



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, LOUISVILLE DISTRICT  
INDIANAPOLIS REGULATORY OFFICE  
8902 OTIS AVENUE, SUITE S106B  
INDIANAPOLIS, IN 46216

August 22, 2023

Regulatory Division  
North Branch  
ID No. LRL-2022-00988-sjk

Mr. Thomas Kretz  
TMK Development, LLC  
9335 Forgotten Creek Drive  
Indianapolis, Indiana 46260

Dear Mr. Kretz:

This is regarding electronic correspondence dated August 18, 2023, from V3 Companies concerning the proposed installation of riprap bank protection along 70 feet of Williams Creek. Additionally, two stormwater outfalls and riprap scour protection would be constructed within a total of 40 feet of Williams Creek. The project is located at latitude 39.9244° and longitude -86.1722°, Indianapolis, Marion County, Indiana. We have reviewed the submitted information pursuant to Section 404 of the Clean Water Act.

We have determined that the proposed work is authorized under the provisions of 33 CFR 330 Nationwide Permit (NWP) No. 7, Outfall Structures and Associated Intake Structures, and NWP No. 13, Bank Stabilization, as published in the Federal Register on December 27, 2021. We do require compliance with the enclosed Terms, General, and Regional Conditions of the NWPs and the following Special Condition:

1. The Permittee shall comply with all conditions of the Section 401 Water Quality Certification dated December 14, 2020, issued by the Indiana Department of Environmental Management, which are incorporated herein by reference.

This verification is valid until March 14, 2026. The enclosed Compliance Certification must be submitted to the District Engineer within 30 days of completion of the authorized activity. Note that we also perform periodic inspections to ensure compliance with our permit conditions and applicable Federal laws.

If you have any questions, please contact me by emailing Sarah.J.Keller@usace.army.mil, or call (317) 543-9424. Any correspondence on this matter should refer to our ID Number LRL-2022-00988-sjk.

Sincerely,

Sarah J. Keller  
Team Leader  
Indianapolis Regulatory Office

Enclosures; Copy Furnished: IDEM (Wrin), V3 (Vine)

## Compliance Certification

**Permit Number:** LRL-2022-00988-sjk (bank stabilization, outfalls)

**Name of Permittee:** TMK Development, LLC

**Agent:** V3 Companies

**Date of Issuance:** August 22, 2023

Within 30 days of completion of the authorized activity or implementation of any required compensatory mitigation (whichever occurs later), sign this certification and return it to [Sarah.J.Keller@usace.army.mil](mailto:Sarah.J.Keller@usace.army.mil) or the following address:

USACE - Louisville District  
Indianapolis Regulatory Office  
8902 Otis Avenue, Suite S106B  
Indianapolis, IN 46216

Please note that your permitted activity is subject to a compliance inspection by an U.S. Army Corps of Engineers representative. If you fail to comply with this permit, you are subject to permit suspension, modification, or revocation.

I hereby certify that the work authorized by the above referenced permit has been completed in accordance with the terms and conditions of the said permit and required mitigation (if applicable) was completed in accordance with the permit conditions.

\_\_\_\_\_  
Signature for Permittee

\_\_\_\_\_  
Date



# 2021 Nationwide Permit Summary

US Army Corps  
of Engineers  
Louisville District ®

Issued: February 25, 2022  
Expires: March 14, 2026

## **No. 7. Outfall Structures and Associated Intake Structures**

(NWP Final Rule, 86 FR 73522)

Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (Section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP unless they are directly associated with an authorized outfall structure.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404).

### **Nationwide Permit General Conditions**

**Note:** To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through

330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

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

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his or her authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. **Aquatic Life Movements.** No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed

and constructed to minimize adverse effects to aquatic life movements.

3. **Spawning Areas.** Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. **Migratory Bird Breeding Areas.** Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. **Shellfish Beds.** No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. **Suitable Material.** No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

7. **Water Supply Intakes.** No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. **Adverse Effects From Impoundments.** If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. Management of Water Flows. To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. Fills Within 100-Year Floodplains. The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

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

12. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. Removal of Temporary Structures and Fills. Temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. Proper Maintenance. Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with

applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. Single and Complete Project. The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. Wild and Scenic Rivers. (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. Permittees shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

17. Tribal Rights. No activity or its operation may impair reserved tribal rights,

including, but not limited to, reserved water rights and treaty fishing and hunting rights.

18. Endangered Species. (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of "effects of the action" for the purposes of ESA section 7 consultation, as well as 50 CFR 402.17, which provides further explanation under ESA section 7 regarding "activities that are reasonably certain to occur" and "consequences caused by the proposed action."

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, and shall not begin work on the activity until notified by the district

engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), the pre-construction notification must include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. For activities where the non-Federal applicant has identified listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have "no effect" on listed species (or species proposed for listing or designated critical habitat (or critical habitat proposed for such designation), or until ESA section 7 consultation or conference has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation or conference with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

(e) Authorization of an activity by an NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a

listed species, where "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word "harm" in the definition of "take" means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.nmfs.noaa.gov/pr/species/esa/> respectively.

19. Migratory Birds and Bald and Golden Eagles. The permittee is responsible for ensuring that an action authorized by an NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether "incidental take" permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. Historic Properties. (a) No activity is authorized under any NWP which may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)(1)). If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed

NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts commensurate with potential impacts, which may include background research, consultation, oral history interviews, sample field investigation, and/or field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect.

(d) Where the non-Federal applicant has identified historic properties on which the proposed NWP activity might have the potential to cause effects and has so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed. For non-federal permittees, the district engineer will notify the prospective permittee within 45

days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. Discovery of Previously Unknown Remains and Artifacts. Permittees that discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by an NWP, they must immediately notify the district engineer of what they have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will

initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. Designated Critical Resource Waters. Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, 52, 57 and 58 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed by permittees in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after she or he determines that the impacts to the critical resource waters will be no more than minimal.

23. Mitigation. The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 3/100-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of 3/100-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. If restoring riparian areas involves planting vegetation, only native species should be planted. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2)

and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f).)

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)). If permittee-responsible mitigation is the proposed option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement.

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).

(6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to

reduce the adverse environmental effects of the activity to the no more than minimal level.

24. Safety of Impoundment Structures. To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state or federal, dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. Water Quality. (a) Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA section 401, a CWA section 401 water quality certification for the proposed discharge must be obtained or waived (see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by certifying authority for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed discharge in order for the activity to be authorized by an NWP.

(b) If the NWP activity requires pre-construction notification and the certifying authority has not previously certified compliance of an NWP with CWA section 401, the proposed discharge is not authorized by an NWP until water quality certification is obtained or waived. If the certifying authority issues a water quality certification for the proposed discharge, the permittee must submit a copy of the certification to the district engineer. The discharge is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied by the issuance of a water quality certification or a waiver.

(c) The district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. Coastal Zone Management. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). If the permittee cannot comply with all of the conditions of a coastal zone management consistency concurrence previously issued by the state, then the permittee must obtain an individual coastal zone management consistency concurrence or presumption of concurrence in order for the activity to be authorized by an NWP. The district engineer or a state may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its CWA section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is authorized, subject to the following restrictions:

(a) If only one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

(b) If one or more of the NWPs used to authorize the single and complete project has specified acreage limits, the acreage loss of waters of the United States authorized by those NWPs cannot exceed



their respective specified acreage limits. For example, if a commercial development is constructed under NWP 39, and the single and complete project includes the filling of an upland ditch authorized by NWP 46, the maximum acreage loss of waters of the United States for the commercial development under NWP 39 cannot exceed 1/2-acre, and the total acreage loss of waters of United States due to the NWP 39 and 46 activities cannot exceed 1 acre.

29. Transfer of Nationwide Permit Verifications. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

“When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”

\_\_\_\_\_  
(Transferee)

\_\_\_\_\_  
(Date)

30. Compliance Certification. Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible

mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

- (a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;
- (b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and
- (c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

31. Activities Affecting Structures or Works Built by the United States. If an NWP activity also requires review by, or permission from, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a “USACE project”), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission and/or review is not authorized by an NWP until the appropriate Corps office issues the section 408 permission or completes its review to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. Pre-Construction Notification. (a) *Timing*. Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) 45 calendar days have passed from the district engineer’s receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is “no effect” on listed species or “no potential to cause effects” on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. If the proposed activity requires a written waiver

to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

- (1) Name, address and telephone numbers of the prospective permittee;
- (2) Location of the proposed activity;
- (3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;
- (4) (i) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures.

(ii) For linear projects where one or more single and complete crossings require pre-construction notification, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by an NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project, and does not change those non-PCN NWP activities into NWP PCNs.

(iii) Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial and intermittent streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45-day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective

permittee may submit a conceptual or detailed mitigation plan.

(7) For non-federal permittees, if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (or critical habitat proposed for such designation), the PCN must include the name(s) of those endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the "study river" (see general condition 16); and

(10) For an NWP activity that requires permission from, or review by, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a

statement confirming that the project proponent has submitted a written request for section 408 permission from, or review by, the Corps office having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification:* The nationwide permit pre-construction notification form (Form ENG 6082) should be used for NWP PCNs. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) all NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iii) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (e.g., via e-mail, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or e-mail that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse

environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure that the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

#### **D. District Engineer's Decision**

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the

district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the single and complete crossings of waters of the United States that require PCNs to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings of waters of the United States authorized by an NWP. If an applicant requests a waiver of an applicable limit, as provided for in NWPs 13, 36, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method

may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters. The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure that the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the

district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) that the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse environmental effects, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

#### **E. Further Information**

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

2. NWPs do not obviate the need to obtain other federal, state, or local permits,

approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

#### **F. Nationwide Permit Definitions**

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term "discharge" means any discharge of dredged or fill material into waters of the United States.

Ecological reference: A model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on the structure, functions, and dynamics of an aquatic habitat type or a riparian area type that currently exists in the region where the proposed NWP 27 activity is located. Alternatively, an ecological reference may be based on a conceptual model for the aquatic habitat type or riparian area type to

be restored, enhanced, or established as a result of the proposed NWP 27 activity. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

High Tide Line: The line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet

the National Register criteria (36 CFR part 60).

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

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. The loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters or wetlands for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act, are not considered when calculating the loss of waters of the United States.

Navigable waters: Waters subject to section 10 of the Rivers and Harbors Act of 1899. These waters are defined at 33 CFR part 329.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of "open waters" include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

Perennial stream: A perennial stream has surface water flowing continuously year-round during a typical year.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-

construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

**Preservation:** The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

**Re-establishment:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

**Rehabilitation:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

**Restoration:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

**Riffle and pool complex:** Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated

with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

**Riparian areas:** Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

**Shellfish seeding:** The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

**Single and complete linear project:** A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term “single and complete project” is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

**Single and complete non-linear project:** For non-linear projects, the term “single and complete project” is defined at 33 CFR

330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of “independent utility”). Single and complete non-linear projects may not be “piecemealed” to avoid the limits in an NWP authorization.

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

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

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

**Stream channelization:** The manipulation of a stream’s course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized jurisdictional stream remains a water of the United States.

**Structure:** An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a jurisdictional wetland that is inundated by tidal waters. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line.

Tribal lands: Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Tribal rights: Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

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

Waterbody: For purposes of the NWP, a waterbody is a “water of the United States.” If a wetland is adjacent to a waterbody determined to be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)).



# 2021 Nationwide Permit Summary

US Army Corps  
of Engineers  
Louisville District ®

Issued: February 25, 2022  
Expires: March 14, 2026

## **No. 13. Bank Stabilization** (NWP Final Rule, 86 FR 73522)

Bank stabilization activities necessary for erosion control or prevention, such as vegetative stabilization, bioengineering, sills, rip rap, revetment, gabion baskets, stream barbs, and bulkheads, or combinations of bank stabilization techniques, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge of dredged or fill material will result in no more than minimal adverse environmental effects (an exception is for bulkheads—the district engineer cannot issue a waiver for a bulkhead that is greater than 1,000 feet in length along the bank);

(c) The activity will not exceed an average of one cubic yard per running foot, as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line, unless the district engineer waives this criterion by making a written determination concluding that the discharge of dredged or fill material will result in no more than minimal adverse environmental effects;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge of dredged or fill material will result in no more than minimal adverse environmental effects;

(e) No material is of a type, or is

placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored native trees and treetops may be used in low energy areas);

(g) Native plants appropriate for current site conditions, including salinity, must be used for bioengineering or vegetative bank stabilization;

(h) The activity is not a stream channelization activity; and

(i) The activity must be properly maintained, which may require repairing it after severe storms or erosion events. This NWP authorizes those maintenance and repair activities if they require authorization.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to construct the bank stabilization activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

**Notification:** The permittee must submit a pre-construction notification to the

district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges of dredged or fill material into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of dredged or fill material of greater than an average of one cubic yard per running foot as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note:** In coastal waters and the Great Lakes, living shorelines may be an appropriate option for bank stabilization, and may be authorized by NWP 54.

## **Nationwide Permit General Conditions**

**Note:** To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.



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

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his or her authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. Aquatic Life Movements. No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

3. Spawning Areas. Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. Migratory Bird Breeding Areas. Activities in waters of the United States that

serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. Shellfish Beds. No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. Suitable Material. No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

7. Water Supply Intakes. No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. Adverse Effects From Impoundments. If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. Management of Water Flows. To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. Fills Within 100-Year Floodplains. The activity must comply with applicable

FEMA-approved state or local floodplain management requirements.

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

12. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. Removal of Temporary Structures and Fills. Temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. Proper Maintenance. Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. Single and Complete Project. The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. Wild and Scenic Rivers. (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild

and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. Permittees shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

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

18. Endangered Species. (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of “effects of the action” for the purposes of ESA section 7 consultation, as

well as 50 CFR 402.17, which provides further explanation under ESA section 7 regarding “activities that are reasonably certain to occur” and “consequences caused by the proposed action.”

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), the pre-construction notification must include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. The district engineer will determine whether the proposed activity “may affect” or will have “no effect” to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps’ determination within 45 days of receipt of a complete pre-construction notification. For activities where the non-

Federal applicant has identified listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing or designated critical habitat (or critical habitat proposed for such designation), or until ESA section 7 consultation or conference has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation or conference with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

(e) Authorization of an activity by an NWP does not authorize the “take” of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with “incidental take” provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word “harm” in the definition of “take” means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition.

The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.nmfs.noaa.gov/pr/species/esa/> respectively.

19. Migratory Birds and Bald and Golden Eagles. The permittee is responsible for ensuring that an action authorized by an NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether "incidental take" permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. Historic Properties. (a) No activity is authorized under any NWP which may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places until the requirements of Section 106 of the

National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)(1)). If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts commensurate with potential impacts, which may include background research, consultation, oral history interviews, sample field investigation, and/or field

survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect.

(d) Where the non-Federal applicant has identified historic properties on which the proposed NWP activity might have the potential to cause effects and has so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed. For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant

adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. Discovery of Previously Unknown Remains and Artifacts. Permittees that discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by an NWP, they must immediately notify the district engineer of what they have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. Designated Critical Resource Waters. Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, 52, 57 and 58 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed by permittees in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after she or he determines that the impacts to the critical resource waters will be no more than minimal.

23. Mitigation. The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-

by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 3/100-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of 3/100-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. If restoring riparian areas involves planting vegetation, only native species should be planted. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the

waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWP, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f).)

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)). If permittee-responsible mitigation is the proposed option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement.

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).

(6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage

limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

24. Safety of Impoundment Structures. To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state or federal, dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. Water Quality. (a) Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA section 401, a CWA section 401 water quality certification for the proposed discharge

must be obtained or waived (see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by certifying authority for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed discharge in order for the activity to be authorized by an NWP.

(b) If the NWP activity requires pre-construction notification and the certifying authority has not previously certified compliance of an NWP with CWA section 401, the proposed discharge is not authorized by an NWP until water quality certification is obtained or waived. If the certifying authority issues a water quality certification for the proposed discharge, the permittee must submit a copy of the certification to the district engineer. The discharge is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied by the issuance of a water quality certification or a waiver.

(c) The district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. Coastal Zone Management. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). If the permittee cannot comply with all of the conditions of a coastal zone management consistency concurrence previously issued by the state, then the permittee must obtain an individual coastal zone management consistency concurrence or presumption of concurrence in order for the activity to be authorized by an NWP. The district engineer or a state may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its CWA section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is authorized, subject to the following restrictions:

(a) If only one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

(b) If one or more of the NWPs used to authorize the single and complete project has specified acreage limits, the acreage loss of waters of the United States authorized by those NWPs cannot exceed their respective specified acreage limits. For example, if a commercial development is constructed under NWP 39, and the single and complete project includes the filling of an upland ditch authorized by NWP 46, the maximum acreage loss of waters of the United States for the commercial development under NWP 39 cannot exceed 1/2-acre, and the total acreage loss of waters of United States due to the NWP 39 and 46 activities cannot exceed 1 acre.

29. Transfer of Nationwide Permit Verifications. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be

attached to the letter, and the letter must contain the following statement and signature:

“When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”

\_\_\_\_\_  
\_\_\_\_\_  
(Transferee)

\_\_\_\_\_  
(Date)

30. Compliance Certification. Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

(a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;

(b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee

secured the appropriate number and resource type of credits; and

(c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

31. Activities Affecting Structures or Works Built by the United States. If an NWP activity also requires review by, or permission from, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a "USACE project"), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission and/or review is not authorized by an NWP until the appropriate Corps office issues the section 408 permission or completes its review to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. Pre-Construction Notification. (a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not

commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

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

(2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) (i) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures.

(ii) For linear projects where one or more single and complete crossings require pre-construction notification, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by an NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project, and does not change those non-PCN NWP activities into NWP PCNs.

(iii) Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the

proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial and intermittent streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45-day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-federal permittees, if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (or critical habitat proposed for such designation), the PCN must include the name(s) of those endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the "study river" (see general condition 16); and

(10) For an NWP activity that requires permission from, or review by, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408 permission from, or review by, the Corps office having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification:* The nationwide permit pre-construction notification form (Form ENG 6082) should be used for NWP PCNs. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) all NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iii) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (e.g., via e-mail, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or e-mail that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure that the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or



economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

#### **D. District Engineer's Decision**

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the single and complete crossings of waters of the United States that require PCNs to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings of waters of the United States authorized by an NWP. If an applicant requests a waiver of an applicable limit, as provided for in NWPs 13, 36, or 54, the district engineer will only grant the waiver upon a written determination that the NWP

activity will result in only minimal individual and cumulative adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters. The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines

that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure that the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) that the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity is authorized under the NWP with specific

modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse environmental effects, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

#### **E. Further Information**

1. District engineers have authority to determine if an activity complies with the terms and conditions of an NWP.
2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.
3. NWPs do not grant any property rights or exclusive privileges.
4. NWPs do not authorize any injury to the property or rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

#### **F. Nationwide Permit Definitions**

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration (re-establishment or rehabilitation),

establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term “discharge” means any discharge of dredged or fill material into waters of the United States.

Ecological reference: A model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on the structure, functions, and dynamics of an aquatic habitat type or a riparian area type that currently exists in the region where the proposed NWP 27 activity is located. Alternatively, an ecological reference may be based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the proposed NWP 27 activity. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

High Tide Line: The line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

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

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. The loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters or wetlands for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act, are not considered when calculating the loss of waters of the United States.

Navigable waters: Waters subject to section 10 of the Rivers and Harbors Act of 1899. These waters are defined at 33 CFR part 329.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be

open waters. Examples of “open waters” include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

Perennial stream: A perennial stream has surface water flowing continuously year-round during a typical year.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a

former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or

shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

**Single and complete linear project:** A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term “single and complete project” is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

**Single and complete non-linear project:** For non-linear projects, the term “single and complete project” is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of “independent utility”). Single and complete non-linear projects may not be “piecemealed” to avoid the limits in an NWP authorization.

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

**Stormwater management facilities:** Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds

and best management practices, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

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

**Stream channelization:** The manipulation of a stream’s course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized jurisdictional stream remains a water of the United States.

**Structure:** An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

**Tidal wetland:** A tidal wetland is a jurisdictional wetland that is inundated by tidal waters. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line.

**Tribal lands:** Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

**Tribal rights:** Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished

aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

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

**Waterbody:** For purposes of the NWPs, a waterbody is a “water of the United States.” If a wetland is adjacent to a waterbody determined to be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)).

**INDIANA REGIONAL GENERAL CONDITIONS FOR**  
**THE STATE OF INDIANA**

These Regional General Conditions are in addition to but do not supersede the requirements in the Federal Register, Volume 86, No. 8, January 13, 2021. Information on pre-construction notification (PCN) procedures can be found in General Condition 32 *Pre-Construction Notification* (pp 2873), while *loss of waters of the United States* is defined in the Nationwide Permit Definitions (pp 2876).

**Regional Conditions Applicable to Specific NWP's within Indiana:**

1. Notification in accordance with General Condition 32 is required to the Corps for impacts to waters of the United States exceeding 0.1 acre for the NWP listed below.

NWP 33 (Temporary Construction, Access, and Dewatering)

**Regional Conditions Applicable to all NWP's within Indiana:**

2. Notification in accordance with General Condition 32 is required to the Corps for all activities affecting Designated Salmonid Waters, Outstanding State Resource Waters, Exceptional Use Streams, and Critical Wetlands and Critical Special Aquatic Sites (See Attachments 1 and 2).
3. Notification in accordance with General Condition 32 is required to the Corps for all activities which would cause, alter, or affect diversion of water from the Great Lakes basin.

## **ATTACHMENT 1**

### **Designated Salmonid Waters**

1. Trail Creek & tributaries downstream to Lake Michigan, LaPorte County.
2. East Branch of the Little Calumet River and its tributaries downstream to Lake Michigan via Burns Waterway (Ditch), Porter, and LaPorte Counties.
3. The Indiana portion of the open waters of Lake Michigan.
4. Salt Creek above (upstream of) its confluence with the Little Calumet River, Porter County.
5. Kintzele Ditch (Black Ditch) from Beverly Drive downstream to Lake Michigan, Porter County.
6. Galena River and its tributaries, LaPorte County
7. The St. Joseph River and its tributaries in St. Joseph County from the Twin Branch Dam in Mishawaka downstream to the Indiana/Michigan state line, St. Joseph County.
8. The Indiana portion of the open waters of Lake Michigan.
9. Those waters designated by the Indiana Department of Natural Resources (IDNR) for put-and-take trout fishing.

### **Waterbodies which have been designated all or partially as Outstanding State Resource Waters:**

1. The Blue River in Washington, Crawford, and Harrison counties from river mile 57.0 to river mile 11.5.
2. The North Fork of Wildcat Creek in Carroll and Tippecanoe counties, from river mile 43.11 to river mile 4.82.
3. The South Fork of Wildcat Creek in Tippecanoe County, from river mile 10.21 to river mile 0.00.
4. Cedar Creek in Allen and DeKalb Counties, from river mile 13.7 to its confluence with the St. Joseph River.
5. The Indiana portion of the open waters of Lake Michigan.
6. All waters incorporated in the Indiana Dunes National Lakeshore.

### **Streams which have been designated all or partially as Exceptional Use Waters:**

1. Big Pine Creek in Warren County downstream of the State Road 55 bridge near the town of Pine Village to its confluence with the Wabash River.
2. Mud Pine Creek in Warren County from the bridge on the County Road between Brisco and Rainsville to its confluence with Big Pine Creek.
3. Fall Creek in Montgomery County from the old C.R. 119 bridge in the NW quarter of Section 21, Township 22N, Range 8W downstream to its confluence with Big Pine Creek.
4. Indian Creek in Montgomery County from the County Road 650 West bridge downstream to its confluence with Sugar Creek.
5. Clifty Creek in Montgomery County within the boundaries of Pine Hills Nature Preserve.
6. Bear Creek in Fountain County from the bridge on County Road 450 North to its confluence with the Wabash River.

7. Rattlesnake Creek in Fountain County from the bridge on County Road 450 North to its confluence with Bear Creek.
8. The small tributary to Bear Creek in Fountain County within the Portland Arch Nature Preserve which enters Bear Creek at the sharpest bend and has formed the small natural bridge called Portland Arch.
9. Blue River from the confluence of the West and Middle Forks of the Blue River in Washington County downstream to its confluence with the Ohio River.
10. The South Fork of the Blue River in Washington County from Horner's Chapel Road bridge downstream to its confluence with Blue River.
11. Lost River and all surface and underground tributaries upstream from the Orangeville Rise (T2N, R1W, Section 6) and the Rise of Lost River (T2N, R1W, Section 7) and the mainstem of the Lost River from the Orangeville Rise downstream to its confluence with the East Fork of White River.

## **ATTACHMENT 2**

### **Critical Wetlands and Critical Special Aquatic Sites**

1. Acid bogs
2. Acid seeps
3. Circumneutral bogs
4. Circumneutral seeps
5. Cypress Swamps
6. Dune and swales
7. Fens
8. Forested fens
9. Forested swamps
10. Marl beaches
11. Muck flats
12. Pannes
13. Sand flats
14. Sedge meadows
15. Shrub swamps
16. Sinkhole ponds
17. Sinkhole swamps
18. Wet floodplain forests
19. Wet prairies
20. Wet sand prairies





# INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

*We Protect Hoosiers and Our Environment.*

100 N. Senate Avenue • Indianapolis, IN 46204  
(800) 451-6027 • (317) 232-8603 • [www.idem.IN.gov](http://www.idem.IN.gov)

Eric J. Holcomb  
Governor

Bruno Pigott  
Commissioner

**VIA ELECTRONIC MAIL:**

December 14, 2020

Mr. Michael Ricketts  
U.S. Army Corps of Engineers  
Louisville District  
P.O. Box 59  
Louisville, KY 40201-0059

Dear Mr. Ricketts:

Re: Section 401 Water Quality Certification  
Project: 2020 Reissuance of 41  
Nationwide Permits

The Office of Water Quality has reviewed the Federal Register Notice dated September 15, 2020, announcing the proposed reissuance of the Nationwide Permits (NWP's). We have also reviewed your correspondence dated October 16, 2020, stating the Federal Register Notice is the U.S. Army Corps of Engineers (Corps) application for water quality certification under Section 401 of the Clean Water Act for those NWP's that will result in a discharge of dredged and/or fill material into waters of the United States within the State of Indiana.

In electronic mail correspondence dated October 21, 2020, the Louisville District Corps of Engineers notified IDEM that the previously suspended NWP's 13, 14, 18, 29, 36, 39, 40, 41, 42, 43, and 44 would no longer be suspended and be in full force and effect in the state of Indiana.

Under Section 401 of the Clean Water Act (CWA), a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a Section 401 Water Quality Certification (WQC) is issued, verifying compliance with water quality requirements. In Indiana, the Indiana Department of Environmental Management (IDEM) is the certifying authority and certification decisions are based on Indiana's water quality standards (WQS) found at 327 IAC 2 [http://iac.iga.in.gov/iac/iac\\_title?iact=327](http://iac.iga.in.gov/iac/iac_title?iact=327)

Per 327 IAC 2.1, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. Mitigation of dredge and fill impacts to Indiana's water resources is required to maintain water quality. To ensure WQS are met, IDEM conditions the NWP's as outlined in this 401 WQC. Additional information about the conditions is found in Attachment #3.

It is the judgment of this office that NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 15, 18, 19, 22, 25, 27, 28, 30, 33, 36, 37, 45, 46, and 49 will comply with applicable provisions of state law (including 327 IAC 2) and Sections 301, 302, 303, 306, and 307 of the Clean Water Act subject to the conditions set forth in this Certification. Therefore, subject to the following conditions, the Indiana Department of Environmental Management (IDEM) hereby grants Section 401 Water Quality Certification (WQC) for these NWP's. Any changes in language or scope of any NWP not detailed in the aforementioned Federal Register Notice, or as modified by the conditions below, are not authorized by this certification.

It is the judgement of this office that NWP's 16, 17, 20, 23, 31, 32, 34, 35, 38, 41, 53, 54, and 59 are denied in the state of Indiana and will require a site specific Individual Section 401 Water Quality Certification. The denial is based on the agency's inability to determine if these activities will comply with Indiana's water quality standards found at 327 IAC 2.

It is the judgement of this office that NWP's 8 and 24 are activities that do not occur in Indiana. Because of this no Section 401 Water Quality Certification is required.

*Section 401 Water Quality Certification decisions for NWP's in effect for the State of Indiana-2020*

<b>NWP</b>	<b>Activity</b>	<b>Decision</b>	<b>Conditions</b>
1	Aids to Navigation	Approve	None
2	Structures in Artificial Channels	Approve	None
3	Maintenance	Approve	General & Specific
4	Fish and Wildlife Harvesting, Enhancement, and Attraction Devices	Approve	General
5	Scientific Measurement Devices	Approve	General
6	Survey Activities	Approve	General
7	Outfall Structures and Associated Intake Structures	Approve	General & Specific
9	Structures in Fleeting and Anchorage Areas	Approve	None
10	Mooring Buoys	Approve	None
11	Temporary Recreational Structures	Approve	None
13	Bank Stabilization	Approve	General & Specific
14	Linear Transportation Projects	Approve	General & Specific
15	U.S. Coast Guard Approved Bridges	Approve	General & Specific
16	Return Water from Upland Contained Disposal Areas	Deny	N/A
17	Hydropower Projects	Deny	N/A
18	Minor Discharges	Approve	General & Specific
19	Minor Dredging	Approve	General
20	Response Operations for Oil and Hazardous Substances	Deny	N/A

22	Removal of Vessels	Approve	General
23	Approved Categorical Exclusions	Deny	N/A
25	Structural Discharges	Approve	General & Specific
26	Reserved	N/A	N/A
27	Aquatic Habitat Restoration, Establishment, and Enhancement Activities	Approve	General & Specific
28	Modifications to Existing Marina	Approve	None
30	Moist Soil Management for Wildlife	Approve	General
31	Maintenance of Existing Flood Control Facilities	Deny	N/A
32	Completed Enforcement Actions	Deny	N/A
33	Temporary Construction, Access, and Dewatering	Approve	General & Specific
34	Cranberry Production Activities	Deny	N/A
35	Maintenance Dredging of Existing Basins	Deny	N/A
36	Boat Ramps	Approve	General & Specific
37	Emergency Watershed Protection and Rehabilitation	Approve	General & Specific
38	Cleanup of Hazardous and Toxic Waste	Deny	N/A
41	Reshaping Existing Drainage Ditches	Deny	N/A
45	Repair of Uplands Damaged by Discrete Events	Approve	None
46	Discharges to Ditches	Approve	General & Specific
47	Reserved	N/A	N/A
49	Coal Remining Activities	Approve	None
53	Removal of Low-Head Dams	Deny	N/A
54	Living Shorelines	Deny	N/A
59	Water Reclamation and Reuse Facilities	Deny	N/A

**GENERAL CONDITIONS:**

The following conditions shall apply to any permittee whose project qualifies under any NWP approved by this certification. All activities that do not meet these conditions require an individual Water Quality Certification from IDEM and are not authorized under this WQC.

- (1) The permittee must submit a complete Notification Form for any NWP that requires notification by this WQC. For those NWPs, the permittee must submit notification at least 30 days prior to the impacts or receive verification from the IDEM Office of Water Quality stating the proposed project meets the terms and conditions of this Section 401 WQC. The notification submitted to the IDEM Office of Water Quality must at a minimum provide applicant information, project location, existing project site conditions, project impacts, and a proposed plan. Failure to submit all required

information will result in the project being considered out-of-scope and not authorized.

- (2) The permittee shall deposit any dredged material in a contained upland disposal area to prevent sediment run-off to any waterbody. An upland disposal area is defined as an area of dry land that does not contain any wetlands as defined by the 1987 Army Corps of Engineers Wetland Delineation Manual and the applicable Regional Supplements or any streams<sup>1</sup>.
- (3) The permittee shall install run-off and sediment control measures prior to any land disturbance to manage stormwater and to minimize sediment from leaving the project site or entering a waterbody. All operations must phase project activities to minimize the impact of sediment to the receiving waterbody(ies). Erosion and sediment control measures shall be implemented using an appropriate order of construction (sequencing) relative to the land-disturbing activities. Wetlands and/or waterbodies that are adjacent to land-disturbing activities must be protected with appropriate sediment control measures. As work progresses, all areas void of protective cover shall be re-vegetated or stabilized as described in the plan. Areas that are to be re-vegetated must utilize mulch that is anchored or, under more severe conditions, erosion control blankets. Erosion control blankets or other armament shall be used for all areas associated with concentrated flow. Standards and specifications for stormwater management, including erosion and sediment control can be obtained in the Indiana Stormwater Quality Manual or similar guidance documents.
- (4) The permittee shall allow the commissioner or an authorized representative of the commissioner (including an authorized contractor), upon the presentation of credentials to conduct the following activities:
  - (a) enter upon the permittee's property;
  - (b) have access to and copy at reasonable times any records that must be kept under the conditions of these permits or this certification;
  - (c) inspect, at reasonable times, any monitoring or operational equipment or method; collection, treatment, pollution management or discharge facility or device; practices required by this certification; and any mitigation site; and
  - (d) sample or monitor any discharge of pollutants or any mitigation site.
- (5) This WQC does not authorize activities that result in a permanent secondary effect to waters of the U.S. (e.g., dredging, excavation, damming, creation of in-channel ponds) that when combined with the primary effect exceeds the area and length thresholds specified by this WQC.

---

<sup>1</sup> Stream, for the purpose of this Water Quality Certification, means conveyance channels that have a defined bed and bank and an ordinary high water mark. This term includes natural streams, relocated streams, channelized streams, artificial channels, encapsulated channels and ditches.

- (6) This WQC does not:
- (a) authorize impacts or activities outside the scope of this certification;
  - (b) authorize any injury to permittees or private property or invasion of other private rights, or any infringement of federal, state or local laws or regulations;
  - (c) convey any property rights of any sort, or any exclusive privileges;
  - (d) preempt any duty to obtain federal, state or local permits or authorizations required by law for the execution of the project or related activities; or
  - (e) authorize changes in the plan design detailed in the notice or application.
- (7) This WQC does not authorize point source discharges of pollutants other than clean fill<sup>2</sup> and uncontaminated dredged material.
- (8) This WQC does not authorize activities associated with the establishment of a mitigation bank.
- (9) This WQC does not authorize activities that will permanently change the sinuosity, flow path, velocity, cross-sectional area under the Ordinary High Water Mark (OHWM), or the slope of a stream except those activities authorized through compliance with NWP #13 Specific Condition 9.
- (10) This WQC does not authorize activities on or in any of the State's waters that have been designated as salmonid waters (*see Attachment #1*), tributaries of salmonid waters within a two river mile reach upstream from the confluence with the salmonid water unless the activity meets one or more of the following conditions:
- (a) Bank stabilization activities that:
    - (1) Are completed using bioengineered methods, riprap, and/or glacial stone, that conforms to the existing shoreline and does not project out into the channel, and
    - (2) Do not create a wall.
    - (3) Do not include the installation of cofferdams, causeways, temporary access roads, or dewatering activities.
  - (b) Encapsulations that:
    - (1) Are installed to span the width of the ordinary high water mark (OHWM), and are embedded in accordance with Specific Condition 3(f)7 below, and
    - (2) Do not include the installation of cofferdams, causeways, temporary access roads, or dewatering activities.
    - (3) Are installed outside the salmonid fish spawning dates of March 15 through June 15 and from July 15 through November 30.

---

<sup>2</sup> Clean fill, for the purpose of this Water Quality Certification, means uncontaminated rocks, bricks, concrete without rebar, road demolition waste materials other than asphalt, or earthen fill.

- (c) Work is conducted outside the salmonid fish spawning dates of March 15 through June 15 and from July 15 through November 30.
- (11) This WQC does not authorize activities on or in any of the State's waters that have been designated as Outstanding State and/or National Resource Waters (see *Attachment #1*).
- (12) This WQC does not authorize activities on or in any critical wetland or critical special aquatic sites (see *Attachment #2*).
- (13) This WQC does not authorize activities that have a cumulative permanent impact of more than twenty-five hundredths (0.25) acre of waters of the U.S. Note: Activities that have a cumulative permanent impact to waters of the U.S. of more than one-tenth (0.10) acre must comply with the mitigation requirements listed in **General Condition 15** of this WQC.
- (14) This WQC does not authorize activities that will have a cumulative permanent impact of more than 500 linear feet of waters of the U.S. Note: Activities that have a cumulative permanent impact to waters of the U.S. of more than 300 linear feet must comply with the mitigation requirements listed in **General Condition 16** of this WQC.
- (15) Cumulative permanent impacts to waters of the U.S. greater than 0.10 acre up to and including 0.25 acre are authorized provided the following conditions are met:
  - (a) The impacts comply with all conditions of this Section 401 Water Quality Certification.
  - (b) Mitigation is provided for all impacts.
  - (c) Sufficient mitigation credits are available in the service area where the impacts occur. Note: Credits may not be available at all times. Failure to purchase credits before impacting water resources will require an individual 401 WQC and may result in additional mitigation requirements to compensate for temporal loss of water resource functions.
  - (d) Mitigation credits are purchased from an approved compensatory mitigation bank or through the Indiana Stream and Wetland Mitigation Program (in-lieu fee (ILF)). Permittee responsible mitigation is not authorized under this 401 WQC.
  - (e) The amount of mitigation credit purchased is 1:1 for streams, open water, and farmed wetlands, 2:1 for emergent wetland, 3:1 for scrub shrub wetland, 4:1 for forested wetland.
  - (f) The credits are purchased in the bank or ILF service area where the impacts occur.
  - (g) Proof of a finalized credit purchase is provided to IDEM:
    - 1) Before the impacts occur. Note: Banks and ILF programs may require 30 days or more to finalize a purchase.

- 2) Within one (1) year of IDEM's receipt of the Notification form.
- (16) Cumulative permanent impacts to waters of the U.S. greater than 300 linear feet up to and including 500 linear feet are authorized provided the following conditions are met:
- (a) The impacts comply with all conditions of this Section 401 Water Quality Certification.
  - (b) Mitigation is provided for all impacts.
  - (c) Sufficient mitigation credits are available in the service area where the impacts occur. Note: Credits may not be available at all times. Failure to purchase credits before impacting water resources will require an individual 401 WQC and may result in additional mitigation requirements to compensate for temporal loss of water resource functions.
  - (d) Mitigation credits are purchased from an approved compensatory mitigation bank or through the Indiana Stream and Wetland Mitigation Program (in-lieu fee (ILF)). Permittee responsible mitigation is not authorized under this 401 WQC.
  - (e) The amount of mitigation credit purchased is 1:1 for streams.
  - (f) The credits are purchased in the bank or ILF service area where the impacts occur.
  - (g) Proof of a finalized credit purchase is provided to IDEM:
    - 1) Before the impacts occur. Note: Banks and ILF programs may require 30 days or more to finalize a purchase.
    - 2) Within one (1) year of IDEM's receipt of the Notification form.
- (17) The permittee must demonstrate, via letter from the Indiana Department of Natural Resources (IDNR), Division of Nature Preserves, that no state endangered, threatened, or rare species are documented on a permanent or seasonal basis within ½-mile radius of the proposed project site. If you have listed species, you must provide documentation from the IDNR that states your project will not impact the listed species. If IDNR recommends seasonal work restrictions or other avoidance and minimization measures, those restrictions or avoidance and minimization measures must be incorporated into your project plans and implemented during construction.
- (18) This WQC allows the use of multiple NWP's on the same project as long as the cumulative effect for the entire project is less than the specified impact thresholds in **General Conditions 13 & 14** or as specified in the **Specific Conditions** below. If a project exceeds the specified impact thresholds, the activities are not authorized by this WQC and an individual WQC is required. IDEM may certify several federal permits or licenses under one individual WQC.
- (19) Upon request, the applicant must submit additional information necessary to IDEM to determine if a project will qualify under the terms and conditions of this

certification. If the applicant fails to provide any information requested by IDEM, then the project is not authorized.

- (20) All stream pump-around activities must be conducted in a manner that does not cause erosion at the outlet. Cofferdam dewatering activities must use filter bags, upland sediment basins/traps, or a combination of other appropriate sediment control measures to minimize the discharge of sediment-laden water into waters of the U.S. All sediment control measures must be installed and maintained in good working order. For stream pump-around activities, the in-stream material used to construct the dam must be constructed of non-sediment producing sources. Examples include sand bags and sheet pile walls.
- (21) The permittee must ensure all placement of riprap or other bank stabilization materials are designed and installed flush with the upstream and downstream bank and stream channel/lake bed elevations and grades.
- (22) Notification to IDEM is required for any temporary impacts that exceed 0.10 acre for any proposed NWP. For emergency repair situations notification may take place after the emergency repair has begun.
- (23) After construction, temporary fill must be removed in their entirety and the affected areas returned to the pre-construction elevations. The areas affected by temporary fill must be revegetated, as appropriate.
- (24) The permittee will submit an application for an individual certification if IDEM determines the project would have more than minimal impacts to water quality, either viewed individually or collectively with other projects that may affect the same waterbody.

### **NATIONWIDE PERMIT #3, MAINTENANCE, SPECIFIC CONDITIONS**

The following conditions apply to NWP #3. All activities that do not meet these conditions require an individual WQC from IDEM and are not authorized under this WQC.

- (1) For activities involving the replacement of a stream encapsulation:
  - (a) The replacement must not reduce the cross-sectional area under bank full elevation;
  - (b) The replacement must not increase the length of the total encapsulation to over 150 feet;
  - (c) The replacement must have either the same slope as the existing encapsulation, or will more closely match the slope of the stream immediately upstream and downstream;



- (d) The replacement must either be the same size and type of encapsulation or one that has a greater ability to provide for aquatic life movement. The replacement must not reduce the cross-sectional area of the encapsulation;
  - (e) Bank stabilization and channel bottom stabilization must not exceed either one bank full width upstream and downstream of the replacement encapsulation or ten linear feet whichever is greater;
  - (f) Any channel bottom stabilization must be flush with the existing grade of the stream bottom; and
  - (g) Existing encapsulations over 150 feet may be replaced under this NWP as long as the structure length does not change more than 20 feet upstream and 20 feet downstream.
- (2) For activities involving the placement of thermal plastic liners or other liner types into existing structures:
- (a) Liners may not be used to extend the structure length by more than 12-inches on either end of the structure;
  - (b) Liners must be installed so that the invert of the liner is as close to the invert of the host pipe as practical;
  - (c) Riprap scour protection or an energy dissipater must be installed flush with the upstream and downstream bank and stream channel elevations and grades;
  - (d) The project must be reviewed and approved by the INDOT Office of Hydraulics for projects undertaken by the Indiana Department of Transportation (INDOT) and a Local Public Agency (LPA);
  - (e) The liner size must be the largest size approved by the INDOT Office of Hydraulics;
  - (f) A hydraulic modeling report must be submitted following the INDOT Standards and Specifications found at [http://www.in.gov/indot/design\\_manual/design\\_manual\\_2013.htm](http://www.in.gov/indot/design_manual/design_manual_2013.htm) for projects undertaken by permittees or entities other than INDOT or a LPA,;
  - (g) If an existing culvert sump cannot be maintained by the installation of a liner then an individual Section 401 Water Quality Certification is required; and
  - (h) For perennial streams, the structure must not be in an elevated position (hanging culvert) within the stream channel. Hanging culverts in perennial stream channels require an Individual Section 401 Water Quality Certification.
- (3) For all other maintenance activities:
- (a) The activity must not permanently affect more than one-tenth (0.1) of an acre of waters of the United States;
  - (b) The activity must not permanently change the sinuosity, flow path, velocity, cross sectional area under the bank full elevation or the slope of a stream;
  - (c) The activity must not permanently affect more than 300 linear feet of stream channel, streambank, or lake shoreline;

- (d) Bank stabilization activities, require the permittee demonstrate that the bank or shoreline in question is unstable;
- (e) The activity must not result in a permanent secondary effect to waters of the United States (e.g., dredging, excavation, damming, creation of in-channel ponds) that, when combined with the primary effect, exceeds the area and length thresholds specified above; and
- (f) Any channel bottom stabilization must be installed flush with the existing stream grade.

### **NATIONWIDE PERMIT #7, OUTFALL STRUCTURES AND ASSOCIATED INTAKE STRUCTURES, SPECIFIC CONDITIONS**

The following conditions apply to NWP # 7. All activities that do not meet these conditions require an Individual WQC from IDEM and are not authorized under this WQC.

- (1) The permittee must notify IDEM in accordance with **General Condition 1** listed above;
- (2) The activity must not permanently affect more than one-tenth (0.1) of an acre of waters of the United States;
- (3) The activity must not permanently affect more than 300 linear feet of streambank or lake shoreline;
- (4) The placement of riprap or other bank stabilization material must be installed flush with the upstream and downstream bank and stream channel/lake bed elevations and grades;
- (5) The activity must not result in a permanent secondary effect to waters of the United States (e.g. dredging, excavation, damming, creation of in-channel ponds) that, when combined with the primary effect, exceeds the area and length thresholds specified above;
- (6) All areas disturbed by the construction of intake and outfall structures must be immediately seeded and stabilized; and
- (7) All outfalls shall be constructed in a manner that does not cause erosion at the outlet.

### **NATIONWIDE PERMIT #13, BANK STABILIZATION, SPECIFIC CONDITIONS**

The following conditions apply to NWP # 13. All activities that do not meet these conditions require an Individual WQC from IDEM and are not authorized under this WQC.

- (1) The permittee must notify IDEM in accordance with **General Condition 1** listed above;
- (2) The WQC does not authorize bank stabilization activities within wetlands;

- (3) The activity must not permanently affect more than twenty-five hundredths (0.25) of an acre of waters of the United States. See **General Condition 13** of this WQC for additional impact and mitigation requirements;
- (4) The activity must not permanently affect more than 500 linear feet of streambank or lake shoreline. See **General Condition 14** of this WQC for additional impact and mitigation requirements;
- (5) The activity must not exceed two (2) cubic yards per running foot, as measured along the length of the treated bank or shoreline;
- (6) The permittee must demonstrate that the bank or shoreline in question is unstable;
- (7) Natural shoreline stabilization methods are required where there is no pre-existing seawall or other shoreline hard armament on a lake or reservoir. Natural shoreline stabilization methods include bank stabilization practices that benefit the aquatic environment by incorporating organic materials to produce functional structures, provide wildlife habitat, and provide areas for revegetation;
- (8) The placement of riprap or other bank stabilization material must be installed flush with the upstream and downstream bank and stream channel/lake bed elevations and grades: and
- (9) The installation of stream barbs (bendway weirs) must:
  - (a) Be a component of a bank stabilization project;
  - (b) Be designed by a qualified engineer;
  - (c) Include bioengineering and vegetative practices to add roughness to the bank;
  - (d) Be placed on the outside meander bend;
  - (e) Be keyed into the stream bank and stream bed;
  - (f) Not direct flow into the opposite bank; and
  - (g) Be placed in a manner that transitions flow into the downstream channel and receiving riffle.

#### **NATIONWIDE PERMIT #14, LINEAR TRANSPORTATION PROJECTS, SPECIFIC CONDITIONS**

The following conditions apply to NWP # 14. All activities that do not meet these conditions require an Individual WQC from IDEM and are not authorized under this WQC.

- (1) The permittee must notify IDEM in accordance with **General Condition 1** listed above;
- (2) The activity must not permanently affect more than twenty-five hundredths (0.25) of an acre of waters of the United States. See **General Condition 13** of this WQC for additional impact and mitigation requirements;
- (3) The activity must not permanently affect more than 500 linear feet of streambank or lake shoreline. See **General Condition 14** of this WQC for additional impact and mitigation requirements;

- (4) The placement of riprap or other bank stabilization material must be installed flush with the upstream and downstream bank and stream channel/lake bed elevations and grades;
- (5) The activity must not result in a permanent secondary effect to waters of the United States (e.g. dredging, excavation, damming, creation of in-channel ponds) that, when combined with the primary effect, exceeds the area and length thresholds specified above;
- (6) The activity must not result in the relocation of a stream. Minimal stream relocations may be authorized, provided the activity:
  - (a) Is associated with the installation of a stream crossing or replacement of an existing crossing, and results in a net benefit to the aquatic ecosystem and stream morphology.
  - (b) Does not reduce the cross-sectional area under the OHWM.
  - (c) Is accompanied by an acceptable restoration/stabilization plan.
  - (d) Does not accelerate stream instability as demonstrated in the plans by a qualified engineer. Examples of instability include, but are not limited to, stream bank erosion, channel enlargement, channel incision, degradation, aggradation, meander migration (down-valley and lateral accretion), avulsion and base-level shifts.
- (7) New bridge piers, piles, shafts or other support structures and their associated scour protection measures must not significantly reduce the cross-sectional area of the stream and be located outside the low flow channel of the stream.
- (8) Permanent stream encapsulations must:
  - (a) Be installed for the purpose of constructing a crossing.
  - (b) Allow the passage of aquatic organisms in the waterbody.
  - (c) Not exceed 150 feet cumulative linear feet of encapsulation.
  - (d) Have at least one (1) opening with a cross-sectional area twenty percent (20%) larger than the area under the OHWM of the stream immediately upstream and downstream of the encapsulation. If multiple encapsulations are proposed, then the largest culvert meeting the cross-sectional area requirement must be positioned in the channel to align with the existing flow of the channel.
  - (e) Have a streambed slope within the encapsulation that matches the slope of the bed both immediately upstream and downstream.
  - (f) Not create or accelerate stream instability as demonstrated in the plans by a qualified engineer. Examples of stream instability include, but are not limited to head cutting, stream bank erosion, channel enlargement, channel incision, degradation, aggradations, meander migration, (down-valley and lateral accretion), avulsion, and base-level shifts.

- (g) Either have not bottom (e.g., three sided culvert) or are embedded (sumped)<sup>3</sup> into the stream channel based on the following structure sizes and substrate types:
- 1) Stream bed of sand
    - Structure <four (4) feet wide: Six (6) inch sump
    - Structure four (4) feet wide to 12 feet wide: 12 inch sump
    - Structure 12 feet to 20 feet wide: 18 inch sump
  - 2) Stream bed of other soil or unconsolidated till<sup>4</sup>
    - Structure < four (4) feet wide: Three (3) inch sump
    - Structure four (4) feet wide to 12 feet wide: Six (6) inch sump
    - Structure 12 feet wide to 20 feet wide: 12 inch sump
  - 3) Stream bed of bedrock or consolidated till<sup>5</sup>
    - Inside elevation of the structure bottom shall be a minimum of three (3) inches below the surface of the bedrock or consolidated till.
- (h) Meet the following requirements when installed in perennial streams with an OHWM width of 12 feet or greater:
- 1) Be sumped to a greater depth if needed for the design of the streambed inside the encapsulation.
  - 2) Have a width equal to or wider than the existing OHWM.
  - 3) Have a natural stream bottom. If the stream bottom will be disturbed during construction (e.g. four sided box culverts, pipe culverts, or because of footer work for three sided culverts), natural stream substrate must be placed in the encapsulation in accordance with the Federal Highway Administration Hydraulic Engineering Circular No. 26: Culvert Design for Aquatic Organism Passage.
  - 4) Have a low flow channel constructed or restored through the encapsulation. The low flow channel shall have the same width, depth, and side slope as the natural upstream and downstream low flow channel. If the upstream and downstream channels are highly degraded, a V-shaped channel with 5:1 slopes within the structure may be substituted.

## **NATIONWIDE PERMIT #15, U.S. COAST GUARD APPROVED BRIDGES, SPECIFIC CONDITIONS**

The following conditions apply to NWP # 15. All activities that do not meet these conditions require an Individual WQC from IDEM and are not authorized under this WQC.

---

<sup>3</sup> Sump, for the purpose of this Water Quality Certification, means the inside elevation of the bottom of the structure is placed at a specified depth below the grade of the stream.

<sup>4</sup> Other soil and unconsolidated till includes substrates that are more cohesive and less mobile (e.g clay, silt, gravel, and cobble substrates).

<sup>5</sup> Consolidated till includes dense hard materials such as hardpan.

- (1) The permittee must notify IDEM in accordance with **General Condition 1** listed above;
- (2) The activity must not permanently affect more than one-tenth (0.1) of an acre of waters of the United States;
- (3) The activity must not permanently affect more than 300 linear feet of streambank or lake shoreline;
- (4) The placement of riprap or other bank stabilization material must be installed flush with the upstream and downstream bank and stream channel/lake bed elevations and grades; and
- (5) The activity must not result in a permanent secondary effect to waters of the United States (e.g. dredging, excavation, damming, creation of in-channel ponds) that, when combined with the primary effect, exceeds the area and length thresholds specified above.

### **NATIONWIDE PERMIT #18, MINOR DISCHARGES, SPECIFIC CONDITIONS**

The following conditions apply to NWP #18. All activities that do not meet these conditions require an Individual WQC from IDEM and are not authorized under this WQC.

- (1) The permittee must notify IDEM in accordance with **General Condition 1** listed above; and
- (2) The activity must not permanently affect more than one-tenth (0.1) of an acre of waters of the United States.

### **NATIONWIDE PERMIT #25, STRUCTURAL DISCHARGES, SPECIFIC CONDITIONS**

The following conditions apply to NWP # 25. All activities that do not meet these conditions require an Individual WQC from IDEM and are not authorized under this WQC.

- (1) The permittee must notify IDEM in accordance with **General Condition 1** listed above;
- (2) The activity must not permanently affect more than one-tenth (0.1) of an acre of waters of the United States;
- (3) New bridge piers, piles, shafts, or other support structures authorized under this NWP shall be located outside the low flow channel of the stream except where the bridge structure is located in a U.S. Army Corps of Engineers Section 10 Water;
- (4) The material excavated from a tightly sealed form or cell must be disposed of in an upland disposal area;
- (5) The dewatering of the tightly sealed form or cell must be discharged into a contained upland disposal area; and
- (6) The activity must not result in a permanent secondary effect to waters of the United States (e.g. dredging, excavation, damming, creation of in-channel ponds) that,

when combined with the primary effect, exceeds the area and length thresholds specified above.

### **NATIONWIDE PERMIT #27, AQUATIC HABITAT RESTORATION, ESTABLISHMENT, AND ENHANCEMENT ACTIVITIES, SPECIFIC CONDITIONS**

This WQC authorizes activities under NWP #27 when they have a minimal effect on water quality, are a component of a restoration program previously approved by IDEM, or involve certain activities undertaken by the Abandoned Mine Land (AML) Program administered by IDNR. All activities that do not meet these conditions require an individual WQC from IDEM and are not authorized under this WQC.

- (1) An activity qualifies for this NWP because it will have a minimal effect if:
  - (a) The activity will permanently affect one-tenth (0.1) of an acre or less of Waters of the United States;
  - (b) The activity will permanently affect 300 linear feet or less of streambank or lake shoreline; and
  - (c) The activity will not result in a permanent secondary effect to waters of the United States (e.g. dredging, excavation, damming, creation of in-channel ponds) that, when combined with the primary effect, exceeds the area and length thresholds specified above.
- (2) An activity qualifies for this NWP because it is a component of a restoration program previously approved by IDEM if:
  - (a) The activity occurs within the same sub-watershed <sup>6</sup> as a water that IDEM has identified as impaired; and
  - (b) IDEM identified the activity as beneficial for reducing or eliminating the impairment in a Total Maximum Daily Load (TMDL), an IDEM approved Watershed Plan or a Memorandum of Agreement or Memorandum of Understanding with the agency sponsoring the restoration or enhancement activities.
- (3) An activity qualifies for this NWP because it is a qualifying AML project if:
  - (a) The activity is undertaken by the IDNR, Division of Reclamation, AML Program;
  - (b) The activity is designed to improve water quality in an impaired water of the United States where the source of impairment is acid mine contamination;
  - (c) The activity facilitates the treatment of acid mine drainage or covers a source of impairment <sup>7</sup>; and
  - (d) The activity does not result in the discharge of dredged or fill material into any wetland, stream, or other Waters of the United States that are unimpaired by

---

<sup>6</sup> For the purpose of this WQC, sub-watershed means the U.S. Geological Survey's 14-digit Hydrologic Unit Code (HUC).

<sup>7</sup> AML projects that qualify generally consist of damming or relocating waters carrying acid mine contamination to divert flow into constructed treatment systems.

acid mine drainage unless that discharge qualifies under specific condition #1 above.

- (4) This WQC does not authorize the discharge of sediment from a reservoir to restore downstream habitat.
- (5) The permittee must notify IDEM in accordance with General Condition (1) listed above for all projects which require the installation or removal of any water control structures, dikes, berms, or accumulated sediment. IDEM will review the notification within 30 days to determine whether or not IDEM will elevate the NWP to an Individual Water Quality Certification or authorize it as submitted.

### **NATIONWIDE PERMIT #33, TEMPORARY CONSTRUCTION, ACCESS, AND DEWATERING, SPECIFIC CONDITIONS**

The following conditions apply to NWP #33. All activities that do not meet these conditions require an individual WQC from IDEM and are not authorized under this WQC.

- (1) The permittee must notify IDEM in accordance with **General Condition 1** listed above;
- (2) The activity must not temporarily affect more than twenty-five hundredths (0.25) of an acre of waters of the United States;
- (3) The activity must not temporarily affect more than 500 linear feet of streambank or lake shoreline;
- (4) The notification must include a restoration plan returning all areas to pre-construction grades, contours, and vegetated conditions. The restoration plan should include plans for the removal of temporary fill, grading/compaction, seeding, planting, success criteria, and any necessary maintenance;
- (5) Temporary stream crossings must meet the following conditions:
  - (a) Must be installed in a manner that maintains near normal downstream flows.
  - (b) Must be installed in a manner that does not interfere with aquatic organism passage.
  - (c) The culverts installed in the crossing must be placed on the bottom of the channel in the low flow channel. If multiple culverts are necessary, they must all be placed on the bottom of the channel.
  - (d) The culverts must be kept clear of sediment and debris and maintained in their designed and approved conditions.
  - (e) The culverts must be placed in a manner that does not direct stream flows toward a streambank.
  - (f) The crossing must be constructed of materials that will not erode due to expected high flow events.
  - (g) The stream must be restored to preconstruction channel bottom elevations and substrate types. The stream banks and riparian corridor must be restored to preconstruction contours, grades, and vegetative conditions.
- (6) Temporary work causeways must meet the following conditions:
  - (a) Must be installed in a manner that maintains near normal downstream flows.



- (b) Must not interfere with aquatic organism passage.
  - (c) Must not span the entire width of the channel unless the notification is accompanied by a letter of approval from the Indiana Department of Natural Resources Division of Water.
  - (d) The culverts used to construct the causeway must be placed on the channel bottom.
  - (e) The culverts must be kept clear of sediment and debris and maintained in their designed and approved conditions.
  - (f) Must be constructed of materials that will not erode due to expected high flow events.
  - (g) The stream must be restored to preconstruction channel bottom elevations and substrate types. The stream banks and riparian corridor must be restored to preconstruction contours, grades, and vegetative conditions.
- (7) All stream pump-around activities must be implemented in a manner that does not cause erosion at the outlet. Cofferdam dewatering activities must use filter bags, upland sediment basins/traps, or a combination of other appropriate sediment control measures to minimize the discharge of sediment-laden water into waters of the U.S. All sediment control measures must be installed and maintained in good working order. For stream pump-around activities, the in-stream material used to construct the dam must be constructed of non-sediment producing sources. Examples include sand bags and sheet pile walls; and
- (8) All dredged material must be disposed of in accordance with **General Condition 2** of this WQC.

### **NATIONWIDE PERMIT #36, BOAT RAMPS, SPECIFIC CONDITIONS**

The following conditions apply to NWP #36. All activities that do not meet these conditions require an individual WQC from IDEM and are not authorized under this WQC.

- (1) The permittee must notify IDEM in accordance with **General Condition 1** listed above;
- (2) The ramp shall not be placed in wetlands;
- (3) The maximum width of the ramp is less than 60 feet;
- (4) The area to be dredged shall be the minimum necessary to construct the ramp; and
- (5) All dredged material will be disposed of in accordance with **General Condition 2** of this WQC.

### **NATIONWIDE PERMIT #37, EMERGENCY WATERSHED PROTECTION AND REHABILITATION, SPECIFIC CONDITIONS**

The following conditions apply to NWP #37. All activities that do not meet these conditions require an individual WQC from IDEM and are not authorized under this WQC.

- (1) The activity is consistent with a Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU) between the IDEM and the Natural Resources Conservation Service, the United States Forest Service, the Department of the Interior, the Farm Services Agency, or the IDNR. An MOA/MOU must be in place prior to the emergency situation and must ensure that the emergency activities authorized under NWP #37 will not cause or contribute to permanent water quality degradation or impairment.

### **NATIONWIDE PERMIT #46, DISCHARGES TO DITCHES, SPECIFIC CONDITIONS**

The following condition applies to NWP #46. All activities that do not meet this condition require an individual WQC from IDEM and are not authorized under this WQC.

- (1) The activity must not permanently change the velocity, cross sectional area under the bank full elevation or the slope of the ditch.

Any changes in the language or scope of any NWP not detailed in the Federal Register notice dated September 15, 2020, are not authorized by this certification. In the absence of another action by IDEM that would alter the termination date of this certification, this certification shall expire with the expiration of the federal permits it certifies.

This certification does not relieve the recipient of the responsibility of obtaining any other permits or authorizations that may be required for this project or related activities from IDEM or any other agency or person. You may wish to contact the Indiana Department of Natural Resources at 317-232-4160 (toll free at 877-928-3755) concerning the possible requirement of natural freshwater lake or floodway permits. In addition, you may wish to contact IDEM's stormwater program at 317-233-1864 ([Stormwat@idem.IN.gov](mailto:Stormwat@idem.IN.gov)) concerning the possible need for construction stormwater permit coverage if you plan to disturb one (1) acre or more of land area.

Failure to comply with the terms and conditions of this Section 401 Water Quality Certification may result in enforcement action against you. You may also be subject to criminal liability if it is determined that the Section 401 Water Quality Certification was violated willfully or negligently.

### **Notice of Right to Administrative Review**

If you wish to challenge this permit, you must file a Petition for Administrative Review with the Office of Environmental Adjudication (OEA), and serve a copy of the petition upon IDEM. The requirements for filing a Petition for Administrative Review are found in IC 4-21.5-3-7, IC 13-15-6-1 and 315 IAC 1-3-2. A summary of the requirements of these laws is provided below.

A Petition for Administrative Review must be filed with the Office of Environmental Adjudication (OEA) within fifteen (15) days of the issuance of this notice (eighteen (18) days if you received this notice by U.S. Mail), and a copy must be served upon IDEM.

Addresses are:

Director	Commissioner
Office of Environmental Adjudication	Indiana Dept. of Environmental Management
Indiana Government Center North	Indiana Government Center North
100 North Senate Avenue, Room N103	100 North Senate Avenue, Room 1301
Indianapolis, Indiana 46204	Indianapolis, Indiana 46204

The petition must contain the following information:

- (a) The name, address and telephone number of each petitioner.
- (b) A description of each petitioner's interest in the permit.
- (c) A statement of facts demonstrating that each petitioner is:
  - (1) a person to whom the order is directed;
  - (2) aggrieved or adversely affected by the permit; or
  - (3) entitled to administrative review under any law.
- (d) The reasons for the request for administrative review.
- (e) The particular legal issues proposed for review.
- (f) The alleged environmental concerns or technical deficiencies of the denial.
- (g) The permit terms and conditions that the petitioner believes would be appropriate and would comply with the law.
- (h) The identity of any persons represented by the petitioner.
- (i) The identity of the person against whom administrative review is sought.
- (j) A copy of the permit that is the basis of the petition.
- (k) A statement identifying petitioner's attorney or other representative, if any.

Failure to meet the requirements of the law with respect to a Petition for Administrative Review may result in a waiver of your right to seek administrative review of the permit. Examples are:

- (a) Failure to file a Petition by the applicable deadline;
- (b) Failure to serve a copy of the Petition upon IDEM when it is filed; or
- (c) Failure to include the information required by law.

If you seek to have a permit stayed during the administrative review, you may need to file a Petition for a Stay of Effectiveness. The specific requirements for such a Petition can be found in 315 IAC 1-3-2 and 315 IAC 1-3-2.1.

Pursuant to IC 4-21.5-3-17, OEA will provide all parties with notice of any pre-hearing conferences, preliminary hearings, hearings, stays, or orders disposing of the review of this action. If you are entitled to notice under IC 4-21.5-3-5(b) and would like to obtain notices of any pre-hearing conferences, preliminary hearings, hearings, stays,

or orders disposing of the review of this action without intervening in the proceeding you must submit a written request to OEA at the address above.

If you have procedural or scheduling questions regarding your Petition for Administrative Review, additional information on the review process is available at the website of the Office of Environmental Adjudication at <http://www.in.gov/oea>.

If you have any questions about this certification, please contact Jason Randolph, Project Manager, of my staff by phone at 317-233-0467, or by e-mail at [jrandolp@idem.in.gov](mailto:jrandolp@idem.in.gov).

Sincerely,



Martha Clark Mettler  
Assistant Commissioner  
Office of Water Quality

cc: Kimberly Simpson, USACE-Louisville  
Aaron Damrill, USACE-Detroit, Michiana Branch  
Paul Leffler, USACE-Chicago  
Scott Pruitt, USFWS  
Matt Buffington, IDNR  
Randy Braun, IDEM

## **Attachment 1: Indiana Waters Designated for Special Protection**

### **Designated Salmonid Waters:**

#### **[327 IAC 2-1.5-5(a)(3)]**

- Trail Creek and its tributaries downstream to Lake Michigan, LaPorte County
- East Branch of the Little Calumet River and its tributaries downstream to Lake Michigan via Burns Ditch, Porter and LaPorte Counties
- Salt Creek above (upstream of) its confluence with the Little Calumet River, Porter County
- Kintzele Ditch (Black Ditch) from Beverly Drive downstream to Lake Michigan, Porter County
- The Galena River and its tributaries, LaPorte County
- The St. Joseph River and its tributaries in St. Joseph County from the Twin Branch Dam in Mishawaka downstream to the Indiana/Michigan state line, St. Joseph County
- The Indiana portion of the open waters of Lake Michigan
- Those waters designated by the Indiana Department of Natural Resources (IDNR) for put-and-take trout fishing<sup>1</sup>

### **Waterbodies which have been designated all or partially as Outstanding State Resource Waters: [327 IAC 2-1-11(b), 327 IAC 2-1.3-3(d), and 327 IAC 2-1.5-19(b)]**

- Big Pine Creek in Warren County downstream of the State Road 55 bridge near the town of Pine Village to its confluence with the Wabash River
- Mud Pine Creek in Warren County from the bridge on the County Road between Brisco and Rainsville to its confluence with Big Pine Creek
- Fall Creek in Warren County from the old C.R. 119 bridge in the NW quarter of Section 21, Township 22N, Range 8W downstream to its confluence with Big Pine Creek
- Indian Creek in Montgomery County from the County Road 650 West bridge downstream to its confluence with Sugar Creek
- Clifty Creek in Montgomery County within the boundaries of Pine Hills Nature Preserve
- Bear Creek in Fountain County from the bridge on County Road 450 North to its confluence with the Wabash River
- Rattlesnake Creek in Fountain County from the bridge on County Road 450 North to its confluence with Bear Creek
- The small tributary to Bear Creek in Fountain County within the Portland Arch Nature Preserve which enters Bear Creek at the sharpest bend and has formed the small natural bridge called Portland Arch
- Blue River from the confluence of the West and Middle Forks of the Blue River in Washington County downstream to its confluence with the Ohio River
- The South Fork of Blue River in Washington County from the Horner's Chapel Road bridge downstream to its confluence with Blue River.
- Lost River and all surface and underground tributaries upstream from the Orangeville Rise (T2N, R1W, Section 6) and the Rise of Lost River (T2N, R1W, Section 7) and the mainstem of the Lost River from the Orangeville Rise downstream to its confluence with the East Fork of White River.
- The Blue River in Washington, Crawford, and Harrison Counties, from river mile 57.0 to river mile 11.5
- The North Fork of Wildcat Creek in Carroll and Tippecanoe Counties, from river mile 43.11 to river mile 4.82

---

<sup>1</sup> Available on the internet at: <http://www.in.gov/dnr/fishwild/5457.htm>

- The South Fork of Wildcat Creek in Tippecanoe County, from river mile 10.21 to river mile 0.00
- Cedar Creek in Allen and DeKalb counties, from river mile 13.7 to its confluence with the St. Joseph River
- The Indiana portion of the open waters of Lake Michigan
- All waters incorporated in the Indiana Dunes National Lakeshore.

## **Attachment 2: Critical Wetlands and Critical Special Aquatic Sites**

In the interest of maintaining consistency with the State Regulated (Isolated) Wetland program established at 327 IAC 17, IDEM defines Critical Wetlands and Critical Special Aquatic Sites to be synonymous with Rare and Ecologically Important Wetland Types under 327 IAC 17-1-3(3)(B):

- **Acid bog:** Acid bog is an acidic wetland of kettle holes in glacial terrain. Bogs can be graminoid (*Carex* spp. and *Sphagnum* spp.) or low shrub (*Chamaedaphne calyculata* and *Betula pumila*). The graminoid bog can be a floating, quaking mat. The soils in acid bogs are saturated and acidic peat. Bogs have non-flowing or very slow flowing water. The water level fluctuates seasonally. When a sphagnum mat floats, it rises and falls with the water table. Acid bogs can be found in northern Indiana.
- **Acid seep:** Acid seep is a bog-like wetland typically found in unglaciated hill regions. This community is a small groundwater-fed wetland located primarily in upland terrain. A thin layer of muck may lie over a mineral substrate. The soil reaction is acid. This seep community is characterized by flowing water during at least part of the year. Acid seeps are located primarily in southern Indiana.
- **Circumneutral bog:** Circumneutral bog is a bog-like wetland that receives groundwater. Circumneutral bogs can be a mosaic of tall shrub bog, graminoid bog, and other communities. The graminoid bog often occurs on a quaking or floating mat. Although a few bogs occur in unglaciated regions, most are found in glacial ice-block depressions. The soils in circumneutral bogs are usually peat, or other low nutrient organic substrates, which are saturated and circumneutral to slightly acid. Circumneutral bogs have non-flowing or very slow flowing water. The water level fluctuates seasonally. Circumneutral bogs are usually found in northern Indiana.
- **Circumneutral seep:** The circumneutral seep (or seep-spring) is a groundwater-fed wetland on organic soil. It is primarily herbaceous. Species typically include marsh marigold (*Caltha palustris*) and skunk cabbage (*Symplocarpus foetidus*) with a scattered tree canopy. Circumneutral seep is typically situated on or near the base of a slope. The soil is typically circumneutral muck. This seep community is characterized by slowly flowing water during at least part of the year. Circumneutral seeps can be found scattered throughout Indiana.
- **Cypress swamp:** Bald cypress swamps are seasonally to permanently inundated wetlands found in depressions and sloughs of large bottomlands associated with the Wabash/Ohio River system. Poorly to very poorly drained soils characterize this environment. Bald cypress (*Taxodium distichum*) is present, and green ash (*Fraxinus pennsylvanica*), silver maple (*Acer saccharinum*), and overcup oak (*Quercus lyrata*) are also usually present. This community is restricted to extreme southwest Indiana.
- **Dune and swale:** Dune and swale is an ecological system consisting of a mixture of upland (black oak sand savanna, dry to mesic sand prairie) and wetland (pond, panne, sedge meadow, marsh, wet prairie) natural communities. These communities occur in long, narrow, linear complexes, with the dry communities occupying sand ridges, and the wet communities occurring in the intervening swales. Black oak (*Quercus velutina*), paper birch (*Betula papyrifera*), jack pine (*Pinus banksiana*), and prairie vegetation typically occur on the ridges, and sedges, reeds, and marsh/aquatic vegetation line are found in the swales. Water levels are directly influenced by ground water, with the interdunal swales controlled

largely by lateral flow through porous beach ridges. Dune and swale is restricted to extreme northwest Indiana, near Lake Michigan.

- **Fen:** Fen is a calcareous, groundwater-fed wetland. Fens are often a mosaic of grassy areas, sedge areas, graminoid-shrubby cinquefoil, and tall shrub areas. The extent of the tall shrub component of fens may be determined by fire frequency and/or soil moisture. Drying of the soil increases the growth of shrubs. Fens typically occur in the vicinity of glacial moraines. Fens typically have a muck or peat substrate. The water level fluctuates seasonally and is fed by groundwater. Fens can be found in central and northern Indiana.
- **Forested fen:** Forested fen is a tree-dominated wetland on organic soil which receives groundwater. Forested fens are often a mosaic of treed areas, tall shrub areas, and herbaceous areas. A tall shrub layer is often well developed in forested fens. Indicative species typically include tamarack (*Larix laricina*), black ash (*Fraxinus nigra*), yellow birch (*Betula alleghaniensis*), poison sumac (*Toxicodendron vernix*), and red maple (*Acer rubrum*). Forested fens occur in wet lowlands, where moraines meet outwash features or depressions. Forested fens have saturated, poorly to very poorly drained soils that are often muck, but some seasonal flooding can occur in forested fens that are especially level. This community is a late successional stage of fen or circumneutral bog. Forested fens occur in northern Indiana.
- **Forested swamp:** Forested swamp is a seasonally inundated to intermittently exposed wetland of large river bottoms. Forested swamps do not receive direct flow from river flooding except under exceptional circumstances. Forested swamps occur in depressions, sloughs and large bottomlands, typically dominated by tree species such as swamp cottonwood (*Populus heterophylla*), green ash (*Fraxinus pennsylvanica*), and swamp white oak (*Quercus bicolor*). In northern Indiana important tree species include black ash (*Fraxinus nigra*), yellow birch (*Betula alleghaniensis*), and red maple (*Acer rubrum*). Poorly to very poorly drained and aerated soils characterize the swamp environment. Soils usually are mineral not muck or peat. This community type is found throughout Indiana.
- **Marl beach:** Marl beach is a fen-like community located on the marly muck shorelines of lakes. Marl precipitate is evident. A thin layer of water is present in spring, but dries down in summer. Draw-down of a lake creates additional area for this community to develop on. Marl beaches can be found in extreme northern Indiana, primarily in the northeast.
- **Muck flat:** Muck flat is a shoreline and lake community possessing a unique flora of sedges and annual plants, many of which are also found on the Atlantic and Gulf Coastal Plains. This community is found at the margins of lakes or covering shallow basins. This community has a peat substrate. The muck flats can float on the water surface, but during high water periods are usually inundated. The water level of a basin fluctuates during a season or from year to year in response to the amount of precipitation. This exposes bare substrate needed for germination by species of the community. Muck flats are found in northern Indiana.
- **Panne:** Panne is a groundwater fed herbaceous wetland occupying interdunal swales near Lake Michigan. Pannes are located on the lee side of the first or second line of dunes from the lakeshore. The soil is wet, calcareous sand. Pannes are located in counties bordering Lake Michigan.
- **Sand flat:** Sand flat is a shoreline and lake community possessing a unique flora of sedges and annual plants, many of which are also found on the Atlantic and Gulf Coastal Plains. This community is found at the margins of lakes or covering shallow basins. This community has a sand substrate. During high water periods sand flats at the margins of



lakes or ponds are inundated. The water level of a basin fluctuates during a season or from year to year in response to the amount of precipitation. This exposes bare substrate needed for germination by species of the community. Sand flats occur in northern Indiana, and in the Plainville Sand Section of southwest Indiana.

- **Sedge meadow:** Sedge meadow is an herbaceous wetland typically dominated by graminoid species such as flat sedge (*Cyperus* spp.), spike rush (*Eleocharis* spp.), rushes (*Juncus* spp.) and sedges (*Carex* spp.). Sedge meadow is an herbaceous wetland of stream margins and river floodplains, and lake margins or upland depressions. Streamside sedge meadows are frequently flooded in the spring and early summer. Sedge meadows of lake margins and depressions often contain standing water during wet months and after heavy rains; during dry periods, the water level is at or just below the substrate. Sedge meadow usually occupies the ground between a marsh and the uplands, or a shrub swamp or wet forest. Periodic high water can kill trees and shrubs invading sedge meadows. Sedge meadows can be found in the northern half of the state.
- **Shrub swamp:** Shrub swamp is a shrub-dominated wetland that is seasonally inundated to intermittently exposed. This community occurs in depressions and the substrate is either mineral soils or muck, as opposed to peat which is characteristic of bogs. Shrub swamp is characterized by non-flowing or very slowly flowing water with levels that fluctuate seasonally. Shrub swamps are persistent, though considered successional. Two opportunistic native shrubs, sandbar willow (*Salix exigua*) and gray dogwood (*Cornus racemosa*), by themselves, are not indicative of shrub swamps. This community type is found throughout Indiana.
- **Sinkhole pond:** Sinkhole ponds are water-containing depressions in karst topography. Sinkhole ponds are found in the Mitchell Karst Plain in south-central Indiana.
- **Sinkhole swamp:** Sinkhole swamps are depressions in karst topography dominated by tree or shrub species. Sinkhole swamps are found in the Mitchell Karst Plain in south-central Indiana.
- **Wet floodplain forest:** Wet floodplain forest is a broadleaf deciduous forest of river floodplains. Wet floodplain forests occur in depressions and flats on narrow to wide floodplains and also on recently exposed substrates that are frequently flooded. Wet floodplain forests are frequently flooded and may have standing water seasonally to permanently present. Wet floodplain forests occur statewide.
- **Wet prairie:** Wet prairie is an herbaceous wetland typically dominated by graminoid species such as prairie cordgrass (*Spartina pectinata*), bluejoint (*Calamagrostis canadensis*), and sedges (*Carex* spp.). Vegetation height is often 2-3 m. The species diversity of wet prairies is lower than that of mesic prairies. Wet prairies occur in deep swales and the substrate ranges from very deep black mineral soils (which are high in organic matter) to muck. Ponding in spring lasts for several weeks prior to drainage. Wet prairies commonly occur in the Grand Prairie Natural Region, the Tipton Till Plain and the Bluffton Till Plain, with a few examples found in the Northern Lakes Natural Region.
- **Wet sand prairie:** Wet sand prairie is an herbaceous wetland typically dominated by graminoid species such as prairie cordgrass (*Spartina pectinata*), bluejoint (*Calamagrostis canadensis*), and sedges (*Carex* spp.). Vegetation height is often 2-3 m. The species diversity of wet prairies is lower than that of mesic prairies. Wet lowland prairies occur in deep swales and the substrate is sand, sometimes mixed with muck. Flooding is a regular springtime occurrence in wet sand prairie and may last several weeks. This community occurs in a mosaic with marsh and other wetlands, and with upland prairies and sand

savannas. Fire was frequent occurrence, but more common in the fall when waters had receded. This community occurs in northwest Indiana and in the Plainsville Sands area.

## **Attachment 3: 40 CFR 121.7 Citation and Justification**

### **NWP Denial Citation and Justification**

It is the judgment of the Office of Water Quality that the proposed Nationwide Permits 16, 17, 20, 23, 31, 32, 34, 35, 38, 41, 53, 54, and 59 may violate Indiana Code (IC) 13-18-4-5 and the water quality standards (WQS) set forth at 327 Indiana Administrative Code (IAC) 2-1-6(a)1, and 327 IAC 2-1.3-3.

1. Indiana Code 13-18-4-5 states in part:

A person may not:

- (1) throw, run, drain or otherwise dispose into any of the streams or waters of Indiana;

or

- (2) cause, permit, or suffer to be thrown, run, drained, allowed to seep, or otherwise disposed into any waters; any organic or inorganic matter that causes or contributes to a polluted condition of any waters, as determined by a rule of the board adopted under Sections 1 and 3 of this chapter.

2. 327 Indiana Administrative Code 2-1-6(a)1 states in part:

All waters at all times and at all places meet the minimum conditions of being free from substances, materials, and discharges that form objectionable deposits, are unsightly or deleterious, and are toxic to plant, animal or aquatic life.

3. 327 Indiana Administrative Code 2-1.3-3 states in part:

For all surface waters of the state, existing uses and the level of water quality necessary to protect existing uses shall be maintained and protected.

Because the discharges associated with the activities specified in NWPs 16, 17, 20, 31, 34, 35, 38, 53, and 59 may, even as conditioned, violate Indiana's WQS, projects undertaking those activities will require a site-specific Section 401 Water Quality Certification to ensure compliance with the water quality requirements found in 327 IAC 2.

The discharges associated with the activities specified in NWPs 23 and 32 are undefined and therefore require a site-specific Section 401 Water Quality Certification to ensure compliance with 327 IAC 2.

The discharges associated with activities specified in NWP 41 have no maximum limitation, no notification requirement, and would authorize activities that would alter the flow path, velocity, and cross-sectional area under the ordinary high water mark. Activities authorized by this NWP would not comply with Indiana's General Condition 9 and therefore require an Individual Section 401 Water Quality Certification to ensure compliance with 327 IAC 2.

The discharges associated with activities specified in NWP 54 would not comply with Indiana's General Condition 21 and would require an Individual Section 401 Water Quality Certification to ensure compliance with 327 IAC 2.

### **General Condition (GC) Citation and Justification**

**To ensure projects completed under the Indiana certified NWPs comply with Indiana's WQS, the Indiana general conditions are required.**

- GC (1) For certain NWPs, IDEM has placed a notification requirement to ensure the discharges associated with the activities specified in those NWPs comply with 327 IAC 2. To appropriately evaluate impacts to water quality, including cumulative impacts, Indiana needs to be notified.
- GC (2) Several NWPs authorize minor dredging. This condition requiring the deposit of any dredged material in a contained upland disposal area to prevent sediment run-off to any waterbody is necessary to ensure the discharges associated with the disposal of the dredged material complies with 327 IAC 2.
- GC (3) Per 40 CFR 122.26 and 327 IAC 15, the use of appropriate stormwater control measures and maintenance thereof will prevent any sediment laden water from migrating off site and entering waterways and wetlands, potentially impairing water quality.
- GC (4) Per IC 13-14-4-2, the department may inspect public or private property to inspect for and investigate possible violations of environmental management laws. Additionally, 40 CFR 121.11 allows the certifying authority the right to inspect a facility or activity prior to initial operation of a certified project.
- GC (5) This condition is necessary to ensure a projects permanent and secondary impacts fall within the designated minimal impact thresholds specified in GC 13 and GC 14. This condition is necessary to ensure authorized project comply with 327 IAC 2.
- GC (6) This condition is necessary to ensure projects are implemented in accordance with this Section 401 Water Quality Certification and only projects described in the notification are authorized. This ensures compliance with 327 IAC 2 and 327 IAC 5-2-8.
- GC (7) This condition is necessary to ensure only clean fill materials are proposed for discharge to ensure compliance with 327 IAC 2. Discharges of pollutants may require separate authorization under Section 402 of the Federal Clean Water Act.
- GC (8) This condition is necessary to ensure mitigation banking projects go through the procedures found in 33 CFR 332 and IDEM has the opportunity to

appropriately review and condition any proposed mitigation bank to ensure it complies with 327 IAC 2.

- GC (9) Projects that will permanently change the sinuosity, flow path, velocity, cross-sectional area or the slope of a stream have more than a minimal impact. These activities can change the physical, chemical, and biological integrity of waters by impacting aquatic life movement, sediment transport, and changing the thalweg of a stream. These activities do not comply with 327 IAC 2.
- GC (10) Salmond streams are designated for special protection by 327 IAC 2-1.5-5(a)(3). Only those activities identified in GC (10) are authorized by this WQC. Compliance with these activities, conditions and work restrictions will ensure the chemical, physical and biological integrity of the salmonid waters are maintained and protected in compliance with 327 IAC 2.
- GC (11) These waters are designated as Outstanding State Resource Waters by 327 IAC 2-1-11(b), 327 IAC 2-1.3-3(d), and 327 IAC 2-1.5-19(b). Individual Section 401 Water Quality Certifications are required for these waters to ensure there is no degradation and their water quality is protected and maintained in accordance with 327 IAC 2-1-1.5 and 327 IAC 2-1.5-3.
- GC (12) These wetlands and special aquatic sites are synonymous with Rare and Ecologically important wetland types under 327 IAC 17-1-2(3)(B). Individual Section 401 Water Quality Certifications are required for impacts to these waters to ensure there is no degradation and their water quality is protected and maintained in accordance with 327 IAC 2-1-1.5 and 327 IAC 2-1.5-3.
- GC (13) To ensure projects comply with the water quality standards found at 327 IAC 2, IDEM has established 0.10 acre as the minimal impact threshold for the state of Indiana. To ensure consistency with the policy established in 327 IAC 17-2-2(b), this is the threshold for which minimal impact projects are eligible for general permit authorizations. To allow more projects to fit under the NWP's, IDEM has increased this threshold to 0.25 acre if compensatory mitigation is conducted in accordance with GC 15. Compensatory mitigation ensures there is no permanent degradation to water quality in compliance with 327 IAC 2.
- GC (14) To ensure projects comply with the water quality standards found at 327 IAC 2, IDEM has established 300 linear feet as the minimal impact threshold for streams in the state of Indiana. To allow more projects to fit under the NWP's, IDEM has increased this threshold to 500 linear feet if compensatory mitigation is conducted in accordance with GC 16. Compensatory mitigation ensures there is no permanent degradation to water quality in compliance with 327 IAC 2.
- GC (15) 327 IAC 2-1.3-3 establishes anti-degradation standards for all waters of the State to include waters of the U.S. Proposed activities that exceed the minimal impact thresholds identified in GC 13 require compensatory mitigation to ensure there is no permanent degradation. IDEM is authorizing the use of mitigation banks and the Indiana Stream and Wetland Mitigation Program since the use of the NWP's does not allow for the placement of specific conditions on a permittee responsible mitigation proposal. IDEM is requiring proof of purchase and establishing a timeframe for submittal which is consistent with current Corps and IDEM procedures. To ensure aquatic resource functions

and values are replaced, the compensatory mitigation ratios and service area requirements are based in part on the requirements found in IC 13-18-22 and 33 CFR 332.

- GC (16) 327 IAC 2-1.3-3 establishes anti-degradation standards for all waters of the State to include waters of the U.S. Proposed activities that exceed the minimal impact thresholds identified in GC 14 require compensatory mitigation to ensure there is no permanent degradation. IDEM is authorizing the use of mitigation banks and the Indiana Stream and Wetland Mitigation Program since the use of the NWP does not allow for the placement of specific conditions on a permittee responsible mitigation proposal. IDEM is requiring proof of purchase and establishing a timeframe for submittal which is consistent with current Corps and IDEM procedures. To ensure aquatic resource functions and values are replaced, the compensatory mitigation ratios and service area requirements are based in part on the requirements found in IC 13-18-22, 327 IAC 2 and 33 CFR 332.
- GC (17) The goal of 327 IAC 2 is to restore and maintain the chemical, physical, and biological integrity of waters of the state. This condition is required to ensure there are no state rare, threatened, or endangered water dependent species impacts authorized by the NWPs.
- GC (18) This a clarification condition to allow the use of multiple NWPs if they do not exceed specific impact thresholds. This condition is necessary to ensure compliance with 327 IAC 2.
- GC (19) This is a necessary condition to ensure an applicant submitted all required information with the notification required by GC 1. Without all necessary information, IDEM cannot determine if a project complies with 327 IAC 2.
- GC (20) Certain NWPs allow for temporary impacts. If these activities are poorly implemented, they result in discharges that would affect water quality. This condition is necessary to ensure projects comply with 327 IAC 2 and 327 IAC 15.
- GC (21) Certain NWPs allow for the discharge of riprap or other bank stabilization material. This condition is necessary to ensure authorized activities do not interfere with sediment transport, create aquatic life barriers, or interfere with movement between aquatic and upland habitats and ensure compliance with 327 IAC 2.
- GC (22) Several NWPs allow temporary impacts. Since these activities exceed the minimal impact threshold specified in GC 13, IDEM is requiring notification to ensure they are properly restored. This will ensure compliance 327 IAC 2.
- GC (23) Several NWPs allow temporary impacts. This condition is necessary to ensure those temporary impacts are restored so there is no degradation and the project complies with 327 IAC 2.
- GC (24) This condition is necessary to ensure only projects that have a minimal impact to water quality and comply with 327 IAC 2 are authorized by the NWPs.

### **Nationwide Permit #3 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. Maintenance activities such as the replacement of stream encapsulations and the installation of thermal plastic liners or other liner types can interfere with or become injurious to aquatic life movements. These activities can change the physical integrity of a stream channel and interfere with movement between aquatic environments and upland habitat. The Specific Conditions for NWP #3 will ensure authorized projects will comply with 327 IAC 2.

### **Nationwide Permit #7 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. Please refer to the citations and justifications above for references to General Conditions. The activities authorized by NWP #7 can interfere with or become injuries to aquatic life movements. These activities can change the physical integrity of a stream channel and interfere with movement between aquatic environments and upland habitat. The Specific Conditions for NWP #7 will ensure authorized projects will comply with 327 IAC 2.

### **Nationwide Permit # 13 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. Please refer to the citations and justification above for references to General Conditions. These conditions are necessary to ensure bank stabilization activities do not interfere with sediment transport, aquatic life movements, or movement between aquatic environments and upland habitat. Some of the condition language is directly from the September 15, 2020, Federal Register Notice Proposal to Reissue and Modify Nationwide Permits and the Indiana Regional General Permit (LRL-2018-00988). These conditions are necessary to ensure compliance with 327 IAC 2.

### **Nationwide Permit #14 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. Please refer to the citations and justification above for references to General Conditions. Activities authorized by NWP #14 can impact aquatic life movement and sediment transport. If structures or fills are not properly installed, they can cause erosion and scour within stream channels which alters the physical integrity of the streams. The sumping conditions were developed by IDEM and the Indiana Department of Transportation and are part of their standards and specifications. The conditions for perennial streams greater than 12 feet were designed by the Federal Highway

Administration to ensure aquatic organism passage is considered during culvert installations. These conditions ensure compliance with 327 IAC 2.

#### **Nationwide Permit #15 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. Please refer to the citations and justification above for references to General Conditions. Activities authorized by NWP #15 can interfere with sediment transport and aquatic life movement. These conditions ensure compliance with 327 IAC 2.

#### **Nationwide Permit #18 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. Please refer to the citations and justification above for references to General Conditions. The 0.10 acre limit is to ensure authorized activities meet the minimal impact threshold IDEM has placed on the NWPs. See the citation/justification for GC 13 for minimal impacts. These conditions ensure compliance with 327 IAC 2.

#### **Nationwide Permit #25 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. Please refer to the citations and justification above for references to General Conditions. These conditions are necessary to ensure the authorized activities are located outside the low flow channel to avoid impacts to sediment transport, aquatic life movements, and the physical degradation of the channel. The disposal requirements are necessary to ensure excavation and dewatering activities are conducted in a manner that does not result in a discharge where a numeric water quality standard exists. These conditions ensure compliance with 327 IAC 2.

#### **Nationwide Permit #27 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. Please refer to the citations and justification above for references to General Conditions. The specified conditions for NWP #27 are necessary to ensure there is no permanent degradation to the existing beneficial uses of waters of the State. The impact thresholds are to ensure only minimal impact projects are authorized. The release of sediment from a reservoir is not authorized by this WQC. The release may result in discharges that have numeric limits within 327 IAC 2. Additionally, the sediment may result in harmful and objectionable depositions to aquatic life. Due to the complexity and numerous types of activities authorized by this NWP, notification for activities that install or remove water control structures, dikes, berms, or accumulated sediment is required to verify compliance with 327 IAC 2. These conditions ensure compliance with 327 IAC 2.



### **Nationwide Permit #33 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. Please refer to the citations and justification above for references to General Conditions. These conditions are necessary to ensure all temporary impacts are installed in a manner that does not impede flow, sediment transport, aquatic life movement or can be eroded and redeposited in a manner that becomes injuries to aquatic life. A restoration plan is required to ensure all areas are restored so there is no degradation. These conditions ensure compliance with 327 IAC 2.

### **Nationwide Permit #36 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. Please refer to the citations and justification above for references to General Conditions. Some of the condition language is directly from the September 15, 2020, Federal Register Notice Proposal to Reissue and Modify Nationwide Permits and the Indiana Regional General Permit (LRL-2018-00988). These conditions are necessary to ensure activities authorized by NWP #36 comply with 327 IAC 2.

### **Nationwide Permit #37 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. This condition is necessary to ensure IDEM has participated in the development of the project and has signed the agreement to ensure compliance with 327 IAC 2.

### **Nationwide Permit #46 Citation and Justification**

Per 327 IAC 2-1-1.5, the goal of Indiana's water quality standards is to restore and maintain the chemical, physical and biological integrity of the state's waters. These activities can change the physical, chemical, and biological integrity of waters by impacting aquatic life movement, sediment transport, and changing the thalweg of a stream. This condition is necessary to ensure compliance with 327 IAC 2.