Condition 15 applies to NWP 27 and all other NWPs.

We have also been made aware of situations where participants in wetland restoration programs, such as the U.S. Department of Agriculture's Wetlands Reserve Program, want to revert their land back to its prior condition. If the land was prior converted cropland before the implementation of the wetland restoration activity, and no associated discharge of dredged or fill material into waters of the United States was required to conduct the wetland restoration activity, the landowner did not require a Section 404 permit. If the landowner wants to revert the land back to its prior condition, he or she could not utilize the reversion provision of NWP 27, because NWP 27 was not needed to restore wetlands on the prior converted wetland. To address this issue, we are proposing to add a provision to NWP 27 that allows the landowner to revert the land back to its prior condition using NWP 27, even though no Section 404 permit was needed to conduct the wetland restoration activity, provided the prior-converted cropland has not been abandoned. We believe this provision is necessary to provide equity for landowners. This provision may encourage more landowners to restore wetlands on prior converted cropland because they will not have to apply for an individual permit at a later date to revert the land back to its prior condition.

Several commenters stated that notification to the resource agencies should be required for all activities authorized by this NWP. One commenter recommended requiring agency coordination for all activities authorized under part (iv) of this NWP. This commenter also recommended that project proponents for stream restoration activities should be required to coordinate with the Corps and Federal and State fish and wildlife agencies prior to submitting a PCN under part (iv). Many commenters suggested PCN thresholds, ranging from 1/10 acre to 1 acre. One commenter stated that downstream landowners should be notified of proposed stream restoration projects.

To clarify the notification requirements of this NWP, we are proposing to restructure NWP 27 to make it easier to understand which activities require notification to the District Engineer. Notification is not required for: (1) activities on public or private land where the landowner has an agreement with the FWS or NRCS, (2) activities on Federal land, or (3) activities on reclaimed surface coal mined land in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining or the applicable state agency. Notification is also required if a permittee wants to use NWP 27 to authorize the construction of a compensatory mitigation site (see the Note at the end of NWP 27). We disagree that agency coordination should be conducted for all activities authorized by this NWP, because this NWP authorizes activities that benefit the aquatic environment. Corps district personnel possess the knowledge and experience to assess the environmental effects, both beneficial and adverse, of those activities requiring notification. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the District Engineer will exercise discretionary authority and require an individual permit. Requiring project proponents to coordinate with the Corps and fish and wildlife agencies prior to submitting a PCN is unlikely to provide any benefits for the aquatic environment, and will serve only to discourage stream restoration projects because the authorization process will become too burdensome for many landowners. For many of the reasons cited above, we do not believe it is necessary to place a PCN threshold based on acreage on this NWP, or to notify downstream landowners of proposed stream restoration projects.

Several commenters stated that the NWP is too vague and is vulnerable to abuse. A number of commenters requested the inclusion of narrow definitions of authorized activities in the NWP. Two commenters asked how the Corps will assess functional gains. One commenter stated that NWP 27 should authorize only ecological-based stream restoration. One commenter asked if NWP 27 was intended to apply to the compensatory mitigation requirements of other Corps permits. Another commenter recommended that the NWP require the planting of native species at the site.

No activities or discharges not directly related to the restoration of ecological values or aquatic functions are authorized by this NWP. This NWP can be used to authorize wetland and stream restoration activities required by other Corps permits. The intent of the proposed modification of this permit is to facilitate the restoration of degraded or altered streams and wetlands. The goals of the proposed activities must be based upon the enhancement, restoration, or creation of the ecological conditions that existed, or may have existed, in the stream or wetland prior to disturbance, or to otherwise improve the aquatic functions and values of such areas. The activities may include, but are not limited to, the modification of the hydrology, vegetation, or physical structure of the altered or degraded stream or wetland. If additional protection is necessary, division engineers can add regional conditions to this NWP. We have added a provision to the proposed modification of NWP 27 that requires the permittee to utilize native plant species if he or she is vegetating the project site. We are limiting this requirement to plant species installed by the permittee, because non-native plant species may naturally colonize the project site and we cannot require the permittee to remove those plants.

Some commenters recommended requiring binding agreements for activities authorized by this NWP. One commenter stated that management plans were needed in all cases. One commenter recommended requiring detailed restoration plans. One commenter recommended prohibiting future fills in areas that have reverted to prior condition under parts (ii) and (iii). Another commenter stated that wetland and stream restoration and enhancement activities by State resource management agencies should be included in NWP.

We do not believe that binding agreements or detailed restoration plans are necessary in all cases. Where the NWP authorizes reversion of the created or restored wetlands to its non-wetland state (*i.e.*, in those cases involving private parties entering into contracts or agreements with, or documentation of prior condition by, the NRCS or FWS under special wetland programs or an Office of Surface Mining (OSM) or applicable state program permit), then a binding agreement, documentation, or permit by NRCS, FWS, or OSM or applicable state agency which clearly documents the prior condition is required. This reversion can only occur when these instruments clearly document the prior condition. In all other cases where the reversion opportunity is not included, a Corps permit would be required for alteration of the site. Therefore, no binding agreement, detailed restoration plan, or documentation of the prior conditions will be required. Because the permit is limited to restoration, enhancement, and creation activities and because authorizations for those projects do not provide the opportunity for reversion, except as noted above, without a permit from the Corps, we believe that a management plan would be unnecessarily burdensome without

additional environmental benefits. Activities by State natural resource management agencies are already authorized by this NWP, but may require notification to the Corps unless those activities are in the categories described by paragraphs (a)(1), (a)(2), or (a)(3).

One commenter stated that evaluation of upstream and downstream impacts should be conducted. Another commenter stated that NWP 27 should not authorize activities that impede fish passage. A couple of commenters requested that the NWP should not be allowed in exceptional use waters and wild and scenic rivers.

All activities authorized by this NWP must comply with General Condition 21, Management of Water Flows. Compliance with this condition will ensure that the authorized activity results in minimal adverse effects on hydrology upstream and downstream of the project site. Similarly, all activities authorized by this NWP must comply with General Condition 4, Aquatic Life Movements, to ensure that the authorized work results in no more than minimal adverse effects on aquatic life movements. The requirement to comply with General Condition 7 will ensure the proper coordination to prevent adverse impacts to Federally-designated wild and scenic rivers. In addition, districts have coordinated with Federal and State natural resource agencies to discuss appropriate regional conditioning for the NWPs. Proposed General Condition 25 requires notification to the District Engineer if the proposed activity will occur in NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened or endangered species, coral reefs, State natural heritage sites, and outstanding national resource waters or other waters officially designated by a State. Restricting the use of NWP 27 in exceptional use waters will also be considered at the district level.

This NWP is subject to the requirements of proposed General Conditions 25 and 26. General Condition 25 requires the prospective permittee to notify the District Engineer in accordance with General Condition 13 for activities in designated critical resource waters, including wetlands adjacent to those waters. The District Engineer may authorize NWP 27 activities in these waters if the adverse effects are no more than minimal. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 27 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody.

In the proposed modification of NWP 27, we are proposing to add a note to the NWP to clarify the compensatory mitigation is not required for activities authorized by this NWP, provided the work results in a net increase in aquatic resource functions and values in the area. The note also states that NWP 27 can be used to authorize compensatory mitigation projects, including mitigation banks, as long as the project includes compensatory mitigation for any losses of waters of the United States that may occur as a result of constructing the compensatory mitigation project. The proposed note also states that NWP 27 does not authorize reversion of sites used as compensatory mitigation projects to prior conditions.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

39. Residential, Commercial, and Institutional Developments

This NWP was proposed as NWP A in the July 1, 1998, **Federal Register** notice. NWP 26 has been used extensively to authorize discharges of dredged or fill material into waters of the United States for residential, commercial, industrial, and institutional development activities. Based on the comments received in response to the July 1, 1998, **Federal Register** notice, we have made changes to the proposed NWP, which are discussed in further detail below. We are proposing to use an index to determine the acreage limit for this NWP. The index will be based on a percentage of the project area, with a ¼ acre base limit. The maximum acreage loss that can be authorized by this NWP is 3 acres. We are also proposing to restrict the list of activities authorized by this NWP to building pads, building foundations, and attendant features for residential, commercial, and institutional development activities. We have reduced the PCN threshold from ⅓ acre to ¼ acre. A PCN will be required for all activities that involve discharges of dredged or fill material into open waters. We believe that these changes will ensure that this NWP authorizes only those development activities that are similar in nature and have minimal adverse effects on the aquatic environment, individually or cumulatively. In addition, to further ensure that the NWP authorizes activities with only minimal adverse effects on the aquatic environment, most, if not all, Corps districts will impose regional conditions on this NWP.

General: Nearly 350 comments were received that specifically addressed this NWP. Many commenters opposed the issuance of this NWP, but a few favored its issuance. Many of the commenters who objected to the issuance of this NWP believe that it authorizes activities with more than minimal impacts, resulting in excessive cumulative adverse effects on the aquatic environment. Several commenters stated that the types of activities authorized by this NWP should be subject to the individual permit process and public comment. Another commenter stated that this NWP is essentially the same as NWP 26, with an expanded scope of waters where it can be used.

NWPs can only authorize activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. We have established PCN thresholds to allow district engineers to review all activities authorized by this NWP that could potentially result in more than minimal adverse effects on the aquatic environment. We believe that, in most cases, residential, commercial, and institutional development activities that result in the loss of less than ¼ acre of wetlands have minimal adverse effects on the aquatic environment. In watersheds or waterbodies where losses of less than ¼ acre of waters of the United States may result in more than minimal adverse effects, division engineers can regionally condition this NWP to lower the notification threshold or require notification for all activities. This NWP can also be revoked by division engineers in those watersheds or geographic regions where use of the NWP will cause more than minimal cumulative adverse effects on the aquatic environment. By restricting the proposed NWP to the construction of building pads, building foundations, and attendant features, we are limiting the use of this NWP to the development activity, which is much narrower than the scope of activities that could be authorized by NWP 26.

Types of Waters Affected: Several commenters objected to this NWP because it authorizes residential, commercial, and institutional development activities in all non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters. They believe that the scope of applicable waters for this NWP will increase wetland destruction. In contrast, two commenters stated that this NWP should be applicable in all non-tidal waters, including non-tidal wetlands contiguous to tidal waters. Another commenter recommended that wetlands and waters adjacent to tidal waters should be excluded from the use of this NWP as are contiguous wetlands. Two commenters stated that this NWP should authorize only activities in isolated wetlands less than 1 acre in size.

To increase protection of the aquatic environment, we are proposing to change the applicable waters of this NWP to: non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters. This change in applicable waters will reduce the geographic extent in which NWP 39 can be used. High value isolated waters can receive additional protection through regional conditions to restrict or prohibit the use of this NWP in those waters.

Another commenter stated that the expansion of applicable waters from headwaters and isolated wetlands will result in degradation of water quality by destroying wetlands which trap sediments and take up pollutants. This commenter also stated that the NWP does not specify stormwater management requirements needed to prevent water quality degradation.

We are proposing to modify General Condition 9, Water Quality, to require a water quality management plan for activities authorized by this NWP. The purpose of the water quality management plan is to ensure that the activities authorized by this NWP result in only minimal degradation of downstream water quality. The permittee must utilize stormwater management techniques and vegetated buffers to ensure that the project complies with this condition and does not result in substantial degradation of downstream water quality. The requirements of proposed General Condition 26 will also prevent further degradation of impaired waters by limiting the use of this NWP to authorize discharges in impaired waterbodies and adjacent wetlands.

Types of Activities Authorized: Many commenters stated that this NWP does not comply with Section 404(e) of the Clean Water Act, which requires activities authorized by general permits to be ''similar in nature.'' They believe that this NWP authorizes a wide variety of activities and does not comply with this requirement. One commenter recommended that the Corps develop a more limited list of activities authorized by this NWP. Another commenter suggested that a separate NWP should be developed for each category of activities. Several other commenters objected to this NWP because they believe that it authorizes activities that are not water dependent and that these activities should not be authorized in wetlands. One commenter suggested that the NWP should authorize only the construction of buildings and attendant features and should not authorize ball fields and golf courses.

In response to these comments, we have restricted the list of activities authorized by the proposed NWP to building pads, foundations, and attendant features constructed for residential, commercial, and institutional purposes. A structure must be built on the building pad or foundation to quality for authorization under this NWP. Attendant features, as defined for the purposes of this NWP, are those features necessary for the use, operation, and maintenance of the residential, commercial, or institutional building. District engineers will determine whether or not a particular attendant feature can be authorized by this NWP. Attendant features can include, but are not limited to: roads constructed within the development project area, parking lots, storage buildings, garages, physical plant, sidewalks, stormwater management facilities, utilities, lawns and landscaped features, and recreational facilities such as playgrounds for schools and day care centers. We do not believe that it is necessary to develop a separate NWP for each category of activity because limiting the proposed NWP to building pads and attendant features necessary for the operation and use of those buildings complies with the similar in nature requirement of Section 404(e) of the Clean Water Act. The purpose of the building and attendant features (i.e., whether it is for residential, commercial, industrial, or institutional purposes) is usually irrelevant in terms of adverse effects on the aquatic environment. The construction of a building pad or foundation for a residential, commercial, or institutional building has the same effects on aquatic habitat because it replaces an aquatic area with a building. Issuing a separate NWP for each type of development activity would also result in a much more complex NWP program with a substantially larger number of NWPs. Authorization of the necessary attendant features with the building pad or foundation will help ensure that the NWP authorizes all activities associated with a single and complete project and avoid piecemealing of projects. In addition, by authorizing the entire development project with one NWP, we will be better able to assess the adverse effects of the entire development on the aquatic environment.

Residential developments include single and multiple unit developments. A residential subdivision may be authorized by this NWP as a single and complete project. This NWP also authorizes the construction of apartment complexes. Developers and speculative builders can use this NWP to construct single family residences. We have removed the language from the proposed NWP A published in the July 1, 1998, **Federal Register** notice that prohibited the use of this NWP to authorize the construction of a single family residence and attendant features for personal residence for the permittee. Although this change results in some overlap between this NWP and NWP 29 because they both can authorize single family residences, we believe that this overlap does not result in less protection of the aquatic environment. The construction of a single family residence, whether it is constructed by the property owner who will live in the residence or by a contractor or speculative builder who will later sell the completed residence, has the same adverse effects on the aquatic environment. Although NWP 39 may have a higher indexed acreage limit than NWP 29, the geographic scope of applicable waters for NWP 39 is much less than the scope of applicable waters for NWP 29. NWP 39 cannot be used to authorize discharges into non-tidal wetlands adjacent to tidal waters, but NWP 29 can authorize discharges in those non-tidal wetlands. NWP 39 has a more stringent avoidance and minimization requirement than NWP 29 because it requires the permittee explain, in the notification submitted to the District Engineer, how avoidance and minimization was achieved on the project site. District engineers will receive PCNs for activities that result in the loss of greater than 1/4 acre of waters of the United States or involve discharges into open waters, such as streams. Based on the review of the PCN, the District Engineer will determine if the proposed work results in minimal adverse effects on the

aquatic environment and qualifies for authorization under NWP 39. We also believe that prohibiting the use of NWP 39 to authorize the construction of a single family home for the property owner, but allowing a contractor or speculative builder to use NWP 39 to construct a single family residence, is unfair to the regulated public because it places different restrictions based solely on who the applicant is (i.e., whether the applicant will be the resident of the home or if the applicant is a contractor or a speculative builder will sell the completed home at a later time to a future occupant). Such inequities are likely to lead to selective use of these two NWPs. A property owner can ask a contractor to apply for NWP 39 authorization for a higher acreage limit, instead of applying for an NWP 29 authorization. Since NWPs can authorize only those activities that result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, we believe this overlap between NWPs 29 and 39 is not contrary to Section 404(e) of the Clean Water Act.

Commercial developments authorized by this NWP include, but are not limited to, retail and wholesale stores, shopping centers, industrial facilities, malls, restaurants, hotels, business parks, and other buildings for the production, distribution, and selling of goods and services, as well as attendant features for those buildings. Institutional developments include, but are not limited to, schools, police stations, fire stations, government office buildings, libraries, courthouses, public works buildings, college or university buildings, hospitals, and places of worship. This NWP does not authorize the construction of new ski areas or the installation of oil or gas wells.

One commenter stated that the term ''infrastructure'' is poorly defined in the NWP. Another commenter suggested that infrastructure should be authorized by a separate NWP. Three commenters recommended that this NWP authorize the roads constructed by State or local governments to the development, not just the roads within the development.

For the purposes of the proposed NWP, infrastructure includes attendant features necessary for the operation of the residential, commercial, or institutional development or building, such as utilities, roads, and stormwater management facilities. Utilities that are not an integral part of the development, but are shared with other developments, may be authorized by other NWPs, such as NWP 12, regional general permits, or individual permits. The proposed NWP authorizes only those roads within the project area (e.g., the subdivision). Roads leading to the project area, including those roads constructed by State or local governments, may be authorized by NWP 14, another NWP, regional general permit, or individual permit. These roads typically serve other areas and may be considered as separate single and complete projects.

The proposed NWP does not authorize discharges of dredged or fill material into waters of the United States for the construction or expansion of golf courses unless the golf course is an integral part of a residential subdivision. However, this NWP may be used to authorize the clubhouse, storage buildings, or garage for a golf course. A golf course that is not an integral part of a residential subdivision may be authorized by proposed NWP 42, Recreational Facilities, provided the golf course is designed and constructed in a manner that complies with the terms of that NWP. Golf courses as primary projects are not authorized by this NWP because they do not require building pads or foundations to fulfill their primary purpose. Rather, the clubhouse, storage building, or garage is an attendant feature of the golf course, not vice versa. Golf courses can also be authorized by other NWPs, regional general permits, or individual permits.

One commenter requested that the Corps develop a separate NWP for shopping centers because shopping centers differ from residential, commercial, and institutional developments. Another commenter stated that institutional facilities should include reuse plants, wastewater treatment facilities, and water treatment plants. One commenter stated that community recreation activities should not be authorized by this NWP.

We do not believe it is necessary to issue a separate NWP for shopping centers because shopping centers are a specific type of commercial development. The adverse effects on the aquatic environment resulting from the construction and use of shopping centers are similar to the impacts of other types of commercial developments. Reuse plants, wastewater treatment facilities, and water treatment plants may be authorized by this NWP, at the discretion of the District Engineer. We cannot list every type of residential, commercial, or institutional development that is authorized by the proposed NWP because such a list would be impractical and unnecessarily restrict the use of this NWP for other development activities that have minimal adverse effects on the aquatic environment. For those discharges that require notification the District Engineer will determine if the proposed activity qualifies for authorization under this NWP. For discharges that do not require notification, a permittee can contact the appropriate Corps district office to determine if his or her development activity is eligible for this NWP.

A commenter requested that the NWP explicitly authorize all commercial and industrial activities because this NWP could be interpreted as not authorizing general industry construction. This commenter stated that there is no difference between commercial developments and general industrial developments. Another commenter requested clarification as to whether the term ''institutional developments'' includes government facilities.

We agree with these commenters and have stated in the text of the proposed NWP that industrial facilities and government office building pads, foundations, and attendant features may be authorized by this NWP.

We do not agree that community recreation activities should not be authorized by this NWP, because NWP 39 authorizes attendant features associated with a residential, commercial, or institutional development. These attendant features may include playgrounds and playing fields, provided those facilities are constructed in conjunction with a residential subdivision or school building. Excluding these features would be contrary to the purpose of the proposed NWP, which is to authorize all necessary attendant features associated with the buildings as part of a single and complete project. This NWP does not authorize discharges of dredged or fill material into waters of the United States for the construction of recreational facilities unless those recreational facilities are attendant features for residential, commercial, or institutional buildings. However, the building need not be constructed in waters of the United States for the attendant features to be authorized by NWP 39. Recreational facilities not constructed with residential, commercial, or institutional buildings may be authorized by proposed NWP 42, other NWPs, regional general permits, or individual permits.

Several commenters stated that rechannelization of streams should not be authorized by this NWP. One commenter said that stream rechannelization would not comply with the proposed modifications to General Conditions 21 and 9 because rechannelization causes more than minor changes in flow characteristics and could measurably degrade water quality. Another commenter stated that

the list of authorized activities should include drainage facilities, culverts, and drainage ditches.

To address concerns regarding stream channelization associated with residential, commercial, and institutional development projects, we have added paragraph (j) to proposed NWP 39. Paragraph (j) prohibits the channelization or relocation of stream beds downstream of the point on the stream where the average annual flow is 1 cubic foot per second. Therefore, only small streams can be channelized or relocated by this NWP. We believe that this restriction will help ensure that residential, commercial, and institutional development activities will result in minimal adverse effects on the aquatic environment. It should also be noted that notification is required for all discharges resulting in the loss of open waters, which allows district engineers to review all proposed activities in streams and other open waters. Division engineers can also regionally condition this NWP to prohibit the channelization or relocation of high value streams with average annual flows of 1 cubic foot per second or less. Channelization or relocation of stream segments with average annual discharges of greater than 1 cubic foot per second may be authorized by regional general permits or individual permits. The construction or maintenance of drainage facilities, culverts, and drainage ditches may be authorized by this NWP only if they are attendant features necessary for the residential, commercial, or institutional building. Drainage facilities and ditches may be part of a stormwater management facility or road. Culverts may be used to construct road crossings in the residential, commercial, or institutional development.

Acreage Limit: In the July 1, 1998, **Federal Register** notice, we requested comments on whether a simple acreage limit should be used for this NWP or whether the acreage limit should be indexed or based on a sliding scale. We proposed options for a simple limit of 3 acres and an indexed acreage limit based on parcel size. Many commenters said that a simple acreage limit should be used instead of indexing or a sliding scale. A few commenters stated that the 3 acre limit is adequate. Many commenters believe that the proposed acreage limit is too high. A number of commenters recommended an acreage limit of 1 acre. Other commenters proposed limits of ½ acre and 2 acres. One commenter recommended acreage limits of 2 acres of isolated wetlands and ⅓ acre of headwater wetlands. Numerous commenters said that the 3 acre limit is too low and that the acreage limit should be 5 acres. They believe that the NWPs should be more flexible and should authorize all activities that result in minimal adverse effects. They recommended that PCNs should be used to determine whether or not a particular project would result in more than minimal adverse effects. Two commenters recommended a 10-acre limit and another commenter suggested a 25-acre limit for this NWP. Some commenters remarked that the acreage limit should be higher because the Corps has not demonstrated that higher acreage limits will result in significant direct or cumulative adverse effects.

Many of the commenters who stated that the 3 acre limit is too high referred to the recent United States District Court decision in the District of Alaska on NWP 29. They cited this court decision as evidence that the acreage limit for NWP 39 is too high because the Corps was enjoined from accepting NWP 29 preconstruction notifications after June 30, 1998. Two commenters stated that the acreage limits and PCN thresholds of this NWP and NWPs 29 and 40 should be similar.

In its decision, the District Court did not rule that the acreage limit for NWP 29 (i.e., ½ acre of non-tidal waters) was too high. The District Court merely required the Corps to consider lower acreage limits and the exclusion of high value waters in its environmental assessment.

For activities in non-tidal wetlands, NWPs 39 and 40 have different acreage limits. NWP 39 utilizes an indexed acreage limit, as does NWP 40 for discharges into playas, prairie potholes, and vernal pools. NWP 40 utilizes a simple acreage limit of 2 acres for discharges into other types of non-tidal wetlands. We are not proposing an indexed acreage limit for discharges authorized by NWP 40 into non-tidal wetlands because the national average for farm tract size is approximately 275 acres, which means that most agricultural producers would qualify for the maximum acreage limit of 2 acres. However, we are proposing to utilize an indexed acreage limit for discharges into playas, prairie potholes, and vernal pools. Most residential, commercial, and institutional developments, on the other hand, would be subject to the indexed acreage limit since most of these developments occur on relatively small parcels of land and the indexed acreage limit would encourage avoidance and minimization of impacts to waters of the United States. It would be impractical for this NWP to have the same acreage limit as NWP 29 because these NWPs fulfill different purposes. NWP 29 applies solely to the construction of a single family residence whereas NWP 39 may be used to authorize the construction of a large residential subdivision, a commercial development, or an institutional development. The PCN requirements of NWPs 29 and 39 are different. NWP 29 requires notification for all activities authorized by that NWP. NWP 39 requires notification for activities resulting in the loss of greater than ¼ acre of non-tidal waters and any discharges resulting in the loss of open waters.

Several commenters favored the use of a sliding scale or indexing to determine the acreage limit for this NWP. A few commenters noted that the sliding scale is too complex to implement. Some of the commenters endorsing the use of a sliding scale recommend basing the indexing on a percentage of the development size. One commenter suggested that the acreage limit should be based on 10% of the parcel size, another commenter suggested that the maximum acreage should be 5% of the parcel size, several commenters recommended an acreage limit 2% of the parcel size, and two commenters recommended using 1% of the parcel size as the acreage limit. Another commenter recommended a minimum acreage limit of ⅓ acre plus 10% of the wetlands on the parcel for this NWP.

One commenter stated that a percentage of parcel size should be used as the basis for the index because if the indexing scheme proposed in the July 1, 1998, **Federal Register** is used, a small increase in parcel size could allow a much larger loss of wetlands. For example, a parcel size of 14.4 acres would have an acreage limit of 1 acre whereas a 15.1 acre parcel would have an acreage limit of 2 acres. In contrast, an index based on the percentage of parcel size or project area would result in a small increase in the acreage limit with a small increase in parcel size or project area.

Other commenters remarked that the indexing scheme proposed in the July 1, 1998, **Federal Register** notice has acreage limits so low for each size category that it is useless. If indexing is used to determine the acreage limit, these commenters requested that the Corps base the index on higher acreage limits. In contrast, some commenters stated that the indexing should be based on lower acreage limits. One commenter recommended an indexed acreage limit of ¼ acre for every 5 acres of parcel size.

In response to these comments, we have decided to utilize an indexed acreage limit for this NWP. The

proposed index begins with a base acreage limit of ¼ acre and increases as 2% of the project area, in acres. The maximum acreage limit for this NWP is 3 acres of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The acreage limit for this NWP is calculated as follows:

Acreage limit = ¼ acre + 2% of the project area (in acres) For example if the project area is 5 acres, the acreage limit would be 0.35 acres. If the project area is 80 acres, the acreage limit would be 1.85 acres. With this indexed acreage limit, the maximum limit of 3 acres is reached at a project area of 137.5 acres. If the project area is greater than 137.5 acres, the acreage limit is 3 acres.

Two commenters said that indexing should be based on the quality or values of the aquatic resource lost due to the authorized work. They stated that such a basis for indexing would ensure that only projects with minimal adverse effects are authorized.

We believe that using functions and values of aquatic resources to determine the maximum acreage limit for an NWP is impractical because we do not currently have a standard method for measuring or assessing aquatic resource functions and values.

One commenter stated that indexing duplicates requirements for avoidance and minimization, including the statement required in paragraph (f) of the proposed NWP A. Two commenters believe that indexing is counter to the requirements for avoidance and minimization and provides incentives for developers to build larger projects.

We disagree with these comments, because the purpose of using an indexed acreage limit for this NWP is to have a proportionally smaller acreage limit for smaller projects, which reduces the potential for losses of waters of the United States. An indexed acreage limit encourages avoidance and minimization because it imposes smaller acreage limits on smaller projects rather than a single larger acreage limit. With an indexed acreage limit, NWP applicants are still required to avoid and minimize impacts to waters of the United States on-site to the maximum extent practicable (see General Condition 19).

Another commenter asserted that project proponents will attempt to get around indexing requirements by artificially defining the parcel as larger than it really is to avoid going through the individual permit process. Two commenters remarked that developers may phase projects so that they can build projects with higher impact acreage limits using the indexing scheme proposed in the July 1, 1998, **Federal Register** notice. In this case, the Corps would have to determine if phasing meets the criteria for a single and complete project. They believe that the use of a sliding scale will encourage piecemealing of projects. One commenter recommended that the term ''parcel size'' used in the proposed indexing scheme should be replaced with the term ''single and complete project,'' as defined by subdivision criteria.

We are proposing to base the indexed acreage limit on a percentage of project area, not parcel size, to ensure that the NWP authorizes only single and complete projects. Basing the indexed acreage limit on project area will result in an acreage limit that reflects the actual size of the proposed activity, which cannot be artificially inflated in an attempt to get a higher acreage limit. Using the project area to determine the acreage limit, a particular parcel could have separate projects built upon it, with acreage limits based on the size of each project, as long as each separate project has independent utility. If the separate projects do not have independent utility, then the acreage limit would be determined by the sum of the project areas for each dependent component of the entire single and complete project.

Two commenters said that the proposed acreage limit will allow long segments of streams to be impacted. Some commenters recommended limits for the amount of linear feet of stream bed that may be filled or excavated under this NWP. Commenters recommended limits of 50, 100, or 150 linear feet of stream bed.

It should be noted that the proposed NWP has a PCN requirement for any loss of open waters, including streams. By reviewing the PCN, district engineers will be able to determine if the loss of stream bed will result in more than minimal adverse effects. If the stream bed impacts are more than minimal, discretionary authority will be exercised by the District Engineer, and the applicant will have to apply for authorization through another permit process or modify the project to comply with the NWP. Therefore, we do not believe that it is necessary to impose a limit on the quantity of stream bed that can be filled or excavated under this NWP.

Preconstruction Notification: We received a variety of comments concerning the notification requirements for this NWP. A couple of commenters supported the proposed PCN threshold of ⅓ acre. Several commenters stated that the PCN threshold should be ¼ acre. Two commenters recommended a ½ acre PCN threshold. Two commenters believe that the PCN threshold should be 1 acre and a few commenters stated that a PCN should be required for all activities authorized by this NWP.

We believe that the PCN threshold should be ¼ acre, to be consistent with the other new NWPs.

For this NWP, we also proposed to require notification for all activities that involve filling or excavating open waters, such as perennial or intermittent streams and lakes. One commenter stated that this PCN requirement is excessive and would mean that a PCN will be required for virtually all projects. This commenter also stated that this PCN requirement implies that open waters are more important than special aquatic sites and is contrary to the Section 404(b)(1) guidelines. The commenter recommended that the Corps establish other PCN thresholds for open water impacts instead, such as a 500 linear foot PCN threshold for intermittent stream impacts, and require a PCN for all perennial stream impacts. Another commenter recommended using the size of the drainage area to determine when a PCN is required for open water impacts. This commenter recommended requiring a PCN when the drainage area is 1 square mile or greater. Another commenter believes that the PCN requirement for open waters demonstrates a lack of understanding that not all significant wetlands have open waters and that this PCN requirement redefines wetlands.

We disagree with the assertion that this PCN requirement is excessive and would result in PCNs for nearly all projects authorized by this NWP. Many development projects authorized by this NWP would only impact wetlands and would require notification only for those activities that result in the loss of greater than ¼ acre of wetlands. In addition, most residential, commercial, or institutional development projects can be designed to avoid impacts to open waters. Road crossings of streams that are constructed with culverts would require submittal of a PCN. The purpose of this PCN requirement is to allow district engineers to review residential, commercial, and institutional development activities that result in a loss of open waters, such as streams, and ensure that activities in these waters will result only in minimal adverse effects on the aquatic environment. We are proposing to add Note 2 to the text of this NWP to help the regulated public identify those areas that require submission of a PCN for discharges into open waters.

We are proposing to add the PCN requirement for discharges into open waters to provide district engineers with the opportunity to review activities in open waters and ensure that the authorized work results in minimal adverse effects on the aquatic environment. One intent of the proposed new and modified NWPs is to provide equal consideration for open and flowing waters and wetlands. The proposed NWPs focus on the aquatic environment as a whole, not just wetlands. Streams and other open waters are extremely important components of the overall aquatic environment. The proposed PCN requirement does not redefine wetlands; it merely places additional emphasis on other types of waters of the United States, such as lakes and streams. High value wetlands and other waters will receive additional protection through regional conditions and the use of discretionary authority where discharges into high value waters may result in more than minimal adverse effects on the aquatic environment.

Several commenters stated that the PCN process for this NWP does not provide the Federal and State resource agencies the opportunity to comment on projects that adversely affect less than 1 acre of waters of the United States. These commenters believe that these agencies should be allowed the opportunity to comment on these projects. One commenter supported Corps-only review of projects that adversely affect between ⅓ acre and 1 acre of waters of the United States. One commenter recommended agency coordination for activities resulting in the loss of greater than ½ acre of waters of the United States.

We are proposing to modify General Condition 13 to require agency coordination for NWP 39 activities that result in the loss of greater than 1 acre of waters of the United States. PCNs for activities that result in the loss of ¼ acre to 1 acre of waters of the United States will be reviewed solely by the Corps. Agency coordination for smaller projects is costly to the Corps and provides little value added in determining whether or not the work will result in minimal adverse effects on the aquatic environment. Corps district personnel are highly experienced in reviewing PCNs to assess the environmental effects of the proposed work and recommending special conditions or requiring compensatory mitigation to ensure that the adverse effects on the aquatic environment are minimal. If the District Engineer determines that the adverse effects are more than minimal, discretionary authority will be exercised and the applicant will be notified that another form of Corps authorization, such as an individual permit, is required for the proposed work.

A few commenters stated that the PCN should include detailed plans and schedules for compensatory mitigation. Another commenter recommended that the PCN should include baseline data for stream flows and a detailed analysis of stormwater standards to ensure compliance with paragraph (g) (formerly paragraph (i) of NWP A) of the proposed NWP.

We believe that it is unnecessary to require detailed plans and schedules for compensatory mitigation with the PCN to ensure that the adverse effects of the authorized work on the aquatic environment are minimal. Requiring the submission of detailed compensatory mitigation plans with the PCN will increase the amount of time required to review the PCN. For the PCN, the applicant need only provide a conceptual proposal for compensatory mitigation that will offset the loss of aquatic resource functions and values. However, a detailed mitigation plan may be submitted with the PCN if the applicant chooses to submit such a plan. The District Engineer will evaluate the compensatory mitigation proposal to determine if it is adequate to ensure that the adverse environmental effects of the proposed work are minimal. Detailed plans for project-specific compensatory mitigation projects are usually required as special conditions of the NWP authorization. If the proposed compensatory mitigation is provided through payment to an approved mitigation bank or in lieu fee program, detailed plans are not required because the Corps may have previously reviewed the plans for the mitigation bank or in lieu fee site. It should be noted that Corps must finish its review of the PCN within 45 days of receipt of a complete PCN; such a time limit makes it difficult to thoroughly review and approve detailed compensatory mitigation plans and schedules.

District engineers will determine compliance with paragraph (g) of NWP 39 through qualitative methods or defer to State or local regulatory agencies, who may require quantitative analyses to ensure that the project does not result in more than minimal adverse effects to water quality or surface water flows.

Statement of Avoidance: Paragraph (f) of the proposed NWP requires the applicant to submit a statement with the PCN which demonstrates that discharges into waters of the United States were avoided and minimized to the maximum extent practicable and that additional avoidance and minimization cannot be achieved. One commenter favored this requirement, but a few commenters remarked that the requirement is unnecessary and recommended that it be removed. One commenter stated that the NWP regulations already require on-site avoidance and minimization and that this requirement increases the burden on the landowner and provides no environmental benefit. This commenter went on to say that the **Federal Register** notice does not provide any guidance as to what information is necessary to fulfill this requirement. Another commenter stated that this requirement will be impossible to implement. Several commenters stated that this requirement is insufficient, and that projects should be subject to more comprehensive alternatives analysis.

This requirement (now in paragraph (e) of NWP 39) is similar to the requirements of General Condition 19, Mitigation. It merely requires that the applicant provide a statement explaining how he or she is complying with this general condition. We disagree that it will create an additional burden on the project proponent because it will provide the Corps with the relevant avoidance and minimization details early in the PCN review process. In fact, submission of such a statement with the PCN is likely to benefit project proponents because the Corps personnel evaluating the PCN will not have to ask during the PCN review period if additional avoidance and minimization can be achieved. We believe that this requirement will save time and make the PCN process more effective. This requirement will also encourage project proponents to think more carefully about how to further avoid and minimize adverse effects to waters of the United States on the project site.

To require a more comprehensive alternatives analysis is contrary to the NWPs. NWPs authorize activities with minimal adverse effects on the aquatic environment, and if the proposed work meets the terms and limits of the NWP, the applicant cannot be required to consider off-site alternatives. If the adverse effects of a particular project are more than minimal the District Engineer will exercise discretionary authority and require an individual permit for the proposed work. The individual permit process requires a full alternatives analysis, including the consideration of off-site alternatives.

Since the avoidance and minimization requirement and the compensatory mitigation requirement of the NWP are related, we have combined paragraphs (f) and (g) of proposed NWP

A into paragraph (e) of NWP 39. Compensatory mitigation requirements for this NWP are discussed below.

Compensatory Mitigation: Paragraph (g) of the proposed NWP A stated that the permittee must submit a mitigation proposal to offset the loss of waters of the United States for activities that require notification. One commenter recommended changing this requirement to specify that the losses of wetland functions and values should be offset, not just the acreage loss. This commenter stated that the proposed wording is unclear and subject to various interpretations and should be consistent with the mitigation memorandum of agreement (MOA) signed in 1990.

This requirement has been incorporated into paragraph (e) of NWP 39. The purpose of compensatory mitigation is to offset losses of functions and values of waters of the United States and ensure that the net adverse effects on the aquatic environment are minimal. However, it is important to allow district engineers the flexibility to require compensatory mitigation that provides more benefits to the aquatic environment. Out-of-kind compensatory mitigation, such as the establishment and maintenance of vegetated buffers adjacent to streams, may provide more benefits to the local aquatic environment than replacing the wetland filled by the authorized work. It is also important to note that compensatory mitigation may be required for losses of other types of waters of the United States, not only wetlands. District engineers can require a greater acreage of compensatory mitigation to replace the aquatic resource functions and values lost due the authorized work if the compensatory mitigation cannot readily replace the lost functions and values. On the other hand, if the waters of the United States lost as a result of the authorized work are low value, providing few functions and values, a smaller acreage of compensatory mitigation may be appropriate to offset the lost functions and values of that area.

The mitigation process, as defined in the Council on Environmental Quality's regulations at 40 CFR Part 1508.20, includes avoidance, minimization, and compensation. Therefore, we are providing further clarification for this requirement by inserting the word ''compensatory'' in front of the word ''mitigation'' to state that the type of mitigation required by the District Engineer is compensation to replace losses of functions and values of waters of the United States.

Two commenters support the requirement for compensatory mitigation for losses that require a PCN. Several commenters objected to this NWP because this condition does not specifically require compensatory mitigation for losses of less than ⅓ acre, which they believe will result in substantial cumulative adverse effects on the aquatic environment. Another commenter suggested that compensatory mitigation should be required for impacts to perennial streams. One commenter stated that mitigation proposals should be subject to agency review. A commenter recommended modifying this paragraph to allow the permittee the opportunity to justify why compensatory mitigation should not be required for a particular project.

It should be noted that paragraph (e) only requires the submission of a compensatory mitigation proposal to the District Engineer with the notification, and is not a requirement for compensatory mitigation. The prospective permittee may submit either a conceptual or detailed compensatory mitigation proposal. District engineers will determine on a case-by-case basis if compensatory mitigation is necessary to ensure that the proposed activity will result in minimal adverse effects on the aquatic environment, individually or cumulatively. However, in most cases, compensatory mitigation will be required for activities that require notification to ensure that those activities result only in minimal adverse effects on the aquatic environment. In paragraph (e), we have stated that compensatory mitigation will normally be required to offset losses of waters of the United States, but if the applicant believes that the adverse effects of the project on the aquatic environment are minimal without compensatory mitigation, then the applicant can provide justification with the PCN for the District Engineer's consideration.

Compensatory mitigation is not required for activities that do not require preconstruction notification, because the adverse effects on the aquatic environment caused by those activities are minimal. In watersheds where small losses of waters of the United States have greater potential for more than minimal adverse effects, division engineers can regionally condition the NWP to lower the notification threshold, which will allow district engineers to require compensatory mitigation for losses of less than 1/4 acre of waters of the United States. For activities that require Corps-only review of the PCN, agency review is not required to review the compensatory mitigation proposal because the District Engineer will determine whether or not the proposed mitigation is appropriate. For PCNs subject to agency coordination, Federal and State resource agencies will have the opportunity to review the compensatory mitigation proposal submitted with the notification.

One commenter stated that buffers adjacent to any waters of the United States, not just open water, should be part of any required compensatory mitigation.

We concur with this comment and have stated elsewhere in this notice that district engineers can consider the establishment and maintenance of vegetated buffers adjacent to waters of the United States, including wetlands, as compensatory mitigation for losses of waters of the United States. Vegetated buffers adjacent to waters of the United States, including open waters and wetlands, can be considered as out-of-kind compensatory mitigation because vegetated buffers are important components of the aquatic environment due to the functions they provide, especially for maintaining water quality and habitat for aquatic organisms. Vegetated buffers reduce adverse effects to local water quality caused by adjacent land use. Forested riparian buffers provide shade to streams, supporting cool water fisheries. When determining the appropriate amount of compensatory mitigation required for particular projects, district engineers should reduce the amount of ''replacement acreage'' required as compensatory mitigation by an amount that recognizes the value of the vegetated buffer to the aquatic environment.

One commenter recommended that on-site mitigation should be considered before off-site mitigation and that off-site mitigation should be accepted only if on-site mitigation is not environmentally beneficial. Two commenters oppose the use of mitigation banks and in lieu fee programs to provide compensatory mitigation for activities authorized by this NWP. Another commenter recommended that where compensatory mitigation is required, it should be done in a State-sponsored mitigation bank within the same drainage basin.

The sequencing requirements for compensatory mitigation recommended in the previous paragraph have limitations. Compensatory mitigation projects, whether they are individual projects that restore, enhance, or create aquatic areas or are payments to mitigation banks or in lieu fee programs, should be selected on the basis of their chance for success and their

effectiveness at offsetting authorized losses of waters of the United States. In-kind and on-site requirements for compensatory mitigation should be considered, but not to the exclusion of what is best for the aquatic environment. If off-site compensatory mitigation will provide more benefits to the local aquatic environment, then that form of compensatory mitigation should be selected. On-site wetland creation projects are often unsuccessful because of changes to local hydrology caused by the authorized activity, which may prevent the development of a functional replacement wetland. On-site restoration may have a better chance of success, but success may not be achieved because of changes in land use in the vicinity of the authorized work. It is often better to utilize off-site wetland creation, restoration, and enhancement projects, including mitigation banks and in lieu fee programs, if they are appropriate and available. The use of mitigation banks to provide compensatory mitigation for losses of waters of the United States authorized by NWPs should not be limited to State-sponsored mitigation banks. Permittees should be allowed to use any mitigation bank in the area that replaces functions and values of waters of the United States, including wetlands, lost due to the authorized work. When reviewing compensatory mitigation proposals, district engineers will consider what is best for the aquatic environment, including requiring vegetated buffers to open and flowing waters and wetlands.

One commenter recommended that the NWP contain a provision requiring all remaining wetlands on the parcel to be protected by a conservation easement to prohibit any future development on the property.

We disagree, because such a requirement can be considered a taking of private property, unless the applicant agrees to preserve the remaining wetlands on the property as compensatory mitigation for authorized losses of waters of the United States. If there are any streams or other open waters on the project site, the District Engineer can require the permittee to establish and maintain vegetated buffers adjacent to those waters as compensatory mitigation. The vegetated buffers should be protected by a conservation easement, deed restriction, or other legal means.

Use of This NWP With Other NWPs: Paragraph (h) of the proposed NWP A addressed the use of this NWP with other NWPs. This paragraph has been changed to paragraph (f), and only addresses the PCN threshold when this NWP is used with other NWPs. The use of NWP 39 with other NWPs is addressed in the proposed modification of General Condition 15. Paragraph (f) has been modified to reflect the changes in the PCN threshold discussed above.

One commenter supported this requirement of paragraph (h) of the proposed NWP A. Another commenter stated that this NWP should not be stacked with other NWPs because this NWP authorizes all activities associated with the single and complete project. One commenter said that this NWP should not be combined with other NWPs to authorize permanent, above-grade fills. One commenter stated that this NWP should not be combined with other NWPs.

Although the proposed NWP 39 authorizes the construction of building pads, foundations, and attendant features for a single and complete residential, commercial, or institutional development, there may be circumstances where other NWPs are necessary to authorize discharges of dredged or fill material into waters of the United States for related activities that occur in types of waters not covered by this NWP. It is important to consider these additional activities as part of the single and complete project. For example, a community boat ramp that can be authorized by NWP 36 may be constructed in tidal waters for a new residential subdivision that is authorized by NWP 39. In this situation, when NWP 39 is combined with NWP 36, the total loss of waters of the United States cannot exceed the indexed acreage limit for NWP 39. The use of more than one NWP to authorize a single and complete project is addressed in the proposed modification of General Condition 15.

One commenter stated that the stacking limitation assumes that projects with greater than 3 acres of impact to waters of the United States exceed the minimal adverse effects threshold and that it is illogical for the Corps to assume that each NWP, if used alone, will result in minimal impacts, but if used with other NWPs will result in more than minimal adverse effects. This commenter asserted that the Corps has no evidence to support its contention that NWP stacking in excess of 3 acres will result in more than minimal impacts and recommended that the Corps eliminate this condition of the NWP because the PCN requirement is sufficient to ensure that the NWP authorizes only those activities with minimal adverse effects. This commenter also stated that the stacking restriction is contrary to 33 CFR Part 330.6(c).

For the NWPs, we establish acreage limits that will ensure that the authorized activities will not result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. There may be some circumstances (e.g., projects in low value waters of the United States) where larger impacts result in minimal adverse effects. If a particular district has a large number of these types of projects, then that district can develop a regional general permit to authorize those activities. When more than one NWP is used to authorize a single and complete project, the District Engineer must consider the additive adverse effects on the aquatic environment. Each NWP has an acreage limit based on a minimal adverse effects determination made only for that NWP. By combining NWPs, the sum of the acreage losses and the sum of the adverse effects of those losses on the aquatic environment increases the probability that the minimal adverse effects threshold will be exceeded. Since the NWPs can authorize only those activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively, a prohibition against stacking NWPs to exceed a specified acreage limit is necessary. General Condition 15 is not contrary to 33 CFR Part 330.6(c) because this regulation does not eliminate the need to comply with Section 404(e) of the Clean Water Act and 33 CFR Part 323.2(h).

Two commenters stated that any stacking that occurs with this NWP should have an acreage limit equal to the lower acreage limit for any of the NWPs involved. Another commenter suggested that any stacking that occurs with this NWP should have an acreage limit equal to the higher acreage limit for any of the NWPs involved. Two other commenters stated that paragraph (h) of the proposed NWP A should be revised to specify that total acreage cannot exceed 3 acres or the indexed acreage limit of the NWP, whichever is less. One commenter recommended that this NWP should not be stacked with NWP 29.

We disagree with the first comment in the previous paragraph because it would render this NWP useless in most situations. For example, NWP 36 limits the construction of boat ramps to a maximum width of 20 feet and a maximum discharge of 50 cubic yards. By requiring a combination of this NWP and NWP 36 to be subject to the lesser acreage limit of NWP 36, NWP 39 would essentially authorize no residential, commercial, or institutional development activities when combined with NWP 36. We are proposing to

modify General Condition 15 to allow the use of more than one NWP to authorize a single and complete project, as long as the acreage loss does not exceed the highest specified acreage limit of the NWPs used to authorize that activity. The statement in paragraph (f) regarding the PCN threshold has been changed to include the PCN threshold of ¼ acre.

We believe that prohibiting the use of NWP 29 with NWP 39 is unnecessary and have not added it to the NWP. NWPs 29 and 39 are used by different groups of landowners. NWP 29 can be used only by the present or future occupants of the single family residence. NWP 39, on the other hand, can be used by others, such as contract builders and developers, to construct single family residences. Paragraph (d) states that only single and complete projects can be authorized by NWP 39. If the District Engineer establishes an exemption to the subdivision provision of this NWP, NWP 29 may be used by an owner of a subdivided parcel to construct a single family residence. If the construction of another single family residence on the property has independent utility and is not part of the previously authorized single and complete project, then either NWP 29 or NWP 39 may be used to authorize that single family residence, provided the authorized work results in minimal adverse effects on the aquatic environment.

Other comments: A few commenters recommended that the Corps add a definition of the term ''single and complete project'' to the NWP.

The Corps has defined the term ''single and complete project'' in the regulations governing the NWP program (see 33 CFR 330.2(i)). This definition applies to all of the NWPs, including the new NWPs proposed today. This definition is repeated in the ''Definitions'' section of the NWPs. For NWP 39, the acreage limit is based on the size of the single and complete project (i.e., the footprint or areal extent of the project). For the purposes of this NWP, a definition of ''project area'' is included in the ''Definitions'' section. The concepts of ''single and complete project'' and ''project area'' must also be considered in the context of the subdivision provision of this NWP. In the July 1, 1998, **Federal Register** notice, we proposed General Condition 16, entitled ''Subdivisions.'' The purpose of proposed General Condition 16 was to define, for proposed NWPs A and B, the single and complete project in terms of land parcels. Since proposed NWP B was withdrawn, we have determined that a separate general condition addressing subdivision of land is unnecessary since it would only apply to NWP 39. Therefore, we have incorporated the text of proposed General Condition 16 into the text of NWP 39, with some minor changes. The term ''parcel'' is used in the subdivision provision of NWP 39 to determine the aggregate total loss authorized by the NWP and the appropriate NWP acreage limit. The project area may be the same as the size of the parcel, but more than one single and complete project may be built on a single parcel.

Multi-phase projects may be considered as separate single and complete projects depending on whether or not one phase has independent utility from another phase. If a phase of a multi-phase project has independent utility from the other phases, then that independent phase can be considered as a separate single and complete project and may be eligible for the maximum acreage limit as determined by the project area. Each phase of a project can be authorized with the maximum acreage, provided each phase has independent utility from the other phases and the work results only in minimal adverse effects on the aquatic environment. Multiple parcels can also be combined for a larger single project. The acreage limit for a combined larger project is based on the indexed acreage limit for the project area.

Two commenters suggested that authorizing the expansion of projects with this NWP is contradictory since this NWP is applicable only for single and complete projects.

We disagree, since a project proponent can expand an existing single and complete project provided the terms and limits of the NWP are not exceeded and the adverse effects on the aquatic environment are minimal. When evaluating such requests for NWP authorization, we add the previously authorized impacts to the proposed impacts to determine if the proposed expansion exceeds the acreage limit. If the PCN threshold is exceeded, the applicant is required to notify the District Engineer. The District Engineer reviews the PCN and determines if the proposed work is authorized by NWP.

One commenter expressed concern that a subdivision developer could construct the project, sell the lots, and the new owners would be eligible for NWP authorization to do further work on their lots. Another commenter stated that after a project is authorized by this NWP, further development on the property should be prohibited.

We are proposing to add a subdivision provision to this NWP to prevent piecemealing of projects that exceed the acreage limit. For real estate subdivisions created or subdivided after October 5, 1984, the aggregate loss of waters of the United States authorized by this NWP cannot exceed the acreage limit based on the index in paragraph (a). If the owners of the property want to do additional work that would exceed the indexed acreage limit under paragraph (a), then they must obtain another type of Corps permit, such as an individual permit or a regional general permit, unless the additional work has independent utility. We cannot prohibit additional activities on the project site unless it is in the public interest to do so.

Three commenters believe that this NWP would authorize considerable impacts to floodplains and riparian zones and should not authorize activities in these areas, or should be limited to those activities with unavoidable impacts that provide essential public services. One commenter stated that a net gain in wetlands cannot be achieved if residential, commercial, and institutional development activities are authorized in wetlands.

In the October 14, 1998, **Federal Register** notice we requested comments on limiting the use of the NWPs to authorize activities in the 100-year floodplain as mapped by the Federal Emergency Management Agency (FEMA) on its Flood Insurance Rate Maps. In response to the October 14, 1998, **Federal Register** notice, proposed General Condition 27 has been added to the NWPs. General Condition 27 prohibits the use of NWP 39 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

Property owners are entitled to reasonable use of their property, the Corps cannot prohibit all of these activities in wetlands. However, NWP applicants are required to avoid and minimize adverse effects to waters of the United States on-site to the maximum extent practicable (see General Condition 19). For those unavoidable impacts, we can require compensatory mitigation to ensure that the adverse effects on the aquatic environment are minimal. In the July 1, 1998, **Federal Register** notice, we cited data from the past use of NWP 26, which demonstrates that during the period of May 1, 1997, through December 31, 1997, more than 3 acres of compensatory mitigation was required for every acre of wetland lost as a result of residential, commercial, and institutional development activities.

One commenter stated that the term ''measurably degrade'' in paragraph (i) of the proposed NWP A needs to be defined. Another commenter said that this term is unnecessary because any measurable degradation of water quality would occur after the work is completed. This commenter went on to say that this condition implies that if the degradation is not measurable, then it is authorized by the NWP.

We have rewritten this condition (now in paragraph (g)) to replace the term ''measurably degrade'' with language that is more consistent with General Condition 9. The intent of this condition is to ensure that the authorized work does not result in more than minimal degradation of local water quality. Vegetated buffers adjacent to open or flowing waters and wetlands and adequate stormwater management facilities can minimize the adverse effects of the development on local water quality.

One commenter stated that the preamble for this NWP in the July 1, 1998, **Federal Register** notice contains several conditions that are not included in the text of the NWP and that these conditions should be consistent with the final NWP.

In the preamble discussion of the proposed NWP, we did not include conditions that were not incorporated into the text of the NWP itself. In the preamble for the NWP, we reiterated some of the terms and conditions of this NWP, with discussions of the intent and meaning of those conditions.

A commenter stated that the eight months of data presented by the Corps in the July 1, 1998, **Federal Register** notice is inadequate to assess the adverse effects that may result from the use of this NWP. The commenter recommended that at least one and a half years of data should be used.

We have collected additional data since the July 1, 1998, **Federal Register** notice for the use of NWP 26 for activities that could be authorized by this NWP. We have collected this data for over a year and will consider this data in our Environmental Assessment for NWP 39. This data will be used to estimate the potential losses of waters of the United States that will result from the use of this NWP. This data will include the losses of waters of the United States authorized by NWP 26, as well as the gains provided by compensatory mitigation.

One commenter requested that this NWP require the establishment and maintenance of vegetated buffers adjacent to open waters and streams, and that these vegetated buffers should be protected by deed restrictions, conservation easements, or other legal means.

We concur with this comment, and have added a new paragraph (i) to NWP 39 to require, to the maximum extent practicable, the establishment and maintenance of vegetated buffers adjacent to open waters and streams, if those types of waters of the United States are present on the project site. Paragraph (i) also requires the protection of these vegetated buffers by deed restrictions, conservation easements, or other legal methods. For activities requiring notification, the composition of the vegetated buffer, in terms of plant species, and the appropriate width of the vegetated buffer, are determined by the District Engineer. For activities authorized by this NWP that do not require notification, the permittee should establish and maintain vegetated buffers that are wide enough to protect water quality and are comprised of native plant species. Division engineers can also regionally condition this NWP to prescribe vegetated buffer requirements for activities that do not require notification.

One commenter stated that this NWP would be overly burdensome to builders. Another commenter believes that authorizing residential, commercial, and institutional development activities in all non-tidal waters of the United States will result in too much workload for Corps districts.

The purpose of the proposed NWP is to efficiently authorize residential, commercial, and institutional development activities that result in minimal adverse effects on the aquatic environment. NWP 26 authorized many of these same activities in isolated waters and headwaters. The proposed NWP authorizes these activities in all non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. Proposed General Condition 27 prohibits the use of NWP 39 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain, which will further limit the use of NWP 39 in non-tidal waters. It is our experience that many builders design their projects to comply with the NWPs, rather than construct larger projects that require individual permits. Although the proposed NWP has additional conditions that were not previously included with NWP 26, these conditions are intended to reduce adverse effects on the aquatic environment. Developers should be able to design their projects to comply with these conditions and qualify for NWP authorization. Another important point to consider is that NWPs are optional permits. If the permittee does not want to comply with all of the terms and conditions of an NWP, then he or she may request authorization through the individual permit process or apply for authorization by a regional general permit, if such a general permit is available.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 39 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all discharges into impaired waters and their adjacent wetlands. General Condition 27 prohibits the use of NWP 39 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

We believe that the terms and conditions of the proposed new and modified NWPs, especially the requirements of the three new NWP general conditions, will result in a substantial increase in the number of individual permits processed by our district offices. Districts will use the proposed new and modified NWPs, with regional conditions, to prioritize their workload in non-tidal waters. In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. Proposed NWP A is designated as NWP 39, with the modifications discussed above.

40. Agricultural Activities

In the July 1, 1998, **Federal Register** notice, we proposed to modify this NWP, which originally authorized only the construction of foundations or building pads for farm buildings in farmed wetlands, to authorize discharges into non-tidal wetlands for the purposes of increasing agricultural

production. As a result of the comments we received concerning this NWP, we have substantially changed the proposed modification of NWP 40 to authorize the following activities: (1) Discharges into non-tidal wetlands, excluding other waters of the United States (*e.g.,* open or flowing waters) and non-tidal wetlands adjacent to tidal waters, conducted by participants in U.S. Department of Agriculture (USDA) programs to increase agricultural production, (2) discharges into non-tidal wetlands, excluding other waters of the United States (*e.g.,* open or flowing waters) and non-tidal wetlands adjacent to tidal waters, conducted by agricultural producers that are not participants in USDA programs to increase agricultural production; (3) discharges into farmed wetlands for the construction of building pads for farm buildings, and (4) the relocation of existing serviceable drainage ditches constructed in non-tidal streams. For activities authorized by paragraph (a) of this NWP, the Natural Resources Conservation Service (NRCS) will determine if the proposed work meets the terms and conditions of NWP 40, unless the permittee also proposes to construct building pads for farm buildings or relocate greater than 500 linear feet of existing serviceable drainage ditches constructed in non-tidal streams. For discharges resulting in the loss of greater than ¼ acre of non-tidal wetlands by non-participants in USDA programs to increase agricultural production, the construction of building pads for farm buildings, and/or the relocation of greater than 500 linear feet of existing serviceable drainage ditches constructed in non-tidal streams, the Corps will determine if the proposed work is authorized by NWP 40. Division engineers will not regionally condition paragraph (a) of this NWP, to ensure that this NWP is consistently applied by NRCS and agricultural producers across the country. These proposed changes are discussed in more detail below.

General Comments: Many commenters objected to the proposed modification and only a few supported the proposed modification of NWP 40. Of those who objected to the proposed modification, the reasons for their objections include: (1) The NWP would authorize substantial cumulative losses of wetlands, especially in the prairie pothole region; (2) the use of the NWP would result in substantial degradation of water quality; (3) the NWP does not comply with Section 404(e) of the Clean Water Act; (4) the NWP delegates some of the Corps responsibilities to NRCS, which lacks the resources to implement the statutory requirements of the Clean Water Act; (5) the NWP is contrary to Swampbuster; and (6) the proposed modification is contrary to the goals of programs that restore and enhance wetlands, such as the Conservation Reserve Program (CRP) and the Wetlands Reserve Program (WRP).

This NWP complies with the requirements of Section 404(e) of the Clean Water Act because it authorizes activities that are similar in nature and will result in minimal adverse effects on the aquatic environment. As with all other NWPs, district engineers will monitor the use of NWP 40 on a watershed basis to determine if the use of NWP 40 and other NWPs results in more than minimal cumulative adverse effects on the aquatic environment, including degradation of local water quality. States, Tribes, and EPA will also make local determinations for compliance with Section 401 of the Clean Water Act and determine if activities authorized by NWP 40 will violate local or State water quality standards. If the cumulative adverse effects within a particular watershed are more than minimal, then the District Engineer will suspend or revoke the use of the NWPs in accordance with 33 CFR Part 330.5. For activities in non-tidal wetlands by USDA program participants to increase agricultural production, NRCS will review the proposed work and determine if it is authorized by NWP 40. In these cases, each landowner must submit a report to the District Engineer so that the use of NWP 40, the losses of waters of the United States, and compensatory mitigation can be monitored. For activities that require notification to the District Engineer (i.e., discharges resulting in the loss of greater than ¼ acre of non-tidal wetlands by non-participants in USDA programs to increase agricultural production, discharges into farmed wetlands for the construction of pads for farm buildings, or the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams), the District Engineer will review the PCN and determine if the adverse effects on the aquatic environment resulting from the proposed work will be minimal. If the proposed work involves both activities in non-tidal wetlands to increase agricultural production and either the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams or the construction of pads for farm buildings, the landowner must submit a PCN to the Corps, and the District Engineer will determine if the proposed work is authorized by NWP 40. For those activities that require notification, the District Engineer will determine if the proposed work will result in minimal adverse effects on the aquatic environment. If the proposed work will result in more than minimal adverse effects on the aquatic environment, discretionary authority will be exercised and an individual permit will be required.

One of the goals of the proposed modification of this NWP is to reduce duplication between the Corps and NRCS, reduce confusion, and provide some regulatory relief to agricultural producers. This is one of the goals of the Administration's wetlands plan, which is to make the wetlands regulatory program fair, flexible, and effective. This NWP does not delegate the Corps responsibilities under Section 404 of the Clean Water Act to NRCS, but allows activities with minimal adverse effects on the aquatic environment to proceed without duplicate review by two Federal agencies. This NWP does not require NRCS to implement the Clean Water Act. It merely addresses certain situations where the Clean Water Act and Swampbuster have duplicate requirements. District engineers will monitor the use of NWP 40 to assess the cumulative adverse effects on the aquatic environment, through reports submitted by landowners and those activities reviewed by the Corps on a case-by-case basis.

This proposed modification of NWP 40 is not contrary to the CRP and the WRP, which are voluntary programs. Participation in these programs by agricultural producers is not mandatory. Although the CRP and WRP are important conservation programs, it is important to note that agricultural producers may need to alter their land to increase production and remain competitive with other agricultural producers. NWP 40 authorizes activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to allow agricultural producers to increase production, as long as those activities have minimal adverse effects on the aquatic environment, individually or cumulatively. Both the Corps and NRCS can require compensatory mitigation to offset losses of waters of the United States authorized by this NWP to ensure that the adverse effects on the aquatic environment are minimal. It is important to note that draining and filling wetlands to increase agricultural production is often reversible. Agricultural lands that were previously wetlands are often the easiest to restore because they require less effort and expense to restore than wetlands that

were filled to create residential subdivisions or commercial facilities. Although this NWP may be used to fill a particular area to increase agricultural production, that area may be restored at a later time.

A commenter stated that the proposed modification is too restrictive and should be equitable with other NWPs, because agricultural activities and other more potentially destructive activities, such as the construction of residential, commercial, and institutional developments, should be held to the same standard. One commenter requested that the preamble to the NWP state that the use of the NWP will help achieve the goal of the Clean Water Action Plan of ''no net loss'' and ensure consistency with the Federal Agriculture Improvement and Reform Act of 1996, which exempts wetland conversions from the Swampbuster provisions of the Food Security Act as long as wetland functions, values, and acreage are fully offset. One commenter recommended modifying the NWP to be consistent with the limits associated with the minimal effects criteria regionally established under the Farm Bill. A number of commenters believe that the proposed modification of NWP 40 is unnecessary because ongoing farm operations in farmed wetlands are exempt under Section 404(f) of the Clean Water Act.

We agree that the modifications to NWP 40 proposed in the July 1, 1998, **Federal Register** notice placed greater restrictions on agricultural producers than proposed NWP A (now designated as NWP 39) did on residential, commercial, and institutional developers. We have attempted to make NWPs 39 and 40 more equitable in terms of applicable waters and determining what constitutes a single and complete project for these NWPs. Both NWPs 39 and 40 authorize activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. We have retained the separate provisions for playas, prairie potholes, and vernal pools from NWP 40, with an indexed acreage limit and a maximum limit of 1 acre, which is achieved for farm tracts 90 acres or greater in size. For proposed NWP 39, the single and complete project will be based on project area. For the proposed modification of NWP 40, a single and complete project will be based on farm tract size. Farm tracts will be identified by the Farm Service Agency. The definition of the term ''farm'' based on reporting to the Internal Revenue Service has been removed. In the ''Definitions'' section of the NWPs, the term ''farm'' has been replaced with ''farm tract.'' The definition of the term ''farm tract'' has been taken from the Farm Service Agency regulations at 7 CFR Part 718.2.

In accordance with the provisions of the Food Security Act, compensatory mitigation will be required for activities authorized by paragraph (a) of this NWP to fully offset losses of non-tidal wetlands. District engineers will determine on a case-by-case basis if compensatory mitigation is necessary to offset losses of waters of the United States resulting from activities authorized by paragraphs (b), (c), and (d) of this NWP to ensure that those activities result in minimal adverse effects on the aquatic environment. NRCS and the Corps, in cooperation with EPA, FWS, and NMFS, will develop joint compensatory mitigation guidance to provide consistency in compensatory mitigation requirements necessary for the implementation of NWP 40. Since the proposed modification of NWP 40 is intended to have national applicability, it is impractical to modify the NWP to be consistent with local minimal effects criteria established regionally under the Farm Bill. This NWP is applicable in all non-tidal wetlands, not just farmed wetlands. The conversion of waters of the United States to another use is not exempt under Section 404(f) of the Clean Water Act, which makes these modifications to NWP 40 necessary to satisfy the requirements of Section 404.

Activities Authorized by NWP 40: One commenter supported the intent of the proposed modification, but stated that the additional activities should be authorized by another NWP, not by modifying the existing NWP 40. Another commenter stated that a separate NWP should be issued to authorize the installation of drainage tiles and drainage ditches, and that the structure of this new NWP should be more like the proposed NWP for residential, commercial, and institutional activities. A commenter suggested that NWP 39 should be used instead of NWP 40 to authorize discharges in waters of the United States to increase agricultural production. One commenter recommended limiting the NWP to maintaining farm acreage, not expanding productive farm area. Two commenters requested the removal of mechanized landclearing from the list of activities authorized by the NWP, stating that only activities in cropland should be authorized by the NWP. Two commenters stated that mechanized landclearing should be considered exempt under Section 404(f)(1) of the Clean Water Act and not included in the NWP. One commenter stated that the proposed modification to NWP 40 illegally brings two Farm Bill exemptions into the Federal wetlands program, namely ''categorical minimal effects'' and ''minimal effects mitigation.''

We disagree that there should be a separate NWP for activities that increase agricultural production. We believe that it is more appropriate to modify NWP 40, which previously authorized only the construction of building pads and foundations for farm buildings in farmed wetlands. The purpose of the proposed modification of NWP 40 is to authorize all activities for increasing agricultural production and constructing farm buildings. By including all of these activities in a single NWP, there will be less confusion for the regulated public and district engineers will be better able to assess the adverse effects on the aquatic environment for single and complete projects. We are proposing to make the modifications to NWP 40 similar to the proposed NWP 39 by utilizing indexed acreage limits and by making both NWPs applicable to non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters. The indexed acreage limit for NWP is applicable only for discharges resulting in the loss of playas, prairie potholes, and vernal pools, with a maximum acreage limit of 1 acre. We are proposing to utilize a simple 2 acre limit for discharges into other types of non-tidal wetlands to increase agricultural production. The proposed modification of NWP 40 has a smaller maximum acreage limit (*i.e.*, 2 acres) than NWP 39 (*i.e.*, 3 acres). The lower maximum acreage limit for NWP 40 is necessary to ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment, because district engineers will not receive notifications for many activities authorized by this NWP. Division and district engineers cannot impose regional or case-specific conditions on paragraph (a) of this NWP, so that NRCS can implement this part of NWP 40 consistently throughout the country. In addition, district engineers cannot revoke authorizations for activities authorized by paragraph (a) of NWP 40 on a case-by-case basis, but division engineers can revoke the provisions of paragraph (a) of NWP 40 within a state, geographic region, or a particular waterbody. However, regional conditions can be added to paragraphs (b), (c), and (d) of NWP 40, since the Corps is responsible for reviewing these activities. We have changed the applicable waters for the proposed modification of NWP 40 to be consistent

with most of the new NWPs. Proposed NWP 39 cannot be used to increase agricultural production instead of NWP 40, because NWP 39 specifically authorizes only building pads and attendant features for residential, commercial, and institutional developments. Activities that increase agricultural production are not included in NWP 39, although the construction of a farm house used as a residence on a farm may be authorized by NWP 39.

Mechanized landclearing may result in a discharge of dredged or fill material into waters of the United States and require a Section 404 permit. We disagree that the NWP should be limited to areas currently used as cropland. It would be inequitable to agricultural producers to limit use of the NWP only to those areas currently used for agricultural production. Mechanized landclearing is not exempt under Section 404(f)(1) if it converts a water of the United States into a use to which it was not previously subject, such as the mechanized landclearing of a forested wetland to convert it into cropland (see Section 404(f)(2) of the Clean Water Act).

Categorical minimal effect determinations and minimal effects mitigation are provisions of the 1996 Farm Bill and 1985 Food Security Act. The categorical minimal effects determination is not an exemption from the permit requirements of Section 404 of the Clean Water Act. It merely allows the landowner to maintain USDA farm program eligibility for activities that convert a wetland to increase agricultural production, provided the activity has minimal effects on the hydrological and biological functions of the wetlands in the vicinity.

One commenter requested clarification of the NWP to state that it authorizes activities for the purposes of improving production on existing agricultural land, because the commenter believes that the proposed wording of the NWP allows conversion of land not previously used for agricultural purposes. Another commenter recommended that, in addition to activities regulated under the National Food Security Act Manual (NFSAM), those activities considered exempt under NFSAM (*i.e.,* where the land is not currently in agricultural production) such as the construction of grassed waterways, storage facilities, and impoundments should be authorized by the NWP. One commenter recommended that the NWP authorize the construction of farm ponds, when they are subject to the recapture provision of Section 404(f)(2) and are not exempt from the Clean Water Act.

The proposed modification of NWP 40 authorizes discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the purpose of increasing agricultural production, including areas not currently used for agricultural production. This NWP authorizes the construction of grassed waterways, storage facilities, and impoundments in non-tidal wetlands, provided their purpose is to increase agricultural production. In certain circumstances, the construction of farm ponds is exempt from Section 404 permit requirements. The proposed modification of this NWP authorizes the construction or expansion of farm ponds used for agricultural purposes (*e.g.*, irrigation ponds) that are not eligible for the Section 404(f) exemption, if the farm ponds are constructed in non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters, and do not involve discharges of dredged or fill material into stream beds or other open waters. The only activity authorized by this NWP in open waters is the relocation of non-tidal streams that have been channelized as drainage ditches. The construction of farm ponds in stream beds or the construction of ponds for purposes other than increasing agricultural production may be authorized by other NWPs, a regional general permit, or an individual permit.

Scope of the NWP: A number of commenters recommended limiting the NWP only to wetlands that are currently frequently cropped. Two commenters suggested that the NWP should authorize discharges only in isolated wetlands and should not authorize draining of wetlands. Several commenters stated that agricultural activities in naturally vegetated playas, prairie potholes, and vernal pools should not be included in the NWP.

Limiting the scope of applicable waters of the proposed modification of this NWP only to frequently cropped or farmed wetlands would be inequitable to farmers, when compared to the applicable waters for NWP 39. District engineers will monitor the use of this NWP to ensure that it authorizes only those agricultural activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, that result in minimal cumulative adverse effects on the aquatic environment. District engineers will receive notification for discharges into non-tidal wetlands by non-participants in USDA programs if the discharge results in the loss of greater than 1/4 acre of non-tidal wetlands, the construction of building pads for farm buildings, and/or the relocation of greater than 500 linear feet of existing serviceable drainage ditches constructed in non-tidal streams. These notifications will be reviewed by District Engineers to ensure that the proposed work will result in minimal adverse effects on the aquatic environment. We have not removed the specific provisions relating to playas, prairie potholes, and vernal pools to ensure that discharges into those types of non-tidal wetlands do not result in more than minimal adverse effects on the aquatic environment. To ensure that the provisions for playas, prairie potholes, and vernal pools are implemented accurately for those wetland types, we are proposing definitions for these terms in the ''Definitions'' section of the NWPs. The proposed definitions are based on geographic, hydrological, and vegetation characteristics. The proposed definitions were derived from information from technical sources on identifying and delineating wetlands. We are proposing to modify the applicable scope of waters for NWP 40 from all non-tidal waters of the United States, as proposed in the July 1, 1998, **Federal Register** notice, to non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, to make it consistent with most of the new NWPs.

Acreage limits: Comments on acreage limits for the proposed modification of this NWP are divided into two categories. One category addresses the basis for determining acreage limits for a single and complete project (i.e., whether NWP 40 should apply to one entire farm or to a single farm tract). The other category of comments addresses the maximum acreage loss authorized by this NWP.

Two commenters favored the use of the term ''farm'' to define the single and complete project for the NWP. One commenter objected to the use of ''farm'' in the NWP, stating that a person who owns more than one farm could use the NWP at each farm for the maximum acreage limit. One commenter stated that the proposed definition of ''farm'' is confusing and would unfairly restrict the use of NWP 40. A few commenters stated that acreage limits should not be linked to farm size. One of these commenters objected to basing the acreage limit on the Internal Revenue Service's definition of a ''farm'' because NRCS personnel would have to review copies of the landowner's tax returns to verify the number of tracts with the farm. This commenter recommended that the Corps determine single and complete projects for NWP 40 based on ''farm tracts'' as identified by the Farm Service Agency. Other commenters

suggested applying the acreage limit to the individual USDA field number or the individual parcel. One commenter requested that the aggregate acreage limit apply only to the property, not the farmer. One commenter advocated the use of ''farm tracts'' for this NWP because the farm tract, not the farm, is the basic unit of land ownership. This commenter stated that many farms consist of different tracts geographically separated from each other. Farm tracts remain constant in size and configuration, but may be sold, leased, or traded between farms. A couple of commenters opposed the use of ''farm tracts'' to determine the acreage limit of NWP 40. One of these commenters reasoned that the use of farm tracts would result in substantial losses of wetlands because of multiple use of the NWP by a large farm operation that owns many farm tracts. One commenter stated that impacts to waters of the United States are not dependent on farm size.

One of the objectives of the Administration is to make the Federal wetlands programs fair, flexible, and effective. Basing the single and complete project on Internal Revenue Service reporting of farms for the proposed modification of NWP 40 results in unfair restrictions on agricultural producers compared to residential, commercial, and institutional developers. Developers often own more than one parcel of land and may have several development projects occurring at the same time. The Corps considers each development a single and complete project, as long as each development has independent utility. Each development can qualify for separate NWP authorization even though the land may be owned by the same developer, if the proposed work meets the terms and conditions of the NWP and if the individual or cumulative adverse effects on the aquatic environment are minimal. We are proposing to base the single and complete project and indexed acreage limit of NWP 40 on farm tract size, instead of farms. The use of farm tracts for NWP 40 provides equitable treatment to agricultural producers, and each farm tract would be considered a single and complete project for the purposes of the NWPs.

Several commenters stated that the proposed acreage limits are too high. Suggested acreage limits were 1, ⅓, ¼, and ⅒ acre. A few commenters suggested higher acreage limits. Several commenters stated that the proposed 3 acre limit is adequate. In the July 1, 1998, **Federal Register** notice, we requested comments on the use of a simple acreage limit versus a sliding scale for this NWP. Most commenters opposed the use of a sliding scale or indexing to determine the acreage limit for this NWP. One of these commenters stated that the indexing scheme proposed in the July 1, 1998, **Federal Register** notice is too burdensome, confusing, and without ecological justification. Two commenters favored the use of a sliding scale, but recommended basing the sliding scale on a percentage, either as 5% of the wetlands on a farm regardless of farm size or 2% of the project size, if the project is greater than 5 acres in size.

A number of commenters stated that the acreage limit for NWP 40 should be the same as for the NWP for residential, commercial, and institutional development activities (*i.e.*, NWP 39). One of these commenters stated that the acreage limits proposed in the July 1, 1998, **Federal Register** notice are inequitable compared to the acreage limits developers are subject to in NWP 39, particularly to farmers who own smaller farms. This commenter also said that using acreage limits and farm size as a substitute to determine minimal adverse effects has not been applied in a consistent manner between similar activities, such as development or agricultural projects.

Based on our review of comments received in response to the July 1, 1998, **Federal Register** notice, and to provide agricultural producers and residential, commercial, and institutional developers with equitable NWPs, we are proposing to utilize a simple 2-acre limit for discharges into non-tidal wetlands and an indexed acreage limit for discharges into playas, prairie potholes, and vernal pools that are authorized by paragraphs (a) (for USDA program participants) or (b) (for non-participants in USDA programs) of NWP 40. The indexed acreage limit for playas, prairie potholes, and vernal pools has a maximum limit of 1 acre per farm tract. A lower maximum acreage limit (*i.e.*, 2 acres per farm tract) was selected to ensure that the NWP authorizes activities only with minimal adverse effects on the aquatic environment because preconstruction notification to the District Engineer is not required for activities authorized by paragraph (a) of this NWP (unless the project proponent is also requesting authorization for the construction of foundations for farm buildings or the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams). We are proposing a 2-acre limit for discharges into non-tidal wetlands (except for playas, prairie potholes, and vernal pools) to increase production. For the proposed modification of NWP 40, the indexed acreage limit for discharges into playas, prairie potholes, and vernal pools is based upon 1% percent of the farm tract size, with a base limit of ⅒ acre. The maximum acreage limit of 1 acre is achieved for farm tracts 90 acres or greater in size. We believe that the formula for the indexed acreage limit will be easy to use. An indexed acreage limit helps encourage avoidance and minimization of losses of waters of the United States.

One commenter opposed the use of an aggregate acreage limit for NWP 40, stating that the requirement for mitigation replaces the need for an acreage limit for activities authorized by the NWP. A couple of commenters said that the Corps cannot enforce the acreage limits of this NWP because land is reapportioned among farm tracts on an annual basis and the Corps does not have access to the farm tract history necessary to ensure compliance with the acreage limits.

The acreage limit for NWP 40, as for all other NWPs, is based on a national determination that the NWP will authorize most activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. For certain activities, preconstruction notification is required to allow district engineers to review these activities on a case-by-case basis and determine if they will result in minimal adverse effects on the aquatic environment, individually or cumulatively. Compensatory mitigation cannot be used to increase the acreage limit for an NWP, but discharges of dredged or fill material into waters of the United States to construct compensatory mitigation are not included in the calculation of acreage loss of waters of the United States to determine if the single and complete project exceeds the acreage limit of NWP 40. It is our understanding that farm tract designations change only when the land is subject to a real estate transaction, such as when a farmer subdivides a farm tract to sell a part of that farm tract to another person.

Paragraph (a) of the proposed NWP 40 modification published in the July 1, 1998, **Federal Register** notice authorized activities that qualify for a minimal effects exemption under the Food Security Act and National Food Security Act Manual, provided the discharge does not cause the loss of greater than 1 acre of non-tidal wetlands or greater than ⅓ acre of playas, prairie potholes, and vernal pools. One commenter supported the inclusion of minimal effects determinations in NWP 40. Two commenters opposed this

provision of the NWP. One commenter stated that the farm owner should not have to obtain an authorization from both the Corps and NRCS for work in wetlands. This commenter believes that the Corps should make the minimal effects determination and that USDA program participants should get an NWP authorization before they can get a minimal effects determination. Another commenter requested that the minimal effects determination should include non-participants in USDA programs. One commenter stated that it is inappropriate for the Corps to apply acreage limits under this part of the NWP to activities that receive minimal effects determinations. Another commenter recommended that this portion of the NWP should be removed and replaced with regional conditions. One commenter believes that NRCS does not currently monitor the indirect or cumulative adverse effects of projects that are eligible for minimal effects determinations, and that this is contrary to the Clean Water Act's general permit criteria. This commenter stated that the minimal effects determination does not assess the value for a watershed. Three commenters recommended that NRCS should receive concurrence from the FWS and/or NMFS prior to issuing a minimal effects determination.

We are proposing to modify this NWP to authorize discharges in non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters, by USDA program participants and non-participants in USDA programs to increase agricultural production on a farm tract. For USDA program participants, the permittee must obtain an exemption or minimal effects with mitigation determination from NRCS and implement an NRCS-approved compensatory mitigation plan that fully offsets wetland losses. For non-participants in USDA programs, notification to the District Engineer is required for discharges resulting in the loss of greater than ¼ acre of non-tidal wetlands to increase agricultural production. The District Engineer will determine on a case-by-case basis if the activities authorized by paragraph (b) will result in minimal adverse effects on the aquatic environment. Compensatory mitigation will normally be required for activities that require notification to ensure that they result in minimal adverse effects on the aquatic environment. The 2 acre limit for discharges into non-tidal wetlands and the indexed acreage limit for discharges into playas, prairie potholes, and vernal pools will ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. District engineers will monitor the use of this NWP through postconstruction reports and preconstruction notifications submitted to the District Engineer. If the activities authorized by NWP 40 result in more than minimal cumulative adverse effects on the aquatic environment, division engineers can suspend the use of this NWP in the watershed or Corps district.

Paragraph (b) of the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** authorized activities in non-tidal wetlands, except for naturally vegetated playas, prairie potholes, and vernal pools for the purposes of increasing agricultural production. Two commenters recommended using a simple acreage limit, but two other commenters favored using a sliding scale. Two commenters opposed the proposed 3 acre limit, because they believe it is too high. One commenter stated that the proposed indexed acreage limit was too low, especially if mitigation is required. One commenter recommended a 1 acre limit and another commenter recommended a ⅓ acre limit. One commenter recommended basing the acreage limit on a sliding scale of 2% of the entire property, with a maximum of 3 acres. One commenter stated that this part of the NWP should apply to all non-tidal wetlands, with no exclusions for playas, prairie potholes, and vernal pools.

We are proposing to modify NWP 40 to authorize agricultural activities in all non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters. For discharges into non-tidal wetlands to increase production, we are proposing a simple acreage limit of 2 acres and an indexed acreage limit for discharges into playas, prairie potholes, and vernal pools. The indexed acreage limit for discharges into playas, prairie potholes, and vernal pools will have a maximum acreage limit of 1 acre. The acreage limit for the proposed modification of this NWP will be based on farm tracts.

Paragraph (c) of the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** authorized activities in naturally vegetated playas, prairie potholes, and vernal pools for the purposes of increasing agricultural production. Two commenters concurred with the proposed acreage limit of 1 acre. One commenter objected to the lower acreage limit for activities in playas, prairie potholes, and vernal pools. One commenter stated that this portion of the NWP should apply only to frequently cropped playas, prairie potholes, and vernal pools and that naturally-vegetated wetlands should not be included in the NWP. Another commenter recommended including pocosins in this paragraph of the NWP. A commenter stated that the proposed 1 acre limit is too high. One commenter believes that a higher acreage limit should be used because the permittee is required to provide mitigation. Two commenters recommended using a simple acreage limit instead of a sliding scale acreage limit.

As previously discussed, we are proposing to modify NWP 40 to include playas, prairie potholes, and vernal pools with an indexed acreage limit.

Construction of Farm Buildings: Paragraph (d) of the proposed modification of NWP 40 contained the original provisions of NWP 40 and authorized discharges into wetlands, excluding playas, prairie potholes, and vernal pools, that were in agricultural production prior to December 23, 1985, for the construction of building pads for farm buildings, with an acreage limit of 1 acre.

One commenter recommended increasing the acreage limit to 2 acres. Another commenter recommended an acreage limit of 1/4 acre, to be consistent with the acreage limit proposed for NWP 29 in the July 1, 1998, **Federal Register** notice. One commenter stated that non-agricultural buildings such as houses should not be authorized by this NWP. Three commenters stated that the December 23, 1985, date should be removed from this part of the NWP, based on the rationale that any area under agricultural production prior to that date should not be considered a jurisdictional wetland and subject to the limitations of the NWP.

We are proposing to remove the exclusion for playas, prairie potholes, and vernal pools from this part of NWP 40. This provision is now in paragraph (c) of the proposed modification of this NWP, with a requirement that the permittee notify the District Engineer in accordance with General Condition 13. We are proposing to maintain the 1 acre limit for this activity. One acre is adequate for the construction of most farm buildings. This acreage limit need not be consistent with the acreage limit of NWP 29, since farm buildings are constructed for the operation of the farm, not for residences. Farm buildings, such as barns, usually must be larger than houses to fulfill their purposes. In addition, this paragraph of NWP 40 encompasses a much smaller geographic scope than the other provisions of NWP 40, since it is limited to farmed wetlands. Paragraph (c) of NWP 40 authorizes discharges only in farmed

wetlands for the construction of building pads for farm buildings, whereas NWP 29 authorizes discharges of dredged or fill material into all non-tidal wetlands. This NWP does not authorize the construction of non-agricultural buildings, such as residences. We do not agree that the December 23, 1985, date should be removed from the NWP because there are jurisdictional wetlands that have been used for agricultural production since that date. Although they are considered farmed wetlands, they are still waters of the United States and subject to Clean Water Act Section 404 permit requirements.

Drainage Ditch Relocations: Paragraph (e) of the proposed NWP 40 modification published in the July 1, 1998, **Federal Register** notice authorized the relocation of existing serviceable drainage ditches and previously substantially manipulated intermittent and small perennial streams. Two commenters supported the proposed provision of the NWP. Several commenters opposed this provision. Two commenters stated that the relocation of streams or drainage ditches may result in substantial adverse effects on the aquatic environment. One commenter recommended modification of this provision to limit the work only to the relocation of currently serviceable drainage ditches or manipulated streams that are not so degraded as to require reconstruction. Another commenter stated that it is unclear which other waters of the United States are included in this paragraph of the NWP. Two commenters suggested that this condition should not apply to perennial streams. Two commenters requested that the Corps define the term ''substantially manipulated stream.''

The purpose of this provision of the proposed modification of NWP 40 is to authorize relocation of drainage ditches constructed in waters of the United States to increase agricultural production. Based on comments received in response to our proposed definition of the term ''drainage ditch,'' and in an effort to clarify this provision of NWP 40, we are changing the language of this paragraph and designating it paragraph (d). Paragraph (d) of the proposed modification of NWP 40 authorizes discharges of dredged or fill material to relocate existing serviceable drainage ditches constructed in non-tidal streams. The relocation of existing serviceable drainage ditches constructed in non-tidal wetlands can be authorized by paragraphs (a) or (b) of this NWP. Notification to the District Engineer is required for the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams. Since drainage ditches can be constructed in wetlands or by channelizing perennial, intermittent, or ephemeral stream beds to improve drainage, we have removed the phrase ''* * * and previously substantially manipulated intermittent and perennial streams'' and replaced it with ''* * * constructed in non-tidal streams'' to reflect the fact that drainage ditches may have been constructed in streams. As a result of this change, it is unnecessary to provide a definition for the term ''substantially manipulated stream.'' Relocation of drainage ditches constructed in uplands does not require a Section 404 permit because these ditches are not waters of the United States, except in certain circumstances.

We do not believe that the relocation of existing serviceable drainage ditches constructed in waters of the United States will result in more than minimal adverse effects on the aquatic environment. The term ''existing serviceable drainage ditches'' adequately describes the limitation of paragraph (d) to only those drainage ditches that do not require reconstruction due to abandonment and neglect.

One commenter asked why this provision was included in the NWP, since ditch maintenance is exempt under Section 404(f) of the Clean Water Act. One commenter stated that other NWPs should be used to authorize work in rivers and streams on agricultural lands. One commenter said that a provision should be added to this paragraph requiring the land to remain in agricultural use if the ditches are maintained. Another commenter recommended adding a 500 linear foot limit to this part of the NWP.

The Section 404(f) exemption for drainage ditch maintenance does not apply to the relocation of drainage ditches. To qualify for the exemption, the landowner cannot change the location of the drainage ditch or modify it beyond the original design dimensions and configuration. Since the relocation of drainage ditches constructed in non-tidal streams can increase agricultural production, it would be inappropriate to require the use of other NWPs to authorize this activity. Other activities in waters of the United States on agricultural lands, such as bank stabilization, may be authorized by other NWPs, regional general permits, or individual permits. We cannot add a provision to paragraph (d) requiring the landowner to keep the land in agricultural use if the ditches are relocated because such a provision is beyond the Corps regulatory authority and unenforceable. We do not believe that is necessary to impose a 500 linear foot limit on relocating drainage ditches constructed in waters of the United States because district engineers will receive a PCN for the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams to determine if the proposed work will result in minimal adverse effects on the aquatic environment and can qualify for authorization under this NWP.

Notification: We proposed requiring notification for activities that cause the loss of greater than ⅓ acre of non-tidal wetlands or the relocation of greater than 500 linear feet of drainage ditches and previously substantially manipulated intermittent and small perennial streams. One commenter recommended a 1 acre PCN threshold. Another commenter recommended a ¼ acre PCN threshold, with agency coordination. One commenter requested that PCNs should be required for all activities authorized by this NWP. Another commenter stated that the PCN requirements for NWP 40 should be the same as for NWP 39. For ditch and stream relocations, recommended PCN thresholds included 150, 200, and 3,000 linear feet. One commenter requested agency coordination for all wetland losses of greater than ⅓ acre and all ditch and stream relocations.

Notification to the District Engineer is required for discharges by non-participants in USDA programs to increase agricultural production that result in the loss of greater than ¼ acre of non-tidal wetlands, the construction of building pads for farm buildings, and for the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams. For USDA program participants, notification to the District Engineer is required if the proposed work involves activities in non-tidal wetlands and the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams or the construction of building pads for farm buildings, agency coordination will be conducted for activities requiring notification to the District Engineer if the proposed work results in the loss of greater than 1 acre of waters of the United States.

Mitigation: Paragraphs (b) and (c) of the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** notice required submission of a mitigation plan to fully offset wetland losses. One commenter stated that the Corps should not require avoidance and minimization for potential losses of frequently cropped, previously altered farmed wetlands, because mitigation sequencing is not required under the

Farm Bill. In other words, the 404(b)(1) guidelines are not applicable to farmed wetland conversions and compensatory mitigation will be required by NRCS. A few commenters recommended that both the Corps and NRCS approve the required compensatory mitigation. Two commenters stated that the required compensatory mitigation should be reviewed by all agencies, not just NRCS. One commenter requested that any compensatory mitigation requirements for this NWP be the same as for all Corps permits.

Although mitigation sequencing may not be required under the 1996 Farm Bill, discharges of dredged or fill material into waters of the United States, including farmed wetlands, require a Section 404 permit, which may be authorized by NWPs. General Condition 19 of the NWPs requires the permittee to avoid and minimize impacts to waters of the United States on-site to the maximum extent practicable. Compensatory mitigation is required for all activities authorized by paragraph (a) of this NWP. For activities requiring notification to the District Engineer, compensatory mitigation may be required to ensure that activities authorized by this NWP result in minimal adverse effects on the aquatic environment. For the purposes of this NWP, compensatory mitigation used to satisfy the requirements of NRCS will be accepted by the Corps. To provide consistency for compensatory mitigation requirements and reduce confusion, NRCS and the Corps will develop, in cooperation with EPA, FWS and NMFS, joint mitigation guidance for this NWP.

One commenter expressed concern that compensatory mitigation requirements will decrease the available amount of farm land and requested that the Corps annually report the amount of farm land used as compensatory mitigation. Two commenters supported the requirement to fully offset losses of waters, but stated that the NWP should require a minimum 1:1 replacement ratio. Another commenter said that compensatory mitigation should be limited to the enhancement, restoration, and creation of aquatic resources and exclude preservation, because the Farm Bill does not authorize preservation and NRCS policy does not allow preservation for Swampbuster purposes.

We do not believe that the compensatory mitigation requirements of this NWP will substantially decrease the amount of available farm land because landowners have the option of avoiding impacts to waters of the United States, which would decrease the amount of land needed for wetland restoration and creation. In addition, compensatory mitigation is often conducted on farm land with marginal productivity, due to soil characteristics or wetness, that has the highest potential for wetland restoration. We disagree that preservation should be prohibited as a means of providing compensatory mitigation for activities that require notification to the Corps. Preservation is an extremely important method for protecting rare and high value waters of the United States from future losses.

Use of NWP 40 with Other NWPs: One commenter stated that the portion of the preamble to the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** that prohibits the future use of NWP A (*i.e.*, NWP 39) if the farm is developed by the farmer or sold, should be included in the text of NWP 40. However, this commenter questions the Corps ability to monitor compliance with this provision. Another commenter suggested that NWP 40 should not be used with NWPs 39 or 44. One commenter recommended a 3 acre stacking limit. Another commenter suggested that any use of this NWP with other NWPs should be subject to the lowest acreage limit allowed for any of the NWPs.

We have incorporated into NWPs 39 and 40 the provision addressing the future use of NWP 39 on the farm if that farm or portions of the farm are converted to residential, commercial, or institutional developments by the farmer or sold to a developer. The indexed acreage limit of paragraph (a) of NWP 39 cannot be exceeded, based on the project area and the subdivision provision of NWP 39. The Corps will rely on its records to track the use of NWPs 39 and 40 for a particular parcel of land. The use of more than one NWP for a single and complete project is addressed in the proposed modification of General Condition 15.

Other Comments: A number of commenters objected to allowing the use of NWP 40 on a farm every 5 years, because it would result in substantial cumulative losses of waters. One commenter recommended that the NWP should be used only once per project and if the land is no longer used for agricultural production the fill should be removed and the new use repermitted. Several commenters believe that NWP 40 should be subject to the same conditions as the NWP for residential, commercial, and institutional development activities and the NWP for mining activities. One commenter recommended including a reference to the Memorandum of Agreement between the Corps and NRCS concerning wetland delineations. One commenter objected to this NWP, stating that it does not address indirect impacts to waters caused by converting wetlands to agricultural use and cited water quality problems that can be caused by ditching activities. Another commenter recommended that the NWP include a requirement for vegetated buffers around streams on farm land, to filter out pollutants and nutrients and prevent erosion.

We have removed the provision allowing the use of NWP 40 on a farm every five years, to make it more consistent with other NWPs. Restricting the use of NWP 40 to a single and complete farm operation will avoid substantial losses that could occur due to repeated use of this NWP every 5 years. We disagree with the recommendation that land no longer in agricultural use should be restored and any new uses repermitted. Such a requirement is impractical, places unnecessary burdens on the regulated public and the Corps, and provides no benefits to the aquatic environment. Former wetlands on agricultural lands may be used for aquatic habitat restoration, including mitigation banks and in lieu fee programs.

We have attempted to provide consistency between proposed NWPs 39, 40, and 44, but due to the differences in the types of activities authorized by these NWPs and their potential adverse effects on the aquatic environment, it is impractical to make the conditions for these NWPs identical. We do not believe that it is necessary to cite the Memorandum of Agreement between the Corps and NRCS concerning wetland delineations in this NWP, partly because it is currently undergoing revisions and it is not essential to the implementation of NWP 40. In accordance with the proposed modification of General Condition 9, district engineers can require a water quality management plan for activities authorized by this NWP, if the 401 certification does not require such a plan or address potential adverse effects to water quality. Both the water quality management plan and General Condition 19 allow the District Engineer to require, as compensatory mitigation, the establishment and maintenance of vegetated buffers adjacent to streams.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1

acre of impaired waters, including adjacent wetlands. NWP 40 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates that the activity will not result in further impairment of the waterbody. General Condition 27 prohibits the use of NWP 40 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. To allow NRCS to implement paragraph (a) of this NWP consistently throughout the country, division engineers cannot add regional conditions to paragraph (a) of NWP 40. However, division engineers can add regional conditions to paragraphs (b), (c), and (d) of NWP 40, since the Corps is responsible for reviewing these activities.

41. Reshaping Existing Drainage Ditches

In the July 1, 1998, **Federal Register** notice, we proposed a new NWP (designated as NWP F) to authorize discharges of dredged or fill material into non-Section 10 waters of the United States for reshaping existing drainage ditches constructed in waters of the United States by altering the cross-section of the ditch to benefit the aquatic environment.

Comments both in support and in opposition of this NWP were received, but most commenters recommended conditions to minimize potential impacts. Those in support of the NWP believe that it would be acceptable with regional conditions or Section 401 water quality certification conditions and that it will provide oversight or enforcement in order to reduce abuse in rural areas. Comments opposing the NWP ranged from no permit should be required at all, as this is an activity which is exempt from Section 404 regulation, to all activities in all ditch types should be prohibited in order to prevent degradation of aquatic resources. One commenter stated that Corps regulation of wet weather conveyances would be a huge paperwork burden contributing little to environmental quality. Several commenters stated that it is not always in the overall best interest of the aquatic resource to attempt to achieve improvements in water quality by simply reshaping the banks of the drainage ditch. Many commenters who expressed opposition to the proposed new and modified NWPs in general stated that this NWP was an exception because it would meet the minimal effect requirement.

Many comments regarding jurisdiction were received. One commenter requested a discussion on jurisdiction as some Corps personnel take jurisdiction over upland ditches based on wetland parameters. Some commenters requested the Corps further clarify the distinction between maintenance work and work that would be authorized by this permit. Some commenters recommending modifying the text of the NWP to exclude ditch maintenance projects while others recommended the new NWP include all ditches that are man-made, regardless of whether or not maintenance has been performed. One commenter suggested that permits should never be required for minor drainage activities on agricultural land and for the maintenance of drainage ditches. Several commenters stated that roadside ditches are not waters of the United States even if they contain wetland vegetation. Many believe this permit authorizes work that is actually exempt from regulation. Other commenters proposed that the NWP should be applicable in Section 10, including tidal waters, as well. One commenter suggested that all natural perennial streams, channelized perennial streams, and/or rechannelized perennial streams should be excluded from this permit. Some commenters said that the permit should authorize the reconversion of abandoned ditches, while others stated that the Corps should stress that abandoned ditches may not be reconverted. Several commenters stated that this permit should provide authorization for reshaping obstructed channels. One commenter said that the permit should be rewritten to clarify that open drainage ditches, including channelized streams, cannot be considered abandoned as long as the maintenance authority exists and as long as all cropland draining to the ditch has not been abandoned. Another stated that this permit should not be used for streams that are called ''ditches'' or in channelized portions of streams that convey surface runoff and/or groundwater.

Several commenters believe the NWP should be more inclusive and should allow some realignment of the waterway if it is beneficial to the aquatic environment. One group recommended that ditch relocation should be allowed because when shopping centers are renovated or expanded, because the relocation of ditches is often the only activity regulated by the Corps. Several commenters recommended the permit should allow for a change in centerline location when the activity pertains to roadside ditches where transportation agencies are flattening the side slopes for safety purposes. Additionally, minor relocation of the ditch could have as much or more of a benefit on improving water quality and should be allowed under this permit. Some commenters requested that deepening of ditches should be included because some ditches were originally dug without enough grade to keep them from accumulating excess sediment. Other commenters stated that deepening of drainage ditches should not be allowed beyond the original configurations due to the resultant additional wetland drainage. One commenter suggested that this permit should not be used to authorize diversion or drainage of wetlands or the expansion of the drainage ditch size. And lastly, one commenter recommended that this permit be broadened to include all reshaping that might not be exempt as maintenance.

Discharges associated with the maintenance of drainage ditches constructed in waters of the United States are exempt from regulation under Section 404, provided the drainage ditch is returned to its original dimensions and configuration (see 33 CFR Part 323.4(a)(3)). However, the modification or new construction of drainage ditches in waters of the United States requires a Section 404 permit. Since the maintenance of drainage ditches to their original dimensions and configurations is exempt from Section 404 permit requirements, the purpose of the proposed NWP is to encourage reshaping of ditches in a manner that provides benefits to the aquatic environment. This NWP is limited to reshaping currently serviceable drainage ditches constructed in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not change the capacity or location of the drainage ditch. We have changed the applicable waters for this NWP to make it more consistent with most of the proposed NWPs. The centerline of the reshaped drainage ditch must be in essentially the same location as the centerline of the existing ditch. The proposed NWP does not authorize reconstruction of drainage ditches that have become ineffective through abandonment or lack of regular maintenance. This NWP authorizes discharges to grade the banks of ditches at a gentler slope than they were originally constructed for the purpose of reducing erosion and decreasing sediment transport down the ditch by

trapping sediments. Shallower slopes may increase the amount of vegetation along the bank of the ditch, which can decrease erosion, increase nutrient and pollutant uptake by plants, and increase the amount of habitat for wildlife. We believe that the deepening and/or widening of a ditch, allowing the centerline to be relocated, and allowing abandoned ditches to be reconverted could result in more than minimal adverse effects on the aquatic environment.

Several commenters suggested this permit should be removed from consideration until questions concerning the Tulloch Rule are resolved, because a landowner does not know if he or she is required to obtain a permit for excavation activities or reshaping existing ditches in wetlands that involve only ''incidental fallback.'' The intent of this NWP is to authorize a certain activity that does not qualify for the maintenance exemption and is not for the purpose of increasing drainage capacity. We believe that this NWP should not be made more inclusive. The intent of this NWP is to authorize those ditch reshaping activities that involve more than ''incidental fallback.''

The proposed NWP may not be used to relocate drainage ditches or to modify drainage ditches to increase the area drained by the ditch (e.g., by widening or deepening the ditch beyond its original design dimensions or configuration) or to construct new drainage ditches if the previous drainage ditches have been neglected long enough to require reconstruction. This NWP does not authorize the channelization or relocation of streams to improve capacity of the streams to convey water. An individual permit, another NWP, or a regional general permit may authorize the construction of new drainage ditches or the reconstruction of drainage ditches. The proposed NWP does not authorize the maintenance or reshaping of drainage ditches constructed in navigable waters of the United States (non-tidal wetlands that are adjacent to tidal waters are also excluded). A Section 10 permit is required for the maintenance or modification of drainage ditches constructed in navigable waters of the United States. We believe that modifying this permit to authorize work in Section 10 waters could result in the authorization of activities that have more than minimal adverse effects on the aquatic environment.

One commenter recommended that NWP 27 should be expanded to include this activity while another suggested that it should be authorized under NWP 3. We do not agree that this activity is similar enough to the activities authorized by NWP 27 to warrant its inclusion in NWP 27. The purpose of NWP 27 is to restore, enhance, and create wetland and riparian areas and restore and enhance non-tidal streams and open waters. The purpose of proposed NWP 41 is to improve water quality. NWP 3 does not currently authorize reshaping of drainage ditches constructed in waters of the United States because this activity is not maintenance or repair. NWP 3 authorizes only maintenance activities with minor deviations from the previously authorized configuration; reshaping drainage ditches typically involves more than minor deviations in ditch cross sectional shape.

Many commenters believe that this NWP will result in the destruction of riparian habitat, specifically adjacent plant communities, and degrade water quality through the sidecasting of excavated material into wetlands. One commenter stated that the permit would prevent the natural process that increases wetland acreage through natural deposition of detritus and sediment in natural cycles that create wetlands. Other commenters believe that this NWP would cause the degradation of salmon and other fisheries habitat through the removal of woody debris and that this permit would authorize activities that reduce the geomorphic ''complexity'' of a stream causing it to become more uniform and adversely affect some fisheries. One commenter said that activities authorized by this NWP will have a detrimental effect on water quality due to a decrease in the velocity of the stream and it is possible that the stability of the stream could be compromised due to an unbalanced width/depth ratio. Several commenters stated that the permit would result in more rapidly draining farm files in the Midwest, which would increase scouring of banks and waterways and degrade water quality. One commenter said that the permit should be modified to state that channel reshaping cannot change the discharge rate or volume of the ditch.

To address concerns for vegetation adjacent to drainage ditches that may be removed as a result of the authorized activity, we have added a second notification requirement to the proposed NWP. The prospective permittee must notify the District Engineer if more than 500 linear feet of drainage ditch is to be reshaped. District engineers can review the proposed work and determine if the clearing of adjacent vegetation will result in more than minimal adverse effects on the aquatic environment. We do not agree that the activities authorized by this NWP will disrupt the natural creation of wetlands or result in substantial degradation of aquatic habitat in streams. It is important to note that drainage ditch maintenance is exempt under Section 404(f). If a stream was channelized to improve drainage, the maintenance of the drainage ditch constructed in the stream is an exempt activity. The purpose of this NWP is to encourage landowners to maintain the drainage ditches constructed in waters of the United States in a manner that benefits the aquatic environment in most cases. Reshaping the drainage ditch with flatter side slopes will improve water quality and decrease the velocity of water flowing through the ditch. This NWP does not authorize modifications to the configuration of the drainage ditch to increase the area drained by the ditch. We believe that the proposed NWP adequately states this requirement. For those activities that require notification, district engineers can impose special conditions on the NWP authorization to ensure that the work results in minimal adverse effects or exercise discretionary authority and require an individual permit.

Some commenters noted that over time, through natural processes, the side slopes of ditches often become flatter than they wee originally. In those cases, they say, it would not make sense to require a permit to maintain existing slopes, even if they are not the original slopes. This NWP does not require the landowner to maintain existing slopes, if they have eroded naturally.

Many commenters stated that this NWP contains vague language and that many terms require clear definition in the context of this permit, especially ''maintenance,'' ''modification,'' ''reconstruction,'' ''regular maintenance,'' ''abandonment,'' and ''loss of serviceability.'' One commenter stated the phrase ''reshaping to benefit the aquatic environment'' means significantly different things in different parts of the country.

We do not agree that definitions of the terms ''maintenance,'' ''modification,'' ''reconstruction,'' and ''regular maintenance,'' need to be provided with the proposed NWP. For the purposes of this NWP, the definitions of these terms are the same as the definitions in common usage today. District engineers will determine which ditch reshaping activities constitute maintenance and which activities constitute reconstruction. District engineers will determine when a particular drainage ditch is considered abandoned. Loss of

serviceability is considered to be the point at which a ditch no longer functions as a drainage ditch, and reconstruction is needed.

Several commenters asked how the original ditch conditions would be determined and how the Corps would distinguish between ''reconstruction'' and ''maintenance to original dimensions.'' Some asked on what basis it would be determined that the proposed project would improve water quality and how the area of wetland drained by the original ditch would be determined. Also, some commenters questioned how one would determine that the proposed channel shape would not change discharge rate or volume. These commenters also asked who would be responsible for making these determinations.

District engineers will determine which activities constitute maintenance, reshaping, or reconstruction. They will use any available information to make these determinations, including field evidence. In general, changing the configuration of the drainage ditch to slow water flow and increase vegetation in the ditch will help improve water quality because the plants and microbes in the ditch will have more contact with the water and remove more nutrients and other compounds from the water. Slower water flow rates will also decrease the sediment load of the water. The area drained by the ditch can be determined by using available models, which consider factors such as soil type, ditch depth, ditch width, etc. The permittee may be required by the District Engineer to demonstrate that the proposed ditch reshaping activity will not increase the area drained by the ditch.

Another subject that generated many comments is the definition of a drainage ditch. One commenter stated that while some drainage ditches were clearly excavated, either though uplands or wetlands, for the purpose of creating a drainage channel where one did not exist previously, in many other cases, natural streams or drainageways were excavated to increase drainage capacity. In many instances, this took place decades ago and the waterway has been considered a ''ditch'' by adjacent landowners since that time. Some commenters believe that channelized streams should not be considered ditches and that this NWP should apply only to ditches constructed in uplands and wetlands. Others, however, noted that in some parts of the country, most functioning ditches were once natural waterways.

Understanding the differences in definitions of a ditch across the county, we have included a definition of the term ''drainage ditch'' in the ''Definitions'' section of the NWPs. This definition recognizes that drainage ditches may be constructed in uplands or waters of the United States, including wetlands and streams. A stream which has been channelized to improve surface drainage is considered a drainage ditch, for the purposes of the NWP program. District engineers will use judgement to determine whether a stream is a drainage ditch and eligible for the Section 404(f) exemption.

Some commenters stated that, to meet minimal adverse effect criteria, this NWP should have acreage and/or stream length limits. The recommended acreage limits ranged from 1/10 to 1 acre. Stream length limits ranged from zero to one mile. There were recommendations for compensatory mitigation requirements, such as requiring compensatory mitigation for impacts greater than 1 acre. Some commenters suggested PCN thresholds. Some commenters cautioned that when a PCN is not required, conditions are often ignored and that a PCN should always be required for work in drainage ditches. Other commenters stated that the NWP should not authorize discharges of excavated material into waters of the United States. One commenter believes the NWP should be conditioned to allow its use only once per watershed and should not be used in any area identified as having water quality problems or in any outstanding resource waters. At least one commenter stated that public review should be required for all work on public storm drain systems because they directly affect the public and are paid for with public funds.

We have determined that no acreage limit is necessary for the proposed NWP, because the authorized work is intended to benefit the aquatic environment, by changing the shape of the drainage ditch to improve water quality and other aspects of the aquatic environment. Notification will be required when excavated material is sidecast into waters of the United States or greater than 500 linear feet of drainage ditch is reshaped. The latter PCN requirement was added to address concerns for adverse effects to riparian areas adjacent to ditches constructed in waters of the United States. District engineers will review the PCNs to determine if the proposed work will result in minimal adverse effects on the aquatic environment. Prohibiting the sidecasting of excavated material into waters of the United States would discourage ditch reshaping activities because the Section 404(f) exemption for ditch maintenance allows sidecasting. Such a prohibition would cause many landowners to maintain the ditch at its originally designed configuration to qualify for the exemption. Since the purpose of the proposed NWP is to encourage ditch maintenance activities that improve the aquatic environment, it would be counterproductive to limit its use to only once per watershed or require public review.

Some commenters recommended that compensatory mitigation be required for all activities authorized by this NWP. Other commenters asked for clarification that compensatory mitigation is not required. One commenter believes that the applicants should be required to provide documentation regarding the scope and effect of the existing drainage ditch before and after the reshaping activity. Another commenter stated that the applicant should be required to obtain a minimal effect determination and certification from NRCS stating that best management practices have been employed. One commenter suggested that the Corps should require the submittal and review of an erosion and sediment control plan prior to authorizing use of this NWP because these conditions are generally ignored when placed on the permit itself. Another commenter suggested that a minimum riparian buffer should be established or maintained as part of the authorization. Several commenters believe that revegetation of ditch banks with tree or shrub species should be required after construction to minimize loss of riparian habitat and reduce the potential for increasing water temperatures within the ditch. Another commenter recommended: (1) Conditioning the NWP to prohibit alteration or replacement of one type of stream substrate with another type; (2) the NWP should not authorize more than minimal adverse effects to riparian corridors during construction activities; (3) the NWP should require the replacement of riparian corridors when they are destroyed during construction; and (4) the NWP should not authorize the sidecasting of material in such a manner that the material would block or impede overland surface flows into any jurisdiction water of the United States, including wetlands.

We have determined that compensatory mitigation will normally not be required for the work authorized by this NWP because the purpose of the proposed NWP is to authorize ditch reshaping activities that improve water quality and aquatic habitat. If the project proponent did the work to qualify for the Section 404(f) exemption,

compensatory mitigation would not be required since the activity is exempt. Requiring compensatory mitigation for modifying the cross-sectional configuration of the ditch may encourage maintenance to the original dimensions and configuration and discourage reshaping the ditch to benefit the aquatic environment. We do not agree that permittees should be required to provide a statement discussing the effects of ditch reshaping or that they should be required to obtain a certification from NRCS. Compliance with any required sediment and erosion control plan is the responsibility of the permittee. Permittees are encouraged to maintain a vegetated buffer along one side of the ditch, but regular maintenance activities will prevent the development of a woody vegetated buffer along the side of the ditch used by equipment to perform the excavation.

Several commenters presented a variety of potential problems and concerns about this NWP. Some commenters believe that this permit will be very difficult to implement and will require substantial coordination with the Corps that previously was not required and will delay implementation of projects. Many commenters requested assurance that it would be used strictly and successfully for water quality improvement. They believe the existing drainage ditch exemption is often abused, resulting in the reditching of long-abandoned ditches, the excavation of natural streams, and the expansion of ditches beyond their original dimensions. They envision abuse of this NWP by applicants stating a water quality improvement purpose, but really intending to remove woody vegetation from the stream bank or increase channel capacity to drain a new area. This group of commenters was concerned that adverse effects on the aquatic environment resulting from activities authorized by this NWP would be more than minimal and could result in loss of important riparian habitat bordering naturalized drainage ditches. They were also concerned about filling and permanent loss of wetlands as a result of sidecasting. Several of these commenters pointed out that many of the conditions of this NWP are very difficult to measure, such as determining if the drainage area has been increased and determining the changes in ditch configuration without altering capacity. They caution that some channel reshaping projects might not be beneficial or would involve a complex trade-off between various environmental values including habitat, flood control, and water quality. One commenter said the permit should have language which encourages retaining the structure and functions of the wetland and stream habitats.

In response to the comments in the previous paragraph, we must reiterate that the proposed NWP is intended to encourage ditch maintenance activities that benefit the aquatic environment. This NWP authorizes activities that are exempt from Section 404 permit requirements if those activities were done strictly as maintenance to the original ditch design configuration. Although the ditch may be a channelized stream, excavation activities to maintain the drainage ditch do not require a Section 404 permit. We believe that a drainage ditch can be reconfigured to provide water quality benefits without increasing the area drained by the ditch. The removal of riparian vegetation from uplands adjacent to a channelized stream is not regulated by the Corps under Section 404. Sidecasting of excavated material into waters of the United States is exempt from Section 404 permit requirements if the activity is associated with ditch maintenance. We believe that conditioning this NWP to prohibit the sidecasting of excavated material into waters of the United States would severely limit the use of this NWP and encourage exempt maintenance activities. Likewise, conditioning this NWP to require the permittee to maintain the wetlands and stream habitat in the project area would encourage exempt maintenance activities that have more adverse effects on the aquatic environment.

This NWP is subject to proposed General Condition 26, which will reduce its applicability. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 41 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all activities authorized by this NWP in impaired waters and wetlands adjacent to those impaired waters.

Division engineers can regionally condition this NWP to exclude certain waterbodies or require notification when waters or unique areas that provide significant social or ecological functions and values may be adversely affected by the work. Activities authorized by this NWP will have minimal adverse effects on the aquatic environment, since it is limited to existing drainage ditches and activities that improve water quality. District engineers can exercise discretionary authority when very sensitive or unique areas, such as salmonid habitat mentioned by several commenters, may be adversely affected by these activities. The PCN requirement allows Corps districts, on a case-by-case basis, to add appropriate special conditions to ensure that the adverse effects are minimal. The District Engineer can also assert discretionary authority to require an individual permit for any activity that may have more than minimal adverse effects. Proposed NWP F is designated as NWP 41, with the proposed modifications discussed above.

42. Recreational Facilities

In the July 1, 1998, **Federal Register** notice, we proposed an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, for the construction or expansion of passive recreational facilities.

Several commenters were concerned about the title of this NWP. Some commenters expressed confusion at the definition of passive recreational facilities. Other commenters were interested in exactly what activities were authorized. One commenter suggested that the Corps clarify what is meant by the term ''open space'' and when a recreational facility is considered to have a substantial amount of buildings and other impervious surfaces. Several commenters suggested defining the wording ''substantially'' when considering the amount of grading necessary for a particular activity.

To help reduce confusion, we have eliminated the word ''passive'' from this NWP and changed the title of the proposed NWP to ''Recreational Facilities.'' The definition of the term ''recreational facilities,'' as used for this NWP, and the types of activities authorized by this NWP have not been modified. For the purposes of this NWP, recreational facilities are defined as low-impact recreational facilities that are constructed so that they do not substantially change preconstruction grades or deviate from natural landscape contours. Low-impact recreational facilities include, but are not limited to, bike paths, hiking trails, campgrounds, and running paths. The construction of golf courses or the expansion of golf courses and ski areas, can be authorized by this NWP, provided these facilities are integrated into the existing landscape, do not require substantial

amounts of grading or filling, and adverse effects to wetlands and riparian areas are minimized to the extent practicable.

The term ''open space'' refers to areas not disturbed by the construction or expansion of the recreational facility, such as forests, fields, riparian areas, etc. Open spaces do not contain any buildings. District engineers will determine when a proposed activity involves a substantial amount of buildings, concrete, asphalt, or other impervious surfaces. The land area for the recreational facility authorized by the proposed NWP should consist only of a small proportion of impervious surface. District engineers will also determine when the amount of grading is substantial.

One commenter stated that facilities for walking, biking, and running require substantial filling and grading if they are located in hydric soils. One commenter suggested that gravel paths are pervious and should qualify for authorization under this NWP. A couple of commenters suggested that roads are not pervious features and should be excluded from authorization by this permit. Several commenters recommended expanding this permit to include other activities that are beneficial to the community, such as playgrounds, pools, and ball fields, suggesting that these activities are no more harmful to the environment than ski areas or golf courses. Many commenters objected to the inclusion of golf courses, campgrounds, and ski areas in this NWP, stating that these activities are not consistent with the concept of passive recreational facilities and do not have low impacts on aquatic resources.

Walking, running, and biking trails do not necessarily require substantial grading or filling of hydric soils. These trails can be constructed by placing a layer of gravel or crushed stone on the trail or placing a thin layer of asphalt on the soil surface. In some situations, a footer may be excavated to construct a base for the gravel or asphalt trail. District engineers will determine when the construction of a trail involves substantial grading or filling. Timber decks and walkways should be used where possible to minimize losses of waters of the United States. Gravel paths and roads are considered pervious. The proposed NWP can authorize the construction of roads to provide access to the recreational facility, including support buildings. However, the roads must be constructed at grade with pervious materials. Other types of roads to provide access to the recreational facility can be authorized by other NWPs, such as NWP 14, as long as the permittee complies with General Condition 15. The construction of substantial amounts of roads within the recreational facility is not authorized, since this NWP does not authorize recreational facilities for use by motor vehicles.

Pools, playing fields, and arenas are not authorized by this NWP. These activities typically involve substantial grading and filling and the use of impervious materials for construction. Recreational facilities can be either public or private and will not have a substantial amount of buildings and other impervious surfaces, such as concrete or asphalt. The proposed NWP also authorizes the construction or expansion of small support facilities such as office buildings, maintenance buildings, storage sheds, and stables, but does not authorize the construction of associated hotels or restaurants. The construction or expansion of campgrounds can be authorized by this NWP, provided they are integrated into the existing landscape. These campgrounds should have few impervious surfaces (e.g., concrete or asphalt) and should consist of small cleared areas for tents and picnic tables connected by dirt or gravel trails or roads.

The proposed NWP does not authorize the construction or expansion of campgrounds for mobile homes, trailers, or recreational vehicles. This NWP does not authorize the construction of playing fields, basketball or tennis courts, racetracks, stadiums, or arenas. Recreational facilities not authorized by this NWP may be authorized by another NWP, a regional general permit, or an individual permit. Playing fields, playgrounds, and other golf courses may be authorized by NWP 39 if they are attendant features of residential, commercial, or institutional developments. For example, NWP 39 can authorize the construction of a golf course, provided the golf course is an attendant feature of a residential subdivision. The construction of hotels and conference centers that are sometimes associated with recreational facilities are not authorized by this NWP, but may be authorized by NWP 39, a regional general permit, or an individual permit.

Many commenters objected to the inclusion of support facilities or buildings in this permit. Several commenters wanted clarification on how much and what type of support buildings are authorized.

This NWP authorizes only small support facilities that are essential to the operation of the recreational facility. District engineers will determine what constitutes a ''small'' support facility. Support facilities typically include maintenance buildings, storage buildings, and stables, but may also include buildings that store equipment (e.g., bicycles and canoes) that can be rented by users of the recreational facilities, and small offices. We anticipate that these structures will be small and typically have minimal adverse effects on the aquatic environment. Therefore, it is appropriate to include these structures in the NWP. We have modified the text of this NWP to specify that the NWP only authorizes small support facilities. The fact that these buildings must be directly related to the recreational activity, along with the acreage limit and PCN thresholds, will ensure that such support facilities are carefully considered and will have only minimal adverse effects on the aquatic environment.

A couple of commenters objected to the inclusion of golf courses and ski areas in this NWP because these facilities also require intensive maintenance activities, including the application of fertilizers and pesticides, as well as utility and road maintenance. Additionally, some ski areas may hydrologically alter certain areas as artificial snow is created, affecting water flow and adversely impacting trout streams. One commenter suggested that this permit should only allow limited size play throughs, and filling of only small isolated wetlands. This commenter and others further stated that this permit should focus on preserving natural systems and landscape features, and incorporating them into the design for the course. Several commenters objected to the authorization of these types of activities due to their impacts on the environment, suggesting that such activities do not have to be located in wetlands.

The proposed NWP authorizes the construction and expansion of golf courses and the expansion of ski areas, provided they are integrated into the existing landscape. The construction of new ski areas is not authorized by this NWP. These facilities may also require some support buildings with some minor grading and filling for building pads and foundations. Golf courses may require the placement of crushed stone or gravel for cart paths or some minor fill for greens and associated construction activities. We believe it is appropriate to include these activities in this NWP.

Golf courses and expanded ski areas authorized by this NWP should be

subject to careful environmental design and planning. For example, features to control surface runoff, buffers established and maintained adjacent to open waters, integrated pest management, and careful fertilizer and pesticide application, are examples of maintenance and operation activities which reduce the impacts of these facilities on the aquatic environment. These types of features and practices may be part of the water quality management plan required by the proposed modification of General Condition 9. A well-designed golf course authorized by this NWP will have avoided most of the wetlands on the site, incorporated stormwater management facilities into the course to protect local water quality, and established and maintained vegetated buffers adjacent to open or flowing waters.

One commenter asked why a project proponent would request authorization under this NWP when a larger golf course could be authorized by NWP 39. Another commenter questioned the statement in the proposed NWP suggesting that commercial recreational facilities may be authorized by NWP 39. Several commenters stated that the Corps will subject golf courses to more restrictions and that those restrictions should be stated in the NWP.

Proposed NWP 39 authorizes the construction of building pads, foundations, and attendant features for residential, commercial, and institutional developments. NWP 39 does not authorize the construction of golf courses on its own, unless those golf courses are attendant features of developments. However, NWP 39 can be used to authorize support buildings for a golf course, such as equipment storage buildings and clubhouses. Other recreational facilities can be authorized by NWP 39, such as playgrounds or playing fields associated with schools, provided those recreational facilities are attendant features of the school buildings. We have adequately discussed the restrictions on golf courses in the text of NWP 42. Division engineers can regionally condition this NWP to impose additional restrictions on this NWP and ensure that it authorizes only activities with minimal adverse effects on the aquatic environment. District engineers can exercise discretionary authority if the proposed work may result in more than minimal adverse effects or place case-specific special conditions on an NWP authorization to ensure that the authorized work results in minimal adverse effects on the aquatic environment.

Several commenters supported the proposed 1 acre limit for this NWP. One commenter suggested that the NWP should authorize the loss of no more than ¼ acre of waters of the United States or 20 linear feet of stream. Another commenter suggested that the NWP should have an acreage limit of 1 acre or 20 percent of the total wetland area on the site, with a prohibition against filling fens, seeps, springs, sand ponds, or bogs. One commenter suggested that this permit should not authorize activities within 200 feet of streams or rivers that contain habitat for salmon. One commenter requested that this permit authorize only up to ⅓ of an acre of impacts for linear impact recreational facilities such as hiking, and biking trails. One commenter recommended that stream bed impacts should not be authorized by this permit since a passive recreational facility ''does not substantially change preconstruction grades or deviate from natural landscape contours.''

We believe that a 1 acre limit for recreational facilities is appropriate. This limit, with the notification requirements, will ensure that only activities with minimal adverse effects on the aquatic environment are authorized by this NWP. With regard to limiting the use of the proposed NWP in certain aquatic habitat types, we believe that these issues are more appropriately addressed at the regional level where division engineers can impose regional conditions to restrict the use of this NWP in high value waters, or prohibit its use in certain waterbodies. To make this NWP consistent with most of the other proposed NWPs, we are proposing to change the applicable waters for this NWP to ''non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.'' We disagree that the NWP should not include impacts to stream beds. The recreational facility may require crossings over streams or bank stabilization activities.

One commenter suggested significantly reducing the proposed PCN thresholds of ⅓ acre and 500 linear feet of stream bed. A couple of commenters suggested that a PCN should be required for all activities authorized by this NWP, because passive recreational facilities are usually built in areas that are recognized as environmentally sensitive. One commenter requested that Federal agencies should be provided the authority to reject an activity for consideration under this permit.

To make the PCN thresholds of the proposed NWP consistent with the PCN thresholds of the other new NWPs, we have reduced the PCN threshold to ¼ acre. The PCN requirement for activities causing the loss of greater than 500 linear feet of perennial and intermittent stream bed will be retained. These PCN requirements will help ensure that the activities authorized by this NWP result in minimal adverse effects on the aquatic environment. Since this NWP has a 1 acre limit, there will be no agency coordination for PCNs. In addition, we do not believe that agency coordination is necessary, since this NWP authorizes only those recreational facilities that are integrated into the natural landscape and consist primarily of open space.

A commenter suggested that trails resulting in the loss of less than one acre of non-tidal waters of the United States should be exempt from the requirements of General Condition 9, especially the requirement for a water quality management plan.

The District Engineer will determine if the proposed recreational facility requires a water quality management plan to comply with General Condition 9. Small trails may not require such a plan. However, where there are water quality concerns due to the construction and use of the facility, vegetated buffers may be required. Stormwater management facilities may also be required.

One commenter said that features such as roads, buildings, and golf courses result in significant indirect and cumulative impacts in watersheds by inducing growth in surrounding areas and increasing runoff and hydrologic modifications. This commenter further suggested that regionally significant resources should be excluded from this NWP or impacts to such resources limited. Many commenters focused on the requirement that this permit should preserve natural systems and that the authorized facilities must be integrated into the natural landscape. One commenter stated that this permit is not consistent with sound watershed management. One commenter stated that the NWP encourages the removal of trees and other vegetation adjacent to waters of the United States, which would increase stream bank erosion, and that the Corps should establish explicit general conditions which prohibit activities that result in removal of stream bank vegetation within riparian areas.

The potential for activities authorized by this NWP to induce growth in surrounding areas is outside of the Corps scope of analysis, unless the induced growth involves activities regulated by the Corps. These low-impact recreational facilities may also be constructed in areas already subject

to increasing populations. The recreational facilities authorized by the proposed NWP are low-impact, and will not cause significant hydrological modifications because the facilities authorized by this NWP consist mostly of open space, with a small proportion of impervious surface. The requirements of General Conditions 9 and 21 will also ensure that the authorized activities do not cause substantial hydrological modifications. The recreational facilities authorized by this NWP will help preserve open space if they are constructed in the vicinity of urbanizing areas. The construction of low-impact recreational facilities is consistent with sound watershed management practices. The NWP does not encourage the removal of riparian vegetation. This NWP, like the other new NWPs, require the establishment and maintenance of vegetated buffers adjacent to waters of the United States to the maximum extent practicable (see General Condition 9).

Many commenters requested that mitigation should be required for activities authorized by this NWP. One commenter opposed the use of in lieu fee or mitigation banking programs to serve as mitigation for losses of waters of the United States authorized by this permit. Another commenter recommended that mitigation should be required for losses of less than ⅓ acre, either through mitigation banks or in lieu fee programs. One commenter stated that preservation of adjacent green space is not acceptable as mitigation. This commenter further stated that the NWP indicates that buffer zones may be required, but there is not an explicit requirement for vegetated buffers and the benefit of such buffers is questionable. One commenter said that the remaining wetlands on the site should be protected from further development through deed restrictions. Another commenter requested that the Corps require monitoring and evaluation standards for mitigation plans.

District engineers may require compensatory mitigation for activities authorized by this NWP to ensure that the net adverse effects to the aquatic environment are minimal. Mitigation banks and in lieu fee programs can be appropriate methods to provide compensatory mitigation for activities authorized by this NWP. The preservation of wetlands or vegetated buffers on the site can satisfy compensatory mitigation requirements, especially if there are high value waters on the project site that should be protected. The establishment and maintenance of vegetated buffers adjacent to waters of the United States can be an important part of the compensatory mitigation required by district engineers. We cannot require the permittee to preserve the remaining waters on the site, unless the preservation satisfies a compensatory mitigation requirement. Otherwise, such a preservation requirement could be considered a taking of private property. Through special conditions, district engineers can require compensatory mitigation, including monitoring plans and evaluation standards.

Several commenters were concerned with the use of this NWP with other NWPs to authorize activities with larger impacts to the aquatic environment.

We are proposing to modify General Condition 15 to address the use of more than one NWP to authorize a single and complete project. In accordance with the proposed modification of General Condition 15, this NWP can be used with other NWPs to authorize a single and complete project, as long as the activity does not cause the loss of waters of the United States in excess of the highest specified acreage limit of the NWPs used to authorize that project. Although this NWP is intended to authorize all activities associated with a single and complete recreational facility, there may be some related activities, such as bank stabilization in tidal waters, that cannot be authorized by NWP 42 but can be authorized by other NWPs.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. In accordance with General Condition 26, recreational activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, cannot be authorized by NWP 42 unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. General Condition 27 prohibits the use of NWP 42 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. Proposed NWP D is designated as NWP 42, with the proposed modifications discussed above.

43. Stormwater Management Facilities

This NWP was proposed in the July 1, 1998, **Federal Register** as NWP C to authorize the discharges of dredged or fill material into non-Section 10 waters of the United States, including wetlands, for the construction and maintenance of stormwater management (SWM) facilities.

A large number of comments were received in response to the proposed NWP, many commenters supporting the NWP and other commenters opposing the issuance of this NWP. Those commenters supporting the NWP stated that it would greatly enhance low-value wetland areas and attenuate the effects of flood waters. Some commenters requested the withdrawal of this NWP. Commenters opposing the issuance of this NWP stated that its use will result in more than minimal adverse effects on the aquatic environment. A number of commenters stated that the NWP would be difficult for the Corps to implement. One commenter said that there is no need for this NWP, because SWM facilities can be authorized by NWP 39 as a part of the residential, commercial, and institutional development. Several commenters were concerned about the possible use of this NWP with other NWPs, if SWM facilities are required as part of the development. One commenter stated that the NWP will reduce incentives to locate SWM facilities in uplands. Many of those opposing this NWP believe that the permit only benefits developers who want to develop the entire upland parcel and locate the SWM facility in wetlands and that mitigation sequencing (*i.e.,* avoidance, minimization, and compensatory mitigation) would not take place.

The proposed NWP and the NWP general conditions contain provisions to help ensure that the NWP does not authorize activities in waters of the United States with more than minimal adverse effects on the aquatic environment, individually or cumulatively. The notification requirements will allow district engineers to review certain stormwater management activities on a case-by-case basis and exercise discretionary authority in those cases where the adverse effects on the aquatic environment are more than minimal. Division and district engineers can add regional or case-specific conditions to this NWP to ensure that the NWP authorizes only activities with minimal

adverse effects on the aquatic environment. An important provision of the proposed NWP is that it does not authorize the construction of new SWM facilities in perennial streams, which will protect habitat for fish and other aquatic organisms.

Although an SWM facility can be authorized by NWP 39 as an attendant feature of a single and complete development project, there are circumstances that warrant a separate NWP for SWM facilities. For example, some SWM facilities may be constructed by a local government as part of a watershed plan, not for a particular development. SWM facilities may also be required for transportation projects or upland development activities. This NWP will not reduce incentives to locate SWM facilities in uplands, because the permittee is still required to comply with General Condition 19 and provide with the notification, a written statement to the District Engineer explaining why the SWM facility must be constructed in waters of the United States and why additional minimization cannot be achieved (see paragraph (d) of the proposed NWP). General condition 19 requires that the permittee avoid and minimize work in waters of the United States on-site to the maximum extent practicable.

A number of commenters stated that SWM facilities should not be constructed in waters of the United States. One commenter said that SWM facilities should not be constructed in waters of the United States adjacent to perennial streams. Many commenters indicated that stormwater should be treated in uplands before it is discharged into waters of the United States. One commenter stated that SWM facilities can only increase wetland functions and values when they are constructed in non-wetland areas. A commenter recommended modifying the NWP to allow the use of wetland systems for passive treatment of stormwater runoff. Many state agencies said that they do not allow the treatment of stormwater in wetlands. One commenter stated that the use of the NWP in waters of the United States should be limited only to receiving stormwater runoff, which will not permanently change the waters of the United States, and proposed a ⅓-acre limit for structures, such as outfalls. Another commenter stated that the NWP should not authorize SWM facilities in waters of the United States, unless the project results in enlargement and enhancement of existing wetlands. One commenter stated that an NWP authorizing SWM facilities in wetlands is contrary to EPA's 1990 guidance on wetlands and non-point source pollution control programs and requested clarification regarding what constitutes ''in certain circumstances,'' as cited in the preamble discussion concerning the placement of SWM facilities in waters of the United States in the July 1, 1998, **Federal Register** notice. This commenter also objected to the proposed NWP because it authorizes SWM facilities in streams and said that these activities will result in the destruction of stream morphology and destabilize the stream bed, reducing water and habitat quality. One commenter stated that stormwater management ponds constructed in wetlands actually encourage a slower decomposition of toxins, and locating an SWM facility in wetlands creates greater potential for toxic pollution if the pond containment structure or fill fails or the pond is overfilled. A commenter recommended prohibiting the construction of stormwater detention facilities in waters of the United States within 150 feet of the ordinary high water mark.

The construction of SWM facilities in waters of the United States is often necessary, and may provide more protection to the aquatic environment. SWM facilities located in waters of the United States are often more effective than SWM facilities constructed in uplands, because storm runoff flows to streams and wetlands, making these areas better able to trap sediments and pollutants than upland areas. The local aquatic environment benefits from more efficient SWM facilities. Low value wetlands and low value ephemeral and intermittent streams may be the best places to locate SWM facilities, to reduce adverse effects to higher value waters by attenuating storm flows and preventing pollutants from further degrading those areas. The proposed NWP authorizes the construction of SWM facilities in waters of the United States, particularly low value waters, provided that adverse effects on the aquatic environment are minimal. Division engineers can regionally condition this NWP to prohibit its use in high value waters. For those activities that require notification, discretionary authority will be exercised by district engineers on a case-by-case basis where the adverse effects on the aquatic environment are more than minimal. We do not agree that the NWP should be limited only to those projects that enlarge or enhance existing wetlands. In addition, we do not agree that the construction of stormwater management facilities should be prohibited in waters of the United States within 150 feet of the ordinary high water mark because this requirement would prevent district engineers from using this NWP to authorize many effective SWM facilities with minimal adverse effects on the aquatic environment.

Through the notification process, district engineers will determine which SWM facilities can be authorized by this NWP. Locating SWM facilities in ephemeral and intermittent streams will help reduce degradation of perennial stream morphology by reducing the velocity of surface water flows during storm events. Adequately designed stormwater detention and retention ponds, particularly those ponds constructed in locations where they most effectively capture runoff (*i.e.*, in ephemeral and intermittent stream beds), will help prevent stormwater flows from entering perennial streams with velocities high enough to erode the stream banks and downcut the stream bed. These ponds will also trap sediments, which will help maintain the substrate of the stream bed and reduce water quality degradation. Permittees are required to maintain authorized SWM facilities to prevent the entry of pollutants in the waterway if the pond fills with sediment or the pond containment structure deteriorates. Paragraph (c)(1) of the proposed NWP requires prospective permittees to submit a maintenance plan, if required, with the PCN. The maintenance plan will ensure that the SWM facility will retain its effectiveness at trapping sediments and pollutants and attenuating flood waters.

Many commenters expressed concern for adverse effects to wetlands that may result from changing from one wetland type to another or from adverse effects caused by secondary impacts due to flooding, excavation, or drainage. One commenter stated that this NWP allows the replacement of a natural SWM facility with a concrete facility, thereby increasing the possibility of downstream flooding. A commenter advocated the preservation of natural landscapes for flood control purposes by promoting the use of non-structural alternatives for SWM. Some commenters said that this NWP should not authorize stream relocation or the construction of ponds in wetlands and that the Corps should not encourage other changes to natural drainage systems or diversions of watercourses.

The proposed NWP authorizes the construction of SWM facilities, which may result in wetland conversion and the flooding, excavation, or draining of wetlands. Some relocation of intermittent or ephemeral streams may be necessary to construct the SWM

facility. For those activities that require notification, district engineers will review the proposed work to determine if the proposed work will result in more than minimal adverse effects on the aquatic environment. Division engineers can regionally condition this NWP lower the notification thresholds or restrict the use of the NWP to ensure that it authorizes only those SWM activities with minimal adverse effects on the aquatic environment. Although we encourage the use of non-structural methods for SWM, structural practices are often the only practicable methods, and should be authorized by NWP if they result only in minimal adverse effects on the aquatic environment.

Many of the commenters supporting the proposed NWP requested that the Corps expand the scope of the NWP to include perennial streams and Section 10 waters, including tidal waters. One commenter requested that the NWP authorize sediment basins in perennial streams if sedimentation is a problem in the area. One commenter stated that outfall structures may need to be constructed in Section 10 waters, especially rivers. Another commenter requested that the Corps clarify whether the NWP authorizes discharges into wetlands adjacent to perennial streams. One commenter stated that design criteria should be included in the NWP.

In the July 1, 1998, **Federal Register** notice, we proposed to limit this NWP to non-Section 10 waters, including wetlands. To simplify the scope of applicable waters for the proposed NWPs, we are proposing to limit this NWP to activities in non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters. However, this NWP is still limited to Section 404 waters and does not authorize SWM activities in non-tidal Section 10 waters. The construction of new SWM facilities in perennial streams is not authorized by this NWP. We believe that expanding the scope of applicable waters for this NWP to tidal waters and perennial streams would be contrary to the minimal adverse effects requirement of the NWPs, because such an expansion of scope would substantially increase the potential for more than minimal adverse effects on the aquatic environment, individually or cumulatively. Project proponents who need to construct SWM facilities in perennial streams, tidal waters, or Section 10 waters can request authorization through the individual permit process or utilize regional general permits, if available. This NWP authorizes discharges into wetlands adjacent to perennial streams, but does not authorize discharges into the perennial stream bed. Outfall structures associated with an SWM facility that must be constructed in Section 10 waters may be authorized by NWP 7, provided the single and complete project complies with General Condition 15. We do not agree that design criteria should be included in the NWP. Specific design criteria vary across the country and are more appropriately evaluated by district engineers on a case-by-case basis. Regional conditions can prohibit certain stormwater management activities from authorization by this NWP.

Several commenters addressed jurisdictional issues related to this NWP. One commenter said that no permit is required for these activities. Several commenters stated that all references to excavation and other activities that do not result in a discharge of material into waters of the United States in accordance with the Tulloch Rule decision should be deleted from the NWP. A few commenters emphasized the need to clearly identify the Corps jurisdiction as it relates to stormwater retention and detention facilities. Other commenters questioned the need for a permit to maintain SWM facilities which were constructed entirely in uplands.

The construction and maintenance of SWM facilities require a Section 404 permit if the activity results in a discharge of dredged or fill material into waters of the United States. SWM facilities require a Section 10 permit if they involve any work in navigable waters of the United States. Excavation activities in waters of the United States require a Section 404 permit, if those excavation activities result in more than incidental fallback of excavated material. District engineers will determine, on a case-by-case basis, if a specific SWM facility contains waters of the United States. If the SWM facility was constructed entirely in uplands, and does not expand the reach of waters of the United States, then that SWM facility is not a water of the United States (see 33 CFR Part 328.5). Maintenance of SWM facilities constructed entirely in uplands does not require a Section 404 permit, provided the construction of that SWM facility did not expand the reach of waters of the United States.

Proposed NWP C had a 2 acre limit for the construction of new SWM facilities, but no acreage limit for maintenance activities. In response to the July 1, 1998, **Federal Register** notice, commenters recommended acreage limits for the construction of new SWM facilities, which ranged from 1 to 5 acres. Several commenters supported no acreage limit for the maintenance of existing SWM facilities. Commenters recommended acreage limits of ⅓ acre and 1 acre for maintenance activities. One commenter stated that the proposed 2 acre limit for construction was too high. One commenter asked the Corps to clarify whether the 2 acre limit applies to each individual facility, or whether it applies to the watershed. A number of commenters recommended limits for impacts to stream beds, ranging from no impacts to stream beds to a 500 linear foot limit. One commenter supported the PCN threshold for stream bed impacts, rather than a linear foot limitation. A couple of commenters stated that the 2 acre limit is too low and the acreage limit should be based site-specific criteria, such as the quality of affected waters. Another commenter recommended basing the acreage limit on regional conditions, with a national PCN threshold of ⅓ acre. One commenter suggested that temporary impacts could result in adverse effects, depending on the duration of flooding, and that impacts due to flooding should be considered in the acreage limit of the NWP.

Based on our review of these comments, we are proposing to retain the 2 acre limit for the construction of new SWM facilities, with no limit on maintenance activities provided the maintenance activity is conducted in accordance with an approved maintenance plan. The 2 acre limit applies to each single and complete project, not the watershed. We believe that the proposed NWP should not have a limit for activities resulting in the loss of intermittent stream bed; the PCN threshold of 500 linear feet is adequate to allow district engineers to determine if the proposed work will result in more than minimal adverse effects on the aquatic environment. For activities resulting in the loss of ephemeral stream bed, there is no PCN threshold. Division engineers can regionally condition this NWP to establish limits for stream bed impacts or lower PCN thresholds. Division engineers can also regionally condition this NWP to add PCN thresholds for activities resulting in the loss of ephemeral stream bed.

A simple 2 acre limit is much easier to implement than an acreage limit based on the quality of affected waters. A simple acreage limit is less confusing to the regulated public, because there are no standard, widely accepted methods available to establish acreage limits for stormwater management facilities based on the quality of affected waters. In areas where the 2 acre limit is too low, the Corps district can

develop regional general permits to authorize these activities. District engineers will determine when adverse effects due to flooding result in permanent, not temporary, losses of waters of the United States and should be counted toward the 2 acre limit for this NWP.

Numerous comments were received regarding the PCN thresholds for the proposed NWP. Some commenters believe that PCNs should not be required for any activity authorized by this NWP. Other commenters recommended requiring PCNs for all activities authorized by this NWP because SWM facilities are public facilities built with public funds. Suggested PCN thresholds included ¼, ⅓, and ½ acre. One commenter recommended requiring agency coordination for all activities authorized by this NWP to provide an opportunity to assist in the planning of the facility. Recommended PCN thresholds for stream bed impacts ranged from 150 to 1,000 linear feet.

The notification process is necessary to ensure that the proposed NWP authorizes only those activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. It is unnecessary to require PCNs for all activities authorized by this NWP, unless the division engineer has specific concerns for the aquatic environment in a particular geographic area and regionally conditions the NWP to lower the notification thresholds. Stormwater management activities resulting in the loss of less than ¼ acre of non-tidal waters of the United States, the loss of less than 500 linear feet of intermittent stream bed, or the loss of ephemeral stream bed are unlikely to result in more than minimal adverse effects on the aquatic environment. To be consistent in the PCN thresholds for the other proposed NWPs, we have lowered the PCN threshold from ⅓ acre to ¼ acre. Agency notification will be conducted for activities that result in the loss of greater than 1 acre of waters of the United States.

We received many comments regarding maintenance requirements and maintenance limits for the proposed NWP. Some commenters stated that a permit should not be required for maintenance as long as there are no impacts beyond the originally approved facility. Other commenters said that this NWP is unnecessary because the maintenance can be authorized by NWP 3. Some commenters stated that maintenance is poorly defined and should not be authorized by this NWP. They state that maintenance activities can be just as destructive of wetlands as the initial construction of the facility. Several commenters requested a limit on the maintenance of SWM facilities, while some commenters recommended no limit to ensure that the design capacity is maintained. One commenter stated that a second review for maintenance of the facility is unnecessary because wetland impacts at the time of the original construction have already been considered.

Some commenters were concerned with the requirement for submitting a maintenance plan as part of the notification package. A number of commenters asked how a prospective permittee would comply with this requirement for the maintenance of an SWM facility that does not have a maintenance plan. Other commenters asked who would approve the maintenance plan if State and local entities did not require such a plan. Many commenters requested guidance as to what information would be required for the maintenance plan.

We are proposing to adopt a tiered approach when assessing the need for, and the amount of, maintenance at the facility. First, if a State or locally approved plan currently exists, that plan must be submitted as part of the notification package. If a plan does not exist, drawings of the original design capacities and design configurations should be submitted. Finally, if no plan and/or drawings exist, the best professional judgment of the Corps, with input from the manager of the facility, will be used to determine if the maintenance activity is authorized by this NWP. As for the content of the maintenance plan, if existing State or local requirements are in place regarding the development of such a plan, their standards will normally be accepted. If there are no such requirements, the plan should generally discuss the frequency and amount of maintenance which is required to ensure the facility functions as designed. If no plan currently exits, a new plan should be submitted for any requests for maintenance under this NWP.

A number of commenters requested that the Corps add a condition to this NWP requiring a statement from the applicant that explains how losses of waters of the United States were avoided and minimized on-site and why additional minimization cannot be achieved. Some commenters stated that compensatory mitigation should be required for all SWM facilities and some suggested that the mitigation proposal should be part of the PCN. One commenter said that compensatory mitigation should not be allowed in designated facility maintenance areas. Several commenters urged the Corps to reiterate that no compensatory mitigation is required for losses resulting only from maintenance excavation. Other commenters stated that compensatory mitigation should not be required for SWM facilities in areas that may provide more environmentally sensitive planning and benefits to the aquatic environment than placing those facilities in uplands. Other commenters asked whether mitigation credits can be gained through the use of bioengineering techniques and aquatic benches.

We have added a provision to the proposed NWP (paragraph (d)), requiring the prospective permittee to submit a written statement explaining how avoidance and minimization, to the maximum extent practicable, was achieved on the project site. Paragraph (c)(3) requires the prospective permittee to submit, with the notification, a compensatory mitigation proposal to offset losses of waters of the United States resulting from activities authorized by this NWP. Maintenance activities typically do not result in losses of waters of the United States if they are conducted in designated maintenance areas. Therefore, compensatory mitigation for maintenance activities within a currently serviceable SWM facility will not be required in most circumstances. Compensatory mitigation areas within an SWM facility should be designated as non-maintenance areas. If maintenance is required in a designated non-maintenance area used for compensatory mitigation, then the permittee may be required to provide compensatory mitigation for that maintenance activity. District engineers will determine if compensatory mitigation is necessary to ensure that the authorized work results only in minimal adverse effects on the aquatic environment. If the SWM facility is not currently serviceable and requires reconstruction, compensatory mitigation may be required if the District Engineer determines that it is necessary to ensure that the adverse effects on the aquatic environment are minimal.

Compensatory mitigation can be located within an SWM facility, provided it is not located in designated maintenance areas. It is at the discretion of the District Engineer to determine if it is appropriate to include compensatory mitigation (*i.e.*, wetland restoration, creation, or enhancement) within a particular SWM facility. Designated maintenance areas include sediment forebays designed to capture

the sediment in a specific area of the SWM facility. Where the SWM facility provides substantial environmental benefits and/or improves the aquatic environment, compensatory mitigation may not be required. Any future maintenance of the SWM facility conducted in designated maintenance areas identified in the maintenance plan will not require additional compensatory mitigation. It is at the discretion of district engineers whether to allow mitigation credits to become established at a SWM facility constructed with bioengineering techniques and aquatic benches. However, since SWM facilities must be regularly maintained to retain their effectiveness, they should not be used to establish mitigation credits for permanent losses of waters of the United States.

Many commenters recommended conditions to be added to the proposed NWP. One commenter suggested prohibiting discharges into fish habitat and requiring riparian buffers. Another commenter recommended prohibiting use of the NWP within 200 feet of streams or rivers that contain habitat for salmon. One commenter stated that intermittent streams provide valuable salmon habitat and should receive the same protection as perennial streams. One commenter requested that the NWP contain a condition prohibiting construction and maintenance during the spring and summer nesting periods of birds protected under the Migratory Bird Treaty Act and prohibiting work in streams during anadromous fish migration periods. A commenter requested a condition to require maintenance of base flows of streams during low flow periods to protect aquatic species. One commenter recommended adding a condition requiring the project proponent to demonstrate that environmental enhancement throughout the life of the project will result from the SWM project.

Conditions for specific fisheries and migratory bird concerns are best addressed through the regional and case-specific special conditions. This NWP can be regionally conditioned to prohibit the construction of SWM facilities in intermittent streams that support important fisheries. General Condition 21 requires the permittee to maintain, to the maximum extent practicable, preconstruction downstream flow rates, including stream base flows. It is unnecessary to require the permittee to demonstrate that the SWM facility will enhance the aquatic environment throughout the life of the project. The purpose of SWM is to prevent or reduce further degradation of the aquatic environment, especially water quality. District engineers will review PCNs for certain SWM activities to determine if the proposed work will result in minimal adverse effects on the aquatic environment. If the adverse effects are more than minimal, discretionary authority will be exercised and an individual permit will be required.

One commenter stated that the NWP should specifically authorize sediment control structures. Another commenter requested clarification as to whether or not this NWP authorizes in-stream sediment retention and detention basins. One commenter suggested prohibiting construction of concrete or rip rap-lined channels. A commenter asked for a definition for water control structures and emergency spillways and to delete the word ''emergency'' in the introductory paragraph of the NWP. One commenter recommended requiring best management practices to prevent downstream impacts of stormwater ponds, including retention facilities, such as holding and treating ''first flush'' from impervious surfaces.

The proposed NWP does not authorize sediment control structures (*e.g.*, silt fences and check dams) unless they are a part of an SWM facility. The intent of the opening paragraph of this NWP is to provide examples of authorized activities, not an inclusive list. For activities that require notification, district engineers will determine which SWM facilities are authorized under this NWP. Water control structures control the flow of water and may impound a certain volume of water. It is unnecessary to delete the word ''emergency'' as a modifier of the word ''spillways,'' because the purpose of emergency spillways is to provide an outlet for larger volumes of water and prevent an emergency situation from developing due to a large amount of water placing pressure on the dam, which may cause the dam to fail. Best management practices to prevent downstream adverse water quality effects of SWM ponds are best addressed through the 401 water quality certification.

A few commenters requested that the Corps expand the NWP to authorize the construction of flood control facilities. One commenter requested that the NWP authorize the construction of drainage conveyances such as culverts, canals, and ditches, as well as dam and/or weir construction. One commenter stated that the Corps needs to distinguish between SWM facilities authorized by this NWP and the flood control facilities authorized by NWP 31.

SWM facilities are constructed to control stormwater quantity and quality. SWM facilities provide some flood control for certain storm events. NWP 43 can authorize the construction of certain SWM facilities that also control flooding during small storm events, but larger flood control facilities constructed in waters of the United States must be authorized by other NWPs, regional general permits, or individual permits. Drainage facilities are not authorized by this NWP, unless they are part of an SWM facility. NWP 31 authorizes the maintenance of flood control facilities, not the construction of new flood control facilities.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 43 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all discharges into impaired waters and their adjacent wetlands. General Condition 27 prohibits the use of NWP 43 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP, proposed as NWP C in the July 1, 1998, **Federal Register** notice, is designated as NWP 43, with the proposed modifications discussed above.

44. Mining Activities

During the 1996 NWP reissuance process, we proposed an NWP for Mining Operations. Based upon comments and information gathered during this process, we decided to encourage the development of regional general permits, rather than develop specific limits to meet the minimal

adverse effects requirement of Section 404(e). As a part of the initiative to replace NWP 26, the aggregate and hard rock/mineral mining industries provided information and proposed draft NWPs that they believed would satisfy the minimal adverse effect criterion. We evaluated that information and in the July 1, 1998, **Federal Register** notice, proposed NWP E for aggregate and hard rock/mineral mining activities. As a result of the comments we received in response to the July 1, 1998, **Federal Register** notice, this NWP has been substantially modified. Many commenters stated that the proposed NWP E was too complex, difficult to understand, and too confusing. A number of commenters expressed uncertainty about the applicable waters for the NWP, the limits of work, and which activities could be conducted under the NWP.

General Comments: Many commenters expressed opposition to the proposed NWP. Numerous commenters objected to the proposed NWP because they believe that it authorizes activities with more than minimal adverse effects on the aquatic environment, especially water quality, aquatic habitat, fish and shellfish populations, and hydrology, as well as adjacent landowners. A large number of commenters stated that aggregate and hard rock/mineral mining activities should be subject to the individual permit process and public interest review. Other commenters said that the NWP should not be issued because it authorizes activities that are not similar in nature. Two commenters recommended that regional general permits should be developed in each state instead of an NWP. Several commenters objected to the proposed NWP because they believe it is too complex. A commenter objected to the proposed NWP because the commenter believes that the preamble fails to explain why a mining NWP is needed. A number of commenters recommended that the Corps issue a separate NWP for aggregate mining activities. One commenter suggested that the Corps issue a separate NWP for crushed stone operations.

We believe that certain aggregate and hard rock/mineral mining activities can be authorized by NWP if that NWP is properly conditioned to protect the aquatic environment. The scope of this NWP has been reduced from the proposed NWP E published in the July 1, 1998, **Federal Register**. We have also substantially restructured the proposed NWP to make it easier to understand. The activities authorized by this NWP are similar in nature, and focus on the mining activity and support activities. This NWP may be suspended or revoked in certain areas, particularly those areas inhabited by economically important fish, such as salmonids. Division engineers can regionally condition this NWP to protect locally important aquatic resources. It is unnecessary and impractical to withdraw this NWP and direct our districts to develop regional general permits. A large number of regional general permits for mining activities would create confusion for the regulated public, especially for those companies that have mining operations across the country. This NWP is necessary because aggregate mining and hard rock/mineral mining have been authorized by NWP 26 in the past. We do not believe it is necessary to develop separate NWPs for aggregate mining and crushed stone mining activities.

Scope of waters: In the July 1, 1998, **Federal Register** notice, we structured the proposed NWP E based on the types of waters impacted by either aggregate or hard rock/mineral mining activities. There were several categories of waters in the proposed NWP. Those categories of waters included: lower perennial riverine systems, intermittent and ephemeral streams, intermittent and small perennial stream relocations, isolated wetlands, wetlands above the ordinary high water mark in non-Section 10 waters, and dry washes and arroyos. Many commenters supported the expanded scope of waters, compared to the applicable waters for NWP 26. Two commenters objected to this NWP because it was applicable to all non-tidal waters, instead of only headwaters and isolated waters. One commenter stated that the July 1, 1998, **Federal Register** notice did not clearly explain why sand and gravel mining, crushed and broken stone mining, and hard rock/mineral mining were authorized in different types of waters. One commenter recommended that this NWP authorize mining activities only in large river systems to protect small streams and creeks. One commenter suggested that all of the types of applicable waters for NWP E should be based on a standard classification system, such as the Cowardin classification system, so that there will be more consistent implementation of the NWP. One commenter stated that this NWP should not authorize work in streams, especially those streams that support fish spawning areas.

As a result of our review of the comments received in response to the July 1, 1998, **Federal Register** notice, we have reduced the applicable waters for the proposed NWP by excluding certain waters from this NWP. The reduced scope of waters will help ensure that the authorized activities will result in minimal adverse effects on the aquatic environment and simplify the NWP to make it easier to understand. We have limited the types of waters where mining activities can occur under this NWP to: lower perennial streams (*i.e.,* lower perennial riverine subsystems as defined by the Cowardin classification system for wetlands and deep water habitats), isolated waters, streams where the average annual flow is 1 cubic foot per second or less, and non-tidal wetlands adjacent to headwater streams. Aggregate mining is not authorized in waters of the United States within 100 feet of the ordinary high water mark of streams where the average annual flow is greater than 1 cubic foot per second. This NWP does not authorize hard rock/mineral mining activities in streams, or in waters of the United States within 100 feet of the ordinary high water mark of headwater streams. Aggregate and hard rock/mineral mining are not authorized in non-tidal wetlands adjacent to streams where the average annual flow is greater than 5 cubic feet per second.

There are different applicable waters for different types of mining activities because not all types of materials are found in the same waters. For example, the substrate of lower perennial riverine subsystems, by definition, contains mostly mud and sand. To obtain larger aggregates, the mining operation must go upstream to upper perennial streams, as well as intermittent and ephemeral streams. We do not believe that it is practical or necessary to restrict the proposed NWP only to large riverine systems. We have reduced the applicability of this NWP in smaller streams to ensure that the adverse effects of these mining activities will be minimal. Notification is required for all activities authorized by this NWP. If a district engineer reviews a PCN and determines that the proposed work will result in more than minimal adverse effects on the aquatic environment, then discretionary authority will be exercised and an individual permit will be required. We are not aware of a classification system that will allow district engineers to better control adverse effects on the aquatic environment and make the NWP easier to implement. For example, the Cowardin classification system is based on a scale that is too large for the purposes of this NWP. The scale of the upper perennial riverine subsystem is too broad to provide district engineers with the type of control that is necessary for this NWP. We believe that our approach is better because the smaller

scale allows us to better control impacts to the aquatic environment.

We have reduced the applicability of the proposed NWP in streams, to better protect those streams that support fish spawning areas. The proposed NWP E authorized discharges into intermittent and ephemeral streams, and authorized the relocation or diversion of intermittent and small perennial streams. In the proposed NWP 44, aggregate mining activities can occur in lower perennial streams or streams where the average annual flow is 1 cubic foot per second or less. Intermittent streams with average annual flows of greater than 1 cubic foot per second cannot be mined for aggregates under this NWP. Hard rock/mineral mining is not authorized in streams.

One commenter stated that the NWP should authorize hard rock mining activities in other waters of the United States, in addition to dry washes and arroyos. Three commenters requested that definitions of the terms ''dry washes'' and ''arroyos'' should be included in the NWPs. One commenter said that ephemeral streams, dry washes, and arroyos should not be included in the NWP because of the recent *United States* v. *James J. Wilson,* 133 F. 3d 251 (4th Cir. 1997) decision.

We do not agree that hard rock/mineral mining activities should be authorized in streams because the potential for more than minimal adverse effects on the aquatic environment is too great. To further protect streams from the adverse effects of hard rock/mineral mining activities, we are proposing to add a condition to this NWP requiring that beneficiation and mineral processing cannot occur within 200 feet of the ordinary high water mark of any open waterbody. Since we have removed the terms ''dry washes'' and ''arroyos'' from the NWP, we do not need to include definitions of these terms. It is important to note that the *United States* v. *James J. Wilson* decision applies only to the states in the 4th Circuit (*i.e.,* Maryland, West Virginia, Virginia, North Carolina, and South Carolina). Other areas of the country are not subject to this decision.

Authorized Activities: One commenter stated that several paragraphs of NWP E appear to duplicate each other and should be combined to simplify the NWP. Another commenter said that the types of mining authorized by this NWP generally result in similar impacts and do not need to be distinguished between each other in the NWP. A large number of commenters stated that the term ''filling'' should be used where appropriate when describing the authorized activities and the acreage limits for those activities. One commenter recommended that the NWP clearly define what types of activities are considered to be mining activities, because many mining sites are managed for multiple land uses. This commenter stated that the NWP should not allow use of this NWP for the mining activity and another NWP for another activity on that parcel of land. One commenter recommended that the NWP include a condition addressing mechanized landclearing when that activity results in a deepening of waters of the United States instead of replacing those areas with dry land. One commenter stated that this NWP should be limited to authorizing access corridors for mining drag lines and prospecting activities, not the actual mining activity.

We have removed the duplication within the proposed NWP to make it simpler and easier to understand. In this NWP, we use the term ''discharges of dredged or fill material'' instead of ''filling'' because it is the standard terminology for the Section 404 program. ''Filling'' is not the only activity that can result in a discharge into waters of the United States. In certain circumstances, excavating, draining, or flooding waters of the United States can be considered as discharges regulated under Section 404 of the Clean Water Act. On a case-by-case basis, district engineers will determine what constitutes ''mining'' for the purposes of this NWP. If a tract of land is managed for multiple uses, district engineers must determine if each land use constitutes a separate single and complete project (*i.e.*, each activity has independent utility from the other activities on the parcel). If an activity on the land tract has independent utility and constitutes a separate single and complete project, another NWP can be used to authorize that activity, if it meets the terms and conditions of that NWP. Mechanized landclearing that changes the use of a water of the United States must be calculated in the acreage loss for the mining activity, but we do not believe that it is necessary to add a condition to this NWP to address this specific situation. Limiting this NWP to the construction of access corridors for mining draglines and prospecting activities rather than the mining activity is illogical, because Section 404 authorization is still likely to be required for the mining activity itself. If an individual permit is required for the mining activity, that permit would authorize the construction of the access corridor, if it is constructed in waters of the United States.

One commenter suggested that aggregate mining activities authorized by this NWP should include the mining of fill dirt, shell, and clay, including Fuller's earth and kaolin. Another commenter recommended that NWP E should be modified to authorize the mining of fill material for levee and embankment construction, reconstruction, and repair.

We do not agree that clay mining should be included in the NWP, because it is a mining activity that is best addressed at a district level through regional general permits. The excavation of fill dirt from waters of the United States, particularly wetlands, is likely to result in more than minimal adverse effects on the aquatic environment, because fill dirt for construction, including the construction and repair of levees, can be easily obtained from upland areas, and authorizing the extraction of soil from wetlands to construct levees and embankments by an NWP is unwarranted. If fill material cannot be obtained from upland areas, then the removal of soil from waters of the United States to provide fill material can be authorized by another NWP, such as NWP 18, a regional general permit, or an individual permit.

The mining of shell is also inappropriate for authorization by this NWP, because the potential impacts of this type of mining activity may be more than minimal, especially in estuarine waters where areas of fossil shell provide valuable habitat for fish. Proponents of shell mining can obtain authorization through the individual permit process or other available general permits.

Two commenters objected to the exclusion of hard rock/mineral mining from intermittent and ephemeral streams. Two commenters objected to prohibiting hard rock/mineral mining activities in lower perennial riverine systems. Another commenter requested clarification as to which types of hard rock/mineral mining activities are authorized by this NWP and the categories of waters in which those activities can take place. One commenter suggested that the NWP prohibit beneficiation and mineral processing in waters of the United States, to minimize potential spills and releases of toxic substances.

Hard rock/mineral mining activities have greater potential for more than minimal adverse effects on the aquatic environment than aggregate mining activities. There are considerable differences in the impacts associated with extracting and processing these

materials. Hard rock/mineral mining activities require processing that may result in discharges of chemical compounds in the water column, which can substantially alter water quality. Hard rock/mineral mining activities often require a Section 402 National Pollution Discharge Elimination System permit for effluent discharges associated with ore processing techniques. Hard rock/mineral mining is authorized only in isolated waters and non-tidal wetlands adjacent to headwater streams (*i.e.,* streams where the average annual flow is less than 5 cubic feet per second). No hard rock/mineral mining is authorized in waters of the United States within 100 feet of ordinary high water mark of streams. The proposed NWP does not authorize hard rock/mineral mining, including place mining, in any streams, including lower perennial riverine systems. To protect streams and other open waters, we are proposing to condition this NWP to prohibit beneficiation and mineral processing within 200 feet of the ordinary high water mark of any open waterbody.

One commenter stated that the NWP should not authorize discharges of fill material into waters of the United States for support features such as haul roads, crushers or other ore processors, and berms. Two commenters requested clarification concerning which stormwater management facilities can be authorized as mining support activities and which stormwater management facilities can be authorized under the new NWP for stormwater management facilities.

Support facilities are essential components of a mining operation and should be authorized as part of the single and complete mining project. Support facilities authorized by this NWP include berms, access and haul roads, rail lines, dikes, road crossings, settling ponds and settling basins, ditches, stormwater and surface water management facilities, head cut prevention, sediment and erosion controls, and mechanized landclearing. District engineers will review preconstruction notifications for mining activities authorized by this NWP to determine if the mining activity, and any associated support activities in waters of the United States, will result in more than minimal adverse effects on the aquatic environment. Stormwater management facilities that are required for a mining activity can be authorized by this NWP as a support activity. District engineers will determine on a case-by-case basis which types of stormwater management facilities may be authorized by this NWP. Due to the proposed modification of General Condition 15, this NWP usually would not be combined with NWP 43 for stormwater management facilities, since the maximum acreage loss cannot exceed the acreage limit of the NWP with the highest specified acreage limit. Since NWP 44 has a limit of 1 acre for support activities, including stormwater management facilities, NWP 43 cannot be used with NWP 44 to authorize a stormwater management facility that results in the loss of greater than 1 acre of waters of the United States.

Several commenters objected to the provision in this NWP that requires measures to prevent adverse effects to groundwater resources, stating that protection of groundwater is the responsibility of the states. We agree with this comment, and have removed this provision from the proposed NWP.

A large number of commenters stated that stream relocation and diversion activities for aggregate mining activities should be authorized in ephemeral and intermittent streams and small perennial streams. One commenter requested that the Corps clarify whether the phrase ''small perennial stream relocations'' refers to the size of the stream to be relocated or the amount of stream to be relocated. One commenter stated that channel relocation should not include decreasing the length of the stream channel. Another commenter requested that the Corps explain why other mining activities cannot be conducted in intermittent and small perennial streams, other than relocation and diversion. One commenter suggested that the Corps specify whether or not the discharge of dredged or fill material into ephemeral or intermittent streams is authorized by the stream relocation/diversion provisions of the NWP. One commenter recommended prohibiting stream relocation and diversion activities, as well as the construction of berms, from this NWP.

Due to the potential for more than minimal adverse effects on the aquatic environment, especially fish habitat, we have removed stream relocation and diversion as a specific activity authorized by this NWP. For the proposed NWP, in-stream aggregate mining activities are limited to lower perennial streams (*i.e.,* lower perennial riverine subsystems described in the Cowardin classification system) and streams where the average annual flow is 1 cubic foot per second or less. This NWP does not authorize hard rock/mineral mining activities in streams, including stream diversion or relocation. In stream segments where the average annual flow is 1 cubic foot per second or less, the stream channel may be excavated by the aggregate mining activity.

Acreage Limits: In the July 1, 1998, **Federal Register** notice, we requested comments on the proposed acreage limit for this NWP. We proposed 2 acre and 3 acre limits for the NWP. Two commenters supported the 3 acre limit. Many commenters recommended the 2 acre limit. Several commenters stated that a 3 acre limit is too high. Two commenters suggested a limit of ¼ acre. Many commenters said that the 3 acre limit is too low. One commenter suggested an acreage limit of 5 acres, stating that mine operators are proficient at site reclamation and wetland construction. Several commenters recommended a 10 acre limit for this NWP. A large number of commenters advocated the use of a sliding scale to determine the acreage limit for this NWP. Many commenters recommended the use of a sliding scale similar to the one proposed for NWP B for master planned development activities.

To ensure that this NWP authorizes only those mining activities that result in minimal adverse effects on the aquatic environment, we are proposing a 2 acre limit for a single and complete mining project. We do not believe that it would be practical to utilize a sliding scale to determine the acreage limit for this NWP, because a primary purpose of a sliding scale is to encourage the prospective permittee to further avoid and minimize losses of waters of the United States. For aggregate and hard rock/mineral mining activities, on-site avoidance and minimization is more difficult to accomplish because the miners need to extract materials from specific areas (*i.e.,* where sufficient aggregates have accumulated or where the densest deposits of ore are located) and in quantities sufficient to make the mining activity economically feasible.

One commenter stated that different acreage limits for different types of waters is too confusing and suggested a single acreage limit for the NWP. One commenter recommended that impacts to lower perennial riverine systems, isolated wetlands, and dry washes and arroyos should be limited to 1 acre. Another commenter suggested an average 1 acre limit for each type of water listed in the NWP. One commenter asked why the acreage limits for losses of open waters and wetlands was 2 acres but the loss of intermittent and ephemeral stream bed was limited to 1 acre. Several commenters supported a higher acreage limit for activities in ephemeral streams. One commenter stated that the 1 acre limit for support

activities is too low for the permit to be useful.

We are proposing a single acreage limit for this NWP (*i.e.,* 2 acres for a single and complete project, including a maximum of 1 acre for support activities). We have also simplified the applicable waters for the proposed NWP. The acreage limit applies to all of the activities authorized by this NWP, for a single and complete project. We believe that the 1 acre limit for support activities is adequate. If the project proponent requires additional impacts for support activities, the mining activity may be authorized by another NWP, a regional general permit, or an individual permit.

A commenter stated that the NWP should have similar acreage limits to the other new NWPs, because there is no justification for more restrictive limits. A number of commenters suggested imposing linear limits on stream impacts. One commenter recommended a 250 linear foot limit whereas another commenter recommended a 500 linear foot limit. A few commenters supported the lack of a linear limit for stream impacts.

We believe that an acreage limit is more appropriate for mining activities because the proposed NWP substantially limits the amount of in-stream mining that can be authorized by this NWP. For aggregate mining activities in streams where the average annual flow is 1 cubic foot per second or less, the adjacent land will usually be mined with the stream bed. This is another reason to use an acreage limit instead of a linear foot limit. In addition, the use of acres instead of linear feet to determine the limit for this NWP allows consistent application of the NWP limits across the different categories of applicable waters. Aggregate mining activities in lower perennial streams are adequately assessed on a acreage basis since lower perennial streams tend to have large channels.

One commenter stated that acreage limit calculations should be based solely on the direct effects of the dredging or filling activities, not indirect effects. One commenter said that a relocated stream channel which duplicates the functions and values of the original stream channel should not be considered a loss and should not be counted towards the acreage limit of the NWP.

The acreage loss of waters of the United States that results from filling, excavating, draining, or flooding is used to determine whether the proposed work exceeds the terms and limits of the NWP (see the definition of ''loss of waters of the United States'' in the ''Definitions'' section of the NWPs). This is the standard definition used in the NWP program. Although stream relocation and diversion activities no longer constitute a specific part of the proposed NWP, these activities may occur in aggregate mining operations in streams where the average annual flow is 1 cubic foot per second or less, because the adjacent land will usually be mined with the stream bed. The stream channel may be reestablished in a different location after the mining activity is completed. Stream relocation and diversion activities that fill and excavate the stream bed cause the loss of waters of the United States. It may take years before the relocated or diverted stream channel achieves similar aquatic functions to the original stream channel. Any stream relocation and diversion activities are included in the acreage loss measurement for this NWP.

Notification Thresholds: In the proposed NWP, preconstruction notification (PCN) was required for all authorized activities. One commenter concurred with this notification threshold. Several commenters recommended imposing notification thresholds similar to the other proposed NWPs. Two commenters suggested that PCNs should be required for activities impacting 150 linear feet or more of stream bed or ⅓ acre or greater of wetlands. One commenter proposed that PCNs should be required only for activities impacting 1 acre or more of waters of the United States. A number of commenters suggested that the PCN threshold for activities in dry washes and arroyos should be higher than for activities in other types of waters. One of these commenters recommended a 5 acre PCN threshold for activities in ephemeral streams, with agency coordination for the loss of 10 acres or greater of ephemeral stream bed. One commenter suggested agency notification for mining activities impacting greater than ⅓ acre. Another commenter suggested extending the agency coordination period to 30 days to allow those agencies to conduct a more thorough review of potential water quality impacts.

We are proposing to retain the original PCN threshold for this NWP, which requires preconstruction notification for all activities authorized by this NWP. District engineers will review proposed mining activities, including measures to minimize or avoid adverse effects to waters of the United States and reclamation plans. This PCN requirement is necessary to ensure that the NWP authorizes only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively. Agency coordination will be conducted for mining activities resulting in the loss of greater than 1 acre of waters of the United States. Compliance with General Condition 9, including the proposed requirement for a water quality management plan, will help ensure that the authorized work will not result in more than minimal adverse effects on local water quality.

Notification Requirements: In the proposed NWP E, the notification was required to include a description of all waters of the United States impacted by the project, a discussion of measures taken to minimize or prevent adverse effects to waters of the United States, a description of measures taken to comply with the conditions of the NWP, and a reclamation plan.

One commenter supported the requirement that the applicant must submit a reclamation plan with the PCN. A couple of commenters recommended that the applicant should submit a statement from the agency approving the reclamation plan. One commenter requested that the Corps define the term ''reclamation plan'' and several commenters asked the Corps to specify what should be included in the plan. One commenter asked if the requirement for a reclamation plan refers to the complete plan for the entire mining site that may be required by law or a plan for restoring affected waters of the United States and providing compensatory mitigation for the losses authorized by the NWP. Several commenters stated that the requirement for a reclamation plan should be eliminated. A number of commenters said that the reclamation plan requirement is redundant with other Federal and state laws and should not be included in the NWP.

The requirement for submission of a reclamation plan with the PCN is not intended to supersede other Federal or State requirements. The District Engineer will not require reclamation *per se,* but will review the reclamation plan to determine if compensatory mitigation is required to offset losses of waters of the United States and ensure that the individual or cumulative adverse effects of the mining activity on the aquatic environment are minimal. The prospective permittee may submit a statement from the Federal or State agency that approves the reclamation plan, with a brief description of reclamation plan, especially the type and quantity of aquatic habitats such as wetlands and streams that will be restored, enhanced, created, and/or

preserved for the mined land reclamation. If there are no Federal or State requirements for a reclamation plan for a particular mining activity, the applicant should state that fact in the PCN. The District Engineer may require compensatory mitigation for that project, to ensure that the adverse effects on the aquatic environment are minimal. If the reclamation plan required by Federal or State law adequately addresses compensation for losses of waters of the United States, then the District Engineer will not require additional compensatory mitigation, unless there are additional concerns for the aquatic environment.

A large number of commenters stated that the reclamation plan requirement needs to be changed because some mining activities, such as in-stream dredging, do not require reclamation. In addition, these commenters were unsure if this requirement applies to mining activities outside of the Corps jurisdiction. For land-based aggregate mining, reclamation may be required at the end of the mining activity, but the mining activity may occur for many years. These commenters expressed concern that when a prospective permittee applies for authorization under NWP E, reclamation for previously authorized mining activities may not be completed. One commenter said that the NWP should contain more specific reclamation requirements. This commenter believes that the mining company should be required to submit a reclamation plan for each phase of a large mining operation, as each phase proceeds. This commenter also recommended that the mining site should be restored within a year after operations cease, if possible. One commenter stated that the Corps ability to deny NWP authorization based on failure to complete reclamation for previously authorized activities exceeds the Corps authority because it is not reasonably related to water quality or the discharge of dredged or fill material. One commenter said that a mining activity that may be eligible for authorization by NWP may not have done any reclamation, but is still in compliance with its reclamation plan. This commenter said that it is unreasonable to require the submission of a separate reclamation plan because of the regulatory oversight by other agencies.

For those mining activities that do not require reclamation, the applicant should include a statement in the PCN that neither State nor Federal regulations require reclamation for the proposed mining activity. If there are portions of a mining activity outside of the Corps jurisdiction (*e.g.*, mining of upland areas), it is unnecessary for the prospective permittee to submit a reclamation plan for those activities. Long-term single and complete mining projects may be authorized by this NWP, provided terms and conditions of the NWP are met. The applicant can submit a conceptual reclamation plan with the PCN or a statement describing the reclamation plan and intended schedule, if the reclamation will not take place until after the long-term mining activity. The Corps can deny NWP authorization if the prospective permittee has not complied with the terms and conditions of previous Corps permits, such as requirements to restore affected waters of the United States.

Conditions of the NWP: One commenter stated that the measures to minimize stream impacts are too vague and inadequate to protect stream stability and integrity. A commenter objected to this NWP, stating that the authorized work results in significant changes in stream morphology and the NWP should require specific measures to prevent those significant changes. Another commenter recommended modifying the prohibition against excavating fish spawning areas or shellfish beds to require avoidance of activities causing degradation of these habitats through excavation, filling, sedimentation caused by upstream work, or other harmful activities. One commenter recommended adding the phrase ''where practicable'' in the requirement for necessary measures to prevent increases in stream gradient for mining activities in dry washes and arroyos. Another commenter stated that the conditions of this NWP are unenforceable, because field verification of spawning areas must be done by agency personnel with expertise in that area. One commenter stated that the use of NWP E would result in non-compliance with Section 402 of the Clean Water Act.

The conditions of the proposed NWP that require measures to minimize stream impacts will help ensure that the aggregate mining activities authorized by this NWP will result in minimal adverse effects on the aquatic environment. The size of streams in which this NWP can be used has been substantially reduced, which will also protect the stability and integrity of streams. For example, paragraph (e) of the proposed NWP requires the permittee to implement measures to prevent increases in stream gradient and water velocities to prevent adverse effects to channel morphology. This requirement allows the aggregate miner to remove only the upper surface of the stream bed to extract the sand, gravel, and crushed and broken stone. Aggregate mining is authorized only in lower perennial streams or those stream segments where the average annual flow is 1 cubic foot per second or less. In lower perennial streams, larger amounts of sand can be removed without substantially altering stream gradient and water velocities because these streams tend to occur on land with gentler slopes. Paragraph (e) requires the permittee to conduct the mining activity so that the authorized work does not have more than minimal adverse effects on channel morphology downstream of the site of the in-stream mining activity.

Paragraph (d) of the proposed NWP states that the authorized activity must not substantially alter the sediment characteristics of concentrated shellfish beds or fish spawning areas, either through discharges of dredged or fill material or sediment that was suspended in the water column by work upstream of the shellfish bed or fish spawning area. We are proposing to modify General Condition 20, Spawning Areas, to require that activities authorized by NWP cannot physically destroy important spawning areas by smothering those areas with suspended sediment generated upstream. In other words, an in-stream mining activity authorized by this NWP must be conducted so that it does not generate a cloud of suspended sediment that will move downstream and smother important spawning areas.

District engineers will rely on local knowledge, including any available documented locations of important spawning habitat and concentrated shellfish beds to ensure compliance with paragraph (d) and General Conditions 17 and 20. Federal and State natural resource agencies may have maps of these areas that district engineers can use during their review of PCNs for these activities. Division engineers can also regionally condition this NWP to restrict or prohibit its use in designated waterbodies that contain important fish spawning areas or shellfish beds. Authorization of mining activities by this NWP does not preclude the permittee from complying with the requirements of Section 402 of the Clean Water Act.

Use of this NWP with other NWPs: Many commenters supported the use of this NWP with other NWPs because of the acreage limits of NWP 44. One commenter recommended that the use of NWP E with other NWPs should be allowed without imposing an acreage limit.

NWP 44 can be used with other NWPs, such as NWP 33, provided the

NWPs authorize a single and complete project and comply with the proposed modification of General Condition 15, Use of Multiple Nationwide Permits.

Mitigation Requirements: Some commenters said that the compensatory mitigation requirements for this NWP were unclear in the July 1, 1998, **Federal Register** notice. A number of commenters suggested the NWP should require restoration when the mining activity is complete. A couple of commenters said that on-site mitigation should be preferred since the mining industry has demonstrated its ability to perform successful mitigation. A few commenters stated that requiring compensatory mitigation for these activities replicates State law and exceeds the mitigation requirements for other activities. A couple of commenters stated that the NWP should include a requirement that the permittee avoid or minimize impacts. A commenter suggested that mitigation plans should include monitoring and evaluation standards to assist agencies in evaluating the effectiveness of the mitigation. Three commenters stated that lands which were not previously waters of the United States and which develop wetland characteristics as a result of mining reclamation should be eligible for compensatory mitigation credit.

The July 1, 1998, **Federal Register** notice contained a general statement that compensatory mitigation would normally be required for NWP activities that require notification to the District Engineer. For this NWP, compensatory mitigation may be provided through the reclamation of the mined site, if reclamation is required by other Federal or State laws. If reclamation is not required, the District Engineer can require compensatory mitigation to offset losses of waters of the United States resulting from the authorized work and ensure that the adverse effects on the aquatic environment are minimal. Compensatory mitigation can be provided through the establishment and maintenance of vegetated buffers adjacent to streams and other open waters, especially in the 100-foot wide zone where no aggregate or hard rock/mineral mining activities can occur (see paragraph (k) and the last paragraph of proposed NWP 44).

We are proposing to add a condition to this NWP requiring the permittee to avoid and minimize discharges into waters of the United States to the maximum extent practicable and to include a statement detailing compliance with this condition with the PCN (see paragraph (c)). Compensatory mitigation requirements, including monitoring and evaluation standards, are at the discretion of district engineers. Mine operators that create wetlands in uplands as part of a reclamation plan can use those created wetlands as compensatory mitigation for other activities that result in the loss of wetlands, if those created wetlands are self-sustaining and the land will not be reverted to uplands in the future. However, it is at the discretion of the District Engineer to determine, on a case-by-case basis, if those areas can be used as compensatory mitigation.

A couple of commenters said that mitigation requirements for activities in ephemeral streams should be less because these areas provide minimal aquatic resources. Another commenter stated that compensatory mitigation requirements should specify in-kind stream replacement. One commenter said that compensatory mitigation in excess of a 1:1 ratio is unfair. Another commenter stated that mitigation requirements should be the same as for proposed NWPs A and B. One commenter expressed concern that mining activities will result in substantial cumulative impacts, and recommended that the Corps encourage mining companies to create on-site mitigation banks to compensate for losses of waters of the United States before they occur as a result of the mining activity. A couple of commenters believe that mine reclamation results in waters with higher value than the impacted waters and that it is counterproductive to place restrictive conditions on this NWP. Two commenters suggested that the creation of vegetated littoral shelves should count towards satisfying mitigation requirements.

Specific compensatory mitigation requirements will be determined on a case-by-case basis by district engineers. We do not believe that it is practical to require mining companies to create on-site mitigation banks to compensate for losses of waters of the United States before the mining activity is conducted. Mined land reclamation, if required, can address compensation for losses of waters of the United States, if the District Engineer determines that the reclamation adequately offsets losses of waters of the United States.

Clarification of Jurisdiction: In the July 1, 1998, **Federal Register** notice, we requested comments on a position intended to clarify a long-standing jurisdictional debate as to what areas should be considered waters of the United States as a result of mining, processing, and reclamation activities. In the July 1, 1998, **Federal Register** notice, we proposed the following position:

''Water-filled depressions and pits, ponds, etc., created in any area not a ''water of the United States,'' as a result of mining, processing, and reclamation activities, shall not be considered ''waters of the United States'' until one of the following occurs:

(1) All construction, mining, or excavation activities, processing activities and reclamation activities have ceased and the affected site has been fully reclaimed pursuant to an approved plan of reclamation; or

(2) All construction, mining, or excavation activities, processing activities and reclamation activities have ceased for a period of fifteen (15) consecutive years or the property is no longer zoned for mineral extraction, the same or successive operators are not actively mining on contiguous properties, or reclamation bonding, if required, is no longer in place; and the resulting body of water and adjacent wetlands meet the definition of ''waters of the United States'' (33 CFR 328.3 (a)).''

We received many comments concerning the proposed position. Many commenters supported the proposed position, including the 15-year term. One commenter recommended incorporating that text into NWP E. Another commenter supported the proposed position, but suggested that the text include a provision stating that water-filled depressions will not be considered waters of the United States as long as the area is actively mined, including reclamation activities.

We do not believe it is necessary to incorporate the text of this position into the text of NWP 44. The position clearly requires that the mining activity must have stopped, and the reclamation completed, before the area can be considered a water of the United States.

Several commenters opposed this clarification, because borrow pits can be idle for many years before they are used again for mining activities. One commenter objected to the proposed position, stating that it is a constitutional taking of property, especially since the Corps has taken the position that water-filled depressions on landfill caps are not waters of the United States. One commenter believes that the proposed position is too restrictive. Another commenter objected to the proposed position, stating that these water-filled depressions become valuable habitats and help compensate for mining damages. A commenter opposed this position because it contradicts the national goal of net wetland gains advocated in the Clean Water Action Plan. One commenter stated that the Corps should assert jurisdiction over areas subject to voluntary abandoned mine land

reclamation only when they are accepted by the Corps as compensatory mitigation for unavoidable impacts and losses caused by mining activities.

The purpose of imposing a specific time period in the text of this position is to ensure that it is consistently applied throughout the country and provide certainty for the regulated public. This position is not contrary to the Clean Water Action Plan. It is intended to comply with the Administration's wetlands plan by providing fairness to the regulated public. By stating a specific time period, mining companies can anticipate when the water-filled depressions they have created can be considered waters of the United States, if the area meets the definition of ''waters of the United States'' at 33 CFR Part 328. The development of water-filled depressions on landfill caps and the creation of water-filled depressions as a result of mining activities are completely different situations, and have substantially different public interest and health implications. Water-filled depressions on landfill caps are not waters of the United States, as stated elsewhere in this **Federal Register** notice. The repair of the landfill cap is necessary to reduce air and groundwater pollution. In contrast, water-filled depressions created by mining activities can develop into waters of the United States, and provide valuable functions, such as waterfowl habitat. Activities that create aquatic habitats from upland areas are not limited to compensatory mitigation activities.

Two commenters said that the water-filled depressions should be considered waters of the United States 2 years after the mining operation ceases. A number of commenters recommended a 5 year period before those areas are considered waters of the United States. Two of these commenters said that a 5 year period is consistent with the current regulatory interpretations of ''normal circumstances.'' One commenter expressed concern that the 15 year period is too long, and would set an inappropriate precedent for the rest of the regulatory program. One commenter suggested that there should be no time limit.

For the purpose of consistency in the regulatory program, we are proposing to change the time period from 15 years to 5 years. The 5-year time period was chosen because a 5-year period is used by the Natural Resources Conservation Service to determine if an area has been abandoned for the purposes of making a wetland determination. If prior converted cropland has not been maintained for a 5 year period and wetland characteristics have developed, then that site is no longer considered prior converted cropland. Therefore, for both agricultural and mining activities, if the area has not been used for any of those purposes for 5 years or longer, it can be considered abandoned, and if the area has developed characteristics of waters of the United States, including wetlands, during that period of abandonment, the area will be subject to Section 404.

One commenter was uncertain whether the proposed position is intended to be prospective, retroactive, or both. A commenter suggested modifying the definition of ''waters of the United States'' to include water-filled depressions created as a result of any extraction activities. A commenter stated that the zoning of the land, the mine operator, and reclamation bonding are irrelevant to the status of the mining pits as waters of the United States. One commenter requested that paragraph (1) contain the phrase ''* * * reclamation bond release has been obtained, if such bond exists * * *'' after the phrase ''* * * site has been fully reclaimed * * *.'' This commenter also recommended adding a definition of the word ''cease'' to the text, because there may be different interpretations as to when the 15-year period started. This commenter also stated that not all property is zoned for mining and this requirement may cause confusion if zoning is necessary to determine if an area is a water of the United States. Another commenter stated that paragraph (2) is difficult to understand and should be rewritten to make it clearer. One commenter recommended that the 15-year time period should apply to mining sites requiring reclamation as well as those mining sites that do not require reclamation.

This proposed position will take effect on the effective date of this NWP. If a jurisdictional determination is conducted on an area that was previously mined, then this position will be used to help determine if the area can be considered a water of the United States or is part of an on-going mining operation and not a water of the United States. This position is applicable only to mining activities, not other types of extraction activities. The preamble to 33 CFR Part 328.3 in the November 13, 1986, **Federal Register** notice (51 FR 41206–41260) adequately addresses water-filled depressions created by other extraction activities. We do not believe it is necessary to add language addressing the release of the bond, because the important criterion is whether the site has been fully reclaimed. A definition of the term ''cease'' is not needed, because it is the same definition in common usage. The 5-year period will start when all construction, mining, extraction, processing, and reclamation activities have stopped. The zoning of the land is only one criterion that may be used to determine if a site will continue to be mined. The zoning classification is not necessary to determine if an area is a water of the United States. If a tract of land was previously zoned for mining, and that zoning classification was changed to residential, then the District Engineer would use that information to determine that the mining activity has ceased. This position applies to all mining sites, whether or not reclamation is required.

One commenter stated that voluntary abandoned mined land reclamation and remining can facilitate abandoned mined land reclamation and result in water quality improvements in the watershed. This commenter believes that if the Corps considers artificial waters constructed for voluntary abandoned mined land reclamation and remining to be waters of the United States, it would deter voluntary reclamation and/or remining because of permit burdens and mitigation costs. Two commenters suggested that the Corps assert jurisdiction over water-filled depressions only when they have been accepted as compensatory mitigation. One commenter recommended that NWP 21 contain this position statement.

We do not believe that the proposed position will discourage voluntary abandoned mined land reclamation, especially if such reclamation can be used as a mitigation bank. NWP 27 can be used to authorize wetland enhancement, restoration, and creation activities in waters of the United States in areas that may have been previously mined. We do not agree that only areas accepted as compensatory mitigation should be considered waters of the United States. District engineers can use this position to determine if an area is a water of the United States in conjunction with mining activities authorized by NWP 21.

Based on the comments discussed above, we are proposing to modify the position to make it easier to read, as follows:

''Water-filled depressions (*e.g.*, pits, ponds, etc.) created in any area not previously considered a ''water of the United States,'' as a result of mining, processing, and reclamation activities, shall not be considered ''water a of the United States'' until one of the following situations occurs:

(1) All construction, mining, excavation, processing, and reclamation activities have

ceased and the affected site has been fully reclaimed pursuant to an approved reclamation plan; or

(2) The resulting body of water and adjacent wetlands meet the definition of ''waters of the United States'' (see 33 CFR Part 328.3 (a)), and any one of the following criteria are met:

(a) all construction, mining, excavation, processing, and reclamation activities have ceased for a period of five (5) consecutive years; or

(b) the property is no longer zoned for mineral extraction; or

(c) the same or successive operators are not actively mining on contiguous properties; or

(d) reclamation bonding, if required, is no longer in place.''

The only substantive change in the position is changing the time period from 15 years to 5 years, as discussed above.

Recommended Additional Conditions: Several commenters suggested additional conditions to incorporate into this NWP. Many of these suggestions are best addressed through the regional conditioning process, so we will only address those recommendations that have national applicability in this section.

One commenter suggested that the NWP should not be used in watersheds with substantial historic aquatic resource losses. Another commenter recommended that the NWP should contain a condition addressing the disposal of dredged or excavated material, wastes from washing minerals, and resuspension of stream bed materials that may be contaminated. One commenter suggested prohibiting the NWP in areas inhabited by State-listed endangered or threatened species, species of special concern, or wild trout. A commenter recommended that the NWP contain a provision requiring zero pollutant runoff or groundwater contamination from the site, as well as a bond to cover expenses incurred by surrounding communities if the mine is abandoned. One commenter recommended adding a condition to the NWP requiring that the current mine site must be successfully reclaimed prior to receiving another Section 404 permit for another mining activity in the same stream reach, and limiting the losses within that stream reach to 2 acres.

Division and district engineers can condition this NWP to prohibit or restrict its use in areas where the individual and cumulative adverse effects of Section 404 activities on the aquatic environment may be more than minimal. A Section 402 permit, if required, should address discharges of wastes from washing materials and runoff from processing areas. District engineers can exercise discretionary authority to restrict or prohibit the use of this NWP to conduct mining activities that will result in the suspension of contaminated sediments in the water column. This issue can also be addressed in the water quality management plan required for activities authorized by this NWP (see General Condition 9). District engineers will review PCNs for proposed mining activities to determine which mining activities constitute separate single and complete projects with independent utility.

Additional Issues: A number of commenters recommended removing all references to excavation from the NWP. Another commenter stated that the proposed NWP appears to violate the invalidation of the Tulloch rule. One commenter suggested that the final NWP clarify that proposed mining activities will be reviewed on a case-by-case basis to determine if there is a discharge regulated under Section 404 of the Clean Water Act.

Excavation activities can result in discharges of dredged or fill material into waters of the United States. Many of these activities were regulated under Section 404 of the Clean Water Act prior to the implementation of the Tulloch rule in 1993. Therefore, we have not removed references to excavation from this NWP. District engineers will review PCNs to determine if the proposed mining activity requires a Section 404 permit.

A number of commenters said that this NWP should contain a provision requiring the prospective permittee to demonstrate that the work complies with the National Historic Preservation Act. One of these commenters objected to the proposed NWP, stating that mining activities have resulted in the destruction of numerous archeological sites eligible for listing in the National Register of Historic Places.

General Condition 12 already addresses this issue. This general condition requires compliance with the requirements of the National Historic Preservation Act prior to commencing the authorized activity.

A number of commenters stated that the NWP 26 data collected by the Corps for mining activities is misleading because the data has been collected for only a short time, the 500 linear foot limit for filling or excavating stream beds in NWP 26 made many mining activities ineligible for NWP 26 authorization, and the Tulloch decision and enforcement policy has been inconsistently implemented.

Although data concerning mining activities authorized by NWP 26 has been collected for only a short period of time, we believe that this data can be used to provide estimates of the potential losses of waters of the United States that may be authorized by this NWP, since the scope of applicable waters is more restrictive than for NWP 26 (with the exception of aggregate mining activities in lower perennial streams). In our environmental assessment for this NWP, we will consider additional sources of information to estimate future impacts.

One commenter recommended that this NWP should include a definition of a single and complete project. Another commenter suggested that the term ''mining'' should be clarified, since mining in Florida refers to the excavated material leaving the mining site; under Florida's definition the extraction of material for on-site grading and filling would not be considered mining. One commenter recommended that the Corps develop a separate NWP for reclamation projects authorized under Title IV Abandoned Mine Land Program of the Surface Mining Control and Reclamation Act of 1977 or equivalent State laws.

The term ''single and complete project'' is already defined at 33 CFR Part 330.2(i). The District Engineer will determine if the proposed activity constitutes mining for the purposes of this NWP. This NWP authorizes reclamation activities in waters of the United States associated with the mining activity.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 44 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all discharges into impaired waters and their adjacent wetlands. General Condition 27 prohibits the use of NWP 44 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

The proposed NWP will be used to authorize aggregate and hard rock/mineral mining activities in certain waters of the United States, including

wetlands. In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. Proposed NWP E is designated as NWP 44, with the modifications discussed above.

IV. Comments and Responses on Nationwide Permit Conditions

A. Consolidation of General Conditions and Section 404 Only Conditions

In an effort to ensure consistent application of the conditions for the NWPs, we proposed in the July 1, 1998, **Federal Register** notice to consolidate the ''General Conditions'' and ''Section 404 Only'' conditions into one set of general conditions for the NWPs. This consolidation is practical because most of the Section 404 Only conditions apply to activities in Section 10 waters. This consolidation does not increase the scope of analysis for determining if a particular project qualifies for authorization under the NWP program. As a result of the number of comments we received in favor of this consolidation, all of the NWP conditions will be combined into one ''General Conditions'' section in the NWPs. The opening language of former Section 404 Only conditions 1, 2, 3, 4, 5, 7, and 8 (now designated as General Conditions 16, 17, 18, 19, 20, 22, and 23, respectively) has been modified to read ''activity [or activities], including structures and work in navigable waters of the United States and discharges of dredged or fill material,'' to reflect their application in Section 10 waters. Due to the changes in the NWP general conditions discussed below, the numbers of some general conditions differ from the numbering scheme in the July 1, 1998, **Federal Register** notice.

B. Comments on Specific General Conditions

In response to the July 1, 1998, **Federal Register** notice we received many comments on specific NWP general conditions. As a result of our review of those comments, we are proposing some changes to the NWP general conditions, as discussed below. Any changes made to the NWP general conditions will apply to all of the NWPs, including the existing NWPs issued in the December 13, 1996, **Federal Register** notice (61 FR 65874–65922), when the proposed new and modified NWPs become effective.

4. Aquatic Life Movements: One commenter requested that we eliminate the word ''substantially'' from Condition 4. Another commenter recommended replacing the phrase ''substantially disrupt'' with ''more than minimally disrupt.''

We recognize that most work in waters of the United States will result in some disruption of movement of those aquatic species that are indigenous to, or pass through, those waters. District engineers will determine if an NWP activity results in substantial disruption of the movement of aquatic organisms. The word ''substantially'' has been retained in this general condition. We are also proposing to add a sentence to this general condition to require that if culverts are placed in a stream as part of the authorized work, they must be installed so that low stream flows will continue to flow through the culverts.

9. Water Quality: In the July 1, 1998, **Federal Register** notice, we proposed to modify General Condition 9 by changing its title from ''Water Quality Certification'' to ''Water Quality'' and changing the text of the general condition to require a water quality management plan for activities authorized by existing NWPs 12, 14, 17, 18, 21, 32, and 40 and the new NWPs 39, 42, 43, and 44 (proposed as NWPs A, D, C, and E, respectively; NWP B was later withdrawn from the new and modified NWPs) if such a plan is not required by the State or Tribal 401 water quality certification. The purpose of the water quality management plan is to ensure that the project will have minimal adverse effects on the aquatic environment, especially by preventing or reducing adverse effects to downstream water quality and aquatic habitat. An important part of a water quality management plan can be the establishment and maintenance of vegetated buffers adjacent to waters of the United States.

The majority of the commenters asserted that the Corps had no statutory authority to impose Section 401 and Section 402 requirements for water quality and storm water management plans and stated that these requirements overlap or duplicate, and often conflict with, State water quality certification and National Pollutant Discharge Elimination System (NPDES) programs. One commenter stated that the Section 401 water quality certification must be issued prior to initiating the work under the NWP, which makes the Corps imposition of these additional requirements under this general condition redundant and unnecessary. Another commenter stated that these requirements would significantly add to the regulatory burden of permit applicants and increase the Corps workload. Several commenters stated that requiring a water quality management plan would increase the scope of the NWP program beyond the expertise of Corps regulatory personnel.

A goal of the Clean Water Act, which provides the Corps with its authority to regulate discharges of dredged or fill material into waters of the United States, is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. We believe that the requirement for a water quality management plan to prevent or reduce adverse effects to water quality as a result of work authorized under Section 404 of the Clean Water Act is within our statutory authority. However, the terms of the proposed modification of this general condition are not intended to replace existing State or Tribal Section 401 requirements, if those programs adequately address water quality concerns. Instead, the requirements of the general conditions provide the Corps the opportunity to protect or improve local open water quality. In states with strong water quality programs, district engineers will defer to State and local requirements and will not require water quality management plans as special conditions of NWP authorizations. If the 401 agency does not require adequate measures to protect downstream water quality, we have the authority to require measures, including the construction of stormwater management facilities or the establishment or maintenance of vegetated buffers adjacent to waters of the United States, that will minimize adverse effects to downstream water quality. If the adverse effects to local water quality resulting from the proposed work are minimal without the need for the implementation of a water quality management plan, then such a plan is not required. This general condition is not an absolute requirement because the criterion is minimal degradation, not no degradation. If a project proponent does not want to implement a water quality management plan, and the plan is necessary to ensure that the NWP authorizes only minimal adverse effects on the aquatic environment, then he or she can apply for an individual permit.

The language of the proposed modification of this general condition is intended to allow flexibility and minimize the amount of information necessary to determine compliance with its requirements. District engineers will use their discretion to qualitatively

determine if a particular project complies with this general condition and will not require extensive analysis or review. Detailed studies will not be required. If a water quality management plan is unnecessary due to the nature of the work and the surrounding area, then the plan is not required. For example, the District Engineer may determine that a water quality management plan is not required for an activity in a watershed that is not substantially developed. If a water quality management plan is required by the District Engineer for a particular NWP authorization, it does not increase the Corps scope of analysis. For example, if the permit area includes an entire subdivision, the District Engineer will determine if a water quality management plan is necessary to address impacts to water quality resulting from the construction and use of the subdivision. However, if a Corps permit is required only for a small portion of the development, such as a single road crossing to provide access to an upland development, the water quality management plan will not apply to the entire project site. District engineers cannot require a water quality management plan for a poorly designed upland development. By limiting our analysis to the qualitative assessment of compliance with this general condition, the increase to the Corps workload will be minor and compliance will be easily assessed by Corps regulatory personnel.

Many commenters recognized the importance of vegetated buffers and agreed that they should be required. One commenter stated that the general condition should not require the establishment of vegetated buffers. Another commenter stated that this general condition would needlessly take private property without compensation. One commenter stated that this condition would cause unreasonable financial burdens on NWP applicants and that future landowners cannot be expected to know if areas adjacent to waters of the United States are upland mitigation areas required for the NWP authorization or the proper width of the buffers. One commenter asked if drainage districts would be allowed to clear the buffer areas and to place excavated material on these areas during future ditch maintenance activities.

We are proposing to modify the general condition to provide district engineers with the flexibility to determine whether or not the establishment or maintenance of a vegetated buffer adjacent to open waters is necessary. The requirement for a water quality management plan does not constitute a taking of private property. It is merely an NWP condition that will help ensure that the authorized activity causes only minimal adverse effects to water quality. This requirement still allows the landowner viable economic use of his or her property. If the District Engineer determines that a water quality management plan is necessary to ensure that the activities authorized by NWPs result only in minimal adverse effects on water quality, and the landowner or developer does not want to implement the water quality management plan, then he or she can request authorization through the individual permit process. NWPs are optional permits, and anyone who does not want to comply with the terms and limits of the NWPs can request authorization through either a regional general permit, if available for the proposed activity, or an individual permit. We disagree that the requirement for a water quality management plan will result in unnecessary financial burdens on the regulated public.

Project-specific requirements for vegetated buffers adjacent to waters of the United States should be incorporated into NWP authorizations as special conditions, based on site conditions. Vegetated buffer requirements may also be regional conditions of the NWPs. The vegetated buffer requirements will be included in the NWP authorization issued to the project proponent, either as special or regional conditions. The NWP authorization will include a description of the width and composition of the vegetated buffer and may contain a plan of the project site showing the location and extent of those buffers. These documents will ensure that the permittee knows the location and extent of those buffers. Since the establishment and maintenance of vegetated buffers adjacent to waters of the United States can be considered as a form of out-of-kind compensatory mitigation for authorized losses of waters of the United States, district engineers may require the protection of vegetated buffers by conservation easements, deed restrictions, or other forms of legal protection.

If a drainage district needs to periodically remove sediments from a waterway where vegetated buffers were established as a condition of an NWP authorization, and those vegetated buffers are protected by a conservation easement or other legal means, the drainage district must notify the District Engineer of its intent to remove the vegetated buffer to conduct the maintenance activity. The drainage district may be required to reestablish of the vegetated buffer upon completion of the maintenance work.

One commenter recommended modifying the general condition to require vegetated buffers adjacent to all waters of the United States, not just open waters, because of the scientific support for buffers adjacent to wetlands and open water as essential for maintaining aquatic functions. One commenter requested a definition of the term ''vegetated buffer'' and that the Corps specifically state the width required for the buffer zone. Two commenters suggested changing the term ''vegetated buffer'' to ''permanently vegetated buffer.'' Some commenters recommended requiring vegetated buffers to be composed of native species. Another commenter recommended making this general condition applicable to NWPs 19, 25, 33, 34, and 36. One commenter stated that the concept of a wetland buffer is better suited for large open space projects than it would be for linear road projects and recommended eliminating buffer requirements from road projects within existing right-of-ways. A commenter requested a definition of the term ''to the maximum extent practicable'' for the vegetated buffer requirement. This commenter also stated that the vegetated buffer requirement is inconsistent with channel relocation authorized by NWP 40 and the removal of undesirable species in NWP 27.

The purpose of the vegetated buffer requirement in this general condition is to prevent more than minimal degradation of the water quality of streams and other open waters. For that reason, we have not included a requirement for vegetated buffers adjacent to wetlands. This does not prevent district engineers from requiring the establishment and maintenance of vegetated buffers adjacent to wetlands as conditions of NWP authorizations. The width and species composition of the required vegetated buffer is at the discretion of the District Engineer. In a previous section of this **Federal Register** notice, we recommend minimum widths for vegetated buffers, as well as the plant sizes and species that should be used. These recommendations are merely guidance; it is the District Engineer's decision as to what constitutes an adequate vegetated buffer for the purposes of a specific NWP authorization. Vegetated buffers should be as wide as possible. The phrase ''to the maximum extent practicable'' provides district engineers with flexibility. The vegetated buffer requirement is not inconsistent with NWPs 40 and 27, because vegetated buffers can be established by planting

appropriate species after drainage ditch or channel relocation activities and the removal of undesirable plant species, such as noxious weeds or invasive species. We have removed NWP 21 from the list of NWPs that may require a water quality management plan, because Title V of the Surface Mining Control and Reclamation Act already has a similar requirement.

11. Endangered Species: In the July 1, 1998, **Federal Register** notice, we did not propose any changes to this general condition. In response to this **Federal Register** notice, one commenter requested that the Corps define the phrase ''in the vicinity'' and another commenter recommended deleting this phrase from the general condition.

The definition of this term is at the discretion of the District Engineer for a particular Federally-listed endangered or threatened species. The area defined as the ''vicinity'' varies from species to species. For example, the ''vicinity'' of an endangered bird species will be different from the ''vicinity'' of an endangered species of orchid. The Standard Local Operating Procedures for Endangered Species established between most Corps districts and the FWS and NMFS will provide more effective protection of endangered and threatened species and their critical habitat, and can provide local definitions of the term ''vicinity.'' General Condition 11 contains provisions requiring notification for activities in designated critical habitat. We are proposing to modify General Condition 11 to clarify that the notification is required for any NWP activity proposed in designated critical habitat. We are proposing to add a provision to General Condition 13, Notification, to require the prospective permittee to provide the name(s) of the Federally-listed endangered or threatened species that may be adversely affected by the proposed work.

12. Historic Properties: In the July 1, 1998, **Federal Register** notice, the Corps did not propose any changes to this general condition. Several commenters believe that General Condition 12 adequately address the Corps responsibilities under Section 106 of the National Historic Preservation Act (NHPA). One commenter recommended that the Corps require that prospective permittees submit with the PCN either an inventory of historic properties prepared by a qualified individual, a letter from the State Historic Preservation Officer (SHPO) concerning potential impacts to historic properties, or some other evidence that demonstrates that the requirements of NHPA have been satisfied. One commenter requested that the notification contain a statement concerning potential effects to historic property. Another commenter stated that General Condition 12 should include a requirement that the permittee notify the District Engineer of the discovery of any artifacts or deposits that may constitute an eligible property while the authorized work is in progress and take steps to protect those potentially eligible properties until the requirements of NHPA are fulfilled. One commenter suggested that if the permittee avoids adverse effects to historic properties by incorporating those properties into ''open space'' or greenbelts on the project site, then those historic properties must be protected by deed restrictions, protective covenants, or other legal means as a condition of the NWP authorization. Another commenter expressed concern as to how Tribal coordination is conducted for potential effects to Tribal cultural or historic resources.

We believe that the current wording of General Condition 12 adequately addresses compliance of the NWP program with NHPA. In 33 CFR Part 325, Appendix C, the Corps has established the procedures necessary to ensure compliance with Section 106 of the NHPA. This general condition already requires that the prospective permittee notify the District Engineer if the proposed work may affect historic properties listed in, or may be eligible for listing in, the National Register of Historic Places. The District Engineer will review the notification and conduct any necessary coordination with the SHPO to ensure compliance with NHPA. The prospective permittee cannot commence work until the requirements of NHPA have been fulfilled. If the permittee discovers previously unknown historic properties during the course of conducting the authorized work, he or she must stop work and notify the District Engineer of the presence of previously unknown historic properties. Work cannot continue under the NWP until the requirements of NHPA have been fulfilled.

If the permittee avoids adverse effects to historic properties, we cannot require the permittee to preserve those properties in open space with a conservation easement or deed restriction. Tribal cultural resources are subject to the same requirements as other cultural and historic resources. The original wording of General Condition 12 will be retained as published in the December 13, 1996, **Federal Register** (61 FR 68574–65922). We are proposing to add a provision to General Condition 13, Notification, to require the prospective permittee to state, in the PCN, which historic property may be affected by the proposed work or to include a vicinity map indicating the location of the historic property.

13. Notification: In the July 1, 1998, **Federal Register** notice, we proposed to require notification for all of the new and modified NWPs, with various notification thresholds, but in general most of these NWPs had a PCN threshold of ⅓ acre. We also proposed to conduct agency coordination for discharges authorized by proposed NWPs A, B, C, E, and 40 that result in the loss of greater than 1 acre of waters of the United States. Notifications for activities that result in the loss of 1 acre of waters of the United States or less would be subject to Corps-only review. In this section, we will address only those comments relating to the notification process; comments concerning PCN thresholds for specific NWPs are addressed in the preamble discussions for each NWP.

Several commenters stated that one PCN threshold should be applied to all of the NWPs. We disagree, because one of the purposes of the PCN process is to provide district engineers the opportunity to review specific NWP activities to ensure that they will result only in minimal adverse effects on the aquatic environment. There is a wide range of activities that are authorized by the existing NWPs and the proposed NWPs. Each of these activities may require different PCN thresholds because they can have different adverse effects on the aquatic environment. We have attempted to make the PCN thresholds for the proposed NWPs as consistent as possible. Most of the proposed NWPs require submission of a PCN for losses of greater than ¼ acre of waters of the United States, but PCN thresholds for steam impacts vary for these NWPs.

One commenter believes that notification should not be required for projects where the Corps accepts compensatory mitigation plans for less than 1 acre of wetland impact, for activities exempt under Section 404(f)(1) of the Clean Water Act, or for the removal of accumulated sediments at stream crossings. Another commenter recommended that notification should be required for all NWP activities where the State has not issued an unconditional WQC. One commenter suggested that all activities impacting stream beds or riparian zones should require a PCN with agency coordination.

We disagree with these recommendations. We require notification for NWP activities that may result in more than minimal adverse effects on the aquatic environment. Activities that are exempt under Section 404(f)(1) of the Clean Water Act do not require a Section 404 permit and are not subject to PCN requirements. For the proposed modification of NWP 3, we are proposing to require notification for all removal of accumulated sediments in the vicinity of existing structures (see the preamble discussion for NWP 3). If an unconditional WQC has not been issued for the NWP by the Section 401 agency, the State or Tribe will have the opportunity to review each activity and determine if it complies with State or Tribal water quality standards. Notification to the Corps is unnecessary unless the Division Engineer regionally conditions the NWP to require notification. The District Engineer will review the PCN to determine if the proposed work complies with the terms of the NWP and if any compensatory mitigation is necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment.

Several commenters addressed the 30-day PCN time period in paragraph (a)(3) of General Condition 13. Two commenters supported the 30-day PCN time period for the new NWPs. One commenter recommended deleting the 30-day time period because the project proponent should not have to wait 30 days to receive an NWP authorization. One commenter stated that the 30-day time period is unjustified and is contrary to the intent of the NWP program. One commenter said that PCN time period should be reduced from 30 days to 15 days. Three commenters stated that the 30-day PCN time period is too short to conduct an adequate review of the proposed work. One of these commenters recommended a 60-day time period and another commenter suggested a 45-day time period.

The PCN time period provides fairness to the regulated public by requiring the Corps to respond to PCNs in a timely manner. Due to the higher workloads that are expected to result from the proposed new and modified NWPs, we are proposing to change paragraph (a) of General Condition 13 by increasing the PCN review period to 45 days for a complete notification. The District Engineer will have 30 days from the PCN receipt date to request additional information that is necessary to make the PCN complete and begin the PCN review process. If the PCN is incomplete, the District Engineer can make only one request for additional information necessary to make the PCN complete. If the applicant does not supply the requested information, the District Engineer will not proceed with the PCN review and the applicant cannot assume that the project is authorized by the NWP 45 days later. If the applicant does not provide all of the requested information, the District Engineer may notify the applicant, either by letter or telephone, that the PCN is not complete and that the PCN review process will not begin until all of the requested information is furnished to the Corps. Upon receipt of a complete PCN, the District Engineer has 45 days to determine if the proposed work qualifies for authorization under the NWP or exercise discretionary authority to require a standard permit. If the District Engineer does not respond to the PCN within 45 days of receipt of a complete application, then the proposed activity is authorized by NWP unless the District Engineer modifies, suspends, or revokes the default NWP authorization in accordance with 33 CFR Part 330.5(d)(2).

Many commenters believe that the information requirements for PCNs are too extensive and confusing. They requested that the Corps provide a checklist to simplify the notification process. Three commenters requested that the requirement for submission of a delineation of special aquatic sites for certain NWPs be deleted from General Condition 13. One of these commenters specifically recommended excluding NWP 12 activities that are not subject to an acreage limit from the delineation requirement. Another commenter stated that wetland delineations are too costly to be required for PCNs.

The format of General Condition 13 clearly outlines the information required for the notification process. Corps districts can, if they choose to do so, provide a checklist with their permit applications to help prospective permittees ensure that they have provided all the required information. The proposed modifications to NWP 12 require the submission of a delineation of special aquatic sites. We are proposing to add NWP 7 to the list of NWPs that require submission of delineations of special aquatic sites with the PCN. NWP 7 was added because there may be some intake or outfall maintenance activities that could adversely affect submerged aquatic vegetation beds.

A few commenters believe that the prospective permittee should not be required to notify the National Ocean Service (NOS) for the construction or installation of utility lines in navigable waters and that this provision should be removed from General Condition 13. We concur with this comment and are proposing to modify NWP 12 to require the Corps to provide NOS with a copy of the PCN and NWP authorization, so that NOS can chart the utility line to protect navigation.

We received many comments concerning interagency coordination of PCNs. Some commenters stated that the Corps should not consider agency comments for NWP activities. Other commenters suggested that agencies should have the opportunity to comment on every PCN. One commenter recommended that agency coordination should be conducted for all activities authorized by NWPs. Several commenters pointed out discrepancies between different discussions of the agency coordination process in the July 1, 1998, **Federal Register** notice. In the preamble discussion for the proposed modifications of General Condition 13, we proposed to conduct agency coordination for NWPs authorizing discharges resulting in the loss of greater than 1 acre of waters of the United States. However, in the proposed revisions General Condition 13, we specifically stated that agency coordination would be conducted only for NWPs A, B, C, E, and 40, where the loss of waters of the United States is greater than 1 acre and for NWPs 12, 21, 29, 33, 37, and 38, regardless of the acreage loss. Many commenters stated that the agency coordination period should be greater than 5 calendar days and some of these commenters said that the Corps should provide responses to agency comments. One commenter recommended that Tribes implementing the Section 401 program should be included in the agency coordination process. Two commenters requested that the Corps put the optional agency coordination process back into General Condition 13, to allow the Regional Administrator of EPA or the Regional Directors of FWS or NMFS to request agency coordination for activities authorized by certain NWPs.

We are proposing to modify the agency coordination thresholds in paragraph (e) to require agency coordination for any NWP activity requiring notification to the District Engineer that results in the loss of greater than 1 acre of waters of the United States. Because of the proposed modification of NWP 40, we have removed the provision for coordination with the FWS for NWP 40 activities resulting in the loss of greater than ⅓ acre of playas, prairie potholes, and vernal pools. We have not put the optional agency notification process

back into General Condition 13. We believe that agency coordination is unnecessary for NWP activities resulting in the loss of 1 acre or less of waters of the United States. Due to the increase complexity of the NWPs, we have modified the time periods for agency coordination. With the exception of NWP 37, these agencies will have 10 calendar days from receipt of the PCN to notify the District Engineer that they intend to provide substantive, site-specific comments within their area of expertise. If so notified, the District Engineer will wait an additional 15 calendar days before making a decision on the PCN. Therefore, these agencies have up to 25 days to provide comments on a PCN. Districts will involve any Tribes with Section 401 programs in the agency notification process, if the proposed activity occurs in an area subject to a Tribal Section 401 program.

One commenter recommended that the mitigation requirements in paragraph (g) should explicitly state that compensatory mitigation must fully offset permanent, temporary, and secondary losses of functions, values, and acreage of aquatic resources to satisfy the ''no net loss'' goal of the Section 404 program. One commenter asked which functional assessment method would be required for mitigation to determine compliance with paragraph (g) of General Condition 13. A commenter requested that the Corps provide compensatory mitigation guidelines for permit applicants to help them better understand and comply with compensatory mitigation requirements. One commenter suggested that the Corps provide guidance for appropriate mitigation ratios. Another commenter asked how the requirements of paragraph (g) of this general condition differ from the analysis required by the Section 404(b)(1) Guidelines. One commenter stated that vegetated buffers should not be considered as compensatory mitigation. This commenter also said that in lieu fee programs should not be used as compensatory mitigation.

For those NWP activities that require notification, district engineers will determine if the proposed compensatory mitigation adequately offsets losses of waters of the United States. To determine if the proposed compensatory mitigation is appropriate, district engineers will consider what is best for the local aquatic environment. The District Engineer is not required to utilize a formal assessment method. It would be inappropriate to issue national standards for compensatory mitigation, because of the regional differences in aquatic resource functions and values across the country. Nationwide permittees are not required to fully offset losses of aquatic resource functions, values, and acreage resulting from permanent, temporary, or secondary impacts. For the NWP program, compensatory mitigation is necessary only to ensure that the adverse effects of the authorized work on the aquatic environment are minimal, individually or cumulatively. The ''no net loss'' goal is not a statutory requirement of the Section 404 program. Other Federal wetlands programs, such as the Wetland Reserve Program, help increase the quantity of the Nation's wetlands and achieve the ''no net loss'' goal. Compensatory mitigation requirements are established by district engineers on a case-by-case or district-wide basis. Therefore, we will not establish national compensatory mitigation guidelines. Compensatory mitigation requirements are addressed in more detail elsewhere in this **Federal Register** notice. Vegetated buffers are an important type of out-of-kind compensatory mitigation that helps protect the quality of the local aquatic environment, especially water quality. District engineers will consider vegetated buffers as part of the compensatory mitigation required for activities authorized by Section 404 permits. In paragraph (g) of General Condition 13, we have specified that in lieu fee programs, mitigation banks, and other consolidated mitigation approaches are preferred methods of providing compensatory mitigation. In lieu fee programs are an important means of providing consolidated compensatory mitigation projects, especially in areas where mitigation banks are uncommon.

For the NWP program, permittees are only required to avoid and minimize impacts on-site to the maximum extent practicable. Off-site alternatives analyses cannot be required for activities authorized by NWPs because the NWPs authorize only those activities with minimal adverse effects on the aquatic environment. If the adverse effects on the aquatic environment are more than minimal, then the District Engineer will exercise discretionary authority and require an individual permit for the proposed work. In accordance with 40 CFR Part 230.7, each NWP is subjected to a Section 404(b)(1) Guidelines analysis before it is issued, but that analysis is not conducted for each activity authorized by the NWP.

One commenter recommended modification of General Condition 13 to require, in addition to preconstruction notification, postconstruction notification for all NWPs. Another commenter requested modification of General Condition 13 to include requirements for the prospective permittee to apply for water quality certification (WQC), in those instances where WQC has been denied, once the notification process has been completed.

We do not agree that postconstruction notification should be required for all activities authorized by NWPs. We believe that General Condition 9, Water Quality, adequately addresses the WQC requirements for the NWPs.

14. Compliance Certification: We did not propose any changes to this general condition, but one commenter recommended that this general condition specify that the Corps will verify the certification by a site visit within 90 days of receipt of the certification from the permittee.

We disagree with this recommendation and will not incorporate it into this general condition. Corps districts will review compliance certifications at their discretion.

15. Use of Multiple Nationwide Permits: Although we did not propose any changes to this general condition, we received many general comments opposing the use of more than one NWP to authorize a single and complete project. We also received comments opposing the provisions of this general condition. One commenter recommended a prohibition against the use of more than one NWP to authorize a single and complete project that results in above-grade wetland fills. Another commenter stated that the use of multiple NWPs for a project should be unrestricted because of the low acreage limits of the NWPs and the unlikely probability that projects authorized by more than one NWP would result in significant adverse effects on the aquatic environment.

We are proposing to modify General Condition 15 to prohibit the use of more than one NWP to authorize a single and complete project, except when the acreage loss of waters of the United States is less than the highest specified acreage limit for the NWPs used to authorize the activity. For example, NWP 13 may be used with NWP 39 to authorize bank stabilization in unvegetated tidal waters at the project site for the construction of a 100-acre residential subdivision that will result in the filling of non-tidal wetlands. In this case, the acreage loss of waters of the United States cannot exceed the indexed acreage limit under NWP 39. Since the project area is 100 acres, the maximum acreage loss for this

particular project is 2.25 acres, and includes the subdivision, attendant features, and bank stabilization.

We are also proposing to modify the title of this general condition to more accurately describe its purpose. The previous title, ''Multiple Use of Nationwide Permits'' implied that the general condition addresses the use of an NWP more than once for a single and complete project. By changing the title to ''Use of Multiple Nationwide Permits,'' we believe that the title more accurately reflects its purpose, which is controlling the use of more than one NWP to authorize a single and complete project.

17. Shellfish Beds: We did not propose any changes to this general condition, except to change it from a ''Section 404 Only'' condition to a general condition and include activities in Section 10 waters, as discussed above. During our review of the comments received in response to the July 1, 1998, and October 14, 1998, **Federal Register** notices, we determined that this general condition requires clarification to ensure that the NWPs do not authorize activities that may result in more than minimal adverse effects on shellfish. In the text of the general condition we are proposing to change the word ''production'' to ''populations'' because the word ''production'' is too limiting and the condition should apply to all areas of concentrated shellfish populations, not just where shellfish are harvested commercially. This general condition was previously entitled ''Shellfish Production.'' We are proposing to modify the title of this general condition to ''Shellfish Beds'' to reflect the proposed change in the general condition.

18. Suitable Materials: We did not propose any changes to this general condition, except to include activities in Section 10 waters of the United States, as discussed above. One commenter requested that the general condition prohibit the use of asphalt, tires, and construction and demolition debris. Another commenter supported the current wording of the general condition, provided it does not authorize the use of fill that contains deleterious materials, such as trash. One commenter recommended modifying this general condition to state that materials used in construction must not be cumulatively toxic, even though they may not be toxic in the amounts discharged for the project.

This NWP condition already contains examples of material that are considered unsuitable, such as trash, debris, car bodies, and asphalt. It is impractical to provide a comprehensive list of unsuitable materials. District engineers will determine on a case-by-case basis which materials are unsuitable. Division engineers can regionally condition the NWPs to prohibit the use of certain materials, if those materials are commonly used in a particular geographic region and are considered toxic. We do not believe that it is necessary to specify that discharged materials must not be cumulatively toxic, because the discharge of toxic pollutants is addressed under Section 307 of the Clean Water Act. We are proposing to retain this general condition as published in the July 1, 1998, **Federal Register** notice.

19. Mitigation: In the July 1, 1998, **Federal Register** notice, we proposed to modify this former Section 404 Only condition by deleting the words ''* * * unless the District Engineer approves a compensation plan that the District Engineer determines is more beneficial to the environment than on-site minimization and avoidance measures.'' We also proposed to modify this general condition to require restoration, creation, enhancement, or preservation of aquatic resources to offset losses of functions and values of waters of the United States due to authorized impacts and to include the establishment of vegetated buffers as part of a compensatory mitigation plan.

A few commenters stated that mitigation is defined too narrowly in the general condition, and should include avoidance and minimization. Some commenters stated that compensatory mitigation should not be required for activities authorized by NWPs because the adverse effects of those activities on the aquatic environment can only be minimal. Other commenters stated that compensatory mitigation should be required for all NWP activities that require a PCN. Some commenters said that compensatory mitigation should be required for all impacts to the aquatic environment. A few commenters stated that compensatory mitigation should not be used to ''buy down'' losses of waters of the United States authorized by NWPs to ensure that the adverse effects on the aquatic environment are minimal.

The text of General Condition 19 includes all three steps of the mitigation process (*i.e.*, avoidance, minimization, and compensation). Permittees are required to avoid and minimize impacts to the aquatic environment on-site to the maximum extent practicable. The consideration of off-site alternatives cannot be required for activities authorized by NWPs. For NWP activities that require notification to the District Engineer, compensatory mitigation may be required to ensure that the net adverse effects on the aquatic environment are minimal, individually or cumulatively. However, if the adverse effects on the aquatic environment are minimal, without compensatory mitigation, the District Engineer may determine that compensatory mitigation is unnecessary and authorize the activity with the NWP. The use of compensatory mitigation to reduce the adverse effects of the authorized work to the minimal level is an essential component of the NWP program, and included in the NWP regulations at 33 CFR Part 330.1(e)(3).

One commenter stated that the NWP program has become a way to avoid an alternatives analysis, but another commenter views the NWPs as similar to the individual permit process because it requires an on-site alternatives analysis. One commenter said that the avoidance requirement of this general condition is meaningless because the resource agencies do not have enough time to review the applicant's avoidance analysis in the PCN. One commenter recommended removing the avoidance requirement from this general condition because there are currently no standards for determining if the requirement has been met.

General Condition 19 requires the consideration of on-site alternatives, including changes to the proposed work to avoid and minimize adverse effects to waters of the United States. District engineers will review the PCN to determine if additional avoidance and minimization is practicable and necessary. If the proposed work meets the terms and conditions of the NWP and results in minimal adverse effects on the aquatic environment (with or without any compensatory mitigation required by the District Engineer) it is not necessary to require additional avoidance and minimization.

Two commenters believe that the requirement for restoration, creation, enhancement, or preservation of aquatic resources to offset authorized impacts to ensure that the adverse effects of the work are minimal is a major change to the NWP program and does not accurately reflect the concept of using compensatory mitigation to ensure that the adverse effects on the aquatic environment caused by activities authorized by NWPs are minimal. Another commenter stated that this requirement is problematic because it requires compensatory mitigation for any activity that requires a PCN even if the adverse effects of the activity on the aquatic environment are minimal. This commenter recommended changing this part of the general condition to read

''* * * of other aquatic resources only as necessary to offset authorized impacts to the extent that adverse environmental effects to the aquatic environment otherwise would be minimal.'' Two commenters objected to the inclusion of preservation as a form of compensatory mitigation.

We believe that this part of the general condition accurately reflects 33 CFR Part 330.1(e)(3), which is the section of the NWP regulations that allows the District Engineer to require compensatory mitigation to offset losses of waters of the United States authorized by NWPs, to ensure that the adverse effects on the aquatic environment are minimal. The phrase ''at least to the extent that adverse environmental effects to the aquatic environment are minimal'' provides district engineers with the flexibility to determine that compensatory mitigation is unnecessary if the authorized adverse effects on the aquatic environment are already minimal. If no compensatory mitigation is necessary to reduce the adverse effects on the aquatic environment to the minimal level, then the District Engineer does not need to require compensatory mitigation. Preservation of aquatic resources is an important type of compensatory mitigation, because it can be used to augment the restoration, creation, and enhancement of aquatic habitats. Preservation can also be used to protect rare or high-value aquatic resources.

Several commenters requested that the Corps not delete the language from the original version of Section 404 Only condition 4 published in the December 13, 1996, issue of the **Federal Register**. This language allowed the District Engineer to determine that off-site compensatory mitigation is more beneficial to the aquatic environment, because of the flexibility allowed by this wording. One commenter objected to the use of the term ''aquatic environment'' in the general condition and stated that the 1990 Memorandum of Agreement (MOA) between the Corps and EPA on mitigation only refers to wetlands. Two commenters recommended that the Corps emphasize that compensatory mitigation may be required for impacts to other aquatic resources, not just wetlands. Other commenters stated that the Corps needs to provide guidelines for replacement ratios, functional assessment methods, and monitoring requirements.

The proposed changes to this general condition do not prohibit the District Engineer from considering and approving off-site compensatory mitigation to offset the adverse effects of the authorized work on the aquatic environment. Off-site and out-of-kind compensatory mitigation can be used to offset losses of waters of the United States, if such compensation is beneficial to the aquatic environment. Mitigation banks, in lieu fee programs, and other consolidated mitigation approaches are also important sources of compensatory mitigation. The 1990 mitigation MOA applies only to the evaluation of standard Corps permits, not general permits such as the NWPs. With the proposed new and modified NWPs, we are placing more emphasis on other types of aquatic resources, such as streams. Vegetated buffers adjacent to open or flowing waters are an excellent form of compensatory mitigation to offset adverse effects on the aquatic environment caused by the activities authorized by the NWPs. Restoration of degraded streams can be used as compensatory mitigation for stream impacts. It is important to note that compensatory mitigation is not necessary for all activities authorized by NWPs. The District Engineer will determine, on a case-by-case basis, if compensatory mitigation is necessary to ensure that the adverse effects on the aquatic environment are minimal for activities authorized by NWPs. We disagree that the NWPs should contain guidance for replacement ratios, functional assessment methods, and monitoring requirements for compensatory mitigation. District engineers will decide the appropriateness of compensatory mitigation on a case-by-case basis, using any replacement ratios, functional assessment methods, or monitoring requirements they believe are appropriate.

Several commenters addressed the use of vegetated buffers as compensatory mitigation. Some commenters stated that the Corps lacks the legal authority to require vegetated buffers, particularly upland buffers, and recommended that the Corps delete the reference to vegetated buffers from the general condition. A commenter objected to use of vegetated buffers as compensatory mitigation for impacts to waters of the United States, particularly as a substitute for the restoration and creation of aquatic habitats. Another commenter recommended using upland vegetated buffers as compensatory mitigation only after the permittee has conducted a one-to-one replacement of aquatic habitats. One commenter recommended modifying the general condition to require planting the vegetated buffer with native vegetation. One commenter said that vegetated buffers should be required adjacent to all open waters. Two commenters recommended including specific width requirements for vegetated buffers in the general condition.

Our legal authority to require vegetated buffers adjacent to waters of the United States is discussed in a previous section of this **Federal Register** notice. Vegetated buffers adjacent to open waters or streams can provide more benefits to the local aquatic environment than wetland creation efforts. District engineers will determine how much the vegetated buffer will count towards any compensatory mitigation requirements. We are proposing to add text to this general condition stating that the vegetated buffer should consist of native species. However, if the vegetated buffer is already inhabited by trees and shrubs, it should be maintained, even if some of the plant species are not native to the region. If the vegetated buffer is inhabited by woody non-native species that do not provide habitat for locally important aquatic species, district engineers can condition the NWP authorization to require the removal of those non-native species and the planting of beneficial native species.

Since two general conditions address mitigation requirements for the NWPs, we are proposing to add a sentence General Condition 19, referring to the additional information concerning mitigation requirements in paragraph (g) of General Condition 13. We are also proposing to add a similar sentence to paragraph (g) of General Condition 13, referring to the mitigation requirements of General Condition 19.

20. Spawning Areas: One commenter suggested that we remove the word ''important'' from General Condition 20 to prohibit activities in any fish spawning area. Two other commenters objected to the addition of this word to the general condition because it does not define what an ''important'' spawning area is and would result in subjective determinations by Corps personnel. Another commenter recommended that the word ''structures'' be added to the examples of activities that can physically destroy a spawning area.

We added the word ''important'' to this general condition to limit the prohibition to spawning areas used by species that are harvested commercially for human consumption. Spawning areas used exclusively by other aquatic species are not subject to this general condition. We are proposing to retain the word ''important'' in this general condition. Division engineers can add regional conditions to the NWPs to prohibit the use of NWPs (or require

notification for NWP activities) in known locations of important spawning habitat. We do not believe it is necessary to include the placement of structures in this general condition as an example of an activity that physically destroys a spawning area because the general condition already clearly states that authorized activities, including structures in navigable waters, cannot result in the physical destruction of important spawning areas.

21. Management of Water Flows: In the July 1, 1998, **Federal Register** notice, we proposed to modify this former Section 404 Only general condition and change the title of the condition from ''Obstruction of High Flows'' to ''Management of High Flows.'' We proposed to modify this NWP to require permittees to design their projects to maintain, to the maximum extent practicable, preconstruction downstream flow conditions and reduce impacts such as flooding or draining, unless the primary purpose of the project is to impound water or reestablish drainage.

Several commenters fully supported the proposed modification to this general condition. Another commenter stated that the general condition should also include water quality control. A number of commenters requested clarification of the proposed general condition. One commenter stated that the condition should be modified to include functionally related components, such as outfalls and developed flows, with the project. Another commenter stated that the condition should be clarified to allow impoundment of water for beneficial use if that is the primary purpose of the project. Many commenters requested clarification of terms used in the preamble discussion relating to this general condition, including ''as close as feasible'' and ''more than minimally flooded or dewatered.'' Other commenters asked if the Corps is relating the preconstruction flows to particular events, such as 50- or 100-year storm flows, or all flows. A commenter requested clarification as to whether the general condition requires on-site detention, if watershed detention is a better solution.

The NWPs are already conditioned to address water quality concerns resulting from activities authorized by NWPs. General Condition 9 requires that the permittee obtain a water quality certification and, for certain NWP activities, develop and implement a water quality management plan to prevent more than minimal degradation of downstream water quality. We do not agree that General Condition 21 requires modification to include outfalls and developed flows with the project because this condition applies to general flow patterns of waters of the United States in the vicinity of the project, not to any specific part of the project. The proposed modification of this condition already contains language allowing the impoundment of water, if that is the primary purpose of the authorized activity. The phrase ''as close as feasible'' as used in the preamble is synonymous with the phrase ''to the maximum extent practicable,'' which is used throughout the text of the general condition. The phrase ''more than minimally flooded or dewatered'' used in the preamble relates to the requirement that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment. District engineers will determine if any changes to surface water flows resulting from the authorized work exceeds the requirements of this general condition.

This general condition applies to the general flow patterns of surface waters over the course of a year, not to any specific storm event. For example, a project authorized by NWP may not cause more than minimal increases in downstream water flows that result in downcutting of the stream bed and substantial increases in stream bed and bank erosion. This general condition does not require any particular method to achieve compliance with the requirements of the general condition. We are proposing to modify the text of the general condition to require the permittee to maintain, to the maximum extent practicable, surface water flow conditions from the site that are similar to preconstruction flow conditions. The text in the July 1, 1998, **Federal Register** notice required the establishment of flow rates similar to preconstruction conditions.

Some commenters stated that the management of water flows is the responsibility of State or local agencies that regulate stormwater management. A number of commenters asked if the Corps or the permittee will be responsible for ensuring compliance with this condition, and what will be required in terms of design and documentation. A couple of commenters asked what type of hydraulic analysis will be required to verify compliance with this condition. Some commenters believe that the Corps should develop consistent standards, guidance, and training programs for the practicable measures that should be incorporated into project plans to comply with this general condition. One commenter requested that the Corps modify the language of the condition to state that project modifications that decrease water supply yield or substantially increase the cost of the water supply yield are not considered practicable for the purposes of the general condition. A commenter recommended modifying the condition to state that practicability determinations will include consideration of costs, benefits, and technical feasibility.

The purpose of the proposed modification of this general condition is to improve protection of the aquatic environment and private property by preventing substantial changes to local surface water flow patterns, as a result of activities authorized by NWPs. If State or local agencies have adequate requirements to manage water flows that accomplish the goals of this general condition, district engineers will normally defer this issue to those agencies. To determine compliance with General Condition 21, district engineers will use discretion, based on general knowledge of local water flow patterns, and will not require a detailed hydrologic analysis or engineering study. The language of this general condition provides district engineers with flexibility to determine if a particular project complies with the general condition. This general condition is not an absolute requirement for maintaining identical preconstruction and postconstruction water flow patterns. In addition, it does not require that the project be designed or constructed to have no effect on water flows. The general condition requires that postconstruction water flow patterns are not more than minimally different from preconstruction water flow patterns.

One commenter stated that the general condition should be modified to allow additional runoff where it can be demonstrated that the increased runoff can be collected by the receiving waterbody and the permittee has received permission from the local flood control agency to add this runoff to the waterbody. For the maintenance of ditches and channelized streams, another commenter recommended modifying this general condition to specify that the flow patterns in the restored ditch will be used to define the preconstruction flow pattern. This commenter said that the deteriorated ditch should not be used to establish the preconstruction flow pattern. A commenter requested modification of this general condition so that it would apply only to off-site areas, not the project site.

If the primary purpose of the proposed work does not include impounding water, and the activity will increase flooding, then the proposed work does not comply with General Condition 21. The project proponent can apply for authorization through the individual permit process or request a regional general permit authorization, if applicable. The maintenance of ditches, including the maintenance of channelized streams used as drainage ditches, may be exempt under Section 404(f) and not require a Section 404 permit. General Condition 21 does not apply to activities exempt from Section 404 permit requirements. Modifying this general condition to allow increases in downstream flows on-site, but prohibiting increases in downstream flows off-site, is impractical. Unless the project site is extremely large, it is likely that any increases in downstream water flows on the project site will extend to off-site areas.

A number of commenters objected to the proposed modifications to this condition. Some commenters stated that the Corps failed to demonstrate the need for the proposed modification. A few commenters said that the Corps does not have the authority to require this condition under the Clean Water Act. Several commenters stated that the Corps does not possess the expertise to enforce this condition and should not regulate activities within floodplains. A commenter believes that the proposed changes to this general condition are contrary to the Corps goal of streamlining the regulatory process. A number of commenters stated that the proposed changes to this general condition would make most projects ineligible for NWP authorization.

Some activities in waters of the United States result in adverse effects on local surface water flow patterns, including increased flooding upstream and downstream of the project site. The purpose of the proposed modifications to General Condition 21 is to require permittees to design and construct their projects to maintain preconstruction downstream flow conditions, unless the primary purpose of the fill is to impound water. Large changes to surface water flow patterns can result in substantial adverse effects on the aquatic environment, by destroying aquatic habitat and impairing water quality. Higher rates of surface runoff caused by increases in the amount of impervious surface in a watershed can create substantial changes in stream morphology, affecting the quality of aquatic habitat and species inhabiting the stream. Water quality will be degraded by increasing the amount of suspended sediment in the water column. For example, the construction of a commercial development, including buildings and parking lots, near a stream can increase storm flows to local streams, which can result in downcutting of the stream bed and increases in bank erosion, destroying aquatic habitat. The proposed modification of this general condition is intended to address these types of changes to surface water flows.

The Clean Water Act provides the Corps with the authority to require this condition, because it is related to the activities regulated under Section 404 of the Clean Water Act. Corps personnel will qualitatively evaluate proposed NWP activities to determine if they comply with this condition. This condition does not expand the Corps regulatory authority to include activities in floodplains; it merely addresses adverse effects to surface water flows that may result from activities in waters of the United States. The proposed modification of General Condition 21 is not contrary to the Corps goal of streamlining the regulatory process, because it requires only a qualitative analysis, not a detailed hydraulic or engineering study, to determine compliance. The phrase ''to the maximum extent practicable'' is used throughout the general condition, and provides district engineers with the flexibility to determine if a particular project complies with this condition. Since this general condition is not an absolute requirement to maintain preconstruction flows, we do not agree that the requirements of this general condition will result in a substantial number of projects becoming ineligible for NWP authorization. We are proposing to modify the last sentence of this general condition to clarify its requirements.

23. Waterfowl Breeding Areas: Although we did not propose any changes to this general condition in the July 1, 1998, **Federal Register** notice, except to consolidate it with the other general conditions, one commenter recommended changing the title of this condition to ''Migratory Bird Breeding Areas'' and adding the phrase ''other migratory birds'' after the phrase ''migratory waterfowl.''

We do not agree with this recommendation, because the inclusion of other migratory birds is outside the scope of the Corps regulatory authority. A goal of the Corps regulatory program is to maintain the quality of the aquatic environment. Including other migratory birds in this general condition would result in an inappropriate increase in the Corps scope of analysis because many migratory bird species are not dependent on wetlands and other waters of the United States. We are not proposing any changes to this general condition.

Proposed General Condition 16, Subdivisions: In the July 1, 1998, **Federal Register** notice, we proposed a new general condition, General Condition 16, entitled ''Subdivisions'' to ensure that only single and complete projects are authorized by the proposed NWPs for residential, commercial, and institutional activities and master planned development activities (*i.e.*, proposed NWPs A and B). A few comments were received in response to this proposed general condition. A commenter remarked that the subdivision date is arbitrary and could allow the NWPs affected by the proposed general condition to authorize activities with more than minimal adverse effects on the aquatic environment. Another commenter stated that subdivisions created after October 5, 1984, should be allowed to use proposed NWP A only once. One commenter recommended that single and complete projects should be determined by the subdivision date, not any phasing schedule for the development. Another commenter stated that the acreage limits for subdivisions should be consistent with regional EPA requirements.

Since the proposed NWP for master planned developments was withdrawn in the October 14, 1998, **Federal Register** notice, we are withdrawing the proposed general condition and placing a modified version of the text in proposed NWP 39, since NWP 39 is the only NWP for which this subdivision provision is currently applicable. NWP 29 has its own subdivision provision. The October 4, 1984, subdivision date is not arbitrary, but this date was chosen to be consistent with the subdivision provision for NWP 26. The reasons for adding a subdivision provision to NWP 26 were addressed in the November 22, 1991, **Federal Register** notice for the reissuance of NWP 26 (see 56 FR 59114). The October 5, 1984, date was selected because it was the date the 1-acre and 10-acre limits were added to NWP 26. A subdivision date was incorporated into NWP 26 to address the issue of single and complete projects, recognizing that most subdivisions are actually individual projects with interrelated components. To provide fairness to the regulated public, we will utilize the same subdivision date for NWP 39.

25. Designated Critical Resource Waters: In response to the comments received in response to the October 14,

1998, **Federal Register** notice concerning the use of NWPs in designated critical resource waters, we are proposing a new NWP general condition that addresses this issue. The proposed general condition prohibits the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity in the following critical resource waters, including wetlands adjacent to these waters. Activities authorized by NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38 can be conducted in these designated critical resources, including adjacent wetlands, provided the permittee notifies the District Engineer in accordance with General Condition 13 and the proposed work will result in minimal adverse effects on the aquatic environment. For the purposes of proposed General Condition 25, no additional notification is required for activities in designated critical resource waters and adjacent wetlands that are authorized by NWPs not listed in the text of this general condition, although notification may be required by other conditions.

For the purposes of the proposed general condition, designated critical resource waters include: NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened or endangered species, coral reefs, State natural heritage sites, or outstanding national resource waters officially designated by the state where those waters are located. Outstanding national resource waters and other waters having particular environmental or ecological significance must be officially designated through an official State process (*e.g.*, adopted through regulatory or statutory processes, approved through State legislation, or designated by the Governor). In those circumstances where a waterbody has been designated by the State, the District Engineer will publish a notice advising the public that such waters will be added to the list of designated critical resource waters. The District Engineer may designate additional critical resource waters after notice and opportunity for public comment.

Paragraph (a) of General Condition 25 refers to General Condition 7 for activities in National Wild and Scenic Rivers. General Condition 25 also states that the NWPs cannot authorize discharges in designated critical habitat for Federally-listed threatened or endangered species unless the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has concurred in a determination of compliance with that general condition.

The comments received in response to the October 14, 1998, **Federal Register** notice related to this new general condition are discussed in detail in a previous section of this **Federal Register** notice.

26. Impaired Waters: As a result of the comments received in response to the October 14, 1998, **Federal Register** notice concerning the use of NWPs in impaired waters, we have proposed a new NWP general condition that restricts the use of NWPs in waterbodies that have been designated as impaired through the Clean Water Act Section 303(d) process. This proposed general condition also applies to wetlands adjacent to those impaired waterbodies. For the purposes of this general condition, ''impaired waters'' are defined as those waters of the United States that have been identified by States or Tribes through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands.

General Condition 26 is based on a presumption that discharges into an impaired waterbody, or wetlands adjacent to that impaired waterbody, will result in further impairment of the waterbody. NWPs cannot be used to authorize discharges of dredged or fill material that result in the loss of greater than 1 acre of impaired waters of the United States and wetlands adjacent to those impaired waters. For activities authorized by NWP 3, this prohibition does not apply, provided the prospective permittee notifies the District Engineer in accordance with General Condition 13 and demonstrates that the work will not result in further impairment of the waterbody. For discharges of dredged or fill material resulting in the loss of 1 acre or less of impaired waters of the United States, including adjacent wetlands, this presumption can be refuted by clear evidence that the proposed project will not further impair the waterbody. To refute this presumption and qualify for NWP authorization, the prospective permittee must submit a notification to the District Engineer in accordance with General Condition 13. The notification must contain a statement explaining how the proposed work will not result in further impairment of the waterbody. Any compensatory mitigation required to offset the losses of impaired waters of the United States, including adjacent wetlands, and ensure that the work results in minimal adverse effects on the aquatic environment should be should be designed to contribute to the reduction of sources of pollution contributing to the impairment. For example, the establishment and maintenance of a vegetated buffer adjacent to a stream impaired due to nutrients will reduce nutrient inputs to that stream (the functions and values of vegetated buffers are discussed in a previous section of this **Federal Register** notice). That vegetated buffer would be considered as compensatory mitigation for a loss of wetlands adjacent to that impaired stream.

If the proposed discharge will result in the loss of greater than ¼ acre of impaired waters and adjacent wetlands, then the District Engineer will coordinate with the State 401 agency in accordance with the procedures in paragraph (e) of General Condition 13. The District Engineer will consider any comments provided by the 401 agency to determine if the proposed work, excluding mitigation, will result in further impairment of the waterbody.

The comments received in response to the October 14, 1998, **Federal Register** notice are discussed in detail in an earlier section of this **Federal Register** notice.

27. Fills Within the 100-year Floodplain: In response to the comments received in response to the October 14, 1998, **Federal Register** notice concerning the use of NWPs to authorize permanent, above-grade fills in waters of the United States within 100-year floodplains, we have proposed NWP General Condition 27. The comments received in response to the 100-year floodplain restriction proposed in the October 14, 1998, **Federal Register** notice are discussed in detail in a previous section of this **Federal Register** notice.

General Condition 27 is based on a presumption that certain NWP activities resulting in permanent, above-grade fills in waters of the United States within 100-year floodplains will cause more than minimal adverse effects on surface hydrology and the functions and values of 100-year floodplains. General Condition 27 prohibits the use of NWPs 21, 29, 39, 40, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within 100-year floodplains. For NWPs 12 and 14, this presumption can be refuted if the prospective permittee clearly demonstrates to the District Engineer that the proposed work and associated mitigation, not decrease the flood-holding capacity of the waterbody and its 100-year floodplain and the proposed

work will not result in more than minimal adverse effects on hydrology, flow regimes, or volumes of water associated with the 100-year floodplain. This demonstration must include proof that the Federal Emergency Management Agency (FEMA) or a state or local flood control authority through a licensed professional engineer, has approved the proposed project and provided a statement that the activity will not increase flooding or result in more than minimal adverse effects to floodplain hydrology or flow regimes. The other NWPs are not subject to the requirements of General Condition 27.

To implement General Condition 27, FEMA's Flood Insurance Rate Maps (FIRMs) will be used to identify 100-year floodplains, provided those maps reflect the current extent of 100-year floodplains. If there are no FIRMs published for the project area, or if the latest FIRM does not represent the current 100-year floodplain, information from the appropriate local floodplain authority will be used to determine the boundaries of the 100-year floodplain. Projects located in a 100-year floodplain at the point in the watershed that has a drainage area of less than 1 square mile are not subject to General Condition 27.

General Condition 27 prohibits the use of NWPs 21, 29, 39, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within 100-year floodplains. For activities authorized by these NWPs, the prospective permittee must notify the District Engineer in accordance with General Condition 13. The notification must include documentation that the proposed work will not be located in the 100-year floodplain or will not result in permanent, above-grade fills in waters of the United States within the 100-year floodplain. Activities authorized by NWPs 21, 29, 39, 42, 43, and 44 that occur within 100-year floodplains but do not result in permanent, above-grade fills in waters of the United States within the 100-year floodplain are not subject to General Condition 27. The term ''permanent above-grade fill'' is defined in the ''Definitions'' section of the NWPs. The District Engineer will make the final determination as to whether a project is actually located in the 100-year floodplain or whether the project results in permanent, above-grade fills in waters of the United States.

General Condition 27 does not prohibit the use of NWPs 12 and 14 to authorize discharges into waters of the United States resulting in permanent, above-grade wetland fills in waters of the United States within 100-year floodplains, provided the prospective permittee clearly demonstrates to the District Engineer that the activity will not decrease flood-holding capacity and will not result in more than minimal modifications of hydrology, flow regime, or volume of waters associated with the 100-year floodplain. The prospective permittee must notify the District Engineer in accordance with General Condition 13 if the proposed work will result in permanent, above-grade wetland fills in waters of the United States within the 100-year floodplains. The notification must include documentation that clearly demonstrates that the project will not increase flooding or result in more than minimal changes to floodplain hydrology or flow regimes. This documentation must include proof that FEMA, or a state or local flood control authority through a licensed professional engineer, has approved the proposed project and provided a statement that the project does not increase flooding or cause more than minimal alterations to floodplain hydrology or flow regimes. Activities authorized by NWPs 12 and 14 that occur within 100-year floodplains but do not result in permanent, above-grade fills in waters of the United States within the 100-year floodplain are not subject to General Condition 27.

V. Comments and Responses on Nationwide Permit Definitions

General

In the July 1, 1998, **Federal Register** notice, we proposed to add a definition section to the NWPs to promote consistency in the implementation of the NWPs. We requested comments on the definitions presented in the **Federal Register** notice. Approximately 45 commenters addressed the proposed definitions.

One commenter stated that the Corps has replaced a simple measurement of 5 cubic feet per second for headwaters determinations for the purposes of NWP 26 with confusing terms and conditions for the new and modified NWPs. This commenter believes that requiring permit applicants to distinguish between perennial, intermittent, and ephemeral streams, contiguous and noncontiguous wetlands, non-tidal wetlands and tidal wetlands, and Section 10 and non-Section 10 waters is too confusing and will undermine the NWP program. One commenter asked if it is the intent of the Corps to expand the applicability of the new NWPs to non-contiguous but adjacent waters.

We believe that the terms used with the proposed new and modified NWPs will promote consistency in the NWP program, make the NWP program easier to implement, and provide District personnel with the means to better assess impacts to the aquatic environment. These terms help Corps personnel to classify some types of aquatic resources and make determinations of minimal adverse effects. The three types of streams cited in the **Federal Register** notice are generally accepted stream types, based on the duration of water flow in the stream channel. We have modified the applicable waters for most of the proposed new NWPs to prohibit their use in non-tidal wetlands adjacent to tidal waters. Non-tidal and tidal wetlands have some different functions and values. For years, Corps personnel have had to distinguish between tidal and non-tidal wetlands and between Section 10 and non-Section 10 waters. Corps personnel have had to identify these types of waters to determine which type of authorization a particular project may require.

In the July 1, 1998, **Federal Register** notice, we proposed definitions for the three different types of streams. One commenter suggested that the Corps provide clarification or a definition to help determine when a stream has sufficient flow to be considered a ''water of the United States.'' This commenter recommended that a stream should be considered a water of the United States only if it is shown as a perennial or intermittent stream on a United States Geological Survey (U.S.G.S.) quadrangle map. Two commenters stated that many perennial, intermittent, and ephemeral streams are perched above the water table and that the definitions of these stream types should be based on flow hydrographs measured over the course of a year, not the relationship between the stream bed and the water table. One commenter said that the different stream types cannot be differentiated in the field and asked whether perennial, intermittent, and ephemeral streams have identifiable beds and banks.

The Corps regulations state that non-tidal waters of the United States, including perennial, intermittent, and ephemeral streams, are waters of the United States up to the ordinary high water mark (see 33 CFR Part 328.4(c)). These three stream types typically have a bed and bank, but the presence of a bed and bank should not be used to identify streams; a gully created by erosion can also be considered to have a bed and bank. If a landscape feature with a bed and bank does not have an ordinary high water mark, it is not a water of the United States unless it contains jurisdictional wetlands. We do not agree that U.S.G.S. maps should be used to determine the limits of

intermittent and perennial streams. The upper reaches of streams are often inaccurately mapped on U.S.G.S. quadrangles. These maps typically do not accurately depict the location and extent of intermittent or ephemeral streams. They are useful for identifying perennial streams, but they should be used with caution. Distinguishing between these three stream types will often require field observations.

Stream beds can be located above or below the water table. Influent streams contribute water to the groundwater because their beds are usually located above the water table. Groundwater provides flowing water to effluent streams because the beds of effluent streams are located below the water table. The interaction between groundwater and stream flows also depends on local geologic features. Perennial streams are mostly effluent streams, flowing even during dry periods. Intermittent streams can be either effluent or influent, depending on the time of year and local precipitation patterns. During wetter months, when the water table is high or at normal elevations, intermittent streams are usually effluent. Intermittent streams are also effluent during short dry periods. During substantial dry periods, intermittent streams are usually influent. Ephemeral streams are always influent, because their beds are located above the water table year round.

Although the focus of the definitions of these stream types is the duration of flowing water over the course of a year, it is important to consider the source of the water flowing in the channel. We believe that it is appropriate to consider the source of water when classifying streams as ephemeral, intermittent, or perennial. However, as with any classification scheme for natural systems, there are exceptions. For example, in some mountain ranges there may be streams with flowing water almost year round due to snow melt. Some of these stream channels may receive no water from groundwater; the only source of water is melting snow. In these areas, stream channels with flowing water year round due to snow melt should be considered perennial. If flowing water is present in the channel for long periods of time due to snow melt, but water flow is not year round, those streams should be considered intermittent.

Artificial sources of water should not affect determinations of stream types. For example, pumping water into an ephemeral stream channel for a long period of time should not cause that stream to be classified as an intermittent stream. We recognize that the definitions proposed in the July 1, 1998, **Federal Register** notice do not completely address all possible factors that can influence the classification of stream types based on duration of flow, but by basing the definitions of perennial, intermittent, and ephemeral streams on the contribution of groundwater to flow patterns, Corps district personnel can consistently apply these definitions in a simple and effective manner in most parts of the country, without the need to do extensive hydrology studies. District engineers will use their discretion to distinguish between ephemeral, intermittent, and perennial streams. These determinations should be based on their general knowledge of flow patterns in the area. District engineers can consider any additional information the permit applicant provides, based on actual measurements or modeling.

It is also important to note that, with the exception of proposed NWP 43, classifying streams as perennial, intermittent, or ephemeral is used only to determine whether or not a PCN is required. For example, proposed NWP 42 requires a PCN for discharges causing the loss of greater than 500 linear feet of perennial or intermittent stream bed. NWP 43 does not authorize the construction of stormwater management facilities in perennial streams. District engineers can regionally condition the NWPs to require notification for certain stream types and exercise discretionary authority when a particular activity may result in more than minimal adverse effects on the aquatic environment.

A commenter stated that the boundary between tidal waters and non-tidal wetlands is not well-defined or readily discernible in some parts of the country and that it will be difficult to determine the precise landward limits of tidal influence and which NWP is applicable. Another commenter said that the proposed definitions of tidal and non-tidal wetlands appear to exclude freshwater wetlands.

The boundary between tidal wetlands and non-tidal wetlands can be estimated by identifying the species of plants inhabiting the area. Tidal wetlands often have a different plant species composition than non-tidal wetlands, which may be used as an indicator of the extent of tidal waters. In most cases, judgement will be required to estimate the location of the high tide line. Wrack lines can be used to locate the high tide line. However, it is not our intent to require permit applicants to conduct land surveys or utilize tide gages to determine the limit of tidal waters. The definitions of tidal and non-tidal wetlands do not exclude freshwater wetlands. Tidal wetlands can be inundated by saline (*i.e.*, marine or estuarine) water or freshwater. Non-tidal wetlands are mostly freshwater wetlands, but there are non-tidal saline marshes in some parts of the country.

Specific Definitions

The following paragraphs discuss the comments received in response to the July 1, 1998, **Federal Register** notice concerning the proposed definitions for the NWPs.

Aquatic Bench: Two commenters stated that the definition of this term should not be limited to stormwater management facilities. They said that these areas are found in natural waterbodies, such as ponds or lakes.

This term is defined for the purposes of NWP 43, Stormwater Management Facilities. It refers to a specific type of area within a stormwater management facility that is constructed for the purpose of providing a substrate in water depths shallow enough to support populations of emergent aquatic vegetation that may enhance the functions of the stormwater management facility. Although these types of areas can be found naturally in ponds and lakes, we would simply consider them to be wetlands. Aquatic benches constructed in stormwater management facilities may or may not be considered waters of the United States for the purposes of Section 404, depending on the circumstances in which they are found. If they are constructed wetlands intended to improve the quality of water retained in the stormwater management facility, they are not considered jurisdictional wetlands. We are proposing to retain this definition as originally proposed.

Best Management Practices: No comments were received concerning this term. We are proposing to retain this definition as originally proposed.

Channelized stream: We received several comments concerning the proposed definition of this term. One commenter said that not all stream channelization results in increases in flow rate or water capacity. Another commenter stated that a channelized stream has been manipulated to fix the channel location, not to increase conveyance, and that the definition should focus on the fixed nature of stream channels, not water flow rates. One commenter asked whether the proposed definition includes transportation activities that change the channel cross-section or other aspects of channel geometry of a stream. This commenter stated that construction of a road embankment may require filling some stream bed and moving the stream

channel to protect the embankment. According to this commenter, this work does not increase conveyance of water, but changes the channel geometry. This commenter wanted assurance that these types of activities are exempt from Section 404 permit requirements. Another commenter recommended that the Corps add a statement to the definition to clarify that stream channelization requires a Section 404 and/or Section 10 permit from the Corps.

Changing the morphology of the stream channel to increase the rate of flow through the stream channel constitutes stream channelization. Relocating the stream channel is not necessarily ''stream channelization'' unless the relocation is intended to increase the rate of water flow through the stream channel. Streams can be relocated, with natural morphology such as meanders, with little or no changes in water flow rates. Stabilizing stream banks near a road crossing (either a bridge or culvert) is not considered stream channelization, unless the stream bed is armored and/or excavated for a substantial distance from the road crossing to increase the rate of water flow. Stream bank stabilization does not necessarily result in channelization, even though it may fix the position of the stream bed in the landscape. If only one bank is covered with rip rap to reduce or prevent bank erosion, then we do not consider that activity as stream channelization. However, lining the stream bed and banks with concrete to increase the rate of water flow through the stream channel is a method of stream channelization that does not necessarily change the location of the stream bed. For the purposes of NWP 14 and other NWPs that can be used to authorize road crossings, stabilizing stream banks near culverts or bridge abutments to prevent erosion near the road crossings, is not considered stream channelization. The construction of a road embankment by filling some of the stream and/or relocating the stream bed is not exempt from Section 404 permit requirements, because these activities are not included in Section 404(f) of the Clean Water Act and they involve discharges of dredged or fill material into waters of the United States. We do not believe it is necessary to include a sentence in the definition stating that a Section 404 or Section 10 permit is required for stream channelization activities.

One commenter requested clarification as to whether stream channelization, when done in conjunction with the construction of a road crossing, is part of the road crossing or requires separate authorization. Another commenter requested that the definition clarify whether the use of culverts to construct a road crossing results in a channelized stream. This commenter stated that some Corps districts consider culverts as channel modifications, while others do not.

Channel modifications in the immediate vicinity of a stream crossing that are conducted to allow the water to flow more efficiently through the crossing or prevent erosion of the soil near the crossing are not considered stream channelization and are part of the single and complete road crossing project. Channel modifications outside of the immediate vicinity of the crossing may constitute stream channelization, and may require a separate authorization at the discretion of the District Engineer. When stream channelization is performed with the construction of a road crossing, both activities should be considered as a single and complete project, which may be authorized by NWPs or another form of authorization, such as a regional general permit or an individual permit. The installation of a culvert in a stream bed does not channelize the stream, provided the length and width of the culvert is limited to the minimum necessary to construct the road crossing and the amount of rip rap placed to protect the culvert is the minimum necessary.

One commenter objected to the last sentence of the proposed definition, stating that this sentence is contrary to the Section 404(f) exemption for drainage ditches. We concur with this comment and have removed the last sentence from this definition.

In the proposed new and modified NWPs, we used different terms relating to stream channelization. For consistency, we will use the term ''stream channelization'' throughout the proposed new and modified NWPs. Stream channelization results from modifications to increase the rate of water flow through the stream channel. Placing rip rap along a stream bank to stabilize the bank and reduce erosion does not necessarily constitute stream channelization, but lining the stream bed and bank with concrete or rip rap to increase the rate of water flow through the stream channel is stream channelization.

We are proposing to replace the term ''channelized stream'' with ''stream channelization'' and modify the definition as discussed above.

Contiguous wetland: We received many comments concerning the proposed definition of this term. Some commenters stated that the definition is unclear. Another commenter stated that the geographic scope of new NWPs is confusing and that the definition appears to provide inconsistent guidance describing when a non-tidal wetland is contiguous to tidal waters. Two commenters requested that the Corps utilize the term ''adjacent'' instead of ''contiguous'' to limit the use of the new NWPs. One commenter expressed concern that the term ''surface waters'' would exclude wetlands that are inundated or saturated primarily by groundwater. This commenter recommended the inclusion of groundwater to establish the contiguous connection.

One commenter requested that the Corps clarify the phrase ''normally contiguous to the nearest open water,'' as contained in the proposed definition. Another commenter questioned why a wetland can act as a surface water connection for a contiguous wetland but a channel cannot, even though a stream channel contains a surface water. One commenter recommended that this definition should state that culverts and tide gates constitute a surface water connection and that the definition is confusing and should be field tested in different areas of the country. This commenter also stated that it is difficult enough to distinguish between tidal and non-tidal areas of a channel without having to worry about small tributaries or sloughs draining into the larger waterbody. The commenter requested that the Corps clarify the definition to state whether the required surface water connection has to be present at low, normal, or high flows or associated with a certain size flood event. Another commenter asked if tide gates break up the contiguous connection. One commenter stated that the proposed definition appears to be a significant change for the purpose of circumventing the decision in the United States Court of Appeals for the Fourth Circuit decision in the *United States* v. *Wilson,* 133 F. 3d 251 (4th Cir. 1997). This commenter believes that the proposed definition will result in the regulation of all isolated waters and wetlands, regardless of the type of connection, and that the definition must be clarified to recognize the different connections between waters of the United States to determine if a particular wetland is isolated. The commenter also believes that the proposed definition eliminates the distinction between natural streams and man-made connections to waters of the United States.

To increase protection of the aquatic environment, we are proposing to prohibit the use of most of the new