitat, the measures may be incorporated as conditions of the COE's permit. Based on the mitigation measures developed in past Section 7 consultations within the GSOA for projects that may affect CFPO, one such requirement that is frequently used as a special condition is to construct the project outside of the CFPO breeding season, which effectively precludes direct, temporary impacts associated with construction (dust, noise, and human activity). This special condition, when applied, generally removes the potential for several NWPs used within the GSOA to have any indirect impacts on CFPO or its habitat (e.g., 3, 6, 7, 13, 25, 27, 32, 33, 37, and 41 as listed in Table 4-1 have the potential to have indirect impacts).

Table 4-1. Summary of the Potential of NWPs Used within the GSOA to Have Indirect Impacts on CFPO or its Habitat

Frequency	NWP	Activity	Human Disturbance (dust, noise, etc.)	Downstream Impacts (unmitigated)	Upland Vegetation Loss
Rarely – Occasionally	**3**	**Maintenance**	**N**	**N**	**N**
	6	**Survey Activities**	**N**	**N**	**N**
	7	**Outfall Structures and Maintenance**	**N**	**N**	**N**
	12	Utilities Line Activities	P	N	P
	13	**Bank Stabilization**	**P**	**N**	**P**
	18	Minor Discharges	P	N	N
	25	**Structural Discharges**	**P**	**N**	**P**
	27	**Stream and Wetland Restoration**	**P**	**P**	**P**
	32	**Completed Enforcement Actions**	**N**	**N**	**N**
	33	**Temporary Construction, Access, and Dewatering**	**N**	**N**	**N**
	37	**Emergency Watershed Protection and Rehabilitation**	**N**	**N**	**N**
	40	Agricultural Activities	Y	N	P
	41	**Reshaping Existing Drainage Ditches**	**N**	**N**	**N**
	42	Existing Recreational Facilities (nature centers, bike paths))	N	N	Y
	43	Stormwater Management Activities	N	N	Y
	44	Sand & Gravel Mining Activities	Y	N	Y
Regularly	14	Linear Public Road Crossings	Y	N	Y
Frequently	26	Headwaters (EXPIRED)	Y	N	Y
	39	Residential, Commercial, and Institutional Developments	Y	N	Y

Key: Y = yes ; N = no or insignificant; P = possible; **Bolding** indicates NWPs issued within the GSOA that are unlikely to have direct or indirect impacts on CFPO or their habitat.

4.3 CONTEXT FOR CUMULATIVE IMPACTS TO CFPO

The status of CFPO and its habitat from historic to present time provides a general context or framework for the assessment of impacts of the six alternatives. Historical threats and impacts to CFPO and its habitat have been summarized in Chapter 3 and extensively in other documents, which are incorporated by reference (Cartron, J.E. and Finch, D.M, tech. eds., 2000; Final Rule on the Determination to List CFPO [50 CFR Part 17 Federal Register Vol. 62, No. 46, 3/10/97 p. 10730 - 10747]). The key findings of these summaries include the following:

- While "it is generally reported that the Arizona population of cactus ferruginous pygmy-owls started to decline sharply around 1950 (Monson and Phillips 1981, Abbate et al. 1996), the lack of information means that the owl population decline could have begun earlier (Cartron and Finch 2000). Indeed, Johnson et al. (Unpublished ms. 2001) report that "a population decline apparently occurred between 1909 and 1933" and that this decline "closely parallels" the desertification of Arizona's rivers (ibid.).

- "...the magnitude of any population decline [of CFPO] is confounded by the lack of baseline information, especially in desertscrub, and the recent increase in sampling effort resulting in more detections..." (Cartron and Finch 2000).

- "The fact that pygmy-owls are now found in desertscrub rather than riparian areas further confounds any effort to evaluate the magnitude and timing of a population decline in the Tucson area" (Cartron and Finch 2000).

- "The relative instability of peripheral populations may help explain why the largely tropical ferruginous pygmy-owl seemingly experienced a population decline in Arizona, at the very northern edge of its distribution" (Cartron and Finch 2000).

- "The cactus ferruginous pygmy-owl is threatened by past, present, and potential future destruction and modification of its habitat...The severity of habitat loss and threats varies across the pygmy-owl's range" (Federal Register, 1997).

- "These [habitat] losses are attributed to urban and agricultural encroachment, woodcutting, water diversion, channelization, livestock overgrazing, groundwater pumping, and hydrological changes resulting from various land-use practices (ibid.).

- It has been estimated that up to 90 percent of low-elevation riparian habitats in the southwestern U.S. have been modified or lost (ibid.).

- One hypothesis regarding CFPO's occupancy of desertscrub habitats is that "the pygmy-owl adapted to upland cactus associations and xeroriparian habitats in response to the demise of Arizona's riverbottom woodlands" (ibid.). However, this may be because "...descertscrub habitats simply are of lesser quality, and have always been occupied by pygmy-owls at lower frequency and density" (ibid.).

- Potential future threats to pygmy-owl habitat include the expanding human populations in the U.S.-Mexico border region, extensive industrial, municipal, and agricultural developments facilitated by the North American Free Trade Agreement that may cause accelerated habitat loss and demands on groundwater (ibid.)

Additionally, a review of the available RAMS2 provides these additional findings as part of the context in which impacts from the NWP program would occur:

- Within the GSOA, the rate of NWPs issued is 565 per 6 yrs = about 94 NWPs per year

- Average WUS impact[16]/NWP[17] =0.39 ac (within the GSOA)

4.4 ALTERNATIVE 1 (NO ACTION): DO NOT APPLY THE NWP PROGRAM WITHIN THE GSOA

Under the No Action alternative, no NWPs would be issued within the GSOA and instead, all activities subject to Section 404 permitting under the Clean Water Act, regardless of magnitude, would be authorized by Individual Permits (IPs). Under this alternative, the same types of activities that are permitted under the NWP program would be allowed, but all activities would be subject to the notification, alternatives and environmental analyses, and mitigation requirements of the IP program regardless of the acreage of impact or the nature of the activity. The COE would prepare public notices for all permit activities, including those affecting less than 1/10 acre of WUS. For those projects in which the COE determines there is a potential for effect on CFPO, consultation with FWS as required under Section 7 of the ESA would be undertaken by the COE (for non-federal applicants; federal applicants would undertake Section 7 consultation themselves).

[16] This number represents unmitigated impacts to WUS.

[17] Data are based on NWPs that are rarely to frequently issued in the GSOA.

4.4.1 Direct Impacts

All direct impacts to CFPO would be considered during the IP review process. Typically formal Section 7 consultation with FWS would be required to address the direct impacts to CFPO or its designated habitat. Each project with direct impacts to CFPO or critical habitat would require individual consultation with FWS prior to COE issuing any IP.

Special conditions typically agreed to in the Section 7 consultation and attached to the Section 404 permit, such as the requirement to construct the project outside of the pygmy owl's breeding season, preclude the most common, potential, temporary impacts associated with construction (noise, dust, and human disturbance). Therefore, all direct impacts to pygmy owls or their habitat would be considered and mitigated through the biological opinion issued by the FWS concluding the Section 7 consultation.

4.4.2 Indirect Impacts

Under this alternative, indirect impacts on CFPO could occur from activities permitted under IPs but those activities where the COE has made a "may affect determination" would be subject to compensatory mitigation requirements and the provisions of the Section 7 consultation process. Therefore, potential indirect impacts to CFPO such as off-site upland and/or downstream impacts or the addition of permanent human activity (e.g., noise, dust, traffic, disturbance, etc.) as a result of an IP are generally precluded or mitigated by the procedural protections of the Section 7 consultation process and the IP review process.

It is important to note that many indirect impacts are facilitated by a variety of factors completely outside the control of the COE. Factors completely beyond the COE's control such as zoning, private property rights, the issuance of grading or other permits by municipalities, compliance with native plant preservation ordinances and floodplain ordinances, tribal sovereignity, etc. also need to be considered when evaluating cumulative impacts to CFPO and its habitat from otherwise legal land development activities, including issuance of a 404 permit. Therefore, it is not possible to attribute the impacts to CFPO and its habitat from otherwise legal land development solely to COE-permitted actions.

With regard to downstream impacts, the COE precludes or minimizes impacts to downstream areas to the maximum extent by requiring that 1) hydrological flow is maintained during and after construction; 2) preconstruction contours are restored after construction is complete; and 3) temporal and physical loss of riparian habitats associated with project-related impacts to WUS is mitigated.

For indirect impacts when the COE has made a 'may affect' determination, the Section 7 consultation and compensatory mitigation requirements under the COE's IP process for activities near or within an owl's territory would ensure that avoidance, minimization, or adequate mitigation is accomplished.

It is also notable that "current information suggests that CFPOs can live and breed successfully in areas that have undergone at lease some degree of low-density human development" (FWS, Biological Opinion on the

Crescent Ridge Apartments in Pima County, Arizona, July 27, 2001). Based on a sample size of six breeding owl sites, wildlife resource agencies estimate that the average amount of vegetation disturbance (e.g., roads, buildings, corrals, pastures, parking lots, golf courses, etc.) that can be tolerated by breeding pygmy-owls is about 21 percent (ibid.). For non-breeding pygmy-owls, the amount of vegetation disturbance within the home range averaged 39 percent, suggesting that "single owls may be able to tolerate higher levels of development and more marginal habitats [than breeding owls]" (ibid.). These data, while limited, suggest that the indirect effects of low-density residential land development, including that associated with issuance of NWPs, may not be adverse to CFPO and its habitat in all cases.

4.4.3 Cumulative Impacts

This alternative has programmatically very little potential to contribute to cumulative impacts to CFPO because all activities subject to Section 404 of the Clean Water Act, regardless of magnitude or type of activity, would undergo the COE's IP review and any activities that the COE determines 'may affect' CFPO or its habitat would be subject to both the COE's compensatory mitigation requirements and the procedural protections of the ESA's Section 7 consultation process. The Section 7 consultation process itself includes evaluation of cumulative effects (i.e., those of the proposed IP activity in conjunction with "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation" [p. xiii, Consultation Handbook, FWS/NMFS 1998]), therefore, the COE anticipates that this procedural aspect would serve to minimize cumulative effects to CFPO if this alternative were implemented.

However, it is recognized that even with the intensive review of direct, indirect, and cumulative effects provided by Section 7 consultation procedures and the subsequent mitigation measures required to offset those impacts, there may always be some potential for minimal and insignificant cumulative impacts to CFPO and its habitat resulting from the temporal loss of WUS and the riparian resources adjacent to WUS. Although the COE recognizes temporal impacts and the mitigation ratios and measures required of the applicant attempt to offset this impact, it is possible that temporal impacts cannot be fully be mitigated in practice even under Section 7 consultation requirements. Cumulative temporal impacts that may occur with this alternative should be considered minimal and insignificant in large part because the majority of impacts permitted under this alternative would otherwise qualify for NWPs and the aquatic ecosystems within the GSOA that would temporarily be impacted under this alternative are typically ephemeral. It is very important to note, however, that the Section 7 consultation process is identical regardless of whether a proposed project qualifies for a NWP or must be processed as an IP. Specific procedures are required to address impacts to a threatened and/or endangered species for **any** proposed project for which the Corps makes a "may affect determination".

4.5 ALTERNATIVE 2: IMPLEMENT 43 NWPS AND 27 GENERAL CONDITIONS

Under this alternative, activities that meet the NWP terms and 27 general conditions would be permitted under the NWP program. For NWP permits requiring notification, the COE would determine on a case-by-case basis whether a proposed project 'may affect' CFPO or its habitat. Activities that the COE determines 'may affect' CFPO or its critical habitat would be subject to Section 7 consultation with FWS and the procedural protections of the ESA.

4.5.1 Direct Impacts

Direct impacts to CFPO and its critical habitat from this alternative would be the similar to those described for Alternative 1, except that some activities not requiring notification would not be reviewed by the COE. It is important to note that, although the regulated public would not be required to notify the COE of some NWP activities, any discharge of fill within WUS would still be subject to compliance with General Conditions 9 (Water Quality), 11 (Endangered Species), 13 (Notification), 19 (Mitigation), and 25 (Critical Resource Waters) (see Section 3.2.2, Chapter 3).

Since the impact limit for NWPs that are rarely to frequently used was reduced from 3 acres to 0.5 acre (nearly 85 percent) on June 7, 2000, it is likely the percentage of all 404 activities permitted through the NWP program may be reduced and an increase occur in the number of activities that would therefore be reviewed and permitted under an IP. Based on 1998 national RAMS2 data in the PDEIS, it is also expected that a certain percentage of activities that would otherwise qualify as non-notifying would still be reviewed by the COE because the proponent seeks a letter of verification from the COE to avoid the possibility of non-compliance. The COE estimates this percentage for NWP 26 (the NWP for which most verification requests were received) to be about 87 percent (PDEIS, p. 5-20 and Appendix C). Given the lowered notification thresholds and other factors within the GSOA, the percentage of activities for which an applicant requests verification may be different within the GSOA but is still expected to be very high.

Assuming the same rate of issuance of NWPs within the GSOA as from 1994-2000, approximately 94 permits/year, roughly 44 of these permits could be non-notification NWP 26. Based on an average of 0.58 acres of WUS impacts per NWP 26 (from the RAMS2 database used for this assessment), this number of non-notifying NWP 26 within the GSOA could be expected to cause a cumulative annual total of 25.52 acres of direct impacts to WUS. This impact represents 0.0074 percent of the total WUS projected to exist within the GSOA, an extremely small portion. Furthermore, as discussed under Alternative 1, these impacts to the aquatic resources within the GSOA are unlikely to have any direct effects on CFPO or its habitat. The total number of NWPs qualifying for non-notification is unknown.

4.5.2 Indirect Impacts

Indirect impacts of this alternative would be similar to those of Alternative 1 (No Action), except the non-notifying permit activities (i.e., those below 1/10 acre of impact) could result in some indirect impacts that are unmitigated if the permittee did not fully comply with General Conditions 9 (Water Quality), 11 (Endangered Species), 13 (Notification), 19 (Mitigation), and 25 (Critical Resource Waters).

For the NWPs that are issued rarely to frequently within the GSOA (see Table 3-4, Categories B, C, and D), the potential for the permitted activity to cause indirect impacts was evaluated. Table 4-1 summarizes the likelihood of these NWPs to result in permanent, indirect impacts such as increased human disturbance (including dust, noise, traffic, etc.) and loss of upland vegetation that may provide habitat for CFPO.

As illustrated in Table 4-1, seven of the 16 NWPs issued rarely to occasionally (NWPs 3, 6, 7, 32, 33, 37, and 41) within the GSOA are extremely unlikely to result in indirect impacts. The remaining 12 NWPs used within the GSOA (12, 13,14, 18, 25, 26, 27, 39, 40, 42, 43, and 44) could be considered to have some potential to result in indirect impacts to areas considered potentially suitable habitat for CFPO. Of these 12, one (NWP 26) is expired and can be eliminated from consideration as having potential for indirect impacts.

The remaining 11 NWPs (12, 13, 14, 18, 25, 27, 39, 40, 42, 43, and 44) cover activities typically associated with new or expanding land development: utilities and access roads; linear public road crossings; residential, commercial, and institutional developments; agricultural activities; stormwater management; expansion of ballfields and golf courses; etc. For these activities, the COE would make a case-by-case determination of effect on endangered species for proposed projects of which it is notified. For non-notifying projects that are in compliance with <u>all</u> general conditions, a determination of 'no effect' is made.

While little data exist on the number of non-notifying activities that may be pre-authorized under the NWP program, a variety of procedural safeguards and other factors serve to minimize the potential for these activities to result in significant indirect impacts to CFPO or its habitat within the GSOA. These include the following:

- Only activities that comply fully with General Conditions 9 (Water Quality), 11 (Endangered Species), 13 (Notification), 19 (Mitigation), and 25 (Critical Resource Waters) are authorized under the NWP program;

- A federal NPDES general construction permit from EPA (or from the Arizona Department of Environmental Quality in the future) under Section 402 of the Clean Water Act is required for any activity which results in surface disturbance of five acres or more, regardless of land ownership;

- It is estimated that letters of verification were requested for some 60 percent of activities that otherwise qualified as non-notifying and that as much as 87 percent of the verification requests received by the COE were for activities resulting in zero impact [to WUS] (PDEIS p. 5-20);

- Some jurisdictions within the GSOA, such as Pima County, require compliance with FWS' survey

recommendations for CFPO prior to issuance of grading permits within survey zones regardless of land ownership or the size of the disturbance area; and

- Several jurisdictions within the GSOA, such as the City of Tucson, Pima County, Town of Sahuarita, Town of Oro Valley, and Town of Marana among others, require developers and project proponents to comply with native plant preservation ordinances and floodplain/riparian zone ordinances that protect and minimize disturbance to native vegetation/habitats potentially used by CFPO.

4.5.3 Cumulative Impacts

This alternative has little to no potential to programmatically contribute to cumulative impacts to CFPO or its habitat. This conclusion is based on the following analysis:

- To be authorized under the NWP program, a proposed activity must meet General Condition 11 (Endangered Species, see Section 3.2.2.1). If this condition is not met, no activity resulting in fill in WUS is authorized by the NWP program. Compliance with this general condition minimizes the potential for direct and indirect impacts to CFPO and designated critical habitat because it also requires notification of the COE "if any listed species or critical habitat *might* be affected or is in the *vicinity* of the project..." (emphasis added, COE 2001). Therefore, a project proponent who fails to notify the COE if a CFPO may be affected or if the project is in the vicinity of an owl observation is <u>not</u> in compliance with this general condition and thus the activity is <u>not</u> authorized by the NWP program and effects on CFPO or its habitat resulting from such unauthorized activities cannot be attributed to the NWP program.

- In some cases within the GSOA, an activity may meet General Condition 11 (Endangered Species) <u>and</u> may also qualify as non-notifying under General Condition 13 (Notification); an example would be a project for which the required CFPO surveys were negative, no critical habitat was affected, and WUS impacts were under 1/10 acre). Assuming all other general conditions are met, the applicant's activity would be authorized under the NWP program. If the applicant sought a letter of verification in such a case, the COE's determination would be that the project would have 'no effect' on listed species. This determination would be made even if the permitted activity <u>may</u> have associated upland impacts on areas that <u>may</u> be considered potentially suitable but unoccupied habitat for CFPO. This determination is consistent with the COE's scope of analysis, which is limited to the permit area unless there is a '<u>physical'</u> effect on threatened and endangered species outside the permit area (PDEIS p. 5-12, emphasis added) or if the project could not otherwise be built without a Section 404 action. Making a determination that physical effects to a species would occur on the basis of *potential* indirect impacts to suitable but *unoccupied* habitat, especially in cases where all general conditions are otherwise met, represents an unreasonable stretch of the causal relationship needed for the COE to expand their scope of analysis. A recent Ninth Circuit Court of Appeals ruling (Arizona Cattle Growers Association v. U.S. Fish and Wildlife Service, 99-16102, December 17, 2001), in which 'take' statements in a Biological Opinion based on the degradation of habitat for a listed species in the

absence of evidence that that species existed on a project area were found to be illegal, supports the COE's determination of no effect in such circumstances. Therefore, no direct, indirect, or cumulative effects on CFPO or its habitat can be attributed to these non-notifying scenarios.

It should also be noted that although currently there is no designated critical habitat for CFPO within the GSOA, the likely future designation of critical habitat would add procedural protection to the COE's process in that all activities subject to Section 404 permitting within designated critical habitat would nearly always receive a 'may affect' determination by the COE and be subject to individual Section 7 consultation. As such, the potential for cumulative impacts to CFPO would be based on the specific and cumulative outcomes of the individual Section 7 consultations rather than on the NWP program itself. It is possible, as discussed in Section 4.4.3 (Cumulative Impacts of Alternative 1), that cumulative effects on CFPO and its habitat may still occur despite the Section 7 consultation process, primarily as a result of the aggregate temporal impacts to WUS.

As with indirect impacts, the cumulative impacts of land development and human disturbance in general on pygmy-owls cannot be attributed solely to the COE's NWP program, in light of 1) myriad factors outside of COE control that facilitate or allow the development of land; and 2) the COE's internal procedural (e.g., General Conditions 9, 11, 13, 19, and 25) and case-by-case safeguards (e.g., 'but for' evaluations) to protect endangered species such as CFPO and its habitat. Furthermore, on an individual and cumulative basis, NWP impacts to the aquatic resource are minimal and insufficient for the COE to increase their Federal control and responsibility over projects that otherwise qualify for authorization under the NWP program. In the case of NWPs that can be stacked, such as NWP 12 or 14, there are either no permanent impacts to WUS allowed or compensatory mitigation is required and generally involves avoidance or replacement of native vegetation that may provide habitat resources for CFPO. Such mitigation further minimizes the potential for cumulative impacts to CFPO or its habitat.

4.6 ALTERNATIVE 3: IMPLEMENT 43 NWPS AND 27 GENERAL CONDITIONS WITH REGIONAL CONDITIONS

4.6.1 Direct Impacts

Direct impacts of this alternative would be similar to those described under Alternative 2, except that implementing regional conditions may provide additional procedural safeguards.

Regional conditions would be targeted to the specific needs and/or requirements of a particular region or state and cannot be used to make the NWPs less restrictive. Three regional conditions are currently being applied by the Corps (COE 2002) within the GSOA. They include a restriction on use of certain NWPs within special aquatic sites as defined at 40 CFR Part 230.40-45; a requirement to submit dated on-the-ground pre-project color photos of a project site with an application; and a requirement to notify the COE for all projects in special aquatic sites and in all perennial watercourses or water bodies. These regional conditions would reduce the potential for impacts to CFPO and its habitat by further restricting non-notification scenarios and providing the

COE with additional information (ground photos) that could be useful in determining or verifying an applicant's compliance with General Conditions 11 and 25.

4.6.2 Indirect Impacts

Indirect impacts of this alternative would be similar to those described under Alternative 2, except that implementation of regional conditions could provide additional procedural safeguards. Since the COE's approach to determining their scope of analysis would be the same under this alternative, indirect impacts to CFPO and its habitat attributable to the NWP program under this alternative would be the same as those described under Alternative 2.

4.6.3 Cumulative Impacts

Cumulative impacts under this alternative would be identical to those described under Alternative 2 except the implementation of regional conditions could provide additional safeguards available to the COE in their review of regulated activities and further minimize the potential for cumulative impacts to CFPO and its habitat resulting from direct and indirect impacts to WUS.

4.7 ALTERNATIVE 4: IMPLEMENT 43 NWPS AND 27 GENERAL CONDITIONS WITH REGIONAL AND CASE-SPECIFIC SPECIAL CONDITIONS

4.7.1 Direct Impacts

Direct impacts of this alternative would be the same as described under Alternative 3, except that the availability of case-specific conditions (e.g., limits on construction timing/sequencing, restricted work areas, etc.), could provide additional procedural safeguards available to the COE to further protect CFPO and its habitat in their review of regulated activities.

4.7.2 Indirect Impacts

Indirect impacts of this alternative would be similar to those described under Alternative 3, except that the availability of case-specific conditions could provide additional procedural safeguards available to the COE in their review of regulated activities. Since the COE's approach to determining their scope of analysis would be the same under this alternative, indirect impacts to CFPO and its habitat attributable to the NWP program under this alternative would be the same as those described under Alternative 3.

4.7.3 Cumulative Impacts

Cumulative impacts under this alternative would be similar to those described under Alternative 3 except the implementation of case-specific conditions would provide additional safeguards available to the COE in their review of regulated activities and further minimize the potential for cumulative impacts attributable to the NWP program.

4.8 ALTERNATIVE 5: IMPLEMENT 43 NWPS AND 27 GENERAL CONDITIONS WITH REGIONAL AND CASE-SPECFIC SPECIAL CONDITIONS AND INCLUDE A NEW REGIONAL CONDITION REQUIRING NOTIFICATION AS DETERMINED IN PROGRAMMATIC SECTION 7 CONSULTATION

4.8.1 Direct Impacts

Direct impacts of this alternative would be similar to those described under Alternative 4, except that a new regional condition for notification for all regulated activities as determined during programmatic Section 7 consultation would provide additional procedural safeguards available to the COE to ensure that impacts to CFPO and its habitat in the areas considered by FWS to be most important to CFPO are avoided or minimized. Only Alternative 1 would be more comprehensive in its notification requirement, but based on data from RAMS2 and the PDEIS and even with the reduced impact thresholds, many activities would still qualify for the NWP program. This alternative provides the maximum procedural safeguards for avoiding and minimizing impacts to CFPO and its habitat while providing for a relatively streamlined permitting and documentation process.

4.8.2 Indirect Impacts

Indirect impacts of this alternative would be similar to those described under Alternative 4, except that the added requirement for notification as determined in programmatic Section 7 consultation would provide further procedural safeguards available to the COE to protect CFPO and its habitat in areas considered by FWS to be important to CFPO. Since the COE's approach to determining their scope of analysis would be the same under this alternative, indirect impacts to CFPO and its habitat attributable to the NWP program under this alternative would be the same as those described under Alternative 4.

4.8.3 Cumulative Impacts

Cumulative impacts under this alternative would be similar to those described under Alternative 4 except the implementation of a new regional condition requiring notification of all permit activities as determined in programmatic Section 7 consultation would provide additional procedural safeguards available to the COE in areas considered by FWS to be important to CFPO and further minimize the potential for cumulative impacts attributable to the NWP program

4.9 ALTERNATIVE 6: REVOKE 43 NWPS AND 27 GENERAL CONDITIONS; ESTABLISH A SECTION 404 REGIONAL GENERAL PERMIT (RGP) WHICH AUTHORIZES PERMANENT IMPACTS IN WUS UP TO 3 ACRES WITHIN THE GSOA

Under this alternative, the COE would conduct a programmatic Section 7 consultation with FWS for the issuance of the RGP. As part of the Section 7 process, the COE would likely develop thresholds for categories of impacts to WUS and/or limit the use of the RGP to within certain areas/zones within the GSOA and work with FWS to develop appropriate pre-set mitigation requirements for each category such that a non-jeopardy biological opinion could be issued for the RGP. It is presumed that the mitigation requirements developed by the COE and FWS would take into consideration the potential direct, indirect, and cumulative effects on CFPO and its habitat of the various activities that would be authorized by the RGP. Non-federal[18] applicants meeting the conditions of the RGP and its Section 7 consultation would then qualify for issuance of a 404 permit under the RGP.

4.9.1 Direct Impacts

This alternative could result in an increase in impacts to WUS because, with all applicants subject to the same permit process for all impacts up to 3 acres of fill including notification, the regulated public might have fewer incentives (e.g., non-notification, or other streamlined procedures) beyond higher mitigation costs to minimize impacts much below the 3 acre limit. However, as discussed in Section 4.2.4.3, increased impacts within OHWM are still unlikely to have direct impacts on CFPO, as the habitat resources within OHWM generally do not represent nesting or roosting habitat for CFPO and it is presumed that implementation of the required mitigation measures developed under the Section 7 consultation for impact categories would result in determinations of 'no effect' for any activities authorized under the RGP. Therefore, this alternative is expected to result in impacts to CFPO and its habitat similar to those described under Alternative 1.

[18] Federal applicants within the RGP area would conduct their own Section 7 consultation.

4.9.2 Indirect Impacts

It is presumed that the mitigation requirements negotiated with FWS as part of the programmatic Section 7 consultation to authorize the RGP would serve to compensate for the potential indirect impacts of this alternative on CFPO and its habitat within the GSOA. Since there would be no non-notifying scenarios under this alternative, no actions subject to Section 404 of the Clean Water Act would be authorized without implementing the applicable mitigation requirements. Therefore, no unmitigated indirect impacts to CFPO and its habitat would be expected to result from this alternative.

4.9.3 Cumulative Impacts

Because of the programmatic Section 7 consultation and the subsequent mitigation measures that would be required, it is anticipated that no unmitigated cumulative impacts to CFPO and its habitat would result from this alternative.

4.10 CONCLUSIONS

Several key conclusions regarding impacts of the NWP program on CFPO and its habitat can be reached based on this analysis:

- For activities otherwise qualifying for non-notification, a majority of project proponents continue to seek letters of verification , thus most NWPs activities are reviewed by the Corps;

- Procedural protections and safeguards provided by general, regional, and case-specific special conditions serve to minimize the potential for adverse impacts to the CFPO and its habitat;

- The Corps makes a case-by-case determination of impacts for NWPs for new or expanding activities to determine if there are any indirect upland impacts to CFPO and/or any designated critical habitat;

- Non-compliance with General Condition 11 (endangered species) means the activity is NOT authorized by the NWP program and the effects on CFPO or its habitat resulting from such unauthorized activities cannot be attributed to the NWP program;

- In cases where General Condition 11 is met and no notification is required but the permitted activity may have indirect impacts in areas that may be considered suitable but unoccupied CFPO habitat (uplands), which are not designated as critical habitat, the Corps would make a “no effect” determination. A recent court ruling, which found “take” statements in a biological opinion based on degradation of habitat for listed species in the absence of evidence the species existed within a project area were illegal, supports the Corps’ approach.

- Indirect and cumulative impacts of legal land development and human disturbance in general on the CFPO cannot be attributed solely to the Corps' NWP program given 1) myriad factors outside of Corps' control that facilitate or allow impacts to lands considered potentially suitable CFPO habitat; and 2) the Corps' internal procedural (programmatic) and case-by-case safeguards to protect listed species. Numerous factors outside the Corps' control, such as land zoning, groundwater pumping, wildcat land development, designated critical habitat, projects without a federal nexus for Endangered Species Act compliance, public lands grazing and recreation, among others, have had in the past and continue to have indirect and cumulative effects on the CFPO and its habitat within the GSOA.

In consideration of the above factors and the analysis of the alternatives developed to address the Corps' purpose and need, the Corps has determined that implementation of alternative 4 within the GSOA best minimizes direct, indirect, and cumulative impacts on the CFPO and previously designated or future designated critical habitat of the CFPO.

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APPENDIX A

LIST OF NATIONWIDE PERMITS (3/18/02)

Appendix A. List of Nationwide Permits (as of March 18, 2002)

NWP	Applies to:	Description	Notification Required? (Note: Non-notifying NWPs may actually require notification to the Corps in accordance with requirements of the regional conditions applicable within Arizona.)
1	Aids to Navigation	Construction of navigational aids such as regulatory markers and buoys	N
2	Structures in Artificial Canals	Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized	N
3	Maintenance	Maintenance to currently serviceable structures or fill including excavation and discharges of dredged sediment into WUS from the vicinity of bridges, culverted road crossings etc. Also includes excavation and discharge of fill into WUS for the restoration of upland areas damaged by flooding. Includes the placement of rip-rap for bank stabilization.	PCN is required when additional rip-rap will be added to a structure, or if the maintenance is due to damage from a storm, flood, or other discrete event. NWP 3 - Cannot be stacked with NWP 18 or 19.
4	Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	Activities associated with Fish and wildlife harvesting, enhancement, and attraction devices. Generally specific to marine applications, and includes pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, clam and oyster digging.	N
5	Scientific Measurement Devices	Stream instrumentation devices such as staff gages, weirs and flumes	PCN (pre-construction notification) required for the construction of weirs and flumes if stream flow is >10 cubic yards
6	Survey Activities	Includes, but not limited to, seismic surveys, boring and filling exploratory-type holes, soil surveys, historic resource surveys	N
7	Outfall Structures and Maintenance	Activities related to construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program. Includes dredging to remove accumulated sediments blocking outfall or intake structures.	PCN is required and must include delineation of affected aquatic sites, and information regarding the design of the area of the outfall facility where construction or maintenance is proposed
8	Oil and Gas Structures	Oil exploration on the outer continental shelf	N
9	Structures in Fleeting and Anchorage Areas	Structures and buoys for the moorage of vessels within Coast Guard designated Fleeting and Anchorage areas	N
10	Mooring Buoys	Non-commercial, single boat, mooring buoys	N

Appendix A. List of Nationwide Permits (as of March 18, 2002)

NWP	Applies to:	Description	Notification Required? (Note: Non-notifying NWPs may actually require notification to the Corps in accordance with requirements of the regional conditions applicable within Arizona.)
11	Temporary Recreational Structures	Temporary buoys, small floating docks etc. used during specific recreational events at COE reservoirs	N
12	Utility Line Activities	Discharge into WUS of dredged or fill material associated with the excavation or backfilling of utility lines provided there is no change in preconstruction contours. Includes the construction of associated access roads in WUS.	PCN is required if any of the following occur: Mechanized land clearing in a forested wetland, a Section 10 permit is required for the utility line, the line crosses more than 500 feet of WUS (excluding overhead lines), is placed within a WUS and runs parallel to the streambed, results in the loss of greater than 1/10 acre of WUS, permanent access roads are constructed above grade in WUS for a linear distance of >500 ft., or if the access roads are built using impervious materials.
13	Bank Stabilization	Bank stabilization activities necessary for erosion prevention.	PCN required for bank stabilization activities in excess of 500 feet, and if more than 1 cubic yard of material (fill, concrete, etc.) per running foot of stream bank is used.
14	Linear Transportation Crossings	Fill discharged into WUS for the construction of Road crossings of WUS.	PCN is required if permanent loss is greater than 1/10 acrea and/or work is in a special aquatic site (SAS). If work is in a SAS, the PCN must include a delineation of the SAS and a mitigation proposal to offset permanent loss of WUS.
15	U.S. Coast Guard Approved Bridges	Discharge of dredged or fill material into WUS incidental to construction of Coast Guard approved bridges across navigable WUS	N
16	Return Water from Upland Contained Disposal Areas	Return-water discharge from contained upland dredged-material disposal areas.	N
17	Hydro power Projects	Discharge of dredged material associated with maintenance of small Hydro power projects (<5000 KW)	N
18	Minor Discharges	Discharge of dredged or fill material into WUS provided the volume of material discharged below OHWM is less than 25 cubic yards	PCN if volume of discharged material below OHWM is greater than 10 cubic yards.
19	Minor Dredging	Dredging as part of a single and complete project within WUS provided the volume of material excavated below OHWM is less than 25 cubic yards	PCN if volume of discharged material below OHWM is greater than 10 cubic yards.
20	Oil Spill Cleanup	Activities required for the containment and cleanup of oil and hazardous substances	N

Appendix A. List of Nationwide Permits (as of March 18, 2002)

NWP	Applies to:	Description	Notification Required? (Note: Non-notifying NWPs may actually require notification to the Corps in accordance with requirements of the regional conditions applicable within Arizona.)
21	Surface Coal Mining Activities	Surface coal mining	PCN is required and must contain an OSM approved mitigation plan
22	Removal of Vessels	Structures and discharges of sediment associated with removing wrecked vessels	N
23	Approved Categorical Exclusions	Activities undertaken by a federal agency other than COE where it has been determined that the activity does not have a significant effect on the human environment pursuant to the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of NEPA.	No PCN required if the agency has provided a Special Notification to Office of the Chief of Engineers and received a determination of concurrence that the particular group of activities is categorically exempt.
24	State Administered 404 Programs	Activities permitted by State Administered Section 404 programs	Not Applicable — there is no State Administered Section 404 program in Arizona.
25	Structural Discharges	Discharge of concrete, sand rock, etc. into WUS in tightly sealed forms or cells to support standard pile supported structures.	N
27	Stream and Wetland Restoration Activities	Activities in WUS associated with restoration of former waters, enhancement of degraded wetlands and riparian areas, creation of wetland and riparian areas, and the restoration of streams and open waters.	PCN is required for activities where a binding wetland enhancement, restoration, or creation agreement between the landowner and USFWS or NRCS is lacking, and must include a description of prior conditions.
28	Modifications of Existing Marinas	Modifications to existing marinas	N
29	Single-Family Housing	Discharges of Dredged or fill material associated with construction of Private Single-Family Housing. May not cause loss of greater than 2 acre of WUS.	PCN is required and should include a description of the parcel and a delineation of wetlands.
30	Moist Soil Management for Wildlife	Discharge of dredged or fill material and maintenance activities associated with soil management for wildlife on federal or state managed property. Soil manipulation to manage habitat and feeding areas for wildlife includes maintenance of dikes and water control structures, plowing or discing to prepare seed beds and to create fire breaks.	N
31	Maintenance of Existing Flood Control Projects	Maintenance of existing flood control projects such as debris basins and detention basins.	PCN is required for each individual maintenance activity. Alternatively the permitee may develop a 5-year maintenance plan. PCN must include baseline data, WUS delineation including special aquatic sites.

Appendix A. List of Nationwide Permits (as of March 18, 2002)

NWP	Applies to:	Description	Notification Required? (Note: Non-notifying NWPs may actually require notification to the Corps in accordance with requirements of the regional conditions applicable within Arizona.)
32	Completed Enforcement Actions	Activities undertaken for mitigation, restoration or environmental benefit as a result of violation section 404 of the CWA	Requires the District Engineer issue a verification letter.
33	Temporary Construction, Access, and Dewatering	Cofferdams and other structures used to facilitate temporary access to construction areas within a WUS or Wetland	PCN is required and must include a restoration plan
34	Cranberry Production Activities	Discharge of dredged of fill material for dikes, berms, beds etc. for cranberry production	PCN is required and must include a delineation of special aquatic sites.
35	Maintenance Dredging of Existing Basins	Dredging in existing marina basins and access channels to marina basins or boat slips	N
36	Boat Ramps	Discharge of material into WUS for the construction of boat ramps	N
37	Emergency Watershed Protection and Rehabilitation	Work done by either the NRCS or the NFS to prevent watershed degradation and erosion caused by events such as forest fires.	PCN is required
38	Cleanup of Hazardous and Toxic Waste	Activities required to contain, stabilize or remove hazardous materials	PCN is required
39	Residential, Commercial, and Institutional Developments	Discharge of fill into WUS due to construction and expansion of residential, commercial and industrial buildings, as well as attendant features such as roads and parking lots, not to exceed loss of greater than 2 acre or 300 linear feet of WUS.	PCN is required and must show compliance with FEMA flood plain construction requirements if more than 1/10 acre WUS is lost, or if any open waters are lost. PCN must include a compensatory mitigation proposal.
40	Agricultural Activities	Discharges of dredged or fill material into WUS for the purpose of improving agricultural production and the construction of farm buildings. Loss of WUS may not exceed 2 acre.	PCN is required for non-USDA program participants if the loss of WUS exceeds 1/10 acre. PCN is required for construction of building pads and farm buildings. PCNs for this NWP must show compliance with FEMA flood plain construction requirements (General condition 26), and must include a compensatory mitigation proposal.
41	Reshaping Existing Drainage Ditches	Discharging dredged or fill material into WUS in order to modify the cross-sectional configuration of existing and functional drainage canals.	PCN is required if more than 500 linear feet of canal is to be reshaped, and must include a delineation of affected aquatic sites.
42	Recreational Facilities	Discharge of fill into WUS for the expansion of existing recreational facilities not to exceed 2 acres, or 300 linear feet of losses.	PCN is required if loss of WUS exceeds 1/10 acre, exceeds 300 feet in length in intermittent stream beds, or is in SAS and must include a delineation of affected aquatic sites.

Appendix A. List of Nationwide Permits (as of March 18, 2002)			
NWP	**Applies to:**	**Description**	**Notification Required?** **(Note: Non-notifying NWPs may actually require notification to the Corps in accordance with requirements of the regional conditions applicable within Arizona.)**
43	Stormwater Management Facilities	Discharge of fill into WUS for the construction and maintenance of stormwater management facilities including ponds and detention basins	PCN is required if loss of WUS exceeds 1/10 acre and should include a maintenance plan and a mitigation plan.
44	Mining Activities	Discharge of dredged or fill material into streams with less than 1 cfs annual average flow associated with sand and gravel mining	PCN is required for any mining-related activity in WUS

APPENDIX B

NATIONWIDE PERMIT GENERAL CONDITIONS

Federal Register

Tuesday,
January 15, 2002

Part II

Department of Defense

Department of the Army, Corps of Engineers

Issuance of Nationwide Permits; Notice

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Issuance of Nationwide Permits; Notice

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final notice.

SUMMARY: The Corps of Engineers is reissuing all the existing Nationwide Permits (NWPs), General Conditions, and definitions with some modifications, and one new General Condition. These final NWPs will be effective on March 18, 2002. All NWPs except NWPs 7, 12, 14, 27, 31, 40, 41, 42, 43, and 44 expire on February 11, 2002. Existing NWPs 7, 12, 14, 27, 31, 40, 41, 42, 43, and 44 expire on March 18, 2002. In order to reduce the confusion regarding the expiration of the NWPs and the administrative burden of reissuing NWPs at different times, we are issuing all NWPs on the same date so that they expire on the same date. Thus, all issued, reissued and modified NWPs, and General Conditions contained within this notice will become effective on March 18, 2002 and expire on March 19, 2007.

DATES: All NWPs and general conditions will become effective on March 18, 2002. All NWPs have an expiration date of March 19, 2007.

ADDRESSES: HQUSACE, ATTN: CECW–OR, 441 ''G'' Street, NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson, at (703) 428–7570, Mr. Rich White, at (202) 761–4599, or Mr. Kirk Stark, at (202) 761–4664 or access the U.S. Army Corps of Engineers Regulatory Home Page at: *http//:www.usace.army.mil/inet/functions/cw/cecwo/reg/*.

SUPPLEMENTARY INFORMATION:

Background

In the August 9, 2001 (66 FR 42070), **Federal Register** the Corps proposed to reissue all the existing Nationwide Permits (NWPs), General Conditions, and definitions with some modifications, and one new General Condition. We proposed to modify NWPs 14, 21, 27, 31, 37, 39, 40, 42, and 43, General Conditions 4, 9, 13, 19, 21, 26, and add a new General Condition 27.

The proposal intended to simplify and clarify permits that have no more than minimal effect on the environment, add additional requirements that will enhance protection of the aquatic environment, increase flexibility for the Corps field staff to target resources where most needed to protect the aquatic environment, reduce unnecessary burdens on the regulated public, and retain the key protections for the aquatic environment that were added last year (e.g. acreage limit of ½ acre of impact per project, the requirement for the Corps to be notified of any impacts over 1/10 acre, and important limits on impacts within mapped floodplains).

As a result of the comments received in response to the August 9, 2001, **Federal Register** notices and the public hearing on September 26, 2001, the Corps has made a number of changes to the proposed NWPs and General Conditions that are designed to further clarify the permits and strengthen environmental protection. These changes are discussed in the preamble.

In the December 13, 1996, issue of the **Federal Register**, the Corps announced its intention to replace NWP 26 with activity-specific NWPs before the expiration date of NWP 26. In the March 9, 2000, **Federal Register** notice (65 FR 12818—12899), the Corps published five new NWPs, modified six existing NWPs, modified six General Conditions, and added two new General Conditions to replace NWP 26. The five new NWPs (i.e., 39, 41, 42, 43, 44) and six modified NWPs (i.e., NWPs 3, 7, 12, 14, 27, and 40) would have expired five years from their effective date of June 7, 2000.

Today the Corps of Engineers is reissuing all the existing Nationwide Permits (NWPs), General Conditions, and definitions with some modifications, and one new General Condition. These final NWPs will be effective on March 18, 2002. All NWPs except NWPs 7, 12, 14, 27, 31, 40, 41, 42, 43, and 44 expire on February 11, 2002. Existing NWPs 7, 12, 14, 27, 31, 40, 41, 42, 43, and 44 expire on March 18, 2002. In order to reduce the confusion regarding the expiration of the NWPs and the administrative burden of reissuing NWPs at different times, we are issuing all NWPs on the same date so that they expire on the same date. Thus, all issued, reissued and modified NWPs, and General Conditions contained within this notice will become effective on March 18, 2002 and expire on March 19, 2007.

Grandfather Provision for Expiring NWPs at 33 CFR 330.6

Activities authorized by the current NWPs issued on December 13, 1996, (except NWPs 7, 12, 14, 27, 31, 40, 41, 42, 43, and 44), that have commenced or are under contract to commence by February 11, 2002, will have until February 11, 2003 to complete the activity. Activities authorized by NWPs 7, 12, 14, 27, 31, 40, 41, 42, 43, and 44, that were issued on March 9, 2000, that are commenced or under contract to commence by March 18, 2002, will have until March 18, 2003 to complete the activity.

Clean Water Act Section 401 Water Quality Certification (WQC) and Coastal Zone Management Act (CZMA) Consistency Agreement

In the August 9, 2001, **Federal Register** notice and concurrent with letters from Corps Districts to the appropriate state agencies, the Corps requested 401 certification and CZM consistency agreement. This began the Clean Water Act section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency agreement processes. Today's **Federal Register** notice provides a 60-day period for the states to complete the Clean Water Act section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency agreement processes. On August 9, 2001, we proposed to increase the normal 60-day period to complete the WQC and CZMA processes to 90 days. However, due to a majority of the NWPs expiring February 11, 2001, and schedule delays, we have had to keep the WQC and CZMA processes to 60 days. Also during this 60-day period, Corps divisions and districts will finalize their regional conditions for the new and modified NWPs.

Discussion of Public Comments

I. Overview

In response to the August 9, 2001, **Federal Register** notice, we received more than 2,100 comments. We reviewed and fully considered all comments received in response to that notice.

Many commenters expressed opposition to the proposed NWPs, but a few commenters indicated support for these NWPs. Most of the comments in opposition of the NWPs were two versions of identical post cards and a form letter that objected to proposed changes to general conditions 19 and 26, opposed the removal of linear limits for NWPs 21, 39, 40, 42, 43, and 44, and requested the withdrawal of NWP 21. Other commenters said that the NWPs were too difficult for the public to use, the NWPs exceeded the Corps jurisdiction, and the acreage and linear limits were too low for the NWPs to be useful. One commenter indicated that few changes proposed in the August 9, 2001, **Federal Register** notice will result in decreased workload for the Corps.

After considering the comments received in response to the August 9, 2001, **Federal Register** notice, we made several changes to the NWPs, general conditions, and definitions. These changes are discussed in detail in the preamble discussion for each NWP, general condition, and definition. We do not agree that the NWPs are too difficult for the regulated public to use. We have retained the ½ acre limit for many of the NWPs, to ensure that those NWPs authorize only activities with minimal adverse effects on the aquatic environment, individually and cumulatively. We have not adopted the proposed waiver process for the 300 linear foot limit for perennial streams in NWPs 39, 40, 42, and 43. We did adopt the waiver for intermittent streams in NWPs 39, 40, 42, and 43. NWPs 21 and 44 do not currently have a linear foot limitation, so the waiver does not apply. We believe that the changes to the NWPs will allow the Corps to more effectively authorize activities with minimal adverse effects on the aquatic environment.

II. General Comments

Many commenters objected to the NWP proposal, stating that it will place citizens at risk from flooding, promote wetland and stream destruction, degrade water quality, and result in the loss of critical habitat. Another commenter indicated that the NWPs need to be strengthened to ensure that marine, riparian, and riverine habitats, and the fish species that depend on those habitats, are adequately protected under the NWP process. One commenter said that the NWPs should authorize only those activities that have minimal impacts on water quality. This commenter said that the NWPs will lead to piecemealing and result in cumulative impacts detrimental to particular waterbodies. A commenter objected to the NWPs, stating that the NWPs authorize activities that expand existing developments. Another commenter said that the proposed NWPs will only benefit the development community and the Corps, while exposing the public and environment to unnecessary harm. One commenter stated that the Corps proposal to modify the NWPs would significantly weaken wetlands protection and severely hamper the ability of State fish and wildlife agencies to conserve wetlands and watersheds.

The terms and conditions of the NWPs, including the general conditions, ensure that the activities authorized by NWPs result in no more than minimal adverse effects on the aquatic environment, including wetlands and streams. General Condition 26, Fills Within 100-year Floodplains, addresses the use of certain NWPs to authorize activities in 100-year floodplains and ensures that such activities comply with FEMA-approved State and local floodplain management requirements. General Condition 11, Endangered Species, ensures that activities authorized by NWPs comply with the Endangered Species Act. Water quality certification is required for NWP activities authorized under section 404 of the Clean Water Act. In addition, district engineers can require water quality management measures to ensure that NWP activities result in no more than minimal adverse effects on water quality. NWPs authorize single and complete projects, and do not result in piecemealing of projects. District engineers consider cumulative adverse effects when reviewing requests for NWP verifications, including activities that result in the expansion of existing developments. The NWPs do not impede the efforts of State fish and wildlife agencies to conserve wetlands and watersheds.

Several commenters asserted that the NWP program contradicts the clear intent of Congress to establish a streamlined general permit process for activities with minimal adverse effects on the aquatic environment. A couple of commenters said that the NWPs regulate activities that are exempt from the Clean Water Act and its implementing regulations. These commenters requested more consistency between the NWPs and these statutory exemptions. One commenter stated that drainage districts are generally exempt from permit requirements, including pre-construction notification (PCN) requirements. This commenter said that the NWP conditions and notification requirements are too costly and could impair the ability of drainage districts to meet their obligations to protect citizens from flooding, and that the drainage ditches should be exempt from these regulations. One commenter stated that the Corps should recognize the important differences between wetland landscapes and the protection of non-aquatic areas that are dominated by ephemeral drainage systems in the desert regions of the southwest United States.

The NWPs provide an expedited review process for activities in waters of the United States that result in no more than minimal individual and cumulative adverse effects on the aquatic environment. Although the NWP program has undergone substantial changes in recent years, we believe those changes were necessary to ensure compliance with section 404(e) of the Clean Water Act. Section 404(e) authorizes the Corps to issue general permits, including NWPs. General permits authorize activities that are similar in nature and result in no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The lower acreage limits and more restrictive terms and conditions of the NWPs are necessary to comply with section 404(e).

The NWPs do not regulate activities that are exempt from the permit requirements of the Clean Water Act. Certain activities that are conducted by drainage districts, such as the maintenance of drainage ditches, may be eligible for section 404(f) exemptions and therefore may not require authorization from the Corps. The construction of new drainage ditches may require a Department of the Army (DA) permit, if the proposed work involves discharges of dredged or fill material into waters of the United States and/or work in Section 10 waters. The NWPs do not change the section 404(f) exemptions. The NWPs authorize certain activities that require a DA permit pursuant to section 10 of the Rivers and Harbors Act and/or section 404 of the Clean Water Act. Some NWPs, such as NWPs 3 and 14, contain references to the section 404(f) exemptions. Project proponents can contact district engineers to determine whether specific activities qualify for the section 404(f) exemptions.

The NWPs allow district engineers flexibility when reviewing activities that involve discharges of dredged or fill material into ephemeral streams. Division engineers can regionally condition the NWPs to restrict or prohibit specific activities that result in the loss of ephemeral stream beds, or require project proponents to notify district engineers prior to construction for case-by-case review. The waiver process for the 300 linear foot limit for NWPs 39, 40, 42, and 43 allows district engineers to issue NWP verifications for activities that result in the loss of greater than 300 linear feet of intermittent (but not perennial) stream bed and have no more than minimal adverse effects on the aquatic environment.

Several commenters indicated that the proposed changes to the NWP program fails to address the significant problems with the new and modified NWPs that were published in the March 9, 2000, **Federal Register** (65 FR 12818). Two commenters stated that the restrictions in those NWPs have resulted in large burdens on the transportation construction industry and planning

officials. One commenter said that the elimination of the NWP 26 has resulted in large increases in delays associated with obtaining individual permits for transportation activities that were authorized by NWP 26. One commenter stated that these NWPs will result in longer delays and greater expenses for simple projects. This commenter said that NWP 26 should be reinstated to replace these cumbersome NWPs. One commenter asserted that the NWPs result in substantial burdens on the regulated public. Two commenters recommended that the Corps improve the NWP program by increasing acreage limits, increasing PCN thresholds, and reducing PCN information requirements.

The replacement of NWP 26 with activity-specific NWPs was necessary to ensure compliance with section 404(e) of the Clean Water Act. The terms and conditions of the NWPs published in the March 9, 2000, **Federal Register** notice were intended to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment. We recognize that certain activities that were previously authorized by NWPs now require individual permits, and that it takes more time to authorize those activities, including some transportation projects. We do not agree that the acreage limits and PCN thresholds of the NWPs should be increased, because the lower limits and thresholds ensure that the NWPs authorize only activities with no more than minimal adverse environmental effects.

One commenter stated that the Corps data shows that the number of acres of wetlands created under the mitigation requirements of the NWP program exceeds the number of acres permitted under the program. This commenter asked why the Corps has failed to do more to carry out the policies established in section 101(f) of the Clean Water Act to minimize paperwork, seek the best uses of manpower and funds, and to prevent needless delays at all levels of government.

The NWP program complies with the requirements of section 101(f) of the Clean Water Act, by providing an effective means of authorizing activities with no more than minimal individual and cumulative adverse effects on the aquatic environment.

Implementation

One commenter objected to the NWPs, stating that these permits remove the public, resource agencies, and the Corps from the permit review process. Another commenter said that NWP activities should be coordinated with natural resource agencies and the public. One commenter said that it is not appropriate for the Corps to rely on discretionary authority, regional conditions, and the PCN process to reduce the adverse impacts to the aquatic environment to a minimal level. This commenter stated that regional conditions are not consistently implemented across the country or to the degree necessary to ensure minimal effects.

The NWPs authorize minor activities that are usually not controversial and would result in little or no public or resource agency comment if they were reviewed through the standard permit process. Conducting full public interest reviews for NWP activities would substantially increase the Corps workload without substantial added value for the aquatic environment. NWP activities that require notification to the district engineer and result in the loss of greater than ½ acre of waters of the United States are coordinated with the appropriate Federal and state agencies (see paragraph (e) of General Condition 13). Discretionary authority, regional conditions, and the PCN process are essential elements of the NWP program, to ensure that NWP activities result in no more than minimal adverse effects on the aquatic environment. In response to a PCN, a district engineer can add special conditions to the NWP authorization to ensure that the activity will result in no more than minimal adverse effects on the aquatic environment. If the proposed work will result in more than minimal adverse effects on the aquatic environment, district engineers can exercise discretionary authority to require an individual permit. Regional conditions are not consistent throughout the country, because they address differences in aquatic resource functions and values in watersheds or other types of geographic regions.

One commenter stated that in order to ensure that the NWPs authorize only activities with minimal adverse effects on the aquatic environment, the NWPs should include a new general condition. This general condition would require public notices in all cases where notification is required and the submission of surveys of terrestrial and aquatic species and cultural and historic resources that may be affected by the NWP activity.

We do not agree that the general condition proposed in the previous paragraph is practical or necessary. General Condition 11, Endangered Species, addresses compliance with the Endangered Species Act. General Condition 12, Historic Properties, addresses compliance with the requirements of the National Historic Preservation Act. Project proponents may be required to provide surveys of endangered species or cultural resources to ensure compliance with these general conditions.

One commenter asserted that there is an unsubstantiated presumption that compensatory mitigation in any form effectively offsets the individual or cumulative adverse effects of NWP activities. One commenter indicated that, due to the small NWP acreage limits, the Corps has lost the ability to direct mitigation toward areas that would provide the most benefits on a watershed basis. One commenter said that mitigation should not be used to ensure that NWP activities result in minimal adverse effects on the aquatic environment. This commenter suggested that avoidance and practicable alternatives should be emphasized.

Compensatory mitigation is an important mechanism to ensure that the activities authorized by NWPs result in no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Compensatory mitigation can be provided through individual aquatic resource restoration, creation, enhancement, or in exceptional circumstances, preservation projects, as well as mitigation banks, in lieu fee programs, and other types of consolidated mitigation efforts. General Condition 19 discusses mitigation for NWP activities, including the requirement for project proponents to avoid and minimize adverse effects on waters of the United States to the maximum extent practicable on the project site.

One commenter objected to the NWPs, stating that conditions imposed on the NWPs are rarely monitored for compliance. This commenter suggested that the Corps commit to an aggressive monitoring and enforcement program for activities authorized by NWPs. Another commenter said that the lack of compliance inspections has resulted in numerous instances where activities authorized by NWPs have resulted, through implementation failures and intentional violations, in substantial adverse effects. This commenter suggested that each NWP should be subject to a statistically sufficient number of compliance inspections to determine whether compliance is being achieved, and whether the NWP activities are resulting in more than minimal individual or cumulative adverse effects. One commenter said that enforcement efforts should not be

weakened. One commenter stated that the Corps needs to monitor and enforce the national and regional conditions of the NWPs.

We are committed to strong enforcement and compliance efforts for activities authorized by DA permits, including NWPs, but the amount of time dedicated to enforcement and compliance is dependent upon the value of the impacted resource and the available amount of district resources. The Corps is increasing its compliance efforts to further improve compliance. In consultation with other Federal agencies, the Corps is currently finalizing guidance that will address the need for improved compliance.

One commenter asserted that Corps personnel rarely verify the information provided in NWP verification requests, and speculated that project proponents may under-report the amount of impacts to waters of the United States to qualify for NWP authorization. This commenter suggested that the Corps commit to independent verification of the information submitted in NWP verification requests or verify the information for randomly selected subsets of verification requests. One commenter suggested that Corps produce educational brochures and web pages that describe the basic information that must be submitted in order to ensure that a NWP request is considered complete.

District personnel review requests for NWP verifications to determine if the information provided by the project proponents is accurate. The level of review is dependent on the amount of impacts proposed by the applicant and the resources available to Corps personnel. Site visits cannot be conducted for all NWP verification requests. District personnel utilize their knowledge of local conditions when reviewing NWP verification requests to assess whether the information provided in the NWP verification request is accurate. The Corps Headquarters homepage, see address above, and Corps district homepages contain information on the NWPs, including the NWPs, general conditions, regional conditions, state 401 and CZM conditions, and decision documents. The text of General Condition 13, Notification, lists the information necessary for a complete PCN. Several districts also provide brochures to assist project proponents who are preparing permit applications or NWP verification requests. District home pages on the Internet also have other information that is useful for permit applicants.

Acreage Limits

Three commenters suggested that higher acreage limits should be adopted for impacts to non-wetland waters and that district engineers should have the authority to issue project-specific waivers to NWP acreage limits. One commenter said that there should be higher acreage limits for master planned communities or similar planned development projects. One commenter said that a 500 linear foot limit for stream impacts should be added to the NWPs.

We do not agree that higher acreage limits should be implemented for NWP activities that result in the loss of non-wetland waters, or for master planned development projects. Open waters, such as streams, ponds, lakes, estuaries, and the oceans, are important components of the overall aquatic environment and provide valuable functions and environmental benefits. We also do not agree that a waiver process should be implemented for the acreage limits of NWPs. We do not believe it is necessary to impose a 500 linear foot limit on all losses of stream bed authorized by NWPs. The 300 linear foot limit for NWPs 39, 40, 42, and 43, and the waiver process for intermittent streams will ensure that those NWPs authorize no more than minimal impacts to stream beds. And such a limit is not necessary for the other NWPs. In addition, these acreage limit suggestions would require notice and comment, before they could be adopted.

One commenter stated that the standard permit process does not necessarily result in additional avoidance, minimization, or compensatory mitigation, but causes substantial project delays, higher costs, and increased risks to public safety. Two commenters suggested that the Corps implement an NWP program that imposes the acreage limits of the 1996 NWPs (*i.e.,* 3 acres) on the activity-specific NWPs published in the March 9, 2000, **Federal Register**. A number of commenters recommended reissuing NWP 26. One commenter said that the NWPs are too restrictive and they add unnecessary administrative burdens while providing questionable environmental benefits. Two commenters said that there is nothing in the administrative record that indicates the need for the ½ acre limit. Three commenters stated that the acreage limits and PCN thresholds are arbitrary and capricious and unsupported by sound science.

The standard permit process can result in additional avoidance and minimization because of the Section 404(b)(1) guidelines analysis required for those standard permit activities that involve discharges of dredged or fill material into waters of the United States. The terms and conditions of the NWPs, including the ½ acre limit for many of the NWPs, are necessary to ensure that the NWPs authorize only those activities with no more than minimal adverse effects on the aquatic environment, individually and cumulatively. We do not agree that NWP 26 should be reinstated, because the replacement of NWP 26 was necessary to ensure compliance with section 404(e) of the Clean Water Act.

One commenter stated that the ½ acre limit for certain NWPs has dramatically expanded the scope of the regulatory program, leading to increased costs and delays with few demonstrated environmental benefits. One commenter asserted that the acreage limits of the NWPs do not decrease losses of wetlands because projects are designed to impact the maximum amount to avoid the individual permit process. Several commenters said that the NWP program is no longer useful to industry and other regulated entities because the strict terms and conditions of the NWPs provide no incentives for project proponents to design projects to qualify for NWP authorization. This commenter said that there should be more reliance on regional conditions to ensure that there is no more than minimal adverse environmental effects, instead of unnecessarily restrictive national conditions. A number of commenters indicated that impacts on the environment will increase since few projects qualify for NWP authorization.

The ½ acre limit for certain NWPs has not increased the scope of the regulatory program, although it may result in more activities requiring individual permits. The terms and conditions of the NWPs are necessary to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Division engineers can add regional conditions to the NWPs to address important aquatic resource functions and values in particular geographic areas, but the terms and national general conditions of the NWPs are necessary to address national concerns for the aquatic environment. The NWP program encourages avoidance and minimization of impacts to wetlands, and most project proponents do not request NWP authorization to fill the maximum amount of wetlands under the NWP acreage limits. General Condition 29 requires project proponents to avoid and minimize impacts to waters of the

United States to the maximum extent practicable on the project site. We believe that many project proponents will continue to design their projects to qualify for authorization under the NWPs, including avoiding and minimizing impacts to aquatic resources on the project site.

Pre-construction Notification Process

One commenter requested that the Corps reinstate the ⅓ acre PCN threshold, or demonstrate that a lower notification threshold is necessary to ensure that adverse effects on the aquatic environment are minimal.

The 1/10 acre PCN threshold for several of the NWPs is necessary so that district engineers can review those activities to ensure that they result in no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Therefore, we have retained the 1/10 acre PCN threshold for certain NWPs. Additionally, the Corps does not believe the PCN requirements impose a significant burden on most project proponents.

A few commenters stated that NWPs are complex and the PCN process requires too much time. One commenter said that the time limit for determining if a PCN is complete is longer than the 15 day period for determining if a standard permit application is complete. This commenter recommended that the Corps delete the 30 day completeness review for PCNs. This commenter said that increasing the PCN review period to 45 days does not comply with the goal for an expedited permit process, and makes the NWP process resemble the standard permit process. One commenter said that the PCN review process provides disincentives for project proponents to design their projects to qualify for NWP authorization.

The 45 day PCN review period is necessary to allow district engineers to adequately review those activities that require PCNs. However, most NWP verifications do not take the full 45 days. The average time to verify a NWP activity is 19 days. Although the 30 day completeness review period for PCNs is less than the 15 day completeness review period for standard permit applications, the PCN process allows more effective authorization of activities with no more than minimal adverse effects on the aquatic environment. An individual activity authorized by an NWP does not require a public notice or the same level of review required for a standard permit activity. Project proponents requesting NWP verifications generally receive their authorizations more quickly than they would receive standard permits. The 45 day PCN review period includes the 30 day completeness review, and we do not agree that the 30 day completeness review period should be deleted. The completeness review period makes the PCN process more efficient by requiring district engineers to request additional information early in the PCN process. If a district engineer receives a complete PCN, then the decision to verify that the activity is authorized by NWP or exercise discretionary authority must be made within 45 days. We do not agree that the PCN process discourages project proponents from designing their projects to qualify for NWP authorization, because the NWP process is faster than the standard permit process.

Compliance With Section 404(e) of the Clean Water Act and the National Environmental Policy Act

Several commenters said that the NWPs do not comply with section 404(e) of the Clean Water Act because they authorize activities with more than minimal adverse effects on the aquatic environment. One commenter asserted that the NWPs should be limited to specific uses. Numerous commenters stated that the NWPs do not comply with the ''similar in nature'' requirement of section 404(e) of the Clean Water Act.

The terms and conditions of the NWPs, including the acreage limits and PCN review process, ensure that the NWPs authorize only those activities with no more than minimal individual and cumulative adverse effects on the aquatic environment. The NWPs undergo a thorough review process every five years to ensure compliance with the requirements of section 404(e) of the Clean Water Act. Each of the NWPs complies with the requirement for general permits to authorize activities that are ''similar in nature.''

One commenter indicated that the database may not be adequate enough to warrant the proposed changes to the NWPs and said that the Corps cannot assure the public that the proposed changes will not result in greater impacts to waters of the United States. Another commenter said that the database to justify the proposed changes is small compared to the overall age of the permit program. A few commenters suggested that the regulations should be modified to require each Corps district office to furnish quarterly reports to each state agency in the district that would summarize the number, type, and impacts of activities in waters of the United States for all NWP verifications issued. Several commenters said that the Corps needs to improve its database for the regulatory program.

The proposed changes to the NWPs published in the August 9, 2001, **Federal Register** will not result in more than minimal adverse effects on the aquatic environment. The proposed modifications are intended to improve the efficiency of the NWP program, and enhance protection of important aquatic resources. We do not agree that it is necessary to change the Corps regulations to require districts to provide states with quarterly reports concerning the impacts authorized by all NWP verifications. Corps headquarters is developing a new data collection and reporting system to replace the current system. The new system will improve data collection for the regulatory program, and will help the Corps compile summary data and evaluate trends. The new data collection system will improve the reliability of regulatory program data.

One commenter said that the Corps has not adequately assessed cumulative impacts and that virtually no mitigation has been required because of the smaller individual impacts of these NWPs. Another commenter objected to the NWPs, stating that district engineers cannot determine the magnitude of individual and cumulative environmental impacts. One commenter said that the NWPs should not be reissued because cumulative impacts have not been addressed at a regional or national level.

We maintain our position that assessing cumulative impacts across the nation is not possible or appropriate. We believe that no assessment of individual and cumulative impacts can be made a national level, because the functions and values of aquatic resources vary considerably across the country. Assessment of cumulative impacts is more appropriately conducted by Corps districts on a watershed basis, because they have better understanding of local conditions and processes. However, the NWP program is designed programmatically to ensure no more than minimal adverse effects, individually and cumulatively. This is accomplished through acreage limits, the PCN process, regional conditioning, and the exercise of discretionary authority to require individual permits. Each district generally tracks losses of waters of the United States authorized by Department of the Army permits, including verified NWPs, as well as required compensatory mitigation achieved through aquatic resource restoration, creation, and enhancement. The regional conditioning process, including

the preparation of supplemental Environmental Assessments by division engineers, also helps ensure that the NWPs authorize activities with no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

One commenter stated that National Environmental Policy Act (NEPA) requires the Corps to evaluate the environmental impacts of every major Federal action, such as the issuance of section 404 permits, that significantly affects the quality of the human environment. Several commenters said that Environmental Impact Statements (EISs) are required for the NWPs, at both the national and district levels. One of these commenters asserted that these EISs should examine all reasonable alternatives to the NWPs, general conditions, and regional conditions. One commenter said that EISs should be completed for NWPs 13, 29, 39, 40, 42, and 44. Two commenters said that regional conditions for the NWPs should not be finalized until an EIS on the NWPs is completed. One commenter expressed disagreement with the Finding of No Significant Impact (FONSI) for the NWP program that was issued on June 23, 1998, which stated that the Corps is not required to do an EIS for the NWPs. One commenter said that an EIS is required to demonstrate compliance with section 404(e) of the Clean Water Act.

We maintain our position that the NWPs do not require an EIS, even though we are in the process of preparing a voluntary programmatic EIS for the NWP program. Since the NWPs authorize only those activities that have no more than minimal adverse effects on the aquatic environment, the NWP program does not reach the significance threshold required for the preparation of an EIS. The NWPs are subjected to a reissuance process every five years. This reissuance process involves a public notice and comment period, which provides the Corps with information to ensure that the NWPs continue to authorize only those activities with no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Again, the NWP program does not reach the level of significant impacts that requires the preparation of an EIS. To comply with NEPA, Corps headquarters issues an Environmental Assessment (EA) for each NWP when it is issued, reissued, or modified. These EAs consider the environmental effects of each NWP from a national perspective. Each Corps division and district engineer will supplement these EAs to evaluate regional environmental effects of the NWPs. For the reasons above, the NWP program and the NWPs do not reach the level of significant impacts that requires the preparation of an EIS, and in fact are far below that level.

We do not agree that regional conditions for the NWPs should not be finalized until an EIS on the NWPs is completed. We also believe that the FONSI for the NWP program that was issued on June 23, 1998, is still valid despite the changes to the NWPs that have occurred since the FONSI was issued. There have been no substantial changes to the NWP regulations at 33 CFR part 330 or to the implementation of the NWP program since the FONSI was issued. The FONSI discussed, in general terms, the implementation of the NWP program, including the procedures used by the Corps to ensure that the NWPs authorize only those activities with no more than minimal individual and cumulative adverse effects on the aquatic environment. The Corps is not required to do an EIS to demonstrate compliance with section 404(e) of the Clean Water Act. The decision documents issued for each NWP address compliance with the section 404(b)(1) guidelines, which require an analysis for the issuance of general permits (see 40 CFR 230.7). Finally, although not required to prepare an EIS, the Corps is preparing a voluntary Programmatic EIS to assess the NWP Program to see if there are changes to the NWP program that would further ensure that there are no more than minimal adverse effects to the aquatic environment, individually and cumulatively. The Programmatic EIS is discussed below.

One commenter said that the Corps can not limit its analyses to only those effects of the NWPs that occur in jurisdictional waters at the location of the permitted activity. Another commenter said that an EIS is required each time an NWP is used to authorize a private development project.

For the purposes of NEPA and the Corps regulatory program, the scope of analysis is limited to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review (see 33 CFR part 325, Appendix B, paragraph 7(b)). We do not agree that an EIS is warranted whenever an NWP is used to authorize a private development project, because the NWPs authorize only those activities that occur within the Clean Water Act section 404 limited scope of review and that have no more than minimal adverse effects on the aquatic environment.

One commenter stated that the EAs for the NWPs must contain current data. Two commenters asserted that the decision documents, including the EAs and Statements of Finding, for the NWPs should be subjected to an agency coordination and public comment period before they are finalized. Another commenter said that the EAs fail to consider alternatives to the proposed NWPs. One commenter stated that the EAs prepared for the NWPs do not adequately describe or assess the significant cumulative effects the NWP program has on the environment. One commenter recommended that the Corps issue new EAs for each nationwide permit to demonstrate compliance with NEPA. One commenter objected to the preliminary EAs, stating that those documents do not demonstrate an ecological rationale for the proposed acreage limits of the NWPs. One commenter stated that the EAs do not adequately assess potentially significant environmental impacts of the NWPs.

We believe it was unnecessary to make the revised EAs for the NWPs proposed in the August 9, 2001, **Federal Register** available for agency review and public comment. The EAs for the new and modified NWPs issued today discuss, in general terms, the acreage limits for these NWPs, the types of waters subject to the new and modified NWPs, and the functions of those waters. The EAs also address projected impacts to waters of the United States that will occur through the use of these NWPs. These projected impacts are based on recent data. The EAs also contain discussions of alternatives analyses. Since aquatic resource functions and values vary considerably across the country, we cannot include detailed ecological analyses to support the acreage limits for these NWPs. In addition, due to NEPA requirements concerning the length of environmental documentation, the EAs for the new and modified NWPs must be limited to general discussions of potential impacts. Division engineers will be issuing supplemental EAs that will address regional issues at the district level. The ''Forty Most Frequently Asked Questions'' concerning NEPA developed by the Council on Environmental Quality (i.e., Question 36) and the Corps regulations at 33 CFR part 325, Appendix B, discuss the recommended length of EAs. Finally, the changes in the new NWPs, relative to the existing NWPs, are minimal and generally designed to simplify the permits and increase protection of the aquatic environment. EAs for the existing

permits have been publicly available since these permits were issued.

A few commenters said that the Corps must finalize the Programmatic Environmental Impact Statement (PEIS) for the NWPs before finalizing the NWP proposal published in the August 9, 2001, **Federal Register**. One commenter stated that the current NWPs should be extended until the PEIS is completed. One commenter stated that the draft PEIS for the NWP program does not address the specific effects of the NWPs on listed species, critical habitat or any other natural resources. Another commenter said that the draft PEIS lacks available data to assess the impacts of the NWP program because the Corps database is faulty. This commenter asserted that there should be no permitting until the Corps can adequately assess the success or failure of the regulatory program. One commenter said that the NWP PEIS does not provide sound scientific data that demonstrates that the NWPs have only minimal impacts on the environment.

In March 1999 the Corps began preparation of a voluntary PEIS to evaluate procedures and processes for the NWP program. The PEIS will not address the impacts of any specific NWPs. The PEIS is not a legally required EIS. The Council of Environmental Quality's regulations at 50 CFR 1506.1(c) do not prohibit the Corps from issuing the NWPs prior to completing the voluntary PEIS. The issuance of the NWPs will not preclude the ability of the Corps to modify the NWP program or modify individual NWPs in accordance with any need for changes identified in the PEIS. The Corps is in compliance with NEPA because a FONSI for the NWP program was issued on June 23, 1998, and the Corps issues decision documents, including EAs, for each NWP when the NWP is issued, reissued, or modified. Specific comments concerning the PEIS will be addressed through the PEIS process.

Jurisdictional Issues

In response to the August 9, 2001, **Federal Register** notice, we received numerous comments concerning the scope of the Corps regulatory authority. These comments addressed issues such as excavation activities in waters of the United States, isolated waters, and ephemeral streams as waters of the United States.

One commenter stated that the Corps should develop regulations that accurately reflect the regulatory exemptions for excavation because all maintenance activities associated with any existing structures or fill are exempt from Section 404 permit requirements. One commenter stated that the definition of ''loss of waters of the United States'' in the NWPs should be clarified to exclude excavation. As an example, this commenter said that if an activity involves non-jurisdictional excavation and temporary stockpiling of excavated material, those activities should not be included in the measurement of ''loss of waters of the United States''.

In the January 17, 2001, issue of the **Federal Register** (66 FR 4550), we promulgated a final rule that revised the Clean Water Act regulatory definition of the term ''discharge of dredged material'' to address recent Court decisions. It is important to note that not all excavation activities in waters of the United States result only in incidental fallback into waters of the United States. Excavation activities that result in the redeposit of dredged material into waters of the United States, other than incidental fallback, require a Section 404 permit. Excavated material that is temporarily stockpiled in waters of the United States before it is removed to a permanent deposit area requires a Section 404 permit. We have retained the excavation language in the new and modified NWPs and the definition of ''loss of waters of the United States'' because some of these activities may be authorized by NWPs. All excavation activities in navigable waters of the United States require Section 10 permits, even if those excavation activities result only in incidental fallback into Section 10 waters. NWPs issued under Section 10 of the Rivers and Harbors Act may authorize excavation activities in navigable waters of the United States.

Two commenters indicated that the NWPs should be modified to ensure compliance with the recent *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers et al.* decision (U.S. Supreme Court No. 99–1178).

The *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers et al.* decision related to the scope of CWA jurisdiction over non-navigable isolated intrastate waters. The NWPs do not establish jurisdiction that does not otherwise exist. They only authorize activities that require a permit. If an activity does not require a permit, the NWPs do not create a requirement for a permit. If an activity does require a permit and complies with the terms and conditions of an NWP, that activity may be authorized by the NWP.

A couple of commenters suggested that the Corps needs to improve its definition of ordinary high water mark (OHWM) because the current definition, which is based on physical evidence, does not provide any criteria regarding the frequency of flow necessary to establish an OHWM. These commenters stated that Corps personnel use the outermost banks to identify OHWMs, regardless of how frequently flows actually inundate the area between banks. Another commenter stated that Congress did not intend to extend Federal jurisdiction to discharges of dredge or fill material into areas that are ordinarily dry. This commenter indicated that a Corps district is asserting jurisdiction up to the limits of the 25-year floodplain. This commenter also suggested that the Corps limit its jurisdiction to areas with an OHWM within a less frequently flooded floodplain and that areas outside of the 1 to 5 year floodplain should not be considered to be within the OHWMs.

The Corps agrees that we should look at improving the definition of the OHWM. This will be the subject of a separate review. However, no schedule has been developed for this review. The frequency and duration at which water must be present to develop an OHWM has not been established for the Corps regulatory program. District engineers will use their judgment on a case-by-case basis to determine whether an OHWM is present. The criteria used to identify an OHWM are listed in 33 CFR 328.3(e).

Procedural Comments

One commenter said that it was unreasonable to: (1) Expect the public to travel to a public hearing to provide comments on the August 9, 2001, proposal in a government building in Washington DC; (2) schedule only one public hearing; (3) expect public comments to reach the Corps in a timely manner when the **Federal Register** notice had only a physical address for receiving public comments; and (4) expect the public to receive updated information regarding the rescheduling of the public hearing because of computer viruses and the absence of phone numbers or e-mail addresses in the **Federal Register** notice. This commenter also stated that it was not reasonable to expect public comments on proposed NWP regional conditions to be submitted in a timely manner because the physical addresses published in the August 9, 2001, **Federal Register** notice contained errors, the deadline for public comment on the regional conditions was not published in the **Federal Register**, and the comment period for proposed regional conditions preceded the

deadline for public comment published in the **Federal Register** notice. This commenter said that future public notices by the Corps should include an electronic mail address, a physical address, and a telephone number for submitting of non-electronic comments. This commenter also asserted that additional public hearings should be conducted throughout the country to provide adequate opportunities for the general public to provide public comment prior to the reissuance and modification of the NWPs.

In response to the August 9, 2001, **Federal Register** notice announcing the proposed changes to the NWPs, we received over 2,100 comments and had 19 people attend the public hearing in Washington, DC. We believe that the level of participation is consistent with other proposals. We understand that the events on September 11, 2001, has affected the general public and we have made reasonable efforts to accommodate the public. In response to these events, we postponed and rescheduled the September 12, 2001, public hearing and extended the 45-day comment period by 15 days. The new date of the public hearing and the extension of the comment period were announced on our web page at *http://www.usace.army.mil/inet/functions/cw/cecwo/reg* and published in the September 18, 2001 (66 FR 48121), and September 21, 2001 (66 FR 48665), issues of the **Federal Register**, respectively. We believe that sufficient time and notice was given to the public to either participate in the public hearing or submit written comments. A physical address, web address that allowed electronic submittal of comments, and a telephone number with a point of contact were included in the August 9, 2001, September 18, 2001, and September 21, 2001, issues of the **Federal Register**. While some addresses within the notice may have contained zip code errors, we continue to provide the best information possible. We disagree that additional public hearings need to be conducted and maintain our position that we have fully complied with the public hearing requirements of the Clean Water Act.

One commenter said that the August 9, 2001, **Federal Register** notice contained several significant changes to the NWPs that were not discussed in the preamble. This commenter cited the addition and removal of a particular word or clauses that may narrow the protection provided by the terms and conditions of an NWP, the general conditions, and the definitions. One commenter said that NWPs should be coordinated with state agencies and the public and that any permit conditions requested by state agencies should be incorporated into the NWPs.

The preamble to the August 9, 2001, **Federal Register** notice discussed the substantive changes that we proposed for the NWPs and general conditions. We do not believe it was necessary to explain all minor editing changes to the NWPs, general conditions, and definitions in the preamble. However, there were a few errors in the proposal that contained some substantive changes that we did not intend to propose as changes. These were not discussed in the proposal and have been changed back to the original March 9, 2000 language. These errors are discussed in the discussion of the NWP, general condition or definition where they occurred. Each Corps district issued public notices announcing the publication of the August 9, 2001, **Federal Register** notice for the proposal to reissue and modify the NWPs. The district public notice process included coordination with state agencies and the public, to solicit their comments on regional issues related to the reissuance and modification of the NWPs, including any proposed regional conditions. We do not agree that all conditions requested by state agencies should be incorporated into regional conditions. Division engineers approve only those regional conditions that are necessary to ensure that the NWPs authorize activities with minimal adverse effects on the aquatic environment, individually and cumulatively. However, state and Tribal Section 401 water Quality Certification and state Coastal Zone Consistency conditions are included as conditions to the NWPs

One commenter said that the August 9, 2001, proposal to reissue and modify NWPs should have had information concerning the cost of administering the NWP program. This commenter stated that costs of administering the NWP program can be reduced by requiring individual permits for all NWP activities that result in more than minimal adverse effects on the aquatic environment and require mitigation. Another commenter asserted that the August 9, 2001, **Federal Register** notice should have included statistics on the current NWP program, such as the number of activities authorized by NWP, the amount of staff time expended to process NWP verification requests, and the amount of staff time used for compliance and enforcement.

We did not believe it was necessary to discuss the costs of administering the NWP program in the August 9, 2001, **Federal Register** notice. Requiring individual permits for all NWP activities that may result in more than minimal adverse environmental effects before consideration of mitigation would not reduce costs. The individual permit process is more costly to implement than the NWP process. Increasing the number of individual permits processed by the Corps would increase the costs to implement the Corps regulatory program. We do not agree that it was necessary to include statistics on the NWP program or the amount of staff time expended to implement the NWP program in the August 9, 2001, notice.

Discretionary Authority

A few commenters objected to the NWPs because they place a large part of the responsibility on discretionary authority at the district and division levels to reduce the adverse individual and cumulative effects to the aquatic environment to a minimal level. One commenter suggested that more restrictive national standards on the NWPs should be imposed instead of relying upon the discretionary authority process. One commenter stated that the use of discretionary authority needs further guidance. Another commenter requested clear criteria district engineers should use to incorporate safeguards as a result of discretionary authority.

We disagree with these commenters because the PCN and discretionary authority processes provide substantial protection for the aquatic environment. The PCN requirements of the NWPs allows case-by-case review of activities that have the potential to result in more than minimal adverse effects to the aquatic environment. If the adverse effects on the aquatic environment are more than minimal, then a district engineer can either add special conditions to the NWP authorization to ensure that the activity results in no more than minimal adverse environmental effects or exercise discretionary authority to require an individual permit. We believe that district engineers are the best qualified to identify projects or activities at the local level that may result in more than minimal adverse effects to the aquatic environment. In addition, division engineers can add regional conditions to the NWPs to lower the PCN threshold or otherwise further restrict the use of the NWPs to ensure that the NWPs authorize only activities with no more than minimal adverse effects on the aquatic environment in a particular watershed or other geographic region. The functions and values of aquatic resources differ greatly across the

country. Therefore, minimal effects determinations for proposed NWP activities should be made at the local level by district engineers. We do not agree that guidance concerning the use of discretionary authority needs to be developed and implemented at the national level.

Compliance With the Endangered Species Act

A couple of commenters said that the Corps should initiate formal Endangered Species Act (ESA) consultation for the NWP program. One commenter suggested that NWPs be subject to national and district-level ESA assessments and formal consultation. One commenter indicated that the Corps is violation of section 7 of the ESA for failing to complete the mandatory formal consultation process with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) prior to reissuing and implementing the NWPs.

The Corps has initiated formal programmatic ESA consultation with the U.S. FWS and NMFS for the NWP program in 1999. A draft Biological Opinion has been prepared, but a final Biological Opinion has not been issued to date. A section 7(d) determination that the NWP reissuance will not foreclose any options has been prepared. Further, we believe that the NWPs, through the requirements of General Condition 11, comply with ESA. Further where necessary for specific cases we use the interagency ESA section 7 consultation regulations at 50 CFR part 402 when determining compliance with ESA. General Condition 11 requires a non-federal permittee to notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the proposed activity, or if the proposed work is located in designated critical habitat. General Condition 11 also states that the permittee shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized by NWP. General Condition 11 further indicates that the NWP does not authorize the taking of any endangered species.

A few commenters indicated that NWPs create cumulative impacts that affect endangered species. One commenter suggested that the Corps prohibit the use of NWPs in proximity to areas containing habitat that may be used by threatened or endangered species. A couple of commenters objected to General Condition 11, stating that it places the responsibility of determining whether a proposed activity may affect a threatened or endangered species in the hands of the prospective permittee.

To address cumulative impacts that affect endangered species, division engineers can impose regional conditions on the NWPs and district engineers can add case-specific special conditions to NWP authorizations to address impacts to endangered or threatened species or designated critical habitat. For example, regional conditions can prohibit the use of NWPs in certain geographic areas or require PCNs for all activities in areas inhabited by endangered or threatened species. Some Corps districts have conducted programmatic ESA consultation to address activities regulated by the Corps that may affect Federally-listed endangered or threatened species. General Condition 11 requires non-federal permittees to notify the Corps if any Federally-listed endangered or threatened species or designated critical habitat might be affected by the proposed work. Those activities that will not affect any Federally-listed endangered or threatened species or designated critical habitat do not require notification to the district engineer. The regulations at 50 CFR part 402 do not require ESA consultation for those activities that will not affect endangered or threatened species or destroy or adversely modify designated critical habitat. The implementation of General Condition 11, regional conditions, and case-specific special conditions will ensure that the NWP program complies with the ESA.

Regional Conditioning of the Nationwide Permits

One commenter stated that the preamble of the August 9, 2001, **Federal Register** notice makes it clear that in taking into account these regional differences, district engineers can change notification thresholds or require notification for all activities within a particular watershed or waterbody. This commenter indicated that district engineers should also have the discretion to eliminate notification requirements, increase acreage limits, add permits, and authorize activities where the impacts to the environment will be minimal based upon the regional conditions.

Division engineers cannot modify the NWPs by adding regional conditioning to make the NWPs less restrictive. Only the Chief of Engineers can modify an NWP to make it less restrictive, if it is in the national public interest to do so. Such a modification must go through a public notice and comment process. However, if a Corps district determines that regional general permits are necessary for activities not authorized by NWPs, then that district can develop and implement regional general permits to authorize those activities, as long as those regional general permits comply with section 404(e) of the Clean Water Act.

One commenter stated that regional conditions are not uniformly applied by district engineers throughout the country and in some cases can potentially result in less protection for the aquatic resources. This commenter suggested that Corps districts adopt stronger regional conditions or institute stronger national conditions. One commenter agreed that regional conditions are an essential tool for protecting valuable aquatic resources and accounting for differences in aquatic resource functions and values across the country. One commenter stated that regional conditions have broadened the applicability of NWPs to make them less protective.

We believe that imposing more restrictive national terms and limitations on the NWPs is unnecessary. The terms and conditions of the NWPs published in this **Federal Register** notice, the PCN process, and the regional conditioning process will ensure that the NWPs authorize activities with no more than minimal adverse effects on the aquatic environment, individually and cumulatively. It is far more efficient to develop NWPs that authorize most activities that have no more than minimal adverse effects on the aquatic environment and provide division and district engineers with the authority to limit the use of these NWPs through discretionary authority or by adding conditions to the NWPs.

For particular regions of the country or specific waterbodies where additional safeguards are necessary to ensure that the NWPs authorize only those activities with no more than minimal adverse effects, regional conditions are the appropriate mechanism to address those concerns. For example, regional conditions can restrict the use of NWPs in high value waters for those activities that do not require submission of a PCN. Division and district engineers are much more knowledgeable about local aquatic resource functions and values and can prohibit or limit the use of the NWPs in these waters. We believe that regional conditioning of the NWPs provides effective protection for high value wetlands and other aquatic habitats.

One commenter stated that NWPs could affect treaty and other Indian

rights and would like to consult with the Corps on a government to government basis to develop regional or national conditions that will address the concerns. One commenter recommended regional conditions that would require notification of Tribes and provide appropriate Tribes with the opportunity to comment on particular NWP activities.

We believe that General Condition 8, Tribal Rights, addresses the issue of tribal rights and the use of NWPs. Division and district engineers can consult with Tribes to develop regional conditions that will ensure that tribal rights are adequately addressed by the NWP process. Division engineers can regionally condition the NWPs to require coordination with Tribes when proposed NWP activities may affect Tribal lands or trust resources.

One commenter said that regional conditions should be developed for all NWPs to conserve Essential Fish Habitat. A couple of commenters indicated that NWPs should not be used in any areas that have been ranked as high value wetlands or critical resource waters. One commenter indicated that NWPs should not be used to authorize Section 10 and Section 404 activities in the Lower Hudson River. One commenter indicated that regional conditions are troubling because there are no central, definitive sources for information concerning those conditions.

We agree that regional conditions are an effective mechanism to help ensure that the NWPs comply with the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act. We require division and district engineers to coordinate with regional offices of the National Marine Fisheries Service to develop and implement regional conditions to conserve Essential Fish Habitat. Areas with high value wetlands or critical resource waters can be subjected to regional conditions, to ensure that activities authorized by NWPs do not result in more than minimal adverse effects to those waters. General Condition 25 addresses the use of certain NWPs in designated critical resource waters. This general condition states that district engineers can designate additional critical resource waters after notice and opportunity for public comment. The Corps has a general map of Corps division and district boundaries that is available on the Internet at *http://www.usace.army.mil/where.html#Divisions.* This interactive map also provides links to the home pages of Corps districts. Due to the scale of this map and since some Corps district boundaries are based on watershed boundaries, prospective permittees should contact the nearest Corps district office to determine which Corps district will review their PCN, permit application. Most Corps districts post their regional conditions on their Internet home pages.

One commenter stated that the last paragraph on page 42070 of the August 9, 2001, **Federal Register** notice contains an incorrect statement. This paragraph states that: ''In addition to the ''notification'' provision, regional conditions may be developed by District Engineers to take into account regional differences in aquatic resource functions and values across the country and to put mechanisms into place to protect them. After identifying the geographic extent of ''higher'' quality aquatic systems, District Engineers can either change ''notification'' thresholds, or require ''notification'' for all activities within a particular watershed or waterbody to ensure that NWP use and authorization only occurs for activities with minimal adverse effects, individually and cumulatively.'' This commenter said that district engineers can only recommend regional conditions and that regional conditions must be approved by division engineers.

This commenter is correct, because regional conditions must be approved by division engineers after a public notice and comment period. District engineers can propose regional conditions at any time, but the division engineer must approve those regional conditions before they become effective.

Water Quality Certification/Coastal Zone Management Act Consistency Determination Issues

One commenter suggested that agencies should work together to make early agreements on certification conditions or denials of certification by states and tribes under section 401 of the Clean Water Act and section 307 of the Coastal Zone Management Act (CZMA). This would improve protection of the aquatic resources, benefit the regulated community, and reduce duplication of workload. Some commenters indicated that NWPs should be conditioned to prohibit construction by an applicant until all state and local permits are issued. A few commenters stated that the Corps should not issue a provisional NWP verification letter if the state denies Water Quality Certification because local regulators are easily persuaded to issue their permit.

We encourage States and Tribes to coordinate with Corps districts to complete and expedite water quality certification (WQC) and coastal zone certification for the NWPs. The proposed changes to the NWPs that were announced in the August 9, 2001, **Federal Register** notice are minor, and we believe that the proposed changes will not substantially affect the water quality certification and coastal zone consistency determination processes. Concurrent with the publication of the August 9, 2001, **Federal Register** notice, Corps districts and divisions were required to issue public notices to solicit comments on proposed regional conditions and initiate coordination with states and Tribes for the purposes of WQC and CZMA consistency determinations. The NWPs published in today's **Federal Register** notice have not been extensively modified from the proposal published in the August 9, 2001, **Federal Register**. These NWPs will become effective in 60 days. Since there have been few changes to the proposed NWPs, we believe that 60 days is sufficient time for states and Tribes to complete their WQC and CZMA consistency determinations. We believe that it is incumbent upon the Corps to let the applicant know when we have completed the Corps review and what the Corps decision is. It is up to the applicant to get the required individual State 401 water quality certification from the state, where the state has denied a water quality certification for the NWP as a whole.

Discussion of Comments and Final Permit Decisions

Nationwide Permits

The following is a discussion of the public comments received on the proposed nationwide permits and our final decisions regarding the NWPs, the general conditions, and the definitions. The Corps prepared decision documents on each of the NWPs, which are available on the Corps web site, indicated above. Following the discussion of the public comments are the final NWPs, the final general conditions, and the final definitions.

1. *Aids to Navigation.* There were no changes proposed to this nationwide permit. Since there were no comments on this nationwide permit. The nationwide permit is reissued without change.

2. *Structures in Artificial Canals.* There were no changes proposed to this nationwide permit. There were no comments on this nationwide permit. The nationwide permit is reissued without change.

3. *Maintenance.* We did not propose any change to this nationwide permit.

However, there were several comments on this NWP. One commenter suggested that 'terms' should be applied to maintenance of all flood protection works that the Corps built in partnership with the State, and that are now maintained by local entities or by ourselves.

We presume that this comment refers to ''term limits'' on the time that may elapse between maintenance events in flood protection projects. Although this idea may have merit in the context of the original project authorization, or with respect to maintenance agreements with local sponsors, we do not believe that such limits can or should be imposed through NWP 3. We do not intend this NWP to encourage or compel maintenance activities to be conducted more frequently than is necessary. However, the eligibility requirements of NWP 3(i) do encourage maintenance to be conducted before the structure or fill falls into such a state of disrepair that it can no longer be considered ''serviceable.''

Another commenter expressed the opinion that NWP 3 addressed activities that are exempt from regulations under section 404(f)(1) of the Clean Water Act

This is not correct. NWP 3 does not, in any way, extend Clean Water Act or River and Harbor Act jurisdiction to any area or activity that is not subject to these laws. Any activity that is exempt does not require a permit for the Corps including NWP 3.

One commenter suggested that while bioengineered projects are less environmentally damaging than riprap and offer benefits to salmon, the presence of wood in some bank protection structures has the potential to interfere with treaty fishing access by preventing the use of nets in areas. Another commenter stated that Tribes should be informed of all requests for this NWP that involve in-water work and granted 30 days to provide comments.

General Condition 8, Tribal Rights, does not allow an activity or its operation to impair reserved tribal rights, including but not limited to, reserved water rights and treaty fishing and hunting rights. Compliance with the general condition for NWP 3 regarding interference with treaty fishing rights, or other tribal rights, and the determination of any relevant and necessary modification of this NWP is the responsibility of our Division and District offices.

One commenter suggested that riprap should not be allowed in any waterbody where habitat-forming processes are limited, as identified by a state or federal watershed analysis for salmon and/or their habitat, and where the riprap would interfere with these processes. This commenter also suggested that the placement of riprap should be the minimum necessary to protect the structure.

We believe that NWP 3, as proposed, will limit the placement of riprap to the minimum necessary to provide adequate erosion protection. However, applicable law does not impose any restriction related to the habitat-forming processes mentioned by this commenter. In light of this, we believe that it would be inappropriate to impose such a policy under any Corps permit process. Although the consideration of such concerns may be proper in the context of authorizations for new work, we do not agree that it should be a compelling consideration in the context of the kinds of maintenance activities that are eligible for authorization under this NWP.

One commenter suggested that the Corps prohibit the addition of new riprap or, at a minimum, require ''Notification'' if new riprap is proposed, and that the Corps prohibit the placement of riprap or any other bank stabilization material in any special aquatic site, including wetlands. Another commenter stated the permit should prohibit ''removal of accumulated sediments'' in special aquatic sites.

Since this NWP only authorizes activities that restore an area to its previous condition, we do not believe it is appropriate to prohibit the maintenance of structures or fills simply because a special aquatic site may have formed in areas that require such repair. Similarly, with respect to the discharge of riprap or other bank stabilization materials, we do not believe that restoration of banks or of stabilization projects, within the limits of NWP 3, should be precluded by the presence of a special aquatic site.

One commenter suggested that this NWP should not be issued for maintenance work on culverts that fail to meet appropriate standards for the upstream and downstream passage of fish, or issued for culverts that do not allow for the downstream passage of substrate and wood. This commenter also suggested that if the proposed action is to remove the build-up of substrate at the upstream end of the culvert, or from the culvert itself, a condition of the permit should be that all substrate of spawning size and all wood of any size should be placed at the downstream end of the culvert.

We do not believe there are any national standards that we can apply to NWP 3 to assure that an adequate passage for fish and substrate materials is provided in the maintenance situations that can be authorized under this NWP. However, we agree that, to the extent that actions to enhance such fish and substrate passage can be incorporated into individual NWP 3 authorizations, they should be included as best management practices. We will encourage Corps districts to consider this issue when approving maintenance of culverts. Any redeposit of excavated spawning-size substrate may be authorized under NWP 18, but is subject to the limitations of that NWP

Several commenters indicated the Corps should withdraw section (iii) as the dredging and discharge allowed is double that authorized by NWPs 18 and 19 and, as such, will result in greater than minimal adverse effects. Several commenters also offered the opinion that restoring upland areas damaged by a storm, etc., has nothing to do with maintaining currently serviceable structures. Furthermore, some commenters suggested that it may be difficult to determine if the ''damage'' is due to a discreet event after a two-year period. Additionally, there is no acreage limit for this section and placement of ''upland protection structures'' will result in changes in the upstream and downstream hydromorphology of a stream.

We do not agree that the mere fact that the amount of the dredging or discharge authorized under this NWP, as compared to the authorization of similar activities under other NWPs, in any way indicates that the effects are more than minimal. The question of whether or not restoring upland areas has anything to do with maintaining currently serviceable structures is not relevant to the consideration of this NWP since no such relationship is required by the permit itself, or by the regulations governing the issuance of such permits. We do agree that, in some cases, it may be difficult to determine whether any damage is due to a discrete event. For this reason, the NWP prescribes only limited criteria in this regard, and it affords considerable discretion to the District Engineer to determine when there is a reasonable indication that the damage being repaired qualifies for authorization under NWP 3.

Two commenters indicated the permit can be used to expand the scope of other NWPs, including 13, 18, 19 and 31 which could result in more than minimal impact to the environment.

General condition 15 addresses the use of multiple NWPs for a project. This condition provides that more than one NWP can only be used if the acreage lost

does not exceed the acreage limit of the NWP with the highest specified acreage limit. Normally, when NWPs are combined for a project, the combined impacts are no more than minimal. We rely on our District offices to provide reasonable final assurance that the use of one or more NWPs, as they are applied in actual situations, do not result in more than minimal impacts. Districts have discretionary authority to require individual permits in situations where there is reason to believe that any NWP, individually or in combination with other NWPs, will result in more than minimal impacts.

One commenter suggested that the permit (inappropriately) encourages reconstruction in floodplains without questioning the need or desirability of doing so.

We believe that, inherent in the authorization of a structure or fill, is the reasonable right to maintain those structures or fills. With respect to the kinds of activities that are eligible for authorization under NWP 3, we do not agree that an assessment of need or desirability, is appropriate or necessary to ensure that the relevant effects are no more than minimal, including the effects on the floodplain.

Several commenters stated the lack of a definition of ''discreet event'' ignores the natural, hydrological processes at work in stream systems and allows landowners to prevent natural meandering processes within a waterway caused by normal storm events.

On the contrary, NWP 3 clearly recognizes that maintenance may be required either as a result of a discrete event such as a storm, or as a result of non-discrete forces. However, we do not agree that landowners should be prevented or unduly constrained from maintaining legitimately constructed structures or fills that are subject to the effects of natural hydrologic processes of adjoining waters.

A couple of commenters stated allowing riprap and gabions will result in the permanent channelization of natural streams by inhibiting their natural movement within the floodplain with major direct and secondary effects to the aquatic environment, as well as adverse hydrologic affects to downstream properties.

Since NWP 3 only authorizes activities that repair or return a project to previously existing conditions, we do not believe that it will result in any effects that did not previously accrue from the existence of the original structure or fill, and we believe that the maintenance activities authorized under this NWP will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

One commenter stated that NWP 3(i) should be modified to also allow for the maintenance of existing structures or fill that did not require a permit at the time they were constructed.

NWP 31 does authorize regulated activities related to the repair, rehabilitation, or replacement of structures or fills that did not require authorization at the time they were constructed. As referenced in NWP 3(i), the regulations at 33 CFR 330.3 provide an elaboration on this point.

One commenter suggested that NWP 3(ii) should be modified to allow the Corps District Engineer to waive the 200' limitation in any direction from the structure when the aquatic resource impacts would remain minimal. It should also specify that areas that are only excavated with only incidental fallback, temporary stockpile areas, and temporary redeposits should not be included in the 200' limitation since such impacts would not cause a loss of waters of the US.

It is entirely reasonable to conclude that regulated discharges associated with the removal of accumulated sediments that occur more than 200 feet from a certain structure may have no more than minimal effects. However, our intent in qualifying such removal for eligibility under NWP was to authorize them as part of the maintenance of a specific structure, and not simply because the effects were no more than minimal. Although we cannot certify that 200 feet is, in any way, an absolute distance within which removals are clearly associated with the maintenance of the structure, we believe that it is a reasonable distance for asserting such association for the purposes of this NWP. Incidental fallback associated with otherwise unregulated activities is not regulated under section 404 of the Clean Water Act or under section 10 of the Rivers and Harbors Act. Temporary stockpiles and other temporary discharges of dredged or fill materials in waters of the US are regulated, but we believe that they can and should be avoided in most maintenance situations. Although they may not result in a permanent or net loss of waters of the US, and they may have no more than minimal adverse effects on the aquatic environment, we do not believe that they are necessary in most cases. They can also lead to discharges of pollutants into waters of the US that may or may not have minimal adverse effects, depending on the circumstances. For these reasons, we are not including such activities among those eligible for authorization under NWP 3.

One commenter suggested that NWP 3(iii) should be modified to allow the Corps District Engineer to waive the limitation which states that dredging may not be done primarily to obtain fill for restorative purposes when the aquatic resource impacts would remain minimal or when it is environmentally advantageous to allow some modification of pre-existing contours or discharges of additional fill material to prevent recurring damage and the associated repeated disturbance to continually repair the damage. This commenter further suggested that the District Engineer could then exercise more discretion in terms of requiring watershed based mitigation banks and in-lieu fee programs for additional impacts while requiring mitigation at a site of superior watershed importance.

This NWP focuses on the repair and restoration of currently serviceable structures and not on the source of such material. We are not convinced that allowing dredging to obtain the fill material would normally have no more than minimal impacts unless there were also detailed listing of dredging limitations and conditions. Further, to establish such limitations we would need to provide opportunity for public review and comment. In light of this, we do not agree that the suggested expansion of this NWP is appropriate. This NWP does allow some minor deviation, but modifications that are more than minor deviations cannot be considered to be ''maintenance'' as it is envisioned in this NWP and, depending on the nature and location of such prospective changes, separate authorization may be required.

One commenter stated that individuals should not be able to use this Nationwide Permit to increase the area impacted by bank stabilization structures.

NWP 3 does not authorize any significant increase in the original structure or fill. Only minor deviations that are necessary to effect repairs are eligible for authorization under this NWP.

One commenter insisted the notification requirement should be removed from NWP 3(ii) and NWP 3(iii) as these requirements create additional administrative burden with no increase in environmental protection or added value to the process. For NWP 3(iii), the commenter suggested that the requirement should be changed to a post-construction notification in order to expedite repairs necessary to public infrastructure.

We believe that these PCN requirements, as proposed, are a prudent means of assuring that the proposed maintenance activities are limited to those eligible for authorization under this NWP. We recognize that the PCN requirement imposes an additional burden on the project proponent, but we do not believe that it is inequitable or, in most circumstances, substantial. Emergency permit procedures are available to authorize such maintenance activities more quickly in emergency situations.

One commenter suggested that NWP 3 should be withdrawn as it is too broad for projects to be considered ''similar in nature'', or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects. The commenter also felt that its limitations are arbitrary and capricious and potentially could result in the exposure of highly toxic compounds.

We believe that NWP 3, as proposed, describes activities that are sufficiently similar in nature for the purposes of the NWP Program. Since this NWP only authorizes activities needed to return a project to a previously existing condition that either was authorized or that was implemented prior to the need for authorization, we do not agree that the effects will be more than minimal.

One commenter stated the Corps is unlikely to obtain adequate information on whether or not a change in use is contemplated, what the practicable alternatives are, or what materials are used unless an Individual Permit is required. In light of this, the commenter suggested that NWP 3 should be rewritten to prevent serious and widespread abuses.

We acknowledge that under this NWP we rely on the applicant's information on the intended use and on other aspects of the regulated activity. Since this NWP only authorizes activities that would return a project to previously existing conditions, we believe that the likelihood of serious or widespread abuses is exceedingly low. Further, we have the authority and use our authority to enforce compliance with permits, where necessary. The nationwide permit is reissued without change.

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* There were no changes proposed to this nationwide permit. There were no comments on this nationwide permit. The nationwide permit is reissued without change.

5. *Scientific Measurement Devices.* There were no changes proposed to this nationwide permit. One commenter stated the word ''primarily'' should be replaced with the word ''solely''. We believe that this change would unnecessarily restrict the NWP and require an individual permit in a few cases, simply because there was a secondary use or benefit of the scientific devise. Further, we do not believe that the requirement for an individual permit, for that reason, would result in any added value for the environmental. The nationwide permit is reissued without change.

6. *Survey Activities.* There were no changes proposed to this nationwide permit. There were no comments on this nationwide permit. The nationwide permit is reissued without change.

7. *Outfall Structures and Maintenance.* There were no changes proposed to this nationwide permit. One commenter suggested that notification should be limited to impacts greater than one acre, and that the District Engineer should have the authority to quickly issue this permit, without agency notification, by placing conditions limiting construction activities to periods of low-flow or no-flow in unvegetated ephemeral watercourses. Another commenter indicated the Corps should withdraw NWP 7(ii) since NWP 19 already provides for minor dredging, or limit the amount of material to be excavated to 25 cubic yards in order to be consistent with NWP 19.

The Corps believes that the limitations on the amount of fill that can be placed per linear foot is normally sufficient to ensure that the adverse effects on the aquatic environment will be minimal, individually and cumulatively. We agree that some impacts can be reduced by conducting certain activities in waters of the United Sates during low-flow or no-flow conditions. However, we also believe that a prohibition is not necessary or not practicable in many cases. We believe that this practice should be encouraged to further minimize any adverse effects on the aquatic environment. Therefore, we have modified general condition 3 to encourage this practice. We agree that there is some redundancy between NWP 7(ii) and NWP 19. However, we believe that NWP 7(ii) should not be eliminated since it is related to other activities authorized by NWP 7. Furthermore, the terms of NWP 7 are specific to that type of activity.

One commenter said this permit should prohibit the removal of accumulated sediments from small impoundments and special aquatic sites as these locally support rare, threatened or endangered water-dependent organisms.

The Corps does not believe that these areas normally support rare, threatened or endangered water dependent organisms, but this NWP does not authorize any regulated activity unless it complies with the Endangered Species Act. This NWP only allows the removal of accumulated sediments to maintain a preexisting depth, to facilitate water withdrawal at the location of the water intake.

One commenter insisted that NW7 should be withdrawn as it is too broad for projects to be considered ''similar in nature'', or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects. The commenter also suggested that its limitations are arbitrary and capricious. The Corps believes that the description of the type of activities will ensure that those activities authorized by this NWP will be similar in nature. Further, we believe that these activities normally will have no more than minimal adverse effects on the aquatic environment, individually or cumulatively. Further, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

The nationwide permit is reissued without change, however condition 3 was modified based on a comment on this NWP as indicated above.

8. *Oil and Gas Structures.* There were no changes proposed to this nationwide permit. However, one commenter recommended that NWP 8 should be withdrawn as it is too broad for projects to be considered ''similar in nature'', or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects. The commenter indicated that this permit category has the potential for catastrophic secondary, indirect, and cumulative adverse impacts, including adverse impacts to federally listed threatened or endangered species.

The Corps believes that this NWP is sufficiently restrictive to protect the environment. The only structures that can be authorized under this NWP are those within areas leased by the Department of the Interior, Minerals Management Service. The general environmental concerns are addressed in the required NEPA documentation that the Service must prepare prior to issuing a lease. Further, Corps involvement is only to review impacts on navigation and national security as stated in 33 CFR 322.5(f). The

nationwide permit is reissued without change.

9. *Structures in Fleeting and Anchorage Areas.* There were no changes proposed to this nationwide permit. However, one commenter suggested changing the permit to read: ''Buoys, floats and similar non-structural devices placed within anchorage or fleeting areas to facilitate moorage of vessels where the USCG has established such areas for that purpose.''

The Corps believes that this change is not needed. The current language is sufficient to ensure that the category of activities will be similar in nature. We believe that the suggested language would not allow certain structures that are necessary for moorage of vessels to be authorized within anchorage and fleeting areas. The types of structures permitted by this NWP within USCG established anchorage or fleeting areas are only those for the purpose moorage of vessels. We believe that this limits the type of structure sufficiently to be considered similar in nature. The nationwide permit is reissued without change.

10. *Mooring Buoys.* There were no changes proposed to this nationwide permit, and there were no comments on this nationwide permit. The nationwide permit is reissued without change.

11. *Temporary Recreational Structures.* There were no changes proposed to this nationwide permit. However, one commenter recommended withdrawing NWP 11 as it is too broad for projects to be considered ''similar in nature'', or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects. The commenter also stated that the permit category has the potential for catastrophic secondary, indirect, and cumulative adverse impacts, including adverse impacts to Federally listed threatened or endangered species. Another commenter suggested that temporary buoys, markers, small floating docks, and similar structures can interfere with the exercise of treaty fishing access and, therefore, in an area subject to treaty fishing, notification to affected tribes is required. The commenter further stated the regional conditions should be added, to require that such structures shall be removed from salmon spawning areas prior to commencement of the spawning season.

We believe that the listing of the type of activities will ensure that those activities authorized by this NWP will be similar in nature. Further, we believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Further, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. We agree that this NWP, as with all NWPs, should not authorize any activity that may impair reserved tribal rights, including, but not limited to, those reserved water rights, and treaty fishing and hunting rights, as stated in general condition 8. District and division engineers will consider the need to add regional conditions or case-specific conditions where necessary to protect such tribal rights. The nationwide permit is reissued without change.

12. *Utility Line Activities.* No changes to this nationwide permit were proposed. Several commenters raised issues and suggested changes related to size and threshold limits and construction practices. One commenter said that the permit should contain height and depth requirements for utility line installation. Another commenter suggested that a strict cap limit on the size of the utility line should be established. One commenter suggested that the Corps should require revegetation, as well as restoration, of the landscape's original contours for all NWP12 projects. One commenter suggested that sidecasting of material into wetlands should be prohibited, as should the construction of permanent access roads. One commenter suggested that the Corps should limit temporary sidecasting to 30 days, rather than 90 to 180 days as currently written. The commenter also suggested that, because temporary impacts can have more than minimal adverse effects, they should be limited to ½-acre, and total impacts should be limited to 0.3 acres. One commenter recommended raising the acreage limit from ½ acre to one acre. Another commenter said that the ½ acre limit is arbitrary and capricious.

Based on our experience, the Corps believes that the current thresholds and construction limitations are adequate to protect the aquatic environment while allowing needed projects to proceed, with restrictions. Furthermore, district engineers can further restrict specific activities, such as limiting sidecasting to 30 days where necessary. At this time, we do not believe that it is necessary or appropriate to increase or reduce the thresholds.

Several commenters suggest changes to the preconstruction notification (PCN) requirement. One commenter recommended requiring a PCN for all lines greater than 6″ in diameter. Two commenters indicated that the absence of a clear definition of ''mechanized land clearing'' and a reasonable threshold for requiring PCNs creates regulatory uncertainty and an unnecessary burden on gas utility and pipeline construction projects. They further indicated that the notification requirement would be more reasonable and consistent with other NWP criteria if it only applied when mechanized land clearing affects more than a reasonable acreage of forested wetland. Another commenter recommended removing the PCN requirements for any mechanized land clearing that occurs in forested wetlands for utility rights-of-way. One commenter stated the Corps should exempt all utility projects other than sewer lines from the notification criteria because it is an unnecessary burden on non-sewer, energy-related utility projects, which typically will cross a water at right angles as opposed to running parallel to a stream bed that is within a jurisdictional area. Also, one commenter suggested we substitute a Corps-only PCN for activities resulting in the loss of between ½ and one acre of waters of the U.S. and a broader PCN for activities resulting in the loss of more than one acre. One commenter recommended reducing the PCN time period for a Corps response from 45 to 30 days.

The Corps believes that the current PCN requirements continue to be the appropriate criteria for determining when a PCN is required. We do not believe that an additional PCN requirement related to the size of the utility line is appropriate since the impacts of the utility line are temporary, and since restoration to preconstruction contours is required. We believe that projects involving mechanized land clearing require a PCN so that the Corps can ensure that the effect are no more than minimal. We also believe that the requirement for agency coordination of PCNs for activities that affect more than ½ acre for all NWPs, including this one, should remain in place to avoid confusion and to be consistent for all other NWPs. We believe that the 45 day response time for PCN is appropriate. It provides adequate time for those NWP activities that need some extra time to review. Corps Districts do not routinely use the 45 day period. Currently the average review time for NWP verifications is 18 days.

One commenter stated that natural gas distribution and pipeline projects typically only result in incidental fallback and, as such, should not require a 404 permit.

The Corps disagrees that such projects exclusively result in only incidental fallback. The Corps recognizes that

some excavation activities are likely to result in only incidental fallback that does not require a Corps permit under section 404 of the Clean Water Act. However, the Corps regards the use of mechanized earth moving equipment in waters of the US as resulting in a discharge of dredged material unless project specific evidence shows that the activity results in only incidental fallback. (See 33 CFR 323.2(d)(2)(i)). The determination whether a permit is required will be made on a case-by-case basis. In addition, the backfill for the pipeline is a regulated discharge which requires authorization under section 404 of the Clean Water Act.

A few commenters suggested that the NWP, as proposed, would eliminate the ½ acre threshold for several activities. They indicated that the proposed NWP states that ''activities authorized by paragraph (i) *and* (iv) may not exceed a total of ½-acre loss of waters of the U.S.'' whereas the existing NWP states that ''activities authorized by paragraphs (i) *through* (iv) may not exceed a total of ½-acre loss of waters of the United States.'' Since the current NWP language more clearly indicates that the total loss may not exceed ½-acre, they recommended that the current language should be retained.

The Corps agrees with this comment. The change was an error and the Corps did not intend to change this NWP. The current language will be retained.

Several commenters indicated that the discharge of dredged or fill material under this NWP could adversely affect a number of species listed under the Endangered Species Act.

The Corps believes that General Condition 11 is adequate to protect endangered species. No NWP authorizes any activity that does not comply with the Endangered Species Act.

One commenter recommended that the Corps prohibit ''stacking'' NWP 12 authorizations to allow multiple crossings, or to allow the use of NWP 12 in combination with any other NWP.

This NWP can only be used once for a pipeline crossing of a water of the United States. A pipeline project may cross more than one stream. However, each of these separate and distinct crossings is considered a single and complete crossing in accordance with Corps regulations at 33 CFR 330.2(i).

A few commenters recommended that the use of NWP12 for water intakes should not be approved because the low head dams typically associated with such structures can violate general condition 4. Some commenters also indicated that water withdrawal projects have different requirements than standard utility line crossings resulting in alterations to natural flow regimes that cannot be considered under this NWP.

NWP 12 specifies that all activities authorized by this NWP must comply with General Condition 4. Furthermore, NWP 12 cannot be used to authorize low head dams. Such structures would require an individual permit or some other general permit.

Two commenters requested the Corps revoke NWP12(ii) since they believed that it is unnecessary to construct such facilities in wetlands. They believe that providing an easily attainable authorization for such construction will actually encourage the placement of utility lines in wetland areas, resulting in an increase in the loss of wetlands.

We agree that any unnecessary construction of utility line substations in wetlands should be avoided. However, where such construction cannot be avoided as a practical matter, we believe that the limitations we have imposed in the NWP will ensure that any adverse effects on the aquatic environment will be no more than minimal, individually and cumulatively.

One commenter suggested that NWP 12 should be conditioned to require BMP's on private lands only, since federal and state land managers are more likely to impose conditions on properties under their control.

We believe that the term and conditions are adequate to ensure that any adverse effects on the aquatic environment will be no more than minimal, individually or cumulatively. The Corps districts will add regional or case specific conditions where they determine a need for such conditions.

One commenter said that NWP 12 should be withdrawn as it is too broad for projects to be considered ''similar in nature'', or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects. The permit category has the potential for catastrophic secondary, indirect, and cumulative adverse impacts, including adverse impacts to federally listed threatened or endangered species.

We believe that the minor nature of these types and categories of activities are similar in nature. We further believe that the conditions and specified thresholds will ensure that the activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The thresholds have been developed based on years of experience and were developed to consider most effects that could occur in many areas of the country. However, Division and District Engineers will condition such activities where necessary to ensure that those activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Activities authorized by this NWP must comply with general condition 11 to ensure that the activity is in compliance with the Endangered Species Act.

One commenter suggested we remove the sentence ''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 water of the United States.''

The Corps has established the threshold limits for all NWPs to be for permanent loss of waters of the US. Further we have establish the thresholds to provide for the Corps to be able to look at those projects to ensure that there will be no more minimal adverse effects on the aquatic environment, individually or cumulatively. Because the temporary discharges do not result in long lasting impacts and any short term impacts are less per acre than permanent, adding those temporary impacted acreage to permanent acreage would not provide an accurate measure of the potential impacts that may result in more than minimal effects.

One commenter recommended that a threshold of ½-acre should be used below which no compensatory mitigation should be required, unless a District Engineer determines otherwise. Another commenter suggested the changes in values and functions associated with the permanent conversion of maintaining gas line rights-of-way are more likely to be beneficial than detrimental. Because of the benefits, as well as the very limited extent of vegetation change, a mitigation ratio of 1:1 should be adopted for wetland disturbances above ½-acre. One commenter suggested we remove the paragraph that characterizes the conversion of a forested wetland to an herbaceous wetland as a ''permanent adverse effect'' that requires mitigation. Compensatory mitigation should not be required as well-maintained herbaceous wetlands are of significant value and often provide greater ecological functions. Additionally, many utility construction and maintenance activities result in only temporary effects on wetlands.

The Corps believes that mitigation should be required to ensure that any adverse effects on the aquatic environment will be no more than

minimal, individually or cumulatively. We have proposed to modify General Condition 19 concerning mitigation requirements for the NWPs. See the preamble discussion on General Condition 19 for our response to mitigation comments. The nationwide permit is reissued without change.

13. *Bank Stabilization.* The Corps proposed no changes to this NWP. One commenter said that this NWP should be withdrawn because it is too broad to meet the ''similar in nature'' requirement of general permits and it authorizes activities that may result in more than minimal adverse environmental effects. This commenter also stated that this NWP has the potential for substantial secondary, indirect, and cumulative adverse impacts, including adverse impacts to federally listed threatened or endangered species and environmental damage at riprap extraction sites. Another commenter stated that the Corps needs to develop a method to document, analyze, and minimize environmental impacts from all bank stabilization activities. One commenter stated that this NWP authorizes activities that adversely affect natural stream processes, is contrary to current practices and philosophies of natural stream rehabilitation, and impedes future restoration work. A couple of commenters suggested that the Corps adopt a ''no net loss in natural stream banks'' policy, requiring the removal of one linear foot of bank stabilization for every linear foot of new bank stabilization. Two commenters stated that the Corps should direct its bank stabilization and bank restoration programs toward the goal of maintaining and restoring natural stream processes to the Nation's rivers and streams.

This NWP complies with the ''similar in nature'' requirement of general permits, including nationwide permits, even though there are numerous methods of bank stabilization that can be authorized by this NWP. The terms and conditions, including the notification requirements and the ability of division and district engineers to impose regional and case-specific conditions on this NWP, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse effects on the aquatic environment. For those NWP 13 activities that require notification, district engineers will review the proposed work to ensure that those activities result in no more than minimal adverse effects to the aquatic environment. We do not agree that it would be appropriate to adopt a ''no net loss'' goal for stream banks. Stream bank stabilization activities are necessary to protect property and ensure public safety. Stream restoration is not always feasible in developed areas and other types of bank stabilization may be more appropriate in those areas.

One commenter said the NWP should encourage consideration of more environmentally acceptable methods of bank stabilization first, and if those methods are not appropriate, then hard erosion control measures such as riprap or bulkheads could be authorized. A commenter recommended that this NWP authorize techniques that employ more natural methods of bank protection channelward of the ordinary high water mark, which may or may not include the use of hard armoring materials.

We do not agree that it is necessary to establish preferences for bank stabilization methods in the terms and conditions of this NWP. In certain situations, riprap or bulkheads may be the only practicable methods of bank stabilization. This NWP can be used to authorize bank stabilization activities channelward of the ordinary high water mark, as long as the terms and conditions of the NWP are met.

One commenter stated that the 500 linear foot limit of this NWP should be reduced to 100 linear feet, to prevent significant degradation of salmon habitat. Two commenters said that NWP 13 should not authorize bank stabilization activities in excess of 300 linear feet. One commenter indicated that NWP 13 should be modified to allow district engineers to waive the 500 linear foot limit when impacts to aquatic resource are minimal or when it is environmentally advantageous to allow additional bank stabilization to prevent recurring damage. Such a waiver would reduce repeated disturbances associated with continuously repairing damaged bank stabilization measures that were shortened to meet the limit. This commenter also said that this waiver would allow district engineers to exercise more discretion in terms of requiring watershed based mitigation banks and in-lieu fee programs for additional impacts and requiring mitigation at a site of greater watershed importance.

Based on our experience of using this limit for over 25 years, we believe that 500 linear feet is the appropriate limit. However, this limit can be waived as indicated in the first sentence of the last paragraph of NWP 13 which states that bank stabilization activities in excess of 500 feet in length may be authorized if the project proponent notifies the district engineer in accordance with General Condition 13 and the district engineer determines that the proposed work results in minimal individual and cumulative adverse environmental effects. Division engineers can regionally condition this NWP to prohibit or restrict its use in streams inhabited by salmon. For those activities that require notification, district engineers will review the proposed work to ensure that the adverse environmental effects are no more than minimal.

One commenter said that projects proposing bank stabilization structures of more than 300 feet should be elevated to the Individual Permit level.

Past experience with the limits of this NWP leads us to believe that the currently proposed 500-foot limit generally will not result in more than minimal impacts.

Two commenters recommended the Corps prohibit stacking of NWP 13 with itself or any other NWP. Two commenters stated the Corps should prohibit the use of waste concrete for bank stabilization material due to the environmental problems, such as toxic paints from sidewalks, rebar from construction, and petroleum products from automobiles. One commenter indicated that the placement of wood in bank stabilization projects has the potential to interfere with treaty fishing access and affected tribes should be notified of activities authorized by this NWP.

This NWP authorizes single and complete bank stabilization activities. We do not agree that it would be appropriate to prohibit the use of NWP 13 with other NWPs, but we do prohibit using a NWP more than once for a single and complete project. General Condition 15 addresses the use of more than one NWP for a single and complete project. General Condition 18 addresses the use of suitable material for discharges of dredged or fill material into waters of the United States. This general condition prohibits the use of materials that contain toxic pollutants in toxic amounts. General Condition 8, Tribal Rights, indicates that no activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights. This NWP can further be regionally conditioned by division engineers to ensure that bank stabilization activities do not interfere with specific treaty fishing access. This nationwide permit is reissued without change.

14. *Linear Transportation Projects.* In the August 9, 2001, **Federal Register** notice, we proposed to modify NWP 14

to authorize private transportation projects in non-tidal waters to have a maximum acreage of ½-acre instead of the current ⅓-acre, and to eliminate the 200 linear-feet prohibition.

Numerous commenters agreed with the proposal to treat both public and private transportation projects the same for tidal and non-tidal waters and increase the impact limit to ½-acre in non-tidal areas. Most agreed that the Corps was unjust in differentiating between private and public projects in the past. Two commenters recommended that the ½ acre threshold be increased to assist the applicant with projects that may still have minimal impacts however will go over the allowed threshold and stated this will decrease the amount of individual permits. Several commenters disagreed with the proposal to treat both public and private transportation projects the same and indicated that private individuals are less likely to have access to critical resource and ecological information to assist them in designing their project with minimal impacts to the aquatic environment. Some commenters recommended that the ½-acre threshold be changed to ½-acre overall. One commenter stated that the change in the acreage threshold conflicts with the general requirement of the Nationwide Permits to have minimal adverse impacts on the aquatic environment. One commenter stated that this NWP supports a non-water dependant activity and therefore activities proposed under this NWP should be reviewed as an Individual Permit. One commenter recommended that the Corps withdraw all proposed changes.

We have determined that the impacts to the aquatic environment for transportation projects will be essentially the same whether the project is public or private and on the average we would expect the private transportation projects to be smaller. We believe that private projects go through local, state, and other permitting processes and have the same access to resource and ecological information as public projects. Furthermore, the terms and conditions will ensure that NWP 14 will have no more than a minimal adverse effect on the aquatic environment. We believe that a distinction needs to be made for transportation crossings based on whether they cross tidal or non-tidal waters. We are not changing the maximum acreage of NWP 14, but are applying the maximum acreage to non-tidal waters rather than public projects. We have determined that the maximum loss of waters of the US for this NWP should be ½ acre in non-tidal waters of the US and ⅓ acre in tidal waters of the US. Both limits along with the terms and conditions of the NWP will ensure that this NWP does not authorize activities with more than minimal adverse effects on the aquatic environment.

Many commenters objected to the removal of the 200 linear-foot restriction because this type of impact could not be considered minimal. The commenters stated that streams have no adjacent wetlands therefore allowing several hundred feet of stream to be impacted before the ½ acre threshold is reached, that requiring a linear measure ensures that impacts will be minimal, and no justification was provided in the **Federal Register** for proposing this change. Numerous commenters agree with the removal of the 200 linear-foot restriction and have stated that the PCN threshold, as well as the acreage limit, will continue to provide protection to the environment. One commenter recommended that a 100 linear-foot restriction be adopted.

We proposed to remove the 200 linear-feet prohibition from NWP 14 to eliminate varied interpretations and to simplify the basis for use of the permit. We have determined that the removal of this prohibition will have little practical effect as the limiting factor contained in the terms and conditions of NWP 14 is most often the acreage limitation. We believe that very few projects exceeding the 200 linear-feet would remain below the ⅒-acre ''notification'' threshold. For example, a 200′ by 22′ wide transportation crossing would impact 4,400 sq. ft. (i.e., ⅒-acre). We have determined that the ''notification'' threshold (i.e. ⅒-acre for areas without special aquatic sites, and all proposed projects that would involve fill in special aquatic sites) allows the Corps to do a case-by-case review. Therefore, we have concluded that these measures, along with the other terms and conditions of the NWPs and other mechanisms such as regional conditions and the discretionary authority, will ensure that any NWP 14 activity that complies with the acreage threshold will have no more than a minimal adverse effect on the aquatic environment.

Two commenters recommend that all proposed changes be implemented and individual Corps Districts not be allowed the use of discretionary authority to restrict these changes nor require an individual permit for multiple stream crossings. One commenter recommended that mitigation always be required for impacts under NWP 14.

We believe that the use of discretionary authority by District Engineers is necessary to ensure that impacts to the aquatic environmental that are more than minimal receive the proper review. The requirement for a compensatory mitigation proposal applies to those activities that require notification. Further, for projects not requiring a PCN, District Engineers may determine, on a case-by-case basis, that compensatory mitigation is necessary to offset losses of waters of the United States because the work, without compensatory mitigation, will result in more than minimal adverse effects on the aquatic environment. This could occur if the project proponent submits a voluntary verification request to the Corps or if a concern is raised to the Corps by a third party.

Numerous commenters agreed with the preamble clarification that features integral to linear transportation projects are covered under NWP 14 and stated this clarification will reduce confusion without adversely affecting environmental values. One commenter objected to the clarification of features integral to linear transportation projects and stated that the addition of these activities expands the possibility of impacts, which often could be avoided. One commenter recommended that the term ''stormwater detention basin'' (as used in the preamble to the proposed NWPs) be changed to read ''stormwater management basin'' and ''water quality enhancement measure'' be changed to read ''water quality/wetland enhancement measures''. The commenter stated that this change would allow additional stormwater best management practices to be authorized by this permit.

We do not believe that the features described in preamble of the August 9, 2001, issue of the **Federal Register**, expanded the activities that can be authorized by NWP 14. We have maintained that NWP 14 may not be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or hangars. We believe the examples listed in the preamble are dependent integral components of typical linear projects and were added for clarification. We maintain the authority to assert discretionary authority when evaluating the magnitude of adverse effects on the aquatic environment (33 CFR 330.1(d), 330.4(e) & 330.5). These examples and other integral features not listed could be authorized. We agree that stormwater management features and wetlands features integrally related to the linear

transportation project could be authorized by this NWP. In addition, other NWPs may be combined with this NWP to authorize related activities subject to general condition 15.

Several commenters addressed the Corps definition of single and complete project under NWP 14. One commenter recommends that any proposed roadway fill in special aquatic sites, including wetlands require a PCN with agency coordination. One commenter recommended that the definition of ''single and complete project'' be amended to include all portions of the linear project that do not have independent utility. One commenter recommended that multiple stream crossings should be deemed to be part of a single road project. One commenter recommended that additions to previously permitted projects be reviewed under the individual permit to avoid piece-mealing.

Notification is required for all discharges of dredged or fill material into special aquatic sites and discharges resulting in the loss of greater than 1/10 acre of waters of the United States. We believe most activities authorized by this NWP will require notification to the district engineer and the determination as to whether to require an individual permit should be made on a case-by-case basis. For example, if NWP 14 is used more than once by different project proponents to cross a single waterbody, the district engineer will assess the adverse effects on the aquatic environment and determine if those adverse effects are minimal. As with any NWP, the district engineer can exercise discretionary authority and require an individual permit if the adverse effects on the aquatic environment will be more than minimal. The definition of the term ''single and complete project'' for linear projects can be found in Corps regulation at 33 CFR 330.2(i).

Many commenters recommend that NWP 14 not be authorized within tidal wetlands or waters and wetlands adjacent to tidal waters as these areas have great ecological importance and already suffer from development pressures. One commenter recommended an individual permit be required for activities within tidal wetlands and wetlands adjacent to tidal waters. One commenter recommended the language in section a. (2) be changed to read ''linear transportation projects in tidal waters and non-tidal wetlands adjacent to tidal waters''.

We agree that tidal waters or water and wetlands adjacent to tidal water can have great ecological importance and have suffered from development pressures. However, the current language is sufficient to protect such areas. We have developed terms and conditions to keep adverse impacts at a minimal level. Further, in many cases a PCN is required and Districts will add case specific conditions and mitigation when needed to ensure that adverse impacts will be minimal. Some projects will need to be processed as an individual permit. The district offices will make that determination when necessary to ensure that the adverse effects to the aquatic environment will be no more than minimal.

One commenter recommends that the Corps prohibit the construction of new transportation or spur projects under this NWP. Due to the development potential associated with road projects, a thorough alternative analysis, along with agency and public review should be required.

The main purpose of this NWP is to authorize new linear transportation crossing of waters of the US. It may also authorize new crossings involved in relocating of existing linear transportation projects. This NWP does not authorize a transportation project as a whole, which does not require authorization by the Corps of Engineers. However, we will address alternatives to crossings to avoid and minimize adverse effects in accordance with General Condition 19, to ensure that adverse effects on the aquatic environment are no more than minimal.

One commenter recommends, condition ''f'' be clarified to ensure less than minimal effects on the environment. The clarification should state ''all stream crossings be engineered to transport flows and sediment during both bank full and flood flows''. Furthermore the clarification should state the permit does not authorize crossings that block flows in or restrict the stream's access to the floodplain. The commenter further recommended that the condition require equalization culverts be installed as part of crossings that affect flood plains.

We agree that activities authorized by this NWP can have adverse effects related to flow and movement of water through and under the crossings. For that reason, the term f. of the NWP was added to emphasize the need for projects authorized by this permit to adequately address water movement impacts. This provision refers to General Conditions 9 & 21. We believe that along with these two conditions, the effects of crossings on the movement of water will be no more than minimal.

15. *U.S. Coast Guard Approved Bridges.* There were no changes proposed to this nationwide permit. However, one commenter recommended that NWP 15 be withdrawn as it is too broad for projects to be considered ''similar in nature'', or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects. The commenter also stated that the permit category has the potential for catastrophic secondary indirect, and cumulative adverse impacts, including adverse impacts to federally listed threatened or endangered species.

We believe that the listing of the type of activities and that they are related to bridge construction only will ensure that those activities authorized by this NWP will be similar in nature. Further, we believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. However, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The nationwide permit is reissued without change.

16. *Return Water From Upland Contained Disposal Areas.* There were no changes proposed to this nationwide permit. A few commenters suggested that, in order to assure that the lands and waters draining the disposal areas are not contaminated from pollutants entrained in the dredged material, the NWP should be tightened to require individual permit review unless the discharge/leachate from the dredged material is controlled through a NPDES permit. Another commenter stated that NWP 16 should be withdrawn as it is too broad for projects to be considered ''similar in nature'', or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects. The commenter also stated that the permit category has the potential for catastrophic secondary indirect, and cumulative adverse impacts, including adverse impacts to federally listed threatened or endangered species.

Consistent with 33 CFR 323.2(d)(1)(ii), this NWP authorizes the return water as the discharge of dredged material. As such, an NPDES permit is not required. However, a 401 certification is required and we believe will adequately control the quality of the return flow. We believe that the listing of the type of activities will ensure that those activities authorized by this NWP will be similar in nature. Further, we believe that normally these activities will have no more than

minimal adverse effects on the aquatic environment, individually and cumulatively. Further, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. General Condition 11 ensures that the activity will comply with the Endangered Species Act. The nationwide permit is reissued without change.

17. *Hydropower Projects.* There were no changes proposed to this nationwide permit. There were no comments on this nationwide permit. The nationwide permit is reissued without change.

18. *Minor Discharges.* There were no changes proposed to this nationwide permit. One commenter said that NWP 18 should be withdrawn as it is too broad for projects to be considered ''similar in nature'', or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects. The permit category has the potential for catastrophic secondary indirect, and cumulative adverse impacts, including adverse impacts to federally listed threatened or endangered species. Also, the thresholds of 25 cubic yards and 1/10th acre are arbitrary and capricious. Another commenter stated that NWP 18 should be modified to allow the Corps District Engineer to waive the 25 cubic yard limitation when the aquatic resource impacts would remain minimal or when it is environmentally advantageous and efficient to allow the discharge of additional material as a single project and direct mitigation to a watershed based mitigation bank.

We believe that the minor nature of these types of small discharge activities authorized by this NWP will be similar in nature. Further, we believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. However, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. While we believe that the small quantity limits are necessary to ensure that on a national basis that the adverse effect on the aquatic environment will be no more than minimal individually and cumulatively, we also recognize that in some areas and in some situations that larger quantities would also have no more than minimal individually and cumulatively. In these situations the Corps Divisions and districts may issue, after notice and comment, regional general permits for larger quantity limits. General Condition 11 ensures that the activity will comply with the Endangered Species Act. The nationwide permit is reissued without change.

19. *Minor Dredging.* There were no changes proposed to this nationwide permit. One commenter said that NWP 19 should be withdrawn as it is too broad for projects to be considered ''similar in nature'', or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects. The permit category has the potential for catastrophic secondary indirect, and cumulative adverse impacts, including adverse impacts to federally listed threatened or endangered species. Also, the thresholds of 25 cubic yards is arbitrary and capricious.

We believe that the minor nature of these types of small dredging activities authorized by this NWP will be similar in nature. Further, we believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. However, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Also these activities do not require a permit under section 404 of the Clean Water Act if they result in only incidental fallback (see 33 CFR 323.2 (d)). While we believe that the small quantity limits are necessary to ensure on a national basis that the adverse effects on the aquatic environment will be no more than minimal individually and cumulatively, we also recognize that in some areas and in some situations that larger quantities would also have no more than minimal adverse effects, individually and cumulatively. In these situations the Corps Divisions and districts may issue, after notice and comment, regional general permits for larger quantity limits. General Condition 11 ensures that the activity will comply with the Endangered Species Act. The nationwide permit is reissued without change.

20. *Oil Spill Cleanup.* There were no changes proposed to this nationwide permit. One commenter suggested that NWP 20 should be withdrawn as it is too broad for projects to be considered ''similar in nature'', or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects. The permit category is a prime example of the secondary, indirect, and cumulative adverse impacts, including adverse impacts to federally listed threatened or endangered species in locations beyond the location of the spill which could result from activities authorized under NWP 8.

We believe that the minor nature of these types of small discharge activities authorized by this NWP will ensure that they are similar in nature. Further, we believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. However, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. This NWP only addresses the need to clean up oil spills regardless of the source of the spill and only when the clean up involves a discharge of dredged or fill material. The effects of the oil spill itself will be considered by the lead Federal or state agency involved in the clean up exercise. General Condition 11 ensures that the activity will comply with the Endangered Species Act. The nationwide permit is reissued without change.

21. *Surface Coal Mining Activities.* The Corps proposed two changes to this NWP to ensure the proper focus of the NWP and to make certain adequate mitigation will be required resulting in no more than minimal adverse effects on the aquatic environment. Both of these changes will increase protection of the aquatic environment. First, the Corps proposed to require a specific determination by the District Engineer on a case-by-case basis that the proposed activity complies with the terms and conditions of this NWP and that adverse effects to the aquatic environment are minimal both individually and cumulatively after consideration of any required mitigation before any project can be authorized. Second, the Corps proposed to add clarification to NWP 21 that the Corps will require mitigation when evaluating surface coal mining activities in accordance with General Condition 19. In addition, the Corps Section 404 review will address the direct and indirect effects to the aquatic environment from the regulated discharge of fill material.

Definition of Fill and Waste

Two commenters stated that the Corps issuance of NWP 21 to authorize valley

fills is illegal in that the Corps current definition of fill specifically precludes pollutants discharged into the water primarily to dispose of waste, as that activity is regulated by EPA under section 402 of the Clean Water Act. (33 CFR section 323.2(e)). One of these commenters quoted from the Bragg v. Robertson decision where the 4th District Court, in ruling upon certain claims against the State under SMCRA, stated in dicta that the overburden or excess spoil was a pollutant and waste material and not fill material subject to Corps authority under section 404 of the CWA when it is discharged into waters of the U.S. for the primary purpose of waste disposal. The other commenter added that even if the Corps had jurisdiction to issue permits for valley fills composed of mining spoils under the April 2000 proposed rule, to amend the definition of ''fill material'', it would not have jurisdiction to authorize the discharge of coal processing waste into refuse impoundments under Section 404. In addition, the commenter asserted that even if the Corps finalizes the proposed rule regarding the definition of fill, it must, under NEPA, perform an EIS before implementing the rule. Because this has not been done and the current rule prohibits fills composed of waste material, the commenter claimed NWP 21 is inapplicable to authorize the placement of mining spoil or coal refuse in waters of the U.S.

Another commenter added that the final notice reissuing NWPs must clearly and unambiguously prohibit placement of coal processing wastes and underground development wastes in ''coal waste dams'' or ''tailings piles'' into waters of the U.S., and must further prohibit the placement of coal mine ''spoil'' material in such waters as ''waste disposal'' unless the final design of the valley fill structure is demonstrated to be necessary to support the approved post-mining land use and is thus placed for a beneficial purpose.

Definition of Fill Rule: On April 20, 2000, the Corps and EPA issued a joint proposal to revise the definition of fill found at 33 CFR 323.2(e) and 40 CFR 232.2 (65 FR 21292, April 20, 2001). The proposed revision would clarify that fill material means material (including, but not limited to rock, sand and earth) that has the effect of: (i) Replacing any portion of water of the US with dry land; or (ii) Changing the bottom elevation of any portion of a water of the US.

Among other things the proposed rule would clarify that placement of excess coal mining overburden, resulting from mountaintop mining/reclamation activities, in waters of the U.S. (valley fills) is considered a discharge of fill material. The agencies are reviewing approximately seventeen thousand comments received in response to the proposed rule and are in the process of drafting the final rule. NWP 21 is available to authorize discharges of fill material meeting the terms of the permit. Issues related to the applicability of Clean Water Act section 404 to ''coal waste dams,'' ''tailings piles''' coal mine ''spoil'' and coal slurry impoundments turn on the jurisdictional question of what constitutes fill material, an issue that will be clarified in that rulemaking. Because the proposed nationwide permits do not seek to resolve those questions, these comments are outside the scope of this proceeding. With regard to valley fills, in a memorandum dated September 26, 2001, the Corps directed all involved field elements to inform the public and initiate regulating valley fills in all states, pursuant to section 404 of the CWA. The memorandum attaches a legal analysis that concludes that Corps regulation of valley fills may be pursued under the current regulations. The Corps decided to regulate valley fills because of the need for consistent administration of the Regulatory Program, assuring equity for the public. In addition, the Corps will require appropriate compensatory mitigation, as necessary, for the loss of aquatic resources.

Bragg Settlement Agreement: On December 23, 1998, a settlement agreement was signed to end litigation against the federal government that challenged whether applicable federal programs were being appropriately applied to regulate valley fills in West Virginia (*Bragg* v. *Robertson*, Civil Action No. 2:98–0636 (S.D. W.Va)). The Court approved the agreement on June 17, 1999 (54F.Supp. 2d 653). The settlement agreement was facilitated, in part, by the Army establishing that the Corps would regulate valley fills in West Virginia pursuant to section 404 of the CWA. While on appeal, the Fourth Circuit Court of Appeals vacated a subsequent decision issued by the District Court addressing Surface Mining Control and Reclamation Act (SMCRA) claims in the case (see 248 F.3d 275); that Fourth Circuit decision left intact the 1998 settlement agreement. See 248 F.3d at 288, n.1 (noting District Court's approval of the settlement agreement). A portion of the settlement agreement stated that excess rock resulting from a surface coal mining and reclamation operation which would bury a stream segment draining a watershed of 250 acres or more would generally be considered to have more than minimal adverse effects on waters of the U.S. Consistent with the terms of this agreement, to which the Corps is a party, the Corps will generally use its discretionary authority to require standard permits for coal mining activities in West Virginia where the material would bury a stream segment draining a watershed of 250 acres or more. The Corps notes that this agreement was negotiated among various Federal agencies and the state of West Virginia and relates to certain types of coal mining operations in that state. The Corps believes there are many different types of coal mining operations in other parts of the country and that the conditions of the settlement agreement may not be applicable to many of these other operations. For this reason, the terms of the agreement have not been incorporated into the permit, which by definition is nationwide in applicability.

Further, we are gathering data and, in conjunction with other federal agencies, are preparing a programmatic mountaintop mining/valley fill (MTM/VF) EIS to better understand the environmental effects of mountaintop mining and valley fills, as well as programmatic changes that may be necessary to address those impacts. The Corps will reevaluate NWP21 when the mountain top mining EIS is completed. The Corps intends to use the results of this EIS and all other information that may be available at that time, including information resulting from individual verification of all NWP 21 projects as required under the revised terms and conditions, to make sure that NWP 21 results in no more than minimal impacts (site-specifically and cumulatively) on the aquatic environment. Therefore, at this time we are not adding additional conditions from the Bragg agreement to the NWP itself. Thus, we do not believe that we should add specific conditions from the settlement agreement to this NWP, which has a term of five years. However, the Corps wishes to reiterate that it will abide by all terms of the settlement agreement in West Virginia as long as it remains in effect.

It is important to the Corps that surface coal mining activities authorized by this NWP do not cause more than minimal adverse effects to the aquatic environment after considering mitigation. As such, the District Engineer will ensure that the discharge of fill material in waters of the US associated with coal mining activities will have no more than minimal adverse effects on the aquatic environment.

EIS/EA for NWP

A few commenters stated that the Corps 1996 EA did not adequately account for the increasing size and scale of valley fills and their impacts. One of these commenters suggested that this NWP should not be reauthorized until the new EA or EIS is completed which may find that impacts due to this nationwide are more than minimal.

Three commenters stated that reissuance of NWP 21 was inconsistent with the Corps obligation under NEPA, since the Draft Nationwide Permit Program Programmatic EIS (PEIS) dated July, 2001, does not adequately address the effects of eliminating NWP 21 and other NWPs which have been controversial due to their substantial environmental effects.

The PEIS addressed the effects of different permit processing scenarios (standard, regional general and nationwide general permits) on the Corps permit program in terms of workload, cost and protection for the environment. It did not include alternatives changing only some nationwide permits to standard permits or regional general permits or any other combination of specific NWPs permits. This combining of different scenarios would have resulted in a very large number of alternatives to analyze.

One commenter stated that the PEIS fails to fully incorporate and analyze the substantial body of scientific knowledge and information that has been amassed as part of the aforementioned MTM/VF EIS relative to the effects of mountain removal mining and valley fill construction on Appalachian streams and rivers. This commenter requests that all available technical and scientific studies, and the draft MTM/VF EIS be incorporated into the DPEIS and that a supplemental PEIS be prepared concerning the proposal to reissue NWP 21, which includes the alternative of reissuance of other nationwide permits with the exception of NWP 21 and other controversial NWPs.

The MTM/VF EIS will not be completed for some time. However, the Corps fully intends to use all relevant information, including the results of this EIS, to make sure that NWP 21 results in no more than minimal impacts (site-specifically and cumulatively) on the aquatic environment.

One commenter noted that the Corps is currently involved in an EIS limited to two states, Kentucky and West Virginia, for a subset of the activities authorized under NWP 21 and which will not determine the effects of all activities associated with this permit. This commenter states that the Corps must perform an EIS on all impacts associated with NWP 21 including, but not limited to, mountaintop removal valley fills, contour mining valley fills, and coal refuse discharges. They also state that particularly, given the concentrated use of NWP 21 in only a few districts, it is clear that the Corps permitting decisions have had impacts exceeding both the ''significant'' standard under NEPA and the ''minimal adverse effects'' standard under Section 404(e).

As previously stated, the Corps is committed to ensuring that NWP 21 does not result in more than minimal adverse effects to the aquatic environment. We believe that the changes proposed and adopted will ensure minimal adverse effects on the aquatic environment. We will review the additional information provided within the MTM/VF EIS, upon its completion, to be sure that this continues to be the case.

Scope of Analysis

One commenter opposed reissuance of NWP 21 based on this activity's non-water dependency and associated secondary/cumulative impacts such as acid rain from burning of coal and its affect on the human environment. This commenter is concerned over the adverse impacts of acid deposition on the human environment. Another commenter claims that coalfield communities near these operations are dwindling as large out of state coal corporations employ fewer and fewer workers and severe flooding in the area caused by the mining activities makes it extremely difficult to live near these mining operations.

These impacts are outside of the Corps scope of analysis pursuant to the National Environmental Policy Act. The Corps evaluation of valley fills is focused on impacts to aquatic resources. Overall mining is permitted under separate Federal laws, SMCRA.

Another commenter, also concerned with secondary and indirect impacts of coal mining activities, objected to the statement in the preamble that the ''Corps review is limited to the direct and indirect, and cumulative effects of fills in waters of the U.S''. This commenter states that the scope of analysis should extend beyond the effects of fills in waters of the U.S. However, another commenter not only agreed that the scope of analysis should be limited to the direct and indirect and cumulative effects of only the fills in waters of the U.S. but also that wording should be included in the permit language to inform all interested parties that the Corps would not be considering the impacts of the actual coal mining operation itself, especially one occurring on a mountain top.

Impacts associated with surface coal mining and reclamation operations are appropriately addressed by the U.S. Department of the Interior Office of Surface Mining or the applicable state agency, if program delegation has occurred, pursuant to the Surface Mining Control and Reclamation Act. Under these circumstances, the Corps NEPA implementing regulations clearly restrict the Corps scope of analysis to impacts to aquatic resources. We concur with the commenter that the scope of analysis should be limited to only impacts to the aquatic environment.

Duplication/ Executive Order 13212

One commenter was opposed to any change to NWP 21 because of possible duplication of the intensive review performed by the Office of Surface Mining in coordination with the Corps and other state and Federal agencies related to approval of reclamation plans for surface coal mining activities. This commenter is concerned that such duplication now proposed will complicate the approval process for mine operations and make approval more cumbersome and bureaucratic resulting in unnecessary duplication and delays for approval of energy related projects which would be in direct conflict with Executive Order 13212 Actions to Expedite Energy Related Projects. One commenter discussed at great lengths the implication of EO 13212 which was signed on May 18, 2001. The commenter asserted coal reserves serve an indispensable role in the nation's energy equation and are used primarily for generating the nation's electricity, and that a reliable general permit program is vital to a coal producer's ability to meet the nation's growing coal needs. This commenter is concerned that the proposed changes to this NWP will cause delays and unnecessary duplication. One commenter suggested that all proposed projects falling under this NWP be coordinated with the SMCRA and should consider any required SMCRA mitigation when making its determinations regarding appropriate mitigation under Section 404. One commenter suggested that the Corps utilize the SMCRA environmental protection, mitigation and findings standards as a general basis for determining that surface coal mining operations regulated by SMCRA will have minimal impact and meet NWP 21 applicability standards. By using SMCRA standards when making determinations of applicability to NWP

21, the commenter indicated the Corps review can be expedited consistent with EO 13212. Further, the commenter indicated that under SMCRA, the DMME is prohibited from issuing a coal surface mining permit unless the agency first finds, in writing, that the proposed mining operation will minimize impacts to the hydrologic balance within the permit area and will not result in material damage to the hydrologic balance outside the permit area.

As stated above, the Corps has determined that the SMCRA process does not currently adequately address impacts to the aquatic environment as required under Section 404, therefore this NWP does not duplicate the mining permit process but does rely on it for help in the analysis. We encourage Corps Districts to work with state and Federal mining agencies to coordinate early in the process so that the SMCRA permit includes adequate mitigation to offset impacts to the aquatic environment.

Two commenters agreed with the proposed changes in this NWP because of the differing goals of the SMCRA/DMME and the CWA, specifically concerning compensatory mitigation. The commenters indicated that while most NPDES permits include conditions to protect against stream impacts, they do not often address wetland impacts. In addition, according to one commenter, there are no clear standards for stream replacement, leading to poor reconstruction techniques with little or no restoration of habitat function.

The Corps is working on stream functional assessment protocols to help in identifying the functions lost through impacts and the functions gained or enhanced through mitigation.

Two commenters suggested that NWP 21 should be significantly restricted or eliminated, since it wrongfully assumes the state or federal regulatory agency under SMCRA is engaging in a process comparable to section 404 of the CWA and the 404(b)(1) Guidelines of assuring avoidance and minimization of impacts on special aquatic sites and other waters of the US, when in fact no other agency engages in such review.

The Corps has not assumed that other state or Federal agencies are engaging in a comparable Section 404 type process. In accordance with the Section 404(b)(1) Guidelines, analysis of offsite alternatives is not required in conjunction with general permits.

A few commenters were opposed to the requirement for a written determination of compliance without a time clock, i.e. 45 days, for the Corps to respond or the applicant can begin work. One of these commenters is concerned that under the proposed NWP, the applicant could wait weeks or months until he receives express authorization from the district to begin which would result in delays and additional paper exercise for a project deemed to be of minimal impact. Another scenario a commenter provided would be to wait months just to be told the project does not qualify for NWP 21 and that a standard permit would be required. This commenter suggests that the Corps could abuse the lack of time constraints when it cannot meet its own deadlines. A few commenters suggested that the Corps rely solely on the notification requirement for determining whether or not any specific activity complies with the terms and conditions of the NWP within the 45 day time limit.

Under the current regulatory program, all coal mine operators must notify the Corps which may involve agency coordination subject to a 45 day time clock to submit comments to the Corps. Under the proposed NWP, the applicant must wait before initiating construction until he receives express authorization from the District Engineer. Corps districts will make decisions in a timely matter. We believe that a careful case specific minimal impacts determination is necessary for this NWP, but it may sometimes take more than 45 days. Because of the potential for more than minimal adverse effects with these projects this approach is necessary.

Impacts from NWP 21

A majority of the commenters opposed the reissuance of NWP 21 because of potential impacts. Specifically, the major concern stated by most commenters was that the mountaintop removal mining and disposing of the overburden in valleys (valley fills) would result in the burying of streams thereby disturbing the natural processes and water quality in the entire watershed and result in the permanent loss of habitat. One commenter stated concern that this NWP activity will displace Federally protected threatened and endangered species. Another commenter raised concerns about impacts to water supplies used for drinking and recreation from the valley fills.

This NWP requires compliance with all of the general conditions for the nationwide permits. One commenter pointed out that in one state alone 15–25% of the mountains have been leveled, that the overburden from these mines placed in ''valley fills'' have destroyed more than 1,000 miles of streams, and that one mine can destroy 10 square miles of mountain and fill as many as 12 stream valleys. This commenter concludes that these kinds of impacts cannot be considered ''minimal in effect'' to qualify for a NWP. One commenter stated that the ''field assessment'' of the nationwide permit program provided an inadequate analytical basis for documenting the extent and severity of aquatic and terrestrial impacts of the implementation of NWP 21.

One commenter contends that the Corps has admitted to its inability to assess direct, indirect, and cumulative impacts associated with specific coal mining projects. Therefore, the Corps cannot be in a position to state whether any application for an authorization under NWP 21 would or would not have more than minimal adverse impacts, either individually or cumulatively.

Another commenter stated that a draft EPA finding indicates that the ''impacts of mountaintop mining and valley fill activities in eastern Kentucky were evident based on stream biological and habitat indicators. Mining related sites generally had higher conductivity, greater sediment deposition, smaller particle sizes, and a decrease in pollution sensitive macoinvertebrates * * * in turn, these streams and rivers may support fewer fish and other taxa which are recreationally or commercially important.''

These studies are draft documents and have not been finalized or the conclusions agreed upon by the cooperating agencies.

One commenter stated that the Corps has ignored OSM studies and are not considering effect of valley fills on flooding. However, another comment challenged the Corps statement under notification that the Corps is ''discouraging extensive channelizing or relocation of stream beds because of potential adverse effects on the stream and the potential to intensify downstream flooding''. This commenter contended that the Corps does not have an adequate basis for this statement concerning downstream flooding and requests that it be taken out.

The basis for this conclusion is that whether increased downstream flooding will occur is a site specific circumstance based on downstream channel capacity and geometry coupled with the influence of man induced alternations to channels and flood plains. These issues will be evaluated during the case specific minimal effects determination.

This commenter added that available studies document lower flood rates in areas of surface mining activities than in similar unmined watersheds and that some mining activities result in alteration to landscape that can provide

significant runoff retention. And, for example, the commenter added, open pits and drainage control structures can provide runoff retention and longer travel times for overland flow and increased infiltration provided by backfills can also retard or lessen peak flows.

The preliminary draft MMEIS, which includes an assessment of scientific studies related to providing a better understanding of flooding potential related to mountaintop mining, concluded that no corroborating evidence exists to support the allegations that surface mining operations increased flooding potential downstream.

Two commenters questioned the Corps proposal of this NWP and the determination that it meets the requirement that the adverse environmental impacts are individually and cumulatively minimal while admitting (in the proposed regulation) that it is still gathering data to better understand the effects of valley fills on the aquatic environment.

The Corps is continually gathering data on all its nationwide general permits to ensure that the effects of the program on the aquatic environment are minimal, both individually and cumulatively. The changes in procedures proposed and adopted here will ensure minimal effects through case specific review and mitigation.

Thresholds for NWP 21

A few of these commenters suggested reissuing this NWP but precluding its use for mining operations involving mountain-top removal.

We disagree, this permit is designed for use by mountaintop mining operations as well as other surface coal mining activities.

Several commenters added that since this nationwide has no size/acreage limits, extensive linear feet of streams could be impacted. Two commenters recommended using the same stream threshold limitations as stated in NWP 39, 40, 42, and 43 (300-foot limitation) for consistency purposes and since stream impacts from filling should be evaluated the same regardless of the activity involved.

The 300 linear foot limit is retained for NWPs 39, 40, 42, and 43, however justification, on a case-by-case basis, can be made to allow additional linear impacts for intermittent streams. The Corps believes that coal mining is different from activities authorized under NWPs 39, 40, 42 and 43 in that coal mining projects are reviewed for environmental impacts under several other authorities (SMCRA, CWA section 402). For this reason, the determination of whether a project will result in more than minimal adverse effects is best made on a case-by case basis.

Two commenters cite from the Draft PEIS that in 2000 alone, 13,907 acres of impacts to streams and wetlands were authorized under NWP 21 making up 72% of all NWP impacts for that year and one of these commenters recommends protective measures and/or environmental thresholds due to the potential losses. One of these applications resulted in the direct filling of over six miles of streams and indirect impacts to an additional three miles with no data to suggest that these impacts were minimal. For this reason, this commenter and others have suggested including the provisions adopted in the Bragg v. Robertson settlement of a 250-acre watershed threshold while waiting the findings of the EIS process to determine the appropriateness of that threshold limit. They believe the 250 acre standard would provide better protection than no threshold at all, as is currently the case. Two commenters suggested that if NWP 21 must be reissued, it should be conditioned such that valley fill projects affecting intermittent and/or perennial streams will be ineligible for authorization and would be evaluated as standard permits. They state that this would be consistent with the Corps July 2000 guidance to the field, which provides that the 250 acre standard should be used in evaluating all PCN for NWP 21. However, two commenters support the Corps decision not to include the 250 acre threshold because it is temporary in nature and limited only to West Virginia. Further, they asserted that limit was not based upon any scientific analysis but rather a product of an agreement arrived at in an arbitrary way, having no correlation with environmental protection. These commenters also cited projects with a 500 acre watershed, which improved the pre-mining conditions. One commenter suggested that if NWP 21 must be reissued, it should be conditioned such that valley fill projects affecting intermittent and/or perennial streams will be ineligible for authorization and be evaluated as standard permits.

The Corps believes that a scientific basis for the 250 acre limit designated in the Bragg v. Robertson settlement has not been adequately established and the limit may not be appropriate for all situations. High quality streams exist above this point on the landscape and lower quality streams exist below this point. We believe it is better for the environment to look at specific sites and watersheds and make quality determinations than to try and fit all watersheds into a rigid pre-determined categorization that may or may not reflect the site specific aquatic conditions. The Corps is further concerned that universal use of the 250 acre limit could encourage a proliferation of smaller valley fills in lieu of fewer larger fills, and that this may not be the best outcome for the aquatic environment. The Corps has identified a data error in the PEIS. The 13,907 acres of impact actually were less that 50 acres.

One commenter suggested that environmental thresholds be established if not with this authorization, definitely with the next and that these thresholds be determined through a public review process.

Thresholds may be added by individual Districts as regional conditions for this permit through the public review process. In addition, we will review this NWP when the MTM/VF EIS is complete along with all other relevant information and will develop criteria or propose any changes that may be needed.

Mitigation

Many of those commenters objecting to the reissuance of NWP 21 stated that the mitigation, even with Corps review and approval, could not sufficiently compensate for these impacts and therefore this NWP would be a violation of the Clean Water Act requirements that general permits result in only minimal adverse impacts to the aquatic environment. One of these commenters stated that stream restoration experts have concluded that it is not possible to recreate streams on most mined areas, therefore, the loss of these stream miles and the functions they provide to the aquatic ecosystems downstream is a permanent loss and, for the purposes of a Section 404 impact assessment, the stream losses cannot be adequately compensated. One commenter, although supporting the requirement of mitigation beyond what the State requires under the project's coal mining permit, still opposes NWP 21 because it illegally jumps from avoidance and past minimization directly to mitigation. This commenter also voiced concern over a lack of alternative analysis for placement of fill into waters of U.S. by any state or Federal agency for these proposed valley fills. Another commenter recommended that any mitigation plan be coordinated and approved by all involved regulatory and commenting resource agencies prior to the NWP approval.

We feel we are avoiding and minimizing impacts to the extent practicable and that adequate mitigation, especially in the form of enhancement or rehabilitation of existing streams through activities such as stabilizing old mined sites to reduce stream sedimentation and reduction in acidic water releases, can be used to determine that a project has minimal impacts, both individually and cumulatively, on the aquatic environment. These activities can result in a substantial improvement in downstream water quality and aquatic habitat within a watershed.

A few commenters agreed with the proposed changes to NWP 21 because of the varying goals of the SMCRA and the CWA program and the wetland mitigation plan requirement. One commenter stated that the review proposed would be valuable in ensuring the requirement of equity between coal mining activities and other wetland impacting activities, and indicated that while most NPDES permits include conditions to protect against stream impacts, they do not usually address wetland impacts. In addition, there are no clear standards for stream replacement, leading to poor reconstruction techniques with little or no restoration of habitat functions.

As stated above, the Corps is in the process of designing stream function protocols to aid in evaluating mitigation projects.

This commenter recommends that the following language be included into the permit language: ''Compensatory mitigation will be required to offset losses of waters of the U.S., consistent with General Condition 19''.

We do not agree this is necessary, as General Condition 19 applies to all nationwide permits and does not need to be specifically repeated in this NWP, however, we agree with the intent of this statement.

Two commenters suggested that at the very least, bonding of mitigation measures should be required in all cases. One of these commenters argued that performance bonds under 30 U.S.C. 1269 should not be used by the Section 404 program because of the limitations imposed on these bonds. For instance, neither state regulatory authorities nor OSM have authority to impose bond liabilities on regulated mines beyond those specified in the mining law which are established by law as that amount needed to assure completion of the reclamation plan required under 30 U.S.C. 1268 and not section 404 of the CWA. Also, if there was a violation of the Corps mitigation conditions, the Corps would not have authority to direct the expenditure of those funds.

Requiring a bond by the Corps in certain cases is consistent with existing policy and the Corps will continue to do so as it deems appropriate.

General Condition 4

One commenter stated that the purpose of valley fills is not to impound water but rather to dispose of overburden or waste material. Furthermore, the commenter asserted that a valley fill is an activity that completely eliminates the possibility of movement and survival of aquatic life. The commenter asserted the Bragg Settlement contains nothing that even remotely purports to modify any Corps regulation * * *. The Corps must still comply with these and all other statutory and regulatory requirements''. The commenter indicated that completely filling streams by valley filling affects the necessary life movements of all aquatic life that must move within or between those streams. Furthermore, the commenter asserted, valley filling violates the General Condition because not only does it preclude movement of species, but destroys the species themselves.

Generally, proposed projects are located at the upper limits of the watersheds and are not interfering with aquatic species migration.

It is our position that this NWP is useful in expediting the processing of permits for some surface coal mining operations provided that adequate compensatory mitigation accompanies the activity so that there is an overall net improvement in functions of the aquatic environment. Our scope of analysis will continue to be limited to the impacts to the aquatic environment. The locations of the mines are dependent on location of the coal seams.

The existing permit relies primarily on any state-required mitigation under SMCRA to address impacts to the aquatic environment. The Corps has determined that this is not appropriate, as the requirements of SMCRA differ from those of the CWA and reliance on SMCRA authorization may not result in adequate mitigation for adverse impacts to the aquatic environment. Therefore, the reissued permit provides for Corps determination of appropriate mitigation in accordance with General Condition 19. Corps review is limited to the direct, indirect, and cumulative effects of fills in waters of the U.S. In order to ensure that appropriate mitigation is performed, and that no activities are authorized that result in greater than minimal adverse impacts, either individually or cumulatively, the revised permit also requires not only notification, but also explicit authorization by the Corps before the activity can proceed. The Corps believes that both of these changes will strengthen environmental protection for projects authorized by this permit. This permit will be reissued as proposed.

22. *Removal of Vessels.* There were no changes proposed to this nationwide permit. There were no comments on this nationwide permit. The nationwide permit is reissued without change.

23. *Approved Categorical Exclusions.* There were no changes proposed to this nationwide permit. One commenter indicated that although the Office of the Chief of Engineers may have been furnished notice of a list of activities, and concurred, a list of activities did not appear to have been included in the referenced August 9, 2001, **Federal Register** notice on which the reissuance of the NWP Program will be based. The commenter further stated that the absence of this critical information mirrors the Corps piece-mealing approach to Regulatory implementation of the CWA that is found in the issuance of Corps permits in the southeastern U.S. The commenter also stated that because of the lack of this information, the public is unable to determine whether new information supporting reversal may have become available since the decisions that these activities do not have a significant effect on the human environment. Another commenter stated that this permit illegally delegates to other federal agencies the ability to decide whether their projects will result in more than minimal impacts. The permit effectively has no ceiling on individual or cumulative impacts and covers a broad range of activities. An additional commenter suggested that the NWP 23 activities listed are extremely dissimilar in nature and impact. It is not possible for the agencies to have made a reasonable evaluation of the cumulative impacts of all of the activities in this permit.

When the Corps considers whether an agency's categorical exclusions have no more than minimal adverse effects on the aquatic environment and whether they could be authorized by this NWP, the Corps first seeks public comment and publishes the proposal in the **Federal Register**. The Corps then determines whether the agencies categorical exclusions have no more than minimal adverse effects on the aquatic environment. The Corps has not approved all agency categorical exclusions, has added further conditions and has required pre-

construction notifications to ensure that there are no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Furthermore, Corps districts and divisions have the discretionary authority to require regional conditions, case-specific conditions or individual permits where the adverse effects may be more than minimal.

One commenter indicated that all projects requiring stream channelization should be evaluated through the Individual Permit process. Another commenter suggested projects affecting more than 1/10th acre of wetland should require a pre-construction notification to the Corps and those affecting 1/3 acre should require an Individual Permit. A commenter recommended all bridge projects that are not longer than 1.5 times bankfull width should be elevated to an individual permit process.

General condition 21 contains provisions to minimize adverse impacts related to water movement, including channelization and passage of high water flows. When reviewing an agency's categorical exclusion for approval under this NWP the Corps considers the need for a pre-construction notification. We have required a pre-construction notification where we believe that it was necessary to ensure that the adverse effects would be no more than minimal, and we have required the individual permit process, where needed. The nationwide permit is reissued without change.

24. *State Administered Section 404 Programs.* There were no changes proposed to this nationwide permit. One commenter stated that applicants will find it difficult to keep up with a complex matrix of non-uniform approaches to regulating water bodies if states across the country run their section 404 programs differently.

The Corps recognizes that nationally there may be different approaches by the states toward regulating section 404 discharges into those waters. However, the Corps will not change the way the states regulate in those waters by requiring a Corps individual permit process. Currently, this NWP is only applicable in the States of Michigan and New Jersey, which have assumed the Clean Water Act section 404 authority in Navigable Waters of the United States based on historic use only. In those waters, which are subject to section 10 of the Rivers and Harbors Act based solely on the historic use for interstate waterborne commerce, the state administers the Section 404 program while the Corps has a permit role under Section 10. Those waters do not have current nor are they susceptible to use for water borne commerce. The Corps believes that the states are considering and adequately addressing the environmental impacts of these projects. The Corps further believes that there are no impacts affecting waterborne commerce needing Section 10 review. Therefore, there is no need to process an individual permit for these activities. The nationwide permit is reissued without change.

25. *Structural Discharges.* There were no changes proposed to this nationwide permit. There were no comments on this nationwide permit. The nationwide permit is reissued without change.

26. [*Reserved*] One commenter indicated that, if reissued, NWP 26 must be modified to significantly lower the threshold of activities not requiring an individual permit.

There are no plans to reissue NWP 26. This NWP expired on June 7, 2000. The number 26 is being reserved to avoid the need to renumber all of the subsequent NWPs. We believe that renumbering NWPs 27 through 44 would be confusing and unnecessary.

27. *Wetland and Riparian Restoration and Creation Activities:* In the August 9, 2001, **Federal Register** notice, we proposed to modify this NWP by combining two categories of land (''any Federal land'' and ''any private or public land'') into a single category: ''any other public, private, or tribal lands''. Therefore, there would be three categories of land that would be eligible for NWP 27 activities, instead of four categories. This change will not affect how or if any activities will be authorized by this NWP.

Many commenters supported the Corps proposal to combine the four categories of lands into three categories. A commenter recommended limiting the use of this NWP to activities conducted or sponsored by Federal or state agencies. One commenter suggested adding the National Marine Fisheries Service and the National Ocean Service to paragraph (a)(1). This commenter also recommended adding ''the construction of oyster habitat over unvegetated bottom in tidal waters'' to the list of examples of activities authorized by this permit. This commenter said that these changes would result in a reduction in Corps workload, and authorize activities conducted under National Marine Fisheries Service and National Ocean Service restoration grant programs.

To simplify the descriptions of the types of lands eligible for this NWP, we are combining paragraphs (a)(2) and (a)(4) of NWP 27 to read as ''any other public, private, or tribal land'' in paragraph (a)(3). The previous text of paragraph (a)(3) has been moved to paragraph (a)(2).

We do not agree that this NWP should be limited to activities conducted or sponsored by Federal or state agencies, because such a restriction would affect the ability of the Corps to effectively authorize aquatic habitat restoration or creation (establishment) activities conducted by individuals, non-government organizations, or local governments. We have added ''the construction of oyster habitat over unvegetated bottom in tidal waters'' to the list of examples of activities authorized by this NWP. Since the construction of oyster habitat in tidal waters could potentially affect navigation, it is important to consider General Condition 1. The construction of oyster habitat in tidal waters cannot have a more than minimal adverse effect on navigation.

We have modified paragraph (a)(1) to include restoration activities undertaken through the programs of the National Marine Fisheries Service and the National Ocean Service. In addition, we have modified the text of this NWP by adding the phrase '' * * *, to the extent that a Corps permit is required, * * *'' after the phrase ''Activities authorized by this NWP include * * *''.

One commenter stated that, even though activities authorized by permit would result in an increase of wetland habitat, NWP 27 should have an upper limit to require more detailed review of restoration and creation projects that involve larger impacts to wetlands. Another commenter said that an acreage limit is needed for this NWP because there are inadequate assurances that it authorizes only activities with minimal adverse environmental effects. This commenter suggested imposing a 250 linear foot limit and a 1/4 acre limit on wetland impacts for restoration activities and a five acre limit for wetland enhancement projects. This commenter also recommended requiring notification and agency coordination for all activities undertaken by private individuals that impact wetlands or more than 100 linear feet of stream, with the notification including documentation of the hydrologic analyses used to design the project. Another commenter said that the ''wetland enhancement, restoration or creation agreement'' described in paragraph (a)(1) should be reviewed and approved by the Corps and other resource agencies and each agreement should have enforceable conditions.

We do not agree that acreage or linear limits are necessary for this NWP, since it authorizes activities that restore, enhance, or create aquatic habitats. The

terms of this NWP, as well as the notification requirements described in paragraph (b), will ensure that the activities authorized by this NWP result only in minimal adverse effects on the aquatic environment. District engineers will review pre-construction notifications for activities on public and private land not conducted under the terms of paragraphs (a)(1) or (a)(2) and determine whether those activities will result in minimal adverse effects on the aquatic environment. Agency coordination is not necessary for NWP 27 activities undertaken by private individuals because Corps personnel have the expertise necessary to evaluate proposed NWP 27 activities. We do not believe that it is necessary for the Corps and other resource agencies to review agreements between landowners and the U.S. Fish and Wildlife Service or Natural Resources Conservation Service. We concur that these agreements should have enforceable conditions.

One commenter suggested adding the phrase ''* * * and the planting of appropriate wetland species'' after the phrase ''* * * activities needed to reestablish vegetation * * *'' and changing ''* * * mechanized land clearing to remove undesirable vegetation * * *'' to ''* * * mechanized land clearing to remove non-native invasive, exotic or nuisance vegetation * * *''.

We concur with these recommendations and have made these changes to the text of the NWP.

One commenter objected to the reissuance of this NWP, stating that it lacks effective oversight, especially for activities on public and private lands, its use has not been effectively monitored in the Corps regulatory database, and the terms ''restoration'' and ''enhancement'' are inadequately defined. To address these concerns, this commenter suggested that all projects must be subjected to strict, enforceable success criteria; all failed projects must be corrected to offset any adverse impacts to waters of the United States; all permitted projects must be overseen by a qualified restoration specialist; only those activities with high likelihood of success should be approved; include a more extensive list of activities not authorized by NWP 27; prohibit the use of NWP 27 to construct compensatory mitigation projects; and limit NWP 27 to one use per applicant per stream. One commenter said that this NWP should not authorize the construction of mitigation banks.

As with all NWPs, the use of this NWP is monitored by each of the Corps districts, to ensure that it authorizes only those activities with individual and cumulative adverse effects on the aquatic environment.

Since the publication of five new and six modified NWPs in the March 9, 2000, issue of the **Federal Register** (65 FR 12818), the terms ''restoration'' and ''enhancement'' have been defined in the ''Definitions'' section of the NWPs. Since that time, the Federal government has adopted new definitions for purposes of tracking losses and gains of wetlands under the previous Administration's Clean Water ActionPlan. The new definitions also apply to mitigation activities for other types of aquatic habitats. Under the new definition for restoration, there are two types activities: re-establishment and rehabilitation. Re-establishment involves the rebuilding of a former wetland, resulting in a net gain in wetland acres. Rehabilitation involves the manipulation of a degraded wetland to repair natural or historic functions, but does not result in a net gain in wetland acres. Enhancement is the manipulation of a wetland for a specific purpose, resulting in increases in some wetland functions and declines in other wetland functions, with no gain in wetland acres.

Where strict criteria are necessary to ensure the success of stream or wetland restoration projects, district engineers can add special conditions to NWP 27 authorizations to specify success criteria. If those success criteria are not met, district engineers can use their enforcement authority to require the permittee to identify the reasons for failure and implement necessary remedial measures. We do not agree that it is necessary for activities authorized by this NWP to be overseen by qualified restoration specialists. The text of NWP 27 clearly states what is not authorized by the NWP; we do not believe any additional clarification is necessary. Since NWP 27 authorizes activities that provide benefits for the aquatic environment, it would not be appropriate to limit the use of this NWP to one time per project proponent per stream channel.

We maintain our position that NWP 27 should authorize the construction of compensatory mitigation sites, including mitigation banks, provided those sites result in net increases in aquatic resource functions and values. NWP 27 requires compensatory mitigation for impacts to waters of the United States caused by the authorized work, as well as notification to the district engineer in accordance with General Condition 13. A mitigation bank can also be authorized by NWP 27, as long as the mitigation bank has been approved under the 1995 Interagency Mitigation Banking Guidelines.

One commenter recommended that the use of this permit should be limited to restoring streams to their historic, undegraded states to prevent their use as a flood control projects. Another commenter said that district engineers should have the authority to waive the prohibition against conversions of certain types of streams or natural wetlands to other aquatic habitat types that could provide more environmental benefits for local watersheds.

NWP 27 does not authorize flood control projects. This NWP authorizes stream restoration activities, which may include grading stream banks and riparian areas so that those riparian areas are flooded more frequently by the streams. In other words, flood storage capacity may be increased by a stream restoration project, but the increase in flood storage capacity is not the main goal of the project. We do not agree that this NWP should allow flexibility to waive prohibitions against certain conversion activities, since conversions of streams, wetlands, and other waters may result in more than minimal adverse effects to the aquatic environment. If such conversions would provide net benefits for watersheds, then those activities could be authorized by other types of permits, including standard permits.

A commenter suggested that NWP 27 should be modified to prohibit the creation of open water areas in existing wetlands and the relocation of existing wetlands. One commenter supported the provision that states this NWP does not authorize the conversion of natural wetlands into another aquatic use, but recommended prohibiting the ''relocation of aquatic habitat types on the project site'' and prohibiting the use of riprap or other armoring material. One commenter said that activities authorized by this NWP should not be allowed to alter the basic functions and habitat of ''high quality wetlands'' and that all projects should have a long-term management plan with a binding contract between the landowner and the Federal and state fish and wildlife agencies, not the Natural Resources Conservation Service.

We maintain our position that the relocation of non-tidal waters, including non-tidal wetlands, on the project site should be authorized by this NWP, provided there are net gains in aquatic resource functions and values. We do not agree that this NWP should prohibit the use of riprap because riprap contains crevices and other habitat features for small organisms. Other armoring materials can provide habitat

for aquatic organisms. The use of armoring materials for stream and wetland restoration activities is at the discretion of the district engineer. We do not agree that it is necessary to have a long-term management plan with a binding agreement between landowners and the Federal and state fish and wildlife agencies for all activities authorized by this NWP.

One commenter said that some activities authorized by this NWP do not comply with the Clean Water Act. One example offered by this commenter is the conversion of waters of the United States to storm water treatment facilities and sewage treatment facilities, under the guise of restoration and mitigation. This commenter states that NWP 27 should be revoked because the activities authorized by this NWP are not similar in nature and it is unreasonable to conclude that all of the cumulative adverse impacts on the human environment could be considered for such a category of dissimilar activities.

This NWP does not authorize the construction of storm water management facilities or sewage treatment facilities. Storm water management facilities and sewage treatment facilities may be authorized by NWP 43 or individual permits. The activities authorized by NWP 27 comply with the similar in nature requirement for general permits. This NWP authorizes aquatic habitat restoration, creation, and enhancement activities that provide benefits for the aquatic and human environments. NWP 27 is reissued with the modification discussed above.

28. *Modifications of Existing Marinas.* There were no changes proposed to this nationwide permit. There were no comments on this nationwide permit. The nationwide permit is reissued without change.

29. *Single-family Housing.* There were no changes proposed to this nationwide permit. One commenter stated that the Corps has failed to demonstrate with substantial evidence that the acreage limits applicable to this and many other NWPs is sufficiently protective of the environment. The commenter also stated that the Corps must validate, with evidence and an environmental impact analysis, the acreage limits it sets for all NWPs. Another commenter said that single-family housing is not a water dependent activity, and therefore it is presumed that alternative locations are available for these activities. That commenter also stated that activities authorized by this permit are not similar and result in more than minimal adverse environmental effects, even individually, much less cumulatively and, that the acreage limits are arbitrary and capricious. Another commenter recommended a full environmental impact statement and, at a minimum, only use the permit to authorize homes, without attendant features, with a 1/10 acre limit and that the Corps establish a process to monitor cumulative impacts over time. The commenter also recommended the Corps prohibit use of this permit in high growth counties and that it not be used to authorize placement of septic tanks or leach fields in wetlands.

The Corps believe that the listing of the type of activities authorized by this NWP will ensure that those activities authorized by this NWP will be similar in nature. Further, we believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Further, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Therefore we find that the NWPs do not require an EIS. However, we do prepare environmental assessments to assess potential impacts. NWP 29 was originally issued with a 1/2 acre maximum limit. We reviewed this threshold in 1999 and decided to reduce the maximum acreage limit for NWP 29 to 1/4 acres. We continue to believe that this is the appropriate maximum acreage limit. The environmental assessment for this NWP is published on our webpage for review. It is true that the activities authorized by the NWP are not water dependent as defined in the Section 404(b)(1) guidelines. However, the alternatives test does not apply to NWPs as stated in the 404(b)(1) guidelines. Therefore, it is not presumed that alternative locations are available for these activities. Furthermore, the EPA and the Corps issued additional guidance on March 6, 1995 regarding compliance with the Section 404(b)(1) guidelines for small landowners. These activities comply with this guidance. This guidance is also available on the Corps webpage. The nationwide permit is reissued without change.

30. *Moist Soil Management for Wildlife.* There were no changes proposed to this nationwide permit. One commenter suggested that this permit be revised to allow local public agencies to conduct these activities, especially when they would result in environmentally useful activities. Another commenter stated that, because the activities authorized by this permit are not similar, the permit should be withdrawn. They go on to say that since the general public cannot determine what activities are authorized by this permit, direct, indirect, or secondary impacts cannot be determined to result in minimal adverse environmental impacts.

We agree that this NWP should also allow local agencies to conduct these activities on public property. Therefore we have modified the NWP to allow activities on local government agency owned or managed property to also be authorized by this NWP. We believe that the terms and conditions will ensure that the adverse effect on the aquatic environment will be minimal. Further we believe this change will provide for additional opportunities for activities to provide needed environmental benefits. Also should some of these activities have the possibility to have adverse environmental effects, the Corps districts or divisions have the discretionary authority to require activity specific conditions or regional conditions. We believe that the listing of the type of activities will ensure that those activities authorized by this NWP will be similar in nature. Further, we believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Further, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The nationwide permit is reissued with the change described above.

31. *Maintenance of Existing Flood Control Facilities.* The Corps proposed to modify NWP 31 to clarify Corps policy and requirements regarding mitigation for maintenance activities. We also proposed to clarify documentation requirements for the baseline determination, and allow maintenance of areas that are a part of the flood control facility without constructed channels provided that the Corps approves Best Management Practices to ensure that adverse environmental effects are no more than minimal.

Two commenters insisted that the language of this NWP must be clear that exempt facilities are not now regulated and they suggested that facilities built prior to, or that were not subject to mitigation as part of the CWA, should not now be subject to mitigation requirements for routine maintenance. They suggested that the language of the currently proposed NWP conflicts with the Corps policy indicating that routine maintenance impacts are temporary and generally not worthy of mitigation. They

questioned how one mitigates for ''unspecified discharges''. They also agree with the Corps Civil Works policy that one-time mitigation should be required as part of the project and should address all permanent and temporary impacts, and that this should be required at the time the project is initially constructed. Most commenters agreed that a one time mitigation requirement for these maintenance projects may be appropriate.

We do not agree that discharges of dredged or fill material in waters of the United States that are part of a pre-Clean Water Act flood control facility are exempt from permit or mitigation requirements. Although discharges associated with the construction of facilities that pre-date the Clean Water Act are not subject to any retroactive authorization requirement, waters of the U.S. flowing through such facilities are not excluded from jurisdiction under the Act. As such, discharges of dredged or fill materials into these waters remain subject to section 404 requirements. NWP 31 conveys the section 404 authorization for discharges associated with flood control facility maintenance activities, provided (1) That a maintenance baseline is established, (2) that the adverse effects of discharges associated with establishing that baseline are adequately mitigated, and (3) that discharges associated with subsequent maintenance activities do not alter the maintenance baseline. We believe that mitigation need only be imposed once, as part of the establishment of the maintenance baseline, to ensure that the loss of waters of the U.S. that are attributable to discharges associated with the establishment of that baseline are no more than minimal. Once this is accomplished, regulated discharges that are associated with maintaining the established baseline, and that do not incur losses beyond those addressed in conjunction with the establishment of that baseline, are authorized under NWP 31 without the need for further mitigation.

We believe that the utilization of the ''maintenance baseline'' procedure is consistent with Corps policy to the effect that ''routine maintenance impacts are temporary and generally not worthy of mitigation.'' The maintenance baseline establishes the limits within which regulated maintenance-related discharges are authorized by NWP 31, and excluded from additional mitigation requirements. We agree that, ideally, all mitigation for permanent and temporary impacts resulting from the construction of flood control facilities, and from the inevitable maintenance, should be imposed only once, at the time of initial construction. The Clean Water Act does not provide an exemption for discharges into the waters of the U.S. specifically for maintenance of flood control facilities. Unless section 404 authorization for discharges associated with regulated construction and maintenance activities has been conveyed through some other means, such as through the Federal Project authorization process, authorization through the Corps permit process is required. As previously indicated, although section 404 authorization is not required for discharges associated with flood control facility construction that pre-dates the Clean Water Act, the Act does not exempt discharges in waters of the U.S. that may accompany the maintenance of these facilities. We believe that NWP 31, with the inclusion of the maintenance baseline provision, is a reasonable and appropriate procedure for conveying the section 404 authorization required for maintenance-related discharges that have not been previously authorized through other means. Finally, the question as to how one mitigates for ''unspecified discharges'' is, we believe, based on a misprint in the original **Federal Register** notice. The preamble, at page 42077 of this notice indicates that we intended to ''* * * proactively *prescribe* mitigation for * * * unspecified discharges * * *'' (emphasis added). This sentence should have read ''* * * proactively *proscribe* mitigation for * * * unspecified discharges * * *''

One commenter suggested that the mitigation requirement should consider future, cumulative impacts as these impacts would likely result in more than minimal adverse impacts to aquatic resources.

We believe that mitigation requirements associated with NWP 31, as proposed, are sufficient to account for future, cumulative impacts. As envisioned, mitigation will be required for adverse effects on the aquatic environment that are attributable to regulated discharges associated with the establishment of the baseline physical parameters (i.e., the maintenance baseline) of the flood control facility. Maintenance-related discharges that do not exceed the established maintenance baseline will not result in losses of aquatic resources beyond those addressed at the time the maintenance baseline is established. Discharges that exceed the established maintenance baseline are not eligible for authorization under NWP 31.

One commenter stated that baseline criteria are often difficult to produce, especially for much smaller drainage/utility districts which may not have nor maintain such records. Two other commenters indicated their support for revisions to this permit which recognize that cyclic maintenance is inherent in the continued operation of flood control facilities, and that regulated discharges will inevitably occur as a result of this activity. They also support the revisions allowing discharges in emergency situations. They suggested that the Corps should clarify that, in situations where baseline information is unavailable due to the age of the facility, lack of construction drawings will not preclude use of this NWP.

We acknowledge that producing records of baseline parameters may not be possible in all cases, but we can not waive this requirement. In these cases, a new maintenance baseline must be established before the maintenance-related discharges in the subject facility are eligible for authorization under NWP 31.

One commenter suggested that the proposal to authorize maintenance activities on natural features is a departure from previous practice and creates the greatest risk for more than minimal adverse environmental impacts. Also, they state that they believe it is critical that the Corps articulate its basis for extending authorization into areas that previously have been prohibited under this NWP, as well as an explanation as to why it believes that adequate protection will be provided through the use of BMPs. They want the Corps to clarify under what circumstances it considers a natural segment to be ''incorporated'' into a flood control facility, as the term may be interpreted broadly to the detriment of aquatic resources. Lastly, they also believe that the open ended nature of the provision may lead to greater than minimal impacts and confusion after the activities are completed, when mitigation is required, and urge the Corps to make clear that this provision only applies to situations satisfying the minimal effects test in light of existing regulatory provisions that already provide for emergency permitting.

The incorporation of natural areas into an overall flood control facility is accomplished through the establishment of a maintenance baseline that includes these areas. Although the current NWP 31 differs from its predecessor with respect to the treatment of these natural areas, this NWP does not authorize discharges that exceed this baseline. As such, NWP 31 does not authorize any regulated discharge that results in the further loss of jurisdictional aquatic areas in the flood control facility, including those in the subject natural

areas. Upon incorporation in the maintenance baseline, the physical parameters of the natural area can be maintained, but not exceeded, through maintenance activities that may involve regulated discharges that are authorized by NWP 31. For example, scoured banks in a natural area may be restored to the baseline condition (but *only* restored, not exceeded) through a discharge of fill material that is authorized under NWP 31. Beyond this, the application of Best Management Practices (such as a time-of-year restriction on the discharge) may further minimize adverse effects on the aquatic environment. As with all NWPs, Corps Districts may ''override'' the use of this NWP by requiring individual permits in situations where the District believes that adverse effects are likely to exceed the minimal level. In light of these factors, we do not agree that the concerns presented in this comment warrant further modification of NWP 31.

One commenter objects to the ''one-time mitigation requirement'' as the Corps has not satisfactorily demonstrated that compensatory mitigation is successful in replacing the lost functions and values destroyed through the original construction of the flood control facility. They also state that it is impossible to pre-determine the magnitude of potential adverse impacts when there are no limits on the acreage of impacts or cubic yardage of excavation authorized under this permit.

Excavation in waters of the U.S. that results in only incidental fallback is not regulated under section 404 of the Clean Water Act, and such activities are not subject to mitigation requirements imposed under that law. Regardless, in the context of the NWPs, the mitigation of the adverse effects of regulated activities need only offset those effects such that ''no more than minimal'' adverse effects remain, and not necessarily to guarantee that losses are exhaustively compensated. NWP 31 authorizes maintenance-related discharges that are subject to regulation under section 404. The establishment of the maintenance baseline, in effect, identifies the location and physical dimensions of waters of the U.S. that have been incorporated in the flood control facility. Discharges that result in losses of these waters (i.e., that exceed the maintenance baseline) are not eligible for authorization under NWP 31. In light of this, we believe that the ''one time mitigation requirement'' imposed in conjunction with the establishment of the maintenance baseline is sufficient for the purpose of this NWP.

One commenter indicated that there are far too many unclear considerations in this permit for it to protect water quality and critical aquatic habitat. They recommend the Corps (1) Process emergency activities through individual permits, (2) maintain and strengthen existing mitigation requirements for unavoidable impacts and amend as needed to comport with aquatic habitat changes, (3) develop a clear definition of acceptable maintenance baselines and a clear explanation of what constitutes suitable documentation, and (4) include adequate conditions that further protect water quality and aquatic habitat and must allow comment from the public prior to adoption and implementation.

Although we respect the concerns that are implicit in this comment, we do not agree that further modification or elaboration of NWP 31 (or of our emergency permit procedures) is a necessary or appropriate way to address them. In adopting generic permits such as NWP 31, and in designing emergency procedures for nationwide application, we try to avoid being unnecessarily prescriptive or restrictive. Our intent is to afford Corps Division and District offices with significant discretion and latitude as to the final application of the NWP program and the emergency procedures, in order to allow them to tailor the actual application of the NWPs to the nuances of local situations that we can not anticipate. Toward this end, we strive to make the generic NWPs as broad as possible within the constraints imposed by the law and related regulations, in order to maximize the potential applicability of these permits. At the same time, we provide our Division and District offices with the authority to further condition, modify, suspend, or revoke these permits in response to regional or local conditions that demand such actions to ensure that effects remain at or below the ''minimal'' level. The corollary to that authority is the Division and District responsibility to ensure that the ''no more than minimal'' threshold is not exceeded by individual activities authorized under a NWP.

One commenter recommended that the Corps consider a review of potential cost to the applicant in establishing a maintenance baseline on a given project. They also opined that any review of whether a project has been abandoned should consider more than just time in that decision-making process due to the fact that the financial resources to perform that maintenance in what might be considered a timely manner are not always available.

Although we are aware of the importance of cost considerations to all applicants for Corps permits, we have no authority to waive requirements under the law because of these considerations. The establishment of a maintenance baseline is the key component of NWP 31 because it delineates parameters of waters of the U.S. that are incorporated into the flood control facility, within which regulated discharges are eligible for authorization under the NWP. As such, we can not factor cost considerations into the requirements for establishing a maintenance baseline. We believe that NWP 31, as proposed, does not compel an abandonment determination to be based exclusively on the time that elapses between maintenance events. This provision of NWP 31 takes into account whether the capacity has been significantly reduced, and whether maintenance was needed but not performed, in addition to consideration of the length of time during which the capacity has been significantly reduced, and during which needed maintenance was not performed. The non-specific nature of the facets of this provision is deliberate, as is the absence of a consideration of environmentally beneficial features, such as wetlands, that may have developed between maintenance events. Our awareness of some of the practical realities of operating and maintaining flood control facilities encourages us to believe that the bar should be set fairly high for determining that such a facility has been abandoned for the purposed of NWP 31.

One commenter suggested that the development of the ''maintenance baseline'' to be employed at these facilities should account for channel and habitat characteristics associated with a hydrogeomorphic approach.

The establishment of the maintenance baseline is related to ensuring that losses of waters of the United States, beyond those addressed in conjunction with such establishment, do not occur as a result of regulated discharges that are authorized by the NWP. We do not believe that formalized assessment methodologies are necessary to accomplish this. The implication of this suggestion is that NWP 31 procedures should be used to determine baseline channel and habitat characteristics, which could then be maintained through subsequent authorizations under the NWP. We do not believe that this is practical or appropriate. Many maintenance activities that are not subject to regulation under section 404 of the Clean Water Act, such as excavation that results in only incidental fallback, are likely to affect channel and habitat characteristics as much as, or more than, the kinds of

discharges that are regulated under NWP 31. We do not believe that it is appropriate to use this NWP to regulate effects that are not attributable to regulated activities.

Two commenters stated that the periodic maintenance of flood control facilities is required for the operation of those facilities and will not have a significant adverse impact on the environment when conducted within the maintenance baselines for such facilities. They support the clarification proposed for NWP 31 that maintenance of these facilities do not require compensatory mitigation when approved BMPs are utilized.

We believe that the maintenance baseline procedure, in combination with the imposition of BMPs, will preclude the need for mitigation for regulated discharges associated with routine and recurrent maintenance activities in most cases. However, in designing nationwide generic permits such as NWP 31, we ultimately rely on our Division and District offices to provide the final surety that the specific regulated activities that are authorized under the NWPs do not result in more than minimal effects. To ensure that the ''minimal effect'' threshold is not exceeded in individual cases, we believe that the Divisions and Districts must continue to have the authority to impose mitigation requirements in addition to BMPs as a means of achieving this.

Three commenters stated that the Corps should not regulate temporary discharges associated with maintenance activities within the flood control facilities since there is not a permanent impact. They state that NWP 31 should make it clear that temporary stockpiles and redeposits associated with otherwise unregulated excavation is not a loss of a water of the U.S. that requires compensatory mitigation. They also state this holds true for other maintenance activities associated with the flood control facility that are not within Corps jurisdiction, i.e., mowing or brush hogging. In addition, they assert, if the flood control facility was constructed by the Corps and turned over to a local or state agency for maintenance, and did not mitigate for the maintenance of its project, the receiving agency should not be burdened with the Corps omission. They also suggest that ensuring that mitigation and/or ESA surveys would not be required if the maintainer reduced the frequency of routine maintenance might be a valuable mitigation tool in and of itself. Lastly, the Corps should provide a means that minimal impact NWP 31 activities could be authorized without a PCN.

We agree that, in situations where there is no permanent loss of waters of the U.S., no mitigation for such temporary effects is required. However, this does not exempt temporary discharges from the need for section 404 authorization, even when those discharges are only incidental to otherwise unregulated activities. Generally, we believe that it is not appropriate to impose mitigation for effects attributable to unregulated activities, such as excavation that results in only incidental fallback, but to the extent that significant regulated discharges may accompany some unregulated maintenance activity, mitigation may be required to ensure that there are no more than minimal adverse effects. We believe that such determinations must be made on a case-by-case basis, as individual NWP authorizations are confirmed.

We do not intend to impose any restriction on the frequency of routine maintenance. We believe that such decisions should be left to those responsible for the operation and maintenance of flood control facilities, since they must often must balance budget limitations against the projected need for maintenance.

We do not intend to impose, on local sponsors, any requirement to mitigate for impacts attributable to the construction of a Corps-constructed flood control facility. However, many such facilities were constructed prior to the implementation of the Clean Water Act, so no section 404-related mitigation was required. Although Clean Water Act requirements are not retroactively imposed on the construction of these facilities, the Corps has no authority to exempt current discharges of dredged or fill material that occur in conjunction with the maintenance of the facility, or to waive any requirement for necessary mitigation.

Reiterating the concern of the previous comment, another commenter stated that, absent sufficient reasoning for requiring a PCN, the Corps should delete the PCN requirement from this permit as it is costly to the applicant both from a time and money standpoint.

We are not currently confident that we could prescribe conditions and limitations on potential NWP 31-authorized discharges sufficient to ensure that their adverse effects can reasonably be determined to be no more than minimal in most cases, in the absence of site-specific verification through the PCN process. Conversely, we are not certain that the PCN requirement for this NWP could not be relaxed at some point in the future, as we gain greater experience with use of the NWP. In light of this uncertainty, we believe that the inclusion of the PCN requirement is prudent, for the current issuance of this NWP, but the Corps will continue to evaluate its appropriateness for future reissuances.

One commenter supported the concept of maintenance baseline, however, to assure the impacts are minimal, suggests that the state regulatory agencies and state and federal resource agencies be involved in the review and approval of the maintenance baseline, as well as mitigation for the projects.

The Corps believes that establishment of the maintenance baseline is essentially a technical exercise. Since the maintenance baseline for NWP 31 purposes, as proposed, is a description of the physical characteristics of the flood control project that has been or is being constructed through some independent authorization, we do not agree that coordination with state or Federal agencies is necessary or warranted for the establishment of the baseline. Coordination may be necessary or appropriate for authorization of the project itself, depending on the terms and conditions of the legal authority under which project authorization occurs.

Two commenters indicated the need to define ''best management practices'' and ''maintenance baselines'' so that a true assessment of impacts resulting from the proposed changes to the NWP can be made. They also suggested that the Corps should work with local communities to restore floodplain functions, where possible, and maintain existing wetlands to help moderate peak flows.

We believe that the concepts of ''best management practices'' and of the ''maintenance baseline'' do not need further definition in order to adequately understand the impacts of this NWP. Through the Regulatory Program, and through other Civil Works and Military Programs, the Corps does work with local communities to restore floodplain functions and to maintain and restore wetlands, but these comments are outside the scope of NWP considerations.

One commenter indicated the changes to this permit could allow any stream that has been deemed incorporated into a ''flood control facility'' to be routinely maintained with little or no mitigation required. He suggested that mitigation should be required for all maintenance activities.

In issuing this NWP, it is our intent to provide for identification of the

extent of waters of the U.S. that exist within the flood control facility, and to authorize maintenance-related, regulated discharges in a manner that does not result in a net loss of these waters. We believe that it is appropriate to include streams that have been incorporated into flood control facilities through the establishment of a maintenance baseline. As long as the maintenance baseline is not exceeded, we believe that the authorization of maintenance-related discharges, with little or no mitigation, is adequate and appropriate, both in areas that include structural features and in those that do not. In light of the fact that only the discharge associated with maintenance activities requires a CWA section 404 permit and other maintenance activities may not be regulated even if conducted in section 404-only waters, we do not believe that mitigation for all maintenance activities is necessary or appropriate. It is not our intent to use this or any NWP to require mitigation for unregulated activities. Despite this, Corps Division and District offices are authorized to impose mitigation requirements that they determine are necessary to keep effects at a minimal level.

One commenter suggested that maintenance baselines be re-evaluated periodically to determine if it still reflects existing conditions. Two other commenters opposed the specifications for one-time mitigation stating that habitat and species composition changes over time, warranting additional mitigation. Also, a separate and new permit should be created through coordination with the US Fish and Wildlife Service for emergency flood control work.

The maintenance baseline is intended to be a fixed description of physical parameters that cannot be exceeded by regulated discharges authorized under NWP 31. Changes in conditions in the flood control facility are expected to occur, and NWP 31 is intended to authorized regulated discharges associated with maintenance activities that can return the facility to the maintenance baseline condition, but not exceed them. As such, we believe that the maintenance baseline must remain fixed, and that it would be inappropriate to raise or lower the bar in connection with periodic reviews. If the operator of the facility wished to change the baseline, however, they could apply to the Corps to do so and appropriate mitigation would be required at the time a new baseline is established. We believe that the current emergency procedures, along with the revisions to NWP 31 related to emergency maintenance, are sufficient to provide necessary and appropriate environmental consideration in emergency situations. In light of this, we do not agree that a new permit should be created.

One commenter who opposed NWP 31 stated that they were concerned with the requirement for mitigation stating that if adverse impacts truly were minimal, then mitigation should not be needed.

After the establishment of the maintenance baseline, we believe that the adverse impacts attributable to regulated discharges associated with maintenance activities will, indeed, be minimal, and mitigation will not be required. However, if the loss of waters of the U.S. in a particular reach of a flood control facility has not previously been mitigated, and a regulated discharge associated with a needed maintenance activity will result in such loss, we believe that ''once only'' mitigation may be required as a prerequisite to NWP 31 eligibility, and that it should be imposed in conjunction with the establishment of the maintenance baseline.

One commenter questioned whether BMPs would adequately protect areas covered under this NWP from environmental degradation and loss of fish and wildlife habitat values.

BMPs are intended to minimize the adverse effects of regulated activities. With respect to NWP 31, the application of BMPs in conjunction with the maintenance baseline provisions is expected to ensure that the effects of activities authorized under this NWP are no more than minimal. They are not necessarily intended to prevent environmental degradation and the loss of habitat values that may be attributable to factors that are not caused by maintenance activities.

One commenter suggested redrafting NWP 31 to clarify what is already exempt under statute and regulation and to narrow its application to debris basins and retention/detention basins, to the portion of constructed soft bottom channels beyond the limits reasonably related to maintenance of the sides of the channel, to natural watercourses that are part of a flood control facility, and to any other part of an existing flood control facility that is not a structure or a constructed fill.

Since our intent in issuing this NWP is to assure that its applicability is as broad as possible within the constraints of the NWP program, we do not agree that is necessary to impose further limitations that are not supported by any clear indication that such limitations are necessary to ensure that the effects will be no more than minimal.

One commenter contends that it should not be mandated that the baseline, with supporting mitigation, be required after-the-fact whenever emergency maintenance has occurred, but instead, the actual facts associated with the emergency related activities should be considered. If no impacts, or only minor impacts, occurred there should be no need to undertake the burdensome task of establishing a baseline. He also suggests that the imposition of administrative burdens to address minor maintenance activities essential to keeping flood control structures in safe operating conditions, cannot be justified and is not required under Section 404.

Regardless of the circumstances, the requirement to establish a maintenance baseline is only imposed in conjunction with the prospective use of NWP 31. If the applicant is not willing or able to establish a maintenance baseline, other Corps permit processes can be applied to consider authorizations for discharges associated with maintenance activities, but necessary mitigation would be required in any case. Since neither emergency circumstances nor the minor nature of a particular activity is exempted from regulation under the law, we can not exempt them through the NWP process. We believe that NWP 31, as proposed, is a reasonable and prudent way to minimize the burdens imposed on applicants, within the constraints of applicable law and regulation.

One commenter requested clarification of terms such as ''reasonably foreseeable discharges'' and ''routine maintenance'' and ''cyclic maintenance'', as well as a clarification of the intent of this rule. He suggested that the rules should provide for permitting authorization for structures constructed by agencies other than the Corps, with maintenance activities focused on restoration to a specific baseline.

We believe that the intent of this NWP, which is to authorize discharges associated with maintenance activities in flood control facilities, is adequately indicated in the NWP, as written. We do not believe that the terms ''reasonably foreseeable discharges,'' ''routine maintenance'' or ''cyclic maintenance'' need to be further defined, since the applicability of NWP 31 does not depend on any precise definition of these terms. As designed, NWP 31 does focus on the maintenance of a predetermined baseline. However, we believe that the inclusion, in this NWP, of provisions to authorize the

construction of structures in jurisdictional areas is not warranted. The authorization of structures is limited to that provided by other applicable NWPs and standard permits. NWP 31 authorizes regulated discharges associated with maintenance activities for the purposes of section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act.

One commenter stated that riverine systems that do not have constructed channels cannot be considered flood control structures and the activities proposed by this NWP would result in more than minimal impacts to the environment. He suggests, if the NWP is issued that, at least regionally, use of this NWP should be prohibited in areas that are not constructed channels.

As proposed, NWP 31 addresses the maintenance of flood control facilities, and not just structures. This NWP authorizes discharges associated with maintenance activities, but it does not subject otherwise unregulated activities or non-jurisdictional areas to the requirements of applicable law. The effects being addressed in connection with this NWP are those that result from regulated discharges in jurisdictional areas. Upon the establishment of the maintenance baseline, the effects of subsequent maintenance-related discharges that do not exceed that baseline will, generally, be no more than minimal.

One commenter indicated that the NWP would result in a significant workload increase for the Corps as most projects did not have a baseline prepared and as a result, a significant quantity of one-time-only mitigation might be identified when these first baselines are determined. This mitigation would have to be reviewed and approved by the Corps. This mitigation preparation and execution would also put a financial and manpower hardship on local sponsors. He suggests a grandfather clause so that the projects would qualify for NWP 31 with no requirement for baseline determinations and/or supplemental mitigation.

Since the Corps has no authority to exempt discharges associated with maintenance activities from regulation under the law, or from corresponding mitigation requirements, we can not adopt a grandfather clause to waive these requirements. Although we recognize that the establishment of a maintenance baseline, and the imposition of related mitigation requirements, will impose a significant burden in some cases, we believe that this one-time procedure is a viable way of generally assuring that the effects of subsequent maintenance-related discharges are no more than minimal.

One commenter suggested that the proposed NWP does not address provisions of, and possible conflict with, a recent proposed policy guidance document for authorization of maintenance activities through the USACE Civil Works Department. He suggests specific language providing that revised as-builts and updated environmental surveys be submitted rather than an EIS to authorize maintenance activities under the Civil Works Program. The commenter would like to see the processes for modification of existing manuals to NEPA and CWA standards be more standardized and expedited.

This comment is apparently more concerned with the specifics of prospective policy guidance on the maintenance of Corps flood control facilities, than with NWP 31 as proposed. We believe that any consideration of issues related to the effects of such policy guidance must be deferred until such time as the policy guidance is actually issued.

One commenter objected that the requirements of the proposed NWP 31 extend jurisdiction to areas outside of those regulated by the CWA, *i.e.,* areas which are the upland portions of detention facilities and areas above the normal high water level in stream channels. If this approach is adopted, the commenter suggests the extent of information required is so detailed and extensive as to make it unruly.

NWP 31 does not extend Clean Water Act jurisdiction to areas or activities that are not subject to that law. Unregulated activities, and work in non-jurisdictional areas, do not require section 404 authorization under NWP 31 or any other Corps permit process. The maintenance baseline provision of NWP 31 does, by necessity, include considerations of non-jurisdictional areas, but this prerequisite only applies in the context of NWP 31. Other permit avenues, such as individual permit procedures, remain available to consider maintenance activities that require section 404 authorization in circumstances in which the maintenance baseline information requirements can not be accommodated by the applicant.

One commenter requested that the Corps revise the NWPs to eliminate the use of the term ''incidental fallback,'' to avoid any requirement for the case-by-case demonstration of proposed equipment use, and to avoid reliance on the ''rebuttable presumption'' approach to defining ''discharge of dredged material.''

We do not believe that this change is necessary. Like all NWPs, NWP 31 authorizes only regulated discharges and does not alter or enlarge program jurisdiction. For example, incidental discharges are addressed in the regulations themselves at 33 CFR 323.2(d), and not the NWPs.

The nationwide permit is reissued as proposed.

32. *Completed Enforcement Actions* There were no changes proposed to this nationwide permit. One commenter suggested that NWP 32 should be withdrawn as it is too broad for projects to be considered ''similar in nature'', or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects, and that it's limitations are arbitrary and capricious (*e.g.,* 5 acres, 1 acre).

The Corps believes that the description of the type of activities will ensure that those activities authorized by this NWP will be similar in nature. Further, we believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Further, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

Another commenter recommended changes to NWP 32 which would allow restoration-based settlements for natural resource injuries by adding the following text: (iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under section 311 of the Clean Water Act (CWA), section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), section 312 of the National Marine Sanctuaries Act (NMSA), section 1002 of the Oil Pollution Act of 1990 (OPA), or the Park System Resource Protection Act at 16 U.S.C. 19jj. For (i), (ii), and (iii) above, the compliance is a condition of the NWP itself.

The Corps agrees with the commenter. These are Federal environmental legal resolutions that we believe should proceed without the delays caused by processing individual permits that would have no added value to resolutions under these laws. However, we have added a clarification that this

NWP only applies to the extent that a Corps permit is required.

The nationwide permit is reissued with the change discussed above.

33. *Temporary Construction, Access and Dewatering* There were no changes proposed to this nationwide permit. One commenter suggested that NWP 33 should be withdrawn as activities authorized under this permit cannot be considered ''similar in nature'' and do not result in temporary or minimal adverse environmental effects to waters of the U.S.

The Corps believes that the description of the type of activities will ensure that those activities authorized by this NWP will be similar in nature. Further, we believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Further, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

The nationwide permit is reissued without change.

34. *Cranberry Production Activities* There were no changes proposed to this nationwide permit. One commenter recommended that the Corps not reissue this permit as it violates section 404(e) of the CWA and the section 404(b)(1) Guidelines. The commenter stated that cranberry growers are allowed to ''buy down'' impacts of conversion with compensatory mitigation and that compensatory mitigation is allowed to take the form of preservation. The commenter further stated that some have indicated that cranberry production can degrade water quality, harm fisheries, and reduce water quantity, each of which can significantly, adversely affect the aquatic environment.

The Corps believes that this NWP is fully in compliance with section 404(e) of the Clean Water Act. Further the Corps believes that it is appropriate to require mitigation for adverse effects of a project and that the mitigation can be considered when determining that the adverse effects of a project are minimal.

The nationwide permit is reissued without change.

35. *Maintenance Dredging of Existing Basins* There were no changes proposed to this nationwide permit. Two commenters pointed out that there was a change in the proposed NWP 35 which was not mentioned in the Preamble. Another commenter recommended withdrawing this permit as it is not reasonable to conclude that the cumulative impacts of all of the activities authorized under this category would not result in greater than minimal adverse environmental effects. The commenter stated it is reasonable to conclude that this category of activities would be incapable of being in compliance with CZM programs.

The Corps agrees that there were differences in the NWP from the 1996 NWP. However, the Corps did not intend to propose a change to this NWP. This was an error. This NWP will be adopted as it has existed since 1996. We continue to believe that the cumulative effects of activities authorized by this NWP will be no more than minimal individually and cumulatively. Furthermore, Corps districts or divisions may add case-specific or regional conditions where necessary to further ensure that the adverse effects to the aquatic environment are no more than minimal, individually and cumulatively. The states will review the activities authorized by this NWP and will agree or disagree that these activities comply with their State CZM programs. If the States disagree, then activities that otherwise qualify for the NWP will need to get an individual State CZM concurrence before they can proceed. If the state conditions its CZM agreement, then those state CZM condition will become conditions of the NWP.

The nationwide permit is reissued without change from the 1996 NWP.

36. *Boat Ramps* There were no changes proposed to this nationwide permit. One commenter suggested that NWP 36 should be withdrawn as it is unreasonable to conclude that the cumulative impacts of all of the activities authorized under this category would not result in greater than minimal adverse environmental effects. The commenter expressed is doubt that the adverse indirect/secondary impacts of extracting the source materials and subsequent degradation of water quality associated with the use of the construction of boat ramps has been considered by the COE.

We continue to believe that the cumulative effects of activities authorized by this NWP will be no more than minimal, individually and cumulatively. Furthermore, Corps districts or divisions may add case-specific or regional conditions where they believe necessary to further ensure that the adverse effects to the aquatic environment are no more than minimal, individually and cumulatively. The Corps will also consider adverse effects at borrow areas where appropriate. It should be noted that normally the materials for the small boat ramps are obtained from existing borrow areas or sources that exist independently of the small projects. Any individual water quality issues will be addressed by the states through water quality certifications, NPDES permits or other programs. In some cases the Corps may directly address water quality issues when appropriate.

The nationwide permit is reissued without change.

37. *Emergency Watershed Protection and Rehabilitation* The Corps proposed to modify this NWP to include the Department of the Interior (DOI), Wildland Fire Management Burned Area Emergency Stabilization and Rehabilitation Program (DOI Manual, part 620, Ch. 3) to this NWP. The existing NWP only included the Natural Resource Conservation Service (NRCS) and U.S. Forest Service (USFS) Programs for emergency watershed protection and rehabilitation. The Department of the Interior has similar responsibilities as the Forest Service, such as suppression of wildland fires and the rehabilitation of the burned land.

Several commenters suggested additional changes to this NWP, including limiting the time that the NWP can be used after an emergency situation, such as 2 years, and broadening the NWP to cover State and local emergency activities. One commenter suggested that there were abuses, such as converting waters of the U.S. in the guise of restoration. Another commenter recommended retaining the word ''exigency'' in the permit language until such time that NRCS completes their final PEIS and modifies their regulations accordingly to ensure that the impacts from this category of NWP will not exceed the minimal impact threshold.

The Corps believes that the time constraint and the expansion to include State and local emergency activities would need to be proposed before a change could be adopted. Furthermore, we believe that the suggested time constraint is not needed and we are not aware of any such abuses. The Corps will monitor the use of this NWP and will propose any changes that may be necessary to ensure that any adverse effects on the aquatic environment are no more than minimal, individually or cumulatively. The Corps believes that the terminology used to describe the NRCS emergency situations will not result in materially different activities that are now covered by the NWP. Should there be a change the Corps can modify the NWP accordingly.

One commenter suggested a grammatical change, removing the

''Work done or funded by'' from the beginning of subsections ''b'' and ''c'' in order to be consistent with subsection ''a''. We concur with this comment and have accordingly changed the NWP.

The nationwide permit is reissued as proposed and with the change described above.

38. *Cleanup of Hazardous and Toxic Waste* There were no changes proposed to this nationwide permit. One commenter indicated that this NWP covers many different activities that are not similar activities. The commenter added that the NWP also lacks any indication of a time constraint that would constitute an ''emergency'' response, which may have occurred up to five years later in some cases. The commenter also stated that there have been adverse effects that occur under the guise of so-called ''Restoration''.

The Corps believes that the description of the type of activities will ensure that those categories of activities authorized by this NWP will be similar in nature. Further, we believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. In addition, Division and District Engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The addition of a time constraint would need to be proposed before a change could be adopted. Furthermore, we believe that a time constraint is not needed and we are not aware of any such abuses. The Corps will monitor the use of this NWP and will propose any changes that may be necessary to ensure that any adverse effects on the aquatic environment are no more than minimal, individually or cumulatively. The nationwide permit is reissued without change.

39. *Residential, Commercial, and Institutional Developments* The Corps proposed these changes to this NWP: (1) Simplify the subdivision provision, without substantively changing its effects, (2) delete the one-cfs restriction on stream impacts, and (3) allow a project specific waiver of the 300 linear-feet prohibition following a written determination by the Corps that any adverse environmental effects would be no more than minimal.

Simplify the Subdivision Provision

Several commenters supported simplifying the subdivision provision while several others indicated that the existing subdivision provision should remain. Several commenters expressed concerns about repeated use of the NWP within a subdivision and supported applying the aggregate of all fills in waters of the U.S. to the ½ acre threshold. Some commenters did not want the restriction to apply to future individual lot owners while others wanted to ensure that it did. One commenter asked whether the new subdivision language would apply to all subdivisions or would some be grandfathered. Another expressed concern about Corps workload and record keeping impacts due to grandfathered subdivision dates. One commenter requested that individual lot owners within a subdivision be exempted from the subdivision provision. Another commenter indicated that the 1/10 acre notification requirement should be retained in the subdivision provision.

The Corps continues to believe that to make the subdivision provision effective, it needs to be simplified. The subdivision provision will apply to all, but only to, residential subdivisions, regardless of when they were built. This will create some additional workload in older residential subdivisions not yet completed. However, in appropriate cases Corps divisions and districts may consider regional general permits or abbreviated permit processes. Also Corps divisions and districts may add regional conditions to require notification or other restrictions when appropriate. The subdivision provision will apply to all lots within a residential subdivision. Furthermore, when authorizing future residential subdivisions the Corps will consider the status of lots that maybe filled in the future and add them to the total for determining compliance with the aggregate ½ acre threshold. The simplified subdivision provision will simplify Corps record keeping and workload. But more importantly it will further compliance with this condition and thus provide additional environmental protection while allowing those subdivisions with minimal impact to proceed without unnecessary costs and delays.

Delete the One-cfs Restriction on Stream Impacts: Many commenters objected to the removal of the one cfs restriction on stream impacts and requested that it be restored to ensure that developments are not located on flood prone property without full individual permit review, including public notice and comment. One commenter recommended a preferred modification involving retaining the provision and proposed specific conditions under which this provision might be waived e.g. severe degradation. Another commenter was concerned that removal of this provision could jeopardize streams considered degraded by the Corps when that degradation might be eliminated or reduced through simple changes in management practices. Two commenters supported the elimination of the one cfs restriction agreeing that it was inconsistent with the intent of the NWP, but one of them further went on to say that the prohibition is unnecessary, confusing and results in many minimal impact projects having to undergo the individual permit process, and that the condition is arbitrary as there is no data to support the application of this condition. One commenter stated that removing the one cfs prohibition would allow a developer to completely remove most functions provided by a stream, however, this much impact should not be authorized by the Corps.

The Corps agrees with those commenters that the one cfs restriction is unnecessarily prohibitive. There is a need on occasion to have some unavoidable elements of relocation and channelization below the one cfs point on a stream for a project covered by NWP 39. In these cases there would be no value added to the environment by processing an individual permit. Further, the added complication and costs of making a determination of another point on a stream in addition to the five cfs point, unnecessarily adds a burden to the Corps and the applicant. We further believe that there are several other general conditions that protect important stream values; such as General Condition 21 Management of Waters Flows, General Condition 20 Spawning Areas, General Condition 17 Shellfish beds and General Condition 9 Water Quality to name a few.

300 Linear Foot Prohibition with a Waiver: This issue is discussed elsewhere in this preamble.

Compliance with 404(e): Several commenters indicated that the NWP was not in compliance with Section 404(e). One commenter said that since a residential development is not a water dependent activity, it is presumed that alternative locations are available for these activities.

We believe that the minor nature of these types and categories of activities will ensure that they are similar in nature. We further believe that the conditions and specified thresholds will ensure that the activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The thresholds have been developed and greatly reduce from 10 acres in 1984 down to ½ acre in 2000, based on years of experience and were developed to consider most effects

that could occurs in many areas of the country. However, Division and District Engineers will condition such activities where necessary to ensure that those activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. A case specific off-site alternatives analysis is not required for activities with minimal adverse effects that are authorized by NWPs, as provided for the Clean Water Act section 404(b)(1) Guidelines. However, on-site avoidance and minimization is required by General Condition 19.

Other Comments

Many commenters opposed the preamble discussion regarding the phasing of subdivisions. The Corps has defined the concept of single and complete projects for the purpose of authorizing activities by nationwide permits. This term is defined in Corps regulations at 33 CFR 330.2(i). The preamble discussion states how the Corps is implementing the regulations. The Corps is not proposing to change the nationwide permit regulations at this time.

Two commenters requested conditions requiring a pre-construction notification for all wetland impacts to allow the Corps to determine the appropriateness of using the NWP for wetlands impacts. One of those commenters recommended that permittees be required to verify compliance with the NWP general conditions. A pre-construction notification is a requirement for impacts to greater than 1/10 acre of non-tidal waters of the U.S., excluding non-tidal wetlands adjacent to tidal waters. This NWP can not authorize activities in tidal waters of the U.S. and not in non-tidal wetlands adjacent to tidal waters and not for permanent above grade fills below the headwaters in the 100 year flood plain as provided for in general condition 26. We believe that this will ensure that the impacts will be no more than minimal. Furthermore, Corps divisions and districts will add regional conditions as appropriate to further ensure that cumulative effects will be no more than minimal. The Corps believes that it would be an unnecessary and unreasonable burden on an applicant to demonstrate compliance with all conditions. The Corps districts will request verification of compliance for those conditions that the Corps believes are applicable to a project but for which the applicant did not supply sufficient information.

This NWP is reissued as proposed except with the modified 300 linear foot waiver discussed below.

40. *Agricultural Activities.* The Corps proposed to modify this NWP by providing a waiver for the 300 linear foot limit on relocating existing serviceable drainage ditches constructed in non-tidal streams. Several commenters opposed this NWP, with some suggesting that it be withdrawn. Some commenters suggested additional restrictions to the NWP. These restrictions included changing the maximum acreage threshold (e.g. 1% of the farm tract, .3 acres, 1/2 acre for the entire farm holding or all the tracts under one ownership, 1/4 acres, and 1/10 acre); prohibiting conversion of waters of the US. to agricultural production; requiring that all impacts must be fully mitigated; and requiring that the Corps must review and approve all mitigation. Additional suggestions included requiring a pre-construction notification to include a hydrologist report documenting the extent of both primary and secondary impacts; limiting the linear footage of fill in all streams to 250 feet; prohibiting the discharge of fill into playas, prairie potholes, and vernal pools, withdrawing the provision that states that ''discharges of dredged or fill materials into waters of the US. associated with the construction of compensatory mitigation are authorized by the NWP, but are not calculated in the acreage loss of waters of the US'; and requiring that the Corps make its own minimal effects determination consistent with section 404 of the Clean Water Act.

Many of these suggestions would require that the Corps publish proposed changes to this NWP for public comments. The Corps can consider and propose any such appropriate changes after this NWP is reissued. However, at this time we believe that the threshold that we established in 1996 continues to be appropriate for this NWP. The Corps will review appropriate activities for compliance with this NWP including requiring appropriate mitigation and ensuring that the authorized activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Further, we also believe that the PCN requirements are adequate to allow the Corps to make such determinations. We also believe that the PCN requirements will ensure that any jurisdictional activities in playas, prairie potholes, and vernal pools will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. However, for activities authorized by paragraph a. of this NWP, we will rely on NRCS to make those decisions. We believe that this is adequate and appropriate considering NRCS's responsibilities under the Swampbuster provisions of the Farm Bill. The threshold limits for all NWPs are based on the amount of impacts to waters of the US of the proposed activity. We do not allow that limitation to be modified by considering mitigation to decrease that number. However, we do consider the net effects including the project effects, mitigation and impacts caused by the mitigation in deciding whether the activity will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

Most commenters stated that the activities authorized under this permit would pose a serious threat of contamination to wetlands and nearby streams from animal waste and should be withdrawn.

We understand these concerns. However, these issues are normally considered and will be addressed as part of the states' Section 401 water quality certification or by a Section 402 permit.

Most commenters stated that the scope of this permit violates the minimal impact standards as it unnecessarily exceeds the 1/4 acre limit for filling wetlands under the ''minimal effects'' provisions of the Farm Bill, and, as such, should be withdrawn.

The Corps disagrees. Nothing in this NWP will override the provisions of the Farm Bill. Where an activity is covered by the Farm Bill, it must meet the requirements of the Farm Bill as well as the requirements of the Corps NWPs. The NRCS is responsible for determining compliance with the Farm Bill, while the Corps is responsible for determining compliance with the NWP.

One commenter recommended withdrawing this NWP as the activities authorized by it are not water dependent activities, are very dissimilar in nature and result in major adverse impacts to the human environment. Additionally, the impact thresholds are arbitrary and capricious.

We believe that the minor nature of these types and categories of activities will ensure that they are similar in nature. We further believe that the conditions and specified thresholds will ensure that the activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The thresholds have been developed based on years of experience and were developed to consider most effects that could occurs in many areas of the country. However, Division and District engineers will condition such activities where necessary to ensure that those activities

will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. This nationwide permit is reissued with a modified 300 linear foot waiver as discussed below.

41. *Reshaping Existing Drainage Ditches.* There were no changes proposed to this nationwide permit. Three commenters said that this NWP should not be reissued. One commenter stated that there is no demonstrated need for this NWP. Three commenters objected to the reissuance of the NWP because there are no acreage or linear foot limits. One of these commenters suggested adding a 500 linear foot limit and a 250 linear foot pre-construction notification threshold. One commenter said that the sidecasting of drainage ditch soils may have significant adverse impacts on the hydrologic regimes of adjacent wetlands. Another commenter indicated that impacts due to temporary sidecasting of excavated material result in more than minimal adverse effects on the human environment.

This NWP authorizes the reshaping of existing, serviceable drainage ditches in a manner that benefits the aquatic environment. Without this NWP, project proponents would likely have to obtain an individual permit to reshape drainage ditches in a manner that helps improve water quality in a watershed. Requiring an individual permit for this activity would discourage landowners from conducting this activity. We do not agree that acreage or linear limits are necessary because of the nature of the authorized activity. The pre-construction notification threshold of 500 linear feet will allow district engineers to review ditch reshaping activities that may result in more than minimal adverse effects to the aquatic environment. In response to a pre-construction notification, a district engineer can require special conditions to ensure that adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work.

One commenter asserted that this NWP will encourage the drainage, degradation, and further loss of waters and wetlands. One commenter recommended revocation of this NWP within ''Tulloch'' ditches because the permit provides additional opportunities for developers to fill wetlands with little oversight by the Federal government. This commenter also suggested modifying NWP 41 to require planting of native trees and shrubs on ditch banks after construction to reduce the potential for water quality degradation.

This NWP authorizes only temporary sidecasting of excavated material into waters of the United States. Therefore, activities authorized by this NWP will not have significant, permanent impacts on the hydrology of adjacent wetlands or the human environment. This NWP does not encourage the loss of waters and wetlands because it is limited to activities in existing, serviceable drainage ditches and reshaping activities cannot increase the area drained by the ditches. We do not agree that it is necessary to require planting of native trees and shrubs after construction. Drainage ditches require periodic maintenance to remove accumulated sediments and any trees and shrubs planted next to drainage ditches would have to be removed during maintenance activities.

One commenter said that if this NWP is used to authorize activities in waters that support salmonids, then a regional condition should be added to the NWP. The recommended regional condition would require delineations of pools and riffles and require that the reshaping activity be conducted in a manner that does not reduce the volume and surface area of pools or other suitable habitat.

Division engineers can add regional conditions to this NWP to address concerns for salmonid species.

One commenter objected to the reissuance of this NWP, stating that it does not define the term ''drainage ditch'' narrowly, it does not require an applicant to prove that the proposed ditch reshaping activity will not increase the area drained by the ditch, it does not require mitigation when work is designed to improve water quality. This commenter said that the NWP should clarify that pre-existing waterways are not drainage ditches, even if they have been channelized. This commenter recommended adding the following text to NWP 41: ''This general permit is limited to reshaping that would restore more natural stream characteristics by activities similar to increasing the area of riparian vegetation through re-grading or by recreating stream meanders.'' Other suggestions by this commenter include requiring applicants to obtain NRCS minimal effects determinations and best management practices certifications and requiring mitigation for adverse impacts to aquatic resources authorized by this NWP.

This NWP does not define the term ''drainage ditch''. District engineers can determine, on a case-by-case basis, what constitutes a ''drainage ditch''. The Corps has modified the language of this permit slightly to clarify that drainage ditches constructed in uplands are generally not waters of the US, consistent with earlier guidance on this issue (FR 51:219, p 41217). We do not believe that it is necessary to require compensatory mitigation for activities authorized by this NWP, since the activities authorized by NWP 41 are designed to improve water quality. We do not agree that the recommended text in the previous paragraph should be added to NWP 41 because this NWP authorizes the reshaping of existing drainage ditches, not stream restoration activities. Requiring applicants to obtain minimal effects determinations and best management practices certifications from NRCS is unnecessary, since this NWP is limited to the reshaping of existing, currently serviceable drainage ditches that have minimal individual and cumulative adverse effects on the aquatic environment. This nationwide permit is reissued without change.

42. *Recreational Facilities* In the August 9, 2001, **Federal Register** notice, we proposed to modify this NWP by allowing on a case-by-case basis, a waiver of the prohibition on impacts exceeding 300 linear feet of stream bed. In addition, we requested suggestions regarding criteria, standards, and best management practices that should be applied to this NWP for recreational facilities to ensure that adverse effects on the aquatic environment are minimal.

One commenter requested that the Corps broaden the applicability of this NWP to include improvements to ski facilities, because ski area expansion is too narrow. This commenter also expressed support for expanding the scope of this NWP to include the construction of hotels and restaurants, because these facilities are important components of skiing facilities. One commenter supported the use of this NWP to authorize the construction of hiking, biking, and horse trails.

This NWP can be used to authorize the construction of certain improvements to ski facilities, provided those improvements comply with the terms and conditions of the NWP. We do not agree that NWP 42 should be expanded to include the construction of hotels and restaurants. These facilities may be authorized by other NWPs, such as NWP 39, which authorizes discharges of dredged or fill material into non-tidal waters of the United States to construct commercial buildings and attendant features, or other types of Corps permits.

Two commenters said that this NWP should be withdrawn. One of these commenters said that the NWP authorizes activities that are not similar in nature that result in more than minimal adverse impacts to the aquatic

environment. Six commenters asserted that this NWP should not authorize the construction of golf courses or ski areas. One commenter objected to the authorization of these facilities under NWP 42 because they are unlikely to substantially deviate from natural landscape contours. Another commenter said that the authorization of golf courses and ski areas discourages developers from looking for alternatives that have less impact on the aquatic environment. One commenter objected to the inclusion of campgrounds in the list of activities that may be authorized by this NWP. Four commenters stated that support facilities, such as buildings, stables, parking lots, and roads should not be authorized by this NWP. One commenter asked if this NWP can be used to authorize the construction of recreational ponds.

This NWP authorizes activities that are similar in nature because it is limited to discharges of dredged or fill material into waters of the United States to construct recreation facilities. The terms and conditions of the NWP, with the case-by-case review of those activities that require pre-construction notification to district engineers, will ensure that the activities authorized by this NWP result in minimal adverse effects on the aquatic environment. Pre-construction notification is required for discharges of dredged or fill material resulting in the loss of greater than 1/10 acre on non-tidal waters of the United States or the loss of greater than 300 linear feet of perennial and intermittent streams. The pre-construction notification process allows district engineers to review those activities that may result in more than minimal adverse effects to the aquatic environment. In response to a pre-construction notification, a district engineer can require special conditions to ensure that adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work.

Golf courses and expanded ski facilities can be constructed so that they are integrated into the natural landscape, without substantial amounts of grading and filling. This NWP authorizes only the expansion of existing ski areas. Paragraph (a) of General Condition 19 requires permittees to avoid and minimize adverse effects to waters of the United States on-site to the maximum extent practicable. We do not agree that campgrounds should be excluded from this NWP. We believe that the construction of small support facilities, such as storage buildings and stables, are necessary attendant features for the operation of the recreational facilities authorized by this NWP. This NWP may authorize the construction of small recreational ponds, provided the construction of those impoundments does not substantially change natural landscape contours.

One commenter said that this NWP should have a 1/3 acre limit, including a 250 linear foot limit for stream impacts. Another commenter said that the 1/2 acre limit was too high. One commenter stated that the pre-construction notification threshold should be 1/3 acre or 1/4 acre, instead of 1/10 acre. A commenter said that all activities authorized by this NWP should require pre-construction notification, and that this NWP should not authorize activities in special aquatic sites. One commenter recommended replacing the word ''loss'' in the text of the NWP with the phrase ''fill or impact (including temporary and permanent impacts)''.

We do not agree that the acreage limit should be reduced to 1/3 acre, or that there should be a 250 linear foot limit for stream impacts. In addition, we believe that the 1/10 acre pre-construction notification threshold adequately ensures that all activities that could result in more than minimal adverse effects on the aquatic environment are reviewed by district engineers on a case-by-case basis. We do not agree that it is necessary to require pre-construction notification for all activities authorized by this NWP or to prohibit use of this NWP in special aquatic sites. Where there are concerns that this NWP may authorize activities with more than minimal adverse effects on the aquatic environment, division engineers can regionally condition this NWP to reduce the acreage limit or require notification for all activities. It is not necessary to replace the word ''loss'' with the phrase ''fill or impact (including temporary and permanent impacts)'' because the word ''loss'' addresses waters of the United States adversely affected by filling, flooding, excavation, or drainage.

Several commenters objected to allowing case-by-case waivers to the 300 linear foot limit for losses of stream beds. One of these commenters said that small and ephemeral streams are important for protecting water quality, preventing flooding, and providing habitat for many species. Another commenter said that the waiver should not be granted until the district engineer solicits comments from the other Federal and state resource and regulatory agencies.

This waiver is discussed in more detail below in this **Federal Register** notice.

One commenter stated that the definition of ''recreational facilities'' is too broad and the NWP does not adequately address impacts at the project site and downstream. One commenter said that the Corps should not attempt to establish criteria, standards, or best management practices because the Corps has already determined that the NWP authorizes only activities with minimal adverse environmental effects. A commenter suggested that the Corps require best management practices for storm water management, limits on the clearing of vegetation for project construction, the establishment and maintenance of 100 foot wide forested buffers adjacent to aquatic resources, and limits on the use of impervious surfaces for trails and walkways. One commenter requested that the NWP contain more flexibility to allow limited use of impervious surfaces to accomplish complete accessibility for the physically challenged on multi-use trails.

We believe that the definition of ''recreational facilities'' used in this NWP, in addition to the terms and conditions of NWP 42 and the NWP general conditions, are sufficient to ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. The August 9, 2001, **Federal Register** notice sought public input on ways to continue to ensure that this NWP authorizes minimal impact recreational facilities. Compliance with General Condition 9, Water Quality, may require storm water management for a particular recreational facility. The maintenance and establishment of vegetated buffers may be required by district engineers as compensatory mitigation. Specific limits on the use of impervious surfaces are determined by district engineers on a case-by-case basis in response to a pre-construction notification. The construction of multi-use trails that provide accessibility for physically challenged individuals can be authorized by this NWP.

One commenter said that regional conditions should be adopted to prevent the cumulative adverse impacts to wood recruitment in waters inhabited by salmon. This commenter also suggested that regional conditions should be adopted to prohibit the construction of trails or paths along the tops of banks unless the facility is constructed so that there is no loss of riparian vegetation and any removed vegetation is allowed to grow back. This commenter also said that this NWP should not be stacked

with NWP 13 because these two NWPs exert synergistic significant adverse impacts on wood recruitment.

Division engineers can impose regional conditions on this NWP to address cumulative impacts, including impacts to salmon habitat. We do not agree that there should be a restriction prohibiting the use of NWP 13 with this NWP for a single and complete project. Bank stabilization may be required to maintain the integrity and safety of a recreational facility.

The nationwide permit is reissued with a modified 300 linear foot waiver as discussed below.

43. *Stormwater Management Facilities* In the August 9, 2001, **Federal Register** notice, we proposed to modify this NWP by allowing on a case-by-case basis, a waiver of the prohibition on impacts exceeding 300 linear feet of stream bed. There were no other changes proposed to this nationwide permit.

Three commenters stated that this NWP should be withdrawn. One of these commenters said that NWP 43 was unnecessary because the construction of stormwater management (SWM) facilities is authorized by other NWPs. Two commenters stated that new SWM facilities should not be constructed in streams, including ephemeral and intermittent streams. Another commenter said that SWM facilities are not water dependent, SWM facilities should not be constructed in waters of the United States, and the activities authorized by this NWP result in more than minimal adverse effects on the human environment. One commenter said that this NWP should not authorize activities in special aquatic sites.

Although other NWPs, such as NWP 39, can authorize the construction of SWM facilities, certain types of SWM facilities, such as regional SWM ponds that are not associated with a particular development, may not be authorized by other NWPs. In some cases, the construction of SWM facilities in waters of the United States may be necessary and may provide more protection to the aquatic environment. Division engineers can regionally condition this NWP to prohibit its use in high value waters. For those activities that require notification, district engineers can add case-specific conditions to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority and require individual permits for activities with more than minimal adverse effects.

One commenter said that the acreage limit for this NWP should be 3 acres and another commenter suggested a ¼ acre limit for the construction of new facilities. One commenter requested a higher acreage limit for activities in non-perennial streams, stating that the pre-construction notification process would provide the Corps the opportunity to ensure that project impacts are not more than minimal.

We believe that the ½ acre limit for the construction of new SWM facilities will ensure that this NWP authorizes activities with minimal adverse effects on the aquatic environment. We do not agree that there should be a higher acreage limit for discharges of dredged or fill material into intermittent and ephemeral streams.

One commenter stated that coordination with Federal and state resource and regulatory agencies should be conducted before the district engineer issues a waiver of the 300 linear foot limit. Another commenter supported waiving the 300 foot limit, but recommended that the Corps clarify that the presence of an ordinary high water mark is required when determining that a waterbody is a water of the United States.

We have adopted a modified condition allowing district engineers to issue case-by-case waivers to the 300 linear foot limit for losses of intermittent stream beds, for activities that result in no more than minimal adverse effects on the aquatic environment. This modified waiver is discussed in more detail in another section of this **Federal Register** notice.

One commenter recommended that the NWP authorize normal operations and maintenance activities so that the multi-objective aspects, including flood mitigation, of the project can be met and the community can realize project benefits. A commenter recommended adding a condition that restricts this NWP to the maintenance of existing SWM facilities. Another commenter said that the NWP should include a condition requiring maintenance of base flows during periods of low flow, to protect the downstream environment. This commenter also said that the NWP should be conditioned to prohibit the construction of concrete or stone-lined channels. One commenter asserted that the text of NWP 43 should clearly state that non-jurisdictional activities are not included in the acreage loss of waters of the United States.

NWP 43 authorizes the maintenance of existing, currently serviceable SWM facilities. Regular maintenance of SWM facilities is an important mechanism for ensuring effective stormwater management, including flood control. We do not agree that this NWP should be limited to maintenance activities. Paragraph (g) of NWP 43 refers to General Condition 21, Management of Water Flows, which requires the maintenance of pre-construction downstream flows. We do not agree that it is necessary to condition the NWP to prohibit the construction of concrete or stone-lined channels. Division engineers can regionally condition this NWP to prohibit these types of activities. During the review of a pre-construction notification, district engineers can exercise discretionary authority if the proposed work involves the construction of a concrete or stone-lined channel and the proposed work will result in more than minimal adverse effects on the aquatic environment. We do not believe it is necessary to explicitly state in the text of the NWP that non-jurisdictional activities are not included in the acreage loss of waters of the United States, although this is true for all NWPs generally.

One commenter said that areas within SWM facilities should not be considered as compensatory mitigation if regular maintenance is required. Another commenter said that this NWP should not authorize the use of SWM facilities as compensatory mitigation sites.

Areas of a SWM facility that are not subject to regular maintenance can be used as compensatory mitigation sites (see paragraph (e)(3)).

The nationwide permit is reissued with a modified 300 linear foot waiver as discussed below.

44. *Mining Activities.* There were no changes proposed to this nationwide permit. Many commenters said that this NWP should be withdrawn. Several of these commenters believe that the activities authorized by this NWP result in more than minimal adverse effects on the aquatic environment, including water quality, navigation, and aquatic habitat. Some commenters said that these activities should be reviewed under the standard permit process.

This NWP authorizes mining activities that have no more than minimal individual and cumulative adverse effects on the aquatic environment. The terms and conditions of this NWP, including the NWP general conditions, will ensure that these mining activities will have no more than minimal adverse environmental effects. For example, mining activities in navigable waters must comply with General Condition 1, Navigation. All activities authorized by this NWP require notification to the district engineer prior to commencement of mining activities. The pre-construction notification process allows district engineers to review mining activities on a case-by-case basis, to ensure that the proposed work has no more than

minimal adverse effects on the aquatic environment. In response to a pre-construction notification, the district engineer can add special conditions to the NWP authorization to ensure that the adverse effects on the aquatic environment are no more than minimal or exercise discretionary authority to require an individual permit for the work.

One commenter stated that this NWP does not satisfy the ''similar in nature'' requirement for general permits, including NWPs. Another commenter asserted that the activities authorized by this NWP are not water dependent and that alternatives are available.

This NWP complies with the ''similar in nature'' requirement of general permits because it is limited to aggregate and hard rock/mineral mining activities. The water dependency test in the Section 404(b)(1) guidelines does not require each activity in waters of the United States to be water dependent to fulfill its basic project purpose. General Condition 19, Mitigation, requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site. The NWPs do not require an analysis of off-site alternatives. As long as the mining activity results in no more than minimal adverse effects to the aquatic environment and complies with all terms and conditions, the activity can be authorized by NWP.

One commenter said that this NWP should be withdrawn because it is of limited use to the aggregate mining industry. A commenter objected to this NWP, stating that the Corps has not demonstrated why the NWP should be limited to activities in isolated waters and wetlands adjacent to headwaters. One commenter asserted that the ½ acre limit for this NWP is too restrictive because of the extensive pre-construction notification and mitigation requirements. This commenter also said that the Corps cannot condition this NWP to prohibit beneficiation and mineral processing within 200 feet of an open waterbody. Another commenter recommended increasing the acreage limit to three acres for impacts to non-wetland waters and allowing district engineers to waive the 1 cubic foot per second limit on a case-by-case basis.

The terms and conditions of this NWP, including the ½ acre limit and the scope of applicable waters, are intended to ensure that activities authorized by this NWP result in no more than minimal adverse effects to the aquatic environment, individually and cumulatively. We have the authority to condition this NWP to prohibit beneficiation and mineral processing within 200 feet of an open waterbody, if such a restriction is necessary to ensure that the NWP authorizes only activities with no more than minimal adverse effects on the aquatic environment. We do not agree that a waiver for the 1 cubic foot per second limit for aggregate mining in headwater streams would be appropriate. That restriction is necessary to ensure that the NWP does not authorize aggregate mining activities with more than minimal adverse effects to headwater streams. Aggregate and hard rock/mineral mining activities that do not qualify for authorization under this NWP can be authorized by individual permits.

Two commenters stated that this NWP must be reevaluated in light of the *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers et al.* (U.S. Supreme Court No. 99–1178) (SWANCC). One commenter said that many mining operations do not involve discharges of dredged or fill material into waters of the United States and the Corps should reassess areas where it has exceeded its statutory authority. One commenter recommended modifying this NWP to clarify that non-jurisdictional excavation activities channelward of the ordinary high water mark and activities outside of the ordinary high water mark and adjacent wetlands do not require a Section 404 permit.

The *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers et al.* decision related to the scope of CWA jurisdiction over nonnavigable isolated intrastate waters. Aggregate and hard rock/mineral mining activities may occur in jurisdictional waters and thus could be authorized by this NWP. Activities that occur in non-jurisdictional waters, as determined by applicable regulations and case law (including SWANCC) do not require a section 404 permit. The nationwide permit is reissued without change.

Project Specific Wavier of 300-Linear Feet Prohibition in NWPs 39, 40, 42, and 43

In the August 9, 2001, **Federal Register** notice, the Corps proposed to allow a waiver, on a case-by-case basis, of the prohibitions in NWPs 39, 40, 42, and 43 against discharges resulting in the loss of greater than 300 linear feet of stream bed. The waiver could be issued only after the district engineer reviewed a pre-construction notification for the proposed work and determined that the activity would result in no more than minimal adverse effects on the aquatic environment.

Several commenters stated that the absolute 300 linear foot limit on the amount of stream that can be filled under these NWPs should be retained. They were concerned that the proposed waiver would lead to severe stream destruction from the construction of developments, agricultural activities, and other activities and said that the existing, strong linear limits on stream bed impacts should be retained. Some of these commenters added that the 300 linear foot limit provides predictability and certainty to the regulated community and state permitting agencies as well as reducing workload for Corps staff. A few commenters stated that the proposed waiver would lead to many variations in the way permit decisions are made between Corps districts and even between Corps project managers within the same district who use their own definitions of minimal impacts. One of these commenters indicated that NWP verification requests should be simple to review and approve, with clear thresholds and consistency in the review process. Another commenter stated that the waiver would require the Corps to rely on the expertise of applicants to provide information and allow developers to excavate or fill as much as one mile of a stream under a general permit when the intent of NWP program is to authorize only those activities with minimal adverse impacts. Numerous commenters supported the proposed waiver. Some of these commenters said that the waiver would allow greater flexibility and efficiency in permit processing and would eliminate the need for individual permits to fill more than 300 linear feet of stream bed where the impacts are minimal.

The waiver adds flexibility to the Corps permit process, by allowing district engineers to efficiently authorize activities that have minimal adverse effects on the aquatic environment. Requiring individual permits for minimal impact activities that would otherwise qualify for authorization under NWPs 39, 40, 42, and 43 because they involve the loss of greater than 300 linear feet of stream bed would increase the Corps workload, with no added environmental benefits. Since aquatic resource functions and values vary across the United States, we recognize that there will be differences in the implementation of the waiver. However, we do not agree that the waiver makes the protection provided by the NWP process less consistent. District engineers will use their knowledge of the local aquatic environment, as well

as the information submitted in pre-construction notifications, to make their case-by-case determinations whether the waiver is applicable for a particular activity.

Some commenters emphasized the functions and values of the small headwater streams in the overall health of the aquatic environment and stated that filling these streams will result in significant impacts. These commenters stated that the cumulative loss of intermittent streams and the downstream impacts of piping these streams can cause significant irreversible environmental and ecological losses. Another commenter added that small streams usually exist within extensive riparian corridors and are incorrectly called drainage ditches to devalue their worth. This commenter is concerned that the waiver would result in the degradation of headwater streams, allow channelization of more streams, and result in more losses of wetlands. One commenter stated that allowing filling of streams could impact the States' efforts to restore wetlands, streams, and watershed functions.

We recognize that headwater streams often provide important functions and values, but there are situations where the loss of these streams will result only in minimal adverse effects on the aquatic environment. We believe that such situations would not likely occur in intermittent streams, but rather in perennial streams. We have thus decided not to adopt the waiver of the 300 linear foot limit for perennial streams. The absolute prohibition on the use of these permits where more than 300 linear feet are impacted remains in place for perennial streams. We have decided to adopt the waiver process for intermittent streams, thereby allowing district engineers to waive, on a case-by-case basis, the 300 linear foot limit for the loss of intermittent stream beds under NWPs 39, 40, 42, and 43. It is important to note that, in order for the waiver to occur, the district engineer must make a written determination that the proposed work will result in no more than minimal adverse effects on the aquatic environment. If the district engineer does not provide written confirmation of the waiver, then the 300 linear foot limit for the loss of intermittent stream beds remains in place and the project proponent must obtain another type of Corps permit for the proposed activity.

Further, if the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will determine that the waiver is not applicable and require the project proponent to obtain an individual permit. As an added level of protection to valuable headwater streams, division engineers can regionally condition the NWPs to further restrict or prohibit their use in high value waters. The waiver will not impact States' efforts to restore waters and watersheds, since the waiver can only be issued after case-by-case review.

Some commenters asked how the Corps would determine whether an activity resulted in minimal environmental impacts to justify waiving the 300 linear foot limit. One commenter asked if the cumulative effects of the waiver would be evaluated each time the waiver was used. A few commenters said that the Corps cannot justify eliminating and waiving the 300 linear foot limit until the Corps can demonstrate that there are no cumulative adverse impacts resulting from activities authorized by NWPs.

District engineers will use their knowledge of local aquatic environments and case-specific circumstances to determine when proposed activities will result in minimal adverse effects on the aquatic environment. District engineers monitor the use of NWPs on a watershed or regional basis to determine whether the cumulative adverse effects of these activities are more than minimal.

One commenter said that the 300 linear foot limit for the NWPs should be reduced to 200 linear feet. This commenter also recommended that mitigation should be required for all projects that result in a net loss of aquatic habitat, acreage, or function.

We do not agree that the 300 linear foot limit should be reduced to 200 linear feet. The mitigation requirements for the NWPs are addressed in General Condition 19, Mitigation. For activities authorized by NWPs, project proponents are required to avoid and minimize adverse effects to waters of the United States on-site to the maximum extent practicable. District engineers will determine, on a case-by-case basis whether compensatory mitigation is required to offset losses of waters of the United States and ensure that the adverse effects on the aquatic environment are minimal.

Several commenters discussed the example provided in the August 9, 2001, **Federal Register** notice (page 42079) which described a 6-inch wide by 1-inch deep ephemeral stream running for several thousand feet. One commenter inferred that the Corps was devaluing all such streams and that the loss of these streams would result in more than minimal impacts. This commenter said that relatively intact ephemeral streams perform a diversity range of hydrologic, biogeochemical, and habitat support functions that directly affect down-gradient streams. Another commenter stated that these small headwater tributaries provide important habitat for aquatic life, including fish spawning areas. This commenter also said that these streams are important habitat for amphibians and reptiles during those short periods when water is flowing or ponded, and that the continued loss of this habitat is cumulatively damaging. Another commenter stated that headwater streams should be protected, and added that continued permitting of these activities under the NWP program must include careful individual site review by qualified aquatic biologists. Two commenters said that minimal impact determinations for the waiver of the 300 linear foot limit should require on-site inspections.

The example provided in the August 9, 2001, **Federal Register** notice was intended as an illustrative example to show that some impacts exceeding 300 linear feet may still be minimal. It was not intended to suggest that all ephemeral streams are of low value, or that all impacts to ephemeral streams are by definition minimal. As a practical matter, ephemeral streams are not covered by the 300 linear feet limitation, so a formal waiver is not needed for ephemeral streams. However, even a project that impacts only an ephemeral stream could be required to obtain an individual permit if the District Engineer determined that individual or cumulative adverse effects were more than minimal. Under the waiver process, the district engineer would have to make a written determination that the loss of an intermittent stream segment exceeding 300 linear feet would result in minimal adverse effects on the aquatic environment. We do not agree that it is necessary to require on-site determinations in all cases by district engineers prior to issuing a waiver. District engineers can utilize their experience, information provided in pre-construction notifications, and other sources of information before determining the applicability of the waiver.

Three commenters suggested allowing the resource agencies to review all waiver applications. One of these commenters said that the public should be allowed to comment on these minimal effect determinations. Several commenters were opposed to the requirement for a written determination of a waiver without a time clock.

We do not agree that it is necessary to conduct agency coordination or a public comment process for requests to

waive the 300 linear foot limit for intermittent streams for NWPs 39, 40, 42, and 43. District engineers have the expertise to determine on a case-by-case basis whether these activities will result in more than minimal adverse effects on the aquatic environment. We do not believe it is necessary to adopt a separate time clock for waiver requests. If a project proponent submits a complete pre-construction notification for a NWP 39, 40, 42, and 43 activity, and the proposed work involves filling or excavating more than 300 linear feet of intermittent stream bed, the project proponent cannot assume that the proposed work is authorized by these NWPs unless a written waiver is obtained from the district engineer. District engineers should respond to requests for the 300 linear foot waivers for intermittent streams within the 45 day pre-construction notification period.

NWPs 39, 40, 42 and 43 are issued with a waiver for the 300 linear foot limit for intermittent stream beds. These NWPs cannot be used to authorize the loss of more than 300 linear feet of a perennial stream bed. As a clarification, there are no absolute quantitative limitations on linear impacts to ephemeral streams, as long as the adverse effects on the aquatic environment are no more than minimal.

Nationwide Permits General Conditions

1. *Navigation.* There were no changes proposed to this General Condition. There were no comments on this General condition. The General Condition is adopted without change.

2. *Proper Maintenance.* There were no changes proposed to this General Condition. There were no comments on this General Condition. The General Condition is adopted without change.

3. *Soil Erosion and Sediment Controls.* There were no changes proposed to this General Condition. There were no comments on this General Condition. However, there was a comment on NWP 7 that the Corps determined was related to this condition. The change is discussed in the Preamble discussion of NWP 7. We agreed with the comment.

The General Condition is adopted with a change to encourage permittees to perform work in waters during low-flow or no-flow conditions.

4. *Aquatic Life Movements.* In the August 9, 2001, **Federal Register** notice, the Corps proposed to modify this General Condition to clarify the intent of the condition was to protect aquatic life cycle movements.

One commenter stated that the current General Condition 4 was difficult to understand. Numerous commenters supported the clarification of this General Condition. Several commenters suggested that the statement ''substantially disrupt life cycle movements'' be replaced with ''prevent life cycle movements'', because substantial gives the impression that the impacts may be more than minimal. One commenter suggested that General Condition 4 should be revised to read, ''No activity conducted under a NWP may substantially disrupt the necessary life-cycle movements of those species of aquatic life indigenous to the water body, including those species that normally migrate through the area, culverts placed in streams must be installed to maintain low flow conditions''. One commenter recommended that General Condition 4 should restrict any activity that could impact or impair aquatic life stages or movement of organisms dependent upon waters or wetlands. One commenter stated that there is no need to change the wording of General Condition 4, if the Corps would consider that all movements by an organism are related to its life cycle. One commenter requested clarification of this condition concerning the application of the condition to other organisms, which do not have all of their life cycles within the aquatic environment (amphibians).

We have retained the word ''substantially'' in the text of this General Condition, which is related to the movement of the species not to the impact on the species. Removal of this word would change the standard to any movement no matter how minimal or inconsequential the movement would be. We believe that most work in waters of the United States will result in some disruption in the movement of some aquatic organisms through those waters. District Engineers will determine, for those activities that require notification, if the disruption of aquatic life-cycle movements is more than minimal and either add conditions to the NWP to ensure that the adverse effects are no more than minimal or exercise discretionary authority and require an individual permit.

A few commenters stated that culverts must be installed in streams to maintain low and high flow conditions to allow fish passage. One commenter added that the hydraulic analysis to determine that range of high flows through the culvert shall be based upon anticipated flows in the basin at build-out.

The Corps believes that it is important to maintain low flow conditions, but that it is not reasonable or necessary to require hydraulic analysis for every culvert that would be authorized by NWPs. Corps district can enforce this condition where necessary.

One commenter stated that activities for which the primary purpose is to impound water should be evaluated as individual permits and not authorized under NWPs since ponds significantly disrupt the necessary life cycle of aquatic life.

We believe there are impoundment projects which would substantially disrupt the movement of specific individuals of aquatic life, but which would not adversely affect the populations of the species nor have more than minimal impacts on the aquatic environment. Such activities would need to be processed as individual permits.

This General Condition is adopted as proposed.

5. *Equipment.* There were no changes proposed to this General Condition. There were no comments on this General Condition. The General Condition is adopted without change.

6. *Regional and Case-by-Case Conditions.* There were no changes proposed to this General Condition. One commenter stated that the public was not given adequate time to evaluate the regional conditions as they were not published in the **Federal Register**. Furthermore, the comment period for the regional conditions did not coincide with the comment period of the proposal to modify and reauthorize the NWP program. Therefore, the public was not provided an opportunity to evaluate and provide comment on the comprehensive and cumulative impacts of the NWPs.

Regional conditions are proposed and evaluated by the individual Corps division offices by a public notice and comment process. Case-by-case conditions are developed by Corps District or Division offices, to ensure that specific activities meet the NWP conditions and have no more than minimal adverse effect on the aquatic environment, individually and cumulatively. Division offices need to know what the final NWPs are before they can develop final regional conditions. Therefore, the review of any proposed regional conditions can not occur simultaneously with the review of the NWPs. Finally, this condition is to reinforce that those regional and case-by-case conditions are legally binding conditions of the NWPs.

The General Condition is adopted without change.

7. *Wild and Scenic Rivers.* There were no changes proposed to this General condition. There were no comments on

this General condition. The General Condition is adopted without change.

8. *Tribal Rights.* There were no changes proposed to this General condition. One commenter stated that tribal rights have been impaired due to cumulative impacts by the NWP program and suggested that a regional condition should be implemented to prohibit use of NWPs in south Florida until a regional EIS has been completed. The comments have been forwarded to the appropriate Corps District. The General Condition is adopted without change.

9. *Water Quality.* The Corps proposed to clarify this condition as it relates to detailed studies and documentation requirements. We also proposed to add language that clarifies that permittees may meet the requirement of this condition by complying with state or local water quality practices.

Numerous commenters agreed with the proposed change to General Condition 9. Many commenters stated the current more burdensome requirements, detailed studies, and design plans, only serve to expend the time and resources of the applicant. Several commenters indicated concern that the Corps may infringe upon the water quality authority of the State. One commenter recommended that General Condition 9 be revised to mandate compliance with the most stringent applicable standards whether they are federal, state, or local. One commenter stated that the Corps should not defer authority by making state or local permits a contingency of an NWP. Several commenters disagree with the proposed changes to this condition stating that many local jurisdictions lack the skilled personnel to develop and/or enforce adequate water quality standards and without evaluation of the state or local practices, the Corps cannot insure that impacts to the aquatic environment are minimal. One commenter stated that the proposed clarification should be withdrawn because the General Condition is less stringent than the existing condition and will result in poorer water quality. One commenter suggested that this condition should be expanded to specifically exclude the use of any NWP for a project adjacent to or in any water of the U.S. designated on a State 303(d) list.

We believe the changes will not reduce protection of the aquatic environment. Although the language of this condition could be interpreted to require detailed studies and design to develop water quality plans for every permit action, that was never our intent. While we do believe that inclusion of water quality management measures in project design is very important, we do not believe that comprehensive water quality planning should be a requirement of Corps NWPs, except in a few cases. In most cases, the Corps relies on state or local water quality programs. Where such programs do exist, the Corps will normally review the project to ensure that appropriate water quality features, such as stormwater retention ponds, are designed into the project. In some cases, the Corps may require more extensive design features to ensure that open water and downstream water quality are not substantially degraded. Normally, we believe that the permittee will comply with the requirements of this condition by obtaining state or local water quality approval or complying with state or local water quality practices, where such practices exist. The Corps proposed a condition in 1998 to restrict NWPs in State 303(d) (impaired) waters. We decided not to adopt that condition as explained in the March 9, 2000 preamble. We could not now adopt such a condition without proposing it for public review and comment.

The General Condition is adopted as proposed.

10. *Coastal Zone Management.* There were no changes proposed to this General Condition. There were no comments on this General Condition. The General Condition is adopted without change.

11. *Endangered Species.* There were no changes proposed to this General Condition. One commenter stated that a sentence has been omitted from this condition in the proposed preamble with no notification of the change. The omitted sentence, the last line of 11(a), states that, ''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''. The commenter stated that omitting this statement shifts the burden of identifying and protecting potentially impacted endangered and threatened species and their critical habitat onto the permit applicant. The commenter requested that this change be dropped because the Corps has not met the legal requirements to adopt it.

The commenter is correct. This sentence is included in the currently in force June 6, 2000, version of this General Condition, but not in the August 9, 2001, proposed version. The Corps did not intend to propose any changes to this General Condition. The omission was in error. The omitted sentence has been reinserted in this condition.

One commenter stated that this condition may lead to compliance with the ESA however, is not likely to fully minimize or substantially reduce the significance of harm to listed species and their critical habitat. One commenter suggested this condition be re-titled to read ''Threatened and Endangered Species'', the condition be simplified and clarified, and the U.S. Fish & Wildlife Service and the National Marine Fisheries Service web sites be placed in this condition.

We believe this condition as stated provides not only the legal protection but also the actual protection required under the ESA. The ''Endangered Species Act'' covers both threatened and endangered species as does the General Condition title ''Endangered Species''. We do not believe that it is necessary to include other agency websites here. These are readily accessible on the internet.

The General Condition is adopted without change (but with the inadvertently omitted sentence restored).

12. *Historic Properties.* There were no changes proposed to this General Condition. Two commenters recommended that the Corps coordinate with the SHPOs in accordance with the National Historic Preservation Act (NHPA) and requested that a FONSI should not be issued until consultation under NHPA has been completed.

Division and districts will coordinate with SHPOs and Tribal Historic Preservation Officers where appropriate and add any regional conditions or case specific conditions that may be necessary to satisfy the NHPA in specified areas. There is no requirement to coordinate with SHPO in developing a FONSI and we do not believe that such coordination is necessary.

The General Condition is adopted without change.

13. *Notification.* In the August 9, 2001 issue of the **Federal Register**, we proposed under Contents of Notification, to provide applicants the option to provide drawings, sketches or plans sufficient for Corps review of the project to determine if the project meets the terms of an NWP, to allow a waiver of the 300 linear-foot prohibition [following written verification from the Corps], and to delete for NWPs 12, 14, 29, 39, 40, 42, 43, and 44 the requirement to provide ''notification'' to the Corps for permanent above grade fills in waters of the U.S. These latter two changes were to make notification requirements consistent with changes discussed elsewhere in this notice.

Several commenters supported the proposed clarification for the submittal of drawings. Few commenters disagreed with the clarification but some said that drawings or sketches should be a mandatory requirement for notification and requiring this information would reduce Corps workload while insuring that impacts to the aquatic environment are minimal. One commenter recommended that photographs be required with notification.

It was not the intent of this proposed clarification to modify the required contents of notification or to make submittal of non required information mandatory but rather to encourage applicants to provide us as complete a submittal as possible to expedite our review of their application. We did state that the Corps has the discretion on a case-by-case basis to require additional information as necessary to determine if the activity complies with the terms and conditions of the NWP.

Several commenters agreed with the proposal to delete the notification requirements for above grade fill in waters of the United States. One commenter recommended expanding notification requirements to include above grade fills in NWPs 3, 12, 14, 21, 31, 39, 40, 42, and 44 and stated that the applicant should submit documentation as to why there is no practicable alternative to the proposed discharge and provide a copy to EPA, F&WS, and NMFS. One commenter stated that a statement of avoidance and minimization should be submitted with NWPs 12, 14, 40, 41, and 42.

The Corps believes it is not necessary for permittees to routinely notify the Corps for above grade fills in waters of the US as long as they are complying with general condition 26. Comments on this issue are further discussed under general condition 26.

One commenter recommended that the review period for NWPs 3, 12, and 33 be amended to 30 days instead of 45 to expedite energy-related projects. One commenter supported the 45-day time frame for review of notification but believed 60 days is more realistic. A couple of commenters requested this condition be amended to require the Corps to issue or deny the NWP within 45 days of receipt of a complete notification and the 45-day timeframe should also apply to the 300-foot stream waiver provision.

The Corps normally does not take the full 45 day time period to verify NWPs. For energy related activities Corps districts will expedite the decision as to whether to verify the activity under an NWP. It is not necessary to make that a permit condition. Corps districts are required to make a decision to verify or deny the NWP within 45 days, or the applicant may proceed. However, this does not apply to waiving the 300 linear foot prohibition for intermittent streams or the verification of NWP 21 or the 500 linear foot limit for NWP 13. In these cases, the applicant may not proceed before receiving written verification. This is to ensure that the district has adequate time to make a satisfactory evaluation before deciding whether to authorize use of an NWP.

One commenter stated that the Corps has amended the language in condition 13(a) without providing notification in the preamble. The March 9, 2000 **Federal Register** stated ''where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a pre-construction notification (PCN) as early as possible''. The August 9, 2001 notice stated ''The District Engineer must determine if the notification is complete within 30 days of the date of receipt and can request additional information necessary for the evaluation of the PCN only once''. The commenter indicated this change will increase the incentive of permit applicants to withhold relevant information necessary for full evaluation of a PCN and the change must be withdrawn.

The Corps did not intend to propose this change. It was an error. The general condition will be issued with the existing language adopted on March 9, 2000.

One commenter disagreed with the agency coordination threshold of ½ acre and stated that all PCNs should require a 30-day agency coordination to ensure minimal impacts. One commenter stated that simply noting in the record that an agency concern has been considered, without a response to the agency, is not agency coordination and is not full consideration of their comments. Furthermore, the commenter stated that any recommendations that are not adopted, after coordinating a decision with the agency, should be fully documented and become part of the administrative record.

We disagree. The requirement for agency coordination is to fully consider agency comment with no specification to document or respond to the commenting agency, though normally the Corps does respond to commenting agencies when significant concerns are raised. Further, it has been determined in coordination with the other Federal agencies that ½ acre is a satisfactory threshold for required coordination. Coordination does occur with other Federal agencies on a case specific as needed basis.

One commenter recommended that the Corps consider removing the mandatory delineation of special aquatic sites, including wetlands, or at the least adding a reasonable threshold for such documentation to all PCNs. One commenter recommended the addition of NWPs 3, 11, 13, 19, 27, 31, and 36 to the requirement for submittal of delineation of special aquatic sites with the PCN.

We do not believe that we should either increase or decrease the specific activities for which a mandatory delineation is required. We do not believe it is necessary for many NWPs, for example; requiring a delineation for NWPs 3 and 31 would be unnecessary for maintenance activities authorized by these NWPs. Also districts may require a delineation of wetlands (or any other appropriate documentation) in cases where they determine it is necessary to evaluate the impacts of the project or to determine the mitigation requirements.

One commenter disagreed with the requirement to submit information regarding the original design capacities and configurations where maintenance excavation is proposed under NWP 7, (b)(5) because if the maintenance excavation is non-jurisdictional, the applicant should not be required to submit such information, and the Corps should not review non-regulated activities. One commenter recommended that the Corps clarify (b)(16) to state that activities that consist of non-jurisdictional excavation or temporary stockpiling during the excavation process are not included in the compensatory mitigation requirements or in the calculation of acreage of waters lost.

Maintenance excavation activities in section 404-only waters do not require a CWA section 404 permit unless they result in more than incidental fallback. If there are regulated excavation activities that can be authorized under NWP 7, then the applicant will need to provide information necessary for the Corps to evaluate the PCN for compliance with the terms and conditions of the NWP. Non jurisdictional activities should not be considered in mitigation requirements. However, related impacts of the project will be considered when determining if the adverse effects are more than minimal. Also the acreage impacts for directly related excavation activities will be included in calculating the acreage limits for the NWP. The concern addressed by the acreage limit is with the direct effects of the activity. Temporary stockpiling is a regulated activity and is considered for possible mitigation requirements where the

impacts are measurable. However, the acreage is not included in calculating the acreage limit because the impacts are temporary.

One commenter recommended that the Corps revise the notification requirement in (b)(10) for NWP 31 to require the applicant to obtain the Corps approval prior to construction for any disposal site within waters of the United States. The commenter stated that the proposed condition requires location of disposal site at time of notification, which is not always an option for long-term maintenance activities.

NWP 31 does not authorize the disposal of the excavated material into waters of the US unless the disposal site is submitted with the PCN. The District Engineer can review a disposal site to assure that it is not in waters of the US or, if it is in a water of the US, to determine if the adverse effects are more than minimal and, if so, disapprove the disposal site.

One commenter recommended that the Corps accept the use of established state agency coordination documents concerning annual work plans as sufficient notification for maintenance activities.

Once a maintenance baseline has been approved, the applicant must then notify the Corps of maintenance activities, either case-specific or generically. The state agency documents you describe may be sufficient, but such a decision would need to be made on a case-by-case basis by the appropriate Corps District Engineer.

One commenter recommended that NWPs 3, and 31 also be added to (b)(5) and a delineation of affected special aquatic sites including wetlands, along with the location of dredge material disposal site, should be provided.

NWP 3 allows for the maintenance of currently serviceable structures and fills, consequently wetlands and other special aquatic site should not be affected by the maintenance activity. However, while this is also true for most NWP 31 activities, NWP 31 also allows the maintenance of unconfined channels that have wetlands in them from time to time. Therefore, (b)(10) does require delineation of special aquatic sites, including wetlands to be included in PCNs for NWP 31. The location of disposal sites for NWP 31 PCNs is required by (b)(10). NWP 3 does not provide for authorization of disposal sites in waters of the US, except for part (ii), which requires that the District Engineer specifically approve any such disposal site under a separate authorization.

One commenter disagreed with the restoration plan requirement in (b)(11) for NWP 33 because excavation is not regulated. The commenter added that the regulated discharge is temporary and the only required restoration should be the removal of the temporary deposit.

The restoration plan must address temporary activities including both filled and excavated areas. If a Corps permit is required for some of the temporary work and the permittee seeks authorization by NWP 33, then the affected waters of the U.S. must be restored by the permittee and a restoration plan submitted to the Corps.

One commenter recommended that the requirement for the submittal of a maintenance plan under (b)(15) be deleted. Excavation in Sec. 404 waters does not required authorization from the Corps. The maintenance plan is to ensure that cyclical maintenance does not cause more than a minimal effect and that cyclical activities only be mitigated for once.

The Corps believes that it is necessary to maintain stormwater management facilities. The Corps also believes that to ensure that the adverse effects are minimal it is necessary that an adequate mitigation plan be developed by the permittee. This requirement provides the necessary assurances that such a necessary maintenance plan is developed.

In the preamble to the August 9, 2001, **Federal Register** notice, the Corps proposed for NWPs 21, 39, 40, 42, and 43, to add language to the notification General Condition 13 from the permit. For all projects using NWP 21 and for projects using NWPs 39, 40, 42, and 43 that propose impacting intermittent stream beds in excess of 300 linear feet, the Corps must be notified and explicit authorization in writing obtained from the Corps before the project can proceed. There were no comments on this proposal. The Corps has added language to General Condition 13 as proposed. This added language does not change any requirement of the NWPs.

The General Condition is adopted as proposed.

14. *Compliance Certification.* There were no changes proposed to this General Condition. There were no comments on this General Condition. The General Condition is adopted without change

15. *Use of Multiple Nationwide Permits.* There were no changes proposed to this General Condition. One commenter stated that the use of more than one NWP for a single and complete project is prohibited. One commenter stated that the Corps should include a General NWP condition that precludes the use of multiple NWPs and NWPs in combination with individual permits for multiple Section 10 or 404 activities located in close proximity to one another. The commenter asserted the Corps is in noncompliance with Section 404(e) and NEPA when stacking of NWPs is allowed. One commenter suggested that the District Engineer be authorized to waive the highest specified acreage limit when stacking NWPs, not to exceed the overall minimal impact threshold in order to avoid an individual permit.

We will continue to allow use of multiple NWPs to authorize a single and complete project provided it will result in no more than minimal adverse effects on the aquatic environment, individually and cumulatively. We do not agree that allowing use of multiple NWPs is in violation of Section 404(e) or NEPA. We continue to believe that in order to allow the use of multiple NWPs for a single and complete project, it is necessary to not exceed the highest acreage limit of any of the NWPs.

The General Condition is adopted without change.

16. *Water Supply Intakes.* There were no changes proposed to this General Condition. There were no comments on this General Condition. The General Condition is adopted without change

17. *Shellfish Beds.* There were no changes proposed to this General Condition. There were no comments on this General Condition. The General Condition is adopted without change.

18. *Suitable Material.* There were no changes proposed to this General Condition. There were no comments on this General Condition. The General Condition is adopted without change.

19. *Mitigation.* The following discussion does not alter or supersede requirements under the section 404(b)(1) Guidelines or guidance applicable to individual permits, such as the 1990 EPA/Department of the Army MOA concerning the determination of mitigation under the Guidelines. The Corps proposed to revise this General Condition to allow a case-by-case waiver of the requirement for one-for-one mitigation of adverse impacts to wetlands. This change is intended to allow Corps Districts to require the mitigation for project impacts that best protects the aquatic environment. In the case of wetland destruction, one-for-one replacement or restoration is often the most environmentally appropriate form of mitigation, and the Corps will continue to require this form of mitigation in the majority of cases. However, the Corps believes the one-for-one acreage requirement as currently written is too restrictive in that it does not allow the Corps to mitigate aquatic impacts to

streams and other non-wetland aquatic resources.

Proposed Waiver of One-for-One Mitigation Requirement

Numerous commenters opposed the case-by-case waiver of the requirement for one-for-one mitigation of adverse impacts to wetlands. Instead they requested that the Corps maintain one-for-one and/or strengthen existing mitigation requirements. Several commenters stated that wetland loss continues to occur despite the regulatory programs efforts and ''no net loss'' policy, and that the proposed waiver would allow extreme flexibility in implementing mitigation policy which would be counter to current Federal mitigation guidance and ''no net loss''. Rather the proposal would further invite net losses of wetlands. As such, many commenters recommended that the Corps require compensation for impacts to wetlands at higher than a one-for-one ratio, or at a minimum, clearly outline the Corps discretion to require greater than one-for-one ratios.

The Corps is committed to the no overall net loss of wetlands goal, and will continue to require more than one for one mitigation for wetland loss in its nationwide permit program. The underlying policy of the Corps, since 1990, has been to offset impacts to wetlands at a one for one ratio on a functional basis. Based on the possibility of failure of mitigation, as pointed out in the recent NRC/NAS Report on the Corps Regulatory Program, the Corps has for many years required more than one for one mitigation on an acreage basis. The proposed change to condition 19 is intended to result in a more ecologically and watershed based approach to mitigation. Wetlands remain one of the most critical ecological assets in most watersheds in the Country, but other vital aquatic ecosystems, such as free-flowing streams, are subject to impacts that must also be offset. The changes to Condition 19 will allow the Corps biologists to make the right decision on mitigation for each project within the watershed context. However, to reinforce its commitment to the no net loss policy, the Corps will also direct its District Offices to ensure that their verified NWPs achieve at least one-for-one mitigation of all wetlands impacts, on an acreage basis for the District as a whole. In documenting compliance with this requirement, districts should not include preservation of existing wetlands in their district-level tally of compensating wetlands mitigation. Preservation, while it may be important for the aquatic environment and may be appropriate in some cases as mitigation, does not compensate for lost wetlands.

The Corps has also slightly modified the wording of paragraph (f) of this general condition from what was proposed to clarify that the requirement to mitigate wetland impacts is not waived only the requirement to provide wetland mitigation. The stream buffers themselves may provide mitigation for wetland impacts. The wording is also revised to clarify that the District Engineer may reduce as well as completely waive the requirement for wetland mitigation for wetland impacts.

One commenter stated that the waiver would conflict with the Corps policy that nationwide permits have only minimal adverse effects on the aquatic environment. Another commenter stated that wetlands offer too many important services to be sacrificed by implementing this waiver. One commenter suggested that guidelines should first be developed that identify the circumstances which warrant the use of a waiver mechanism and outline its proper implementation.

The waiver will not sacrifice wetlands; it will ensure the best mitigation for each permit decision that is made. The Corps cannot establish specific guidelines beyond what we have for waiver of the one for one acreage requirement. The Corps has exceptional biological and ecological expertise in the districts and we trust those professionals to make the proper judgments in each case.

One commenter suggested that the Corps coordinate with regulatory natural resource agencies for out-of-kind mitigation when the one-for-one mitigation requirement is waived.

The Corps 1,150 district employees in the Regulatory Program are predominantly biologists and ecologists. These exceptional professionals have the capability to make the ecological mitigation judgments, and with 40,000 nationwide permit decisions made every year the other agencies do not have the capability to substantively comment on every project.

Many commenters agreed with the proposed waiver of the one-for-one-mitigation requirement, stating it would provide the Corps with increased flexibility when determining appropriate mitigation. One commenter, while agreeing with the proposal, suggested the applicant should be required to justify why a less than one-for-one mitigation is appropriate by clearly articulating why a mitigation area's functions and values are greater than what was lost.

We agree that proper mitigation decisions will be made under the revisions to Condition 19. The Corps will make a decision in writing when the one for one acreage ratio for mitigation will not be met. In most cases, that decision will be based on the applicant's information, however, we do not believe we should require a process that may not in some cases be needed. Applicants should note however that providing sound justification with a waiver request will increase the chances of the waiver being granted.

Vegetated Buffers

Many commenters were opposed to the use of vegetated buffers to mitigate wetland losses. Several stated that allowing vegetated buffers to count as mitigation would be counter to current Federal mitigation guidance and the goal of ''no net loss''. One commenter suggested the proposal constitutes a major change in mitigation policy by establishing a sort of ''ecological trading'', allowing the offsetting of impacts to wetlands with compensation through non-wetland environmental improvements. Other commenters stated that this proposal was against Corps policy that nationwide permits have minimal adverse effects on the aquatic environment.

The Corps believes that vegetated buffers are a critical element of the overall aquatic ecosystem in virtually all watersheds. Of course, some arid areas do not have vegetated buffers even in a natural state and the Corps will not require vegetated buffers where they would not naturally occur. However, nationwide this is uncommon. The Corps believes we need to protect open waters better than we have in the past, and vegetated buffers are a critical element of that protection. Many vegetated buffers to open waters are in fact wetlands. Some vegetated buffers are uplands, but are critical to open water protection. The Corps believes in a watershed approach, with the ability of the Corps districts to make the best decision for the aquatic ecosystem and watershed where the permitted impacts will occur. Mitigation, including vegetated buffers is used to ensure that no more than minimal adverse effects on the aquatic environment will occur.

Several commenters indicated that it was inappropriate to suggest that vegetated buffers in uplands could act as compensatory mitigation for the placement of fill in waters of the U.S. A few commenters stated that, as a means of increasing value of mitigation, vegetated buffers are beneficial and are often incorporated into compensatory mitigation plans to offset the adverse effect of an individual permit authorization. However vegetated

buffers alone will not fully compensate for wetland loss, do not replace wetland/aquatic environment value and function, and should not be regarded as compensatory mitigation for the placement of fill in waters of the U.S., but instead should be added to the one-for-one mitigation requirement.

The Corps takes a holistic watershed approach to mitigation of impacts to waters of the U.S., which includes impacts to non-wetlands. Vegetated buffers, both upland and wetland are a critical part of that watershed approach. The Corps needs the flexibility to make the best mitigation decision for each watershed.

A few commenters were concerned that vegetated buffers may be used more often than one-for-one wetland mitigation (e.g. restoration, enhancement, and/or creation), supporting a continual loss of wetland habitats. Concerned for cases in which less than one-for-one mitigation of lost wetlands incorporates the establishment and/or preservation of vegetative buffers as part of that mitigation, commenters suggested a careful analysis of the functions and values of the vegetated buffers as compared to the impacted wetlands be performed.

The Corps will use the modified Condition 19 to make the best decision for the watershed where the permitted effects occur. The Corps will continue to require more than one for one mitigation for wetlands, it is just not required for every permit decision, because that does not always make sense for the aquatic environment.

One commenter suggests that functional assessments of mitigation with the purpose of justifying ratios less than one-for-one based on a projected functional boost provided by the buffer is inappropriate. Rather, the Corps should also address functional impacts to wetlands under the permit process and require mitigation for loss of functional value from permitted impacts to vegetated buffers.

The Corps does use a functional basis when requiring mitigation, but since models to assess aquatic ecosystem functions, including but not limited to wetlands, are not yet comprehensive, the decision requires professional judgment. The Corps 1,150 Regulatory Program employees are predominantly biologists and ecologists, so we have the capability to make sound ecological decisions.

One commenter stated the proposed regulations do not require proof that vegetated buffers or other methods of mitigation would replace lost functions and values of an impacted wetland. This commenter added that they were not convinced the Corps would be able to assess lost functions resulting from impacts to particular wetlands or those functions gained by incorporating vegetated buffers.

The Corps makes its mitigation decisions on an aquatic ecological function basis using professional judgment. With thousands of decisions each year many involving less than 0.1 acre of impact, it is not practical, nor a responsible expenditure of resources to require absolute proof that the mitigation will offset the impacts. Programmatically, the Corps will improve its enforcement, and mitigation banks and in lieu fees are an important part of that improved mitigation performance.

One commenter disagreed with the Corps statement regarding the greater effectiveness of vegetated buffers at protecting open waters due to their relative proximity to open waters over those wetland distant to open waters. Instead, the commenter suggests that the relative effectiveness of vegetated buffers and wetlands at protecting open waters depends more on the nature of water flow through an area than on the proximity of the buffer or wetland to the water body.

There is no doubt that vegetated buffers protect open waters in terms of removing non point source water pollution. Vegetated buffers also stabilize the shoreline of open waters and in most cases provide important aquatic habitat such as shading or providing hiding places during high water. The Corps believes that establishing or maintaining existing vegetated buffers to open waters is critical to overall protection of the nations aquatic ecosystems. The Corps agrees, however, that the relative importance of wetlands and vegetated buffers at any particular site is dependent on site-specific factors. This is why Corps field staff must have flexibility to determine appropriate mitigation on a site-specific basis.

One commenter stated that vegetative buffers must not be used in lieu of wetlands mitigation, but there must be a preference for restoring, enhancing, or creating buffers as a component of appropriate mitigation. The commenter further stated that the Corps must require a minimum 100-foot-wide riparian or wetland buffer (instead of the proposed 25 to 50 feet), to be increased as necessary in proportion to the size and shape of waters they surround to obtain the desired performance.

The Corps will take a watershed approach with mitigation, which will include vegetated buffers as a critical element of mitigation. The Corps must be reasonable in the width of the vegetated buffer required. While a wider buffer clearly provides more protection, even a narrow vegetated buffer provides important protection for the aquatic environment. In determining appropriate buffer widths, the Corps must balance environmental protection with what is reasonable given the scope of the project and the level of impacts that need to be mitigated.

One commenter stated that the Corps proposal is counter to Federal policy and Corps guidance that favors mitigation banks in the context of general permitting.

The Corps believes the proposed changes to Condition 19 are consistent with Corps policy. Mitigation banks are one important form of mitigation, but there are many others. The proposed changes will enhance, not limit, the opportunity to use mitigation banks by providing greater flexibility to Corps field staff to determine the most environmentally beneficial mitigation.

One commenter expressed concern that vegetated buffer areas, especially non-jurisdictional habitats, used as mitigation, would not be afforded the same protection by existing laws as mitigation sites in which jurisdictional areas are created, enhanced, restored, or preserved.

Vegetated buffers established or preserved in uplands are subject to the same protection as aquatic areas are through permit conditions. The Corps will generally require that all mitigation, including upland areas that are parts of vegetated buffers, are placed in conservation easements or protected in some other manner.

One commenter recommended that the Corps only consider other forms of mitigation as part of an overall compensatory mitigation requirement once no net loss of function and acreage is obtained, and that a conservation easement or deed restriction be required for all such mitigation.

The Corps will take a holistic watershed approach to mitigation without arbitrarily favoring any type of mitigation. The Corps biological and ecological capability in the districts will be used to make the best mitigation decisions.

A few commenters disputed the appropriateness of the ''normal'' requirement of upland buffers as compensatory mitigation to open waters since it exceeds the Corps statutory authority to regulate these areas. A few commenters expressed concern that requiring vegetated buffers as mitigation may be invalid where the condition

bears no relationship to the impacts of the discharge on a particular site.

Vegetated buffers required by the Corps as mitigation on open waters is within the Corps authority because they are providing water quality benefits to the open water areas and often the vegetated buffer provides aquatic habitat such as shading to maintain cool water stream. All mitigation, whether vegetated buffers or wetland mitigation, must be related to the impacts authorized. The Corps views that relationship in the context of the overall aquatic environment on a watershed basis.

One commenter suggested that the Corps' advocacy of the use of vegetated buffers for mitigation of impacts to waters of the U.S. is an abandonment of a long-standing policy of ''no net loss'' and requirement of in-kind wetlands mitigation, and called for an adequate basis for this change in policy.

The proposed modification to Condition 19 does not change the Corps commitment to no overall net loss of wetlands. The Corps has required no overall net loss of wetlands since the early 1990s and will continue to do so under the revised condition. The changes to Condition 19 simply allow the Corps to make the best mitigation decision on a case-by-case basis from a watershed perspective. Requiring one-for-one mitigation in every single permit does not support a watershed approach to mitigation because it focuses excessively on one type of mitigation. Although the Corps believes that flexibility is needed on a project specific basis to determine the appropriate mitigation, we will continue to ensure that the NWP Program results in no overall net loss of wetlands. On an individual permit basis, the Corps often requires greater than one-for-one mitigation on an acreage basis, due to the value of the replacement acreage, temporal effects and risk factors. As noted above, to further ensure that no net loss is achieved, we are establishing a requirement that all Corps districts must meet an annual goal of at least one-for-one wetlands mitigation on an acreage basis for verified nationwide permit activities within each district for each fiscal year. The Corps will collect information documenting compliance with this requirement and make it available on the internet.

Numerous commenters agreed with eliminating the mandatory one-for-one mitigation requirement to qualify for an NWP, stating that it would provide Corps with increased flexibility in determining mitigation requirements that may be more appropriate and environmentally beneficial. A couple of commenters also favored the proposed waiver because they believe the very low PCN thresholds for the NWPs creates situations where many small projects become subject to review for which one-to-one mitigation would be overly burdensome and impracticable.

The Corps agrees with these comments.

One commenter supported the proposed use of buffers as mitigation, but cautioned the Corps to avoid suggesting any minimum width prescriptions or specific replacement ratios. Another commenter cautioned that, in situations where less than one-for-one mitigation of permanent impacts to wetlands is allowed, and the establishment and/or preservation of vegetative buffers as mitigation is proposed, then a careful analysis must be conducted and include a determination of the function and value of the proposed vegetated buffers as compared to the impacted wetlands. The commenter indicated that determining the width of vegetated buffers is extremely subjective, and that mitigation containing these features should be scrutinized to ensure the vegetated buffers have sufficient width and length to provide habitat in and of themselves, not just for the waters of the U.S. they border. Another commenter stated that alternative mitigation measures, such as vegetated buffers, should be valued and compared to permitted losses only to the degree that they enhance or create wetland functions beyond what would exist without them (*e.g.* a 10-acre buffer placed around a 5-acre wetland would not necessarily offset 10, or even 5 acres, of wetland impacts; rather, if the 5-acre wetland were improved 20 percent in habitat value the buffer would receive credit for mitigating only 1 acre of wetlands impact.)

The Corps must make its mitigation decisions based on the information available and based on the significant knowledge and understanding of the aquatic environment that the district staff of biologists and ecologists possess. The Corps can not always quantify precise offset determinations, and it would not make sense to do so in the nationwide permit program because project specific impacts are generally limited to less than one half acre, and are often one tenth of an acre or less.

A few commenters agreed with using vegetated buffers as mitigation, but opposed using upland buffers as additional compensatory mitigation, suggesting that they are neither a wetland nor aquatic resource, and therefore it is not justifiable to include a requirement of upland vegetated buffers as additional compensatory mitigation. The commenters suggested that if the Corps normally includes a requirement for establishment, maintenance, and legal protection of vegetated buffers, then the total mitigation requirement shall not exceed that necessary for wetland impacts. (*i.e.* if total proposed wetland impacts are ½ acre and one-for-one mitigation is required, then the total amount of mitigation that should be required, inclusive of any upland buffers, should not exceed ½ acre). One commenter suggested that the Corps establish a maximum percentage of overall compensation that ''alternative forms'' of compensation (such as vegetated buffers) may comprise.

As stated above, the Corps is committed to a holistic watershed approach to mitigation and that cannot be accomplished with rigid quantitative requirements. The Corps regulates the entire aquatic environment, not just wetlands. Mitigation must consider the entire aquatic ecosystem as well. The Corps has and will continue to programmatically require greater than one-for-one acreage of wetland mitigation to account for differences in function and values, temporal losses and potential failure of mitigation. The Corps will continue to require greater than one-for-one acreage mitigation for wetlands programmatically, but some projects should not and will not require such mitigation, because it is not what is best for the aquatic environment.

One commenter stated that upland (riparian) buffers could be used as mitigation for stream or other non-wetland impacts, but should not be allowed to compensate for wetlands. Another commenter stated that the use of upland buffers as compensatory mitigation is acceptable, provided that it is at the option of the permittee and that the amount of land required for mitigation is proportionate to the impacts.

The Corps will require mitigation for permitted impacts based on a watershed approach and what is best for the aquatic ecosystem in that watershed. This approach will often involve a mix of vegetated buffers and other wetland mitigation. In some cases it will involve only one type of mitigation. In all cases, mitigation will be based on what is best for the overall aquatic environment in the particular watershed involved. The Corps always tries to ensure that mitigation requirements are proportionate to impacts, though the areas affected may be greater or less depending on site-specific circumstances.

One commenter cautioned that incorporating vegetated buffers as mitigation measures may prove problematic, especially if a particular organism relies on vegetated buffer habitat that is injurious to another organism using the same aquatic system.

The Corps recognizes this concern. It is one example of why the Corps must use its professional judgment based on a holistic watershed approach to determine appropriate mitigation.

One commenter warned that, vegetated buffers present a promising tool with real benefits to water quality and public resource, but are not always compatible with existing functioning federally authorized flood protection systems. In some instances, they may reduce channel capacities and conflict with maintenance activities; in others, they may improve flow.

The Corps will consider the aquatic environment and the practicability of requiring vegetative buffers. The Corps will not require vegetative buffers where it would have adverse effects on projects such as flood control projects.

Several commenters stated that guidelines and clarification on the appropriate use of non-wetland vegetated buffers as mitigation for impacts to wetlands should be developed—perhaps by the Corps and other appropriate natural resource agencies, or through some form or rulemaking—prior to extending them credit as compensatory mitigation. A few commenters stated that the Corps should develop guidelines to support the need to establish buffers and standards and criteria for determining appropriate buffer types and widths based on intended benefit, adjacent land use, density of vegetative cover, etc., and that this documentation should be put forth for public comment. One commenter stated that the current guidance regarding upland vegetated buffers is lax, suggesting little other than prohibition of using mowed lawns and encouraging use of native vegetation. As such, golf course roughs, where the height of vegetation is actively managed, and areas subject to human disturbance could be proposed as compensatory mitigation for the loss of wetlands. Similarly, landscaped areas of development projects could be proposed as compensatory mitigation as well.

The Corps can not establish detailed guidelines for vegetated buffers on a nationwide basis. No such guidance exists for wetland mitigation either. Such detailed guidance for wetland mitigation would not be sensible just as detailed guidance for vegetated buffers would not make sense. The Corps has adequate protections in the condition to ensure that vegetated buffer mitigation will be properly used by the districts. As stated many times above, the Corps is taking a holistic watershed approach to mitigation which relies on the exceptional expertise of our 1,150 district employees, who are predominantly biologists and ecologists.

Corps Preference for Restoration Over Preservation

Many commenters stated that the preference for restoration of wetland impacts over preservation must be maintained. Several commenters indicated that restoration should be the preferred option, since, for certain, a net loss of wetlands will always occur when preservation is chosen as mitigation. One commenter stated that preservation does not necessarily ensure replacement of functions and values of lost wetlands. A couple of commenters stated that many of the existing wetlands that are appropriate for preservation are already protected by law. Therefore, preservation should only be used in extreme situations, such as when the wetlands are under threat or not afforded protection (isolated wetlands), or when the wetlands to be preserved are large or are of high significance. One commenter suggested that if and when preservation of high quality wetlands is preferred, it should force the project to be reviewed under an individual permit instead of a nationwide permit, allowing the state, the public and other resource agencies to review the proposed project.

The Corps is increasingly taking a holistic watershed approach to mitigation of impacts in our Regulatory Program, including the nationwide permit program. The Corps district experts must have the flexibility in policy to make decisions that support a holistic watershed approach. Preservation is often a very important component of a watershed approach. Some of the most important and high functioning wetlands are potentially subject to many activities that are not regulated by the Corps or any other governmental body. Therefore, absent the protection by preservation of these high value areas through mitigation they will be degraded over time. Restoration is the main method of mitigating impacts to the aquatic environment permitted by the Corps and it will continue to be the primary mitigation approach. The Corps has slightly modified the wording in paragraph (c) of this general condition from what was proposed to clarify that this preference for restoration applies regardless of what wetlands mitigation ratio is required at a specific site.

However, preservation is also a very important tool in the Corps ability to mitigate impacts on a holistic watershed basis. Protection of the aquatic environment through preservation of high value aquatic areas is critical to protecting the nation's aquatic ecosystems. The view that preservation is not appropriate because the areas are not ''new'' is shortsighted and has proven to be mistaken because of the significant impacts to wetlands that are not protected through preservation, particularly when the preservation includes adjacent uplands and open waters as a preserved matrix of environmental assets that work together to produce high value habitat. However, the Corps recognizes that preservation does not provide new acres and thus cannot compensate for wetlands loss on an acreage basis. As noted above, the Corps will instruct district offices not to include preservation in their documentation of compliance with the minimum one-for-one district level mitigation requirement.

A few commenters stated that preservation of wetlands is preferable to restoration. The evolving emphasis on watershed assessment and protection underscores the need and importance of preserving aquatic ecosystems. One commenter pointed out that if sites are established, and functioning well, it would appear that preserving them should be critical in attempts to maintain the present and future value of wetlands. If vegetated buffers, or the enhancement of uplands, adjoining wetlands are important enough to be considered as mitigation credit, then preservation of existing wetlands adjacent to a mitigation site should be at least similarly credited.

We agree with these commenters to the extent that they identify the importance of a holistic approach to mitigation. However, as noted above, restoration will continue to be the primary mitigation approach, and preservation will not be counted in the district-level one-for-one mitigation requirement.

One commenter opposed the use of preservation of onsite avoided wetlands or wetland buffers as compensatory mitigation since it credits the avoidance of impacts, which is the first step in mitigation sequencing, a second time in the form of compensation for unavoidable impacts. The commenter did state that off-site preservation was acceptable, however, since it did not conflict with the on-site mitigation sequencing process.

Whether the Corps requires preservation and gives project-level mitigation credit for onsite or offsite

preservation depends on the size, functional value and relationship of the area to other aquatic areas. For example, preservation of an extremely high value wetland on the border of a permitted development site where that high value wetland is part of a larger high value wetland system is a very positive mitigation approach in terms of holistic watershed protection of the aquatic environment, particularly if it increases the chances that the entire system will be preserved. On the other hand, preservation of a small moderate value wetland that will be surrounded by paved parking areas and may lose its hydrology because of overall site development may not make environmental sense, on-site or off-site.

Several commenters stated that there should be no established Federal preference of either restoration or preservation, and both are equally appropriate. One commenter suggested that a preference for restoration over preservation could result in an opportunity to preserve a highly functioning wetland being overlooked. Other commenters urged greater acceptance of preservation when the area to be preserved is of high value, subject to significant impacts, and included in a wider planning framework, and restoration/creation are not feasible and wetlands are in abundance, locally, compared to other important resources. Several of the commenters stated that the decision to use either preservation or restoration (or a combination of the two) should be flexible and left up to the individual Corps Districts to decide on a case-by-case, local or watershed basis, depending on which type would be most appropriate.

We agree with these commenters.

One commenter stated that there should be guidance showing the need for preservation before it is used over any other type of mitigation for wetland losses.

This does not support the holistic watershed approach the Corps is working to establish, and would not be a good use of Corps resources. We want Corps districts to focus their limited resources on what makes sense for the aquatic environment in a particular watershed.

One commenter stated that the use of either preservation or restoration is contrary to the ''no net loss'' policy and the goal of the CWA to restore and maintain the physical, chemical and biological integrity of the Nations waters. The General Condition should require that project impacts be fully offset unless the applicant demonstrates that full offset is impracticable. At a minimum, mitigation must offset all impacts that are more than minimal, both individually and cumulatively.

The Corps has and will continue to require mitigation that is necessary to reduce project impacts to the minimal adverse effect level. The Corps will continue to meet the no overall net loss goal for wetlands because most wetland mitigation is at a greater than one for one acreage basis to ensure that the functional impacts authorized are offset by the mitigation. In addition, districts will be required to document at least one-for-one mitigation at the district level.

One commenter stated that the preference for restoration over preservation affects the entire Section 404 program and the preamble of the NWPs is not the appropriate forum to discuss and change that policy.

The Corps does not agree that it is inappropriate to discuss this policy, as it relates to the implementation of the NWP program. The Corps is not proposing to change this policy. The preference for restoration over preservation is preserved in the language of paragraph (c) of GC 19.

Mitigation Bonding

Several commenters stated that unless a comparable bonding program exists within the Districts, bonding of mitigation measures under NWPs should be established that obligate a permittee to complete the mitigation, bond the mitigation activity and success period, and allow the Corps to execute the bond in the event of forfeiture.

The Corps is currently reviewing guidance which addresses bonding and otherwise protecting mitigation sites and ensuring they will be successful. The principles in that guidance will apply to the nationwide permit program. Bonding is just one tool available to the Corps in its efforts to ensure that required mitigation is established and is successful.

Other Comments on General Condition 19

Several commenters suggested the Corps should require natural resource agency review of all mitigation plans, especially mitigation proposing the use of vegetated buffers. One commenter requested rewording of General Condition19c to read* * *'' unless the District Engineer determines [in consultation with the appropriate natural resource agencies through a PCN coordination process such as that described in General Condition 13,] that some other form of mitigation* * *''

The Corps does not agree. We believe that such a change would result in excessive review that would not result in benefits for the aquatic environment. The commenting agencies do not have the staff necessary to evaluate all such projects either. The Corps has the technical expertise and capability to make these determinations. Where appropriate, the Corps does and will continue to consult with other agencies.

Many commenters stated that numerous studies from around the country, including recent studies conducted by the National Academy of Science and General Accounting Office, showed that mitigation is not fully successful, and does not compensate for wetlands lost to permitted fills. Therefore, reducing mitigation requirements that already aren't working is unsupportable.

The Corps is not reducing the mitigation requirements necessary in the nationwide permit program. The requirement remains that mitigation adequate to ensure no more than minimal adverse effects on the aquatic environment will be required. The Corps agrees with the NRC/NAS report that we must improve the success of mitigation. One method the Corps has used, and will continue to use, to deal with the failure of some mitigation is higher ratios of mitigation for most impacts. Consolidating mitigation into larger sites through mitigation banks, in lieu fees, and other large mitigation areas as well as protecting a matrix of environmental assets in mitigation areas including wetlands, open waters and uplands will also serve to improve mitigation in the long term.

Several commenters indicated that the Corps must improve data collection from mitigated projects and reporting cumulative wetland losses to evaluate and ensure that impacts to waters of the US have been minimized and the goals of the program achieved.

We agree that we need to improve our data collection and tracking of mitigation and will soon bring a new data system on line to facilitate such tracking. By better documenting the mitigation requirements included in NWPs and tracking the fulfillment of these requirements, the Corps will better ensure that the impacts authorized are offset to the level that no more than minimal adverse effects will result.

One commenter stated that the proposal continues to elevate one form of mitigation—compensation—above all others by automatically requiring that type of mitigation in every instance. Thus, the program fails to consider whether avoidance and/or minimization has been sufficiently incorporated into a project to the maximum extent necessary to ensure that adverse effects

to the aquatic environment are minimal. Then, in a gesture toward easing the burden of compensatory mitigation, the Corps allows different types of compensation, such as vegetated buffers, to be used in lieu of providing one-for-one wetlands compensation. The Corps should treat ALL forms of mitigation uniformly, not just all forms of compensation, especially those such as the use of upland buffers which are not subject to regulation or jurisdiction. This omission removed any incentive to incorporate avoidance and minimization efforts. The Corps is urged to remove preferential treatment given to compensatory mitigation, over avoidance and minimization, by deleting all mandatory compensation requirements.

We disagree with these comments because deleting all compensatory mitigation requirements would substantially reduce protection of the aquatic environment by reducing mitigation, much of which is very successful. The Corps will instead take a watershed approach to mitigation, as discussed above.

One commenter stated the acreage of fill placed in waters of the U.S. to construct compensatory mitigation must be included in the calculation of acreage and impacts. These fills should not be discounted, because compensatory mitigation does not always succeed, and can result in the conversion of one type of water of the U.S. to another.

The Corps considers the overall impacts of a proposed project. Fill in waters of the US involved with mitigation projects is very small in volume in essentially all cases. If there were a case where potentially substantial impacts would be involved in the mitigation project the Corps will consider that impact. However, the acreage used to construct compensatory mitigation projects is not counted in the acreage limit of the NWPs.

A few commenters stated that in-kind mitigation must be mandatory for all unavoidable impacts to wetlands, non-wetland aquatic habitats, and terrestrial habitats.

We disagree. The Corps will take a watershed and holistic approach when requiring mitigation.

A few commenters stated that mitigation ratios recommended by EPA Region 4 must be adopted as the absolute minimum ratios for wetland mitigation.

The Corps disagrees with nationwide mandatory ratios on a permit-specific basis although, as noted above, ratios exceeding one-for-one are often required. The underlying requirement for mitigation in the nationwide permit program is that the mitigation reduces the permitted adverse effects on the aquatic environment to the minimal adverse effect level.

A few commenters stated that there should be a requirement for detailed mitigation plans as part of each PCN, which at a minimum identify specific mitigation sites, detailed mitigation development/management plans, assurances against mitigation failure; success criteria, detailed monitoring plans, details of protection afforded to guarantee functions replaced by the mitigation will be protected and maintained in accordance with objectives, and identification of the party responsible for the mitigation.

We believe we have required the proper level of documentation for PCNs submitted to the Corps. If the Corps determines on a case by case basis that additional information is necessary to ensure that any permitted impacts will be offset by mitigation the district can require such information.

Several commenters stated that mitigation buy downs to meet the 404(e)(1) minimal effects requirement should be prohibited in the context of NWPs. A couple of commenters questioned the capability of any type of mitigation to compensate for the complete loss of an aquatic environments. One commenter pointed out that there is significant scientific evidence, the validity of which is recognized by the Corps and other federal agencies,which shows that wetlands mitigation often fails, meets mixed success, or does not replace lost functions/values. Thus, mitigation cannot assure minimal effects. The commenter adds that if minimal effects are not achieved through the use of NWPs, then their use should be prohibited since they cannot satisfy the CWA's requirement of minimal cumulative adverse effects. One commenter suggested that any activities having adverse impacts sufficient to warrant compensatory mitigation be converted to an individual permit. However, another commenter stated that some compensatory mitigation plans which have been reviewed under individual permit public notice were inappropriate for the resources lost, and would not adequately replace lost functions and values, and therefore they see no reason to believe that compensatory mitigation proposed for NWPs—which lacks public review and agency comment—would be any better.

The Corps understands that some mitigation projects fail. We are working to improve the success of mitigation we require. The test for mitigation for adverse effects on the aquatic environment under the nationwide permit program is to ensure no more than minimal adverse effects after considering the required mitigation. For general permits, by regulation, impacts to the aquatic environment are to be avoided to the extent practicable on the project site. These regulations are not being changed. General Condition 19 deals with mitigation when it is required, after impacts to aquatic areas have been avoided to the extent practicable.

One commenter suggested that language regarding compensatory mitigation be narrowed to prevent its use in open water habitats in navigable public waterways. The commenter states that there is an unwarranted assumption that compensatory mitigation can be relied on to compensate for alteration or destruction of naturally occurring aquatic ecosystems, including open waters. The commenter adds that habitats should not be tradeable; each is unique and artificial habitats are not as good as the real thing. Eliminating open water by constructing wetlands or altering the habitat as mitigation can destroy species which are dependent upon open water.

These comments identify one of the many reasons that the Corps is changing its approach in Condition 19 to more effectively allow the Corps expert biologists and ecologists to make project specific decisions on impacts to be authorized and mitigation that will be required.

One commenter suggested that NWPs should require mandatory mitigation for all unavoidable impacts to non-wetland aquatic habitats and to terrestrial habitats since these areas have significant ecological value as do wetlands.

The Corps regulates the aquatic environment not uplands. We may require upland vegetated buffers as mitigation to the extent the vegetated upland buffers to open waters protect or enhance aquatic functions and habitat. The Corps agrees we need to more effectively mitigate impacts permitted to waters other than wetlands. That is precisely why the Corps is modifying Condition 19 to allow flexibility in mitigation decisions that are holistic and take a watershed approach.

One commenter stated that the Corps should emphasize the importance of accurate assessments and expressly indicate whether it has taken into account new data on mitigation methods.

The Corps continually works to improve its mitigation approaches at the Corps district level. The Corps districts are where the local technical expertise

resides and they continually adjust the program based on new information.

One commenter stated that the Corps should reassert its policy and preference of utilizing mitigation banking versus in-lieu-fee or other types of compensation for mitigation in the context of General permits.

The Corps needs to use all mitigation options in its tool box, including mitigation banks and in lieu fees. These methods are extensively used and will continue to be extensively used because they are effective and simple for the applicant.

One commenter stated that mitigation bankers acknowledge financial considerations and not always ecological considerations in locating mitigation banks. This does not ensure that functions and values lost within a local watershed will be replaced, a fact acknowledged by the Corps in the last version of the NWPs—mitigation banks are usually constructed and maintained by entrepreneurs, who locate mitigation banks in areas where they believe the established credits will sell quickly''.

The Corps requires mitigation that will offset the permitted adverse effects on the aquatic environment. The Corps identifies service areas for mitigation banks based on reasonably focusing mitigation in watersheds where impacts are permitted. We will continue to approve mitigation bank service areas in a manner that recognizes the need to offset impacts in the same watershed to the extent practicable. The fact that mitigation banks are designed to be financially successful does not mean that they will not also be ecologically successful. On the contrary, ecological success is a prerequisite for financial success.

One commenter stated that the Corps should prohibit the use of in-lieu-fee mitigation since it does not ensure no net loss of wetlands, and at best may provide some protection for existing wetlands. The time constraints of the review and approval process for NWP's limits adequate analysis of this type of mitigation. In the absence of meaningful resource agency and public review, in-lieu-fee mitigation is not consistent with the goals of the CWA of ''restoring/maintaining the chemical, biological * * *''

This commenter appears not to understand in lieu fee programs approved by the Corps. The majority of in lieu fee mitigation involves some type of restoration, creation or enhancement of aquatic areas. Some of the mitigation is preservation, but not all mitigation under in lieu fees involves only preservation. In lieu fee arrangements are getting better as time goes forward. The GAO report that raised concerns about the Corps use of in lieu fees was incomplete in that it limited its in lieu fee program analysis to in lieu fees programs that were in place as of 1997, when the approach was still very new. Substantial improvement has occurred since 1997 in the Corps use of in lieu fees.

One commenter objected to any changes and additions to mitigation requirements after the environmental documents have been completed and a Record of Decision issued, stating that it is a violation of Congress' mandate for streamlining as well as a violation of NEPA and should be prohibited in the permitting process.

The environmental documentation will be finalized as we issue the nationwide permits in final form. No changes to the new permits will occur after that, unless they are revised or reissued following opportunity for public comment.

One commenter indicated that offsite mitigation greatly reduces overall aquatic habitat quality and natural functioning. Mitigated wetlands have been demonstrated time after time to ''show a decrease in native plant species diversity'', and are ''not functionally equivalent to reference sites'' in terms of ''flood retention, water quality improvement and habitat provision.''

The Corps will take a holistic watershed approach to mitigating impacts permitted. Onsite mitigation is typically best for water quality measures including vegetated buffers and stormwater management. However, onsite mitigation for loss of habitat, such as wetlands is usually less preferable to offsite. Moreover, consolidated mitigation such as that in mitigation banks and in lieu fee operations is generally more successful than project specific mitigation. All of these principles are consistent with the findings of the recently issued NRC/NAS report. In fact, the changes to General Condition 19, are intended to facilitate the adoption of some of the report's recommendations, by moving toward a watershed approach.

One commenter objected to the use of in-lieu-fee agreements for compensatory mitigation, especially in areas where land prices are high and in-lieu fees low. Money must sit in an account for many years before any use can be made of it, while the nation suffers temporal loss of wetlands and the in-lieu-fee cannot provide adequate compensation.

The Corps is improving its in lieu fee arrangements to ensure that ecological mitigation will occur within 2 years of accepting funds from permittees.

A commenter stated that mitigation should be required for any length of piping or filling of streams covered by NWP. The US has lost thousands of miles of headwater and streams from the landscape. It is time to recognize the ecological services provided by these ecosystems [in addition to wetland].

The proposed changes to General Condition 19 are specifically designed to improve our ability to consider and properly mitigate impacts to streams. We agree that too often in the past stream impacts may have been overlooked. Decisions on the level of mitigation required by the Corps will be made on a case-by-case basis by the Corps districts.

The General Condition is adopted with the wording clarifications discussed above.

20. *Spawning Areas*. There were no changes proposed to this General Condition. However, one commenter recommended that the statement ''important spawning area'' should be rewritten to say ''spawning areas that support federally-listed or special status fish''. Another commenter agreed that this General Condition 20 is acceptable but stated that it would not sufficiently protect the areas intended. This commenter suggested that discharges into spawning areas should be prohibited year round and not just during spawning season. The commenter requested that the second paragraph, which states ''Activities that result in the physical destruction of an important spawning area are not authorized'' be changed to ''Activities that could result in the physical destruction of an important spawning area, up or downstream, are not authorized''.

We disagree with these comments. It is not appropriate to narrow this condition to cover only Federally-listed or special status fish. General Condition 20 prohibits the physical destruction of important spawning areas. However, it does allow temporary effects provided they occur outside of the spawning season. We believe this adequately protects such spawning areas and ensures that there will be no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

The General Condition is adopted without change.

21. *Management of Water Flows*. The Corps proposed to revise the wording of this General Condition to clarify that normally detailed studies and monitoring would not be required, but may be required in appropriate cases. Several commenters agreed with the proposed clarification. One commenter

supported the clarification but believed the Corps is exceeding its authority by regulating water flow and suggested the Corps delete the requirement to maintain preconstruction flow or clarify how compliance with this requirement will be judged. A few commenters opposed the proposed clarification because without flow information it will be hard to determine if the impacts are only minimal to the aquatic environment, including indirect impacts. One commenter recommended that each applicant be required to submit a written description of how the requirements of General Condition 21 will be met. One commenter suggested that General Condition 21 should state that the Corps defers to state and local authorities when local regulations are in place.

Authorized activities or improvements to aquatic systems typically will cause deviation from pre-construction flow conditions. NWPs authorize only those activities that will have no more than minimal adverse effect on the aquatic system including water flows. Typically, well-established design features are included as part of projects without a need for detailed engineering studies. State or local agencies often require these design features. Consequently, we believe that detailed studies and monitoring would not normally be required by this condition. Where appropriate, the Corps will review projects to ensure that design features that address flows are included, such as limited channelization, proper design for culverts, and retention ponds, but generally will not require detailed studies of post-project flow. However, in some cases, detailed studies may be required where there is a potential for substantial impacts. Compliance with state and local flow management requirements, where these exist, is usually sufficient to satisfy this General Condition.

The General Condition is adopted as proposed.

22. *Adverse Effects from Impoundments.* There were no changes proposed to this General Condition. One commenter stated that impacts associated with impoundments result in more than minimal impacts, should be evaluated as an individual permit, and General Condition 22 should be deleted.

We disagree. Some small impoundments do not result in more than minimal impacts. However, where they do result in more than minimal adverse effects to the aquatic environment, individually or cumulatively, an individual permit will be required.

The General Condition is adopted without change.

23. *Waterfowl Breeding Areas.* There were no changes proposed to this General Condition. Two commenters suggested this condition be amended to prohibit discharges into breeding areas for migratory waterfowl as well as other migratory birds.

The Corps believes this would place an unreasonable and overly restrictive limitation on this NWP and that the condition, as worded, provides sufficient protection of aquatic resources.

The General Condition is adopted without change.

24. *Removal of Temporary Fills.* There were no changes proposed to this General Condition. One commenter suggested this condition be amended to require any temporary fills be removed in their entirety and affected areas returned to their preexisting elevations immediately upon removal of the fill.

The condition as stated requires that the affected area be returned to preexisting elevation concurrent with the removal of the fill. We do not agree that this condition should require immediate restoration in all cases. Corps districts can add a time period for when the restoration to preexisting elevations should take place, when necessary.

The General Condition is adopted without change.

25. *Designated Critical Resource Waters.* There were no changes proposed to this General Condition. One commenter in favor of General Condition 25 suggested it be amended to include ''source waters used for drinking water or ground water recharge'' in the definition of ''critical resource waters''. The commenter added that there should be no provision for discretionary authority for discharges of dredged or fill material into designated critical resource waters or wetlands within the NWP program.

Concerns regarding impacts to sources for drinking water and ground water recharge are more appropriately addressed through regional conditioning of the NWPs or case-specific review of PCNs for specific and identified waters. Division engineers can regionally condition the NWPs to prohibit or limit their use in such high value waters. District engineers should continue to exercise discretionary authority and require individual permits for activities proposed in such valuable waters when they will result in more than minimal adverse effects on the aquatic environment.

One commenter recommended that the Corps exempt utility activities within designated critical resource waters affecting ½ acre or less from the prohibition in General Condition 25 because utility projects have only minimal impacts and should be allowed under NWP 12 without requirement of notification or consultation.

While utility line activities that comply with NWP 12 normally do have no more than minimal adverse effect on the aquatic environment, individually and cumulatively, we remain concerned that this will often not be the case in designated critical resource waters. Therefore, unless there is evidence to the contrary, we believe that the restriction on NWP 12 should remain.

One commenter recommended the title of General Condition 25 be changed to ''Critical Resource Waters''. The commenter also recommended that the condition be changed to read ''Discharges within or affecting Critical Resource Waters, including wetlands adjacent to those waters, are not authorized under the NWP program except as specified in National Wild and Scenic Rivers, provided that the activity complies with General Condition 7''.

The Corps does not agree with the suggested title change. In order to apply this condition to critical waters those waters need to be designated so the Corps and the public know where the condition is applicable. The Corps continues to believe that an activity can occur in designated critical habitat if it is compliance with the Endangered Species Act.

The General Condition is adopted without change.

26. *Fills Within the 100-year Floodplain.*

The Corps proposed to delete the ''notification'' requirement, to delete the requirement to document that the project meets Federal Emergency Management Agency (FEMA) approved requirements and to modify the condition to require that all projects authorized by the NWPs must comply with any applicable FEMA approved state or local floodplain management requirements. In addition, we proposed to remove the prohibitions in paragraphs 26(a) and 26(b) for NWPs 12, 14, and 29, and the prohibition in 26(b) for NWP 43. We also requested comment on allowing projects to proceed under this condition below the headwaters where the project provides additional flood storage.

Many commenters supported the Corps proposal to remove the notification requirement and the requirement to document that the project meets FEMA approved requirements for fills within the 100-year floodplain. One commenter stated that this revision would reduce

redundancy since they must comply with E.O. 11988 for all structures associated with roadway construction and routinely provide documentation to federal and state agencies for review. A few commenters stated that the Corps is beyond its statutory authority and the existing documentation requirements have done nothing to affect compliance with FEMA approved floodplain management requirements. One commenter recommended that the Corps delete the notification requirement for NWP 12.

The Corps continues to believe that the notification should be removed from this condition. We agree that this change would reduce some paper work redundancy at various levels of government while retaining the restrictions on floodplain development. We agree that the notification requirement for NWPs under this condition, including NWP 12, should be removed.

Many commenters objected to the change. One commenter stated that documenting compliance with FEMA approved requirements is very important and strong motivation for ensuring that projects meet local floodplain regulations.

The Corps has found that requiring applicants to document that they have met FEMA approved requirements has done little to change or enhance compliance with these requirements. We believe that a General Condition clearly requiring that ALL permittees comply with FEMA approved requirements will be just as effective.

One commenter stated that the Corps added additional wording without providing proper notice in the preamble of the notice and failed to provide the legally required explanation for their action. Specifically, the first sentence of the current General Condition 26 states that, ''For purposes of this General Condition, 100-year floodplains will be identified through Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps'', and the first sentence of proposed General Condition 26 states that, ''For purposes of this General Condition, 100-year floodplains will be identified through the *existing* Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps.

The word ''existing'' was addressed and discussed in the preamble of the March 9, 2000, NWPs. The word ''existing'' was placed in the proposed NWPs to clarify questions raised by Corps personnel and the public.

One commenter stated that the Corps should not rely on often out-of-date and inaccurate floodplain maps and suggested that General Condition 26 should apply to all 100-year floodplains, including those not mapped by FEMA. One commenter requested clarification where no FEMA floodplain maps exist. One commenter suggested that where no FEMA maps exist, permits should require applicants to obtain a determination from a registered hydrologist that their project is not within the 100-year floodplain.

To effectively implement the requirements of this General Condition and to be consistent with other Federal programs, 100-year floodplains will be identified through the latest Flood Insurance Rate Maps (FIRMs) published by FEMA or FEMA-approved local floodplain maps. We believe that these maps are adequate for the purposes of this General Condition. Further, utilizing existing FIRMs and FEMA-approved local floodplain maps eliminates the additional burdens on local governments or landowners that existed in the proposed condition. If there are no FIRMs or FEMA-approved local floodplain maps available for the area where the proposed work is located, then the requirements of this General Condition do not apply. In such cases, the Corps will still consider the impacts of proposed projects through the PCN review process. In addition, we believe that the prospective permittee should not routinely be required to incur the cost of having a licensed professional engineer or hydrologist certify whether or not the proposed work is within a 100-year floodplain, particularly considering the very small scale of many permitted projects. Where appropriate, the District Engineer can require additional documentation on a case-by-case basis.

Several commenters agreed with the Corps proposal allowing DE's the discretion to approve projects in the floodplain below the headwaters where the project could improve flood storage. One commenter agreed provided the project complies with FEMA approved requirements. One commenter stated that floodplains are the best sites for creating stormwater management facilities. One commenter agreed and stated that these types of activities and facilities authorized under NWP 43 increase floodplain capacity. One commenter suggested that if NWP 43 is not removed from part (b) of General Condition 26, the DE should be authorized to waive this restriction on a project specific basis. One commenter requested that the Corps define increased flood storage. One commenter agreed with the Corps observation that some activities authorized by NWP 39, 40, and 42–44 provide additional flood storage capacity and recommends that such projects below the head waters should be allowed to proceed even if they result in permanent above grade fills.

The Corps has decided not to make this change at this time. We need to consider the specific language that would be needed to effectively implement this option. If we can develop acceptable language, we will consider proposing such a provision for public notice and comment.

A dozen or so commenters objected to the Corps proposal to remove NWP43 from part (b) of General Condition 26. A couple of commenters stated that the proposal could result in unacceptable threats to life and property. One commenter stated additional case-by-case review will increase workload. The commenter requested our rationale for considering that NWP 43 projects such as golf courses could provide additional flood storage. One commenter cited that other public interest factors should be evaluated, which highlights the need for completing a comprehensive PEIS. One commenter stated that the change was made without discussing it in the preamble and with no explanation supported by substantial evidence. This commenter requested that the Corps place NWP 43 back into part b of General Condition 26. One commenter stated that while providing additional flood storage is generally beneficial, there may be situations where such actions could cause adverse hydraulic or other impacts on the floodplain and increase risk of damage to existing floodplain properties. The commenter suggests that the Corps allow discretion on these projects only if the action is in furtherance of a local stormwater or watershed plan that has already assessed the hydrologic and hydraulic and other impacts of the action. One commenter stated the prohibitions of General Condition 26(a) and (b) do not allow for NWP 43 to be authorized in a floodplain but does allow projects to be authorized in a floodway. The commenter requested further clarification and explanation.

We are keeping the prohibition on the of NWP 43 in the floodplain below the headwaters. However, allowing NWP 43 to be used for projects above the headwaters but keeping them out of the floodway would be counterproductive. We believe that above the headwaters the only feasible alternative will often be to place them in the floodway. General Condition requires that the project avoid and minimize impacts to

waters. For stormwater management facilities this means keeping them out of the waters and the floodway, if practicable. Since the purpose of stormwater management facilities is to minimize flooding impacts, when they must be located in the floodway, there is no value added to the aquatic environment by requiring a more costly and lengthy individual permit process.

One commenter suggested that parts (a) and (b) of General Condition 26 should be removed because the requirements in pact (c) that the applicant must comply would be a sufficient safeguard. A few commenters stated that General Condition 26 should be removed because it is a duplication of activities regulated by local floodplain administrators. One commenter stated that the 100-year floodplain restrictions have increased the time required for reviewing small projects and leave the Corps less time and resources to focus on projects that may have significant impacts.

We continue to believe that the NWPs listed in General Condition 26(a) and (b) need to be restricted in the flood plain. This provides an added measure of protection of floodplains beyond that in paragraph 26(c). There has been some increase in workload due to the general condition. We believe that the adopted modifications to this General Condition will reduce that workload somewhat, which will allow the Corps to focus those resources on areas where the Corps can provide added protection to the aquatic environment.

One commenter stated that General Condition 26 is unnecessary and duplicative of existing FEMA requirements and would like the Corps to provide any data to show any correlation between wetlands loss and flooding. One commenter suggested that the Corps delete General Condition 26 for all permits and retain the flexibility to authorize all projects resulting in minimal adverse effects to proceed under NWPs, regardless of where those waters are located within the landscape. The same commenter recommended that any project located within a floodplain that meets FEMA requirements and the minimal impact test should be allowed to proceed under a NWP. One commenter stated that General Condition 26 is redundant and believes that the ban on permanent fills should not extend to all waters, specifically ephemeral streams above headwaters.

We agree that we are using the FEMA requirements that are applied to flood insurance programs for projects that occur in the flood plain. To this extent General Condition 26 is somewhat duplicative with that program. However, we believe that General Condition 26 plays an important role in reinforcing the FEMA program to minimize impacts to flood plains.

Several commenters objected to the changes to General Condition 26 and some commenters requested that the Corps retain General Condition 26 without any changes. A couple of commenters stated that the Corps must consider other aspects of flood plains such as water quality, ground water recharge, fish, wildlife, plant resources, and open space. Several commenters objected to development within 100-year flood plain. A couple of commenters objected to development within the floodplain. One commenter stated that the proposal would no longer discourage above grade fills with the floodplain. One commenter suggested that NWPs should not be used in counties designated as federal flood hazard areas at least once in the past 10 years. One commenter objected to the use of NWP 39, 40, 42, 43, and 44 within the 100-year floodplain. One commenter suggested that NWPs located within a floodplain should be required to demonstrate that the project is essential and has no alternative, the public should be able to comment on these types of projects, and they should be reviewed as an individual permit. One commenter stated that FEMA approved requirements are inadequate in many locations. A hand full of commenters suggested that the Corps should not allow the use of expedited permits for any filling activities in the entire 100-year floodplain.

We are very concerned with the loss of life and property resulting from unwise development in the floodplain. The Corps has recently advocated the strengthening of floodplain policy and the use of non-structural measures to reduce flood damages. We believe that the changes to the NWP program published today and two years ago will play an important role in reducing damages associated with development in the floodplain. Specifically, we are now requiring that ALL projects comply with FEMA approved state and local floodplain management requirements. We will monitor carefully the effectiveness of the new floodplain condition to ensure that it has the intended impact on reducing floodplain development.

A couple of commenters agreed with the Corps proposal to remove the prohibitions of General Condition 26 (a) and (b) from NWP 12, 14, and 29. One commenter suggested that part (b) of General Condition 26 should be changed to allow the use of NWP 39, 40, 42, or 43 with a PCN requirement. A few commenters suggested that the Corps retain prohibitions of General Condition 26 (a) and (b) for NWPs 12, 14, 29. One commenter objected to removing the prohibitions because it will increase damage and destruction of aquatic habitat and should not be permitted. A few commenters agreed with the Corps proposal to remove the prohibitions of General Condition 26 (a) and (b) from NWP 12 and 14. One commenter recommended that the prohibitions of General Condition 26 (a) and (b) should be retained for NWP 29 because local FEMA authorizes can come under tremendous pressure to stretch the regulations for certain projects. One commenter agreed with the Corps proposal to remove the prohibitions of General Condition 26 (a) and (b) from NWP 12 but wants to keep the prohibitions for NWP 14 & 29. The commenter stated that homes and other structures create a potential for increased downstream flooding due to floodplain storage capacity and transmission line projects occupy very little volume of the 100-year floodplain and would have only a minimal effect on floodplain storage capacity. One commenter suggested reducing the PCN requirements and raising the acreage thresholds for NWP 12. Numerous commenters objected to the removal of the prohibitions of General Condition 26(a) and 26(b) from NWP 29. A couple of commenters objected because it could result in unacceptable threats to life and property. A couple of commenters objected because it will have long-term negative consequences, including the potential to heighten downstream flooding. One commenter stated that the removal will make it easier to build homes and developments in floodplains, will place families at greater risk, and cost taxpayers for the inevitable cycle of flooding and rebuilding. A couple of commenters suggested that NWP 12 and 29, in light of the requirements of General Condition 21, continue to be subject to all of the limitations in General Condition 26. Given that these permits are subject to General Condition 21, the commenters stated concerns that improper use of these permits could adversely impact flooding, because linear projects are likely to obstruct flood flows while single-family housing can result in cumulative losses of flood storage. Both commenters stated that if the Corps removes the prohibition of General Condition 26(a) and (b) from NWP 12 and 29, the Corps should closely monitor activities authorized under these permits over time to ensure

that cumulative impacts on flooding are in fact minimal.

The Corps believes that it is appropriate to remove NWPs 12, 14 and 29 from the prohibition below headwaters and retain the prohibition for NWPs 39, 40, 42, 43, and 44. The permanent above grade fill authorized by these NWPs are small and do not occur very often especially in the same watershed. Furthermore, these activities must comply with the applicable FEMA approved requirements. We believe that activities authorized by these NWPs that are in full compliance with FEMA approved requirements will have no more than minimal impacts on the flood plain.

The General Condition is adopted as proposed.

27. *Construction Period.*

We proposed a new General Condition for activities for which the Corps has received notification and a construction schedule has been reviewed, and verification issued by the Corps. The condition will allow the Corps to establish project completion dates beyond the expiration of the NWPs.

Several commenters stated that they are in favor of this new condition. Some commenters suggested that this condition be applicable to all permit authorizations that are currently in effect including activities, which were authorized under NWP 26 and are still under the grandfather rule, and the District Engineer should be urged to authorize extensions providing conditions have not changed substantially. One commenter in favor of General Condition 27 requested that the Corps revise the condition to have a definite extension period and remove the language ''reasonable period''. One commenter in favor of General Condition 27 suggested that it be amended specifically to include an extension of the completion date for multi-phase linear transportation projects that have been verified and the extension request should be submitted 30 days prior to the previously approved completion date. One commenter suggested that the life of the permit be extended instead of adopting General Condition 27. One commenter stated that General Condition 27 will reduce protection for listed species and critical habitat. Two commenters suggested that there is no need to extend an NWP beyond the current expiration date because the permittee is offered sufficient time within the current time parameters to complete an authorized project. Two commenters stated that General Condition 27 violates the terms and conditions of the Clean Water Act and this condition would establish National policy on what is considered a reasonable timeframe to complete a minimal impact activity. One commenter recommended that the permit be modified to change the extension date of those activities not verified by the Corps from 12 months to 3 months and that all future projects be verified by the Corps.

The NWPs authorize many activities that have no more than minimal adverse effects on the aquatic environment and generally involve projects that need a relatively short period for construction. For some projects, obtaining a Corps permit is one of the many steps necessary to complete that project. It may be two, three or more years after obtaining the Corps permit before the work can be completed. Under the existing NWPs, if such projects obtain a Corps NWP verification near the expiration date of the NWP, the permittee can not necessarily rely on that permit to continue in effect through the lengthy and costly process of developing and planning the project. This causes uncertainty regarding the NWP authorization for the project because the construction phase was not completed before the NWP authorization expired. Many logistical issues may delay construction projects sometimes for considerable periods. We believe that the district office that is reviewing the project is best able to determine a reasonable time to complete the work. Projects will vary in the amount of time it takes to complete the activity. We believe that general condition 11 will ensure that NWP authorized activities will comply with the Endangered Species Act. The Crops is not proposing to change the completion period for unverified NWP activities.

The General Condition is adopted as proposed.

Definitions

There were no comments on the definitions not listed below. There were no changes proposed to those definitions. Those definitions are adopted without change.

Floodway. There were no changes proposed to this definition. One commenter believes that the definition of floodways is very broad.

The Corps is using the definition of flood way as it is determined by the Federal Emergency Management Agency for the purposes of the national flood insurance program. This is the standard that is most used by Federal agencies for compliance with Executive Order 11988, Floodplain Management. It is the definition of the term that is used in general condition 26 of the NWPs. The definition is adopted without change.

Independent Utility. There were no changes proposed to this definition. One commenter said that the definition of the term ''independent utility'' should exclude highway projects, because a single project within the limits of the particular logical termini may need to be reviewed and authorized under the same NWP multiple times.

We do not agree that the definition of this term should exclude highway projects. The Corps issues permits for a highway to cross a waterbody not for the highway itself. Normally the separate crossings will have independent utility. Only in rare circumstances would a highway project be considered a single and complete project as discussed in Corps regulations at 33 CFR 330. The terms and conditions of the NWPs, as well as the PCN process and the ability of district engineers to exercise discretionary authority, will ensure that highway projects authorized by NWPs, such as NWP 14, result in minimal adverse effects on the aquatic environment. The definition is adopted without change.

Loss of waters of the US. The Corps proposed to clarify this definition, consistent with the explanation provided in the preamble to the March 9, 2000, NWPs **Federal Register** notice, which reflects the current practice for measuring the acreage and linear foot impacts for determining compliance with the threshold limits of the NWPs. In other words, this clarification does not change the current application of this term.

One commenter noted that the Corps proposed to change the definition of ''loss of waters of the US'' without discussing the proposed change in preamble of the August 9, 2001, **Federal Register** notice. The commenter suggested that the definition remain as defined in the March 9, 2000, **Federal Register** notice that announced the issuance of new and modified NWPs to replace NWP 26. The definition in the March 9, 2000, notice stated that ''* * * the loss of stream bed includes the linear feet of stream bed that is filled or excavated.'' The commenter suggested explicitly including perennial, intermittent, and ephemeral reaches in this definition. One commenter stated that the proposed change to limit the definition of ''loss of waters of the US'' to perennial or intermittent stream could weaken protection for ephemeral streams.

The Corps believes that it is necessary to clarify, that for determining the acreage and linear thresholds for the NWPs, ephemeral waters and streams

are not included in the measurement. This was previously explained on page 12881 of the March 9, 2000, preamble of the NWPs, but not included in the permit language. We now believe that it is important to include this language in the formal definition to avoid the confusion that was created by having this information in a Preamble discussion only and not in the definition itself. However, the Corps had proposed modifying language that we now believe did not fully and clearly address the issue. Therefore we are retaining the current language of this definition, but adding a new sentence at the end of the definition. The new sentence will clearly state that for measuring the threshold limitation only will we not include impacts to ephemeral waters. As with the proposed change, the new sentence will not change the current application of this term.

Note that in excluding ephemeral streams from the definition of ''Loss of Waters of the US'' for the purposes of determining compliance with NWP acreage and linear foot limitations, we are not suggesting that ephemeral streams are not jurisdictional waters under the Clean Water Act.

One commenter requested clarification concerning the placement of box culverts and the definition of ''loss of the water of the US''. This commenter said that if the placement of a culvert in waters of the US does not change the bottom elevation, then the activity should not be considered to result in a loss of waters of the US.

The placement of a culvert in waters of the United States would be considered a loss of waters of the United States, even if the activity would not result in a change in the bottom elevation. The definition of the term ''loss of waters of the US'' includes activities that change the use of the waterbody. The placement of a culvert in a stream or other water of the United States changes the use of that waterbody, and therefore the area changed by the installation of the culvert would be considered when determining whether the proposed work exceeded the acreage limit of an NWP.

The definition is adopted with the change discussed above.

Minimal effects. The Corps did not propose to define this term. Several commenters said that the term ''minimal effects'' should be defined. One commenter requested that the Corps develop an evaluation criteria for determining when an activity results in more than minimal impacts.

We maintain our position that the term ''minimal effects'', as used in the context of the NWP program, cannot be simply defined. Aquatic resource functions and values vary considerably across the country, and the minimal adverse effects criterion for general permit must be subjectively applied by district engineers. Site-specific factors, such as the quality of waters that may be impacted by the proposed work, the functions and values of those waters, the geographic setting, and other factors must be considered when determining whether a particular activity results in minimal adverse effects on the aquatic environment. Further, in order to adopt such a term the Corps would have to publish a proposed definition for public notice and comment. A definition of this term is not being adopted.

Open water. There were no changes proposed to this definition. One commenter stated that the definition of the term ''open water'' should be refined. This commenter said that sparsely vegetated areas of obligate emergent vegetation still meet the definition of a wetland and that vegetated shallows are special aquatic sites, such as seagrass beds. Sparsely vegetated waters inhabited by emergent vegetation may be identified as wetlands, provided the area meets the criteria required by the *1987 Corps of Engineers Wetlands Delineation Manual* (Technical Report Y–87–1) and associated guidance. Vegetated waters inhabited by non-emergent vegetation, such as beds of submersed aquatic vegetation often found in estuaries, lakes, and ponds, are considered open waters for the purpose of the NWP program.

The definition is adopted without change.

Mechanized Land Clearing. The Corps did not propose to define this term. One commenter stated that the term ''mechanized land clearing'' is not defined in the ''Definitions'' section of the NWPs and recommends that the Corps adds a definition for this term.

We do not agree that it is necessary to include a definition of the term ''mechanized land clearing'' in the NWPs. Matters related to mechanized landclearing have been most recently addressed in the changes to 33 CFR 323.2 that were published in the January 17, 2001, issue of the **Federal Register** (66 FR 4550). A definition of this term is not being adopted.

Stream Definitions. There were no changes proposed to these definitions. One commenter said that the definitions of ephemeral and intermittent streams do not address streams that may flow for longer periods due to snowmelt, artificial discharges, or other water sources beside groundwater and precipitation. This commenter also suggested that artificial water discharges should not be used for the definitions of ephemeral and intermittent streams and if a water course is naturally ephemeral and a water treatment plant outfall is constructed, the watercourse should continue to be defined as ephemeral for Section 404 purposes.

When determining whether a particular stream segment is perennial, intermittent, or ephemeral, district engineers should consider the source of hydrology and the normal circumstance of that hydrology. They will make these determinations on a case-by-case basis. We believe that these definitions are sufficient for the Corps Regulatory Program. The stream definitions are adopted without change.

Executive Order 13212—Energy-related Projects Issues

One commenter indicated that NWPs have already been designed to expedite permit processing and any new energy related projects (i.e. drilling oil in the Arctic National Wildlife Refuge, construction of new nuclear power plants, or electric power generation dams) not covered by existing NWPs should receive full consideration under the National Environmental Policy Act (Act) and not be authorized by NWPs. One commenter said that states have provisions similar to Executive Order 13212 and this commenter believes that the current coordination process and the expedited review process provided by the NWPs are sufficient. One commenter asserted that the expiration of NWP 26 reduced the ability of the Corps to efficiently authorize energy-related projects. This commenter suggested that other NWPs be amended to expedite energy-related projects or revisit the development of a regional permit for such activities.

President George W. Bush signed Executive Order 13212 (66 FR 28357–28358, May 22, 2001) on May 18, 2001, directing new policy actions to expedite the increased supply and availability of energy to our Nation. This Executive Order directs all agencies to take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase energy production, transmission, or conservation, while maintaining protection of the environment. We believe that the NWP program provides an opportunity to expeditiously authorize energy-related activities that have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Energy related projects that have more than minimal individual and cumulative

adverse effects on the aquatic environment cannot be authorized by NWPs and will be expeditiously reviewed under the individual permit process.

Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Statement of Energy Effects)

The NWP Program is designed to regulate certain activities having no more than minimal adverse effects with little, if any, delay or paperwork. NWPs allow smaller, repetitive, low impact projects with no more than minimal adverse effects on the aquatic environment, to be reviewed and authorized in a shorter period than larger complex projects that require an Individual Permit review. Many energy related projects, such as petroleum pipelines and electric utility lines, are expeditiously authorized by Nationwide Permits. The Corps is adopting changes to the Nationwide Permits that will maintain the expedited process for these energy related projects. Therefore, the Corps concludes that the proposed NWPs will not significantly affect the supply, distribution, and use of energy and fully complies with Executive Order 13211.

Regional Conditioning of Nationwide Permits

Concurrent with this **Federal Register** notice, District Engineers are issuing local public notices. In addition to the changes to some NWPs and NWP conditions required by the Chief of Engineers, the Division and District Engineers may propose regional conditions or propose revocation of NWP authorization for all, some, or portions of the NWPs. Regional conditions may also be required by state Section 401 water quality certification or for state coastal zone consistency. District engineers will announce regional conditions or revocations by issuing local public notices. Information on regional conditions and revocation can be obtained from the appropriate District Engineer, as indicated below. Furthermore, this and additional information can be obtained on the internet at *http://www.usace.army.mil/where.html#State* by clicking on the appropriate District office.

Alabama

Mobile District Engineer, ATTN: CESAM–OP–S, 109 St. Joseph Street, Mobile, AL 36602–3630

Alaska

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

Arizona

Los Angeles District Engineer, ATTN: CESPL–CO–R, P.O. Box 532711, Los Angeles, CA 90053–2325

Arkansas

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

California

Sacramento District Engineer, ATTN: CESPK–CO–R, 1325 J Street, Sacramento, CA 95814–2922

Colorado

Albuquerque District Engineer, ATTN: CESPA–OD–R, 4101 Jefferson Plaza NE, Albuquerque, NM 87109–3435

Connecticut

New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

Delaware

Philadelphia District Engineer, ATTN: CENAP–OP–R, Wannamaker Building, 100 Penn Square East Philadelphia, PA 19107–3390

Florida

Jacksonville District Engineer, ATTN: CESAJ–CO–R, P.O. Box 4970, Jacksonville, FL 32202–4412

Georgia

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

Hawaii

Honolulu District Engineer, ATTN: CEPOH–EC–R, Building 230, Fort Shafter, Honolulu, HI 96858–5440

Idaho

Walla Walla District Engineer, ATTN: CENWW–OD–RF, 210 N. Third Avenue, Walla Walla, WA 99362–1876

Illinois

Rock Island District Engineer, ATTN: CEMVR–OD–P, P.O. Box 2004, Rock Island, IL 61204–2004

Indiana

Louisville District Engineer, ATTN: CELRL–OP–F, P.O. Box 59, Louisville, KY 40201–0059

Iowa

Rock Island District Engineer, ATTN: CEMVR–OD–P, P.O. Box 2004, Rock Island, IL 61204–2004

Kansas

Kansas City District Engineer, ATTN: CENWK–OD–R, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106–2896

Kentucky

Louisville District Engineer, ATTN: CELRL–OP–F, P.O. Box 59, Louisville, KY 40201–0059

Louisiana

New Orleans District Engineer, ATTN: CEMVN–OD–S, P.O. Box 60267, New Orleans, LA 70160–0267

Maine

New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

Maryland

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

Massachusetts

New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

Michigan

Detroit District Engineer, ATTN: CELRE–RG, P.O. Box 1027, Detroit, MI 48231–1027

Minnesota

St. Paul District Engineer, ATTN: CEMVP–CO–R, 190 Fifth Street East, St. Paul, MN 55101–1638

Mississippi

Vicksburg District Engineer, ATTN: CEMVK–OD–F, 4155 Clay Street, Vicksburg, MS 39183–3435

Missouri

Kansas City District Engineer, ATTN: CENWK–OD–R, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106–2896

Montana

Omaha District Engineer, ATTN: CENWO–OP–R, 106 South 15th Street, Omaha, NE 68102–1618

Nebraska

Omaha District Engineer, ATTN: CENWO–OP–R, 106 South 15th Street, Omaha, NE 68102–1618

Nevada

Sacramento District Engineer, ATTN: CESPK–CO–R, 1325 J Street, Sacramento, CA 95814–2922

New Hampshire

New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

New Jersey

Philadelphia District Engineer, ATTN: CENAP–OP–R, Wannamaker Building, 100 Penn Square East, Philadelphia, PA 19107–3390

New Mexico

Albuquerque District Engineer, ATTN: CESPA–OD–R, 4101 Jefferson Plaza NE, Albuquerque, NM 87109–3435

New York

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

North Carolina

Wilmington District Engineer, ATTN: CESAW–RG, P.O. Box 1890, Wilmington, NC 28402–1890

North Dakota

Omaha District Engineer, ATTN: CENWO–OP–R, 106 South 15th Street, Omaha, NE 68102–1618

Ohio

Huntington District Engineer, ATTN: CELRH–OR–F, 502 8th Street, Huntington, WV 25701–2070

Oklahoma

Tulsa District Engineer, ATTN: CESWT—PE–R, 1645 S. 101st East Ave, Tulsa, OK 74128–4609

Oregon

Portland District Engineer, ATTN: CENWP–PE–G, P.O. Box 2946, Portland, OR 97208–2946

Pennsylvania

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

Rhode Island

New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

South Carolina

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

South Dakota

Omaha District Engineer, ATTN: CENWO–OP–R, 106 South 15th Street, Omaha, NE 68102–1618

Tennessee

Nashville District Engineer, ATTN: CELRN–OP–F, P.O. Box 1070, Nashville, TN 37202–1070

Texas

Ft. Worth District Engineer, ATTN: CESWF–PER–R, P.O. Box 17300, Ft. Worth, TX 76102–0300

Utah

Sacramento District Engineer, ATTN: CESPK–CO–R, 1325 J Street, CA 95814–2922

Vermont

New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

Virginia

Norfolk District Engineer, ATTN: CENAO–OP–R, 803 Front Street, Norfolk, VA 23510–1096

Washington

Seattle District Engineer, ATTN: CENWS–OP–RG, P.O. Box 3755, Seattle, WA 98124–2255

West Virginia

Huntington District Engineer, ATTN: CELRH–OR–F, 502 8th Street, Huntington, WV 25701–2070

Wisconsin

St. Paul District Engineer, ATTN: CEMVP–CO–R, 190 Fifth Street East, St. Paul, MN 55101–1638

Wyoming

Omaha District Engineer, ATTN: CENWO–OP–R, 106 South 15th Street, Omaha, NE 68102–1618

District of Columbia

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

Pacific Territories (American Samoa, Guam, & Commonwealth of the Northern Mariana Islands)

Honolulu District Engineer, ATTN: CEPOH–EC–R, Building 230, Fort Shafter, Honolulu, HI 96858–5440

Puerto Rico & Virgin Islands

Jacksonville District Engineer, ATTN: CESAJ–CO–R, P.O. Box 4970, Jacksonville, FL 32202–4412

Dated: January 4, 2002.

Approved:

Robert H. Griffin,

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

Nationwide Permits, Conditions, Further Information, and Definitions

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B. Nationwide Permits

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

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

3. *Maintenance.* Activities related to:

(i) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement are permitted, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This NWP 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 US 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 riprap 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 US for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event, including the construction, placement, or installation of upland protection structures and minor dredging to remove obstructions in a water of the US. (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 US 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 before the damage. The District Engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this permit. Minor dredging to remove obstructions from the adjacent waterbody is limited to 50 cubic yards below the plane of the ordinary high water mark, and is limited to the amount necessary to restore the pre-existing bottom contours of the waterbody. The dredging may not be done primarily to obtain fill for any restoration activities. The discharge of dredged or fill material and all related work needed to restore the upland must be part of a single and complete project. This permit cannot be used in conjunction with NWP 18 or NWP 19 to restore damaged upland areas. This permit cannot be used to reclaim historic lands lost, over an extended period, to normal erosion processes.

This permit does not authorize maintenance dredging for the primary purpose of navigation and beach restoration. 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 repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Section 404(f) exemption for maintenance.

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, clam and oyster digging; and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP authorizes shellfish seeding provided this activity does not occur in wetlands or sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist, but may not be present in a given year.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the US for the culture or holding of motile species such as lobster or the use of covered oyster trays or clam racks. (Sections 10 and 404)

5. *Scientific Measurement Devices.* Devices, whose purpose is to measure and record scientific data such as staff gages, tide gages, water recording devices, water quality testing and improvement devices and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards and further for discharges of 10 to 25 cubic yards provided the permittee notifies the District Engineer in accordance with the ''Notification'' General Condition. (Sections 10 and 404)

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

7. *Outfall Structures and Maintenance.* Activities related to:

(i) Construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (Section 402 of the CWA), and

(ii) Maintenance excavation, including dredging, to remove accumulated sediments blocking or restricting outfall and intake structures, accumulated sediments from small impoundments associated with outfall and intake structures, and accumulated sediments from canals associated with outfall and intake structures, provided that the activity meets all of the following criteria:

a. The permittee notifies the District Engineer in accordance with General Condition 13;

b. The amount of excavated or dredged material must be the minimum necessary to restore the outfalls, intakes, small impoundments, and canals to original design capacities and design configurations (i.e., depth and width);

c. The excavated or dredged material is deposited and retained at an upland site, unless otherwise approved by the District Engineer under separate authorization; and

d. Proper soil erosion and sediment control measures are used to minimize reentry of sediments into waters of the US.

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)

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

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

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

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

12. *Utility Line Activities.* Activities required for the construction, maintenance and repair of utility lines and associated facilities in waters of the US 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 US, 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, liquescent, 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 US, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary side casting not to exceed a total of 180 days, where appropriate. In wetlands, the top 6″ to 12″ of the trench should normally be backfilled with topsoil from the trench. Furthermore, the trench cannot be constructed in such a manner as to drain waters of the US (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 US 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 US, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not result in the loss of greater than ½-acre of non-tidal waters of the US.

(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 US, 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 US, excluding non-tidal wetlands adjacent to tidal waters, provided the discharges do not cause the loss of greater than ½-acre of non-tidal waters of the US. 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 US 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 US must be properly bridged or culverted to maintain surface flows.

The term ''utility line'' does not include activities which drain a water of the US, 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 US includes the filled area plus waters of the US that are adversely affected by flooding, excavation, or drainage as a result of the project. Activities authorized by paragraph (i) through (iv) may not exceed a total of ½-acre loss of waters of the US. Waters of the US temporarily affected by filling, flooding, excavation, or drainage, where the project area is restored to preconstruction contours and elevation, is not included in the calculation of permanent loss of waters of the US. 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 US 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 land clearing 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 US 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 US 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 US, excluding overhead lines, exceeds 500 feet;

(d) The utility line is placed within a jurisdictional area (i.e., water of the US), 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 ⅒-acre of waters of the US; or

(f) Permanent access roads constructed above grade in waters of the US for a distance of more than 500 feet.

(g) Permanent access roads constructed in waters of the US 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, liquescent, or slurry substances over navigable waters of the US, which are considered to be bridges, not utility lines, and may require a permit from the USCG 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 US (*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 (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

13. *Bank Stabilization.* Bank stabilization activities necessary for erosion prevention provided the activity meets all of the following criteria:

a. No material is placed more than the minimum needed for erosion protection;

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

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

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

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

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

g. The activity is part of a single and complete project.

Bank stabilization activities in excess of 500 feet in length or greater than an average of one cubic yard per running foot may be authorized if the permittee notifies the District Engineer in accordance with the ''*Notification*'' General Condition 13 and the District Engineer determines the activity complies with the other terms and conditions of the NWP and the adverse environmental effects are minimal both individually and cumulatively. This NWP may not be used for the channelization of waters of the US. (Sections 10 and 404)

14. *Linear Transportation Projects.* Activities required for the construction, expansion, modification, or improvement of linear transportation crossings (e.g., highways, railways, trails, airport runways, and taxiways) in waters of the US, including wetlands, if the activity meets the following criteria:

a. This NWP is subject to the following acreage limits:

(1) For linear transportation projects in non-tidal waters, provided the discharge does not cause the loss of greater than ½-acre of waters of the US;

(2) For linear transportation projects in tidal waters, provided the discharge does not cause the loss of greater than ⅓-acre of waters of the US.

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 ⅒-acre of waters of the US; 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 US to ensure that those losses result only in minimal adverse effects to the aquatic environment and a statement describing how temporary losses will be minimized to the maximum extent practicable;

d. For discharges in special aquatic sites, including wetlands, and stream riffle and pool complexes, 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 waters of the US. 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).

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

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

17. *Hydropower Projects.* Discharges of dredged or fill material associated with (a) small hydropower projects at existing reservoirs where the project, which includes the fill, are licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; and has a total generating capacity of not more than 5000 kW; and the permittee notifies the District Engineer in accordance with the ''Notification'' General Condition; or (b) hydropower projects for which the FERC has granted an exemption from licensing pursuant to section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and section 30 of the Federal Power Act, as amended; provided the permittee notifies the District Engineer in accordance with the ''Notification'' General Condition. (Section 404)

18. *Minor Discharges.* Minor discharges of dredged or fill material into all waters of the US if the activity meets all of the following criteria:

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

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

c. If the discharge, including any excavated area, exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line or if the discharge is in a special aquatic site, including wetlands, the permittee notifies the District Engineer in accordance with the ''Notification'' General Condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands (also see 33 CFR 330.1(e)); and

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

19. *Minor Dredging.* Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the US (i.e., Section 10 waters) as part of a single and complete project. This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist, but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the US (see 33 CFR 322.5(g)). (Sections 10 and 404)

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

21. *Surface Coal Mining Activities.* Discharges of dredged or fill material into waters of the US associated with surface coal mining and reclamation operations provided the coal mining activities are authorized by the DOI, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the ''Notification'' General Condition. In addition, to be authorized by this NWP, the District Engineer must determine that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing. The Corps, at the discretion of the District Engineer, may require a bond to ensure success of the mitigation, if no other Federal or state agency has required one. For discharges in special aquatic sites, including wetlands, and stream riffle and pool complexes, the notification must also include a delineation of affected special aquatic sites, including wetlands. (also, see 33 CFR 330.1(e))

Mitigation: In determining the need for as well as the level and type of mitigation, the District Engineer will ensure no more than minimal adverse effects to the aquatic environment occur. As such, District Engineers will determine on a case-by-case basis the requirement for adequate mitigation to ensure the effects to aquatic systems are minimal. In cases where OSM or the state has required mitigation for the loss of aquatic habitat, the Corps may consider this in determining appropriate mitigation under Section 404. (Sections 10 and 404)

22. *Removal of Vessels.* Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-

made obstructions to navigation. This NWP does not authorize the removal of vessels listed or determined eligible for listing on the National Register of Historic Places unless the District Engineer is notified and indicates that there is compliance with the ''Historic Properties'' General Condition. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging. Vessel disposal in waters of the US may need a permit from EPA (see 40 CFR 229.3). (Sections 10 and 404)

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

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

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

26. [Reserved]

27. *Stream and Wetland Restoration Activities.* Activities in waters of the US 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), the National Marine Fisheries Service, the National Ocean Service, or voluntary wetland restoration, enhancement, and creation actions documented by the NRCS pursuant to NRCS regulations; or

(2) Reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the OSM 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

(3) Any other public, private or tribal lands;

(b) *Notification:* For activities on any public or private land that are not described by paragraphs (a)(1) or (a)(2) above, the permittee must notify the District Engineer in accordance with General Condition 13; and

(c) Planting of only native species should occur on the site.

Activities authorized by this NWP include, to the extent that a Corps permit is required, 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; the construction of oyster habitat over unvegetated bottom in tidal waters; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive, exotic or nusiance 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)(3), 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)(2), 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). The reversion must occur 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. Before any reversion activity the permittee or the appropriate Federal or state agency must notify the District Engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements 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 US 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 Bank Guidelines.

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

29. *Single-family Housing.* Discharges of dredged or fill material into non-tidal waters of the US, including non-tidal wetlands for the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an Individual Permittee provided that the activity meets all of the following criteria:

a. The discharge does not cause the loss of more than ¼-acre of non-tidal waters of the US, including non-tidal wetlands;

b. The permittee notifies the District Engineer in accordance with the ''Notification'' General Condition;

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

d. The discharge is part of a single and complete project; furthermore, that for any subdivision created on or after November 22, 1991, the discharges authorized under this NWP may not exceed an aggregate total loss of waters of the US of ¼-acre for the entire subdivision;

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

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

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

h. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation.

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

30. *Moist Soil Management for Wildlife.* Discharges of dredged or fill material and maintenance activities that are associated with moist soil management for wildlife performed on non-tidal Federally-owned or managed, state-owned or managed property, and local government agency-owned or managed property, for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to: The repair, maintenance or replacement of existing water control structures; the repair or maintenance of dikes; and plowing or discing to impede succession, prepare seed beds, or establish fire breaks. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, etc. associated with the management areas. This NWP does not authorize converting wetlands to uplands, impoundments or other open water bodies. (Section 404)

31. *Maintenance of Existing Flood Control Facilities.* Discharge of dredge or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, and channels that

(i) were previously authorized by the Corps by Individual Permit, General Permit, by 33 CFR 330.3, or did not require a permit at the time it was constructed, or

(ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the ''maintenance baseline,'' as described in the definition below. Activities including the discharges of dredged or fill materials, associated with maintenance activities in flood control facilities in any watercourse that has previously been determined to be within the maintenance baseline, are authorized under this NWP. The NWP does not authorize the removal of sediment and associated vegetation from the natural water courses except to the extent that these have been included in the maintenance baseline. All dredged material must be placed in an upland site or an authorized disposal site in waters of the US, and proper siltation controls must be used. (Activities of any kind that result in only incidental fallback, or only the cutting and removing of vegetation above the ground, e.g., mowing, rotary cutting, and chainsawing, where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material, do not require a Section 404 permit in accordance with 33 CFR 323.2(d)(2)).

Notification: After the maintenance baseline is established, and before any maintenance work is conducted, the permittee must notify the District Engineer in accordance with the ''Notification'' General Condition. The notification may be for activity-specific

maintenance or for maintenance of the entire flood control facility by submitting a five year (or less) maintenance plan.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the District Engineer. The District Engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels, but which are part of the facility. If no evidence of the constructed capacity exist, the approved constructed capacity will be used. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the design capacities of the flood control facility. The documentation will also include BMPs to ensure that the impacts to the aquatic environment are minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP can not be used until the District Engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This permit does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner.

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

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate. (Sections 10 and 404)

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

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

a. The unauthorized activity affected no more than 5 acres of non-tidal wetlands or 1 acre of tidal wetlands;

b. The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

c. The District Engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the U.S. under section 404 of the CWA and/or section 10 of the Rivers and Harbors Act of 1899; or

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

For either (i), (ii) or (iii) above, compliance is a condition of the NWP itself. Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement or fails to complete the work by the specified completion date. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6 (d)(2) and (e). (Sections 10 and 404)

33. *Temporary Construction, Access and Dewatering.* Temporary structures, work and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites; provided that the associated primary activity is authorized by the Corps of Engineers or the USCG, or for other construction activities not subject to the Corps or USCG regulations. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must be of materials, and placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if it is determined by the District Engineer that it will not cause more than minimal adverse effects on aquatic resources.

Temporary fill must be entirely removed to upland areas, or dredged material returned to its original location, following completion of the construction activity, and the affected areas must be restored to the pre-project conditions. Cofferdams cannot be used to dewater wetlands or other aquatic areas to change their use. Structures left in place after cofferdams are removed require a Section 10 permit if located in navigable waters of the U.S. (See 33 CFR part 322). The permittee must notify the District Engineer in accordance with the ''Notification'' General Condition. The notification must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources. The District Engineer will add Special Conditions, where necessary, to ensure environmental adverse effects is minimal. Such conditions may include: limiting the temporary work to the minimum necessary; requiring seasonal restrictions; modifying the restoration plan; and requiring alternative construction methods (e.g. construction mats in wetlands where practicable.). (Sections 10 and 404)

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

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

b. The permittee notifies the District Engineer in accordance with the ''Notification'' General Condition. The notification must include a delineation of affected special aquatic sites, including wetlands; and,

c. The activity does not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid. (Section 404)

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

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

a. The discharge into waters of the U.S. does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or placement of pre-cast concrete planks or slabs. (Unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized);

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

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

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

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

Another NWP, Regional General Permit, or Individual Permit may authorize dredging to provide access to the boat ramp after obtaining a Section 10 if located in navigable waters of the U.S. (Sections 10 and 404)

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

a. The NRCS which is a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624); or

b. The USFS under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13); or

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

For all of the above provisions, the District Engineer must be notified in accordance with the General Condition 13. (Also, see 33 CFR 330.1(e)). (Sections 10 and 404)

38. *Cleanup of Hazardous and Toxic Waste.* Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority provided the permittee notifies the District Engineer in accordance with the ''Notification'' General Condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste. Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under section 404 of the CWA or section 10 of the Rivers and Harbors Act. (Sections 10 and 404)

39. *Residential, Commercial, and Institutional Developments.* Discharges of dredged or fill material into non-tidal waters of the U.S., 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 ½-acre of non-tidal waters of the U.S., excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear-feet of a stream bed, unless for intermittent stream beds this criterion is waived in writing pursuant to a determination by the District Engineer, as specified below, that the project complies with all terms and conditions of this NWP and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;

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 1/10-acre of non-tidal waters of the US, 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); or

(3) The discharge causes the loss of greater than 300 linear feet of intermittent stream bed. In such case, to be authorized the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

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 US at the project site to the maximum extent practicable. The notification, when required, must include a written statement explaining how avoidance and minimization of losses of waters of the US were achieved on the project site. Compensatory mitigation will normally be required to offset the losses of waters of the US. (See General Condition 19.) The notification must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the US. 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 US exceeding 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 1/10-acre or less of waters of the US, 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 US (e.g., 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 US (e.g., 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.

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 that is required in paragraph (e) of this NWP may be either conceptual or detailed. The wetland or upland vegetated buffer required in paragraph (i) of this NWP will be determined on a case-by-case basis by the District Engineer for addressing 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 US to increase production or construct farm buildings, NWP 39 cannot be used by the developer to authorize additional activities. This is more than the acreage limit for NWP 39 impacts to waters of the US (i.e., the combined acreage loss authorized under NWPs 39 and 40 cannot exceed 1/2-acre, see General Condition 15).

Subdivisions: For residential subdivisions, the aggregate total loss of waters of US authorized by NWP 39 can not exceed 1/2-acre. This includes any loss of waters associated with development of individual subdivision lots. (Sections 10 and 404)

Note: Areas where wetland vegetation is not present should be determined by the presence or absence of an ordinary high water mark or bed and bank. Areas that are waters of the US based on this criterion would require a PCN although water is infrequently present in the stream channel (except for ephemeral waters, which do not require PCNs).

40. *Agricultural Activities.* Discharges of dredged or fill material into non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters, for 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 land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the US; 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 an United States Department of Agriculture (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 1/2-acre of non-tidal wetlands on a farm tract;

(3) The permittee must have 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., 1/3-acre of emergent wetlands); and (e) The type, acreage (or square feet), and location of compensatory mitigation (e.g. 1/3-acre of emergent wetland on a farm tract; credits purchased from a mitigation bank); 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 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 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 US; or

c. For the construction of building pads for farm buildings, the discharge does not cause the loss of greater than ½-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; and

d. Any activity in other waters of the US 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 unless, for drainage ditches constructed in intermittent non-tidal streams, the District Engineer waives this criterion in writing, and the District Engineer has determined that the project complies with all terms and conditions of this NWP, and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively. For impacts exceeding 300-linear feet of impacts to existing serviceable ditches constructed in intermittent non-tidal streams, the permittee must notify the District Engineer in accordance with the ''Notification'' General Condition 13; and

e. The term ''farm tract'' refers to a parcel of land identified by the Farm Service Agency. The Corps will identify other waters of the US 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 US 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 US 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 ½-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 CWA, 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 ½-acre on a single 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 US 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 US on the site, the combined acreage loss authorized by NWPs 39 and 40 cannot exceed ½-acre (see General Condition 15). (Section 404)

41. *Reshaping Existing Drainage Ditches.* Discharges of dredged or fill material into non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the US. The reshaping of the ditch cannot increase drainage capacity beyond the original design capacity. Nor can it 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 US). 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.).

Notification: 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 US, 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. In general, this NWP does not apply to reshaping drainage ditches constructed in uplands, since these areas are generally not waters of the US, 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 US; 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 US, 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 ½-acre of non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear-feet of a stream bed, unless for intermittent stream beds this criterion is waived in writing pursuant to a determination by the District Engineer, as specified below, that the project complies with all terms and conditions of this NWP and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;

c. The permittee notifies the District Engineer in accordance with the ''Notification'' General Condition 13 for discharges exceeding 300 linear feet of impact of intermittent stream beds. In such cases, to be authorized the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine the adverse environmental effects are minimal both individually and cumulatively, and waive this limitation in writing before the permittee may proceed;

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

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

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

g. Compensatory mitigation will normally be required to offset the losses of waters of the US. The notification must also include a compensatory mitigation proposal to offset authorized losses of waters of the US.

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). This NWP may authorize the construction or expansion of golf courses and the expansion of ski areas, provided the golf course or ski area does not substantially deviate from natural landscape contours. Additionally, these activities are designed to minimize adverse effects to waters of the US 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 US, 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 ½-acre of non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear-feet of a stream bed, unless for intermittent stream beds this criterion is waived in writing pursuant to a determination by the District Engineer, as specified below, that the project complies with all terms and conditions of this NWP and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;

c. For discharges causing the loss of greater than 300 linear feet of intermittent stream beds, the permittee notifies the District Engineer in accordance with the ''Notification'' General Condition 13. In such cases, to be authorized the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine the adverse environmental effects are minimal both individually and cumulatively, and waive this limitation in writing before the permittee may proceed;

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

e. 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 ⅒-acre of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, provided the permittee notifies the District Engineer in accordance with the ''Notification'' 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 US. 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 that are exempt from Section 404 permit requirements);

f. The permittee must avoid and minimize discharges into waters of the US 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 US and why additional minimization cannot be achieved);

g. The stormwater management facility must comply with General Condition 21 and be designed using 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;

h. 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

i. 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 US, plus the acreage loss of waters of the US resulting from support activities, cannot exceed ½-acre;

b. The permittee must avoid and minimize discharges into waters of the

US 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 US 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 US;

f. The permittee must use 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 CWA section 402 permit may be required;

i. All activities authorized 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 US 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 US for multiple mining activities on several designated parcels of a single and complete mining operation can be authorized by this NWP provided the ½-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 US 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 US 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 US within 100 feet of the ordinary high water mark of headwater streams. The term's ''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. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow.

4. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life-cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. 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 that may have been added by the Division Engineer (see 33 CFR 330.4(e)). Additionally, 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 water quality management measures, the permittee must provide water quality management measures that will ensure that the authorized work does not result in more than minimal degradation of water quality (or the Corps determines that compliance with state or local standards, where applicable, will ensure no more than minimal adverse effect on water quality). An important component of water quality management 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 water quality management 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).

This condition is only applicable to projects that have the potential to affect water quality. While appropriate measures must be taken, in most cases it is not necessary to conduct detailed studies to identify such measures or to require monitoring.

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 (ESA), 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 ESA 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 NWP does not authorize the ''take'' of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with ''incidental take'' provisions, etc.) from the USFWS or the NMFS, both lethal and non-lethal ''takes'' of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the USFWS and NMFS or 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 District Engineer has complied with the provisions of 33 CFR part 325, Appendix C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

13. *Notification.*

(a) *Timing;* where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the notification is complete within 30 days of the date of receipt and can request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the notification is still incomplete and the PCN review process will not commence until all of the requested information has been received by the District Engineer. The prospective permittee shall not begin the activity:

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

(2) If notified in writing by the District or Division Engineer that an Individual Permit is required; or

(3) Unless 45 days have passed from the District Engineer's receipt of the complete notification and the prospective permittee has not received written notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

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

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), Regional General Permit(s), or Individual Permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP (Sketches usually clarify the project and when provided result in a quicker decision.);

(4) For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (e.g., submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

(5) For NWP 7 (Outfall Structures and Maintenance), the PCN must include information regarding the original design capacities and configurations of those areas of the facility where maintenance dredging or excavation is proposed;

(6) For NWP 14 (Linear Transportation Crossings), the PCN must include a compensatory mitigation proposal to offset permanent losses of waters of the US and a statement describing how temporary losses of waters of the US will be minimized to the maximum extent practicable;

(7) For NWP 21 (Surface Coal Mining Activities), the PCN must include an Office of Surface Mining (OSM) or state-approved mitigation plan, if applicable. To be authorized by this NWP, the District Engineer must determine that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing;

(8) For NWP 27 (Stream and Wetland Restoration), the PCN must include documentation of the prior condition of the site that will be reverted by the permittee;

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

(i) Any past use of this NWP by the Individual Permittee and/or the permittee's spouse;

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

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring ¼-acre or less will not require a formal on-site delineation. However, the applicant shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than ¼-acre in size, formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See paragraph 13(f));

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

(10) For NWP 31 (Maintenance of Existing Flood Control Projects), the prospective permittee must either notify the District Engineer with a PCN prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

(i) Sufficient baseline information identifying the approved channel depths and configurations and existing facilities. Minor deviations are authorized, provided the approved flood control protection or drainage is not increased;

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

(iii) Location of the dredged material disposal site;

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

(12) For NWPs 39, 43 and 44, the PCN must also include a written statement to the District Engineer explaining how avoidance and minimization for losses of waters of the US were achieved on the project site;

(13) For NWP 39 and NWP 42, the PCN must include a compensatory mitigation proposal to offset losses of waters of the US or justification explaining why compensatory mitigation should not be required. For discharges that cause the loss of greater than 300 linear feet of an intermittent stream bed, to be authorized, the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

(14) For NWP 40 (Agricultural Activities), the PCN must include a compensatory mitigation proposal to offset losses of waters of the US. This NWP does not authorize the relocation of greater than 300 linear-feet of existing serviceable drainage ditches constructed in non-tidal streams unless, for drainage ditches constructed in intermittent non-tidal streams, the District Engineer waives this criterion in writing, and the District Engineer has determined that the project complies with all terms and conditions of this NWP, and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;

(15) For NWP 43 (Stormwater Management Facilities), the PCN must include, for the construction of new stormwater management facilities, a maintenance plan (in accordance with state and local requirements, if applicable) and a compensatory mitigation proposal to offset losses of waters of the US. For discharges that cause the loss of greater than 300 linear feet of an intermittent stream bed, to be authorized, the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

(16) For NWP 44 (Mining Activities), the PCN must include a description of all waters of the US adversely affected by the project, a description of measures taken to minimize adverse effects to waters of the US, a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for all aggregate mining activities in isolated waters and non-tidal wetlands adjacent to headwaters and any hard rock/mineral mining activities);

(17) For activities that may adversely affect Federally-listed endangered or threatened species, the PCN must include the name(s) of those endangered or threatened species that may be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work; and

(18) For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

(c) *Form of Notification:* The standard Individual Permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b) (1)–(18) of General Condition 13. A letter containing the requisite information may also be used.

(d) *District Engineer's Decision:* In reviewing the PCN for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may submit a proposed mitigation plan with the PCN to expedite the process. The District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the District Engineer will notify the permittee and include any conditions the District Engineer deems necessary. The District Engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the District Engineer will expeditiously review the proposed compensatory mitigation plan. The District Engineer must review the plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the District Engineer to

be minimal, the District Engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then the District Engineer will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an Individual Permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the District Engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the US will occur until the District Engineer has approved a specific mitigation plan.

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

For activities requiring notification to the District Engineer that result in the loss of greater than ½-acre of waters of the US, the District Engineer will provide immediately (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy to the appropriate Federal or state offices (USFWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. As required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act, the District Engineer will provide a response to NMFS within 30 days of receipt of any Essential Fish Habitat conservation recommendations. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(f) *Wetland Delineations:* Wetland delineations must be prepared in accordance with the current method required by the Corps (For NWP 29 see paragraph (b)(9)(iii) for parcels less than (¼-acre in size). The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

14. *Compliance Certification.* Every permittee who has received NWP verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter and will include:

(a) A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions;

(b) A statement that any required mitigation was completed in accordance with the permit conditions; and

(c) The signature of the permittee certifying the completion of the work and mitigation.

15. *Use of Multiple Nationwide Permits.* The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the US authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit (e.g. if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the US for the total project cannot exceed ⅓-acre).

16. *Water Supply Intakes.* No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

17. *Shellfish Beds.* No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. *Suitable Material.* No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the CWA).

19. *Mitigation.* The District Engineer will consider the factors discussed below when determining the acceptability of appropriate and practicable mitigation necessary to offset adverse effects on the aquatic environment that are more than minimal.

(a) The project must be designed and constructed to avoid and minimize adverse effects to waters of the US to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland impacts requiring a PCN, unless the District Engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement. Consistent with National policy, the District Engineer will establish a preference for restoration of wetlands as compensatory mitigation, with preservation used only in exceptional circumstances.

(d) Compensatory mitigation (i.e., replacement or substitution of aquatic resources for those impacted) will not be used to increase the acreage losses allowed by the acreage limits of some of the NWPs. For example, ¼-acre of wetlands cannot be created to change a ¾-acre loss of wetlands to a ½-acre loss associated with NWP 39 verification. However, ½-acre of created wetlands can be used to reduce the impacts of a ½-acre loss of wetlands to the minimum impact level in order to meet the

minimal impact requirement associated with NWPs.

(e) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or upland vegetated buffers to protect open waters such as streams; and replacing losses of aquatic resource functions and values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., easements, deed restrictions) of vegetated buffers to open waters. In many cases, vegetated buffers will be the only compensatory mitigation required. Vegetated buffers should consist of native species. The width of the vegetated buffers required will address documented water quality or aquatic habitat loss concerns. Normally, the vegetated buffer will be 25 to 50 feet wide on each side of the stream, but the District Engineers may require slightly wider vegetated buffers to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the Corps will determine the appropriate compensatory mitigation (e.g., stream buffers or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where vegetated buffers are determined to be the most appropriate form of compensatory mitigation, the District Engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland impacts.

(g) Compensatory mitigation proposals submitted with the ''notification'' may be either conceptual or detailed. If conceptual plans are approved under the verification, then the Corps will condition the verification to require detailed plans be submitted and approved by the Corps prior to construction of the authorized activity in waters of the US.

(h) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases that require compensatory mitigation, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

20. *Spawning Areas.* Activities, including structures and work in navigable waters of the US or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. *Management of Water Flows.* To the maximum extent practicable, the activity must be designed to maintain preconstruction downstream flow conditions (e.g., location, capacity, and flow rates). Furthermore, the activity must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The activity must, to the maximum extent practicable, provide for retaining excess flows from the site, provide for maintaining surface flow rates from the site similar to preconstruction conditions, and provide for not increasing water flows from the project site, relocating water, or redirecting water flow beyond preconstruction conditions. Stream channelizing will be reduced to the minimal amount necessary, and the activity must, to the maximum extent practicable, reduce adverse effects such as flooding or erosion downstream and upstream of the project site, unless the activity is part of a larger system designed to manage water flows. In most cases, it will not be a requirement to conduct detailed studies and monitoring of water flow.

This condition is only applicable to projects that have the potential to affect waterflows. While appropriate measures must be taken, it is not necessary to conduct detailed studies to identify such measures or require monitoring to ensure their effectiveness. Normally, the Corps will defer to state and local authorities regarding management of water flow.

22. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to the acceleration of the passage of water, and/or the restricting its flow shall be minimized to the maximum extent practicable. This includes structures and work in navigable waters of the US, or discharges of dredged or fill material.

23. *Waterfowl Breeding Areas.* Activities, including structures and work in navigable waters of the US or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

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

25. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment. The District Engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the US are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the US may be authorized by the above NWPs in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the USFWS or the NMFS has concurred in a determination of compliance with this condition.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

26. *Fills Within 100-Year Floodplains.* For purposes of this General Condition, 100-year floodplains will be identified through the existing Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps.

(a) *Discharges in Floodplain; Below Headwaters.* Discharges of dredged or fill material into waters of the US within the mapped 100-year floodplain, below

headwaters (i.e. five cfs), resulting in permanent above-grade fills, are not authorized by NWPs 39, 40, 42, 43, and 44.

(b) *Discharges in Floodway; Above Headwaters.* Discharges of dredged or fill material into waters of the US within the FEMA or locally mapped floodway, resulting in permanent above-grade fills, are not authorized by NWPs 39, 40, 42, and 44.

(c) The permittee must comply with any applicable FEMA-approved state or local floodplain management requirements.

27. *Construction Period.* For activities that have not been verified by the Corps and the project was commenced or under contract to commence by the expiration date of the NWP (or modification or revocation date), the work must be completed within 12-months after such date (including any modification that affects the project).

For activities that have been verified and the project was commenced or under contract to commence within the verification period, the work must be completed by the date determined by the Corps.

For projects that have been verified by the Corps, an extension of a Corps approved completion date maybe requested. This request must be submitted at least one month before the previously approved completion date.

D. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other Federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project.

E. Definitions

B*est Management Practices (BMPs):* BMPs are policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural. A BMP policy may affect the limits on a development.

Compensatory Mitigation: For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Creation: The establishment of a wetland or other aquatic resource where one did not formerly exist.

Enhancement: Activities conducted in existing wetlands or other aquatic resources that increase one or more aquatic functions.

Ephemeral Stream: An ephemeral stream has flowing water only during and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Farm Tract: A unit of contiguous land under one ownership that is operated as a farm or part of a farm.

Flood Fringe: That portion of the 100-year floodplain outside of the floodway (often referred to as ''floodway fringe'').

Floodway: The area regulated by Federal, state, or local requirements to provide for the discharge of the base flood so the cumulative increase in water surface elevation is no more than a designated amount (not to exceed one foot as set by the National Flood Insurance Program) within the 100-year floodplain.

Independent Utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Intermittent Stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of Waters of the US: Waters of the US that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the US is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and values. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the US temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the US. Impacts to ephemeral waters are only not included in the acreage or linear foot measurements of loss of waters of the US or loss of stream bed, for the purpose of determining compliance with the threshold limits of the NWPs.

Non-tidal Wetland: A non-tidal wetland is a wetland (i.e., a water of the US) that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open Water: An area that, during a year with normal patterns of precipitation, has standing or flowing water for sufficient duration to establish an ordinary high water mark. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. The term ''open water'' includes rivers, streams, lakes, and ponds. For the purposes of the NWPs, this term does not include ephemeral waters.

Perennial Stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Permanent Above-grade Fill: A discharge of dredged or fill material into waters of the US, including wetlands, that results in a substantial increase in ground elevation and permanently converts part or all of the waterbody to dry land. Structural fills authorized by NWPs 3, 25, 36, etc. are not included.

Preservation: The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to

ensure protection and/or enhancement of the overall aquatic ecosystem.

Restoration: Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.

Riffle and Pool Complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Single and Complete Project: The term ''single and complete project'' is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers (see definition of independent utility). For linear projects, the ''single and complete project'' (i.e., a single and complete crossing) will apply to each crossing of a separate water of the US (i.e., a single waterbody) at that location. An exception is for linear projects crossing a single waterbody several times at separate and distant locations: each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies.

Stormwater Management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater Management Facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and BMPs, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream Bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream Channelization: The manipulation of a stream channel to increase the rate of water flow through the stream channel. Manipulation may include deepening, widening, straightening, armoring, or other activities that change the stream cross-section or other aspects of stream channel geometry to increase the rate of water flow through the stream channel. A channelized stream remains a water of the US, despite the modifications to increase the rate of water flow.

Tidal Wetland: A tidal wetland is a wetland (i.e., water of the US) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line (i.e., spring high tide line) and are inundated by tidal waters two times per lunar month, during spring high tides.

Vegetated Buffer: A vegetated upland or wetland area next to rivers, streams, lakes, or other open waters which separates the open water from developed areas, including agricultural land. Vegetated buffers provide a variety of aquatic habitat functions and values (e.g., aquatic habitat for fish and other aquatic organisms, moderation of water temperature changes, and detritus for aquatic food webs) and help improve or maintain local water quality. A vegetated buffer can be established by maintaining an existing vegetated area or planting native trees, shrubs, and herbaceous plants on land next to open-waters. Mowed lawns are not considered vegetated buffers because they provide little or no aquatic habitat functions and values. The establishment and maintenance of vegetated buffers is a method of compensatory mitigation that can be used in conjunction with the restoration, creation, enhancement, or preservation of aquatic habitats to ensure that activities authorized by NWPs result in minimal adverse effects to the aquatic environment. (See General Condition 19.)

Vegetated Shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: A waterbody is any area that in a normal year has water flowing or standing above ground to the extent that evidence of an ordinary high water mark is established. Wetlands contiguous to the waterbody are considered part of the waterbody.

[FR Doc. 02–539 Filed 1–14–02; 8:45 am]

BILLING CODE 3710–92–P

ADDRESSES). The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the permit action summaries are those of the applicant and do not necessarily reflect the views of NMFS.

Species Covered in This Notice

The following species are covered in this notice:

Sea turtles

Threatened and endangered green turtle (*Chelonia mydas*)
Endangered hawksbill turtle (*Eretmochelys imbricata*)
Endangered Kemp's ridley turtle (*Lepidochelys kempii*)
Endangered leatherback turtle (*Dermochelys coriacea*)
Threatened loggerhead turtle (*Caretta caretta*)

Application 1361

The applicant is applying for a 5–year permit to trawl for turtles, as needed, at dredge and other construction/destruction sites to remove the turtles to a safe location. The turtles will be captured, tagged, measured and released offshore away from the dredging activities. The applicant expects to capture and relocate 95 green, 11 hawksbill, 160 loggerhead, 14 Kemp's ridley and 4 leatherback turtles on the Atlantic coast and 105 green, 17 hawksbill, 160 loggerhead, 50 Kemp's ridley and 11 leatherback turtles on the Gulf coast.

Dated: February 7, 2002.

Jill Lewandowski,

Acting Chief, Permits, Conservation, and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 02–3522 Filed 2–12–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Issuance of Nationwide Permits; Notice; Correction

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final notice; correction.

SUMMARY: This document contains corrections to the final notice of issuance of Nationwide Permits (NWPs) which was published in the **Federal Register** on Tuesday, January 15, 2002 (67 FR 2020–2095).

ADDRESSES: HQUSACE, ATTN: CECW–OR, 441 ''G'' Street, NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson, at (703) 428–7570, Mr. Kirk Stark, at (202) 761–4664 or Ms. Leesa Beal at (202) 761–4599 or access the U.S. Army Corps of Engineers Regulatory Home Page at: http://www.usace.army.mil/inet/functions/cw/cecwo/reg/.

SUPPLEMENTARY INFORMATION: In the **SUMMARY** section on page 2020, the third and fourth sentences are corrected to read: ''All NWPs except NWPs 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44 expire on February 11, 2002. Existing NWPs 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44 expire on March 18, 2002.'' In the last sentence of the **SUMMARY** section, the expiration date is corrected as ''March 18, 2007'', instead of ''March 19, 2007''.

On page 2020, in second sentence of the **DATES** section, the expiration date is corrected as ''March 18, 2007'', instead of ''March 19, 2007''. Therefore, the NWPs published in the January 15, 2002; **Federal Register** will expire on March 18, 2007, five years from their effective date of March 18, 2002.

On page 2020, in the fifth paragraph of the *Background* section, the third and fourth sentences are corrected to read: ''All NWPs except NWPs 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44 expire on February 11, 2002. Existing NWPs 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44 expire on March 18, 2002.'' The expiration date in the last sentence of this paragraph is corrected as ''March 18, 2007'', instead of ''March 19, 2007''.

On page 2020, the paragraph in the section entitled ''*Grandfather Provision for Expiring NWPs at 33 CFR 330.6*'' is corrected to read: ''Activities authorized by the current NWPs issued on December 13, 1996, (except NWPs 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44), that have commenced or are under contract to commence by February 11, 2002, will have until February 11, 2003, to complete the activity. Activities authorized by NWPs 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44, that were issued on March 9, 2000, that are commenced or under contract to commence by March 18, 2002, will have until March 18, 2003, to complete the activity.''

On page 2020, in the ''*Clean Water Act Section 401 Water Quality Certification (WQC) and Coastal Zone Management Act (CZMA) Consistency Agreement*'' section, the date in the fifth sentence is corrected as ''February 11, 2002'', instead of ''February 11, 2001''.

On page 2023, third column, last sentence, the number 29 is replaced with the number 19, because this sentence refers to General Condition 19.

On page 2024, first column, in the fourth sentence of the last paragraph the phrase ''less than'' is replaced by ''greater than'' because the 30 day completeness review period for NWP pre-construction notifications is greater than the 15 day completeness review period for standard permit applications.

On page 2031, second column, second full paragraph, the number 31 is replaced with the number 3 because this paragraph refers to NWP 3.

On page 2044, second column, fourth complete paragraph, the title is corrected to read ''Stream and Wetland Restoration Activities'' because that is the title of NWP 27.

On page 2054, second column, the year cited in the third sentence of the second paragraph is the year 2000, not 1996.

On page 2058, third column, in the second sentence of the second complete paragraph the word ''intermittent'' is inserted before the phrase ''stream bed'' because the waiver for filling or excavating greater than 300 linear feet of stream beds can apply only to intermittent stream beds.

On page 2072, third column, last sentence, the number 19 is inserted after the term ''General Condition'' since this sentence refers to General Condition 19.

On page 2076, second column, the street address for the Walla Walla District Engineer is corrected to read ''201 N. Third Avenue''.

On page 2080, second column, third paragraph from the top of the column (in the ''Notification'' section of NWP 12), the word ''or'' at the end of paragraph (e) is deleted and the period at the end of the fourth paragraph (paragraph (f)) is replaced with ''; or''.

On page 2080, second column, paragraph (a) of NWP 13 is corrected to read: ''No material is placed in excess of the minimum needed for erosion protection;'' The change was not intended and we are correcting this paragraph by reinstating the original text as it appeared in the version of NWP 13 published in the December 13, 1996, **Federal Register** (61 FR 65915).

On page 2080, third column, the word ''or'' is inserted at the end of paragraph (a)(1) of NWP 14, Linear Transportation Projects. Paragraph (a) of NWP 14 is corrected to read: ''a. This NWP is subject to the following acreage limits: (1) For linear transportation projects in non-tidal waters, provided the discharge does not cause the loss of greater than ½-acre of waters of the US; or (2) For linear transportation projects in tidal waters, provided the discharge does not cause the loss of greater than ⅓-acre of waters of the US.''

On page 2085, second column, the last sentence of NWP 36 is corrected to read as follows: ''Dredging to provide

access to the boat ramp may be authorized by another NWP, regional general permit, or individual permit pursuant to section 10 if located in navigable waters of the United States. * * *'' The change was not intended and we are correcting this paragraph by reinstating the original text as it appeared in the version of NWP 36 published in the December 13, 1996, **Federal Register** (61 FR 65919).

On page 2086, in the second full paragraph of the second column, ''paragraph (e)'' in the second sentence is replaced with ''paragraph (f)'' and ''paragraph (i)'' in the third sentence is replaced with ''paragraph (j)'' to accurately cite the previous paragraphs of NWP 39. The last two sentences of the paragraph before the subdivision paragraph were incorrectly divided into two sentences from the original single sentence and identified as being related to General Condition 15. This change was not intended and we are correcting this paragraph by reinstating the original last sentence as it exists in the March 9, 2000, text of NWP 39 (65 FR 12890).

On page 2086, middle column, the parenthetical statement at the end of the **Note** at the end of NWP 39 is corrected to read ''* * * (except for ephemeral waters, which do not require PCNs under paragraph (c)(2), above; however, activities that result in the loss of greater than 1/10 acre of ephemeral waters would require PCNs under paragraph (c)(1), above).'' The addition to the **Note** was intended to clarify that under paragraph (c)(2) only the loss of ephemeral open waters were not included in the requirement for a pre-construction notification (PCN). However, under paragraph (c)(1) all ephemeral waters of the United States are included in the measurement for the 1/10 acre PCN requirement. The correction is needed because the statement in the parentheses could be incorrectly interpreted to apply to paragraph (c)(1) and possibly to all PCNs, not just those affected by paragraph (c)(2).

For clarity, we are providing the text of NWP 39 in its entirety, with the corrections described above:

39. Residential, Commercial, and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the U.S., 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 1/12-acre of non-tidal waters of the U.S., excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear-feet of a stream bed, unless for intermittent stream beds this criterion is waived in writing pursuant to a determination by the District Engineer, as specified below, that the project complies with all terms and conditions of this NWP and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;

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 1/10-acre of non-tidal waters of the US, 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); or

(3) The discharge causes the loss of greater than 300 linear feet of intermittent stream bed. In such case, to be authorized the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

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 US at the project site to the maximum extent practicable. The notification, when required, must include a written statement explaining how avoidance and minimization of losses of waters of the US were achieved on the project site. Compensatory mitigation will normally be required to offset the losses of waters of the US. (See General Condition 19.) The notification must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the US. 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 US exceeding 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 1/10-acre or less of waters of the US, 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 US (*e.g.,* 1/2-acre of emergent wetlands); and (5) The type and acreage of any compensatory mitigation used to offset the loss of waters of the US (*e.g.,* 1/2-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.

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 that is 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 be determined on a case-by-case basis by the District Engineer for addressing 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 ½ acre).

Subdivisions: For residential subdivisions, the aggregate total loss of waters of US authorized by NWP 39 can not exceed ½-acre. This includes any loss of waters associated with development of individual subdivision lots. (Sections 10 and 404)

Note: Areas where wetland vegetation is not present should be determined by the presence or absence of an ordinary high water mark or bed and bank. Areas that are waters of the US based on this criterion would require a PCN although water is infrequently present in the stream channel (except for ephemeral waters, which do not require PCNs under paragraph (c)(2), above; however, activities that result in the loss of greater than 1/10 acre of ephemeral waters would require PCNs under paragraph (c)(1), above).

On page 2088, in the sixth sentence of the first paragraph in the first column, the phrase ''an adequate water quality management plan'' is replaced with the phrase ''adequate water quality management measures'' to reflect the modified language in General Condition 9. This sentence is corrected to read ''The facility must have adequate water quality management measures 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.''

On page 2089, first column, the second sentence of paragraph (c) of NWP 44 is corrected to read ''Normally, the water quality management measures required by General Condition 9 should address these impacts;''. In addition, the second sentence of paragraph (i) of NWP 44 is corrected to read ''Further the District Engineer may require water quality management measures to ensure the authorized work results in minimal adverse effects to water quality;'' These corrections are necessary to reflect the modified language in General Condition 9.

On page 2089, third column, the text of General Condition 6 is corrected to read: ''The activity must comply with any regional conditions that 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.'' The change to General Condition 6 that was published in the January 15, 2002, **Federal Register** was not intended and we are correcting this sentence by reinstating the original text as it existed in the March 9, 2000, NWPs.

On page 2090, first column, the word ''Section'' in the parenthetical at the end of General Condition 10 is replaced with ''33 CFR'' so that the parenthetical reads ''(see 33 CFR 330.4(d))''.

On page 2090, at the top of the second column, the second Internet URL is replaced with ''* * * *http://www.nmfs.noaa.gov/prot_res/overview/es.html* * * *'' because the Internet address for the National Marine Fisheries Service home page for endangered species has been changed.

On page 2090, third column, in paragraph (b)(4) of General Condition 13, NWP 40 should be added to the list of NWPs that require submission of delineations of special aquatic sites with pre-construction notifications. Therefore, paragraph (b)(4) of General Condition 13 is corrected to read ''For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 40, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (*e.g.,* submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));''

On page 2090, third column, in paragraph (b)(6) of General Condition 13, the word ''Projects'' replaces the word ''Crossings'', because the title of NWP 14 is ''Linear Transportation Projects''.

On page 2090, third column, in paragraph (b)(8) of General Condition 13, the word ''Activities'' is inserted after the word ''Restoration'' because the title of NWP 27 is ''Stream and Wetland Restoration Activities''.

On page 2091, first column, in paragraph (b)(10) of General Condition 13, the word ''Projects'' is replaced with the word ''Facilities'' because the title of NWP 31 is ''Maintenance of Existing Flood Control Facilities''.

On page 2094, third column, we are correcting the definition of ''Loss of Waters of the US'' by deleting the last sentence and inserting the following sentence after the fourth sentence of this definition: ''Impacts to ephemeral streams are not included in the linear foot measurement of loss of stream bed for the purpose of determining compliance with the linear foot limits of NWPs 39, 40, 42, and 43.''

Due to the number of corrections made to the definition of ''Loss of Waters of the US'', we are providing the text of this definition in its entirety, with the corrections described above:

Loss of Waters of the US: Waters of the US that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the US is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and values. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Impacts to ephemeral streams are not included in the linear foot measurement of loss of stream bed for the purpose of determining compliance with the linear foot limits of NWPs 39, 40, 42, and 43. Waters of the US temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the US.

In the January 15, 2002, **Federal Register**, it was stated that the definition was being revised (to clarify that ephemeral waters and streams are not included in the acreage or linear thresholds for NWPs) to comport with language in the preamble of the March 9, 2000 **Federal Register** notice. However, the language in the preamble of the March 9, 2000 **Federal Register** notice (65 FR 12881, third column) does not support this revision. Rather, the referenced preamble states, ''During our review of the comments received in response to the July 21, 1999, **Federal Register** notice, we found an error in the proposed definition of the term, ''loss of waters of the United States.'' In the fourth sentence of the draft definition, we stated that the loss of stream bed

includes the linear feet of perennial or intermittent stream bed that is filled or excavated. This statement is inaccurate because ephemeral stream bed that is filled or excavated can also be considered a loss of waters of the United States. However, the 300 linear foot limit for stream beds filled or excavated does not apply to ephemeral streams. We have modified this sentence to define the loss of stream bed as the linear feet of stream bed that is filled or excavated.'' Thus, the modification of this definition was intended to clarify that activities that involve filling or excavating ephemeral streams are not included in the linear foot limits for filling or excavating stream beds in NWPs 39, 40, 42, and 43. However, it was not intended to exempt ephemeral waters or streams from calculations of impacted acreages to determine PCN or maximum acreage requirements in accordance with NWPs 39, 40, 42, and 43.

In the August 9, 2001, **Federal Register** notice (66 FR 42099) we proposed to modify the definition of ''Loss of Waters of the US'' by adding the sentence ''* * * The loss of stream bed includes the linear feet of perennial stream or intermittent stream that is filled or excavated * * *''. The proposed change was in response to a commitment to clearly state in the text of the NWPs (which includes the definitions) that the 300 linear foot limit in NWPs 39, 40, 42, and 43 for filling and excavating stream beds would only apply to intermittent and perennial streams, not to ephemeral streams.

In the January 15, 2002, **Federal Register** notice (67 FR 2074–2075) we erroneously stated that both the acreage and linear limits of the NWPs do not apply to ephemeral waters. This was never intended to be adopted as policy for the NWPs or the Corps regulatory program. A previously stated, in the first column of page 2075 of the January 15, 2002, **Federal Register** notice, we refer to page 12881 of the March 9, 2000, **Federal Register** notice, which only discusses the 300 linear foot limit, not the acreage limits of the NWPs. Our intent is to continue to apply acreage limits of NWPs to activities that result in the permanent loss of ephemeral waters, but the linear foot limits of the NWPs (*i.e.,* NWPs 39, 40, 42, and 43) for filling or excavating stream beds would not apply to activities that involve filling or excavating ephemeral streams. The last sentence of the definition of ''Loss of Waters of the US'' as published in the January 15, 2002, **Federal Register** notice does not comport with remainder of this NWP package. Therefore, we are correcting this definition as described above.

We believe that correcting the text of NWP 39 and the definition of ''Loss of Waters of the US'' through the publication of this correction notice is appropriate. Nevertheless, in order to give all interested parties further opportunity to comment on this matter, we intend to publish a **Federal Register** notice to solicit public comments on those two corrections. If we determine that any other matter relating to the final NWPs requires correction or clarification, but that matter was not adequately dealt with in this correction notice, we will address that additional matter in the forthcoming **Federal Register** notice, as well. We expect to publish that **Federal Register** notice within a few weeks.

Dated: February 7, 2002.

Lawrence A. Lang,

Assistant Chief, Operations Division, Directorate of Civil Works.

[FR Doc. 02–3555 Filed 2–12–02; 8:45 am]

BILLING CODE 3710–92–P

DEPARTMENT OF DEFENSE

Uniformed Services University of the Health Sciences

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Uniformed Services University of the Health Sciences.

TIME AND DATE: 8:00 a.m. to 4:00 p.m., February 5, 2002.

PLACE: Uniformed Services University of the Health Sciences, Board of Regents Conference Room (D3001), 4301 Jones Bridge Road, Bethesda, MD 20814–4799.

STATUS: Open—under ''Government in the Sunshine Act'' (5 U.S.C. 552b(e)(3)).

MATTERS TO BE CONSIDERED:

8:30 a.m. Meeting—Board of Regents

(1) Approval of Minutes—November 14, 2001
(2) Faculty Matters
(3) Department Reports
(4) Financial Report
(5) Report—President, USUHS
(6) Report—Dean, School of Medicine
(7) Report—Dean, Graduate School of Nursing
(8) Comments—Chairman, Board of Regents
(9) New Business

CONTACT PERSON FOR MORE INFORMATION: Mr. Bobby D. Anderson, Executive Secretary, Board of Regents, (301) 295–3116.

Dated: February 8, 2002.

Linda Bynum,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 02–3683 Filed 2–11–02; 3:32 pm]

BILLING CODE 5001–08–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 15, 2002.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Lauren Wittenberg, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10202, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address *Lauren_Wittenberg@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

APPENDIX C

GIS METHODS

Appendix C. GIS METHODS

Introduction

Spatial data used in the Environmental Assessment (EA) were obtained from a variety of federal, state, and local government agencies. Each digital thematic map layer (coverage) was projected into a common coordinate system for registration, or correct spatial alignment. However, coverages provided by these agencies had been digitally captured using different techniques at different source scales. These disparities depended upon the agency of origination and made absolute registration of all coverages used in the analysis problematic. Nevertheless, inaccuracies of registration generally were not seen to exceed 5 meters. This magnitude of error was deemed acceptable given the regional, medium scale scope of the analysis for the EA. Most area counts in the EA have been rounded to the nearest 100 or 1000 acres to account for this variability, with little loss of accuracy or meaningfulness.

Following are explanations of the overlay procedures referenced by figures and tables in the EA. First mention of a coverage is followed by information on how to obtain relevant metadata.

Explanation: Figures 1-3, 3-1, and 3-3

The coverage for survey zones was obtained from USFWS (contact COE for metadata file). The coverage showing units for the Draft Recovery Plan was tablet-digitized from maps in that document and snapped to the section line coverage maintained by ASLD (see "http://www.land.state.az.us/alris/index.html" for metadata). It expected that USFWS will release an official coverage for recovery units in the near future. The coverage for historic range was tablet-digitized from a USFWS document (getting citation).

A digital elevation model of 90 meter resolution (see "http://usgsbrd.srnr.arizona.edu/nbii/" for metadata) was used to map the 4000' elevation contour. The result served to clip the survey zones coverage to yield the GSOA map.

Explanation: Table 3-1

AGFD provided records which described the location of owl sightings to the nearest township. These townships were selected from the townships coverage maintained by ASLD (see "http://www.land.state.az.us/alris/index.html" for metadata). Townships which straddled survey zones were assigned to the higher-numbered zone.

Explanation: Table 3-2

A coverage for the Brown-Lowe-Pase vegetation classifications (see "http://usgsbrd.srnr. arizona.edu/nbii/" for metadata) was used to select appropriate habitat types and then to clip the coverage for survey zones within the GSOA.

Explanation: Table 3-4

COE provided a tabular database of Section 404 permit records (RAMS2). Each record contained positional information that allowed it to be mapped into the GIS. COE and SWCA staff screened these records for duplicates and other anomalies; several long linear utility and telecommunications projects for which multiple/stacked NWPs were issued were edited to represent only single records in the database. Note: the

majority of records contained no data for impacts to WUS. A legend editing tool was used to derive the natural breaks classification.

Explanation: Table 3-5 (see Figure C-1)

To estimate WUS in the project area, SWCA staff delineated flow channels on aerial photography. In particular, staff relied upon aerial orthophotography obtained at no cost from the USGS via University of Arizona. An aerial orthophoto is an image that has been processed to remove variations in scale due to tilt of the aircraft and relief displacement. The USGS product is known as a Digital Orthophoto Quarter Quadrangle (DOQQ; see "http://aria.arizona.edu/" for metadata), as each image covers a quandrant of a 7.5' USGS topographic map quadrangle. The resolution of this b/w imagery is 1 meter.

A DOQQ sampling theme was produced by finding midpoints along the sides of polygons from the 7.5' quad reference theme maintained by ASLD ASLD (see "http://www.land.state.az.us/ alris/index.html" for metadata). The midpoints served as nodes for the generation of new linework from which attributed polygons (sampling units) were built. This set of sampling units was refined by excluding those polygons that fell above the 4000' contour, within the Tucson Urban Exclusion area, across the international border with Mexico, or outside the three survey zones proper. The rule for exclusion of a polygon was that less than 50% of its area fell outside the union of these constraints. The exception was the international border: a sampling unit for which any portion crossed the border was excluded for obvious reasons. Each remaining sampling unit was given a unique identifier.

The sampling units were then grouped by survey zone. It is not uncommon for geographic regions to be stratified into similar areas by means of a known variable such as habitat type, which, by extension, the survey zones represent. Those polygons straddling survey zones were assigned by majority area as above. The three strata were then overlain on a theme depicting areas of likely future development. The future development theme was drawn in broad strokes by buffering existing transportation corridors (selected stretches of interstate highways) and incorporated areas. The width of the buffer was 5 miles. The buffer was not permitted to extend onto tribal lands. The result was a theme showing two areas for the presence/absence of likely development. Each sampling unit per stratum was then assigned to one of these two areas using the majority rule.

Five sampling units were selected from each stratum using a random number generator. Sampling units in areas likely to experience land development were given a twice higher probability of being included in each of the three samples. Sampling was conducted *with replacement* to ease statistical computation, though no units were selected twice. A value for total acres of WUS was photo-interpreted from each DOQQ referenced by a selected sampling unit. Several statistics were calculated for each stratum. These were: an estimate for mean WUS per standard unit area; an estimate for total WUS; the standard error of both estimates; sample variance; and confidence intervals for both estimates. (See next paragraph for an explanation of "standard unit area".) These same statistics were also calculated for the entire GSOA. To calculate statistics for each stratum, the Horvitz-Thompson method, which accounts for unequal probabilities of being sampled, was chosen (Thompson 1992). To calculate statistics for the combined strata, an appropriate method that allows for the use of any type of sampling design per and across strata (e.g. the unequal probability method used within strata in this study) was chosen (Thompson 1992).

The DOQQs contain irregularities that cause the surface area shown to vary from image to image. The irregularities stem from photogrammetric processing on part of the USGS's subcontractor. This necessitated developing a standard unit area by which to judge WUS. A standard unit area polygon of 10,000 square meters was drawn to include nearly all the surface area of any sampled DOQQ yet be subtended by any DOQQ's border. Prior to the on-screen digitizing process, the polygon was centered onto each DOQQ, and

digitized WUS were clipped to this standard. This avoided digitizing WUS to the image edge on a set of DOQQs with varying extents.

Explanation: Table 3-6

The RAMS2 records that had been mapped into the GIS were grouped by survey zone using an overlay operation. They were also grouped by frequency of occurence as already described. Impacts to WUS were summed for each of the nine groupings of frequency by survey zone. Note: Again, the majority of RAMS2 records have no data for impacts to WUS.

Explanation: Table 3-7

A coverage for the areas formerly designated as Critical Habitat was obtained from USFWS (see COE for metadata). These data were segmented by an overlay operation to yield acres of critical habitat per survey zone.

Explanation: Table 3-8

Pima County provided a coverage of new construction permits issued from 1-1-97 through early 2001 (see COE for metadata). Pima County was the only jurisdiction able to provide such information in a GIS format. These data were clipped to the temporal scope of the EA (to 12-11-00) and segmented by survey zone using an overlay operation.

Explanation: Figure 3-4

Coverages showing ranches that contain state or BLM leases were obtained from those respective agencies (see COE for metadata). These boundaries were used to select all state and BLM lands from the surface management coverage maintained by ASLD (see "http://www.land.state.az.us/ alris/index.html" for metadata). The Tonto and Corondado Districts of USFS provided coverages showing lands that are excluded from leasing (see COE for metadata). Data from all three agencies was then merged to show public lands that could be subject to grazing pressures.

Explanation: Figure 3-5

Arizona Department of Water Resources (ADWR) provided a coverage showing all registered wells in the state through the third quarter of 2001 (see COE for metadata). Note: this database is incomplete for tribal land. The coverage was clipped to the GSOA.

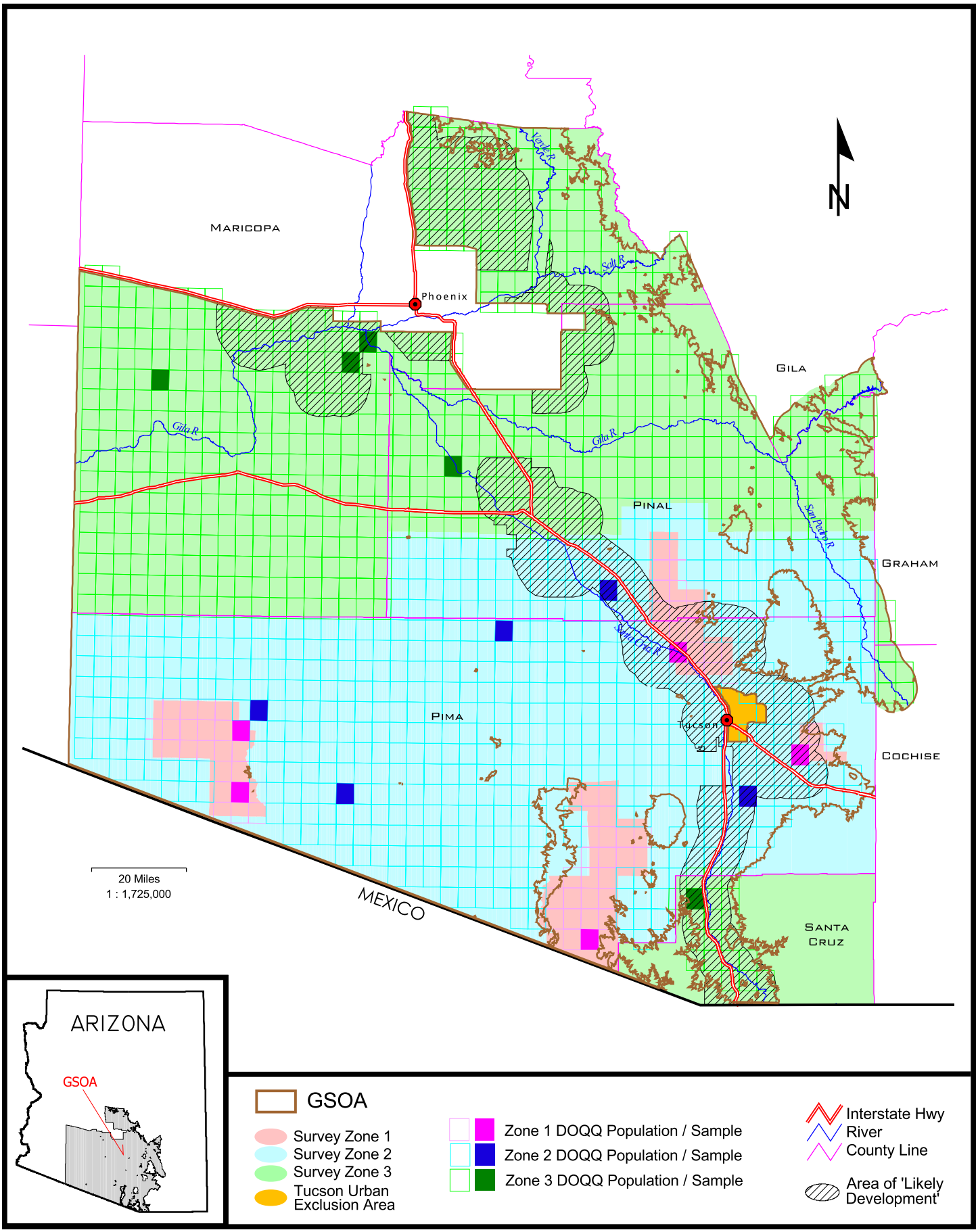

Figure C-1. Illustration of sampling scheme for selection of orthophotography to estimate Waters of the U.S.