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Thursday  
July 27, 1995

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**Part V**

**Department of  
Defense**

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Corps of Engineers, Department of the  
Army

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**Issuance of Nationwide Permit for Single-  
Family Housing; Notice**

## DEPARTMENT OF DEFENSE

## Corps of Engineers, Department of the Army

## Issuance of Nationwide Permit for Single-Family Housing

AGENCY: Army Corps of Engineers, DOD.  
ACTION: Notice.

**SUMMARY:** As a part of our effort to improve the regulatory program, the Army Corps of Engineers is hereby issuing a new nationwide general permit (NWP) under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act for single-family residential housing activities. As announced by the President on July 12, 1995, the NWP will provide for effective protection of the aquatic environment while substantially reducing regulatory burdens on landowners.

In August 1993, the Clinton Administration announced a comprehensive package of improvements to the Federal wetlands program that identified measures to enhance the fairness, flexibility, and effectiveness of the wetlands program. A major focus of the Administration's Wetlands Plan is intended to address the concerns of landowners by streamlining the Section 10 and Section 404 permitting programs, where possible, while maintaining needed environmental protection.

**EFFECTIVE DATE:** September 25, 1995.

**ADDRESS:** Information can be obtained by writing to: The Chief of Engineers, U.S. Army Corps of Engineers, ATTN: CECW-OR, Washington, C 20314-1000.

**FOR FURTHER INFORMATION, CONTACT:** Ms. Kelly Enright or Mr. Sam Collinson at (202) 761-0199.

**SUPPLEMENTARY INFORMATION:** On August 24, 1993, the White House Office on Environmental Policy announced the President's Wetlands Plan (Plan). The 40-point Plan set forth a comprehensive package of improvements to the Federal wetlands protection programs. A major goal of the Plan is to ensure that programs are fair, flexible, and effective. To achieve this goal, the Corps regulatory program must continue to provide effective protection of wetlands while conveying to the public a clear understanding of regulatory requirements. In its implementation, the regulatory program must be administratively efficient, flexible yet predictable, and avoid unnecessary impacts to private property and the regulated public.

We are issuing this new NWP to support the objectives in the President's Wetlands Plan. The new NWP will

authorize activities in wetlands related to the construction or expansion of a single-family home. This would allow, for example, a couple to build a retirement home on wetlands property they own without applying for an individual Section 404 permit. The NWP includes limits and conditions to minimize impacts on the aquatic environment.

There is a perception by many in the country that the regulatory process has become too burdensome on small landowners simply desiring to build a home. This NWP has been developed to reduce the regulatory burden on small landowners proposing to build or expand a single-family home while simultaneously maintaining environmental safeguards. This NWP seeks to strike this balance by allowing a landowner to build or expand a home with minimal regulatory oversight while protecting the aquatic resource through specific limitations. The new NWP will allow the Corps to focus better its resources on areas that have the potential for greater environmental impacts. Furthermore, as the Corps realizes workload savings resulting from this NWP, service to other sectors of the regulated public (e.g., large developments), should be improved.

On March 23, 1995, the Corps published its proposed single-family housing NWP in the **Federal Register**. We received approximately 450 comments responding to the proposed NWP. In response to these comments, we made a few revisions to the NWP as discussed below. Issuance of this NWP should result in continued protection of the aquatic environment, reduced regulatory burden on the small landowner and an overall decrease in workload. Any workload savings will be devoted to more efficient individual permit evaluations and increased enforcement and compliance activities.

This nationwide permit for single-family housing activities issued today becomes effective on September 25, 1995. During this 60-day period, the States must make their final determination on issuance of State Section 401 water quality certification or, where appropriate, whether they agree with our CZM consistency determination. The NWP will remain in effect for 5 years from the effective date unless sooner revoked, modified, or reissued.

#### Discussion of Public Comments and Changes

*We requested comments on the following specific issues:*

#### 1. Maximum Acreage

This topic received a large number of comments; specifically, commenters suggested increasing, decreasing, or retaining the proposed acreage figure. Several commenters supported the 0.5 acre limit. They stated that such an acreage figure was appropriate, reasonable and sufficient for a single-family residence with attendant features.

Several commenters were in favor of an increased acreage threshold. Some stated that the acreage figure should be increased to 10 acres to remain consistent with that of the NWP 26. One commenter suggested a 5-acre limit to correspond with the Department of the Interior's proposal to lessen Endangered Species Act restrictions on individuals owning 5 acres or less. The majority of those who encouraged a higher acreage amount, recommended a 1-acre threshold. One of these commenters equated this figure to the 1-acre threshold of the NWP 26 below which the Corps does not require notification. One commenter expressed concern over the proportionality of impacts versus the overall size of the parcel of land to be impacted. This commenter recommended increasing the maximum acreage threshold so that a more proportional impact to wetlands could be allowed. For example, if a landowner owns a 10-acre parcel, he should be authorized to fill 5 acres of wetlands and one who owns a 1-acre parcel should be allowed to fill 0.5 acre of wetlands. The commenter did not offer a specific ratio or threshold. Another commenter recommended that wetlands of lower value should have a higher acreage threshold while higher quality wetlands should be allowed more minor impacts. Again, this commenter did not offer specific thresholds.

The majority of the comments on the acreage limit were in favor of a lesser acreage. Many commenters maintained that the acreage proposed was excessive and a lesser acreage would encourage prospective permittees to avoid and minimize impacts. Several commenters compared the acreage threshold to that allowed in their respective states for single-family housing activities. Those states had a lower acreage threshold. Many commenters suggested that the NWP should only apply to individuals who had some usable uplands on their property. By using some uplands the property owner would need less fill in wetlands to have a homesite, and therefore a lower acreage limit could be established. These commenters indicated that the NWP should not apply to those who own only wetlands

since they would need to fill more to achieve their project purpose. One commenter stated that there should be a distinction made between residential expansion and completely new construction. That commenter suggested that an individual developing a new lot should be afforded a greater authorization than one expanding a developed lot, but that both acreages should be less than 0.5 acre.

A few commenters questioned the logic used in the selection of the 0.5 acre threshold. Several commenters suggested that the NWP should apply only to lots of a certain size but greater than 0.5 acre (e.g., the NWP should apply only to parcels that are greater than 5 acres).

Review of statistical data from the U.S. Department of Commerce and the U.S. Department of Housing and Urban Development reveals that approximately 90% of residential landowners in the United States own parcels that are 0.5 acre in size or less. This includes all residential land; wetlands comprise a very small subset of these lands. From this data we conclude that construction on 0.5 acre of land is consistent with what the public believes to be adequate for single-family housing activities. Furthermore, this data demonstrates that this 0.5 acre threshold would satisfy the vast majority of the public's need for a homesite. Additionally, approximately 60% of landowners own parcels that are less than 0.25 acre in size. Adopting this lower acreage threshold may eliminate a large portion of the public who could benefit from this NWP. However, we anticipate that most landowners, regardless of the size of their property, will require impacts less than 0.25 acre for their single-family housing activities.

We believe that relating the size of the impact to the upland acreage would add unnecessary confusion to the applicability of the NWP without additional, commensurate aquatic resource protection. We are concerned with the impacts to the aquatic environment and are therefore measuring those impacts. When we review the Pre-Construction Notification (PCN), we will consider the availability of uplands at the site and cumulative impacts. Therefore, we are not establishing a limitation on the size of the parcel for which this NWP is applicable. With regard to State acreage thresholds, a Corps permit does not obviate the need for a State permit. Therefore, a permittee can only impact the lowest acreage threshold allowed by either the State or the Corps. Additionally, the Corps will encourage its district offices to adopt the State's

equivalent authorization, where appropriate, and regionally condition this NWP to adhere to that threshold. The Corps is issuing the NWP with the 0.5 acre threshold for the single-family housing NWP. In an effort to simplify this permitting process, the Corps will allow no more than 0.5 acre of impact for non-tidal wetlands. There will be no automatic exclusions based on wetland value. However, the Corps will determine on a case-by-case basis, if a specific area should be exempted from this NWP based on functions or values. Upon review of the comments, statistical data, a survey of Corps district offices to determine need for the permit, and our experience and judgement concerning the potential for adverse effects on the environment associated with the various acreage limits, we concluded that the 0.5 acre threshold was appropriate. The 0.5 acre limit strikes a balance that will reduce unnecessary regulatory burdens on most residential landowners while providing for individual permit review of those single-family housing activities with the potential for more than minimal impacts on the aquatic environment. While the NWP provides for up to 0.5 acre of impacts to wetlands, we believe that compliance with the permit requirement to avoid and minimize on-site impacts will result in most homesites affecting less than 0.25 acre. The PCN will provide for Corps district offices to ensure compliance with this requirement as well as to review cumulative impacts. Finally, we will monitor this NWP and will revoke or modify the NWP, if necessary, to further reduce unacceptable impacts to the aquatic environment.

One commenter questioned how the Corps could ever justify denying proposals for impacts due to larger developments when this NWP will authorize equivalent impacts for several individual homesites in a given area.

The Corps does issue and will continue to issue individual permits for large developments. These often involve mitigation for impacts. The Corps also denies and will continue to deny permits for large developments, when appropriate. This NWP will not affect those decisions. When reviewing the PCN for a single-family housing activity, the Corps will consider cumulative impacts of the proposed homesite with other potential homesites. In some cases, the Corps Division Engineers may exercise their discretionary authority which will result, in a given area, in the requirement for individual permits and/or for mitigation for the individual homesites to address cumulative impacts. Therefore, we expect that

similar considerations and requirements would be imposed for both large developments and for many individual homesites in a given area. Furthermore, this NWP does not apply to individual parcels subdivided on or after November 22, 1991, where the aggregate total of impacts exceeds 0.5 acre.

## 2. Pre-Construction Notification:

The comments on the Pre-Construction Notification (PCN) requirement for this NWP addressed a wide range of issues including, the need for the pre-construction notification, the criteria for when a PCN should be required, the 30-day timeframe, the need for agency coordination, and the wetland delineation requirements. The majority of the commenters supported the requirement for a PCN in some form, while a few commenters opposed a PCN entirely or in certain circumstances.

Several commenters recommended that PCNs should be required in all cases. Reasons given include: to maintain consistency, to avoid potential violations, to assist applicants in avoiding impacts on their property, to allow the Corps to ensure that the permittee has minimized to the greatest extent practicable, and to aid in evaluating cumulative impacts. Several commenters indicated the PCN should only be required in certain situations. One commenter suggested that any discharge occurring after March 6, 1995, should require a PCN but that activities occurring prior to this date should not. Some commenters suggested flexibility when the area of effect is a lesser acreage; specifically, sizes of 0.1 and 0.25 acre were referenced as dimensions warranting no notification. Another commenter suggested that the Corps require a PCN for all projects, regardless of size, for the first 3 years after implementation of this NWP; afterwards, adopt a size limit regarding PCNs, if practicable. Several commenters recommended that the notification process be eliminated completely. One commenter stated that the PCN procedure was cumbersome and undermines the intent of the general permit program. Some other reasons given include reducing the regulatory workload, reducing the required recordkeeping, reducing agency spending, avoiding delay and expense to the landowner, and serving as an incentive for landowners to reduce the area of impact. One commenter suggested that the PCN would result in subjective treatment of the regulated public. A few commenters stated that no notification would be consistent with the notification procedures governing the existing NWPs. One commenter

recommended adopting existing PCN requirements rather than a modified PCN only for this NWP, to avoid confusion by both the regulated public and the resource and regulatory agencies.

We continue to believe that the PCN process is necessary for the Corps to examine projects on a case-by-case basis to determine compliance with the single-family housing NWP and to ensure that the impacts are minimal. Furthermore, the PCN will maintain nationwide consistency and continue to provide adequate environmental protection. At this time we are requiring the PCN for all activities qualifying for this NWP. However, we will monitor the NWP use and, if appropriate, will propose, at a later date, any necessary thresholds below which the PCN would not be required. Although having two notification procedures may seem confusing, the PCN process for this NWP is simpler than the existing PCN and will result in less burdens on the applicant. We believe that the PCN process for this NWP should be different from the existing PCN for the reasons discussed below.

A few commenters addressed the 30-day timeframe. Specific concerns were that Corps personnel may not be able to adhere to this limiting factor, thus, verifying projects that would not otherwise qualify for authorization under this NWP; the 30-day timeframe will discourage case-by-case review and site visits to independently monitor impacts; and the Corps will have to verify authorization prior to State water quality and CZMA certification being issued or denied. One recommendation was that the Corps should detail how the PCN process will be undertaken to ensure that only a minimum number of projects exceed the 30-day limit. A few commenters stated that the 30-day timeframe was inadequate and should be extended; one suggested a 90-day timeframe. One commenter questioned whether the District Engineer will send notification to the permittee as to the date that notification was received. Another commenter suggested that the permittee should be able to rely on the 30-day timeframe for the Corps to raise issues and that the District Engineer should not be able to intervene after that point.

The Corps believes that the 30-day timeframe is sufficient, based on the nature of these activities and the information required to be submitted by the permittee, to review and determine if an activity qualifies for this NWP. Currently, the Corps reviews approximately 40,000 general permit activities and reaches a decision in an

average of 16 days. State 401 water quality certification and CZMA consistency determinations will not be affected by the 30-day timeframe. Permittees may proceed under the NWP upon verification by the Corps, if the State issues 401 certification or 401 certification conditions for the NWP. However, if the State denies 401 certification for the NWP, the Corps will verify the activity within the 30-day timeframe, subject to the permittee individually obtaining 401 certification from the State. Until then, authorization for the activity is denied without prejudice. (This also applies to CZMA consistency determinations.) Therefore, during the 30-day timeframe the Corps will only verify that authorization under the NWP will be valid if the permittee does successfully obtain State water quality certification or waiver thereof and/or CZMA concurrence or presumed concurrence, where applicable. Some Corps districts may have some mechanism in place whereby permittees are informed that their notification has been received. However, there is no requirement that the districts send such notification. Permittees may use certified mail to document receipt of their notice by the Corps district office. The Corps expects to evaluate all activities under this NWP, on a case-by-case basis. However, we do not believe that minor activities will require on-site inspections in every situation. If, subsequent to verification, the Corps discovers that false information has been furnished, then appropriate action will be taken. Finally, if the Corps does not respond within the 30-day timeframe, then the permittee may proceed with the project.

Many commenters expressed their views concerning the proposal to not notify the Federal and State resource agencies as part of the notification procedures. Several commenters disagreed that notifying the resource agencies would result in significant increases in permit processing time. Many stated that review of the public notice was insufficient consultation and that notification with the agencies should be retained. However, the issue of greatest concern was the belief that the Corps' would be in violation of Section 404(q) of the Clean Water Act, the Fish and Wildlife Coordination Act, the Endangered Species Act, associated Memoranda of Agreement, and the National Historic Preservation Act. Many commenters stated that the modified PCN process provided inadequate evaluation of fish and wildlife impacts, impacts to threatened and endangered species, and all

potential adverse impacts in general. One commenter stated that the Corps lacks the expertise to protect fish and wildlife resources as its primary responsibility and, therefore, coordination with resource agencies should be required. One commenter recommended that coordination should be maintained if the activity is within close proximity to an "endangered species area." A few commenters suggested establishing a process by which the USFWS and a representative State agency coordinates review of activities which could potentially impact Federally threatened or endangered species. A few commenters questioned how the Corps intends to implement the NWP general conditions that prohibit jeopardizing endangered species and impacting historic resources. Also offered were recommendations that the Corps should notify agencies who issue building permits about proposed projects and the Corps should notify the NRCS of any agricultural projects. One commenter posed several questions in an effort to justify the need for notification with the resource agencies. Specifically, the commenter asked if the Corps had examined statistics on the number of homes to be built under this NWP, amount of ground disturbance, and amount of impacts to known archaeological sites. Another commenter recommended that a review for the presence of archaeological resources be conducted prior to commencement of the activity. One commenter stated that not requiring a PCN will reduce the accuracy of USFWS' records of wetland losses for its national status and trends report. One commenter stated that the NWP limits the States' involvement in reviewing proposed activities that may affect State resources. Other commenters stated that the public should have the opportunity to comment on projects in areas under developmental pressure; the public should have the opportunity to comment on all projects (e.g., rescind all NWPs); PCNs should include notification to all adjacent property owners within 500 feet of the project site; and the Corps should not only require resource agency coordination but also include a provision that allows any Federal resource agency the authority to require an individual permit.

The purpose of NWPs is to authorize activities having minimal impacts, with little or no review, in a timely manner. Based on our experience, third party involvement adds little to the review process, but decreases the efficiency of

Corps staff who could be focusing their resources on areas that have the potential for greater environmental impacts. Due to reduced agency resources, resource agency comments frequently merely cite regulations or policies governing alternatives analysis and/or mitigation policy and do not provide site-specific comments. Furthermore, we believe that the interdisciplinary Corps regulatory staff is extremely knowledgeable of resource values and fully capable of evaluating impacts resulting from NWP activities. Over 70% (700) of the Corps regulatory personnel, nationwide, are natural resource scientists, many with advanced degrees. Regarding endangered species and historic properties, 33 CFR 330.4(f) and (g) outline the procedures regarding adverse impacts to threatened or endangered species or critical habitat, and impacts to historic properties. The permittee must follow these standard conditions in order to be in compliance with the NWP; failure to adhere to these conditions results in a violation of the permit on the permittee's part. It has been our experience that requiring notification to the resource agencies places an additional burden on the applicant and the regulator, with very little benefit. We do not believe that this NWP will reduce the USFWS' ability to monitor losses of the nation's wetlands. Further, other mechanisms can be implemented to assist the USFWS with the task of tracking cumulative impacts. The States may impose conditions on the NWP or review each project with regard to water quality certification and coastal zone management consistency, where applicable. The Corps disagrees that case-by-case notification with the resource agencies is necessary for these minor activities. However, it is the Corps' belief that notification to the Corps is necessary to ensure that impacts are minimal.

A few commenters stated that the Corps should outline under what circumstances a wetland jurisdictional delineation will be necessary. It was also recommended that we require a wetland delineation to ensure that the proposed project impacts comply with the acreage threshold. One commenter questioned the requirement for the permittee to identify the project's direct and indirect adverse environmental effects, likening this condition to an environmental impact statement (EIS) such as those required for large scale projects. Additional comments received regarding PCNs include: PCNs should contain evidence of avoidance and minimization on the part of the applicant; permittees should complete a

standard individual permit application form for all projects; PCNs should include scaled site plans with existing and proposed development, slopes and elevation; PCNs should include a legal description of the project site and a certified statement as to whether the parcel is part of a real estate subdivision; and a copy of the PCN should be sent to the clerk or secretary of the appropriate local municipality.

For the purpose of clarification, a formal wetland delineation is a routine or comprehensive delineation as described in the Corps' 1987 wetland delineation manual. We have determined that if the entire parcel owned by the NWP applicant is 0.5 acre or less in size, no formal on-site wetland delineation will be required. Therefore, such individuals will not be required to hire a consultant to perform a detailed field investigation for the purpose of determining Federal jurisdiction. A general indication of the amount and/or location of the wetlands would be sufficient. Permittees who own parcels greater than 0.5 acre must have a formal wetland delineation prepared in accordance with the current method required by the Corps. Conditions will be incorporated stating this and allowing applicants to request that the Corps perform the delineation with the understanding that such requests may cause some delay in the permitting process. Approximately 90% of the landowners in the United States own less than 0.5 acre of land; therefore, this condition should not prove to be a burden on most applicants. We disagree that the permittee's responsibility to identify adverse environmental effects is in anyway similar to preparing an EIS.

The Corps only requires a clear and concise statement regarding the proposed project's direct and indirect adverse environmental effects; such a requirement can be undertaken by the permittee or done in consultation with Corps staff. We do not expect a study or detailed analysis of such impacts. We disagree that the aforementioned proposals should be required in all cases. These options are certainly available to each applicant and in some cases may expedite the permitting process, but will not be required. This NWP is a general permit; as such, it authorizes activities with minimal environmental effects and requires minimal effort on the part of the applicant. The Corps will require that applicants avoid and minimize impacts wherever practicable on-site.

### 3. Mitigation

Numerous comments were received regarding mitigation. Many of these

comments concerned compensatory mitigation and include: mitigation should be in-kind and on-site except in extreme cases of hardship; permittees should mitigate for the lost acreage, functions, and values; the Corps should justify mitigation based on the wetland loss and not the applicant type (small landowner); compensatory mitigation should be required for impacts to high quality systems and for impacts resulting from construction of attendant features; and compensatory mitigation should be required for impacts exceeding 0.1 acre. Several commenters recommended mitigation ratios ranging from 1:1 to 10:1, compensatory mitigation to impacts. One commenter recommended that mitigation requirements should be established at the Corps district level based on local resource needs and should be made in consultation with other resources agencies. One commenter recommended that all remaining wetlands on a parcel in which this NWP is used should be placed into a deed restriction.

Many suggestions were made to utilize mitigation banking. Some of the justifications presented were because it has been successful in creating sizeable wetland resources, is affordable, can assist in maintaining a no net loss policy, can aid in avoiding the problems with compensatory mitigation for small impacts, and would give permittees predictability with regard to mitigation costs. Some stated that the mitigation bank should be utilized on a sub-watershed basis. Some have recommended only allowing application of the NWP in watersheds where mitigation banks have been legally established. A few suggestions were offered to have permittees make donations to a recognized wetland conservation project.

The no net loss of wetlands policy was a recurring theme in comments regarding mitigation requirements for this NWP, as well as a long-term goal of increasing the quality and quantity of wetlands.

Some commenters recommended that no mitigation be required. Some of the reasons presented include: the requirement is too burdensome on individual property owners; no significant loss of wetlands will result from this NWP, mitigation is too costly for the Corps to track; mitigation limits the landowner's ability to construct a home in the most desirable location; mitigation is too costly for the landowner; and the creation of non-tidal wetlands is difficult and results in questionable success. Many believe that compensatory mitigation should not be required if avoidance and minimization

are undertaken on-site. One commenter stated that compensatory mitigation should not be used in lieu of avoidance and minimization. One commenter offered that NWP's are supposed to apply only to actions having minimal individual and cumulative effects and the Corps' consideration of mitigation suggests that the Corps does not believe the activity covered by this NWP is minor.

If cumulative impacts become more than minimal or a wetland system proposed to be impacted through the use of this NWP is of such high quality or importance, in terms of functions, that compensation is warranted, the District Engineer will so notify the applicant, who may offer compensatory mitigation to offset the adverse environmental effects. However, a standard ratio to establish the amount of compensation required per amount of impact will not be established in this NWP. The decision regarding the quantity of mitigation that is required will be made by the District Engineer on a case-by-case basis, if mitigation is determined to be necessary. The District Engineer also has the authority to require an individual permit in which the need for mitigation would be more closely examined. The Corps Division Engineers have the authority to regionally condition the single-family housing NWP to exclude certain geographical areas, where applicable. The Corps does not believe that placing a deed restriction provision on all small landowners is necessary, warranted or follows the intent of this NWP. A permit would be necessary for activities in the remaining wetlands, and we would address any adverse effects for such a permit. Furthermore, we do not believe it is appropriate to require mitigation beyond the adverse impacts that are being caused by the permittee.

The Corps agrees that mitigation banks, wetland trusts, and other conservation projects offer a solid means for compensating for lost wetland functions and values. However, we do not believe that such compensation is warranted for every impact covered by this NWP, nor is it a practicable option for every district, since many areas do not have mitigation banks or other conservation projects established. These options will be considered and encouraged where cumulative impacts are a concern.

The Administration's policy of no net loss of wetlands is a national goal that calls for no net loss overall, not on a case-by-case basis. This policy also recognizes that the Corps Regulatory Program will support but not meet this goal in every permit case and provides

for other programs to help meet the goal. Thus, compensation associated with standard and general permits is not the only means by which the nation attains the goal of no net loss of wetlands. Some other examples of means by which a no net loss of wetlands goal is achieved include State comprehensive watershed management plans, State and local programs that require compensation for residential development, and the Wetland Reserves Program.

This NWP is not a guarantee that every landowner who owns 0.5 acre of wetlands will be authorized to impact the entire parcel. One of the specific conditions of this NWP is that the permittee takes necessary actions to minimize on-site and off-site impacts of the discharge. Such evidence will be provided and evaluated in the notification procedure. Compensatory mitigation will generally not be accepted in lieu of on-site avoidance and minimization. Although the Corps agrees that compensatory mitigation is not warranted for every single-family housing activity authorized by this NWP, we do regard on-site avoidance and minimization as necessary steps in all cases to ensure that there are only minimal environmental effects.

Several commenters questioned how the Corps intends to ensure that permittees will minimize impacts. One commenter stated that the existing NWP's have proven that general permits do not include even a minimum level of review. A few commenters stated that this NWP would eliminate the requirement for landowners to avoid and minimize impacts. One commenter recommended that the District Engineer should be able to condition the NWP to require further minimization of impacts.

Many stated that the NWP should not be utilized where alternatives exist. One commenter questioned whether the Corps would require an alternatives review to determine if the permittee owns a non-wetland parcel. Another stated that it appears that the Corps considers single-family housing activities to have no alternative. One commenter stated that individual permits are now more flexible than this NWP, given the recent flexibility guidance. A few commenters suggested that the failure to require compensatory mitigation for this NWP would be contrary to the sequencing requirements outlined in the 404 (b)(1) Guidelines and the MOA between the EPA and the Corps. Another disagreed and stated that sequencing requirements do not apply to any other general permit and questioned why it should apply to this NWP.

The issue of water dependency was raised by a few commenters. These commenters specifically stated that existing regulations require a project to be water dependent to qualify for a Section 404 permit and that this NWP could remove the water dependency standard for all 404 permitting.

One commenter stated that, with regard to on-site adjustment of the home to avoid flooding of adjacent property owners, the Corps implied that a wetland can be altered as long as no harm is caused to another man-made structure. Another commenter asked if this NWP allowed the partial filling of a lake to construct a home, if one owned property adjacent to a lake.

The modified notification condition will require that the permittee notify the Corps prior to discharging fill. The District Engineer will then be responsible for determining whether the proposed activity would result in more than minimal individual or cumulative adverse environmental effects. If the District Engineer determines that the adverse effects of the proposed work are more than minimal, he will so notify the applicant and present his options (e.g., offer mitigation to reduce impacts or apply for an individual permit). While this review is not as extensive as that for an individual permit, we have determined that it is sufficient to make the "minimal effect" determination.

In March 1995, the Corps issued a Regulatory Guidance Letter regarding individual permit flexibility for small landowners. This guidance indicated that the Corps will presume that small landowners have no practicable alternatives on property not owned by the landowner. This guidance is to be used for activities affecting up to 2 acres of non-tidal wetlands for the construction or expansion of a single-family home and attendant features, or a farm building, or for the expansion of a small business facility. In accordance with 40 CFR 230.7, consideration of alternatives is not directly applicable to general permits. Other existing NWP's require compensatory mitigation where the individual or cumulative impacts from a discharge are more than minimal. We believe that the activities covered by this NWP will have minimal impacts. However, there may be cases where the cumulative impacts within a particular watershed become more than minimal. In these instances, the District Engineers have the authority to require compensatory mitigation. Additionally, on-site avoidance and minimization will be required in all cases for the entire parcel.

Water dependency criteria under the section 404(b)(1) Guidelines establishes

a rebuttable presumption that other, less environmentally damaging, practicable alternatives exist for the proposed project. It does not, however, as suggested by some commenters, allow authorization of only water dependent projects. Further, as indicated above, the alternative test does not apply to general permits. Additionally, we believe that for single-family housing activities qualifying for this NWP, other practicable alternatives normally do not exist for these homeowners. We do not agree that issuance of this NWP will affect the water dependency standard of other 404 permitting procedures.

We did not intend to imply that a wetland can be altered as long as there are no impacts to another man-made structure. Rather our intent was to give an example of when it may be necessary to relocate a fill. In addition, it is highly unlikely that an applicant will need to discharge fill into a lake to construct a single-family house and therefore, use of this NWP would normally not be authorized in such cases. One term of this NWP is that the permittee will minimize on-site and off-site impacts of the discharge. We believe that this NWP will have only minimal environmental adverse effects. However if, on an individual basis, the impacts are determined to be more than minimal, then the NWP does not apply.

#### 4. Subdivisions

The comments indicated there was some confusion regarding the subdivision provision. There were several requests for an overall clarification of the subdivision clause. A few commenters requested that a clear definition of a subdivision be provided, not only for the purposes of understanding but to ensure that the circumstances the Corps is trying to guard against do not surface as a problem. A few commenters requested a more encompassing definition of subdivision. Other commenters advised the Corps to carefully word the conditions surrounding the subdivision date to prevent misinterpretation and misuse.

"Real estate subdivision" shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial, or other real estate subdivision, including all parcels and parts thereof. The definition of the term "real estate subdivision" is the same as the existing definition of that term that applies to NWP 26. However, the date of the

subdivision provision is different for this NWP and NWP 26 as discussed below.

Several commenters agreed that March 6, 1995, was an appropriate date regarding the subdivision provision of the NWP. Several commenters questioned how the March 6, 1995, date was selected. A few commenters argued that the March 6, 1995, date penalizes developers who subdivided their property after October 5, 1984, since under existing regulations they were required to avoid and minimize impacts for the entire subdivision but would not under the new NWP. Some of the commenters further said that these developers may have realized greater profits if they had not followed the regulations. Many commenters recommended that the date be changed to October 4, 1984. Some of the reasons given to justify this date include remaining consistent with NWP 26, avoiding complicated regulations when we are supposedly simplifying, avoiding greater individual and cumulative impacts in subdivisions created prior to March 6, 1995, and avoiding negation of previous wetland master planning efforts. Other reasons were centered around the large number of subdivisions created since 1984, and because property owners were made aware, at that time, of the need for Section 404 permits to develop lots. One commenter stated that modifying the date to October 5, 1984, would penalize existing single lot owners who purchased lots in subdivisions in the last 10 years. Another commenter questioned how the NWP would apply in a situation where the subdivision is approved and lots are being sold but are not completely sold by March 6, 1995; the question was whether or not early lot owners would be treated differently. One commenter suggested allowing this NWP to apply to individuals who purchased property prior to October 5, 1984. One commenter recommended that this NWP should not apply in cases where property was platted prior to 1984, but is currently undeveloped and under one ownership. One commenter stated that modifying the subdivision provision to allow for the later date could create legal conflict in existing subdivisions where the developer has placed restrictive covenants on property that has been sold and developed because the property owners would seek authorization for expansion. Several commenters recommended that the date be modified to the effective date of the permit so as to maximize the number of individuals who may take advantage of the permit.

March 6, 1995, was the date that this NWP was proposed. November 22, 1991, is the date in which the current NWP program regulations, including issuance of, reissuance of and modifications to the existing NWPs were published in the **Federal Register**. It was in these regulations that the terms surrounding subdivisions for the purpose of NWP 26 were outlined and awareness of the subdivision clause was heightened. With few exceptions, we believe this date would be fair to all parties. We do not believe that the November 22, 1991, date will penalize any one group of individuals. The subdivision date issue centers on when a parcel is subdivided into smaller parcels, not when the subdivided smaller parcels are sold. Therefore, individual parcel owners will not be penalized based on when they purchased property. Furthermore, we understand that this NWP may not appear to address all possible scenarios similarly. However, we will encourage Corps districts to use consistency when reviewing any project under this new NWP and to give consideration to existing authorizations a property owner may have. Upon review and consideration of the comments, we determined that the appropriate date regarding subdivision creation should be November 22, 1991.

Any subdivisions or lots that were platted, developed, sold, or purchased in the past were done so under regulations in place at that time. This NWP does not apply to wetlands in developed subdivisions where restrictive covenants have been employed to preserve such wetlands. If the subdivision was platted on or after November 22, 1991, the aggregate total of impacts within the subdivision cannot exceed 0.5 acre. Similarly, if a parcel was subdivided prior to November 22, 1991, each lot owner may use this NWP, regardless of when he purchased the property. However, any previously permitted fill must be added to any fill proposed under this NWP such that the aggregate total impacts for the lot does not exceed 0.5 acre.

This NWP will not be modified to exempt situations such as the aforementioned where property was platted prior to 1984, but is currently undeveloped and under one ownership. We realize that under this authorization, impacts in such a scenario have the potential to become unacceptable. However, NWPs do not apply in cases where cumulative impacts are more than minimal. Furthermore, Corps Division Engineers may exercise their discretionary authority to require individual permits or mitigation for the

individual homesites to address cumulative impacts. Additionally, we do not believe that such situations are prevalent and therefore will not present a problem.

With regard to dealing with property owners who subdivided their parcel prior to November 22, 1991, and either acquired a Department of the Army permit or did not, we understand that this NWP may not appear to address the 2 scenarios similarly. However, we will encourage Corps districts to use consistency when reviewing any project under this new NWP and to give consideration to existing authorizations a property owner may have. For example, if the district has previously required a permittee to provide the total plan of development including infrastructure and lot fill, then we would expect the district to require such information of all permittees under this NWP.

One commenter stated that there is no limit on how much area could be impacted within a subdivision. Another commenter questioned to what size subdivisions the NWP would apply, specifically, a few buildable lots subdivided from a small parcel or several lots complete with infrastructure. Another commenter questioned how the Corps would address a situation where landowners create parcels one at a time over a period of time. One commenter suggested that this NWP might lead to many smaller subdivisions, thus making cumulative impact tracking more difficult. One commenter stated that the NWP should not apply to residential or commercial developments but rather to single-family developments in private family ownership. Another commenter stated that the NWP would probably be used more for large landowners seeking to build a large subdivision rather than small landowners, for which the permit was intended.

Regarding use of this NWP, there is no threshold on parcel size. The 0.5 acre limit applies to all single-family housing activities complying with this NWP. The use of Corps district databases will be utilized to assist in one-time, per lot usage and cumulative impact tracking. The size or number of subdivisions within a watershed should not affect this mechanism. It is anticipated, based on the aggregate acreage threshold, that this NWP will not be utilized for many residential developments created on or after November 22, 1991, and commercial developments are not permitted under this NWP. Furthermore, it is anticipated that landowners will choose to receive verification under NWP 26, where

applicable, since the acreage threshold under the single-family housing NWP is more restrictive. The Corps believes that large landowners seeking to build a single-family residence will generally have more options with regard to where they place a homesite, thereby, negating the large landowners' need for this NWP. Nevertheless, the maximum acreage of impacts to non-tidal wetlands under this NWP is 0.5 acre regardless of whether the landowner owns a large parcel and intends to subdivide or owns a small parcel for a single residence. The term of this NWP which is applicable to subdivisions states that the discharge must be part of a single and complete project and that for any subdivision created on or after November 22, 1991, the discharges authorized under this NWP may not exceed an aggregate total loss of waters of the United States of 0.5 acre for the entire subdivision.

A few commenters questioned how the Corps will track each landowner in a development, determine if the NWP has been used, track the number of times a parcel has been subdivided and when a parcel was subdivided. Another commenter questioned what requirements will be placed on permittees to provide evidence that demonstrates that the project meets this provision of the NWP.

Each Corps district has a computer database to assist with the task of tracking pertinent information. The Corps districts will continually monitor their tracking mechanisms and make adjustments, as necessary, to ensure production of the most reliable data. Additionally, the Corps must depend on facts presented by the applicant during the notification process and will verify such information, as needed, using available data. Taking all of this information together, the Corps makes the final determination on whether an activity complies with the NWP.

#### 5. One-Time Use

Many questions surrounded the issue of one-time use. One commenter stated that this condition was too ambiguous and asked for clarification. Many commenters suggested clarifying this term of the NWP by stating that it is to be used once per individual and once per lot. A few commenters questioned whether a successive parcel owner can fill an additional 0.5 acre. One commenter stressed the importance of explaining that, within a subdivision, the landowner cannot use his or her one-time allowance if the 0.5 acre loss for the subdivision has already occurred through another landowner's or the subdivision developer's action. A few

commenters raised the issue of whether a loophole exists when a developer subdivides a parcel after March 6, 1995, then sells lots to individuals who may then use this NWP. The commenter stated that the developer may legally defend that each project is single and complete. However, the cumulative impacts would be more than minimal. A few commenters inquired about how this NWP applies to property owners who own more than one lot or who move to a new lot. One commenter suggested that because farming operations may need more than one single-family housing NWP, the one-time allowance should be determined on a case-by-case basis. A few said the NWP should be allowed to be used an unlimited number of times. One commenter stated that the NWP should only be available to individuals who own a specific piece of property at the time the permit becomes effective.

Several commenters recommended eliminating this one-time use provision because of enforcement difficulties and the idea that permits should apply to projects, not individuals. Some questioned how tracking of this condition would be accomplished. One commenter raised the issue that since the permittee does not have to own the property, another individual could apply for the NWP on behalf of the property owner who has already used his one-time allowance. Several other commenters inquired about transferring one-time use to others and how this would be prevented.

This NWP was developed to address situations where land was subdivided into homesites or where individuals purchased homesites for the purpose of building a single-family home. We did not intend to limit its use to land that an individual owns on a given date. We also did not intend the NWP to be used for further subdivision of property for residential development in wetlands. By applying the NWP to aggregate impacts in subdivisions created on or after November 22, 1991, we encourage the use of individual permits for such development. Therefore, we do not believe that the NWP should be restricted by the date on which an applicant purchased a piece of property or be limited to only those individuals who own the land at the time this NWP becomes effective. In an effort to hold cumulative impacts to a minimum, we proposed the one-time usage clause. Upon further consideration and review of the comments, the Corps decided to restrict use to an individual who may use this NWP only for a single-family home for a personal residence. As an example, an individual could choose to



construct a single-family homesite for a seasonal (e.g., summer) residence, or for both an East Coast and West Coast residence. Such an individual may use this NWP in each situation with the stipulations that the home is for a personal residence and all other terms and conditions are met. However, we believe that the vast majority of individuals would only need this NWP once in their lifetime. Additionally, we determined that the one-time usage provision of this NWP should apply to the lot for a single-family housing activity. Thus, successive property owners cannot fill additional 0.5 acre fragments of a lot using the NWP. The total impacts for a specific lot cannot exceed the 0.5 acre threshold whether filled by a previous owner, developer, or an individual within a subdivision created on or after November 22, 1991. Consequently, when determining if a single-family housing activity is authorized by this NWP, any fill material currently permitted for the lot must be added to any proposed fill such that the total impacts do not exceed 0.5 acre. We believe that applying this usage restriction to both individuals and the lot is necessary to ensure that the impacts will be minimal and that the NWP will be used for the type of housing for which it was developed.

We have addressed many of the enforcement issues raised by adding several requirements to the PCN. Enforcement will be accomplished by requiring that the applicant submit a statement declaring that the single-family housing activity is for a personal residence of the permittee, stating how many times this NWP has been used, and listing other property owned by the applicant in the vicinity of the proposed single-family homesite. The Corps will use district databases to monitor use of this NWP, and if this provision is abused, we will consider appropriate action to address the abuse.

#### 6. Attendant Features

A few commenters requested a more encompassing definition of "attendant features" beyond those examples that were listed in the proposed **Federal Register** notice. One commenter stated that such an ambiguous term may prompt a prospective permittee to assert that anything is an attendant feature. Several commenters recommended including amenities such as yards, pools, tennis courts, barns, stables, in addition to housepads, driveways, and septic systems. However, the majority of the commenters disagreed with the idea of authorizing fill for non-essential amenities such as tennis courts, swimming pools, ponds, and gazebos,

some stating that such accommodations were non-water dependent. Some of these commenters recommended limiting fill to foundations only, while others approved of the need for additional fill for driveways and garages. While some commenters included septic fields as an essential feature for the construction of a single-family residence, many specifically disagreed with allowing fill for septic fields. Some of the reasons given were water quality impacts, discrepancies with existing state and local regulations, and the existence of other available options for wastewater treatment.

A few commenters also singled out disallowing fill for a yard because of the adverse impacts associated with fertilizers and pesticides. One commenter suggested such attendant features be authorized on a regional basis if they are standard for a particular area. One commenter stated that if attendant features were not included in this NWP authorization, then the permittee would have to endure individual permit processing for minor, additional work.

The purpose of this NWP is to reduce the regulatory burden associated with the construction of single-family homes while maintaining environmental protection. When building single-family homes we recognize that, besides the foundation of the house itself, there are activities associated with a house that are considered necessary, customary, or normal to homesites. We believe these "attendant features" should normally be authorized with the house. We would not accomplish the purpose of this NWP if we were to authorize the house only and process an individual permit for the attendant features. Attendant features for the purpose of this NWP, include features that are reasonable, necessary appurtenances constructed in conjunction with single-family housing activities. Examples include a garage, driveway, storage shed, septic field, and yard. Examples of inappropriate attendant features not covered by this NWP include a barn, which may be covered by NWP 40, or a small business. Such features would not be directly related to a single-family home. While we believe that a yard is an appropriate attendant feature of a single-family home, we have not identified a size that would be acceptable. Corps districts will work with the applicant to ensure that acceptable, but not excessive, yards are authorized. This NWP only authorizes activities from the perspective of the Corps regulatory authorities; other Federal, state, and local permits, approvals, or authorizations may also be required.

The permittee would be responsible for obtaining all necessary authorizations, including building permits, prior to placing a septic system, yard, or any other fill in wetlands. Additionally, water quality is a concern addressed by applicable state agencies as well as the Corps. It is the permittee's responsibility to obtain any necessary water quality approvals or authorizations prior to the discharge of fill. Furthermore, while properly designed, constructed, and operated septic systems can be placed on fill in many wetlands, the septic system must be approved by the appropriate state or local agency. The Corps has determined the extent of the attendant features to be applied on a nationwide basis. If an individual district concludes that a particular feature should not be authorized under this NWP, then the Division Engineer must regionally condition the NWP to exclude the feature. Furthermore, additional restrictions may be placed by states in 401 water quality certification or CZM consistency determination. On a case-by-case basis, where a particular feature is not appropriate at a specific site, the District Engineer may condition the NWP or require an individual permit.

*Other concerns were raised during the comment period on the following specific issues:*

#### 7. Permit Applicability

We received a wide range of recommendations to both increase and decrease the applicability of the single-family housing NWP. Many commenters raised the issues regarding the geographic scope of waters of the United States. Several others offered suggestions to expand the category of activities to which this NWP would be applicable. Several commenters raised the issue of the definition of non-tidal waters and how it applies to this NWP. One commenter stated that with this NWP, the Corps is broadening their authority beyond that allowed under Section 404 of the Clean Water Act, specifically by regulating excavation, flooding, and draining.

With regard to decreasing the applicability of this NWP, several commenters replied by listing a variety of geographic areas from which this NWP should not apply. Different commenters suggested limiting the scope of the NWP to isolated systems only, wetlands only, and wetlands above the headwaters. Other areas suggested to be disallowed by this NWP include threatened and endangered species habitats, sensitive or important wildlife and fisheries habitats, highly developed areas, non-riverine wetlands,

riparian or lacustrine wetlands, areas on state and national scenic rivers, national park areas, national wildlife refuges, bogs, ferns, springs, forested wetlands, rivers, streams, lakes containing anadromous or native fish, and wetlands identified as high value in state or Federal land management plans or wetland inventories. With regard to increasing the applicability of this NWP, one commenter recommended expanding the authorization to include tidal as well as non-tidal wetlands. Several other commenters made no recommendation regarding the applicability of certain systems, but simply inquired as to whether marine waters, surface waters, estuaries, riparian zones, streams, ponds, non-wetland special aquatic sites and freshwater riverine systems were included.

Many commenters raised the issue of analyzing the functions and values of wetlands. Some stated that higher quality wetlands warrant a more rigorous review than do lower quality wetlands and that non-tidal systems were not necessarily less valuable than tidal systems. Several recommendations were made to develop a functions and values rating system and some suggested that such functions could be better evaluated at the local level. One commenter stated that man-made wetlands should be exempt from all environmental regulations, while another commenter made a more general statement that certain wetlands having no real value should be exempt from regulations.

The Corps of Engineers regulates the discharge of dredged or fill material under Section 404 of the Clean Water Act. The discharge of dredged material includes discharges incidental to any activity including mechanized landclearing, ditching, channelization, or other excavation. Furthermore, in evaluating permit applications and pre-construction notifications, the Corps considers the effects of flooding and draining with respect to the proposed project. However, the Corps includes excavation, flooded and drained areas in measuring the acreage of loss to ensure that the impacts of the proposed project are minimal.

Limiting this NWP to many of the aforementioned suggestions would negate the need for the permit due to existing authorizations that cover these categories. In some areas listed above, the Division and District Engineers have the authority to regionally condition the NWP to exempt these systems or require an individual permit, if warranted. Discharges of fill in tidal waters for residential development are generally

not reasonable or practicable since contiguous, more suitable property is usually available. Furthermore, the individual permit process is available to those who desire to request authorization to discharge fill in tidal wetlands. We determined that applying this NWP to non-tidal waters of the United States, including non-tidal wetlands, is appropriate and assists in achieving the goal of targeting a large group of people desiring to construct a single-family homesite with minimal impacts.

At this time, the Corps has not adopted a functions and values rating system for wetlands. While it is the Corps' responsibility to regulate all Federally jurisdictional wetlands regardless of their value unless specifically exempted by section 404(f), we do take into account the relative functions of the resource when deciding how to regulate. It is anticipated that single-family residential construction is not going to occur in aquatic ecosystems of the highest value. We recognize, however, that there are circumstances where authorization in a specific area under this NWP would not be appropriate. In those cases, the Division or District Engineer may assert discretionary authority to add regional conditions or revoke the NWP authorization for activities in such areas. We believe that the Division and District Engineers are more familiar with the wetlands and other aquatic resources in their area and can best determine which of those resources should be subject to individual permit evaluations or regional conditions.

Several commenters recommended specific activities to which this NWP should apply. Some of these activities include agricultural uses, apartments, and commercial uses. One commenter suggested expanding the permit to include residential buildings for a maximum of four families. A few commenters argued that the impact to the resource is the same regardless of use; therefore, land use should not be a factor in the permit. Other categories that commenters suggested be excluded from this permit include subdivisions with lots for commercial use and significant areas conserved through an enforceable instrument.

This NWP was created for single-family housing activities. Allowing this authorization to encompass all possible land uses would dramatically increase cumulative impacts and surpass the intended scope of this NWP. Furthermore, adopting many of the aforementioned suggestions would be an unacceptably extensive change. Such a modification to this NWP would

require additional public notice and opportunity for comment. The restrictive category of activities for which this NWP applies remains as proposed.

The primary activity associated with this NWP is private residential development. No commercial uses will be allowed. Any area conserved through an enforceable instrument, such as a legal conservation easement, is subject to the restrictions existing within the document. For example, if this NWP is appropriate for use on a parcel of land with the exception that development is prohibited on the parcel by other restrictions, then the NWP would not apply.

Several commenters requested clarification of the definition of non-tidal waters. One question was whether or not this NWP will apply to wetlands adjacent to tidal waters. Another question was the extent of tidal influence. One commenter interpreted the definition of non-tidal as areas above mean high water, excluding all coastal areas supporting halophytes and all freshwater wetlands subject to tidal influences. One commenter pointed out that the terms "waters of the United States" and "wetlands" were used interchangeably and questioned which was appropriate. Another commenter questioned if salinity characteristics in the water column would be used to define tidal waters. One commenter asked if areas blocked by tide gates and man-made berms would be considered tidal waters. Another commenter inquired as to whether the NWP cover activities within wetlands as defined in 40 CFR 230.3(s) and 40 CFR 230.3 (t).

The definition of tidal waters can be found in 33 CFR 328.3(f) and is defined as those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects. The limits of jurisdiction in non-tidal waters of the United States can be found in 33 CFR 328.4(c). This regulation does not mean that wetlands adjacent to tidal wetlands are also tidal wetlands, but rather that in coastal areas, Corps jurisdiction extends to the limits of these "non-tidal wetlands" that are adjacent to tidal wetlands. Consequently, this NWP is applicable to wetlands that are adjacent to tidal wetlands. Areas blocked by tide gates may modify the area behind the tide gate so as to no longer meet the definition of tidal waters. The Corps district office would make this decision

on a case-by-case basis. However, in any case, such tide gates would not remove Section 10 jurisdiction.

#### *8. Relationship of this NWP to other NWPs*

Several commenters questioned the applicability of existing NWPs as they relate to the single-family housing permit. One commenter questioned the 0.1 acre threshold of the NWP 18 and how it compares to this new NWP. One commenter observed that this NWP might amend or supersede NWP 18 since NWP 18 only authorizes 0.1 acre of fill for minor discharges. Many commenters stated that NWP 26 completely covers the activity to be included in this NWP. A few commenters suggested expanding the application of either the existing NWP 26 or NWP 18 in lieu of issuing a new NWP. Many other questions were raised about the combined use of NWPs. A few commenters expressed that it is redundant to have two NWPs that authorize the same type of activity. Several commenters recommended not allowing combination of authorizations in an effort to avoid more than minimal impacts, and suggested that if there is a need for more than one NWP per project, then the project should be evaluated under an individual permit process. Several commenters recommended that projects authorized with this NWP should not be provided additional coverage under any other individual permit or NWP.

Each NWP is issued to authorize certain types of activities. However, in some cases a particular activity may qualify for more than one NWP or a combination of NWPs.

Consequently, some single-family housing activities could qualify for either NWP 18 or NWP 26. For example, NWP 18 could authorize 0.1 acre of fill in any wetland; NWP 26 could authorize up to 10 acres of fill in a wetland above the headwaters or an isolated wetland, while this NWP could authorize up to 0.5 acre of fill in a non-tidal wetland. Therefore, it is possible that a single-family home involving 0.1 acre of fill in a wetland above the headwaters could qualify for either NWP 18, NWP 26, or this NWP. Our regulations provide for multiple use of NWPs (but each one only once for a single and complete project) provided that the combined impacts are minimal. Furthermore, if an NWP authorized activity is an integral part of a larger project which requires an individual permit, then that NWP will not be valid for that portion of the larger project and an individual permit is required for the entire project, including the NWP

portion. This NWP is intended to authorize single-family housing, including attendant features where the maximum impact on waters of the United States does not exceed 0.5 acre. We did not intend this NWP to authorize a portion of a single-family housing activity that was in excess of 0.5 acre. Therefore, if such a single-family housing activity, including attendant features, is being proposed that exceeds 0.5 acre, this NWP cannot be used in conjunction with other NWPs, regional general permits, or individual permits to authorize the project. We further believe this restriction may be confusing and could cause some inadvertent violations of the NWP. Therefore, to clarify this point we have added a condition to the NWP to indicate that it cannot be used with NWPs 26, 18, and 14. Furthermore, Division Engineers will add regional conditions to ensure that it is not used with any similar regional general permits.

#### *9. Cumulative Impacts*

Many commenters stated, in general terms, that the proposed NWP would result in detrimental cumulative impacts on the aquatic environment. Many other commenters were specifically concerned with the cumulative loss of wetland functions, specifically, fish and wildlife resources, endangered species, filtration, groundwater recharge and stormwater retention. Concerns over increased flooding potential were the most often stated.

A few commenters stated that limiting the aggregate loss of wetlands to 0.5 acre for the entire subdivision only in real estate subdivided after March 6, 1995, does nothing to protect wetlands in already existing subdivisions. They gave examples of existing, platted subdivisions, comprised of dozens, hundreds, and thousands of lots which could amount to substantial cumulative impacts within a given watershed.

One commenter questioned how cumulative impacts would be addressed without the full review of the individual permit process. One commenter stated that such a permit would allow for an entire, large wetland system to be destroyed since there is no limit on the number of 0.5 acre sites that may be located on it.

Because the activity associated with the use of the NWP could be located within the floodplain of a waterbody, there is potential for increased flooding and reduced flow. The modified notification process will allow the District Engineer to evaluate the proposed impacts, including potential

flooding impacts, compare them to existing impacts within the wetland system or watershed, and determine if the project has more than minimal individual or cumulative effects. The District Engineer has the discretionary authority to place conditions upon a proposed activity to avoid or minimize these potential impacts. If the activity is determined to be more than minimal, the District Engineer can require mitigation or an individual permit. With regard to this and other potential cumulative wetland functions impacts, this NWP will be subject to the conditions that apply to all NWPs. The district and division offices may identify specific geographic areas, such as a subdivision, where there may be concerns over cumulative impacts to a watershed, and revoke this NWP in specific geographic areas or develop regional conditions that apply to that specific area. Many districts and divisions have already revoked NWPs or imposed such regional conditions in many geographic areas or wetland or water types.

#### *10. Regulatory Burden*

Several commenters supported this NWP because it would reduce the regulatory burden on the public by simplifying the process to obtain approval of single-family housing activities and would reduce the Corps regulatory workload. An equal number of commenters were opposed to the NWP. The principal reason for such opposition was a perception that the NWP would result in less environmental protection. Also, a few commenters believed the NWP is not necessary either because the current individual permit process is not a burden on the public, existing NWPs are adequate to cover single-family housing activities, or because the NWP is motivated only by politics. One commenter felt the NWP would encourage poor construction practices (e.g. the construction of structures on wetland fills). A few commenters indicated that, rather than this NWP, state programs would be a better mechanism to reduce burden on the public and the Corps. Programs such as State assumption, State Programmatic General Permits (SPGP), and State stewardship workshops assist landowners in utilizing their lands in an environmentally sensitive manner and reduce inconsistencies among federal, state and local regulations. Many commenters believed that we were increasing the regulatory burden on the public based on their understanding that we were proposing, for the first

time, to begin regulating single-family housing activities.

We believe this NWP will be applicable to over 95% of all single-family housing activities. Statistical data from the U.S. Department of Commerce and the U.S. Department of Housing and Urban Development reveals that approximately 90% of residential landowners in the United States own parcels that are 0.5 acre in size or less. Furthermore, most houses are less than 2000 square feet while few exceed 10,000 square feet. Therefore, we believe that virtually all single-family houses could easily fit on less than 0.25 acre. This would allow in excess of 0.25 acre for attendant features. We believe this would be sufficient for all but a few single-family homes. Currently, the Corps regulates the discharge of dredged or fill material for many single-family housing activities by the individual permit process. A number of single-family housing activities are also currently authorized by regional general permits or other NWPs, such as NWP 26. Our proposal will allow us to regulate, with this NWP, the vast majority of single-family housing activities that are not now covered by other general permits. Virtually all individual permit applications for single-family housing activities are issued. This NWP provides a quick approval process while, through the notification process, we would ensure that impacts are minimal and on-site impacts will be avoided or minimized to the extent practicable. However, some single-family housing activities would continue to be authorized by other NWPs or Regional General Permits which, in many cases, would be less burdensome. Where State mechanisms are available, and are determined to provide equivalent environmental safeguards, the Corps district and division offices will consider regional conditions or revocations of this NWP to reduce any unnecessary regulatory burden on the public. For example, our New England Division has proposed to revoke this NWP in the State of New Hampshire, because an existing State regulatory program and a Corps SPGP already adequately regulate single-family housing activities in that state. Therefore, in New Hampshire, single-family housing activities that qualify for a State permit would be authorized by the Corps SPGP. Other districts and divisions are proposing or considering similar State mechanisms to reduce unnecessary regulatory burdens. In conclusion we believe that this NWP in conjunction with other NWPs and Regional and SPGPs will provide for an

expedited decision for all but the most atypical or extremely large single-family housing activities. Therefore, over 90% of single-family housing activities would now qualify for a general permit, which should reduce the average permit processing time from a little over 100 days to less than 30 days.

Several commenters stated that this NWP would be inconsistent with either state or local wetland protection programs. Several of these commenters asserted that the NWP would be more lenient than state or local wetland protection programs and would tend to weaken state and local positions regarding wetland protection. In some of those cases where NWPs have been revoked in conjunction with SPGPs, the involved states were concerned that this NWP would add complexity and confusion to the process. A few commenters stated that the NWP preempts state and local wetland protection laws and building codes. These commenters, in general, also asked that all permittees be notified of the requirements to obtain other state and local required permits and approvals. A few commenters suggested that some other agency be responsible for administering and implementing the 404 wetlands program.

In those States where NWPs have been suspended or revoked in conjunction with SPGPs, the districts have the authority to suspend or revoke this NWP as well, and we anticipate they will give serious consideration to such action. As discussed in 33 CFR 330.4 of the NWP Program Regulations, NWPs do not obviate the need to obtain other Federal, State, or local permits, approvals, or authorizations required by law; nor do they grant any property rights or exclusive privileges. We believe that this NWP does not represent a relaxing of Federal protection for wetlands, but rather strengthens our capability to deal effectively with those cases involving greater than minor impacts. The Corps currently has the responsibility for implementing and administering the Section 404 program and will continue to uphold this responsibility until otherwise directed.

One commenter stated that improved service to landowners can be addressed by hiring adequate staff. Another stated that workload savings is not a justifiable reason to relax regulation of nationally important resources.

Budgetary constraints are continually a source of concern. Therefore, other avenues must be pursued to improve service to the public and make the program more efficient. The Corps agrees that regulatory requirements

protecting wetlands should not be relaxed to facilitate workload savings at the expense of needed environmental protection. The same aquatic systems will be regulated, but in an expedited manner. In an attempt to relieve the regulatory burden on small landowners, this new NWP is designed to streamline the process for such individuals desiring to build a residence, and we believe it will be successful to this extent.

#### *11. Enforcement*

Several issues regarding enforcement of distinct aspects of this NWP were raised. A few commenters expressed concern that permittees may not use the NWP for the construction of a home but for some other use and that they may exceed the allowed impact acreage. A few commenters raised the issue of enforcement regarding the flooding of adjacent property as a result of fill material authorized by this NWP. One commenter questioned how the Corps can determine adverse effects from flooding and drainage without reviewing necessary hydrologic information; how the Corps can ensure maintenance of structures without reviewing engineering analyses and design calculations; and who is responsible for infrastructure failures. One commenter specified enforcement of the notification requirement, specifically, that permittees will be tempted to fill first then notify the Corps or not notify the Corps at all. Many commenters discussed general enforcement of both the existing NWPs and the proposed NWP, claiming that the Corps fails to enforce compliance with general permits. All commenters questioned how compliance with the NWP conditions would be enforced.

Corps regulations at 33 CFR part 326 detail the Corps' enforcement procedures for all general and standard permits. Additionally, the Corps district offices have enforcement and compliance procedures in place which they implement at the district level. Furthermore, generally the Corps staff has the expertise to assess the adverse effects from flooding and drainage without reviewing detailed hydrologic information. However, this data can be obtained and examined when necessary. It is not anticipated that single-family housing activities covered under this NWP will require such detailed analysis except when considering cumulative impacts. It is not the Corps', but the permittee's, responsibility to maintain the structural integrity of his or her dwelling and attendant features. No new enforcement issues have been raised that the Corps hasn't encountered in the

past. Enforcement and compliance violations such as those mentioned by the commenters will occur. When they do, we will resolve the violations in the most expeditious and equitable manner possible.

#### 12. Public Hearing

Many commenters requested that a public hearing be held. For the most part, commenters did not specify reasons for holding a hearing. However, some commenters did present more definitive reasons, which included increasing community awareness of the proposal, discussing in greater detail the individual and cumulative effects, and allowing property owners a chance to address the proposal in an open forum. A few others stated that a change in permitting procedures of this magnitude warranted a public hearing.

A public hearing is held when there is a need to acquire new information to consider in evaluating a proposed Department of the Army permit action. Upon close scrutiny of the comments in response to this NWP, we concluded that it was unlikely that new information regarding the single-family housing NWP would be obtained through a public hearing. Therefore, a public hearing will not be held for the NWP. Public hearing requests for local and regional issues, regional conditions, and regional modifications, will be evaluated by Corps district and division offices, which will determine if a public hearing is warranted locally.

#### 13. Need for Environmental Impact Statement

Several commenters requested that an environmental impact statement be completed. One commenter recommended that a systematic scientific study be undertaken to determine the degree of potential impacts. Other commenters stated that the NWP is inconsistent with the 404(b)(1) Guidelines.

Environmental documentation has been prepared for the NWP and includes an environmental assessment and Section 404(b)(1) Guidelines compliance review. Copies of this document are available for inspection at the office of the Chief of Engineers and at each Corps district office. The document demonstrates that this NWP complies with the requirements for issuance under general permit authority. This includes consideration that, because some projects that may be authorized by the NWP may have a potential to cause more than minimal adverse effects on the environment, the NWP has been conditioned to require notification to the District Engineer.

Furthermore, there are several conditions imposed on the NWP to further minimize impacts of single-family housing activities. In this way, we have ensured that activities will not occur under the NWP which would cause more than minimal adverse effects on the environment. Furthermore, although secondary and cumulative impacts, in general, have been considered in the documentation, the notification requirement will allow for further consideration of these impacts. The Corps has made a final determination that this action does not constitute a major Federal action significantly affecting the quality of the human environment.

#### 14. Miscellaneous

A few commenters recommended a checklist, document or booklet be established that would outline what permits are necessary, the purposes, identify the entity processing the permit, timeframes associated with processing, and a fee schedule. One commenter suggested that many landowners would not know the answers to many issues that will need to be addressed in utilizing this NWP, nor will they be inclined to hire a consultant to assist them. Concurrent with this **Federal Register** notice, Corps district offices will issue local public notices. These public notices will include regional information about the NWP and how to notify the district offices. We agree that additional information regarding this and other NWPs would be useful to landowners. We will begin developing a manual or booklet to address this. One commenter requested that the Corps quantify, by district, the "large number of permit applications" for single-family housing activities referenced in the proposal for this NWP, because the need for such a permit may not be nationwide. The Corps conducted an internal survey of Corps districts requesting information on the number of permit applications for which this NWP would apply to determine the need for such a permit. The results warranted the proposal of a single-family housing NWP. One commenter stated that no information was provided about the wetlands potentially affected by this NWP or about the general, special and regional conditions of this NWP. Another commenter questioned if the existing general conditions apply to this NWP. The type of wetlands, specifically non-tidal, were identified in the public notice. The NWP general conditions and Section 404 conditions were not rewritten but were referenced in this NWP proposal. All general conditions

pertaining to the other NWPs also apply to this NWP, with the exception of notification condition which still applies but has been modified for the purpose of this NWP only. For clarity, the NWP conditions are published in this **Federal Register** notice below. Furthermore, regional conditions will be added by the Division Engineer, where appropriate, for a specific area; and special conditions will be added by the District Engineer on a case-by-case basis, where applicable. A few commenters stated that the NWP does not involve activities similar in nature, and therefore, does not qualify as a NWP. One commenter raised the issue of the Corps' failure to discuss, in the environmental assessment, that the activities are similar in nature and will cause minimal individual and cumulative adverse impacts. We believe that we have narrowly defined the scope of this NWP for activities similar in nature. The only activities authorized by this NWP are construction or expansion of a single-family homesite with attendant features. In the preliminary environmental assessment, we discussed, in detail, both the individual and cumulative impacts likely to result from this NWP. One commenter stated that the public notice made no reference to an expiration date for public comment. The expiration date of May 8, 1995, was published in the **Federal Register**; that publication was to be accompanied by a public notice from each Corps district that reiterated the date. Another commenter asserted that the permit language refers only to states and not to sovereign Tribal Nations and to Public interest but not Tribal interest. We do consider Tribal interest in addition to public interest where concerns are raised. General condition number 8 addresses Tribal rights and requires that they be considered. A few commenters declared that the nationwide would not be in compliance with Executive Orders 11988 and 11990. The NWP does not encourage the destruction of wetlands or development within the floodplain, but rather is a tool designed to reduce regulatory burdens while maintaining appropriate levels of protection. This NWP would not be in conflict with Executive Orders 11988 or 11990. A few commenters provided general recommendations related to the economics of the program. One recommended that we provide financial incentives for wetland protection; one recommended that the program be based on the applicant's resource capability, not tax status; one recommended that everyone involved in the Corps evaluation process be held

financially liable for their actions in conjunction with each permit processed; and one commented that we need to recognize the public cost of environmental degradation. A few commenters expressed general opposition to the federal government's regulation of private lands and expressed the belief that if the government prohibits the filling, the owner should be compensated. Such issues are beyond the scope of this proposal and would require additional proposed regulations with opportunity for public comment or even legislative changes. Therefore, they are not addressed in this notice. In an effort to simplify the program, one commenter recommended applying this NWP to all activities at a lesser acreage, thereby justifying the revocation of many of the other NWPs. One commenter suggested that we rework the entire NWP program. Another commenter questioned if this NWP will be included in the forthcoming NWP review process. At this time, we are not proposing the reissuance, modification, or revocation of all other NWPs but will do so prior to their expiration date of January 21, 1997. Comments regarding this entire NWP package may be submitted at that time. However, regarding the proposal for the entire NWP package, we will propose that this NWP be reissued with all other NWPs. At this time, our intent is to simply extend the expiration date of this NWP so that it coincides with all other NWPs for administrative purposes.

Accordingly, a Nationwide Permit for single-family housing activities is issued as follows:

Dated: July 19, 1995.

Approved:

**Stanley G. Genega,**

*Major General, Director of Civil Works.*

## **Nationwide Permit and Conditions**

### **A. Nationwide Permit**

**Single-Family Housing.** Discharges of dredged or fill material into non-tidal waters of the United States, including non-tidal wetlands, for the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an individual permittee provided:

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

b. The permittee notifies the District Engineer in accordance with the "Notification for single-family housing NWP" general condition;

c. The permittee has taken all practicable actions to minimize the on-site and off-site impacts of the discharge. For example, the location of the home may need to be adjusted on the parcel to avoid flooding of adjacent property owners;

d. The discharge is part of a single and complete project; furthermore, that for any subdivision created on or after November 22, 1991, the discharges authorized under this NWP may not exceed an aggregate total loss of waters of the United States of 1/2 acre for the entire subdivision;

e. An individual may use this nationwide permit only for a single-family home for a personal residence;

f. This nationwide permit may be used only once per parcel; and,

g. This nationwide permit may not be used in conjunction with NWP 14, NWP 18, or NWP 26, for any parcel.

For the purposes of this nationwide permit, the acreage of loss of waters of the United States includes any filled area previously permitted, the proposed filled area, and any other waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. This nationwide permit authorizes activities only by individuals; for this purpose, the term "individual" refers to a natural person and/or a married couple, but does not include a corporation, partnership, or similar entity. For the purposes of this nationwide permit, a parcel of land is defined as "the entire contiguous quantity of land in possession of, recorded as property of, or owned (in any form of ownership, including land owned as a partner, corporation, joint tenant, etc.) by the same individual (and/or his or her spouse), and comprises not only the area of wetlands sought to be filled, but also all land contiguous to those wetlands, owned by the individual and/or his or her spouse in any form of ownership." (Sections 10 & 404)

### **B. Nationwide Permit Conditions**

**General Conditions:** The following general conditions must be followed in order for any authorization by a nationwide permit to be valid:

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

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

3. **Erosion and siltation controls.** Appropriate erosion and siltation controls must be used and maintained in effective operating condition during construction, and all exposed soil and

other fills must be permanently stabilized at the earliest practicable date.

4. **Aquatic life movements.** No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water.

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

6. **Regional and case-by-case conditions.** The activity must comply with any regional conditions which may have been added by the division engineer (see 33 CFR 330.4(e)) and any case specific conditions added by the Corps.

7. **Wild and Scenic Rivers.** No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status. Information on Wild and Scenic Rivers may be obtained from the National Park Service and the U.S. Forest Service.

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

9. **Water quality certification.** In certain states, an individual state water quality certification must be obtained or waived (see 33 CFR 330.4(c)).

10. **Coastal zone management.** In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived. (see 33 CFR 330.4(d)).

11. **Endangered Species.** No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or critical habitat might be affected or is in the vicinity of the project and shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. Information on the location of threatened and endangered species and their critical habitat can be obtained from the U.S. Fish and Wildlife Service and National Marine Fisheries Service. (see 33 CFR 330.4(f)).

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

13. *Notification for single-family housing NWP.*

(a) The prospective permittee must notify the District Engineer with a Pre-Construction Notification (PCN) as early as possible and shall not begin the activity authorized by this NWP:

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

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

(3) Unless 30 days have passed from the District Engineer's receipt of the notification and the prospective permittee has not received notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) The Pre-Construction Notification must be in writing and include the following information:

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

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any past use of this NWP by the individual permittee and/or his or her spouse; any other NWP(s), regional general permit(s) or individual permit(s) used in the past or intended to be used to authorize any part of the proposed project or any related activity;

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

(5) A description of the entire parcel, including its size, and a delineation of wetlands. (See paragraph (e) below.)

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

(c) The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN for this NWP and must include all of the information required in (b) (1)–(6) of this General Condition.

(d) In reviewing the Pre-Construction Notification for the proposed activity, the District Engineer will determine whether the activity will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The District Engineer will consider any optional mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, the District Engineer will notify the permittee and include any agreed upon special conditions and/or mitigation. If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then the District Engineer will notify the applicant that the project does not qualify for authorization under the NWP. Furthermore, the District Engineer will explain the procedures that are available to seek authorization, which will include the following options: apply for an individual permit, obtain authorization under any other applicable general permits, or modify the project to qualify for the NWP.

(e) *Wetlands Delineations:* For the purpose of this NWP, parcels of land measuring 0.5 acre or less will not require a formal on-site delineation. However, the applicant shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than 0.5 acre in size, a formal wetland delineation must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the wetland. However, there may be some

delay if the Corps does the delineation, and the 30-day period (see paragraph 13(a)(3) above) will not start until the wetland delineation has been completed.

*Section 404 Only Conditions:* In addition to the General Conditions, the following conditions apply only to activities that involve the discharge of dredged or fill material and must be followed in order for authorization by the nationwide permit to be valid:

1. *Water supply intakes.* No discharge of dredged or fill material may occur in the proximity of a public water supply intake except where the discharge is for repair of the public water supply intake structures or adjacent bank stabilization.

2. *Shellfish production.* No discharge of dredged or fill material may occur in areas of concentrated shellfish production, unless the discharge is directly related to a shellfish harvesting activity authorized by nationwide permit 4.

3. *Suitable material.* No discharge of dredged or fill material may consist of unsuitable material (e.g., trash, debris, car bodies, etc.) and material discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

4. *Mitigation.* Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e. on-site), unless the DE has approved a compensatory mitigation plan for the specific regulated activity.

5. *Spawning areas.* Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.

6. *Obstruction of high flows.* To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

7. *Adverse impacts from impoundments.* If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

8. *Waterfowl breeding areas.* Discharges into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

9. *Removal of temporary fills.* Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

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