NWPs in non-tidal wetlands adjacent to tidal waters instead of prohibiting the use of those NWPs in non-tidal wetlands contiguous to tidal waters. Therefore, the definition of the term ''contiguous wetland'' has been removed from the ''Definitions'' section of the NWPs.

Drainage ditch: We received a variety of comments concerning the proposed definition of this term. One commenter supported the proposed definition. Another commenter agreed that drainage ditches constructed in uplands are not waters of the United States. A commenter stated that a drainage ditch is not a stream and that all activities associated with drainage ditches should be exempt from all permits. A number of commenters stated that channelized streams are not drainage ditches and that the Corps should retain that part of the proposed definition. A commenter requested that the Corps identify methods that will be used to distinguish between a drainage ditch constructed in wetlands and a channelized stream. Two commenters opposed the exclusion of channelized streams in the definition and stated that the proposed definition is contrary to the 404(f)(1) exemption, which considers streams that are channelized to improve drainage to be drainage ditches. Another commenter stated that some drainage ditches are constructed in intermittent and ephemeral streams.

We concur with the last two comments in the previous paragraph, and have removed the last two sentences from the proposed definition. Channelized streams that are maintained as drainage ditches are waters of the United States, but maintenance of these drainage ditches is exempt from Section 404 permit requirements as long as the maintenance activity does not exceed the original drainage ditch design and configuration.

One commenter stated that the portion of the proposed definition that includes the phrase ''otherwise extends the ordinary high water line of existing waters'' is not clear and that this part of the proposed definition could expand the Corps jurisdiction into waters that have always been thought of as man-made extensions which were not considered by some Corps districts as jurisdictional.

This part of the proposed definition is consistent with 33 CFR 328.5, which states that man-made changes may affect the limits of waters of the United States, but ''permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer.'' Therefore, activities that extend the ordinary high water mark may, at the discretion of the District Engineer, expand waters of the United States.

We are proposing to modify the definition of the term ''drainage ditch'' as discussed above.

Ephemeral stream: Two commenters stated that the proposed definition is too broad and subject to various interpretations. One of these commenters recommended that the Corps develop a more specific definition of the limits of jurisdiction, such as drainage area. One commenter suggested that the definition should be changed to exclude drainage ditches.

Using drainage area to differentiate between stream types is not practical because there are many factors, in addition to drainage area, that influence the duration of water flow in streams channels. It is not appropriate to change the definition to specifically exclude drainage ditches, because some drainage ditches may be channelized streams, which are waters of the United States.

A number of commenters disagreed that ephemeral streams are waters of the United States. One of these commenters requested that the Corps specify the circumstances under which ephemeral streams are, or are not, waters of the United States. One commenter requested that the Corps issue guidance to its districts to identify ephemeral streams and provide prospective permittees with maps of streams that require PCNs under the NWP program.

Ephemeral streams are waters of the United States as long as an ordinary high water mark is present and the waterbody meets the criteria in 33 CFR Part 328. If there is no ordinary high water mark, and there are no adjacent wetlands, the area is not a water of the United States. The limit of non-tidal waters of the United States is discussed at 33 CFR Part 328.4(c). It would be too resource intensive to provide maps of streams that require a PCN for the purposes of the NWPs. Instead, districts will determine on a case-by-case basis whether or not a particular stream is ephemeral, intermittent, or perennial. We are proposing to retain the definition.

Farm: For the purposes of the proposed modification of NWP 40, we proposed a definition of the term ''farm'' to help determine what constitutes a single and complete project. Two commenters stated that the proposed definition is too narrow and will add unnecessary complexity for farmers, because using Internal Revenue Service (IRS) tax criteria to identify farms is too complicated.

Because of the changes to the modification of NWP 40, we will use the term ''farm tract'' instead of ''farm'' to determine what constitutes a single and complete project for the purposes of NWP 40. Farm tract determinations are not based on IRS criteria. The Farm Service Agency of the U.S. Department of Agriculture identifies farm tracts. The rationale for basing the single and complete project on farm tracts for NWP 40 is discussed in more detail in the preamble for NWP 40. In the ''Definitions'' section of the NWPs, we are proposing to use the Farm Service Agency's definition of the term ''farm tract,'' as found at 7 CFR Part 718.2, to replace the proposed definition for ''farm.''

Intermittent stream: We received similar comments to those received for the proposed definition of ''ephemeral stream,'' which were discussed above. A number of commenters stated that it is difficult for permit applicants to distinguish between intermittent and ephemeral streams and requested further clarification. One of these commenters recommended that the Corps utilize the ordinary high water mark to distinguish between intermittent and ephemeral streams: if an ordinary high water mark (OHWM) is present, the stream is intermittent; if an OHWM is absent, the stream is ephemeral. Two commenters recommended that the definition distinguish between intermittent streams and man-made ditches. Another commenter stated that intermittent streams should be excluded from the NWPs because under the proposed definition, a swale in a pasture would qualify as a stream.

The proposed definition is adequate to differentiate between intermittent and ephemeral streams. Determinations as to whether a particular stream is perennial, intermittent, or ephemeral will be made by district engineers on a case-by-case basis. These determinations should be based on their general knowledge of flow patterns in the area. District engineers will consider any additional information the permit applicant provides based on actual measurements or modeling. Using the OHWM to distinguish between ephemeral and intermittent streams would be contrary to 33 CFR Part 328. The limit of jurisdiction for intermittent and ephemeral streams is the OHWM. If no OHWM is present, then that channel is not a water of the United States. We do not agree that it is necessary to distinguish between intermittent streams and man-made ditches. An intermittent stream may have been channelized to improve local drainage. Man-made ditches can be constructed in wetlands and other waters of the United

States, such as perennial and intermittent streams, as well as uplands. Man-made ditches constructed in waters of the United States are still considered waters of the United States. If a swale possess an OHWM, it would be considered a water of the United States, if it meets the criteria in 33 CFR Part 328. If a swale lacks an OHWM, but possess wetland hydrology, hydric soils, and a hydrophytic plant community, it may be considered a jurisdictional wetland, unless the swale was constructed in uplands and has not been abandoned. A swale that lacks an OHWM or does not exhibit wetland characteristics is not a water of the United States.

Another commenter requested further clarification to address situations where there is extensive groundwater pumping for crop irrigation. Except in extremely wet years, this activity causes some streams to dry up entirely; without groundwater pumping for irrigation, many of these streams would have flowing water during most of the year or year round.

Adjacent land use changes can affect water flow patterns of streams. Removal of large amounts of groundwater can decrease the duration of water flow through the stream channel over the course of a year. District engineers should base their stream classification determinations on normal circumstances and whether or not the region is experiencing normal rainfall patterns. For example, if the stream has flowing water for only part of a typical year due to normal pumping of groundwater for irrigation or domestic uses, then that stream should be classified as ''intermittent,'' even though it may have been a perennial stream prior to the introduction of the activities that changed the flow pattern. We are proposing to retain this definition.

Loss of waters of the United States: A number of commenters objected to the proposed definition because it includes excavation. These commenters cited the recent decisions by the United States District Court for the District of Columbia in *American Mining Congress* v. *United States Army Corps of Engineers* and the United States Court of Appeals for the District of Columbia Circuit in *National Mining Association et al.* v. *U.S. Army Corps of Engineers.* In these decisions, the District Court overturned the Corps and EPA's revisions to the definition of ''discharge of dredged material,'' which were promulgated on August 25, 1993 (see 58 FR 45008) and the Court of Appeals affirmed the District Court's decision. These commenters said that the definition should not include excavation. Three commenters asserted that the definition should not include, in addition to excavation activities, flooding and draining activities. A number of commenters stated that the definition does not contain any discussion concerning what constitutes an adverse effect.

These recent court decisions do not affect the definition of the term ''loss of waters of the United States.'' Because of these decisions, the Corps does not regulate excavation of waters of the United States under Section 404 of the Clean Water Act if the excavation activity results only in incidental fallback of excavated material. Excavation activities that result in more than incidental fallback of dredged material into waters of the United States require a Section 404 permit and may be authorized by NWP. District engineers will determine whether or not a particular excavation activity requires a Section 404 permit based on the degree of the discharge associated with the excavation activity. In summary, if the discharge resulting from the excavation activity is only incidental fallback, then no Section 404 permit is required. We believe that retaining excavation activities in this definition will reduce confusion for the regulated public because some excavation activities in waters of the United States are still regulated under Section 404 and to exclude excavation activities from this definition would be misleading.

Since the Corps and EPA's revisions to the definition of ''discharge of dredged material'' promulgated on August 25, 1993, were overturned, the criteria concerning what constitutes an adverse effect for the purposes of Section 404 of the Clean Water Act has become narrower in scope. Regulatory Guidance Letters 90–5 and 88–06 were issued prior to the August 25, 1993, rule and provide guidance relevant to this issue. An activity that converts a wetland to another use can be considered a loss of waters of the United States and regulated under Section 404 if that activity causes the loss of, or substantially modifies, waters of the United States by eliminating or greatly reducing the principal valuable functions of those waters. Losses of waters of the United States can occur either by direct impacts (*e.g.*, covering by fill) or by closely-related indirect impacts (*e.g.*, the changes in vegetation that occur after a swamp is flooded by constructing a dam, killing all of the trees in the flooded area). Any indirect adverse effects factored into the acreage measurement of ''loss of waters of the United States'' must eliminate or substantially impair the principal valuable functions that the waterbody provided prior to conducting the activity. Indirect adverse effects such as backwater flooding and dewatering are more strongly related to the discharge and should be included in the loss of waters of the United States if they result in substantial, long-term adverse effects on the aquatic environment. Excavation activities that result only in incidental fallback and waters affected by that excavation activity should not be calculated into the acreage loss unless the permittee cannot conduct the excavation activity without the associated discharge that is regulated under Section 404.

For the purposes of the proposed NWP notification thresholds, we have modified the sentence addressing the loss of stream bed by adding the phrase ''perennial and intermittent'' before the word stream, because the proposed NWPs require notification only for those activities that result in the discharge of dredged or fill material into waters of the United States due to filling or excavating perennial or intermittent stream beds.

One commenter requested that the definition of ''loss of waters of the United States'' include the effects of habitat fragmentation, which could adversely affects some functions and values of waters of the United States.

We disagree, because this effect is beyond the Corps scope of analysis for Section 404 activities. Many activities that result in habitat fragmentation do not result in a discharge of dredged or fill material into waters of the United States, and are not regulated under Section 404 of the Clean Water Act.

We have added sentences to this definition to differentiate between permanent and temporary losses of waters of the United States. Temporary losses of waters of the United States are not included in the measurement of loss of waters of the United States. We are proposing to modify the definition of the term ''loss of waters of the United States'' as discussed above.

Noncontiguous wetland: In response to the proposed definition, we received comments that were similar to the comments received for the proposed definition of ''contiguous wetland,'' which were discussed above. Several commenters stated that the proposed definition is unclear. A commenter stated that noncontiguous wetlands are isolated wetlands. Another commenter recommended that the break between contiguous and non-contiguous waters should be based on topography or hydrologic influence, not the type of channel between the wetland and the waterbody. Another commenter stated

that the part of the definition referring to ''a linear aquatic system with a defined channel to the otherwise contiguous wetland'' needs to be clarified and that the term ''linear aquatic system'' needs to be defined. This commenter also recommended that the Corps include examples and explanatory statements to describe how contiguous and noncontiguous wetlands differ from each other. One commenter recommended that the definition should state that noncontiguous wetlands do not share a common groundwater connection with other waters of the United States.

To increase protection of the aquatic environment, we are proposing to prohibit the use of most of the new NWPs in non-tidal wetlands adjacent to tidal waters instead of prohibiting the use of these NWPs in non-tidal wetlands contiguous to tidal waters. Therefore, the definition of the term ''noncontiguous wetland'' has been removed from the ''Definitions'' section of the NWPs.

Non-tidal wetland: No comments were received on the proposed definition. We are proposing to retain this definition.

Perennial stream: One commenter requested that the Corps, in the definition of this term, distinguish between perennial streams and drainage ditches. Another commenter stated that the definition should be based on the duration of flow, not on the position of stream bed relative to the water table.

The definition of this term should not distinguish between perennial streams and drainage ditches because some streams have been channelized to improve local drainage. These streams, which are still waters of the United States, are considered drainage ditches for the purposes of Section 404(f). The maintenance of these channelized streams as drainage ditches is exempt from Section 404 permit requirements. As previously discussed in this section, we believe that it is appropriate to consider the source of water when classifying streams as ephemeral, intermittent, or perennial. The definitions for these stream types focus on how long flows in the channel over the course of a year, but the source of the flowing water is also important. It is important to distinguish between natural and artificial sources of water when classifying stream types for the purposes of the NWPs. We have modified the second sentence of the definition, to make it clearer that the water in the stream channel is due to the relative position of the water table (*i.e.*, groundwater flows into the stream channel, because the water table is above the stream bed). We are proposing to modify the definition of this term as discussed above.

Riffle and pool complexes: One commenter questioned whether or not riffle and pool complexes are limited to perennial streams. Another commenter stated that the definition should include a reference to 40 CFR Part 230.45. One commenter remarked that the word ''of'' should be removed from before the word ''movement.'' Two commenters stated that riffle and pool complexes are not limited to perennial streams but may occur in intermittent and ephemeral streams. One commenter agreed that the definition should be limited to perennial streams and suggested that the definition should recognize that riffle and pool complexes are often important spawning habitats. A commenter requested that the definition provide a minimum threshold for the ratio of riffles, pools, and flats that would be considered as riffle and pool complexes because some Corps districts consider all ratios except 100% flat as riffle and pool complexes.

We agree that the definition should be the same as the definition in 40 CFR Part 230.45 and have replaced the proposed definition with the definition found at 40 CFR Part 230.45. We cannot provide a minimum threshold for the ratio of riffles, pools, and flats to be considered as a riffle and pool complex. District engineers will determine which segments of streams contain riffle and pool complexes. We are proposing to modify the definition of this term as discussed above.

Stormwater management: One commenter recommended that the definition should include replenishment of groundwater as one of the purposes of stormwater management. Another commenter stated that the definition should specifically refer to changes in water turbidity. Two commenters said that the definition should not be limited to the mitigation of negative impacts resulting from urbanization, but should recognize that stormwater management is used to mitigate land modification, such as the construction of roads in rural areas. One commenter suggested that the definition state that stormwater management reduces adverse impacts on aquatic resources.

The primary purposes of stormwater management are to reduce degradation of water quality and aquatic habitat quality and reduce flooding. Although certain stormwater management techniques are used to increase infiltration of stormwater into the soil, it is not our intent to list every function provided by stormwater management in the definition. Stormwater infiltration techniques are often used to offset losses of local infiltration due to increases in the amount of impervious surface in the project area, so that increases in stormwater runoff do not increase downstream erosion, water quality degradation, and flooding.

We disagree that the definition should specifically reference changes in water turbidity. Turbidity is simply one measure of water quality, and is already adequately addressed in the definition. We concur that the definition should not be limited to urbanization, and will replace this word with the phrase ''changes in land use.'' We will add the phase ''on the aquatic environment'' to the end of the definition to provide further clarification of the purpose of stormwater management. We are proposing to modify the definition of this term as discussed above.

Stormwater management facilities: One commenter stated that the proposed definition is far more limited and does not include the full description provided in text of the NWP for stormwater management facilities. This commenter recommended that the definition include the following stormwater management activities: water control structures, outfall structures, emergency spillways, constructed wetland basins, wetland bottom channels, filter basins, infiltration basins, channels, and ditches. Another commenter recommended that the definition should also include debris basins and dams, storm drains, levees, and channels. A third commenter suggested that the definition include retarding basins.

It is not our intent to include a comprehensive list of stormwater management techniques, practices, or structures in the definition. The inclusion of stormwater retention and detention ponds and best management practices in the definition is intended only to provide examples. We are proposing to retain this definition.

Tidal wetland: One commenter stated that the definition at 33 CFR Part 328.3(d) does not include the qualification that the high tide line must be inundated by tidal waters at least 2 times per month and recommended that this part of the proposed definition should be eliminated from the definition because of the great differences in daily tide heights. Two commenters said that tidal waters occur only below the mean high water line and that the Corps is attempting to extend its jurisdictional authority by defining tidal waters to include spring high tides. One of these commenters stated that the proposed definition is

contrary to Section 10 of the Rivers and Harbors Act.

The definition proposed in the July 1, 1998, **Federal Register** notice is not contrary to current Corps regulations and definitions. All waters subject to the ebb and flow of the tide are waters of the United States, including spring high tides. Spring high tides occur two times per lunar month when the sun, moon, and earth are aligned with each other and exert the greatest gravitational influence on tidal waters, resulting in the highest and lowest tides that occur during the tidal cycle. It is important to recognize that spring high tides occur only two times per lunar month to differentiate between high tides regularly caused by gravitational interactions of the sun, moon, and earth and storm surges of tidal waters caused by atmospheric phenomena. To provide further clarification, we will insert the word ''lunar'' before the word ''month'' in the last sentence of this definition.

Tidal waters extend landward of the mean high tide line. The ''mean high tide line'' is an average of tidal heights over the course of a complete monthly tidal cycle. Therefore, half of the monthly tides will be landward of the mean high tide line and half of the monthly tides will be channelward of the mean high tide line. Tidal waters landward of the mean high tide line are waters of the United States, but they are not navigable waters of the United States. Therefore, tidal waters landward of the mean high tide line are subject to Section 404 of the Clean Water Act, but not Section 10 of the Rivers and Harbors Act. See 33 CFR 329.12 for a discussion of the geographic and jurisdictional limit of oceanic and tidal waters relative to Section 10 of the Rivers and Harbors Act. The definition of this term has been modified as discussed above.

Vegetated shallows: No comments were received concerning the proposed definition of this term. We are proposing to retain this definition.

Waterbody: One commenter is unsure why a definition is required for this term because, according to the commenter, the definition does not appear anywhere else in the Corps regulatory program. This commenter also stated that wetlands are waterbodies, but often do not have discernible high water marks. This commenter recommended the elimination of this term from the ''Definitions'' section of the NWPs. Another commenter stated that the proposed definition does not have a frequency threshold for the establishment of an ordinary high water mark (OHWM) and recommended that the definition include such a threshold. One commenter stated that the Corps should clarify how the definition relates to open waters and that the definition should clarify that waterbodies may or may not be regulated under Section 404 of the Clean Water Act. Another commenter recommended that the definition exclude farm ponds.

The word ''waterbody'' was used throughout the July 1, 1998, **Federal Register** notice for the proposed new and modified NWPs. It is also used in the NWP regulations issued on November 22, 1991 (56 FR 59110–59147), particularly for the definition of the term ''single and complete project'' at 33 CFR Part 330.2(i). This word is also used in NWP 29 and General Condition 4. The intent of the definition is to ensure consistent application of the term for the NWPs.

Waterbodies consist of open and flowing waters, as well as contiguous wetlands. We will modify this definition to include contiguous wetlands, which may not have an OHWM. For example, a lake may be surrounded by a wetland fringe inhabited by emergent wetland vegetation. The OHWM may or may not be the same as the wetland boundary, which may extend beyond the OHWM. Wetlands contiguous to open or flowing waters should be considered as part of the same waterbody. A wetland can be considered a waterbody if it is inundated with flowing or standing water.

To provide further clarification to distinguish between wetlands and open and flowing waters, we have added a definition for the term ''open water,'' which is often used in these NWPs. We are proposing to modify this definition as discussed above.

Additional Definitions: In response to the July 1, 1998, **Federal Register** notice, we received several comments requesting definitions of additional terms used in the NWP program. Some of these terms will be added to the definition section of the NWPs, as discussed below.

For the purposes of NWP 27 and the NWP conditions addressing compensatory mitigation, we are proposing to add definitions of the terms ''compensatory mitigation,'' ''restoration,'' ''creation,'' ''enhancement,'' and ''preservation.'' The definitions for these terms that were developed for the ''Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks,'' published in the November 28, 1995, issue of the **Federal Register** (60 FR 58605–58614) will be used in the ''Definitions'' section of the NWPs.

Two commenters requested that the Corps include a definition of the word ''aquatic'' in the NWPs. They believe that the Corps should include a definition of this word that reflects the limits of its regulatory authority or replace this word with the phrase ''waters of the United States'' or ''navigable waters.''

We believe that is not necessary to include a definition of this word for the NWP program. If an aquatic area is not a water of the United States, then it is not subject to either Section 404 or Section 10.

In response to comments received in response to our proposed definition of the term ''waterbody,'' we are proposing to add a definition of the term ''open water'' because this term is used in NWPs 27 and 39 and General Conditions 9 and 19.

One commenter requested a definition of the phrase ''projects that may have more than minimal adverse effects on the aquatic environment.'' This commenter believes that a definition is necessary to provide clarification to district engineers and regulated public.

We disagree with this comment. For every request for NWP authorization, district engineers must determine whether or not that particular project will result in more than minimal adverse effects. This determination is made on a case-by-case basis, and depends on many factors which cannot be captured in a simple definition. Therefore, we will not include a definition of this phrase.

Another commenter suggested including a definition of ''region,'' because division and district engineers should utilize this term consistently.

We do not agree that it is necessary to define the term ''region'' for the NWPs, because no specific definition is required. A region is simply a geographic area. For the purposes of regional conditioning or revocation of the NWPs, a region may be a waterbody, watershed, sub-watershed, county, state, or Corps district. Corps districts review cumulative adverse effects on the aquatic environment on a watershed basis. Division or district engineers can determine which scale of region is appropriate. If cumulative adverse effects are more than minimal in a single sub-watershed, then it would be appropriate to suspend or revoke NWP only in that sub-watershed. If the cumulative adverse effects on the aquatic environment due to an NWP are more than minimal in an entire state, then the appropriate region would be the state. For these reasons, we will not add a definition of the term ''region'' to the NWPs.

One commenter requested that we add a definition of the term ''restored channel'' to the NWPs.

We disagree that such a definition is necessary because ''restoration,'' as presently used for wetland compensatory mitigation projects, can apply to streams as well. The restoration of a stream channel reestablishes the stream channel where it previously existed.

Two commenters recommended that we include a definition of the term ''single and complete project'' with the NWPs. One commenter stated that the definition in 33 CFR Part 330.2(i) is confusing and difficult to implement, especially with respect to the cumulative adverse effects that occur when a linear project crosses single waterbody several times. Another commenter requested a definition of this term that would include all current and future phases of development of land under a single common ownership which has been subdivided or transferred to facilitate development.

We believe that this term does not need to be redefined. For convenience, we are proposing to add a definition of the term ''single and complete project'' to the ''Definitions'' section of the NWPs, which paraphrases the definition at 33 CFR Part 330.2(i). For linear projects, district engineers will continue to assess cumulative adverse effects on the aquatic environment to determine if the project can be authorized by NWPs. If the adverse effects on the aquatic environment are more than minimal, individually or cumulatively, the District Engineer will exercise discretionary authority and require an individual permit for the project. For subdivisions, the subdivision provision of proposed NWP 39 as well as 33 CFR Part 330.2(i) will be used to determine acreage limits for particular subdivisions. In addition, district engineers will consider whether or not each phase of a multi-phase project can be considered as a separate single and complete project. If each phase has independent utility, then each phase can be considered a separate single and complete project.

One commenter requested that the definition of the term ''small perennial stream,'' which was used in NWPs 40 and 44, should be included in the ''Definitions'' section of the NWPs.

We have deleted the reference to small perennial streams from NWPs 40 and 44. Therefore, no definition of this term is needed.

One commenter recommended that the Corps include a definition of the term ''stream'' in the NWPs. Another commenter requested the inclusion of a definition of ''stream bed'' because the definition on page 36042 of the July 1, 1998, **Federal Register** notice is a definition of ''stream,'' not ''stream bed.'' The term ''stream bed'' is also used throughout the NWPs.

We agree that the definition on page 36042 of the July 1, 1998, **Federal Register** notice is actually a definition of the term ''stream'' and believe that it is unnecessary to include a definition of ''stream'' in the NWPs since the term ''stream bed'' is used throughout the NWPs, particularly in the context of the 500 linear foot notification requirement. Therefore, we are proposing to add a definition of the term ''stream bed'' to the ''Definitions'' section of the NWPs. The limits of the stream bed are identified by the location of the ordinary high water marks on either side of the stream bed. Any wetlands contiguous to the stream bed, but outside of the ordinary high water mark, are not part of the stream bed.

Due to changes in the NWPs made in response to the comments received in reply to the July 1, 1998, **Federal Register** notice, we are proposing to add definitions for several more terms used in the NWPs. These terms include: ''project area'' and ''independent utility.'' We are also proposing to add a definition of the term ''permanent above-grade fill'' to the ''Definitions'' section since this term is used in proposed General Condition 27.

One commenter requested that the Corps include definitions of ''important spawning areas'' and ''water quality management plan'' in this section.

We disagree that definitions of these terms are necessary. District engineers will determine which areas are important spawning areas. The content of the water quality management plan, if required by General Condition 9, is also at the discretion of the District Engineer.

VI. Comments on Other Issues in July 1, 1998, Federal Register Notice

Other Suggested NWPs

In response to the December 13, 1996, **Federal Register** notice, several commenters recommended additional replacement NWPs. We do not believe that development of more new NWPs is warranted at this time. Some of the recommended NWPs are for activities in areas that are not considered waters of the United States and others are for activities that are exempt from permit requirements of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

Maintenance of Landfill Surfaces: Most commenters agreed with the statement that routine maintenance of landfill surfaces does not require a Section 404 permit. Several commenters requested that we reiterate such language in the final **Federal Register** notice for the NWPs, and further requested that the Corps also include a discussion of the 9th Circuit decision in the *Resource Investment Incorporated (RII)* v. *Corps of Engineers* case. One commenter disagreed with the statement that most landfills are constructed in uplands, stating that there are a number of landfills constructed on wetlands.

Ponded areas that develop on landfill surfaces are not waters of the United States. Although a landfill may be constructed in wetlands, the landfill replaces the waterbody with dry land. Therefore, that area is no longer a water of the United States. The landfill cap may develop ponded areas that may be inhabited by wetland vegetation, but these areas must be repaired to prevent additional air and water pollution. These maintenance activities do not require a Section 404 permit because these ponded areas are not waters of the United States. The preamble to 33 CFR Part 328 in the November 13, 1986, **Federal Register** (51 FR 41217, Section 328.3) states that ''water filled depressions created in dry land incidental to construction activity * * *'' are not considered waters of the United States ''* * * until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.'' The landfill is not abandoned because of the routine maintenance required by law to keep the landfill surface at the designed grade. Since routine maintenance of landfill surfaces does not require a Section 404 permit, we will not be developing an NWP for this activity. With regard to requests to include a discussion of the RII case, this matter is still in litigation and such a discussion is inappropriate at this time.

Maintenance and Filling of Ditches Adjacent to Roads and Railways

Although a few commenters requested a new NWP authorizing the maintenance and filling of ditches adjacent to roads and railways, such a NWP is not necessary. In response to the July 1, 1998, **Federal Register** notice, most commenters stated that this activity is exempt from regulation or is outside of the Corps jurisdiction. One commenter stated that wet weather conveyances should not be regulated because it would greatly increase the Corps workload. Another commenter noted that, to meet safety design standards, transportation agencies often

widen and flatten side slopes of the embankment by adding fill to one side of the ditch.

The maintenance of roadside or railroad ditches constructed in uplands does not require a Section 404 permit since these ditches are not waters of the United States, even though they may support wetland vegetation. The preamble to 33 CFR Part 328.3, as published in the November 13, 1986, issue of the **Federal Register** (51 FR 41217), states that ''non-tidal drainage or irrigation ditches excavated on dry land'' are generally not considered to be waters of the United States. Filling these ditches to widen the road or railroad bed does not require a Section 404 permit.

If these roadside or railroad ditches are constructed in waters of the United States, the maintenance of these ditches is exempt from Section 404 permit requirements (see CFR Part 323.4(a)(3)), provided the ditch is restored to its original dimensions and configuration. However, the construction of these ditches in waters of the United States requires a Section 404 permit and may be authorized by an NWP, an individual permit, or a regional general permit. A Corps permit is required to widen the road or railroad bed if the ditches adjacent to the existing road or railroad bed were constructed in waters of the United States. The construction or maintenance of roadside and railroad ditches in navigable waters of the United States requires a Section 10 permit. Furthermore, if the maintenance of a roadside ditch includes reconfiguring that ditch, the activity does not qualify for the exemption at 33 CFR Part 323.4(a)(3).

Maintenance of Water Treatment Facilities

A commenter requested that the Corps consider a new NWP for the maintenance of water treatment facilities, such as the removal of material from constructed settling lagoons and associated constructed wetlands, maintenance and de-watering of stock ponds for livestock, and maintenance of recharge ponds for water supplies. One commenter said that the Corps description on page 36063 of the July 1, 1998, **Federal Register** notice characterizing exempt activities related to stock ponds contained errors (*e.g.*, water quality benefits ''test'').

Water treatment facilities constructed in uplands do not require a Section 404 permit for maintenance activities. We do not generally consider ''[a]rtificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing'' to be waters of the United States. (Refer to the preamble for 33 CFR Part 328.3, as published in the November 13, 1986, issue of the **Federal Register** (51 FR 41217).)

The proposed modifications to NWP 3 and NWP 7, which authorize the removal of accumulated sediment in the vicinity of existing structures, should address some of these issues. Removal of sediments from detention and settling basins constructed with a Section 404 permit may be authorized by NWP 7 as long as the maintenance activity is associated with an intake or outfall structure. Maintenance of recharge ponds constructed in uplands does not require a Section 404 permit, but the maintenance of these ponds constructed in waters of the United States may be authorized by existing NWPs, such as NWPs 3, 13, or 18. Therefore, these activities have not been specifically included in the proposed NWPs.

With regard to comments relating to stock pond exemptions, we provide the following clarification: The construction of stock ponds is an exempt activity; thus, activities necessary for the construction and maintenance of stock ponds are exempt from Section 404 permit requirements. Maintenance activities, such as the deepening of a stock pond, do not require a Section 404 permit provided the activity does not increase in the lateral extent of the pond. Additionally, the construction or maintenance activity may not bring a water into a use to which it was not previously subject and it may not impair the flow or circulation or reduce the reach of such waters.

NWP 31: In the July 1, 1998, **Federal Register** notice, we responded to a request to expand the scope of NWP 31 to authorize other maintenance activities associated with flood control and maintenance of water supply facilities. In response to this part of the July 1, 1998, **Federal Register** notice, several commenters addressed issues related to NWP 31. Two commenters suggested that routine maintenance activities should be omitted from the requirements of the Corps regulatory program. Another requested that the Corps explain why a single activity may be authorized by three different NWPs, in this case NWP 3, 7, or 18 to authorize removal of accumulated sediments.

Any maintenance activity that involves a discharge of dredged or fill material into waters of the United States requires a Section 404 permit, unless that activity qualifies for the exemption under Section 404(f). We cannot expand the exemptions in Section 404(f); adding other maintenance activities to Section 404(f) requires modification of the Clean Water Act through the legislative process. Therefore, routine maintenance activities cannot be omitted from the Corps Regulatory Program.

NWPs 3, 7, and 18 were developed to authorize specific activities. Although we are proposing to modify both NWPs 3 and 7 to authorize the removal of accumulated sediments, this activity is subject to different terms in these NWPs, based on the nature of the work. The removal of accumulated sediments in the vicinity of existing structures authorized by paragraph (ii) of NWP 3 will allow permittees to restore the waterway in the immediate vicinity of structure and protect that structure with rip rap. The purpose of part (ii) of NWP 7 is to restore outfalls, intakes, small impoundments, and canals to original design capacities design configurations. NWP 7 authorizes maintenance dredging or maintenance excavation of canals associated with intakes and outfalls; paragraph (ii) of NWP 3 does not authorize that activity. NWP 18 authorizes minor discharges, which is not the same as the activities authorized by NWPs 3 and 7.

We continue to believe that NWP 31 does not require further modification at this time, for the same reasons discussed in the July 1, 1998, **Federal Register** notice.

Regional Conditioning of Nationwide Permits: Concurrent with this **Federal Register** notice, District Engineers are issuing local public notices. Division and district engineers have proposed regional conditions or revocation of some or all of the NWPs contained in this **Federal Register** notice. Regional conditions may also be required by State Section 401 water quality certification or Coastal Zone Management Act consistency determinations. District engineers will announce regional conditions or revocations by issuing local public notices. Information on regional conditions and revocation can be obtained from the appropriate District Engineer, as indicated below or at the District's Internet home page. Furthermore, this and additional information can be obtained on the Internet at the Corps Regulatory Home Page at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/.

ALABAMA

Mobile District Engineer, ATTN: CESAM–OP–S, 109 St. Joseph Street, Mobile, AL 36602–3630

ALASKA
Alaska District Engineer, ATTN: CEPOA–CO–R, P.O. Box 898, Anchorage, AK 99506–0898
ARIZONA
Los Angeles District Engineer, ATTN: CESPL–CO–R, P.O. Box 2711, Los Angeles, CA 90053–2325
ARKANSAS
Little Rock District Engineer, ATTN: CESWL–CO–P, P.O. Box 867, Little Rock, AR 72203–0867
CALIFORNIA
Sacramento District Engineer, ATTN: CESPK–CO–O, 1325 J Street, Sacramento, CA 95814–4794
COLORADO
Albuquerque District Engineer, ATTN: CESPA–CO–R, 4101 Jefferson Plaza NE, Room 313, Albuquerque, NM 87109
CONNECTICUT
New England District Engineer, ATTN: CENAE–OD–R, 696 Virginia Road, Concord, MA 01742–2751
DELAWARE
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–ET–PO, Building 230, Fort Shafter, Honolulu, HI 96858–5440
IDAHO
Walla Walla District Engineer, ATTN: CENWW–OP–RF, 210 N. Third Street, City-County Airport, Walla Walla, WA 99362–1876
ILLINOIS
Rock Island District Engineer, ATTN: CEMVR–RD, P.O. Box 004, Rock Island, IL 61204–2004
INDIANA
Louisville District Engineer, ATTN: CELRL–OR–F, P.O. Box 59, Louisville, KY 40201–0059
IOWA
Rock Island District Engineer, ATTN: CEMVR–RD, P.O. Box 2004, Rock Island, IL 61204–2004
KANSAS
Kansas City District Engineer, ATTN: CENWK–OD–P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106–2896
KENTUCKY
Louisville District Engineer, ATTN: CELRL–OR–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–OD–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–OD–R, 696 Virginia Road, Concord, MA 01742–2751
MICHIGAN
Detroit District Engineer, ATTN: CELRE–CO–L, 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–P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106–2896
MONTANA
Omaha District Engineer, ATTN: CENWO–OP–R, 215 N. 17th Street, Omaha, NE 68102–4978
NEBRASKA
Omaha District Engineer, ATTN: CENWO–OP–R, 215 N. 17th Street, Omaha, NE 68102–4978
NEVADA
Sacramento District Engineer, ATTN: CESPK–CO–O, 1325 J Street, Sacramento, CA 95814–2922
NEW HAMPSHIRE
New England District Engineer, ATTN: CENAE–OD–R, 696 Virginia Road, Concord, MA 01742–2751
NEW JERSEY
Philadelphia District Engineer, ATTN: CENAP–OP–R, Wannamaker Building, 100 Penn Square East, Philadelphia, PA 19107–3390
NEW MEXICO
Albuquerque District Engineer, ATTN: CESWA–CO–R, 4101 Jefferson Plaza NE, Room 313, Albuquerque, NM 87109
NEW YORK
New York District Engineer, ATTN: CENAN–OP–R, 26 Federal Plaza, New York, NY 10278–9998
NORTH CAROLINA
Wilmington District Engineer, ATTN: CESAW–CO–R, P.O. Box 1890, Wilmington, NC 28402–1890
NORTH DAKOTA
Omaha District Engineer, ATTN: CENWO–OP–R, 215 North 17th Street, Omaha, NE 68102–4978
OHIO
Huntington District Engineer, ATTN: CELRH–OR–F, 502 8th Street, Huntington, WV 25701–2070
OKLAHOMA
Tulsa District Engineer, ATTN: CESWT–OD–R, P.O. Box 61, Tulsa, OK 74121–0061
OREGON
Portland District Engineer, ATTN: CENWP–PE–G, P.O. Box 2946, Portland, OR 97208–2946
PENNSYLVANIA
Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715
RHODE ISLAND
New England District Engineer, ATTN: CENAE–OD–R, 696 Virginia Road, Concord, MA 01742–2751
SOUTH CAROLINA
Charleston District Engineer, ATTN: CESAC–CO–P, P.O. Box 919, Charleston, SC 29402–0919
SOUTH DAKOTA
Omaha District Engineer, ATTN: CENWO–OP–R, 215 North 17th Street, Omaha, NE 68102–4978
TENNESSEE
Nashville District Engineer, ATTN: CELRN–OR–F, P.O. Box 1070, Nashville, TN 37202–1070
TEXAS
Ft. Worth District Engineer, ATTN: CESWF–OD–R, P.O. Box 17300, Ft. Worth, TX 76102–0300
UTAH
Sacramento District Engineer, ATTN: CESPK–CO–O, 1325 J Street, CA 95814–2922
VERMONT
New England District Engineer, ATTN: CENAE–OD–R, 696 Virginia Road, Concord, MA 01742–2751
VIRGINIA
Norfolk District Engineer, ATTN: CENAO–OP–R, 803 Front Street, Norfolk, VA 23510–1096
WASHINGTON
Seattle District Engineer, ATTN: CENWS–OP–RG, P.O. Box 3755, Seattle, WA 98124–2255
WEST VIRGINIA
Huntington District Engineer, ATTN: CELRH–ORF, 502 8th Street, Huntington, WV 25701–2070
WISCONSIN
St. Paul District Engineer, ATTN: CEMVP–CO–R, 190 Fifth Street East, St. Paul, MN 55101–1638
WYOMING
Omaha District Engineer, ATTN: CENWO–OP–R, 215 North 17th Street, NE 68102–4978
DISTRICT OF COLUMBIA
Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715
PACIFIC TERRITORIES
Honolulu District Engineer, ATTN: CEPOH–ET–PO, Building 230, Fort Shafter, Honolulu, HI 96858–5440
PUERTO RICO & VIRGIN ISLANDS
Jacksonville District Engineer, ATTN: CESAJ–CO–R, P.O. Box 4970, Jacksonville, FL 32202–4412

Dated: July 13, 1999.

Approved:

Hans A. Van Winkle,

Brigadier General, U.S. Army, Deputy Commander for Civil Works.

Authority

Accordingly, we are proposing to issue new NWPs, modify existing NWPs, and add conditions and to add NWP definitions under the authority of Section 404(e) of the Clean Water Act

(33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act (33 U.S.C. 403).

Nationwide Permits, Conditions, Further Information, and Definitions

A. Index of Nationwide Permits, Conditions, Further Information, and Definitions

Nationwide Permits

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

Nationwide Permit General Conditions

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

Further Information

Definitions

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

B. Nationwide Permits and Conditions

3. *Maintenance.* Activities related to: (i) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement are permitted, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(ii) Discharges of dredged or fill material, including excavation, into all waters of the United States to remove accumulated sediments and debris in the vicinity of, and within, existing structures (*e.g.*, bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional rip rap to protect the structure, provided the permittee notifies the District Engineer in accordance with General Condition 13. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. The placement of rip rap must be the minimum necessary to protect the structure or to ensure the safety of the structure. All excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the District Engineer under separate authorization. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the District Engineer.

(iii) Discharges of dredged or fill material, including excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event, including the construction, placement, or installation of upland protection structures and minor dredging to remove obstructions in a water of the United States. (Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a Section 404 permit provided the uplands are restored to their original pre-event location. This NWP is for the activities in waters of the United States associated with the replacement of the uplands.) The permittee must notify the District Engineer, in accordance with General Condition 13, within 12 months of the date of the damage and the work must commence, or be under contract to commence, within two years of the date of the damage. The permittee should provide evidence, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. The restoration of the damaged areas cannot exceed the contours, or ordinary high water mark, that existed prior to the damage. The District Engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this permit. Minor dredging to remove obstructions from the adjacent waterbody is limited to 50 cubic yards below the plane of the ordinary high water mark, and is limited to the amount necessary to restore the pre-existing bottom contours of the waterbody. The dredging may not be done primarily to obtain fill for any restoration activities. The discharge of dredged or fill material and all related work needed to restore the upland must be part of a single and complete project. This permit cannot be used in conjunction with NWP 18 or NWP 19 to

restore damaged upland areas. This permit cannot be used to reclaim historic lands lost, over an extended period of time, to normal erosion processes.

Maintenance dredging for the primary purpose of navigation and beach restoration are not authorized by this permit. This permit does not authorize new stream channelization or stream relocation projects. Any work authorized by this permit must not cause more than minimal degradation of water quality, more than minimal changes to the flow characteristics of the stream, or increase flooding (See General Conditions 9 and 21).

Note: This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Section 404(f) exemption for maintenance. For example, the repair and maintenance of concrete-lined channels are exempt from Section 404 permit requirements. (Sections 10 and 404)

7. *Outfall Structures and Maintenance.* Activities related to: (i) Construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act), and (ii) maintenance excavation, including dredging, to remove accumulated sediments blocking or restricting outfall and intake structures, accumulated sediments from small impoundments associated with outfall and intake structures, and accumulated sediments from canals associated with outfall and intake structures, provided that the activity meets all of the following criteria:

a. The permittee notifies the District Engineer in accordance with General Condition 13;

b. The amount of excavated or dredged material must be the minimum necessary to restore the outfalls, intakes, small impoundments, and canals to original design capacities and design configurations (*i.e.,* depth and width);

c. The excavated or dredged material is deposited and retained at an upland site, unless otherwise approved by the District Engineer under separate authorization; and

d. Proper soil erosion and sediment control measures are used to minimize reentry of sediments into waters of the United States.

The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure. For maintenance excavation and dredging to remove accumulated sediments, the notification must include information regarding the original design capacities and configurations of the facility and the presence of special aquatic sites (*e.g.,* vegetated shallows) in the vicinity of the proposed work. (Sections 10 and 404)

12. *Utility Line Activities.* Activities required for the construction, maintenance and repair of utility lines and associated facilities in waters of the United States as follows:

(i) *Utility lines:* The construction, maintenance, or repair of utility lines, including outfall and intake structures and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in preconstruction contours. A ''utility line'' is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication (see Note 1, below). Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary side casting not to exceed a total of 180 days, where appropriate. In wetlands, the top 6″ to 12″ of the trench should normally be backfilled with topsoil from the trench. Furthermore, the trench cannot be constructed in such a manner as to drain waters of the United States (*e.g.,* backfilling with extensive gravel layers, creating a french drain effect). For example, utility line trenches can be backfilled with clay blocks to ensure that the trench does not drain the waters of the United States through which the utility line is installed. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

(ii) *Utility line substations:* The construction, maintenance, or expansion of a substation facility associated with a power line or utility line in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not result in the loss of greater than 1 acre of non-tidal waters of the United States.

(iii) *Foundations for overhead utility line towers, poles, and anchors:* The construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

(iv) *Access roads:* The construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1 acre of non-tidal waters of the United States. Access roads shall be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes the adverse effects on waters of the United States and as near as possible to preconstruction contours and elevations (*e.g.,* at grade corduroy roads or geotextile/gravel roads). Access roads constructed above preconstruction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows. All access roads will be constructed with pervious surfaces.

The term ''utility line'' does not include activities which drain a water of the United States, such as drainage tile, or french drains; however, it does apply to pipes conveying drainage from another area. For the purposes of this NWP, the loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. Waters of the United States temporarily affected by filling, flooding, excavation, or drainage, where the project area is restored to preconstruction contours and elevations, are not included in the calculation of permanent loss of waters of the United States. This includes temporary construction mats (*e.g.,* timber, steel, geotextile) used during construction and removed upon completion of the work. Where certain functions and values of waters of the United States are permanently adversely affected, such as the conversion of a forested wetland to a herbaceous wetland in the permanently maintained utility line right-of-way, mitigation will be required to reduce the adverse effects of the project to the minimal level.

Mechanized landclearing necessary for the construction, maintenance, or repair of utility lines and the construction, maintenance and expansion of utility line substations, foundations for overhead utility lines,

and access roads is authorized, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as near as possible. The area of waters of the United States that is filled, excavated, or flooded must be limited to the minimum necessary to construct the utility line, substations, foundations, and access roads. Excess material must be removed to upland areas immediately upon completion of construction. This NWP may authorize utility lines in or affecting navigable waters of the United States, even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322).

Notification: The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

(a) Mechanized land clearing in a forested wetland for the utility line right-of-way;

(b) A Section 10 permit is required;

(c) The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet;

(d) The utility line is placed within a jurisdictional area (*i.e.*, a water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area;

(e) Discharges associated with the construction of utility line substations that result in the loss of greater than ¼ acre of waters of the United States; or

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

Note 1: Overhead utility lines constructed over Section 10 waters and utility lines that are routed in or under Section 10 waters without a discharge of dredged or fill material require a Section 10 permit; except for pipes or pipelines used to transport gaseous, liquid, liquefiable, or slurry substances over navigable waters of the United States, which are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material associated with such pipelines will require a Corps permit under Section 404.

Note 2: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work and the area restored to preconstruction contours, elevations, and wetland conditions. Temporary access roads for construction may be authorized by NWP 33.

Note 3: Where the proposed utility line is constructed or installed in navigable waters of the United States (*i.e.*, Section 10 waters), copies of the PCN and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the utility line to protect navigation. (Sections 10 and 404)

14. *Linear Transportation Crossings.* Activities required for the construction, expansion, modification, or improvement of linear transportation crossings (e.g., highways, railways, trails, airport runways, and taxiways) in waters of the United States, including wetlands, provided that the activity meets the following criteria:

a. This NWP is subject to the following acreage and linear limits:

(1) For *public linear transportation projects* in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1 acre of waters of the United States;

(2) For *public linear transportation projects* in tidal waters or non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than ⅓ acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet, or;

(3) For *private linear transportation projects* in all waters of the United States, provided the discharge does not cause the loss of greater than ⅓ acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet;

b. The permittee must notify the District Engineer in accordance with General Condition 13 if any of the following criteria are met:

(1) The discharge causes the loss of greater than ¼ acre of waters of the United States; or

(2) There is a discharge in a special aquatic site, including wetlands;

c. The notification must include a mitigation proposal to offset permanent losses of waters of the United States to ensure that those losses result only in minimal adverse effects to the aquatic environment and a statement describing how temporary losses will be minimized to the maximum extent practicable;

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

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

f. This permit does not authorize stream channelization, and the authorized activities must not cause more than minimal changes to the hydraulic flow characteristics of the stream, increase flooding, or cause more than minimal degradation of water quality of any stream (see General Conditions 9 and 21);

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

h. The crossing is a single and complete project for crossing a water of the United States. Where a road segment (*i.e.*, the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of streams (several single and complete projects) the Corps will consider whether it should use its discretionary authority to require an individual permit.

Note: Some discharges for the construction of farm roads, forest roads, or temporary roads for moving mining equipment may be eligible for an exemption from the need for a Section 404 permit (see 33 CFR 323.4). (Sections 10 and 404)

27. *Stream and Wetland Restoration Activities.* Activities in waters of the United States associated with the restoration of former waters, the enhancement of degraded tidal and non-tidal wetlands and riparian areas, the creation of tidal and non-tidal wetlands and riparian areas, and the restoration and enhancement of non-tidal streams and non-tidal open water areas as follows:

(a) The activity is conducted on:

(1) Non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or creation agreement between the landowner and the U.S. Fish and Wildlife Service (FWS) or the Natural Resources Conservation Service (NRCS) or voluntary wetland restoration, enhancement, and creation actions documented by the NRCS pursuant to NRCS regulations; or

(2) Any Federal land; or

(3) Reclaimed surface coal mined lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining or the applicable state agency (the future reversion does not apply to streams or wetlands created, restored, or enhanced as mitigation for the mining impacts, nor naturally due to hydrologic or topographic features, nor for a mitigation bank); or

(4) Any private or public land;

(b) *Notification:* For activities on any private or public land that are not described by paragraphs (a)(1), (a)(2), or (a)(3) above, the permittee must notify the District Engineer in accordance with General Condition 13; and

(c) Only native plant species should be planted at the site, if permittee is vegetating the project site.

Activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or creation of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or create stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation; mechanized landclearing to remove undesirable vegetation; and other related activities.

This NWP does not authorize the conversion of a stream to another aquatic use, such as the creation of an impoundment for waterfowl habitat. This NWP does not authorize stream channelization. This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. However, this NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands, on the project site provided there are net gains in aquatic resource functions and values. For example, this NWP may authorize the creation of an open water impoundment in a non-tidal emergent wetland, provided the non-tidal emergent wetland is replaced by creating that wetland type on the project site. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Reversion. For enhancement, restoration, and creation projects conducted under paragraphs (a)(2) and (a)(4), this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion. For restoration, enhancement, and creation projects conducted under paragraphs (a)(1) and (a)(3), this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (*i.e.*, prior to the restoration, enhancement, or creation activities) within five years after expiration of a limited term wetland restoration or creation agreement or permit, even if the discharge occurs after this NWP expires. This NWP also authorizes the reversion of wetlands that were restored, enhanced, or created on prior-converted cropland that has not been abandoned, in accordance with a binding agreement between the landowner and NRCS or FWS (even though the restoration, enhancement, or creation activity did not require a Section 404 permit). The five-year reversion limit does not apply to agreements without time limits reached under paragraph (a)(1). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate State agency executing the agreement or permit. Prior to any reversion activity the permittee or the appropriate Federal or State agency must notify the District Engineer and include the documentation of the prior condition. Once an area has reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. (Sections 10 and 404)

Note: Compensatory mitigation is not required for activities authorized by this NWP, provided the authorized work results in a net increase in aquatic resource functions and values in the project area. This NWP can be used to authorize compensatory mitigation projects, including mitigation banks, provided the permittee notifies the District Engineer in accordance with General Condition 13, and the project includes compensatory mitigation for impacts to waters of the United States caused by the authorized work. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition.

39. *Residential, Commercial, and Institutional Developments.* Discharges into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not authorized by this NWP. Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The activities listed above are authorized, provided that the activities meet all of the following criteria:

a. The acreage limit for this NWP is determined by using the following index (see Note 1, below):

Acreage limit = ¼ acre + 2% of the project area (in acres)

The maximum acreage limit for this NWP is 3 acres of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters. This acreage limit is achieved for a project area of 137.5 acres or more.

b. The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

(1) The discharge causes the loss of greater than ¼ acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters; or

(2) The discharge causes the loss of any open waters, including perennial or intermittent streams, below the ordinary high water mark (see Note 2, below).

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

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

e. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification, when required, must include a written statement explaining how avoidance and minimization of losses of waters of the United States were achieved on the project site. Compensatory mitigation will normally be required to offset the losses of waters of the United States. The notification, when required, must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the United States. If an applicant believes that the project impacts are minimal without mitigation, then the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration;

f. When this NWP is used in conjunction with any other NWP, any

combined total permanent loss of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, exceeding ¼ acre requires that the permittee notify the District Engineer in accordance with General Condition 13;

g. Any work authorized by this NWP must not cause more than minimal degradation of water quality or more than minimal changes to the flow characteristics of any stream (see General Conditions 9 and 21);

h. For discharges causing the loss of ¼ acre or less of waters of the United States, the permittee must submit a report, within 30 days of completion of the work, to the District Engineer that contains the following information: (1) The name, address, and telephone number of the permittee; (2) The location of the work; (3) A description of the work; (4) The type and acreage (or linear feet) of the loss of waters of the United States (*e.g.*, ⅒ acre of emergent wetlands and 50 linear feet of stream bed); and (5) The type and acreage (or linear feet) of any compensatory mitigation used to offset the loss of waters of the United States (*e.g.*, ⅒ acre of emergent wetlands created on-site);

i. If there are any open waters or streams within the project area, the permittee will establish and maintain, to the maximum extent practicable, wetland or upland vegetated buffers adjacent to those open waters or streams consistent with General Condition 19. Deed restrictions, conservation easements, protective covenants, or other means of land conservation and preservation are required to protect and maintain the vegetated buffers established on the project site; and

j. Stream channelization or stream relocation downstream of the point on the stream where the annual average flow is 1 cubic foot per second is not authorized by this NWP.

Only residential, commercial, and institutional activities with structures on the foundation(s) or building pad(s), as well as the attendant features, are authorized by this NWP. For the purposes of this NWP, the term ''project area'' is defined in the definition section of the NWPs. The compensatory mitigation proposal required in paragraph (e) of this NWP may be either conceptual or detailed. The wetland or upland vegetated buffer required in paragraph (i) of this NWP will normally be 50 to 125 feet wide, but the District Engineer will determine the appropriate width of the vegetated buffer. The required wetland or upland vegetated buffer is part of the overall compensatory mitigation requirement for this NWP. If the project site was previously used for agricultural purposes and the farm owner/operator used NWP 40 to authorize activities in waters of the United States to increase production or construct farm buildings, NWP 39 cannot be used by the developer to authorize additional activities in waters of the United States on the project site in excess of the indexed acreage limit for NWP 39 (i.e., the combined acreage loss authorized under NWPs 39 and 40 cannot exceed the indexed acreage limit based on project area in paragraph (a), above).

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to paragraph (b) of this NWP is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed ¼ acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed the indexed acreage limit based on project area as determined by paragraph (a) is not authorized by this NWP; unless the District Engineer exempts a particular subdivision or parcel by making a written determination that: (1) The individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to July 21, 1999, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate the property owner's investment-backed expectations, or (2) that the individual and cumulative adverse environmental effects would be minimal, high quality wetlands would not be adversely affected, and there would be an overall benefit to the aquatic environment. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 39. For the purposes of NWP 39, the term ''real estate subdivision'' shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial, or other real estate subdivision, including all parcels and parts thereof. (Sections 10 and 404)

Note 1: For example, if the project area is 15 acres, the acreage limit for a single and complete project under this NWP is 0.55 acres. For any project area of 137.5 acres or more, the acreage limit under this NWP is 3 acres of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

Note 2: Areas where there is no wetland vegetation are determined by the presence or absence of an ordinary high water mark or bed and bank. Areas that are waters of the United States based on this criteria would require a PCN even though water is infrequently present in the stream channel.

40. *Agricultural Activities.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the purpose of improving agricultural production and the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized landclearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities, provided the permittee complies with the following terms and conditions:

a. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is a USDA program participant:

(1) The permittee must obtain an exemption or a minimal effects with mitigation determination from NRCS in accordance with the provisions of the Food Security Act (16 U.S.C. 3801 *et seq.*) and the National Food Security Act Manual (NFSAM);

(2) The discharge into non-tidal wetlands does not result in the loss of greater than 2 acres of non-tidal wetlands on a farm tract;

(3) The discharge into playas, prairie potholes, and vernal pools does not exceed the acreage limit as determined by the following index (see Note, below):

Acreage limit = ⅒ acre + 1% of farm tract size (in acres)

The maximum acreage loss of playas, prairie potholes, and vernal pools authorized by this NWP is 1 acre;

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

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

(6) The permittee must submit a report, within 30 days of completion of the authorized work, to the District Engineer that contains the following information: (a) The name, address, and telephone number of the permittee; (b) The location of the work; (c) A description of the work; (d) The type and acreage (or square feet) of the loss of wetlands (*e.g.*, ½ acre of emergent wetlands); and (e) The type, acreage (or

square feet), and location of compensatory mitigation (*e.g.*, ¾ acre of emergent wetlands on the farm tract); or

b. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is not a USDA program participant:

(1) The discharge into non-tidal wetlands does not result in the loss of greater than 2 acres of non-tidal wetlands on a farm tract;

(2) The discharge into playas, prairie potholes, and vernal pools does not exceed the acreage limit as determined by the following index (see Note, below):

Acreage limit = 1/10 acre + 1% of farm tract size (in acres)

The maximum acreage loss of playas, prairie potholes, and vernal pools authorized by this NWP is 1 acre;

(3) The permittee must notify the District Engineer in accordance with General Condition 13, if the discharge results in the loss of greater than ¼ acre of non-tidal wetlands, including playas, prairie potholes, and vernal pools;

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

(5) The notification must include a compensatory mitigation proposal to offset losses of waters of the United States; or

c. For the construction of building pads for farm buildings, the discharge does not cause the loss of greater than 1 acre of non-tidal wetlands that were in agricultural production prior to December 23, 1985, (*i.e.*, farmed wetlands) and the permittee must notify the District Engineer in accordance with General Condition 13; or

d. Any activity in other waters of the United States is limited to the relocation of existing serviceable drainage ditches constructed in non-tidal streams. For the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams, the permittee must notify the District Engineer in accordance with General Condition 13.

The term ''farm tract'' refers to a parcel of land identified by the Farm Service Agency. The Corps will identify other waters of the United States on the farm tract. For the purposes of this NWP, the terms ''playas,'' ''prairie potholes,'' and ''vernal pools'' are defined in the ''Definitions'' section. NRCS will determine if a proposed agricultural activity meets the terms and conditions of paragraph (a) of this NWP, except as provided below. For those activities that require notification, the District Engineer will determine if a proposed agricultural activity is authorized by paragraphs (b), (c), and/or (d) of this NWP. USDA program participants requesting authorization for discharges of dredged or fill material into waters of the United States authorized by paragraphs (c) or (d) of this NWP, in addition to paragraph (a), must notify the District Engineer in accordance with General Condition 13 and the District Engineer will determine if the entire single and complete project is authorized by this NWP. Discharges of dredged or fill material into waters of the United States associated with the construction of the compensatory mitigation are authorized by this NWP, but are not calculated in the acreage loss of waters of the United States. This NWP does not affect, or otherwise regulate, discharges associated with agricultural activities when the discharge qualifies for an exemption under Section 404(f) of the Clean Water Act, even though a minimal effect/mitigation determination by NRCS pursuant to the Food and Security Act may be required. Activities authorized by paragraphs (c) and (d) are not included in the indexed acreage limit for the farm tract. If the site was used for agricultural purposes and the farm owner/operator used either paragraphs (a), (b), or (c) of this NWP to authorize activities in waters of the United States to increase agricultural production or construct farm buildings, and the current landowner wants to use NWP 39 to authorize residential, commercial, or industrial development activities in waters of the United States on the site, the combined acreage loss authorized by NWPs 39 and 40 cannot exceed the indexed acreage limit based on project area for a single and complete project in paragraph (a) of NWP 39. (Section 404)

Note: For example, under paragraphs (a)(3) or (b)(2) above, for a 20-acre farm tract, the maximum acreage loss authorized for playas, prairie potholes, and vernal pools on the farm tract under this NWP is 0.3 acre. For any farm tract 90 acres or more in size, the acreage limit of this NWP is 1 acre of playas, prairie potholes, and vernal pools.

41. *Reshaping Existing Drainage Ditches.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of existing serviceable drainage ditches constructed in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The reshaping of the ditch cannot increase drainage capacity beyond the original design capacity or expand the area drained by the ditch as originally designed (*i.e.*, the capacity of the ditch must be the same as originally designed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality (*e.g.*, by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, increase uptake of nutrients and other substances by vegetation, etc.). The permittee must notify the District Engineer in accordance with General Condition 13, if material excavated during ditch reshaping is proposed to be sidecast into waters of the United States or if greater than 500 linear feet of drainage ditch is to be reshaped. This NWP does not apply to reshaping drainage ditches constructed in uplands, since these areas are not waters of the United States, and thus no permit from the Corps is required, or to the maintenance of existing drainage ditches to their original dimensions and configuration, which does not require a Section 404 permit (see 33 CFR 323.4(a)(3)). This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects. (Section 404)

42. *Recreational Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction of expansion of recreational facilities, provided the activity meets all of the following criteria:

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

b. For discharges causing the loss of greater than ¼ acre of non-tidal waters of the United States, or the loss of greater than 500 linear feet of perennial or intermittent stream bed, the permittee notifies the District Engineer in accordance with General Condition 13;

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

d. The discharge is part of a single and complete project.

For the purposes of this NWP, the term ''recreational facility'' is defined as a recreational activity that has low-impact on the aquatic environment, is integrated into the natural landscape, and consists primarily of open space that does not substantially change

preconstruction grades or deviate from natural landscape contours. For the purpose of this permit, the primary function of recreational facilities does not include the use of motor vehicles, buildings, or impervious surfaces. Examples of recreational facilities that may be authorized by this NWP include: hiking trails, bike paths, horse paths, nature centers, and campgrounds (excluding trailer parks). The construction or expansion of golf courses and the expansion of ski areas may be authorized by this NWP, provided the golf course or ski area does not substantially deviate from natural landscape contours and is designed to minimize adverse effects to waters of the United States and riparian areas through the use of such practices as integrated pest management, adequate stormwater management facilities, vegetated buffers, reduced fertilizer use, etc. The facility must have an adequate water quality management plan in accordance with General Condition 9, such as a stormwater management facility to ensure that the recreational facility results in no substantial adverse effects to water quality. This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity. This NWP does not authorize other buildings, such as hotels, restaurants, etc. The construction or expansion of playing fields (*e.g.*, baseball, soccer, or football fields), basketball and tennis courts, racetracks, stadiums, arenas, and the construction of new ski areas are not authorized by this NWP. (Section 404)

43. *Stormwater Management Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction and maintenance of stormwater management facilities, including activities for the excavation of stormwater ponds/facilities, detention basins, and retention basins; installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins provided that the activity meets all of the following criteria:

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

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

c. For discharges or excavation for the construction of new stormwater management facilities or for the maintenance of existing stormwater management facilities causing the loss of greater than ¼ acre of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, or causing the loss of greater than 500 linear feet of intermittent stream bed, the permittee notifies the District Engineer in accordance with General Condition 13. In addition, the notification must include:

(1) A maintenance plan. The maintenance plan should be in accordance with State and local requirements, if any such requirements exist;

(2) For discharges in special aquatic sites, including wetlands and submerged aquatic vegetation, the notification must include a delineation of affected areas; and

(3) A compensatory mitigation proposal that offsets the loss of waters of the United States. Maintenance in constructed areas will not require mitigation provided such maintenance is accomplished in designated maintenance areas and not within compensatory mitigation areas (*i.e.*, district engineers may designate non-maintenance areas, normally at the downstream end of the stormwater management facility, in existing stormwater management facilities). (No mitigation will be required for activities which are exempt from Section 404 permit requirements);

d. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition (*i.e.*, why the discharge must occur in waters of the United States and why additional minimization cannot be achieved);

e. The stormwater management facility must comply with General Condition 21 and be designed using best management practices (BMPs) and watershed protection techniques. Examples may include forbays (deeper areas at the upstream end of the stormwater management facility that would be maintained through excavation), vegetated buffers, and siting considerations to minimize adverse effects to aquatic resources. Another example of a BMP would be bioengineering methods incorporated into the facility design to benefit water quality and minimize adverse effects to aquatic resources from storm flows, especially downstream of the facility, that provide, to the maximum extent practicable, for long term aquatic resource protection and enhancement;

f. Maintenance excavation will be in accordance with an approved maintenance plan and will not exceed the original contours of the facility as approved and constructed; and

g. The discharge is part of a single and complete project. (Section 404)

44. *Mining Activities.* Discharges of dredged or fill material into: (i) Isolated waters, streams where the annual average flow is 1 cubic foot per second (cfs) or less, and non-tidal wetlands adjacent to headwater streams, for aggregate mining (*i.e.*, sand, gravel, and crushed and broken stone) and associated support activities; (ii) lower perennial streams, excluding wetlands adjacent to lower perennial streams, for aggregate mining activities (support activities in lower perennial streams or adjacent wetlands are not authorized by this NWP); and (iii) isolated waters and non-tidal wetlands adjacent to headwater streams, for hard rock/mineral mining activities (*i.e.*, extraction of metalliferous ores from subsurface locations) and associated support activities, provided the discharge meets the following criteria:

a. The mined area within waters of the United States, plus the acreage loss of waters of the United States resulting from support activities, cannot exceed 2 acres;

b. The acreage loss of waters of the United States resulting from support activities cannot exceed one acre;

c. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition (*i.e.*, why the discharge must occur in waters of the United States and why additional minimization cannot be achieved);

d. In addition to General Conditions 17 and 20, activities authorized by this permit must not substantially alter the sediment characteristics of areas of concentrated shellfish beds or fish spawning areas. Normally, the mandated water quality management plan should address these impacts;

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

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

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

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

i. Beneficiation and mineral processing may not occur within 200 feet of the ordinary high water mark of any open waterbody. Although the Corps does not regulate discharges from these activities, a Clean Water Act Section 402 permit may be required;

j. All activities authorized by this NWP must carefully adhere to General Conditions 9 and 21. Further, if determined necessary by the District Engineer, the Corps may require modifications to the required water quality management plan;

k. No aggregate mining can occur within stream beds where the average annual flow is greater than 1 cubic foot per second or in waters of the United States within 100 feet of the ordinary high water mark of headwater stream segments where the average annual flow of the stream is greater than 1 cubic foot per second (aggregate mining can occur in areas immediately adjacent to the ordinary high water mark of a stream where the average annual flow is 1 cubic foot per second or less), except for aggregate mining in lower perennial streams;

l. *Single and complete project:* The discharges must be for a single and complete project, including support activities. Multiple mining activity discharges into several designated parcels of a mining project may be included together as long as the 2 acre limit is not exceeded; and

m. *Notification:* The permittee must notify the District Engineer in accordance with General Condition 13. The notification must include: (1) A description of measures proposed to minimize or prevent adverse effects (*e.g.*, head cutting, bank erosion, turbidity, water quality) to waters of the United States; (2) A written statement to the District Engineer detailing compliance with paragraph (c), above (*i.e.*, why the discharge must occur in waters of the United States and why additional minimization cannot be achieved); (3) A description of measures taken to meet the criteria associated with the discharge being permitted (*i.e.*, how the proposed work complies with paragraphs (d) through (g), above); and (4) A reclamation plan (for aggregate mining in isolated waters and non-tidal wetlands adjacent to headwaters and hard rock/mineral mining only).

This NWP does not authorize hard rock/mineral mining, including placer mining, in streams. No hard rock/mineral mining can occur in waters of the United States within 100 feet of the ordinary high water mark of headwater streams. The terms ''headwaters'' and ''isolated waters'' are defined in 33 CFR Parts 330.2(d) and (e), respectively. For the purposes of this NWP, the term ''lower perennial streams'' is the same as the lower perennial riverine subsystem described in the Cowardin classification system of wetlands and deepwater habitats of the United States. (Sections 10 and 404)

C. Nationwide Permit General Conditions

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

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

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

3. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date.

4. Aquatic Life Movements. No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

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

6. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions which may have been added by the division engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the State or tribe in its Section 401 water quality certification and Coastal Zone Management Act consistency determination.

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

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

9. Water Quality. In certain States and tribal lands an individual 401 water quality certification must be obtained or waived (See 33 CFR 330.4(c)). For NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44 where the State or tribal 401 certification (either generically or individually) does not require/approve a water quality management plan, the permittee must include design criteria and techniques that provide for protection of aquatic resources. The project must include a method for stormwater management (whether required by the State or not) that minimizes degradation of the downstream aquatic system, including water quality. To the maximum extent practicable, a vegetated buffer zone (including wetlands, uplands, or both) adjacent to open waters of the river, stream, or other open waterbody will be established and maintained, if the project occurs in the vicinity of such an open waterbody. The District Engineer will determine the proper width of the buffer and in which cases it will be required. Normally, the vegetated buffer will be 50 to 125 feet wide.

10. Coastal Zone Management. In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (see Section 330.4(d)).

11. Endangered Species. (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall

not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work.

(b) Authorization of an activity by a nationwide permit does not authorize the ''take'' of a threatened or endangered species as defined under the Federal Endangered Species Act. In the absence of separate authorization (*e.g.*, an ESA Section 10 Permit, a Biological Opinion with ''incidental take'' provisions, etc.) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, both lethal and non-lethal ''takes'' of protected species are in violation of the Endangered Species Act. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. Fish and Wildlife Service and National Marine Fisheries Service or their world wide web pages at http://www.fws.gov/r9endspp/endspp.html and http://www.nfms.gov/prot__res/esahome.html, respectively.

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

13. Notification. (a) Timing: Where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the notification is complete within 30 days of the date of receipt and can request additional information necessary for the evaluation of the PCN only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the notification is still incomplete and the PCN review process will not commence until all of the requested information has been received by the District Engineer. The prospective permittee shall not begin the activity:

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

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

(3) Unless 45 days have passed from the District Engineer's receipt of the complete notification and the prospective permittee has not received written notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

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

(2) Location of the proposed project;

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

(4) For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (*e.g.*, submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

(5) For NWP 7, Outfall Structures and Maintenance, the PCN must include information regarding the original design capacities and configurations of those areas of the facility where maintenance dredging or excavation is proposed.

(6) For NWP 21, Surface Coal Mining Activities, the PCN must include an Office of Surface Mining (OSM) or State-approved mitigation plan.

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

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

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

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring ½ 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 ½ acre in size, a formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See paragraph 13(f));

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

(8) For NWP 31, Maintenance of Existing Flood Control Projects, the prospective permittee must either notify the District Engineer with a PCN prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

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

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

(iii) Location of the dredged material disposal site.

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

(10) For NWPs 39, 43, and 44, the PCN must also include a written statement to the District Engineer

explaining how avoidance and minimization of losses of waters of the United States were achieved on the project site and either a compensatory mitigation proposal that offsets unavoidable losses of waters of the United States or justification explaining why compensatory mitigation should not be required.

(11) For NWP 40, Agricultural Activities, the PCN must include information regarding the past use of this NWP on the farm.

(12) For NWP 43, Stormwater Management Facilities, the PCN must include, for the construction of new stormwater management facilities, a maintenance plan (in accordance with State and local requirements, if applicable) and a compensatory mitigation proposal to offset losses of waters of the United States.

(13) For NWP 44, Mining Activities, the PCN must include a description of all waters of the United States adversely affected by the project, a description of measures taken to minimize adverse effects to waters of the United States, a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for all aggregate mining activities except for aggregate mining activities in lower perennial streams and any hard rock/mineral mining activities).

(c) Form of Notification: The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b)(1)–(7) of General Condition 13. A letter containing the requisite information may also be used.

(d) District Engineer's Decision: In reviewing the PCN for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may, optionally, submit a proposed mitigation plan with the PCN to expedite the process and the District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, the District Engineer will notify the permittee and include any conditions the District Engineer deems necessary.

Any compensatory mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the District Engineer will expeditiously review the proposed compensatory mitigation plan. The District Engineer must review the plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant stating that the project can proceed under the terms and conditions of the nationwide permit.

If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the District Engineer determines that mitigation is required in order to ensure no more than minimal adverse effects on the aquatic environment, the activity will be authorized within the 45-day PCN period, including the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the United States will occur until the District Engineer has approved a specific mitigation plan.

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

For activities requiring notification to the District Engineer that result in the loss of greater than 1 acre of waters of the United States, the District Engineer will, upon receipt of a notification, provide immediately (*e.g.*, via facsimile transmission, overnight mail, or other expeditious manner), a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(f) Wetlands Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps. For NWP 29 see paragraph (b)(6)(iii) for parcels less than ½ acre in size. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

(g) Mitigation: Factors that the District Engineer will consider when determining the acceptability of appropriate and practicable mitigation necessary to offset impacts on the aquatic environment that are more than minimal include, but are not limited to:

(i) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or

upland vegetated buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed;

(ii) To the extent appropriate, permittees should consider mitigation banking and other appropriate forms of compensatory mitigation. If the District Engineer determines that compensatory mitigation is necessary to offset the losses of waters of the United States and ensure that the net adverse effects of the authorized work on the aquatic environment are minimal, mitigation banks, in lieu fee programs, and other consolidated mitigation approaches will be the preferred method of providing compensatory mitigation, unless the District Engineer determines that activity-specific compensatory mitigation is more appropriate, based on what is best for the aquatic environment. These types of mitigation are preferred because they involve larger blocks of protected aquatic environment, are more likely to meet the mitigation goals, and are more easily checked for compliance. If a mitigation bank, in lieu fee program, or other consolidated mitigation approach is not available in the watershed, the District Engineer will consider other appropriate forms of compensatory mitigation to offset the losses of waters of the United States to ensure that the net adverse effects of the authorized work on the aquatic environment are minimal. In addition, compensatory mitigation must address wetland impacts, such as functions and values, and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the NWPs (*e.g.*, for NWP 14, ½ acre of wetlands cannot be created to change a ¾acre loss of wetlands to a ¼ acre loss; however, ½-acre of created wetlands can be used to reduce the impacts of a ⅓-acre loss of wetlands). If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. (Refer to General Condition 19 for additional information concerning mitigation requirements for the NWPs.)

14. Compliance Certification. Every permittee who has received a Nationwide permit verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter and will include: (a) A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions; (b) A statement that any required mitigation was completed in accordance with the permit conditions; and (c) The signature of the permittee certifying the completion of the work and mitigation.

15. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed ⅓ acre.

16. Water Supply Intakes. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

17. Shellfish Beds. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. Suitable Material. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may consist of unsuitable material (*e.g.*, trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

19. Mitigation. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material into waters of the United States, must be minimized or avoided to the maximum extent practicable at the project site (*i.e.*, on-site). Furthermore, the District Engineer will require restoration, creation, enhancement, or preservation of other aquatic resources in order to offset the authorized impacts, at least to the extent that adverse environmental effects to the aquatic environment are minimal. An important element of any mitigation plan for projects in or near streams or other open waters is the requirement of vegetated buffers (wetland, upland, or both) adjacent to the open water areas. The vegetated buffer should consist of native species and will constitute a portion, as determined by the District Engineer, of the required compensatory mitigation. The District Engineer will determine the proper width of the vegetated buffer and in which cases it will be required. Normally, the vegetated buffer will be 50 to 125 feet wide. (Refer to paragraph (g) of General Condition 13 for additional information concerning mitigation requirements for the NWPs.)

20. Spawning Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (*e.g.*, excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. Management of Water Flows: To the maximum extent practicable, the project must be designed to maintain preconstruction downstream flow conditions (*e.g.*, location, capacity, and flow rates). Furthermore, the project must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The project must provide, to the maximum extent practicable, for retaining excess flows from the site and for maintaining surface flow rates from the site similar to preconstruction conditions. To the maximum extent practicable, the authorized work must not increase water flows from the project site, relocate water, or redirect water flow beyond preconstruction conditions, to reduce adverse effects such as flooding or erosion downstream and upstream of the project site.

22. Adverse Effects From Impoundments. If the activity, including structures and work in navigable waters of the United States or discharge of dredged or fill material, creates an impoundment of water, adverse effects on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

23. Waterfowl Breeding Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

24. Removal of Temporary Fills. Any temporary fills must be removed in their

entirety and the affected areas returned to their preexisting elevation.

25. Designated Critical Resource Waters. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, State natural heritage sites, and outstanding national resource waters or other waters officially designated by a State as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the United States are not authorized by 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 United States may be authorized by the above NWPs in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has concurred in a determination of compliance with this condition.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWPs only after he determines that the impacts to the critical resource waters will be no more than minimal.

26. Impaired Waters. Impaired waters are those waters of the United States that have been identified by States or Tribes through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands. For the purposes of this general condition, the impaired waterbody includes any adjacent wetlands.

(a) Discharges of dredged or fill material causing the loss of more than one acre of impaired waters of the United States, including adjacent wetlands to such impaired waters, except for activities authorized by NWP 3 in such waters, are not authorized by nationwide permit.

(b) For discharges of dredged or fill material causing the loss of less than one acre of impaired waters of the United States, including adjacent wetlands to such impaired waters, or any activity authorized by NWP 3 in such waters, it is presumed that the project will, unless clearly demonstrated otherwise, directly or indirectly result in the further impairment of the listed water. Such activities in an impaired water or adjacent wetlands will be not be authorized by nationwide permit, unless the District Engineer determines that the prospective permittee has clearly demonstrated that the authorized project will not result in the further impairment of the listed water. For such discharges, the prospective permittee must notify the District Engineer in accordance with General Condition 13. In the notification to the District Engineer, the prospective permittee must submit a statement explaining how the proposed project, excluding mitigation, will not result in further impairment. Also, in accordance with the procedures in paragraph (e) of General Condition 13, the District Engineer will coordinate with the State 401 agency for NWP activities resulting in the loss of greater than ¼ acre of impaired waters of the United States. In addition, mitigation for any permitted discharges in impaired waters or their adjacent wetlands should be designed to offset impacts to aquatic functions and values being impacted by the project, as well as contribute to the reduction of sources of pollution contributing to the impairment (*e.g.*, by restoring wetlands that intercept non-point sources of sediment or nutrient laden runoff).

27. Fills Within the 100-year Floodplain. The 100-year floodplain will be defined by an up to date Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map, or in the absence of such map, the appropriate local floodplain authority through a licensed professional engineer.

(a) Except as provided below, discharges of dredged or fill material into waters of the United States resulting in permanent above-grade fills in the 100-year floodplain are not authorized by NWPs 21, 29, 39, 40, 42, 43, and 44. Prospective permittees must notify the District Engineer in accordance with General Condition 13, of any discharge of dredged or fill material in 100-year floodplains as defined above. The notification must include documentation that the proposed project will not involve discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills in waters of the United States within the FEMA mapped 100-year floodplain. For those areas where no FEMA map exists or the map is out of date (*e.g.*, the map no longer reflects current flooding conditions), the documentation should be from the local floodplain authority (or local official with authority to issue development permits within the floodplain). Based on such documentation, the District Engineer will make the final determination as to whether the proposed project is actually located within the 100-year floodplain.

(b) For NWPs 12 and 14, where there are discharges of dredged or fill material resulting in permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain, it is presumed that such discharges will result in more than minimal adverse effects. Such discharges are not authorized by NWPs 12, and 14, unless the District Engineer determines that the prospective permittee has clearly demonstrated that the project, and associated mitigation, will not decrease the flood-holding capacity and no more than minimally alter the hydrology, flow regime, or volume of waters associated with the floodplain. Prospective permittees attempting to rebut this presumption must notify the District Engineer in accordance with General Condition 13. The notification must include documentation, which demonstrates that the project will not result in increased flooding or more than minimally alter floodplain hydrology or flow regimes. This documentation must include proof that FEMA, or a state or local floodplain authority through a licensed professional engineer, has approved the proposed project and provided a statement that the project does not increase flooding or more than minimally alter floodplain hydrology or flow regimes.

(c) Notwithstanding (a) and (b) above, projects located in the 100-year floodplain at a point in a watershed which drains less than one square mile are not subject to this condition.

D. Further Information

1. District engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other Federal, State, or local permits, approvals, or authorizations required by law.

3. 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

Aquatic bench: Aquatic benches are those shallow areas around the edge of a permanent pool stormwater management facility that support aquatic vegetation, both submerged and emergent.

Best management practices: Best Management Practices (BMPs) are policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural. A BMP policy may affect the limits on a development.

Compensatory mitigation: For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Creation: The establishment of a wetland or other aquatic resource where one did not formerly exist.

Drainage ditch: A linear excavation or depression constructed for the purpose of conveying surface runoff or groundwater from one area to another. An ''upland drainage ditch'' is a drainage ditch constructed entirely in uplands (*i.e.*, not waters of the United States) and is not a water of the United States, unless it becomes tidal or otherwise extends the ordinary high water line of existing waters of the United States. Drainage ditches constructed in waters of the United States (*e.g.*, by excavating wetlands or stream channelization) remain waters of the United States even though they are heavily manipulated to increase drainage. A drainage ditch may be constructed in uplands or wetlands or other waters of the United States.

Enhancement: Activities conducted in existing wetlands or other aquatic resources which increase one or more aquatic functions.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Farm tract: A unit of contiguous land under one ownership which is operated as a farm or part of a farm.

Independent utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent utility.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage as a result of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and values. The loss of stream bed includes the linear feet of perennial or intermittent stream that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland (*i.e.*, a water of the United States) that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (*i.e.*, spring high tide line).

Open water: An area that, during a year with normal patterns of precipitation, has standing or flowing water for sufficient duration to establish an ordinary high water mark. Aquatic vegetation within the area of standing or flowing water is non-emergent, vegetated shallows, sparse, or absent. This term includes rivers, streams, lakes, and ponds.

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Permanent above-grade fill: A discharge of dredged or fill material into waters of the United States, including wetlands, that results in a substantial increase in ground elevation and permanently converts part or all of the waterbody to dry land. Structural fills authorized by NWPs 3, 25, 36, etc. are not included.

Playa: A type of marsh found on the high plain of northern Texas and eastern New Mexico that is characterized by small, seasonally flooded basins with clay or fine sandy loam hydric soils and emergent hydrophytic vegetation.

Prairie pothole: A type of marsh found on glacial till in Minnesota, Iowa, North Dakota, South Dakota, and Montana that is characterized by small seasonally or permanently flooded depressions and emergent hydrophytic vegetation.

Preservation: The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the overall aquatic ecosystem.

Project area: The acreage of land, including waters of the United States and uplands, utilized for the single and complete project. The acreage is determined by the amount of land cleared, graded, and/or filled to construct the single and complete project, including any buildings, utilities, stormwater management facilities, roads, yards, and other attendant features. The project area also includes any other land that is used in conjunction with the single and complete project, such as open space. Roads constructed by State or local governments for general public use are not included in the project area.

Restoration: Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a 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. Pools are characterized by a slower stream velocity, a streaming flow, a smooth surface, and a finer substrate.

Single and complete project: The term ''single and complete project'' is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers (see definition of independent utility). For linear projects, the ''single and complete project'' (*i.e.*, a single and complete crossing) will apply to each crossing of a separate water of the United States (*i.e.*, a single waterbody) at that location. An exception is for linear projects crossing a single waterbody several times at separate and distant locations: Each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and BMPs, which retain water for a period of time to control runoff and/or improve the quality (*i.e.*, by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream channel to increase the rate of water flow through the stream channel. Manipulation may include deepening, widening, straightening, armoring, or other activities that change the stream cross-section or other aspects of stream channel geometry to increase the rate of water flow through the stream channel. A channelized stream remains a water of the United States, despite the modifications to increase the rate of water flow.

Tidal wetland: A tidal wetland is a wetland (*i.e.*, a water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line (*i.e.*, spring high tide line) and are inundated by tidal waters two times per lunar month, during spring high tides.

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Vernal pool: A type of marsh found in Mediterranean-type climates (*i.e.*, wet winters and dry summers), especially on coastal terraces in southwestern California, the central valley of California, and areas west of the Sierra Mountains, that is characterized by shallow, seasonally flooded wet meadows with emergent hydrophytic vegetation.

Waterbody: A waterbody is any area that in a normal year has water flowing or standing above ground to the extent that evidence of an ordinary high water mark is established. Wetlands contiguous to the waterbody are considered part of the waterbody.

[FR Doc. 99–18292 Filed 7–20–99; 8:45 am]
BILLING CODE 3710–92–P