**DECISION DOCUMENT**
**NATIONWIDE PERMIT 2**

This document discusses the factors considered by the Corps of Engineers (Corps) during the issuance process for this Nationwide Permit (NWP). This document contains: (1) the public interest review required by Corps regulations at 33 CFR 320.4(a)(1) and (2); and (2) a discussion of the environmental considerations necessary to comply with the National Environmental Policy Act. This evaluation of the NWP includes a discussion of compliance with applicable laws, consideration of public comments, an alternatives analysis, and a general assessment of individual and cumulative impacts, including the general potential effects on each of the public interest factors specified at 33 CFR 320.4(a).

## 1.0 Text of the Nationwide Permit

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

## 1.1 Requirements

General conditions of the NWPs are in the Federal Register notice announcing the issuance of this NWP. Pre-construction notification requirements, additional conditions, limitations, and restrictions are in 33 CFR part 330.

## 1.2 Statutory Authority

- Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403)

## 1.3 Compliance with Related Laws (33 CFR 320.3)

### 1.3.1 General

NWPs are a type of general permit designed to authorize certain activities that have minimal individual and cumulative adverse effects on the aquatic environment and generally comply with the related laws cited in 33 CFR 320.3. Activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment cannot be authorized by NWPs. Individual review of each activity authorized by an NWP will not normally be performed, except when pre-construction notification to the Corps is required or when an applicant requests verification that an activity complies with an NWP. Potential adverse impacts and compliance with the laws cited in 33 CFR 320.3 are controlled by the terms and conditions of each NWP, regional and case-specific conditions, and the review process that is undertaken prior to the issuance of NWPs.

The evaluation of this NWP, and related documentation, considers compliance with each of

the following laws, where applicable: Sections 401, 402, and 404 of the Clean Water Act; Section 307(c) of the Coastal Zone Management Act of 1972, as amended; Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the National Environmental Policy Act of 1969; the Fish and Wildlife Act of 1956; the Migratory Marine Game-Fish Act; the Fish and Wildlife Coordination Act, the Federal Power Act of 1920, as amended; the National Historic Preservation Act of 1966; the Interstate Land Sales Full Disclosure Act; the Endangered Species Act; the Deepwater Port Act of 1974; the Marine Mammal Protection Act of 1972; Section 7(a) of the Wild and Scenic Rivers Act; the Ocean Thermal Energy Act of 1980; the National Fishing Enhancement Act of 1984; the Magnuson-Stevens Fishery and Conservation and Management Act, the Bald and Golden Eagle Protection Act; and the Migratory Bird Treaty Act. In addition, compliance of the NWP with other Federal requirements, such as Executive Orders and Federal regulations addressing issues such as floodplains, essential fish habitat, and critical resource waters is considered.

### 1.3.2 Terms and Conditions

Many NWPs have pre-construction notification requirements that trigger case-by-case review of certain activities. Two NWP general conditions require case-by-case review of all activities that may adversely affect Federally-listed endangered or threatened species or historic properties (i.e., general conditions 18 and 20). General condition 16 restricts the use of NWPs for activities that are located in Federally-designated wild and scenic rivers. None of the NWPs authorize the construction of artificial reefs. General condition 28 prohibits the use of an NWP with other NWPs, except when the acreage loss of waters of the United States does not exceed the highest specified acreage limit of the NWPs used to authorize the single and complete project.

In some cases, activities authorized by an NWP may require other federal, state, or local authorizations. Examples of such cases include, but are not limited to: activities that are in marine sanctuaries or affect marine sanctuaries or marine mammals; the ownership, construction, location, and operation of ocean thermal conversion facilities or deep water ports beyond the territorial seas; activities that result in discharges of dredged or fill material into waters of the United States and require Clean Water Act Section 401 water quality certification; or activities in a state operating under a coastal zone management program approved by the Secretary of Commerce under the Coastal Zone Management Act. In such cases, a provision of the NWPs states that an NWP does not obviate the need to obtain other authorizations required by law. [33 CFR 330.4(b)(2)]

Additional safeguards include provisions that allow the Chief of Engineers, division engineers, and/or district engineers to: assert discretionary authority and require an individual permit for a specific activity; modify NWPs for specific activities by adding special conditions on a case-by-case basis; add conditions on a regional or nationwide basis to certain NWPs; or take action to suspend or revoke an NWP or NWP authorization for activities within a region or state. Regional conditions are imposed to protect important regional concerns and resources. [33 CFR 330.4(e) and 330.5]

### 1.3.3 Review Process

The analyses in this document and the coordination that was undertaken prior to the issuance of the NWP fulfill the requirements of the National Environmental Policy Act (NEPA), the Fish and Wildlife Coordination Act, and other acts promulgated to protect the quality of the environment.

All NWPs that authorize activities that may result in discharges into waters of the United States require water quality certification. NWPs that authorize activities within, or affecting land or water uses within a state that has a Federally-approved coastal zone management program, must also be certified as consistent with the state's program. The procedures to ensure that the NWPs comply with these laws are described in 33 CFR 330.4(c) and (d), respectively.

## 1.4 Public Comment and Response

For a summary of the public comments received in response to the, February 16, 2011, Federal Register notice, refer to the preamble in the Federal Register notice announcing the reissuance of this NWP. The substantive comments received in response to the February 16, 2011, Federal Register notice were used to improve the NWP by changing NWP terms and limits, pre-construction notification requirements, and/or NWP general conditions, as necessary.

No changes were proposed for this NWP. One commenter recommended not reissuing this NWP because a state will deny water quality certification.

The potential for a state to deny water quality certification for an NWP is not a sufficient basis for not reissuing an NWP. The water quality certification process is independent of the decision on whether to issue or reissue an NWP.

# 2.0 Alternatives

This evaluation includes an analysis of alternatives based on the requirements of NEPA. The alternatives discussed below are based on an analysis of the potential environmental impacts and impacts to the Corps, Federal and state resource agencies, general public, and prospective permittees.

## 2.1 No Action Alternative (No Nationwide Permit)

The no action alternative would not achieve one of the goals of the Corps Nationwide Permit Program, which is to reduce the regulatory burden on applicants for activities that result in minimal individual and cumulative adverse effects on the aquatic environment. The no action alternative would also reduce the Corps ability to pursue the current level of review

for other activities that have greater adverse effects on the aquatic environment, including activities that require individual permits as a result of the Corps exercising its discretionary authority under the NWP program. The no action alternative would also reduce the Corps ability to conduct compliance actions.

If this NWP is not available, substantial additional resources would be required for the Corps to evaluate these minor activities through the individual permit process, and for the public and Federal, Tribal, and state resource agencies to review and comment on the large number of public notices for these activities. In a considerable majority of cases, when the Corps publishes public notices for proposed activities that result in minimal adverse effects on the aquatic environment, the Corps typically does not receive responses to these public notices from either the public or Federal, Tribal, and state resource agencies. Another important benefit of the NWP program that would not be achieved through the no action alternative is the incentive for project proponents to design their projects so that those activities meet the terms and conditions of an NWP. The Corps believes the NWPs have significantly reduced adverse effects to the aquatic environment because most applicants modify their projects to comply with the NWPs and avoid the delays and costs typically associated with the individual permit process.

In the absence of this NWP, Department of the Army (DA) authorization in the form of another general permit (i.e., regional or programmatic general permits, where available) or individual permits would be required. Corps district offices may develop regional general permits if an NWP is not available, but this is an impractical and inefficient method for activities with minimal individual and cumulative adverse effects on the aquatic environment that are conducted across the Nation. Not all districts would develop these regional general permits for a variety of reasons. The regulated public, especially those companies that conduct activities in more than one Corps district, would be adversely affected by the widespread use of regional general permits because of the greater potential for lack of consistency and predictability in the authorization of similar activities with minimal individual and cumulative adverse effects on the aquatic environment. These companies would incur greater costs in their efforts to comply with different regional general permit requirements between Corps districts. Nevertheless, in some states Corps districts have issued programmatic general permits to take the place of this and other NWPs. However, this approach only works in states with regulatory programs comparable to the Corps Regulatory Program.

### 2.2 National Modification Alternatives

Since the Corps Nationwide Permit program began in 1977, the Corps has continuously strived to develop NWPs that authorize activities that result only in minimal individual and cumulative adverse effects on the aquatic environment. Every five years the Corps reevaluates the NWPs during the reissuance process, and may modify an NWP to address concerns for the aquatic environment. Utilizing collected data and institutional knowledge concerning activities authorized by the Corps regulatory program, the Corps reevaluates the potential impacts of activities authorized by NWPs. The Corps also uses substantive public

comments on proposed NWPs to assess the expected impacts. This NWP was developed to authorize the placement of structures in artificial canals that have minimal adverse effects on the aquatic environment. The Corps has considered modifying or adding NWP general conditions, as discussed in the preamble of the Federal Register notice announcing the issuance of this NWP.

In the February 16, 2011, Federal Register notice, the Corps requested comments on the proposed reissuance of this NWP. The Corps did not propose any changes to this NWP.

### 2.3 Regional Modification Alternatives

An important aspect for the NWPs is the emphasis on regional conditions to address differences in aquatic resource functions, services, and values across the nation. All Corps divisions and districts are expected to add regional conditions to the NWPs to enhance protection of the aquatic environment and address local concerns. Division engineers can also revoke an NWP if the use of that NWP results in more than minimal adverse effects on the aquatic environment, especially in high value or unique wetlands and other waters.

Corps divisions and districts also monitor and analyze the cumulative adverse effects of the NWPs, and if warranted, further restrict or prohibit the use of the NWPs to ensure that the NWPs do not authorize activities that result in more than minimal adverse effects on the aquatic environment. To the extent practicable, division and district engineers will use regulatory automated information systems and institutional knowledge about the typical adverse effects of activities authorized by NWPs, as well as substantive public comments, to assess the individual and cumulative adverse effects on the aquatic environment resulting from regulated activities.

### 2.4 Case-specific On-site Alternatives

Although the terms and conditions for this NWP have been established at the national level to authorize most activities that have minimal individual and cumulative adverse effects on the aquatic environment, division and district engineers have the authority to impose case-specific special conditions on NWP authorizations to ensure that the authorized activity will result in minimal individual and cumulative adverse effects.

General condition 23 requires the permittee to minimize and avoid impacts to waters of the United States to the maximum extent practicable at the project site. Off-site alternatives cannot be considered for activities authorized by NWPs. During the evaluation of a pre-construction notification, the district engineer may determine that additional avoidance and minimization is practicable. The district engineer may also condition the NWP authorization to require compensatory mitigation to offset losses of waters of the United States and ensure that the net adverse effects on the aquatic environment are minimal. As another example, the NWP authorization can be conditioned to prohibit the permittee from conducting the activity during specific times of the year to protect spawning fish and shellfish. If the proposed activity will result in more than minimal adverse effects on the aquatic

environment, then the district engineer will exercise discretionary authority and require an individual permit. Discretionary authority can be asserted where there are concerns for the aquatic environment, including high value aquatic habitats. The individual permit review process requires a project-specific alternatives analysis, including the consideration of off-site alternatives, and a public interest review.

## 3.0 Affected Environment

The affected environment consists of navigable waters of the United States, which are defined at 33 CFR part 329. Generally, navigable waters of the United States are defined as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." [33 CFR 329.4] Using the estimate of the number of stream and river miles in the United States that was derived by Leopold, Wolman, and Miller (1964) (i.e., 3,250,000 miles), and further assuming that approximately one percent of the rivers and streams within a tributary system are navigable-in-fact (Wood 2004), the amount of traditionally navigable rivers is estimated to be 325,000 miles.

The Federal Geographic Data Committee has established the Cowardin system developed by the U.S. Fish and Wildlife Service (USFWS) (Cowardin et al. 1979) as the national standard for wetland mapping, monitoring, and data reporting (Dahl 2011) (see also http://www.fgdc.gov/standards/projects/FGDC-standards-projects/wetlands/fgdc-announce , accessed December 12, 2011). The Cowardin system is a hierarchical system which describes various wetland and deepwater habitats, using structural characteristics such as vegetation, substrate, and water regime as defining characteristics. Wetlands are defined by plant communities, soils, or inundation or flooding frequency. Deepwater habitats are permanently flooded areas located below the wetland boundary. In rivers and lakes, deepwater habitats are usually more than two meters deep.

There are five major systems in the Cowardin classification scheme: marine, estuarine, riverine, lacustrine, and palustrine (Cowardin et al. 1979). The marine system consists of open ocean on the continental shelf and its high energy coastline. The estuarine system consists of tidal deepwater habitats and adjacent tidal wetlands that are usually partially enclosed by land, but may have open connections to open ocean waters. The riverine system generally consists of all wetland and deepwater habitats located within a river channel. The lacustrine system generally consists of wetland and deepwater habitats located within a topographic depression or dammed river channel, with a total area greater than 20 acres. The palustrine system generally includes all non-tidal wetlands and wetlands located in tidal areas with salinities less than 0.5 parts per thousand; it also includes ponds less than 20 acres in size. Navigable waters of the United States are found in the marine and estuarine systems, and some riverine systems constitute navigable waters.

The Emergency Wetlands Resources Act of 1986 (Public Law 99-645) requires the USFWS to submit wetland status and trends reports to Congress (Dahl 2011). The latest status and

trends report, which covers the period of 2004 to 2009, is summarized in Table 3.1.

**Table 3.1. Estimated aquatic resource acreages in the conterminous United States in 2009 (Dahl 2011).**

| Aquatic Habitat Category | Estimated Area in 2009 (acres) |
|---|---|
| Marine intertidal | 227,800 |
| Estuarine intertidal non-vegetated | 1,017,700 |
| Estuarine intertidal vegetated | 4,539,700 |
| **All intertidal waters and wetlands** | 5,785,200 |
| Freshwater ponds | 6,709,300 |
| Freshwater vegetated | 97,565,300 |
| • Freshwater emergent wetlands | 27,430,500 |
| • Freshwater shrub wetlands | 18,511,500 |
| • Freshwater forested wetlands | 51,623,300 |
| **All freshwater wetlands** | 104,274,600 |
| Lacustrine deepwater habitats | 16,859,600 |
| Riverine deepwater habitats | 7,510,500 |
| Estuarine subtidal habitats | 18,776,500 |
| **All wetlands and deepwater habitats** | 153,206,400 |

The acreage of lacustrine deepwater habitats does not include the open waters of Great Lakes (Dahl 2011), which are navigable waters.

According to Hall et al. (1994), there are more than 204 million acres of wetlands and deepwater habitats in the State of Alaska, including approximately 174.7 million acres of wetlands. Wetlands and deepwater habitats comprise approximately 50.7 percent of the surface area in Alaska (Hall et al. 1994).

Leopold, Wolman, and Miller (1964) estimated that there are approximately 3,250,000 miles of river and stream channels in the United States. This estimate is based on an analysis of 1:24,000 scale topographic maps, by stream order. This estimate does not include many small streams. Many small streams are not mapped on 1:24,000 scale U.S. Geological Survey topographic maps (Leopold 1994) or included in other analyses (Meyer and Wallace 2001). In a study of stream mapping in the southeastern United States, only 20% of the stream network was mapped on 1:24,000 scale topographic maps, and nearly none of the observed intermittent or ephemeral streams were indicated on those maps (Hansen 2001). For a 1:24,000 scale topographic map, the smallest tributary found by using 10-foot contour interval has drainage area of 0.7 square mile and length of 1,500 feet, and smaller channels

are common throughout the United States (Leopold 1994). Due to the difficulty in mapping small streams, there are no accurate estimates of the total number of river or stream miles in the conterminous United States that may be classified as "waters of the United States."

Navigable waters of the United States also include marine habitats and estuarine subtidal habitats, the extent of which Dahl (2011) estimates to be 227,800 and 18,776,500 acres, respectively in the conterminous United States (see Table 3.1). There are approximately 95,471 statute miles of coast in the United States and its territories (http:shoreline.noaa.gov/faqs.html accessed December 14, 2011).

Information on water quality in waters and wetlands, as well as the causes of water quality impairment, is collected by the U.S. Environmental Protection Agency (U.S.EPA) under sections 305(b) and 303(d) of the Clean Water Act. Table 3.2 provides U.S. EPA's most recent national summary of water quality in the Nation's waters and wetlands.

**Table 3.2. The 2010 national summary of water quality data (U.S. EPA 2012).**

| Category of water | Total waters | Total waters assessed | Percent of waters assessed | Good waters | Threatened waters | Impaired waters |
|---|---|---|---|---|---|---|
| Rivers and streams | 3,533,205 miles | 965,693 miles | 27.3 | 445,079 miles | 6,369 miles | 514,246 miles |
| Lakes, reservoirs and ponds | 41,666,049 acres | 18,796,765 acres | 45.1 | 5,833,964 acres | 38,681 acres | 12,924,120 acres |
| Bays and estuaries | 87,791 square miles | 32,830 square miles | 37.4 | 11,045 square miles | 17 square miles | 21,768 square miles |
| Coastal shoreline | 58,618 miles | 9,143 miles | 15.6 | 1,746 miles | 0 miles | 7,396 miles |
| Ocean and near coastal waters | 54,120 square miles | 1,275 square miles | 2.4 | 968 square miles | 0 square miles | 307 square miles |
| Wetlands | 107,700,000 acres | 1,311,645 acres | 1.2 | 208,944 acres | 805 acres | 1,101,895 acres |
| Great Lakes shoreline | 5,202 miles | 4,431 miles | 85.2 | 78 miles | 0 miles | 4,353 miles |
| Great Lakes open waters | 60,546 square miles | 53,332 square miles | 88.1 | 62 square miles | 0 square miles | 53,270 square miles |

According to the 2010 national summary (U.S. EPA 2012), 53% of assessed rivers and streams, 66% of assessed bays and estuaries, 81% of assessed coastal shoreline, 24% of assessed ocean and near coastal waters, and 84% of assessed wetlands are impaired.

For rivers and streams, 34 causes of impairment were identified, and the top 10 causes were pathogens, sediment, nutrients, organic enrichment/oxygen depletion, polychlorinated biphenyls, habitat alterations, metals (excluding mercury), mercury, flow alterations, and

temperature. The primary sources of impairment for the assessed rivers and streams were agriculture, atmospheric deposition, unknown sources, hydrology modification, urban-related runoff/stormwater, wildlife, municipal discharges/sewage, unspecified non-point sources, habitat alterations, and resource extraction.

For bays and estuaries, 28 causes of impairment were identified, and the top 10 causes of impairment were mercury, pathogens, polychlorinated biphenyls, organic enrichment/oxygen depletion, dioxins, metals (excluding mercury), noxious aquatic plants, pesticides, algal growth, and unknown causes of impaired biota. The primary sources of impairment of bays and estuaries were atmospheric deposition, "unknown," municipal discharges/sewage, wildlife, industrial, other sources, agriculture, unspecified non-point sources, hydrologic modifications, and habitat alterations.

For coastal shorelines, 17 causes of impairment were listed, led by mercury, pathogens, organic enrichment/oxygen depletion, metals (excluding mercury), pesticides, polychlorinated biphenyls, turbidity, nutrients, algal growth, and unknown causes of impaired biota. The top 10 sources of impairment for coastal shorelines were "unknown," atmospheric deposition, urban-related runoff/stormwater, municipal discharges/sewage, agriculture, hydrologic modifications, industrial, unspecified non-point sources, wildlife, and recreational boating and marinas.

For ocean and near coastal waters, 16 causes of impairment were identified, and the top 10 causes of impairment were mercury, pathogens, organic enrichment/oxygen depletion, nuisance exotic species, toxics, polychlorinated biphenyls, turbidity, pesticides, metals, and toxic organics. Habitat alterations were ranked eleventh. The primary sources of impairment of ocean and near coastal waters were "unknown," atmospheric deposition, recreational boating and marinas, municipal discharges/sewage, unspecified non-point sources, urban-related runoff/stormwater, recreation and tourism (non-boating), industrial, hydrologic modifications, and construction.

Most causes and sources of impairment are not due to activities regulated under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899. Habitat alterations as a cause or source of impairment may be the result of activities regulated under section 404 and section 10 because they involve discharges of dredged or fill material or structures or work in navigable waters, but habitat alterations may also occur as a result of activities not regulated under those two statutes, such as the removal of vegetation from upland riparian areas. Hydrologic modifications may or may not be regulated under section 404 or section 10.

Wetland functions are the biophysical processes that occur within a wetland (King et al. 2000). Wetlands provide many functions, such as habitat for fish and shellfish, habitat for waterfowl and other wildlife, habitat for rare and endangered species, food production, plant production, flood conveyance, flood-peak reduction, flood storage, shoreline stabilization, water supply, ground water recharge, pollutant removal, sediment accretion, and nutrient uptake (NRC 1992).

Functions provided by streams include sediment transport, water transport, transport of nutrients and detritus, habitat for many species of plants and animals (including endangered or threatened species), and maintenance of biodiversity (NRC 1992). Streams also provide hydrologic functions, nutrient cycling functions, food web support, and corridors for movement of aquatic organisms (Allan and Castillo 2007).

Freshwater ecosystems provide services such as water for drinking, household uses, manufacturing, thermoelectric power generation, irrigation, and aquaculture; production of finfish, waterfowl, and shellfish; and non-extractive services, such as flood control, transportation, recreation (e.g., swimming and boating), pollution dilution, hydroelectric generation, wildlife habitat, soil fertilization, and enhancement of property values (Postel and Carpenter 1997).

Marine ecosystems provide a number of ecosystem services, including fish production; materials cycling (e.g., nitrogen, carbon, oxygen, phosphorous, and sulfur); transformation, detoxification, and sequestration of pollutants and wastes produced by humans; support of ocean-based recreation, tourism, and retirement industries; and coastal land development and valuation, including aesthetics related to living near the ocean (Peterson and Lubchenco 1997).

Activities authorized by this NWP will provide a wide variety of goods and services that are valued by society. For example, structures in artificial canals support navigable access to other waters, for recreation and other purposes. The structures authorized by this NWP would support recreation and other activities in residential areas.

## 4.0 Environmental Consequences

### 4.1 General Evaluation Criteria

This document contains a general assessment of the foreseeable effects of the individual activities authorized by this NWP, the anticipated cumulative effects of those activities, and the potential future losses of waters of the United States that are estimated to occur until the expiration date of the NWP. In the assessment of these individual and cumulative effects, the terms and limits of the NWP, notification requirements, and the standard NWP general conditions are considered. The supplemental documentation provided by division engineers will address how regional conditions affect the individual and cumulative effects of the NWP.

The following evaluation comprises the NEPA analysis and the public interest review specified in 33 CFR 320.4(a)(1) and (2).

The issuance of an NWP is based on a general assessment of the effects on public interest and environmental factors that are likely to occur as a result of using this NWP to authorize

activities in waters of the United States. As such, this assessment must be speculative or predictive in general terms. Since NWPs authorize activities across the nation, projects eligible for NWP authorization may be constructed in a wide variety of environmental settings. Therefore, it is difficult to predict all of the indirect impacts that may be associated with each activity authorized by an NWP. For example, the NWP that authorizes 25 cubic yard discharges of dredged or fill material into waters of the United States may be used to fulfill a variety of project purposes. Indication that a factor is not relevant to a particular NWP does not necessarily mean that the NWP would never have an effect on that factor, but that it is a factor not readily identified with the authorized activity. Factors may be relevant, but the adverse effects on the aquatic environment are negligible, such as the impacts of a boat ramp on water level fluctuations or flood hazards. Only the reasonably foreseeable direct or indirect effects are included in the environmental assessment for this NWP. Division and district engineers will impose, as necessary, additional conditions on the NWP authorization or exercise discretionary authority to address locally important factors or to ensure that the authorized activity results in no more than minimal individual and cumulative adverse effects on the aquatic environment. In any case, adverse effects will be controlled by the terms, conditions, and additional provisions of the NWP. For example, Section 7 Endangered Species Act consultation will be required for activities that may affect endangered or threatened species or critical habitat.

### 4.2 Impact Analysis

This NWP authorizes the installation of structures in artificial canals, which may be located primarily in residential areas. This NWP authorizes structures in navigable waters of the United States, but it does not authorize discharges of dredged or fill material into those waters.

Pre-construction notification is not required for activities authorized by this NWP, but the division engineer can add regional conditions to this NWP to require pre-construction notification for certain activities. If the district engineer determines that the adverse effects of a particular project are more than minimal after considering mitigation, then discretionary authority will be asserted and the applicant will be notified that another form of DA authorization, such as a regional general permit or individual permit, is required (see 33 CFR 330.4(e) and 330.5).

Additional conditions can be placed on proposed activities on a regional or case-by-case basis to ensure that the activity will have minimal individual and cumulative adverse effects on the aquatic environment. Regional conditioning of this NWP will be used to account for differences in aquatic resource functions, services, and values across the country, ensure that the NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment, and allow each Corps district to prioritize its workload based on where its efforts will best serve to protect the aquatic environment. Regional conditions can prohibit the use of an NWP in certain waters (e.g., high value waters or specific types of wetlands or waters), lower pre-construction notification thresholds, or require pre-construction notification for some or all NWP activities in certain watersheds or

types of waters. Specific NWPs can also be revoked on a geographic or watershed basis where the adverse effects resulting from the use of those NWPs are more than minimal.

In high value waters, division and district engineers can: 1) prohibit the use of the NWP in those waters and require an individual permit or regional general permit; 2) impose an acreage limit on the NWP; 3) require pre-construction notification for some or all NWP activities in those waters; 4) add regional conditions to the NWP to ensure that the individual and cumulative adverse environmental effects are minimal; or 5) for those NWP activities that require pre-construction notification, add special conditions to NWP authorizations, such as compensatory mitigation requirements, to ensure that the adverse effects on the aquatic environment are minimal. NWPs can authorize activities in high value waters as long as the individual and cumulative adverse effects on the aquatic environment are minimal.

The construction and use of fills for temporary access for construction may be authorized by NWP 33 or regional general permits issued by division or district engineers. The related activity must meet the terms and conditions of the specified permit(s). If the discharge is dependent on portions of a larger project that require an individual permit, this NWP will not apply. [See 33 CFR 330.6(c) and (d)]

### 4.3 Cumulative Effects

The Council on Environmental Quality's NEPA regulations define cumulative effects as: "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." [40 CFR 1508.7.] Therefore, the NEPA cumulative effects analysis for an NWP is not limited to activities authorized by the NWP or other DA permits and includes Federal and non-Federal activities that affect section 10 waters and wetlands (i.e., those waters and wetlands subject to jurisdiction under Section 10 of the Rivers and Harbors Act of 1899). The cumulative effects analysis should focus on specific categories of resources instead of the environmental effects caused by a particular action, and it requires identification of the stressors that cause degradation of those resources, including those caused by actions unrelated to the proposed action (CEQ 1997). The geographic scope of the cumulative impacts analysis is the United States and its territories, where the NWP may be used to authorize specific activities that require DA authorization. The temporal scope of the cumulative effects analysis includes past actions that have affected section 10 waters and wetlands, as well as present actions and reasonably foreseeable future actions that are affecting, or will affect, section 10 waters and wetlands. The present effects of past federal, non-federal, and private actions are included in the affected environment, which is described in Section 3.0. The affected environment includes current aggregate effects of past actions, which are captured in recent national information on the quantity and quality of wetlands, streams, and other aquatic resources that is summarized in Section 3.0.

In addition to the activities authorized by this NWP, there are many activities that contribute to cumulative effects on section 10 waters and wetlands in the United States, and alter the quantity of those resources and the functions they provide. Activities authorized by past versions of NWP 2, as well as other NWPs, individual permits, letters of permission, and regional general permits have resulted in direct and indirect impacts to section 10 waters and wetlands. Those activities may have legacy effects that have added to the cumulative effects and affected the quantity of those resources and the functions they provide. Structures or work that convert section 10 waters and wetlands to upland areas result in permanent losses of aquatic resource functions. Temporary structures or work and other activities may cause short-term or partial losses of aquatic resource functions. Discharges of dredged or fill material into waters of the United States regulated under Section 404 of the Clean Water Act may also contribute to cumulative effects to section 10 waters and wetlands.

Cumulative effects to section 10 waters and wetlands in the United States are not limited to the effects caused by activities regulated and authorized by the Corps under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. Other federal, non-federal, and private activities also contribute to the cumulative effects to section 10 waters and wetlands by changing the quantity of those resources and the functions they provide. Cumulative effects to aquatic resources are the result of landscape-level processes (Gosselink and Lee 1989). As discussed in more detail below, cumulative effects to aquatic resources are caused by a variety of activities (including activities that occur entirely in uplands) that take place within a landscape unit, such as the watershed for a river or stream (e.g., Allan 2004, Paul and Meyer 2001, Leopold 1968) or the contributing drainage area for a wetland (e.g., Wright et al. 2006, Brinson and Malvárez 2002, Zedler and Kercher 2005).

The ecological condition of rivers is dependent on the state of their watersheds (NRC 1992), because they are affected by activities that occur in those watersheds, including agriculture, urban development, deforestation, mining, water removal, flow alteration, and invasive species (Palmer et al. 2010). Land use changes affect rivers and streams through increased sedimentation, larger inputs of nutrients (e.g., nitrogen, phosphorous) and pollutants (e.g., heavy metals, synthetic chemicals, toxic organics), altered hydrology, the alteration or removal of riparian vegetation, and the reduction or elimination of inputs of large woody debris (Allen 2004). Agriculture is the primary cause of river and stream impairment, followed by urbanization (Paul and Meyer 2001). Agricultural land use adversely affects river and stream water quality, habitat, and biological communities (Allan 2004). Urbanization causes changes to river and stream hydrology (e.g., higher flood peaks, lower base flows), sediment supply and transport, water chemistry, and aquatic organisms (Paul and Meyer 2001). Leopold (1968) found that land use changes affect the hydrology of an area by altering river and stream flow patterns, total runoff, water quality, and geomorphology. Changes in peak flow patterns and runoff affect channel stability. River water quality is adversely affected by increased inputs of sediments, nutrients, and pollutants, many of which come from non-point sources (Paul and Meyer 2001, Allan and Castillo 2007).

Activities that affect wetland quantity and quality include: land use changes that alter local

hydrology (including water withdrawal), clearing and draining wetlands, constructing levees that sever hydrologic connections between rivers and floodplain wetlands, constructing other obstructions to water flow (e.g., dams, locks), constructing water diversions, inputs of nutrients and contaminants, and fire suppression (Brinson and Malvárez 2002). Upland development adversely affects wetlands and reduces wetland functionality because those activities change surface water flows and alter wetland hydrology, contribute stormwater and associated sediments, nutrients, and pollutants, cause increases in invasive plant species abundance, and decrease the diversity of native plants and animals (Wright et al. 2006). Many of the remaining wetlands in the United States are degraded (Zedler and Kercher 2005). Wetland degradation and losses are caused by changes in water movement and volume within a watershed or contributing drainage area, altered sediment transport, drainage, inputs of nutrients from non-point sources, water diversions, fill activities, excavation activities, invasion by non-native species, land subsidence, and pollutants (Zedler and Kercher 2005).

Coastal waters are also affected by a wide variety of activities. Most inland waters in the United States drain to coastal areas, and therefore activities that occur in inland watersheds affect coastal waters (NRC 1994). Adverse effects to coastal waters are caused by habitat modifications, point source pollution, non-point source pollution, changes to hydrology and hydrodynamics, exploitation of coastal resources, introduction of non-native species, global climate change, shoreline erosion, and pathogens and toxins (NRC 1994). Eutrophication of coastal waters is caused by nutrients contributed by waste treatment systems, non-point sources, and the atmosphere, and may cause hypoxia or anoxia in coastal waters (NRC 1994). Inland land uses, such as agriculture, urban development, and forestry, adversely affect coastal waters by diverting fresh water from estuaries and by acting as sources of nutrients and pollutants to coastal waters (Millennium Ecosystem Assessment 2005). Habitat modifications are the result of dredging or filling coastal waters, inputs of sediment via non-point sources, changes in water quality, or alteration of coastal hydrodynamics (NRC 1994). Coastal development activities, including those that occur in uplands, affect marine and estuarine habitats (Millennium Ecosystem Assessment 2005). The introduction of non-native species may change the functions and structure of coastal wetlands and other habitats (Millennium Ecosystem Assessment 2005). Substantial alterations of coastal hydrology and hydrodynamics are caused by land use changes in watersheds draining to coastal waters, the channelization or damming of streams and rivers, water consumption, and water diversions (NRC 1994). Changes in water movement through watersheds may also alter sediment delivery to coastal areas, which affects the sustainability of wetlands and intertidal habitats and the functions they provide (NRC 1994). Fishing activities may also modify coastal habitats by changing habitat structure and the biological communities that inhabit those areas (NRC 1994).

There is also little information on the ecological condition of the Nation's section 10 waters and wetlands, and the amounts of functions they provide, although reviews have acknowledged that most of these resources are degraded (Zedler and Kercher 2005, Allan 2004) or impaired (U.S. EPA 2012) because of various activities and other stressors. These data deficiencies make it more difficult to characterize the affected environment to assess

cumulative effects.

As discussed in Section 3.0 of this document there is a wide variety of causes and sources of impairment of the Nation's rivers, lakes, estuarine waters, and marine waters (U.S. EPA 2012), which also contribute to cumulative effects to aquatic resources. Many of those causes of impairment are point and non-point sources of pollutants that are not regulated under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899. Two common causes of river impairment, habitat alterations and flow alterations, may be due in part to activities regulated by the Corps under Section 10 of the Rivers and Harbors Act of 1899 and/or Section 404 of the Clean Water Act. Habitat and flow alterations may also be the caused by activities that do not involve discharges of dredged or fill material or structures or work in navigable waters.

Many of the activities discussed in this cumulative effects section that affect section 10 waters and wetlands are not subject to regulation under Section 10 of the Rivers and Harbors Act of 1899 or Section 404 of the Clean Water Act.

Compensatory mitigation required by district engineers for specific activities authorized by this NWP will help reduce the contribution of those activities to the cumulative effects on the Nation's wetlands, streams, and other aquatic resources, by providing ecological functions to partially or fully replace some or all of the aquatic resource functions lost as a result of those activities. Compensatory mitigation requirements for the NWPs are described in general condition 23 and compensatory mitigation projects must also comply with the applicable provisions of 33 CFR part 332. District engineers will establish compensatory mitigation requirements on a case-by-case basis, after evaluating pre-construction notifications. Compensatory mitigation requirements for individual NWP activities will be specified through permit conditions added to NWP authorizations. When compensatory mitigation is required, the permittee is required to submit a mitigation plan prepared in accordance with the requirements of 33 CFR 332.4(c). Credits from approved mitigation banks or in-lieu fee programs may also be used to satisfy compensatory mitigation requirements for NWP authorizations. Monitoring is required to demonstrate whether the permittee-responsible mitigation project, mitigation bank, or in-lieu fee project is meeting its objectives and providing the intended aquatic resource structure and functions. If the compensatory mitigation project is not meeting its objectives, adaptive management will be required. Adaptive management may involve taking actions, such as site modifications, remediation, or design changes, to ensure the compensatory mitigation project meets its objectives (see 33 CFR 332.7(c)).

Based on reported use of this NWP during the period of August 1, 2009, to July 31, 2010, the Corps estimates that this NWP will be used approximately 50 times per year on a national basis, resulting in impacts to less than acre of waters of the United States. Compensatory mitigation is not normally required to offset the impacts resulting from the activities authorized by this NWP. The demand for these types of activities could increase or decrease over the five-year duration of this NWP. Using the current trend, approximately 250 activities could be authorized over a five year period until this NWP expires, resulting in

impacts to less than one acre of waters of the United States. Because of the small amount of estimated impacts to waters of the United States expected to result from the use of this NWP over a five year period and the size of the Nation's aquatic resource base as described in Section 3.0 of this document, the net effects on the aquatic environment resulting from the activities authorized by this NWP will be minimal.

The activities authorized by this NWP will result in minor contributions to the cumulative effects that have occurred to section 10 waters and wetlands because, as discussed in this section, they are one of many activities that affect those resources. The causes of cumulative effects discussed in this section include past, present, and reasonably foreseeable future federal, non-federal, and private activities. For the national-scale cumulative effects analysis presented in this section, it is not possible to quantify the relative contributions of the various activities that affect the quantity of section 10 waters and wetlands and the functions they provide, because such data are not available at the national scale.

In a specific watershed, division or district engineers may determine that the cumulative adverse effects of activities authorized by this NWP are more than minimal. Division and district engineers will conduct more detailed assessments for geographic areas that are determined to be potentially subject to more than minimal cumulative adverse effects. Division and district engineers have the authority to require individual permits in watersheds or other geographic areas where the cumulative adverse effects are determined to be more than minimal, or add conditions to the NWP either on a case-by-case or regional basis to require mitigation measures to ensure that the cumulative adverse effects are minimal. When a division or district engineer determines, using local or regional information, that a watershed or other geographic area is subject to more than minimal cumulative adverse effects due to the use of this NWP, he or she will use the revocation and modification procedure at 33 CFR 330.5. In reaching the final decision, the division or district engineer will compile information on the cumulative adverse effects and supplement this document.

The Corps expects that the convenience and time savings associated with the use of this NWP will encourage applicants to design their projects within the scope of the NWP rather than request individual permits for projects which could result in greater adverse impacts to the aquatic environment. The minimization encouraged by the issuance of this NWP, as well as compensatory mitigation that may be required for specific activities authorized by this NWP, will help reduce cumulative effects to the Nation's wetlands, streams, and other aquatic resources.

## 5.0 Public Interest Review

### 5.1 Public Interest Review Factors (33 CFR 320.4(a)(1))

For each of the 20 public interest review factors, the extent of the Corps consideration of expected impacts resulting from the use of this NWP is discussed, as well as the reasonably foreseeable cumulative adverse effects that are expected to occur. The Corps decision-

making process involves consideration of the benefits and detriments that may result from the activities authorized by this NWP.

(a) Conservation: The activities authorized by this NWP may modify the natural resource characteristics of the project area. Compensatory mitigation, if required for activities authorized by this NWP, will result in the restoration, enhancement, creation, or preservation of aquatic habitats that will offset losses of conservation values. The adverse effects of activities authorized by this NWP on conservation will be minor.

(b) Economics: The construction or installation of structures in artificial canals will have positive impacts on the local economy. During construction, these activities will generate jobs and revenue for local contractors as well as revenue to building supply companies that sell construction materials. Structures installed in artificial canals may increase the value of the homes in the residential developments serviced by these canals.

(c) Aesthetics: The installation of structures in artificial canals will alter the visual character of some waters of the United States. The extent and perception of these changes will vary, depending on the size and configuration of the structures, the nature of the surrounding area, and the public uses of the area. During the construction or installation of these structures, adverse effects to other aesthetic characteristics, such as air quality and the amount of noise, may temporarily increase.

(d) General environmental concerns: Activities authorized by this NWP will have negligible adverse effects on general environmental concerns, such as water, air, noise, and land pollution. The authorized activity will also affect the physical, chemical, and biological characteristics of the environment. The adverse effects of the activities authorized by this NWP on general environmental concerns will be minor. Adverse effects to the chemical composition of the aquatic environment will be controlled by general condition 6, which states that the material used for construction must be free from toxic pollutants in toxic amounts. General condition 23 requires mitigation to minimize adverse effects to the aquatic environment through avoidance and minimization at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse effects on the aquatic environment are minimal. It is important to note that the Corps scope of review is usually limited to impacts to aquatic resources. Specific environmental concerns are addressed in other sections of this document.

(e) Wetlands: The construction and installation of structures in artificial canals is likely to have only minor impacts on wetlands, since most of these structures will be located in open, navigable waters.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because

these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse effects on the aquatic environment are minimal. Division engineers can regionally condition this NWP to restrict or prohibit the use of this NWP in high value wetlands. The district engineer will exercise discretionary authority to require an individual permit if the wetlands to be filled are high value and the activity will result in more than minimal adverse effects on the aquatic environment. District engineers can also add case-specific special conditions to the NWP authorization to provide protection to wetlands or require compensatory mitigation to offset losses of wetlands.

(f) Historic properties: General condition 20 states that in cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act have been satisfied.

(g) Fish and wildlife values: This NWP authorizes activities in navigable waters of the United States, including marine, estuarine, lacustrine, and riverine waters, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of streams and wetlands, decreasing the quantity and quality of fish and wildlife habitat. Wetland and riparian vegetation provides food and habitat for many species, including foraging areas, resting areas, corridors for wildlife movement, and nesting and breeding grounds. Open waters provide habitat for fish and other aquatic organisms. Woody riparian vegetation shades streams, which reduces water temperature fluctuations and provides habitat for fish and other aquatic animals. Riparian vegetation provides organic matter that is consumed by fish and aquatic invertebrates. Woody riparian vegetation creates habitat diversity in streams when trees and large shrubs fall into the channel, forming snags that provide habitat and shade for fish. Compensatory mitigation may be required by district engineers to restore, enhance, create, and/or preserve wetlands and other aquatic habitats to offset losses of waters of the United States. These methods of compensatory mitigation will provide fish and wildlife habitat values.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the necessary life cycle movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized activity has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized activity cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent undertaking a particular NWP activity. General condition 19 states that the permittee is responsible for obtaining any "take" permits required under the U.S. Fish and Wildlife Service's regulations governing compliance with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that may adversely affect essential fish habitat. Consultation may occur on a case-by-case or programmatic basis. Division and district engineers can impose regional and special conditions to ensure that activities authorized by this NWP will result in minimal adverse effects on essential fish habitat.

(h) Flood hazards: The activities authorized by this NWP are unlikely to have adverse effects on the flood-holding capacity of 100-year floodplains, including surface water flow velocities. The structures authorized by this NWP will be located in open, navigable waters, not 100-year floodplains.

(i) Floodplain values: Activities authorized by this NWP are unlikely to affect the flood-holding capacity of the floodplain, as well as other floodplain values. For those NWP activities that require pre-construction notification, district engineers will review the proposed activities to ensure that those activities result in minimal adverse effects on the aquatic environment. The structures authorized by this NWP will be located in open, navigable waters, not 100-year floodplains.

(j) Land use: Activities authorized by this NWP will not result in any substantial change in land use, since these canals are usually located in residential areas. Any changes in land use will be minor, since these structures are usually constructed in open waters. Since the primary responsibility for land use decisions is held by state, local, and Tribal governments, the Corps scope of review is limited to significant issues of overriding national importance, such as navigation and water quality (see 33 CFR 320.4(j)(2)).

(k) Navigation: Activities authorized by this NWP must comply with general condition 1, which states that no activity may cause more than minimal adverse effects on navigation. The activities authorized by this NWP will enhance navigable access by waterfront property owners.

(l) Shore erosion and accretion: The activities authorized by this NWP will have negligible direct effects on shore erosion and accretion processes, since the NWP authorizes only the installation of structures in artificial canals.

(m) Recreation: Activities authorized by this NWP may change the recreational uses of the

area. However, many of the activities authorized by this NWP will enhance recreational values, because recreational boaters may use these structures.

(n) Water supply and conservation: Activities authorized by this NWP will have little or no adverse effects on surface water and groundwater supplies because the NWP authorizes only structures in artificial canals.

(o) Water quality: The activities authorized by this NWP will have little or no adverse effects on water quality, since the NWP authorizes only the installation of structures in navigable waters of the United States. This NWP does not authorize discharges of dredged or fill material into waters of the United States. During the construction and installation of these structures, small amounts of oil and grease from construction equipment may be discharged into the waterway. Because most of the construction will occur during a relatively short period of time, the frequency and concentration of these discharges are not expected to have more than minimal adverse effects on overall water quality.

(p) Energy needs: The activities authorized by this NWP will have negligible adverse effects on energy consumption. Energy consumption may increase temporarily during construction.

(q) Safety: The activities authorized by this NWP will have minor effects on safety. Activities authorized by this NWP will be subject to Federal, state, and local safety laws and regulations. Therefore, this NWP will not adversely affect the safety of the project area.

(r) Food and fiber production: Activities authorized by this NWP will have negligible adverse effects on food and fiber production, since it authorizes only structures in navigable waters of the United States. The activities authorized by this NWP will have minor adverse effects on fisheries.

(s) Mineral needs: Activities authorized by this NWP will have little or no adverse effects on mineral needs. Some structures in artificial canals may be constructed with steel, aluminum, and copper, which are made from mineral ores.

(t) Considerations of property ownership: The NWP complies with 33 CFR 320.4(g), which states that an inherent aspect of property ownership is a right to reasonable private use. The NWP provides expedited DA authorization for structures installed in canals, which may improve navigable access.

## 5.2 Additional Public Interest Review Factors (33 CFR 320.4(a)(2))

### 5.2.1 Relative extent of the public and private need for the proposed structure or work

This NWP authorizes structures in artificial canals that have minimal individual and cumulative adverse effects on the aquatic environment. These activities satisfy public and private needs for these types of structures. The need for this NWP is based upon the number of these activities that occur annually with individual and cumulative minimal adverse

effects on the aquatic environment.

5.2.2 Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work

Most situations in which there are unresolved conflicts concerning resource use arise when environmentally sensitive areas are involved (e.g., special aquatic sites, including wetlands) or where there are competing uses of a resource. The nature and scope of the activity, when planned and constructed in accordance with the terms and conditions of this NWP, reduce the likelihood of such conflict. In the event that there is a conflict, the NWP contains provisions that are capable of resolving the matter (see Section 1.2 of this document).

General condition 23 requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site. Consideration of off-site alternative locations is not required for activities that are authorized by general permits. General permits authorize activities that have minimal individual and cumulative adverse effects on the aquatic environment and overall public interest. The district engineer will exercise discretionary authority and require an individual permit if the proposed activity will result in more than minimal adverse environmental effects on the project site. The consideration of off-site alternatives can be required during the individual permit process.

5.2.3 The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited

The nature and scope of the activities authorized by the NWP will most likely restrict the extent of the beneficial and detrimental effects to the area immediately surrounding these structures. Activities authorized by this NWP will have minimal individual and cumulative adverse effects on the aquatic environment.

The terms, conditions, and provisions of the NWP were developed to ensure that individual and cumulative adverse environmental effects are minimal. Specifically, NWPs do not obviate the need for the permittee to obtain other Federal, state, or local authorizations required by law. The NWPs do not grant any property rights or exclusive privileges (see 33 CFR 330.4(b) for further information). Additional conditions, limitations, restrictions, and provisions for discretionary authority, as well as the ability to add activity-specific or regional conditions to this NWP, will provide further safeguards to the aquatic environment and the overall public interest. There are also provisions to allow suspension, modification, or revocation of the NWP.

5.2.4 Endangered and threatened species.

The Corps believes that the procedures currently in place result in proper coordination under Section 7 of the Endangered Species Act (ESA) and ensure that activities authorized by this

NWP will not jeopardize the continued existence or any listed threatened and endangered species or result in the destruction or adverse modification of critical habitat. The Corps also believes that current local procedures in Corps districts are effective in ensuring compliance with ESA.

Under general condition 18, no activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

Each activity authorized by an NWP is subject to general condition 18, which states that "[n]o activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species." In addition, general condition 18 explicitly states that the NWP does not authorize the taking of threatened or endangered species, which will ensure that permittees do not mistake the NWP authorization as a Federal authorization to take threatened or endangered species. General condition 18 also requires a non-federal permittee to submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat. This general condition also states that, in such cases, non-federal permittees shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized.

Under the current Corps regulations (33 CFR 325.2(b)(5)), the district engineer must review all permit applications for potential impacts on threatened and endangered species or critical habitat. For the NWP program, this review occurs when the district engineer evaluates the pre-construction notification or request for verification. Based on the evaluation of all available information, the district engineer will initiate consultation with the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS), as appropriate, if he or she determines that the proposed activity may affect any threatened and endangered species or critical habitat. Consultation may occur during the NWP authorization process or the district engineer may exercise discretionary authority to require an individual permit for the proposed activity and initiate consultation through the individual permit process. If ESA consultation is conducted during the NWP authorization process without the district engineer exercising discretionary authority, then the applicant will be notified that he or she cannot proceed with the proposed activity until ESA consultation is complete. If the district engineer determines that the activity will have no effect on any threatened and endangered species or critical habitat, then the district engineer will notify the applicant that he or she may proceed under the NWP authorization.

Corps districts have, in most cases, established informal or formal procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps district engineers determine if a proposed activity may affect listed species or their critical habitat

and, if necessary, initiate ESA consultation. Corps districts may utilize maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Where necessary, regional conditions are added to NWPs to require pre-construction notification for NWP activities that occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed activities for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make a "no effect" or "may affect" decision.

Based on the safeguards discussed above, especially general condition 18 and the NWP regulations at 33 CFR 330.4(f), the Corps has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. Although the Corps continues to believe that these procedures ensure compliance with the ESA, the Corps has taken some steps to provide further assurance. Corps district offices meet with local representatives of the USFWS and NMFS to establish or modify existing procedures, where necessary, to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat. Corps districts can also establish, through local procedures or other means, additional safeguards that ensure compliance with the ESA. Through formal consultation under Section 7 of the Endangered Species Act, or through other coordination with the USFWS and/or the NMFS, as appropriate, the Corps will establish procedures to ensure that the NWP will not jeopardize any threatened and endangered species or result in the destruction or adverse modification of designated critical habitat. Such procedures may result in the development of regional conditions added to the NWP by the division engineer, or in special conditions to be added to an NWP authorization by the district engineer.

## 6.0 Determinations

### 6.1 Finding of No Significant Impact

Based on the information in this document, the Corps has determined that the issuance of this NWP will not have a significant impact on the quality of the human environment. Therefore, the preparation of an Environmental Impact Statement is not required.

### 6.2 Public Interest Determination

In accordance with the requirements of 33 CFR 320.4, the Corps has determined, based on the information in this document, that the issuance of this NWP is not contrary to the public interest.

### 6.3 Section 176(c) of the Clean Air Act General Conformity Rule Review

This NWP has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities authorized by this permit will not exceed de minimis levels of direct emissions of a criteria pollutant or its precursors and are exempted by 40 CFR 93.153. Any later indirect emissions are generally not within the Corps continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons, a conformity determination is not required for this NWP.

FOR THE COMMANDER

Dated:

13 Feb 2012

Michael J. Walsh
Major General, US Army
Deputy Commanding General
for Civil and Emergency Operations

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