

DECISION DOCUMENT
NATIONWIDE PERMIT 21

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); (2) a discussion of the environmental considerations necessary to comply with the National Environmental Policy Act; and (3) the impact analysis specified in Subparts C through F of the 404(b)(1) Guidelines (40 CFR Part 230). 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). The Corps analysis of environmental effects, or scope of analysis, including, for example, those effects on endangered species and historic properties, is generally limited to the waters of the US. Effects on environmental resources outside of the waters of the US, including, for example, effects on endangered species that do not inhabit or use waters of the US as habitat, are generally evaluated by the state or OSM under the Surface Mining Control and Reclamation Act of 1977 or the Fish and Wildlife Service under the Endangered Species Act.

1. SURFACE COAL MINING ACTIVITIES. Discharges of dredged or fill material into waters of the US associated with surface coal mining and reclamation operations provided the coal mining activities are authorized by the Department of the Interior, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the “*Notification*” General Condition. In addition, to be authorized by this NWP, the District Engineer must determine that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing. The Corps, at the discretion of the District Engineer, may require a bond to ensure success of the mitigation, if no other Federal or state agency has required one. For discharges in special aquatic sites, including wetlands, and stream riffle and pool complexes, the *notification* must also include a delineation of affected special aquatic sites, including wetlands. (also, see 33 CFR 330.1(e))

Mitigation: In determining the need for as well as the level and type of mitigation, the District Engineer will ensure no more than minimal adverse effects to the aquatic environment occur. As such, District Engineers will determine on a case-by-case basis the requirement for adequate mitigation to ensure the effects to aquatic systems are minimal. In cases where OSM or the state has required mitigation for the loss of aquatic habitat, the Corps may consider this in determining appropriate mitigation under Section 404. (Sections 10 and 404)

General conditions of the NWP are in the Federal Register notice announcing the reissuance of this NWP. Notification requirements, additional conditions, limitations, and restrictions are in 33 CFR Part 330.

2. STATUTORY AUTHORITY:

- (a) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403)
- (b) Section 404 of the Clean Water Act (33 U.S.C. 1344)

3. COMPLIANCE WITH RELATED LAWS (33 CFR 320.3):

(a) General:

NWPs are a type of general permit designed to authorize certain activities that have minimal 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 adverse effects on the aquatic environment, individually or cumulatively, cannot be authorized by NWPs. Individual review of each activity authorized by an NWP will not normally be performed, except when preconstruction 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; and the Magnuson-Stevens Fishery and Conservation and Management 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.

(b) Terms and Conditions:

Many NWP's have 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 11 and 12). General Condition 7 restricts the use of NWP's for activities that are located in Federally-designated wild and scenic rivers. None of the NWP's authorize artificial reefs. General Condition 15 prohibits the use of an NWP with other NWP's, except when the acreage loss of waters of the United States does not exceed the highest specified acreage limit of the NWP's 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 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 NWP's 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 NWP's for specific activities by adding special conditions on a case-by-case basis; add conditions on a regional or nationwide basis to certain NWP's; 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]

(c) 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 NWP's that authorize activities which may result in discharges into waters of the United States require Section 401 water quality certification. NWP's 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 NWP's comply with these laws are described in 33 CFR 330.4(c) and (d), respectively.

(d) Public Comment and Response:

For a summary of the public comments received in response to the August 9, 2001, 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 August 9, 2001, Federal Register notice were used to improve the NWP by changing NWP terms and limits, notification requirements, and/or NWP general conditions, as necessary.

4. INDIVIDUAL AND CUMULATIVE IMPACTS:

(a) 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 supplementary 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, the public interest review specified in 33 CFR 320.4(a)(1) and (2), and the impact analysis specified in Subparts C through F of the 404(b)(1) Guidelines (40 CFR Part 230).

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 of 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 consultation will be required for activities that may affect endangered species.

(b) NEPA Alternatives:

This evaluation includes an analysis of alternatives based on the requirements of NEPA, which requires a more expansive review than the Clean Water Act Section 404(b)(1) Guidelines. 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. Since the consideration of off-site alternatives under Section 404(b)(1) does not apply to specific projects authorized by general permits, the alternatives analysis discussed below consists of a general NEPA alternatives analysis for the NWP.

(i) 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 adverse effects on the aquatic environment, individually or cumulatively. 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 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 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 or 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 work 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 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.

(ii) 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 adverse effects on the aquatic environment, individually or cumulatively. 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 constantly 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 discharges of dredged or fill material into waters of the US associated with surface coal mining and reclamation operations provided the coal mining and reclamation activities are authorized by the DOI, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

In the August 9, 2001, Federal Register notice, the Corps proposed two changes to NWP 21, to ensure that activities authorized by the NWP result in minimal individual and cumulative adverse effects on the aquatic environment. One proposed modification requires each project proponent to obtain a written determination from the District Engineer that the proposed work complies with the terms and conditions of this NWP and will result in minimal individual and cumulative adverse environmental effects, after consideration of any required mitigation. The other proposed modification clarifies that the Corps will require mitigation when evaluating surface coal mining activities, in accordance with General Condition 19.

One commenter opposed the requirement for written verifications from district engineers, stating that the requirement would delay projects. This commenter said that all requests for NWP 21 verifications should be completed within the 45 day pre-construction notification review period in General Condition 13.

Pre-construction notifications for NWP 21 activities will be reviewed in accordance with the procedures in paragraph (a) of General Condition 13. Within 45 days of receipt of a complete pre-construction notification, the District Engineer will notify the project proponent that either: (1) the proposed work is authorized by NWP or, (2) discretionary authority is asserted and the proposed work will require an individual permit.

Many commenters stated that the mitigation requirements in General Condition 19 cannot sufficiently compensate for impacts resulting from surface coal mining activities. One commenter objected to the proposed modification, stating that it places too much emphasis on compensation, instead of avoiding and minimizing impacts. One commenter supported the proposed modification and another commenter suggested that bonding mitigation measures should be required for all activities authorized by this NWP.

Compensatory mitigation is an appropriate mechanism to ensure that the net adverse effects of NWP activities on the aquatic environment are minimal. The provisions of General Condition 19 describe the mitigation requirements of the NWPs, including the requirement for project proponents to avoid and minimize impacts to waters of the United States to the maximum extent practicable on the project site. Specific compensatory mitigation requirements will be determined by district engineers on a case-by-case basis, to ensure that the adverse effects on the aquatic environment are minimal. The text of NWP 21 states that district engineers can require bonds to ensure success of the mitigation, if no other Federal or state agency has required such a bond. The need for bonds will be determined on a case-by-case basis.

The Corps has decided to reissue NWP 21 with the proposed modifications. The Corps has also agreed to do a Programmatic Environmental Impact Statement (PEIS) for NWP 21. This PEIS will examine the implementation of NWP 21 across the country. The PEIS will examine data to improve understanding of the effects of surface coal mining activities, including valley fills, on the aquatic environment. The PEIS will help the Corps determine if any changes to NWP 21 are necessary to ensure that the NWP authorizes only those surface coal mining activities with minimal adverse effects on the aquatic environment.

In response to the August 9, 2001, Federal Register notice, two commenters recommended adding a 300 linear foot limit for impacts to stream beds. Another commenter suggested that this NWP should be conditioned to limit impacts to watersheds less than 250 acres in size. Two commenters supported the Corps position that the 250-acre watershed limit should not be incorporated into the terms and conditions of NWP 21.

The Corps does not believe it is necessary to impose a 300 linear foot limit for stream bed impacts or limit impacts to watersheds less than 250 acres in size. The notification requirements of this NWP will ensure that the NWP authorizes activities with minimal adverse effects on the

aquatic environment. Division engineers can regionally condition this NWP to impose acreage and linear foot limits, if such limits are necessary to ensure that the NWP authorizes only those activities with minimal adverse environmental effects.

(iii) Regional Modification Alternatives:

An important aspect for the NWPs is the increased emphasis on regional conditions to address differences in aquatic resource functions and values across the nation. Division engineers can 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.

The Bragg Settlement Agreement (54 F. Supp. 2d 653), which was approved on June 17, 1999, was the result of a lawsuit filed in West Virginia (Bragg v. Robertson, Civil Action No. 2:98-0636 (S.D. W. Va)). This lawsuit challenged the use of NWPs, including NWP 21, to authorize valley fills associated with certain types of coal mining activities in West Virginia. The settlement agreement stated that excess rock from a surface coal mining and reclamation activity that would bury a stream segment draining a watershed in excess of 250 acres in size would generally be considered to result in more than minimal adverse effects on the aquatic environment. If the District Engineer determines that such coal mining and reclamation activities would result in more than minimal adverse effects on the aquatic environment, discretionary authority would be asserted and the project proponent would be required to obtain an individual permit for the surface coal mining activity.

The Corps does not believe that the terms of the Bragg Settlement Agreement should be applied across the Nation, because there are different types of coal mining activities in other areas of the country, with varying degrees of impacts to the aquatic environment. The notification requirements of this NWP, as well as the requirement for project proponents to obtain written verification that the proposed work is authorized by this NWP, will result in case-by-case review of all activities, to ensure that the NWP authorizes only those surface coal mining activities that have minimal adverse effects on the aquatic environment.

Corps divisions and districts also monitor and analyze the cumulative adverse effects of the NWPs on a watershed basis, 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 maximum extent practicable, division and district engineers will use regulatory databases 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. When conducting this assessment, division and district engineers can only consider

those activities regulated by the Corps under Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972. Adverse impacts resulting from activities outside of the Corps scope of analysis, such as the construction or expansion of upland developments, cannot be considered in the Corps analysis of cumulative adverse effects on the aquatic environment.

(iv) 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 adverse effects on the aquatic environment, division and district engineers have the authority to impose case-specific special conditions on an NWP authorization to ensure that the authorized work will result in minimal adverse effects.

General Condition 19 requires the permittee to minimize and avoid impacts to waters of the United States on-site to the maximum extent practicable. Off-site alternatives cannot be considered for activities authorized by NWPs. During the evaluation of a preconstruction notification, the District Engineer may determine that additional avoidance and minimization is practicable. The District Engineer will also condition the NWP authorization, if necessary, 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 work during specific times of the year to protect spawning fish and shellfish. If the proposed work 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.

(c) Impact Analysis

(i) General:

This NWP authorizes discharges of dredged or fill material waters of the United States, including wetlands, for surface coal mining activities and reclamation operations, provided the coal mining activities are authorized by the Office of Surface Mining of the United States Department of the Interior or a state with an approved Title V program under the Surface Mining Control and Reclamation Act. There is no acreage limit for this NWP.

Notification will be required for activities authorized by this NWP. The notification requirement allows district engineers to review proposed activities on a case-by-case basis to ensure that the

adverse effects of those activities on the aquatic environment are minimal. 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 work has minimal adverse effects on the aquatic environment. Regional conditioning of this NWP will be used to account for differences in aquatic resource functions and values across the country, ensure that the NWP authorizes only those activities with minimal individual or 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). 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) add regional conditions to the NWP to ensure that the adverse environmental effects are minimal; or 3) for those activities that require 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 work must meet the terms and conditions of the specified permit(s). If the activity 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)]

(ii) 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 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 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, since the NWP authorizes only those activities with minimal adverse effects on the aquatic environment and the Corps scope of analysis is usually limited to impacts to aquatic resources.

(b) Economics: Surface coal mining activities will have positive impacts on local economies. These activities will generate jobs and revenue for local contractors as well as revenue to building supply companies that sell construction materials. The sale of coal extracted from these mines will generate revenue for mining companies. The energy provided by coal-burning power plants will provide power for businesses, including manufacturing industries. Activities authorized by this NWP will also benefit the community by improving the local economic base, which is affected by employment, tax revenues, community services, and property values.

(c) Aesthetics: Surface coal mining activities 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 mining activity and any associated fills, the nature of the surrounding area, and the public uses of the area. Activities authorized by this NWP can also modify other aesthetic characteristics, such as air quality and the amount of noise. The increased human use of the project area and surrounding land will also alter local aesthetic values.

(d) General environmental concerns: Activities authorized by this NWP will affect general environmental concerns, such as water, air, noise, and land pollution. The authorized work 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, since the NWP authorizes only those activities with minimal adverse effects on the aquatic environment. Adverse effects to the chemical composition of the aquatic environment will be controlled by General Condition 18, which states that the material used for construction must be free from toxic pollutants in toxic amounts. General Condition 19 requires mitigation to minimize adverse effects to the aquatic environment through on-site avoidance and minimization. Compensatory mitigation required by district engineers will ensure that the net adverse effects on the aquatic environment are minimal. It is important to note that the Corps scope of analysis is usually limited to impacts to aquatic resources. Specific environmental concerns are addressed in other sections of this document.

(e) Wetlands: Discharges of dredged or fill material into waters of the United States for surface coal mining activities may result in the destruction of wetlands. In most cases, the affected wetlands will be permanently filled, especially where rocks and soil from mining operations are deposited, resulting in the permanent loss of aquatic resource functions and values. Wetlands may also be converted to other uses and habitat types. Some wetlands may be temporarily impacted by the work through the use of temporary staging areas and access roads. These wetlands will be restored, unless the District Engineer authorizes another use for the area, but

the plant community may be different, especially if the site was originally forested. Compensatory mitigation will normally be required to offset the loss of wetlands and ensure that the adverse effects to the aquatic environment are minimal.

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 19 requires on-site avoidance and minimization of impacts to waters of the United States, including wetlands. Compensatory mitigation required by district engineers will ensure that the net adverse effects on the aquatic environment are minimal. As part of the notification, the permittee must submit a copy of a mitigation plan approved by the Office of Surface Mining or the state mining agency. General Condition 25 restricts the use of this NWP in critical resource waters and adjacent wetlands, which may include high value wetlands. Division engineers can regionally condition this NWP to restrict or prohibit the use of this NWP in high value wetlands. District engineers will also exercise discretionary authority to require an individual permit if the wetlands to be filled are high value and the work 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 12 states that the NWPs cannot authorize activities that affect historic properties listed, or eligible for listing in, the National Register of Historic Places, until the District Engineer has complied with 33 CFR Part 325, Appendix C. The provisions of Appendix C ensure that activities authorized by NWPs comply with the National Historic Preservation Act.

The review required under the Surface Mining Control and Reclamation Act will also ensure compliance with the National Historic Preservation Act.

(g) Fish and wildlife values: This NWP authorizes activities in waters of the United States, including streams and wetlands, 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. The morphology of a stream channel may be altered by activities authorized by this NWP, which can affect fish populations. However, notification is required for all activities authorized by this NWP, which provides the District Engineer with an opportunity to review the proposed work and assess potential impacts on fish and wildlife values and ensure that the authorized activity results in minimal adverse effects on the aquatic environment. The District Engineer must verify in writing that the proposed work will result in minimal adverse effects on the aquatic environment, individually and cumulatively. Compensatory mitigation required by district engineers to restore, enhance, create, and/or preserve wetlands and other aquatic habitats will offset losses of waters of the United States, and provide fish and wildlife habitat. Vegetated buffers next to open and flowing waters may also be required as compensatory mitigation. These methods of compensatory mitigation will provide fish and wildlife habitat values.

General Condition 4 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 17 and 20 will ensure that the authorized work has minimal adverse effects on shellfish beds and spawning areas, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory waterfowl, due to the requirements of General Condition 23.

Pursuant to Section 305(b)(2) of the Magnuson-Stevens Fishery and Conservation Management Act, the Corps entered into programmatic Essential Fish Habitat consultation with the NMFS. As discussed elsewhere in this document (i.e., Section 4(c)(ii)(g), Section 4(c)(iii)(h), and Section 4(c)(iii)(l)), the NWPs contain provisions that will ensure that impacts to Essential Fish Habitat are minimal, individually or cumulatively. 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 may affect the flood-holding capacity of 100-year floodplains, including surface water flow velocities. Changes in the flood-holding capacity of 100-year floodplains may impact human health, safety, and welfare. Compliance with General Condition 21 will reduce flood hazards. This general condition requires the permittee to maintain preconstruction surface flow rates from the site and avoid relocating or redirecting water to the maximum extent practicable. It is important to note that much of the land area within 100-year floodplains is upland, and outside of the Corps scope of review.

(i) Floodplain values: Activities authorized by this NWP may affect the flood-holding capacity of floodplains, as well as other floodplain values. The fish and wildlife habitat values of floodplains will be adversely affected by activities authorized by this NWP, by modifying or eliminating areas used for nesting, foraging, resting, and reproduction. The water quality functions of floodplains may also be adversely affected by these activities. Modification of the floodplain may also adversely affect other hydrological processes, such as groundwater recharge. All activities authorized by this NWP require notification, so that district engineers can review the proposed work on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment.

Compensatory mitigation will normally be required for activities authorized by this NWP, which will offset losses of waters of the United States and provide water quality functions and wildlife habitat. General Condition 19 requires on-site avoidance and minimization of impacts to waters of the United States to the maximum extent practicable, which will reduce losses of floodplain values. The mitigation requirements of General Condition 19 will help ensure that the adverse effects of these activities on floodplain values are minimal. Compliance with General Condition 21 will also ensure that activities in 100-year floodplains will not cause more than minimal adverse effects on flood storage and conveyance.

(j) Land use: Activities authorized by this NWP will change land use. The mining of coal and the deposition of rock and soil from the mining operation will change the character of the land. Reclamation required for activities authorized by this NWP will restore natural land uses. Since the primary responsibility for land use decisions is held by state, local, and Tribal governments, the Corps scope of analysis 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. This NWP requires notification for all activities, which will allow district engineers to review the proposed work and determine whether adverse effects on navigation will be minimal.

(l) Shore erosion and accretion: The activities authorized by this NWP will have minor direct effects on shore erosion and accretion processes, since surface coal mining activities are usually located on inland areas. NWP 13, regional general permits, or individual permits may be used to authorize bank stabilization projects associated with surface coal mining activities, which may affect shore erosion and accretion.

(m) Recreation: Activities authorized by this NWP may change the recreational uses of the area. Certain recreational activities, such as bird watching, hunting, and fishing may no longer be available in the area during the mining operation, but these activities may

resume after the mined area has been successfully reclaimed. Some mining activities may permanently eliminate recreational uses of the area.

(n) Water supply and conservation: Activities authorized by this NWP may adversely affect both surface water and groundwater supplies. Surface coal mining activities may increase the demand for potable water in the region. The deposition of rock and soil from surface coal mining operations may alter groundwater recharge areas, which could decrease replenishment of groundwater supplies. Surface water flow patterns may be affected by the authorized work. Activities authorized by this NWP can also affect the quality of water supplies by adding pollutants and toxic chemicals to surface waters and groundwater, but many causes of water pollution, such as discharges regulated under Section 402 of the Clean Water Act, are outside the Corps scope of analysis. The quantity and quality of local water supplies may be enhanced through the construction of water treatment facilities. Division and district engineers can prohibit the use of this NWP in watersheds for public water supplies, if it is in the public interest to do so. General Condition 16 prohibits discharges in the vicinity of public water supply intakes. Compensatory mitigation will normally be required for activities authorized by this NWP, which will help maintain or improve the quality of surface waters.

(o) Water quality: Surface coal mining activities in wetlands and open waters will have adverse effects on water quality. These activities can cause increases in nutrients, sediments, and pollutants in the water. The loss of wetland and riparian vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland and riparian 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 column. Wetlands and riparian areas also decrease the velocity of flood waters, removing suspended sediments from the water column and reducing turbidity. Riparian vegetation also serves an important role in the water quality of streams by shading the water from the intense heat of the sun. Compensatory mitigation will normally be required for activities authorized by this NWP, to ensure that the work does not have more than minimal adverse effects on the aquatic environment, including water quality. Wetlands and riparian areas restored, created, enhanced, or preserved as compensatory mitigation will provide local water quality benefits.

During mining and construction, small amounts of oil and grease from mining and construction equipment may be discharged into the waterway. The frequency and concentration of these discharges are not expected to have more than minimal adverse effects on overall water quality.

This NWP requires a Section 401 water quality certification, because it authorizes discharges of dredged or fill material into waters of the United States. Most water quality concerns are addressed by the state or Tribal Section 401 agency. The Office of Surface Mining or the state

mining agency may require the permittee to implement water quality management measures that minimize the degradation of the downstream aquatic environment, including water quality. Vegetated buffers may be required for activities authorized by the NWP, if there are streams or other open waters on the project site. The vegetated buffers will protect downstream water quality and enhance the aquatic habitat.

(p) Energy needs: During the mining operation, the activities authorized by this NWP may increase energy consumption in the area, especially electricity, natural gas, and petroleum products. The coal extracted from mines will be used to fuel power plants, thereby providing energy to people. Existing infrastructure may have to be expanded to distribute the electricity generated by power plants to cities and other areas.

(q) Safety: The 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 may adversely affect food and fiber production, especially where rock and soil from surface coal mining operations are deposited in farm fields. The use of farmland for the disposal of mined material and wastes reduces the amount of available agricultural land in the nation, unless that land is replaced by converting other land, such as forest, to agricultural land. The loss of farmland is outside of the Corps scope of analysis.

(s) Mineral needs: Activities authorized by this NWP may increase demand for aggregates and stone, which could be used for mining activities. Activities authorized by this NWP may increase the demand for other building materials, such as 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 activities in waters of the United States for surface coal mining and reclamation activities, provided the activity complies with the terms and conditions of the NWP and results in minimal adverse effects on the aquatic environment.

(iii) 404(b)(1) Guidelines Impact Analysis (Subparts C through F):

(a) Substrate: Discharges of dredged or fill material into waters of the United States will alter the substrate of those waters, usually replacing the aquatic area with dry land, and changing the physical, chemical, and biological characteristics of the substrate. The original substrate will be removed or covered by other material, such as concrete, soil, gravel, etc. Temporary fills may be placed upon the substrate, but must be removed upon completion of the work (see General

Condition 24). Higher rates of erosion may result during construction, but General Condition 3 requires the use of appropriate measures to control soil erosion and sediment.

(b) Suspended particulates/turbidity: Depending on the method of mining, soil erosion and sediment control measures, equipment, composition of the bottom substrate, and wind and current conditions during mining operations, fill material placed in open waters will temporarily increase water turbidity. Notification is required for all activities authorized by this NWP, which will allow the District Engineer to review each activity and ensure that adverse effects on the aquatic environment are minimal. Particulates will be resuspended in the water column during removal of temporary fills. The turbidity plume will normally be limited to the immediate vicinity of the disturbance and should dissipate shortly after each phase of the mining activity. General Condition 3 requires the permittee to stabilize exposed soils and other fills, which will reduce turbidity. Mining companies may be required to develop and implement sediment and erosion control plans to minimize the entry of soil into the aquatic environment. NWP activities cannot create turbidity plumes that smother important spawning areas downstream (see General Condition 20).

(c) Water: Surface coal mining activities can affect some characteristics of water, such as water clarity, chemical content, dissolved gas concentrations, pH, and temperature. These activities can change the chemical and physical characteristics of the waterbody by introducing suspended or dissolved chemical compounds or sediments into the water. Changes in water quality can affect the species and quantities of organisms inhabiting the aquatic area. Water quality certification is required for activities authorized by this NWP, which will ensure that the work does not violate applicable water quality standards. The District Engineer may require vegetated buffers next to open waters, such as streams. Vegetated buffers help improve or maintain water quality, by removing nutrients, moderating water temperature changes, and trapping sediments.

(d) Current patterns and water circulation: Activities authorized by this NWP may adversely affect the movement of water in the aquatic environment. All activities authorized by this NWP require notification to the District Engineer, to ensure that adverse effects to current patterns and water circulation are minimal. Fills associated with surface coal mining activities, such as berms, may alter water flow patterns and circulation. General Condition 21 requires the authorized activity to be designed to withstand expected high flows and maintain preconstruction surface flow rates from the site to the maximum extent practicable.

(e) Normal water level fluctuations: The activities authorized by this NWP will have negligible adverse effects on normal patterns of water level fluctuations due to tides. To ensure that the NWP does not authorize activities that adversely affect normal flooding patterns, General Condition 21 requires the permittee to maintain preconstruction surface flow rates from the site

to the maximum extent practicable.

(f) Salinity gradients: The activities authorized by this NWP are unlikely to adversely affect salinity gradients, since the NWP authorizes surface coal mining activities that are typically located in inland areas.

(g) Threatened and endangered 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.

The review required under the Surface Mining Control and Reclamation Act will also ensure compliance with the Endangered Species Act.

Each activity authorized by an NWP is subject to General Condition 11, which states that “no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to modify the critical habitat of such species.” In addition, General Condition 11 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 11 also requires the applicant to notify the District Engineer if there are endangered or threatened species in the vicinity of the project.

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 preconstruction 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 (FWS) or National Marine Fisheries Service (NMFS), as appropriate, if he or she determines that the regulated 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 FWS 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 will affect endangered species or their critical habitat and, if necessary, initiate consultation. Corps districts may utilize maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional conditions are added to NWP, where necessary, to require notification for activities that occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the notification process, the FWS and NMFS will review the proposed work 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 notification process will be used by the district engineer to make a “may affect” or “not likely to adversely affect” decision.

Based on the safeguards discussed above, especially General Condition 11, 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 ESA, the Corps has taken some steps to provide further assurance. Corps district offices have met with local representatives of the FWS 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 ESA. Through formal consultation under Section 7 of the Endangered Species Act, or through other coordination with the FWS 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 will be included as regional conditions to the NWPs or as special conditions of an NWP authorization, if necessary.

(h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web:

All activities authorized by this NWP require notification to the District Engineer, which will allow review of each activity to ensure that adverse effects to fish and other aquatic organisms in the food web are minimal. Fish and other motile animals will avoid the project site during construction. Sessile or slow-moving animals in the path of discharges, equipment, and building materials will be destroyed. Some aquatic animals may be smothered by the placement of fill material. Motile animals will return to those areas that are temporarily impacted by the work and restored or allowed to revert back to preconstruction conditions. Aquatic animals will not return to sites of permanent fills. Benthic and sessile animals are expected to recolonize sites

temporarily impacted by the work, after those areas are restored. Activities that alter the riparian zone, especially floodplains, may adversely affect populations of fish and other aquatic animals, by altering stream flow, flooding patterns, and surface and groundwater hydrology. Some species of fish spawn on floodplains, which could be prevented if the mining or reclamation activity involves clearing or filling the floodplain. Surface coal mining activities in the vicinity of streams may alter habitat features by increasing surface water flow velocities, which can increase erosion and reduce the amount of habitat for aquatic organisms and destroy spawning areas. Activities in the vicinity of streams can also cause more unstable flow regimes, such as higher peak flows, more frequent dry periods, and more frequent flooding, which may decrease the amount of habitat for aquatic animals.

Division and district engineers can place conditions on this NWP to prohibit discharges during important stages of the life cycles of certain aquatic organisms. Such time of year restrictions can prevent adverse effects to these aquatic organisms during reproduction and development periods. General Conditions 17 and 20 address protection of shellfish beds and spawning areas, respectively. General Condition 17 prohibits activities in areas of concentrated shellfish populations. General Condition 20 states that activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. In addition, General Condition 20 also prohibits activities that result in the physical destruction of important spawning areas. General Condition 21 requires the maintenance of preconstruction downstream flow conditions to the maximum extent practicable, which will help minimize adverse impacts to fish, shellfish, and other aquatic organisms in the food web.

(i) Other wildlife: Activities authorized by this NWP will result in adverse effects on other wildlife associated with aquatic ecosystems, such as resident and transient mammals, birds, reptiles, and amphibians, through the destruction of aquatic habitat, including breeding and nesting areas, escape cover, travel corridors, and preferred food sources. This NWP does not authorize activities that jeopardize the continued existence of Federally-listed endangered and threatened species or result in the destruction or adverse modification of critical habitat. Compensatory mitigation, including the establishment and maintenance of vegetated buffers next to open waters, will normally be required for activities authorized by this NWP, which will help offset losses of aquatic habitat for wildlife. General Condition 23 states that activities in breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General Condition 25 prohibits the use of this NWP in NOAA-designated marine sanctuaries, National Estuarine Research

Reserves, coral reefs, state natural heritage sites, and outstanding national resource waters officially designated by the state where those waters are located. For those sanctuaries and refuges not listed above, division engineers can regionally condition the NWP to restrict or prohibit its use in those areas. District engineers will also exercise discretionary authority and require individual permits for specific projects in waters of the United States in sanctuaries and refuges if those activities will result in more than minimal adverse effects on the aquatic environment.

(2) Wetlands: The activities authorized by this NWP will have minimal adverse effects on wetlands. District engineers will review preconstruction notifications to ensure that the adverse effects on the aquatic environment are minimal. Division engineers can regionally condition this NWP to restrict or prohibit its use in certain high value wetlands. See paragraph (e) in Section 4(c)(ii), above, for a more detailed discussion of impacts to wetlands.

(3) Mud flats: The activities authorized by this NWP will have minimal adverse effects on mud flats. Division engineers can regionally condition this NWP to restrict or prohibit its use in mud flats. District engineers will review pre-construction notifications to ensure that the adverse effects on the aquatic environment are minimal.

(4) Vegetated shallows: The activities authorized by this NWP will have minimal adverse effects on vegetated shallows. Division engineers can regionally condition this NWP to restrict or prohibit its use in vegetated shallows. District engineers will review pre-construction notifications to ensure that the adverse effects on the aquatic environment are minimal. If the vegetated shallows are high value and the proposed work will result in more than minimal adverse effects on the aquatic environment, the District Engineer will exercise discretionary authority to require the project proponent to obtain an individual permit.

(5) Coral reefs: The activities authorized by this NWP will have minimal adverse effects on coral reefs. Division engineers can regionally condition this NWP to restrict or prohibit its use in coral reefs. District engineers will review pre-construction notifications to ensure that the adverse effects on the aquatic environment are minimal.

(6) Riffle and pool complexes: Activities in riffle and pool complexes may be authorized by this NWP, but district engineers will review all proposed activities to determine if those activities will result in minimal adverse effects on the aquatic environment. If the riffle and pool complexes are high value and the proposed work will result in more than minimal adverse effects on the aquatic environment, the District Engineer will exercise discretionary authority to require the project proponent to obtain an individual permit.

(k) Municipal and private water supplies: See paragraph (n) in Section 4(c)(ii), above, for a discussion of potential impacts to water supplies.

(l) Recreational and commercial fisheries, including Essential Fish Habitat: The activities authorized by this NWP may adversely affect waters of the United States that act as habitat for populations of economically important fish and shellfish species. Division and district engineers can condition this NWP to prohibit discharges during important life cycle stages, such as spawning or development periods, of economically valuable fish and shellfish. All activities authorized by this NWP require notification to the District Engineer, which will allow review of each activity to ensure that adverse effects to economically important fish and shellfish are minimal. Compliance with General Conditions 17 and 20 will ensure that the authorized work does not adversely affect concentrated shellfish populations or important spawning areas.

Pursuant to Section 305(b)(2) of the Magnuson-Stevens Fishery and Conservation Management Act, the Corps entered into programmatic Essential Fish Habitat consultation with the NMFS. As discussed elsewhere in this document (i.e., Section 4(c)(ii)(g), Section 4(c)(iii)(h), and Section 4(c)(iii)(l)), the NWPs contain provisions that will ensure that impacts to Essential Fish Habitat are minimal, individually or cumulatively. 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.

(m) Water-related recreation: See paragraph (m) in Section 4(c)(ii) above.

(n) Aesthetics: See paragraph (c) in Section 4(c)(ii), above.

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: General Condition 25 restricts the use of this NWP in designated critical resource waters and adjacent wetlands, which may be located in parks, national and historical monuments, national seashores, wilderness areas, and research sites. This NWP can be used to authorize activities in parks, national and historical monuments, national seashores, wilderness areas, and research sites if the manager or caretaker wants to conduct work in waters of the United States and those activities result in minimal adverse effects on the aquatic environment and do not involve discharges into designated critical resource waters or wetlands adjacent to those waters. Division engineers can regionally condition the NWP to prohibit its use in designated areas, such as national wildlife refuges or wilderness areas.

(iv) Cumulative Impacts:

The cumulative impacts of an NWP generally do not depend on the number of times the permit is used on a national basis but on the number of times the NWP and other DA permits are used

within a specific geographic area, particularly a watershed. In a specific watershed, division or district engineers may determine that the cumulative adverse effects of activities authorized by NWP are more than minimal. Division and district engineers will monitor and review geographic areas that may be subject to more than minimal cumulative adverse effects. Division and district engineers have the authority to require individual permits where the cumulative adverse effects are more than minimal, or add conditions to the NWP either on a case-by-case or regional basis to ensure that the cumulative adverse effects are minimal. When division or district engineers determine that a geographic area is subject to more than minimal cumulative adverse effects due to the use of the NWP, they will use the revocation and modification procedure at 33 CFR 330.5. In reaching the final decision, they will compile information on the cumulative adverse effects and supplement this document.

Based on the reported use of this NWP in calendar year 2000, the Corps estimates that this NWP will be used approximately 325 times per year, resulting in impacts to approximately 175 acres of waters of the United States, with approximately 420 acres of compensatory mitigation required to offset those impacts. The demand for these types of activities could increase or decrease over the five-year duration of this NWP. Using the current trend, approximately 1,625 activities could be authorized over a five year period until this NWP expires, resulting in impacts to approximately 875 acres of waters of the United States. Approximately 2,100 acres of compensatory mitigation would be required to offset those impacts to waters of the United States. 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.

(d) Additional Public Interest Review Factors (33 CFR 320.4(a)(2)):

(i) Relative extent of the public and private need for the proposed structure or work:

This NWP authorizes surface coal mining activities in waters of the United States that have minimal adverse effects on the aquatic environment, individually and cumulatively. These activities satisfy public and private needs, such as fuel for power plants. The need for this NWP is based upon the large number of these activities that occur annually with minimal adverse effects on the aquatic environment.

(ii) 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 Sections 1 and 3 of this document).

General Condition 19 requires permittees to avoid and minimize discharges of dredged or fill material into 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. District engineers will exercise discretionary authority and require an individual permit if the proposed work 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.

- (iii) 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 work authorized by the NWP will most likely restrict the extent of the beneficial and detrimental effects to the area immediately surrounding the surface coal mining and reclamation activity. Activities authorized by this NWP will have minimal adverse effects on the aquatic environment. A provision of the NWPs requires that the discharge, including all attendant features, both temporary and permanent, is part of a single and complete project.

As previously stated, 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. Refer to Sections 1 and 3 of this document for further information and procedures.

5. EVALUATION OF COMPLIANCE WITH THE GUIDELINES PROMULGATED UNDER SECTION 404(b)(1) OF THE CLEAN WATER ACT (40 CFR Part 230):

The 404(b)(1) compliance criteria for general permits are contained in 40 CFR 230.7.

- (a) Evaluation Process (40 CFR 230.7(b)(1)):

(i) Alternatives (40 CFR 230.10(a)):

General Condition 19 requires permittees to avoid and minimize discharges of dredged or fill material into waters of the United States to the maximum extent practicable on the project site. The consideration of off-site alternatives is not directly applicable to general permits.

(ii) Prohibitions (40 CFR 230.10(b)):

This NWP authorizes discharges of dredged or fill material into waters of the United States, which require Section 401 water quality certification. Water quality certification requirements will be met in accordance with the procedures in 33 CFR 330.4(c).

No toxic discharges will be authorized by this NWP. General Condition 18 specifically states that the material must be free from toxic pollutants in toxic amounts.

This NWP does not authorize activities that jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of critical habitat. Reviews of preconstruction notifications, regional conditions, and local operating procedures for endangered species will ensure compliance with the Endangered Species Act. Refer to General Condition 11 and to 33 CFR 330.4(f) for information and procedures.

This NWP will not authorize the violation of any requirement to protect any marine sanctuary. Refer to Section 3 of this document for further information.

(iii) Findings of Significant Degradation (40 CFR 230.10(c)):

Potential impact analysis (Subparts C through F):

The potential impact analysis specified in Subparts C through F is discussed in Section 4 of this document. Mitigation required by the District Engineer will ensure that the adverse effects on the aquatic environment are minimal.

Evaluation and testing (Subpart G):

Because the terms and conditions of the NWP specify the types of discharges that are authorized, as well as those that are prohibited, individual evaluation and testing for the presence of contaminants will normally not be required. If a situation warrants, provisions of the NWP allow division or district engineers to further specify authorized or prohibited discharges and/or require testing.

Based upon Subparts B and G, after consideration of Subparts C through F, the discharges

authorized by this NWP will not cause or contribute to significant degradation of waters of the United States.

(iv) Factual determinations (40 CFR 230.11):

The factual determinations required in 40 CFR 230.11 are discussed in Section 4 of this document.

(v) Appropriate and practicable steps to minimize potential adverse impacts (40 CFR 230.10(d)):

As demonstrated by the information in this document, as well as the terms, conditions, and provisions of this NWP, actions to minimize adverse effects (Subpart H) have been thoroughly considered and incorporated into the NWP. General Condition 19 requires permittees to avoid and minimize discharges of dredged or fill material into waters of the United States to the maximum extent practicable on the project site. Compensatory mitigation required by the District Engineer will ensure that the net adverse effects on the aquatic environment are minimal.

(b) Evaluation Process (40 CFR 230.7(b)(2)):

(i) Description of permitted activities:

As indicated by the text of this NWP in Section 1 of this document and the discussion of potential impacts in Section 4, the activities authorized by this NWP are sufficiently similar in nature and environmental impact to warrant authorization under a single general permit. Specifically, the purpose of the NWP is to authorize work, including discharges of dredged or fill material, in waters of the United States for surface coal mining and reclamation activities. The nature and scope of the impacts are controlled by the terms and conditions of the NWP.

If a situation arises in which the activity requires further review, or is more appropriately reviewed under the individual permit process, provisions of the NWPs allow division and/or district engineers to take such action.

(c) Cumulative effects (40 CFR 230.7(b)(3)):

The cumulative effects, including the number of activities likely to be authorized under this NWP, are discussed in Section 4 of this document. If a situation arises in which the proposed activity requires further review, or is more appropriately reviewed under the individual permit process, provisions of the NWPs allow division and/or district engineers to take such action.

6. Final Determinations:

(a) 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.

(b) 404(b)(1) Compliance:

This NWP has been evaluated for compliance with the Section 404(b)(1) Guidelines, including Subparts C through G. Based on the information in this document, the Corps has determined that the discharges authorized by this NWP comply with the 404(b)(1) Guidelines, with the inclusion of appropriate and practicable conditions, including mitigation, necessary to minimize adverse effects on affected aquatic ecosystems. The activities authorized by this NWP will not result in significant degradation of the aquatic environment.

(c) 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.

(d) 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.

(e) Public Hearing: A public hearing was held on September 26, 2001, in Washington, D.C. to solicit comments on the proposed issuance of this NWP.

FOR THE COMMANDER

Date: 04 JAN 2002

/s/

ROBERT H. GRIFFIN
Brigadier General, U.S. Army
Director of Civil Works