

RESOLUTION 22-06

**Nine Mile Creek Watershed District
BOARD OF MANAGERS**

**Adopting a record of decision for the environmental review of the
South Fork of Nine Mile Creek Project and making a negative declaration on
the need for an environmental impact statement**

Manager Hunker offered the following resolution and moved its adoption, seconded by Manager Olson:

WHEREAS Nine Mile Creek Watershed District has adopted a watershed management plan in accordance with Minnesota Statutes 103B.231 (the Plan), and stabilization of the south fork of Nine Mile Creek is identified in the Plan as a NMCWD capital improvement project;

WHEREAS the stretch of the south fork of the creek from Lake Smetana to Normandale Lake has been designated as impaired by the Minnesota Pollution Control Agency for fish and benthic macroinvertebrates, and the NMCWD engineer has identified biotic stressors including excess sediment, inadequate baseflow, dissolved oxygen and ionic strength in the south fork, each of which plays a role in biotic impairments by degrading water quality and available instream habitat, which in turn can affect the distribution and abundance of biotic organisms in the creek;

WHEREAS, to address the stressors found in the south fork, the NMCWD Board of Managers retained Emmons & Olivier Resources (the Project Engineer) to further assess the health of the south fork, and following up on the assessment at the direction of the NMCWD Board of Managers and staff, the Project Engineer identified options to address the impairments in the south fork, and determined – as described in a draft feasibility report presented to the board at the August 17, 2022, public hearing on the project – that improvement of water quality in the south fork could be achieved by reconnecting the creek to its floodplain, restoring eroding banks to reduce sediment and nutrient loading, providing pools during periods of low flow, increasing instream habitat for fish and macroinvertebrates, and restoring vegetation diversity through removal of invasive species and planting native herbaceous vegetation;

WHEREAS to achieve these goals the Project Engineer recommended construction of numerous riffles to increase dissolved oxygen concentrations during periods of sustained flow, creation of deep pool habitat, restoration of floodplain connectivity, and reduction of channel incision and bank erosion to minimize excess sediment contributions to the creek, as well as restoration of vegetation within the riparian corridor to establish deep-rooted herbaceous vegetation along the stream banks and increase vegetative diversity for non-game habitat (the Project);

WHEREAS in the course of assessing the south fork and developing recommendations for improvement, the Project Engineer and NMCWD staff determined that under the Minnesota Environmental Policy Act, Minnesota Statutes chapter 116D, and Minnesota Rules 4410.4300, subpart 26, implementation of the Project would need to be preceded by the preparation of an environmental assessment worksheet because the envisioned and recommended work would affect more than 500 linear feet of a natural watercourse with a total drainage area of 10 square miles or more;

WHEREAS in January 2022 the board directed the Project Engineer to prepare an environmental assessment worksheet, setting out the basic facts needed for NMCWD, as the responsible governmental unit designated in accordance with section 4100.4300, subpart 26, to render a decision on the need for the preparation of an environmental impact statement for the Project;

WHEREAS at its June 15, 2022, regular meeting, the NMCWD Board of Managers approved the EAW for the Project and directed the NMCWD administrator to provide the EAW to the state Environmental Quality Board for publication of a notice of availability in the *EQB Monitor*, which occurred on June 28, 2022, and the EAW was distributed as required by Minnesota Rules 4410.1500, and a 30-day public comment period was provided as required by the rules, ending July 28, 2022, and NMCWD received written comments from state agency representatives during the comment period and comments from the U.S. Army Corps of Engineers after the close of the comment period;

WHEREAS on August 4, 2022, NMCWD Board of Managers held a noticed public hearing at which interested members of the public and others were afforded the further opportunity to comment on potential impacts examined in the EAW, and no comments were offered;

WHEREAS the Project Engineer and NMCWD staff have carefully reviewed the written comments received, and have prepared specific written responses, in accordance with the terms of Minnesota Rules 4410.1700, and a compilation of the comments and responses are attached hereto;

WHEREAS on the basis of comments provided, the analysis of the Project Engineer and NMCWD staff as presented in the findings of fact attached to this resolution, and its own deliberations, the NMCWD Board of Managers concludes as a matter of law that an environmental impact statement for the Project is not necessary because: (1) the Project does not fall within a mandatory EIS category in Minnesota Rules 4410.4400; and (2) the Project does not have the potential for significant negative environmental effects, as specified at Minnesota Rules 4410.1700, subpart 6, and (3) the Project will effectively achieve the NMCWD's water-quality improvement goals with the least possible impact on environmental and other public interests; and

WHEREAS the EAW, the written comments and responses prepared by the Project Engineer and staff, and the attached findings of fact are incorporated herein and adopted as the record of decision in the matter.

NOW, THEREFORE, BE IT RESOLVED that the NMCWD Board of Managers, sitting as the responsible government unit in the matter, adopts the record of decision as described above, and makes a negative declaration, determining that preparation of an environmental impact statement is not necessary, and directs staff to distribute this resolution and the record of decision in the matter within five days per Minnesota Rules 4410.1700, subpart 5.

The question was on the adoption of the resolution and there were five (5) yeas and zero (0) nays as follows:

	<u>Yea</u>	<u>Nay</u>	<u>Absent</u>	<u>Abstain</u>
Butler	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Cutshall	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Hunker	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Kvam	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Olson	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Upon vote, the chair declared the resolution adopted.

Grace Butler
 Grace Butler, Secretary

Dated: August 17, 2022

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I, Grace Butler, secretary of the Nine Mile Creek Watershed District, do hereby certify that I have compared the above resolution with the original thereof as the same appears of record and on file with the District and find the same to be a true and correct transcript thereof.

Grace Butler
 Grace Butler
 Secretary
 August 17, 2022

**South Fork of Nine Mile Creek Project
Environmental Assessment Worksheet
Findings of Fact, including Comments and Responses**

SOUTH FORK NINE MILE CREEK BANK STABILIZATION PROJECT

FINDINGS OF FACT

August 17, 2022

Background

The Nine Mile Creek Watershed District Board of Managers is the Responsible Governmental Unit (RGU) for environmental review of the South Fork Nine Mile Creek Bank Stabilization Project, an effort to be undertaken by NMCWD to reconnect the creek with its floodplain, restore eroding banks to reduce sediment and nutrient loading, provide pool refugia during periods of low flow, increase instream habitat for fish and macroinvertebrates, and restore vegetative diversity through removal of invasive species and planting native herbaceous vegetation (the Project). An Environmental Assessment Worksheet (EAW) was completed for the project pursuant to Minnesota Rules 4410.4300, subpart 27A). The Project is expected to change the course or cross-section of more than 1 acre Nine Mile Creek, a public water of the state as defined in Minnesota Statutes section 103G.005, subdivision 15. The Project will result in conversion of a small area of forested habitat to open prairie and wetlands with a net improvement in habitat for fish, macroinvertebrates, and pollinators. In general, the Project will act as a buffer to the cumulative effects of climate change and increased urbanization. The Project will have a net positive effect on nearby infrastructure by protecting it from erosion, and a net positive effect on downstream waters by improving water quality and habitat for aquatic biota.

The EAW was filed with the EQB and circulated for review and comment in accordance with Minnesota Rules 4410.1500. Notice of the availability of the EAW was published in the *EQB Monitor* on June 28, 2022, announcing a 30-day comment period which ended on July 28, 2022. A news release was issued informing the public that the EAW was available on the NMCWD website and at the NMCWD office. The news release directed people wishing to make comments to file them with the president of the NMCWD board. In addition, NMCWD held a public hearing to receive comments on the EAW on August 4, 2022.

Brief Project Description

Nine Mile Creek Watershed District proposes to restore 5,300 feet of stream corridor along two noncontiguous reaches of the South Fork Nine Mile Creek (SFNMC). The subject reach of the creek begins downstream of Lone Lake, south of Highway 62 in Eden Prairie, and extends approximately 3,000 feet downstream to the inlet of Bryant Lake. The subject reach of the creek in Bloomington occurs downstream of Smetana Lake and east of Braemar Golf Course, where the creek meanders along the southside of 78th Street and north of I-494. The reach extends upstream and downstream of 78th Street Court and is approximately 2,300 feet in length. The work will take place on five specific reaches of the creek, numbered 6, 7, 8, 16 and 17. Work on each reach will include earthwork to reconnect the creek with the floodplain (approximately 1-2 feet of cut depending on existing creek bank heights), tree harvest along eroding creek banks, and installation of instream habitat for fish and macroinvertebrates including rootwads, toewood, brush mattresses, and rock riffles.

Grade-control structures will emulate natural rock riffles and will be installed in the creek to increase the baseflow water elevation to restore riparian hydrology that has been impacted by channel incision and a disconnected floodplain. In general, earthwork will occur within 30 feet of the creek to reconnect the floodplain, and selective tree harvest will occur within 50 feet of the creek. Most of the tree harvest will

occur on the steep eroding creek banks where earthwork is proposed, but some removal will occur in the adjacent floodplain to thin the canopy, increase beneficial sunlight reaching bank vegetation, and improve native herbaceous vegetation and pollinator habitat along the creek corridor. Construction site access will occur off existing roads (NMCWD will coordinate with property owners where the creek meanders along 78th St for the Bloomington Reach and from an existing Three Rivers Park gravel trail adjacent to the creek north of Bryant Lake for the Eden Prairie location). No infrastructure is proposed to be built for this project, and no alterations to existing infrastructure are proposed.

Erosion control measures that will be implemented during project construction include installation of temporary sediment traps in storm drains, installation of bio logs or silt fence to capture surface runoff, and installation of hydro mulch on all disturbed soils. All disturbed soils will be planted with a cover crop and native seed. Erosion control measures will be installed prior to construction, and hydro mulch and native seeding will occur immediately after final grading for each stream bank.

Construction Phasing:

1. Installation of erosion control BMPs
2. Initiate selective tree harvest and temporary stockpile of harvested wood
3. Bank grading and installation of grade control riffles and instream habitat
4. Installation of hydro mulch and native seed to establish permanent vegetation
5. Removal of erosion control BMP's such as silt fence, bio logs, and catch basin sediment traps following establishment of native vegetation

The Project will have a net-positive impact on fish, wildlife, and the plant communities within the Project area. While project construction has the potential to spread weedy and invasive species through soil disturbance, the net effect will be a reduction of invasive species presence in the long-term through removal of invasive species from the work area, particularly common buckthorn and exotic bush honeysuckles, and establishing a diverse herbaceous community of native grasses and flowers. Invasive species removal will happen at a time of year and through removal techniques to prevent spread of invasive species during construction. The NMCWD will coordinate with the cities of Eden Prairie and Bloomington on long term maintenance of these restored reaches of the creek.

The Project will have a long-term positive impact on local fish and wildlife species through the following:

- Creation of rock riffles and toewood would improve and increase available macroinvertebrate habitat and fish spawning opportunities
- Rock riffles will also increase the number and depth of pools for thermal refugia during the summer months and provide overwintering habitat for fish and amphibians
- Reconnected floodplain will improve riparian hydrology and benefit native hydrophytic vegetation
- Improving stream hydrology will improve aquatic habitats downstream of the Project reaches
- Native seeding will increase the diversity and extent of native vegetation over exotic invasives like common buckthorn, reed canary grass, and garlic mustard
- Seeding native forbs will also improve habitat for pollinators including listed species like the rusty-patched bumblebee and monarch butterfly
- Establishment of brush piles will provide refugia for small mammals, reptiles, and amphibians

Project Schedule

The Minnesota Department of Natural Resources (MNDNR) has established work exclusion dates for work in public waters to protect fish spawning and migration (MNDNR, 2014). The South Fork of Nine Mile Creek is classified as a non-trout stream with work exclusion dates from March 15 to June 15. Construction of the SFNMC project will occur outside the work exclusion dates, ideally between June 15 and September 15. Work during this construction window will allow for proper grading and materials installation and provide a sufficient growing season for establishment of vegetative cover. To limit impacts to wildlife, tree harvest will occur in late fall or early winter when most terrestrial species have migrated or are in hibernation.

With this in mind, the South Fork Nine Mile Creek Bank Stabilization Project is anticipated to start in 2023 and continue into 2024. The specific project timeline is still to be determined, and dependent on acquiring all necessary permits as well as obtaining all access and maintenance agreements with landowners and cities that have been identified to be within the project reaches.

Summary of EAW Comments Received and Associated Responses

The 30-day EAW review and comment period began June 28, 2022 and terminated July 28, 2022. Written comments were received from seven individuals, all representing governmental organizations with an interest in the Project, during the public comment period, listed below. The NMCWD Board also received comments from an individual representing the U.S. Army Corps of Engineers after the close of the comment period:

- City of Bloomington
- Office of State Archaeologist
- Minnesota Department of Transportation (MnDOT)
- Minnesota Pollution Control Agency (MPCA)
- Minnesota State Historic Preservation Office (SHPO)
- Metropolitan Council
- Minnesota Department of Natural Resources (DNR)
- United States Army Corps of Engineers

The following table provides a summary of the comments and responses to them. Comment letters are available for review in **Exhibit A**.

From	Staff contact	Comment Synopsis	Response
City of Bloomington	Nick Johnson	<p>The City of Bloomington is responsible of regulating shore areas adjacent to public waterbodies identified in the Shore Area Regulations within the Zoning Code. The South Fork of Nine Mile Creek is identified as one of these waterbodies subject to such regulations. The shore area as it relates to the South Fork of Nine Mile Creek is 50 feet from the top of bank. The project scope may include site disturbance within the shore area for the South Fork of Nine Mile Creek. The project scope should be evaluated according to the limitations and restrictions of the City's shore area regulations, including provisions pertaining to vegetation removal and grading (see Sec. 19.87.04(b)(1) and (2)). Here is a link to the shore area regulations pertaining to alteration of shore areas: https://codelibrary.amlegal.com/codes/bloomington/latest/bloomington_mn/0-0-0-138371 . Compliance with the City's shore area regulations would be formally reviewed as part of a shore area permit process.</p> <ul style="list-style-type: none"> • Shore Area Permit – Section 9 of the EAW lists potential permits that might be required. Given potential for disturbance in the shore area of Nine Mile Creek, a shore area permit should be added to this list as a requirement of the City of Bloomington. 	As part of the project-specification process, NMCWD will analyze the city's shore area ordinance, and will secure all city permits applicable to the final work, if ordered by the NMCWD board.
Office of State Archaeologist	Jennifer Tworzanski	While there are no previously recorded archaeological sites, archaeological site leads, or burials in the proposed project areas, they retain a moderate to high potential for archaeological materials or features. Therefore, a phase I archaeological reconnaissance conducted by a qualified archaeologist is recommended. The Minnesota Historical Society maintains a list of archaeologists here: https://www.mnhs.org/preservation/directory .	NMCWD completed a desktop review of historical conditions to address EAW question #15 Historic Properties. NMCWD has since developed a phase 1A technical memorandum; the memo was provided to SHPO via email August 10, 2022. NMCWD intends to conduct a phase 1 archaeological reconnaissance with a qualified archaeologist in the next phase of design development.

MPCA	Karen Kromar	<p>Since the Eden Prairie Reach of the Project flows directly into Bryant Lake with construction-related impairments, additional erosion, and sediment control best management practices (BMPs) must be implemented at the site to meet National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Construction Stormwater Permit (CSW Permit) requirements. Additional BMPs include immediately stabilizing temporarily or permanently inactively worked soils on any portion of the site and completing the stabilization within 7 days. A temporary sediment basin must also be supplied where 5 acres or more drain to a common location. The same requirements apply to the Bloomington reach of the Project since that portion of the South Fork Nine Mile Creek also has construction-related water impairments.</p> <p>In addition, redundant (double) down gradient sediment control BMPs must be supplied where construction encroaches within 50 feet of the creek or any of the wetlands at the site. The redundant BMPs must be installed above the Ordinary High Water Level. Additional sediment controls may also be needed below the OHWL including in water BMPs to comply with the Department of Natural Resources Public Waters permit. It is also advised that the construction activity is phased to limit the amount of soil exposed at one time. Questions regarding Construction Stormwater Permit requirements should be directed to Roberta Getman at 507-206-2629 or Roberta.Getman@state.mn.us</p>	<p>NMCWD will prepare and implement comprehensive stormwater management, wetland protection and erosion control plans as an integral part of the Project, if ordered. Fully effective erosion control measures will be installed for construction along the creek, including floating silt curtain to Bryant Lake, silt fence and biologs where necessary, as well as hydromulch and/or erosion control blanket along the banks where there is exposed soil while we establish native plants long term. As part of the project-specification process, NMCWD will determine applicable requirements -- including National Pollutant Discharge Elimination System/State Disposal System Construction Stormwater Permit requirements -- and will secure all local, state and federal permits applicable to the Project.</p>
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MnDOT	Jason Swenson	<p>Water Resources</p> <p>1. The project site area as identified on Figure 3 for both proposed segments show the project site extents to extend onto MnDOT right-of-way (North End of the Eden Prairie Reach and the west end of the Bloomington Reach). The project proposer should be aware that MnDOT has drainage infrastructure in its right-of-way adjacent to the project site at the Eden Prairie reach. Project proposer should coordinate its proposed plans with MnDOT Water Resources Engineering to ensure the improvements are consistent with existing infrastructure.</p> <p>2. Table 8. Permits and Approvals required should be modified to indicate that a MnDOT Drainage permit is required and to be applied for, based on the project site extents mentioned in the previous comment.</p> <p>Items that will be needed as part of a drainage permit review include project plans with the right-of-way boundaries correctly identified, showing all removals, grading, and BMP installations proposed, both temporary and permanent. The plans must identify a revegetation plan, including seed mixtures, mulch or blanket, and fertilizer. MnDOT will not approve a permit until proof of obtaining other permits is provided, in this case, an NPDES Construction Stormwater Permit, DNR Public Waters Permit, and WCA permitting required, and Nine Mile Creek Watershed approval. MnDOT may require hydraulic modeling upon review of the plans.</p>	<p>For reaches 6-8, no construction work is proposed in the MNDOT right-of-way, per sheet 5 of the 30% construction plan, which is available on request. (Basic survey data was collected on the MNDOT ROW for reference.) For the reaches 16-17, the riffle from stream station 0+60 – 1+00 is shown in the preliminary 30% designs slightly on MNDOT ROW. It is not necessary for the integrity of the creek to have this practice in this exact location, and NMCWD will update the design in the next stage of development to shift the riffle downstream (east) to ensure no work will occur on MnDOT property.</p>
SHPO	Sarah Beimers	<p>According to EAW Item 15. "Historic Properties", a Phase IA Archaeological and Cultural Resources Desktop Assessment has been completed for this project. We understand that this document will be submitted to our office for review and comment. We look forward to reviewing the document when it becomes available and will provide comments at that time.</p> <p>Please note that this comment letter does not address the requirements of Section 106 of the National Historic Preservation Act of 1966 and 36 CFR § 800. If this project is considered for federal financial assistance, or requires a federal permit or license, then review and consultation with our office will need to be initiated by the lead federal agency. Be advised that comments and recommendations provided by our office for this state-level review may differ from findings and determinations made by the federal agency as part of review and consultation under Section 106.</p>	<p>NMCWD completed a desktop review of historical conditions to address EAW question #15 Historic Properties. NMCWD has since developed a phase 1A technical memorandum; the memo was provided to SHPO via email August 10, 2022. NMCWD intends to conduct a phase 1 archaeological reconnaissance with a qualified archaeologist in the next phase of design development.</p>

Met Council	Eric Wojchik	<p>Item 11.b.i. - Wastewater (Roger Janzig, roger.janzig@metc.state.mn.us) The South Fork Nine Mile Creek Bank Stabilization Project located in Eden Prairie and Bloomington may have an impact on multiple Metropolitan Council Interceptors in multiple locations. To assess the potential impacts to our interceptor system; prior to initiating this project, preliminary plans should be sent to Tim Wedin, Interceptor Engineering Assistant Manager (651-602-4571) at the Metropolitan Council Environmental Services.</p> <p>Item 13. - Fish, wildlife, plant communities, and sensitive ecological resources (rare features) (Colin Kelly, 651-602-1361)</p> <p>There are three units of the Regional Parks System in the vicinity (i.e., within 1/2 mile) of the proposed project: Bryant Lake Regional Park and Eagle-Bryant Lake Regional Trail are adjacent to the Eden Prairie Reach and Hyland Bush Anderson Lakes Park Reserve is approximately 0.1 mile south of the Bloomington Reach, on the opposite side of I-494. All of these units are operated and maintained by Three Rivers Park District. Hyland-Bush-Anderson Lakes Park Reserve is owned by the City of Bloomington.</p> <p>While Council staff do not believe the bank stabilization project will have an adverse impact on the referenced Regional Parks System units, Council staff encourage the proposer and RGU (Nine Mile Creek Watershed District) to coordinate with Three Rivers Park District before and during the bank stabilization project to ensure regional park and trail use is not impacted, and visitors have an opportunity to learn about the project.</p>	<p>NMCWD will coordinate with all potentially affected property owners prior to the start of construction if the Project is ordered. Land-use rights will be secured in advance, where necessary and appropriate, and NMCWD plans to work specifically with Three Rivers Park District and the adjacent International School of Business to design the Project to best align with their property-use goals and plans to accommodate both improvements to the natural resources as well as human interaction with the creek.</p>
DNR	Melissa Collins	<p>Section 14, Fish, Wildlife, Plant Communities, and Ecological Resources:</p> <p>1. Please be aware that an agency may use a Natural Heritage Information System (NHIS) license to query the DNR rare features database in order to screen for rare species. When a rare feature is identified within one mile of the project area, the proposer needs to contact NHIS staff for further guidance (Review.NHIS@state.mn.us), so that DNR staff can determine if rare features are likely to be impacted by the project and provide next steps.</p>	<p>NMCWD consulting engineer for the Project has a NHIS license and will query for rare species within one mile of the project extents for each reach. NMCWD will coordinate with DNR staff if any rare species occur within one mile of the project extent to determine appropriate measures to avoid impacts to rare species.</p>

DNR	Melissa Collins	2.DNR NHIS staff have determined that kitten-tails (<i>Besseyia bullii</i>), state-listed as threatened, is unlikely to be impacted by this project.	Noted. Thank you.
DNR	Melissa Collins	<p>3.Please note that Blanding’s turtles (<i>Emydoidea blandingii</i>), a state-listed threatened species, have been documented just over one mile from the project area, and could be present during project construction activities. This project does have the potential to impact this rare turtle through direct fatalities and habitat disturbance/destruction due to excavation, fill, and other construction activities associated with the project. Therefore, the following avoidance measures are recommended:</p> <ul style="list-style-type: none"> o Avoid wetland impacts during hibernation season, between October 15th and April 15th, unless the area is unsuitable for hibernation. o The use of erosion control blanket shall be limited to ‘bio-netting’ or ‘natural-netting’ types, and specifically not products containing plastic mesh netting or other plastic components. <p>Also, be aware that hydro-mulch products may contain small synthetic (plastic) fibers to aid in their matrix strength. These loose fibers could potentially re-suspend and make their way into Public Waters. As such, please review mulch products and not allow any materials with synthetic (plastic) fiber additives in areas that drain to Public Waters.</p> <ul style="list-style-type: none"> o Areas where there will be construction should be checked for turtles before the use of heavy equipment or any ground disturbance. o The Blanding’s turtle flyer should be given to all contractors working in the area. o Monitor for turtles during construction and report any sightings to the DNR Nongame Specialist. o If turtles are in imminent danger they must be moved by hand out of harm’s way, otherwise, they are to be left undisturbed. o Blanding’s turtles use upland areas up to and over a mile distant from wetlands, waterbodies, and watercourses. Uplands are used for nesting, basking, periods of dormancy, and traveling between wetlands. Factors believed to contribute to the decline of this species include collisions with vehicles, wetland drainage and degradation, and the development of upland habitat. Any added mortality can be detrimental to populations of Blanding’s turtles, as these turtles have a low reproduction rate that depends upon a high survival rate to maintain population 	Noted. Thank you. In completing specifications for the Project, if ordered, NMCWD will require its contractor to use biodegradable erosion control blanket. NMCWD will ensure all materials used meet all applicable regulatory criteria, including "bio-netting" and hydromulch products. NMCWD will also review the Blanding's turtle fact sheet for recommendations for avoiding and minimizing impacts, including avoiding hibernation season timeframes and searching for turtles during active project construction. If any Blanding's turtles are found, DNR non-game staff will be contacted promptly.

levels.

For additional information, see the Blanding's turtle fact sheet, which describes the habitat use and life history of this species. The fact sheet also provides two lists of recommendations for avoiding and minimizing impacts to this rare turtle. Please refer to both lists of recommendations for your project.

DNR	Melissa Collins	4. Ecological Impact Mitigation – Will there be any follow up wetland restoration monitoring and invasive species control for the project beyond initial vegetation establishment?	If the Project is ordered, construction plans and specifications will include three years of post-construction vegetation management to control invasive species while native vegetation becomes established. Management will likely include spot mowing/ weed-whipping and herbicide approved for use in aquatic environments.
US Army Corps of Engineers	Dan Reburn	The purpose of this letter is to inform you that based on the South Fork Nine Mile Creek Bank Stabilization Project: EAW, a Department of the Army (DA) permit does appear to be required for your proposed activity. In lieu of a specific response, please consider the following general information concerning our regulatory program that may apply to the proposed project. St. Paul District has several general permits to authorize work that would result in no more than minimal adverse effects, individually and cumulatively. Activities that have the purpose of bank stabilization (e.g. riprap or bioengineering that are serving to stabilize an eroding bank) could be evaluated under Nationwide Permit (NWP) 13, Bank Stabilization. Practices that are for the purpose of providing aquatic habitat restoration or enhancement could be evaluated under NWP 27, Aquatic Habitat Restoration, Enhancement and Established Activities. For any activities evaluated under NWP 27, an ecological reference must be provided. An ecological reference may be based on the characteristics of a target intact or conceptual-model aquatic resource habitat or riparian area. Please see the enclosed NWP 13 and NWP 27 terms and conditions. Associated impacts to wetlands (identified in area) and any streams or rivers (identified in linear feet and area below the plane of the ordinary high water mark of the waterbody) must be identified, labeled, and evaluated. A delineation of the aquatic resources on-site will be needed to evaluate impacts. Bank stabilization impacts over 500 linear feet or over 1 cubic yard per running linear foot below the plane of the ordinary high water mark would require a waiver, agency coordination, and sufficient justification must be provided for the need for bank stabilization. You may find the Minnesota Joint Application Form on	NMCWD anticipates that the Project will require U.S. Army Corps of Engineering regulatory approvals, and identification of and application for the necessary approvals will be built into completion of the design, plans and specifications. In the next phase of work, NMCWD will delineate all wetlands within the project area or that may be affected by project work. The proposed creek-stabilization bioengineering practices will be for purposes identified in NWP 13 and NWP 27; NMCWD will pursue approval under these general permits as and when necessary, then complete the work in compliance with applicable terms. We anticipate preparation of a Minnesota Joint Application to be submitted to the U.S. ACOE

		our website at https://www.mvp.usace.army.mil/Missions/Regulatory/ to submit an application for impacts to aquatic resources.	during the permitting phase of the project.
US Army Corps of Engineers	Dan Reburn	If the proposal involves activity in navigable waters of the United States, it may be subject to the Corps of Engineers' jurisdiction under Section 10 of the Rivers and Harbors Act of 1899 (Section 10). Section 10 prohibits the construction, excavation, or deposition of materials in, over, or under navigable waters of the United States, or any work that would affect the course, location, condition, or capacity of those waters, unless the work has been authorized by a Department of the Army permit.	Comment noted. NMCWD anticipates preparation of a Minnesota Joint Application to be submitted during the permitting phase of the Project.

Environmental Issue Summary

Based on the information contained in the EAW and in the written comments received, the South Fork Nine Mile Creek Bank Stabilization Project does not create significant environmental issues. Adverse impacts to the environment would be temporary and NMCWD will be able to substantially mitigate any adverse impacts in construction design and specification. The long-term outcome of the Project will provide benefits to both the natural and human environments.

Comparison of Potential Impacts with Evaluation Criteria under Minnesota Rules

In deciding whether a project has the potential for significant environmental effects and whether an Environmental Impact Statement is needed, the RGU must consider the impacts that may be reasonably expected to occur from the project with four criteria by which potential impacts must be evaluated (Minnesota R. 4410.1700, subp. 7A-7D).

A. Type, extent, and reversibility of environmental impacts

Based upon information provided in the EAW and the responses to review comments, the RGU concludes that the potential environmental effects of the project will be effectively mitigated, limited in extent, temporary, or reversible. In general, long-term project effects are beneficial both to the natural and human environments.

The Project will result in conversion of a small area of forested habitat to open prairie and wetlands with a net improvement in habitat for fish, macroinvertebrates, and pollinators. See table below for a breakdown of the preliminary design estimates of proposed land cover acreage before and after the bank stabilization project.

Project Feature	Before (acres)	After (acres)
Wetlands	2.40	6.24
Forested Wetlands	5.76	1.92
Streams	5,300 linear ft	5,300 linear ft
Upland Woodland/Forest	12.58	6.99
Grassland/Prairie	0	5.59
Cropland	-	-
Livestock Rangeland/Pastureland	-	-
Lawn/Landscaping	-	-
Impervious Surfaces	0.16	0.16
Stormwater Pond	-	-
Total Acreage	20.9	20.9

In general, the Project will act as a buffer to the cumulative effects of climate change and increased urbanization. This will be done primarily by reconnecting the creek with the floodplain in multiple locations, as well as the recreation of rock riffles to increase the baseflow water elevation to restore

riparian hydrology that has been impacted by channel incision and a disconnected floodplain. This, as well as selective tree harvest and installation of bank stabilization techniques will increase beneficial sunlight reaching bank vegetation, and improve native herbaceous vegetation and pollinator habitat along the creek corridor. The project will have net positive effect on nearby infrastructure by protecting it from erosion, and a net positive effect on downstream waters by improving water quality and habitat for aquatic biota. The temporary negative impacts the Project will create during construction will be mitigated with the following measures:

- Only specifying work on degraded stream banks that are contributing pollutants to the creek and bypassing stream banks that are stable or that are currently providing quality near-stream/ instream habitat (i.e. stable undercut banks with adequate vegetation/ rooting for stability).
- Preserving significant native trees in the floodplain and stable root masses adjacent to the creek that provide bank stability and diversity.
- Ensuring the stability of existing riffles and deep pools will be left undisturbed to minimize impacts to the existing macroinvertebrate community and provide refuge for fish.
- Construction will not occur during bald eagle nesting season or long-eared bat roosting season.
- Stabilizing construction areas in accordance with best practices and all applicable permits and approvals, including best practices to minimize spread of invasive species.
- Vegetation establishment and longterm maintenance to ensure the creekbanks remain stable and quality biodiverse habitat will establish along the creek corridor.

B. Cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project.

The South Fork Nine Mile Creek Bank Stabilization Project is not dependent on the initiation or development of any other project.

For each of the environmental effects listed in the EAW and responses to comments, the Project would potentially contribute to only minor, temporary increases in cumulative potential effects on the project area relative to other contributors. Cumulative effects resulting from the proposed project are largely environmentally protective and beneficial in nature. There are no related projects affecting the proposed project area at this time that would result in significant cumulative impacts when combined with the proposed project.

C. The extent to which environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project.

Mitigation of any impacts from the project will be achieved through design and inclusion of best management practices (BMPs), and compliance with all applicable regulations, including permit requirements and other programs as listed in the following table:

Unit of Government	Type of Application	Justification
City of Eden Prairie	Land Alteration Permit Floodplain Permit/No-Rise Certificate Shore Area Permit	Land altering work below the floodplain in a shore area
City of Bloomington	Floodplain Permit/No-Rise Certificate Grading Permit Shore Area Permit	Land altering work below the floodplain in a shore area
Local Government Unit/Minnesota Department of Natural Resources /U.S. Army Corps of Engineers	Joint Permit Application (Wetland Delineation Review / Wetland Impacts) Section 401 Water Quality Certification	Land altering work that impacts a water of the US
Nine Mile Creek Watershed District	Permit for: Floodplain and Drainage Alterations Wetlands Management Erosion and Sediment Control Shoreline and Streambank Improvements	Land altering work including impacts to wetlands and streambank improvements within the 100-year floodplain
Three Rivers Park District	Special Use Permit	Special use for park areas when they are otherwise closed to the public
Minnesota Pollution Control Agency	NPDES/SDS Permit	Sites disturbing 1 acre or more of land
Minnesota Department of Natural Resources	Public Waters Work Permit	Work within a public water or public water wetland

D. The extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

No other environmental effects, other than what is noted in the EAW, are anticipated. Environmental effects related to project activities, including stormwater management and invasive species control, can be controlled in accordance with the results of the following studies:

Minnesota Pollution Control Agency. 2005. State of Minnesota Stormwater Manual. Minnesota Pollution Control Agency, St. Paul, MN. (Stormwater Manual updated via Stormwater Manual Webpage)
https://stormwater.pca.state.mn.us/index.php?title=Main_Page

Minnesota Invasive Species Advisory Council. 2009. A Minnesota State Management Plan for Invasive Species. State of Minnesota, St. Paul, MN.
https://files.dnr.state.mn.us/natural_resources/invasives/state_invasive_species_plan.pdf

Minnesota Department of Natural Resources. Best Practices for Meeting General Public Waters Work Permit GP 2004-0001 (reference for work exclusion dates)
https://files.dnr.state.mn.us/waters/watermgmt_section/pwpermits/gp_2004_0001_chapter1.pdf

Attached Exhibits:

- A. EAW Review Comments

From: [Bob Cutshall](#)
To: [Randy Anhorn](#); [Brett Eidem](#)
Subject: FW: South Fork Nine Mile Creek EAW - City of Bloomington Review
Date: Tuesday, July 26, 2022 8:05:03 AM
Attachments: [image001.png](#)

From: Johnson, Nick M <nmjohnson@BloomingtonMN.gov>
Date: Monday, July 25, 2022 at 1:50 PM
To: Bob Cutshall <bcutshall@ninemilecreek.org>
Subject: FW: South Fork Nine Mile Creek EAW - City of Bloomington Review

[External Sender]

Good morning Mr. Cutshall,

I am writing to provide review comments on the EAW that has been prepared and published for the improvements to the South Fork of Nine Mile Creek. I offer the following comments from the City of Bloomington for your consideration:

- **Shore Area Regulation** – The City of Bloomington is responsible of regulating shore areas adjacent to public waterbodies identified in the Shore Area Regulations within the Zoning Code. The South Fork of Nine Mile Creek is identified as one of these waterbodies subject to such regulations. The shore area as it relates to the South Fork of Nine Mile Creek is 50 feet from the top of bank. The project scope may include site disturbance within the shore area for the South Fork of Nine Mile Creek. The project scope should be evaluated according to the limitations and restrictions of the City's shore area regulations, including provisions pertaining to vegetation removal and grading (see Sec. 19.87.04(b)(1) and (2)). Here is a link to the shore area regulations pertaining to alteration of shore areas: https://codelibrary.amlegal.com/codes/bloomington/latest/bloomington_mn/0-0-0-138371. Compliance with the City's shore area regulations would be formally reviewed as part of a shore area permit process.
- **Shore Area Permit** – Section 9 of the EAW lists potential permits that might be required. Given potential for disturbance in the shore area of Nine Mile Creek, a shore area permit should be added to this list as a requirement of the City of Bloomington.

Thanks for the opportunity to provide comment. I am happy to address any questions you or your staff may have.

Take care,



NICK M. JOHNSON (he/him)
Senior Planner, Planning Division
PH: 952-563-8925 **EMAIL:** nmjohnson@bloomingtonmn.gov
1800 West Old Shakopee Road, Bloomington, MN 55431

[CONFIDENTIALITY AND PRIVACY NOTICE] Information transmitted by this email is proprietary to the City of Bloomington and is intended for use only by the individual or entity to which it is addressed, and may contain information that is private, privileged, confidential or exempt from disclosure under applicable law. If you are not the intended recipient or it appears that this mail has been forwarded to you without proper authority, you are notified that any use or dissemination of this information in any manner is strictly prohibited. In such cases, please delete this mail from your records. If you received this communication in error, please

notify me promptly.



328 West Kellogg Blvd St Paul, MN 55102

OSA.Project.Reviews.adm@state.mn.us

Date: 07/18/2022

Bob Cutshall
Nine Mile Creek Watershed District
952-835-2078
bcutshall@ninemilecreek.org

Project Name: South Fork Nine Mile Creek Bank Stabilization Project

Known or Suspected Cemeteries
<input checked="" type="checkbox"/> Platted Cemeteries - T117 R22 S35 SE NE <input type="checkbox"/> Unplatted Cemeteries <input type="checkbox"/> Burial File
Notes/Comments
Thank you for the opportunity to comment on the above listed project. While there are no previously recorded archaeological sites, archaeological site leads, or burials in the proposed project areas, they retain a moderate to high potential for archaeological materials or features. Therefore a phase I archaeological reconnaissance conducted by a qualified archaeologist is recommended. The Minnesota Historical Society maintains a list of archaeologists here: https://www.mnhs.org/preservation/directory .
Recommendations
<input type="checkbox"/> Not Applicable <input type="checkbox"/> No Concerns <input type="checkbox"/> Monitoring <input type="checkbox"/> Phase Ia – Literature Review

Phase I – Reconnaissance survey

Phase II – Evaluation

Phase III – Data Recovery

If you require additional information or have questions, comments, or concerns please contact our office.

Sincerely,

A handwritten signature in blue ink, appearing to read 'JTW', is positioned above the typed name and contact information.

Jennifer Tworzyanski
Assistant to the State Archaeologist
OSA
Kellogg Center 328 Kellogg Blvd W
St Paul MN 55102
651.201.2265
jennifer.tworzyanski@state.mn.us

July 26, 2022

Randy Anhorn
Nine Mile Creek Watershed District
12800 Gerard Drive
Eden Prairie, Minnesota 55346

SUBJECT: Nine Mile Creek Bank Stabilization Project
MnDOT Review EAW22-017
Locations: Eden Prairie site (SE quad of I494 and MN 62)
Bloomington site (NW quad of MN 100 and I494)
Control Sections: 2773 and 2785
Eden Prairie and Bloomington in Hennepin County

Dear Randy Anhorn,

Thank you for the opportunity to review the Nine Mile Creek Bank Stabilization Project EAW. As plans are refined, we would like the opportunity to review the updated information. MnDOT's staff has reviewed the document and has the following comments:

Water Resources

1. The project site area as identified on Figure 3 for both proposed segments shows the project site extents to extend onto MnDOT right-of-way (North End of the Eden Prairie Reach and the west end of the Bloomington Reach). The project proposer should be aware that MnDOT has drainage infrastructure in its right-of-way adjacent to the project site at the Eden Prairie reach. Project proposer should coordinate its proposed plans with MnDOT Water Resources Engineering to ensure the improvements are consistent with existing infrastructure.
2. Table 8. Permits and Approvals required should be modified to indicate that a MnDOT Drainage permit is required and to be applied for, based on the project site extents mentioned in the previous comment.

Items that will be needed as part of a drainage permit review include project plans with the right-of-way boundaries correctly identified, showing all removals, grading, and BMP installations proposed, both temporary and permanent. The plans must identify a revegetation plan, including seed mixtures, mulch or blanket, and fertilizer. MnDOT will not approve a permit until proof of obtaining other permits is provided, in this case, an NPDES Construction Stormwater Permit, DNR Public Waters Permit, and WCA permitting required, and Nine Mile Creek Watershed approval. MnDOT may require hydraulic modeling upon review of the plans.

For questions regarding this comment, contact Jason Swenson, Water Resources, at Jason.Swenson@state.mn.us or 651-234-7539.

Review Submittal Options

MnDOT's goal is to complete reviews within 30 calendar days. Review materials received electronically can be processed more rapidly. Do not submit files via a cloud service or SharePoint link. In order of preference, review materials may be submitted as:

1. Email documents and plans in PDF format to metrodevreviews.dot@state.mn.us. Attachments may not exceed 20 megabytes per email. Documents can be zipped as well. If multiple emails are necessary, number each message.
2. For files over 20 megabytes, upload the PDF file(s) to MnDOT's Web Transfer Client site: <https://mft.dot.state.mn.us>. Contact MnDOT Planning development review staff using the same email above for uploading instructions, and send an email listing the file name(s) after the document(s) has/have been uploaded.

You are welcome to contact me at 651-234-7785, or Jake.Schutt@state.mn.us with any questions.

Sincerely,

Jake Schutt
Principal Planner

Copy sent via email:

Jason Swenson, Water Resources
Buck Craig, Permits
Douglas Nelson, Right of Way
Eric Lauer-Hunt, Traffic
Andrew Lutaya, Area Engineer
Tod Sherman, Planning

Cameron Muhic, Planning
David Elvin, Planning
David Kratz, Planning
Bethany Brant-Sargent, Metropolitan Council
Jed Hanson, Metropolitan Council

July 25, 2022

Bob Cutshall
Board President
Nine Mile Creek Watershed District
12800 Gerard Drive
Eden Prairie, MN 55346

Re: South Fork Nine Mile Creek Bank Stabilization Project Environmental Assessment Worksheet

Dear Bob Cutshall:

Thank you for the opportunity to review and comment on the Environmental Assessment Worksheet (EAW) for the South Fork Nine Mile Creek Bank Stabilization project (Project) located in the cities of Eden Prairie and Bloomington, Hennepin County, Minnesota. The Project consists of a stream restoration project along a portion of the creek. Regarding matters for which the Minnesota Pollution Control Agency (MPCA) has regulatory responsibility and other interests, the MPCA staff has the following comments for your consideration.

Water Resources (Item 12)

Since the Eden Prairie Reach of the Project flows directly into Bryant Lake with construction-related impairments, additional erosion, and sediment control best management practices (BMPs) must be implemented at the site to meet National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Construction Stormwater Permit (CSW Permit) requirements. Additional BMPs include immediately stabilizing temporarily or permanently inactively worked soils on any portion of the site and completing the stabilization within 7 days. A temporary sediment basin must also be supplied where 5 acres or more drain to a common location. The same requirements apply to the Bloomington reach of the Project since that portion of the South Fork Nine Mile Creek also has construction-related water impairments.

In addition, redundant (double) down gradient sediment control BMPs must be supplied where construction encroaches within 50 feet of the creek or any of the wetlands at the site. The redundant BMPs must be installed above the Ordinary High Water Level. Additional sediment controls may also be needed below the OHWL including in water BMPs to comply with the Department of Natural Resources Public Waters permit. It is also advised that the construction activity is phased to limit the amount of soil exposed at one time. Questions regarding Construction Stormwater Permit requirements should be directed to Roberta Getman at 507-206-2629 or Roberta.Getman@state.mn.us.

We appreciate the opportunity to review this Project. Please provide your specific responses to our comments and notice of decision on the need for an Environmental Impact Statement. Please be aware that this letter does not constitute approval by the MPCA of any or all elements of the Project for the purpose of pending or future permit action(s) by the MPCA. Ultimately, it is the responsibility of the Project proposer to secure any required permits and to comply with any requisite permit conditions. If you have any questions concerning our review of this EAW, please contact me by email at Karen.kromar@state.mn.us or by telephone at 651-757-2508.

Sincerely,

Karen Kromar

This document has been electronically signed.

Karen Kromar
Planner Principal
Environmental Review Unit
Resource Management and Assistance Division

KK:rs

cc: Dan Card, MPCA, St. Paul
Roberta Getman, MPCA, Rochester

July 27, 2022

Randy Anhorn
Administrator
Nine Mile Creek Watershed District
12800 Gerard Drive
Eden Prairie, MN 55346

RE: EAW – Nine Mile Creek Watershed District
Eden Prairie & Bloomington, Hennepin County
SHPO Number: 2022-1956

Dear Randy Anhorn:

Thank you for providing this office with a copy of the Environmental Assessment Worksheet (EAW) for the above-referenced project.

According to EAW Item 15. “Historic Properties”, a Phase IA Archaeological and Cultural Resources Desktop Assessment has been completed for this project. We understand that this document will be submitted to our office for review and comment. We look forward to reviewing the document when it becomes available and will provide comments at that time.

Please note that this comment letter does not address the requirements of Section 106 of the National Historic Preservation Act of 1966 and 36 CFR § 800. If this project is considered for federal financial assistance, or requires a federal permit or license, then review and consultation with our office will need to be initiated by the lead federal agency. Be advised that comments and recommendations provided by our office for this state-level review may differ from findings and determinations made by the federal agency as part of review and consultation under Section 106.

Please contact Kelly Gragg-Johnson, Environmental Review Program Specialist, at kelly.graggjohnson@state.mn.us if you have any questions regarding our review of this project.

Sincerely,



Sarah J. Beimers
Environmental Review Program Manager



July 27, 2022

Randy Anhorn, Administrator
Nine Mile Creek Watershed District
12800 Gerard Drive
Eden Prairie, MN 55346

RE: Nine Mile Creek Watershed District, - Environmental Assessment Worksheet (EAW) – South Fork Nine Mile Creek Bank Stabilization Project (Eden Prairie and Bloomington)
Metropolitan Council Review No. 22781-1
Metropolitan Council District No. 3, 5

Dear Randy Anhorn:

The Metropolitan Council received the EAW for the South Fork Nine Mile Creek Bank Stabilization project on June 23, 2022. The proposed project is located in both Eden Prairie and Bloomington. The proposed development consists of 20.9 acres with forests and wetlands.

The staff review finds that the EAW is complete and accurate with respect to regional concerns and does not raise major issues of consistency with Council policies. An EIS is not necessary for regional purposes.

We offer the following comments for your consideration.

Item 11.b.i. - Wastewater (Roger Janzig, roger.janzig@metc.state.mn.us)

The South Fork Nine Mile Creek Bank Stabilization Project located in Eden Prairie and Bloomington may have an impact on multiple Metropolitan Council Interceptors in multiple locations. To assess the potential impacts to our interceptor system; prior to initiating this project, preliminary plans should be sent to Tim Wedin, Interceptor Engineering Assistant Manager (651-602-4571) at the Metropolitan Council Environmental Services.

Item 13. - Fish, wildlife, plant communities, and sensitive ecological resources (rare features) (Colin Kelly, 651-602-1361)

There are three units of the Regional Parks System in the vicinity (i.e., within 1/2 mile) of the proposed project: Bryant Lake Regional Park and Eagle-Bryant Lake Regional Trail are adjacent to the Eden Prairie Reach and Hyland Bush Anderson Lakes Park Reserve is approximately 0.1 mile south of the Bloomington Reach, on the opposite side of I-494. All of these units are operated and maintained by Three Rivers Park District. Hyland-Bush-Anderson Lakes Park Reserve is owned by the City of Bloomington.

While Council staff do not believe the bank stabilization project will have an adverse impact on the referenced Regional Parks System units, Council staff encourage the proposer and RGU (Nine Mile Creek Watershed District) to coordinate with Three Rivers Park District before and during the bank stabilization project to ensure regional park and trail use is not impacted, and visitors have an opportunity to learn about the project.

This concludes the Council's review of the EAW. The Council will not take formal action on the EAW. If you have any questions or need further information, please contact Eric Wojchik, Principal Reviewer, at 651-602-1330 or via email at Eric.Wojchik@metc.state.mn.us.

Sincerely,

A handwritten signature in blue ink that reads "Angela R. Torres". The signature is written in a cursive style.

Angela R. Torres, AICP, Senior Manager
Local Planning Assistance

CC: Tod Sherman, Development Reviews Coordinator, MnDOT - Metro Division
Molly Cummings, Metropolitan Council District 5
Eric Wojchik, Sector Representative/Principal Reviewer
Reviews Coordinator

N:\CommDev\LPA\Agencies\Watershed Districts\Nine Mile Creek WD\Nine Mile Creek Watershed District 2022 South Fork Nine Mile Bank Stabilization EAW Ok Comments 22781-1.docx

From: [Collins, Melissa \(DNR\)](#)
To: [Randy Anhorn](#)
Subject: South Fork Nine Mile Creek EAW -DNR Comments
Date: Thursday, July 28, 2022 4:40:47 PM
Attachments: [image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)

[External Sender]

Dear Randy Anhorn,

Thank you for the opportunity to review the South Fork Nine Mile Creek EAW. DNR is supportive of the project and its goals to reduce erosion and sedimentation within Nine Mile Creek, as well as restore the floodplain connection. We respectfully submit the following comments for your consideration.

Section 14, Fish, Wildlife, Plant Communities, and Ecological Resources:

1. Please be aware that an agency may use a Natural Heritage Information System (NHIS) license to query the DNR rare features database in order to screen for rare species. When a rare feature is identified within one mile of the project area, the proposer needs to contact NHIS staff for further guidance (Review.NHIS@state.mn.us), so that DNR staff can determine if rare features are likely to be impacted by the project, and provide next steps.
2. DNR NHIS staff have determined that kitten-tails (*Besseya bullii*), state-listed as threatened, is unlikely to be impacted by this project.
3. Please note that Blanding's turtles (*Emydoidea blandingii*), a state-listed threatened species, have been documented just over one mile from the project area, and could be present during project construction activities. This project does have the potential to impact this rare turtle through direct fatalities and habitat disturbance/destruction due to excavation, fill, and other construction activities associated with the project.

Therefore, **the following avoidance measures are recommended:**

- Avoid wetland impacts during hibernation season, between October 15th and April 15th, unless the area is unsuitable for hibernation.
- The use of [erosion control](#) blanket shall be limited to 'bio-netting' or 'natural-netting' types, and specifically not products containing plastic mesh netting or other plastic components.
 - Also, be aware that hydro-mulch products may contain small synthetic (plastic) fibers to aid in their matrix strength. These loose fibers could potentially re-suspend and make their way into Public Waters. As such, please review mulch products and not allow any materials with synthetic (plastic) fiber additives in areas that drain to Public Waters.

- Areas where there will be construction should be checked for turtles before the use of heavy equipment or any ground disturbance.
 - The [Blanding's turtle flyer](#) should be given to all contractors working in the area.
 - Monitor for turtles during construction and report any sightings to the [DNR Nongame Specialist](#).
 - If turtles are in imminent danger they must be moved by hand out of harm's way, otherwise, they are to be left undisturbed.

Blanding's turtles use upland areas up to and over a mile distant from wetlands, waterbodies, and watercourses. Uplands are used for nesting, basking, periods of dormancy, and traveling between wetlands. Factors believed to contribute to the decline of this species include collisions with vehicles, wetland drainage and degradation, and the development of upland habitat. Any added mortality can be detrimental to populations of Blanding's turtles, as these turtles have a low reproduction rate that depends upon a high survival rate to maintain population levels.

For additional information, see the [Blanding's turtle fact sheet](#), which describes the habitat use and life history of this species. The fact sheet also provides two lists of recommendations for avoiding and minimizing impacts to this rare turtle. Please refer to both lists of recommendations for your project.

4. Ecological Impact Mitigation – Will there be any follow up wetland restoration monitoring and invasive species control for the project beyond initial vegetation establishment?

Thank you again for the opportunity to provide comments. Please let me know if you have any questions.

Thank you,

Melissa Collins

Regional Environmental Assessment Ecologist | Ecological and Water Resources

Pronouns: She/her/hers

Minnesota Department of Natural Resources

1200 Warner Road

St. Paul, MN 55106

Phone: 651-259-5755

Email: melissa.collins@state.mn.us

mndnr.gov





DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT
180 FIFTH STREET EAST, SUITE 700
ST. PAUL, MN 55101-1678

AUGUST 9, 2022

Regulatory File No. MVP-2022-01071-DCR

Nine Mile Creek Watershed District
c/o Randy Anhorn
randhorn@ninemilecreek.org

Dear Mr. Anhorn:

This letter is in response to correspondence we received from Nine Mile Creek Watershed District regarding the South Fork Nine Mile Creek Bank Stabilization Project located in Section 35, Township 117 North, Range 22 West, Hennepin County, Minnesota. This letter contains our initial comments on this project for your consideration. The purpose of this letter is to inform you that based on the South Fork Nine Mile Creek Bank Stabilization Project: EAW, a Department of the Army (DA) permit does appear to be required for your proposed activity. In lieu of a specific response, please consider the following general information concerning our regulatory program that may apply to the proposed project.

St. Paul District has several general permits to authorize work that would result in no more than minimal adverse effects, individually and cumulatively. Activities that have the purpose of bank stabilization (e.g. riprap or bioengineering that are serving to stabilize an eroding bank) could be evaluated under Nationwide Permit (NWP) 13, Bank Stabilization. Practices that are for the purpose of providing aquatic habitat restoration or enhancement could be evaluated under NWP 27, Aquatic Habitat Restoration, Enhancement and Established Activities. For any activities evaluated under NWP 27, an ecological reference must be provided. An ecological reference may be based on the characteristics of a target intact or conceptual-model aquatic resource habitat or riparian area. Please see the enclosed NWP 13 and NWP 27 terms and conditions. Associated impacts to wetlands (identified in area) and any streams or rivers (identified in linear feet and area below the plane of the ordinary high water mark of the waterbody) must be identified, labeled, and evaluated. A delineation of the aquatic resources on-site will be needed to evaluate impacts. Bank stabilization impacts over 500 linear feet or over 1 cubic yard per running linear foot below the plane of the ordinary high water mark would require a waiver, agency coordination, and sufficient justification must be provided for the need for bank stabilization. You may find the Minnesota Joint Application Form on our website at <https://www.mvp.usace.army.mil/Missions/Regulatory/> to submit an application for impacts to aquatic resources.

If the proposal involves activity in navigable waters of the United States, it may be subject to the Corps of Engineers' jurisdiction under Section 10 of the Rivers and Harbors Act of 1899 (Section 10). Section 10 prohibits the construction, excavation, or deposition of materials in, over, or under navigable waters of the United States, or any work that would affect the course, location, condition, or capacity of those waters, unless the work has been authorized by a Department of the Army permit.

Regulatory Branch (File No. MVP-2022-01071-DCR)

If the proposal involves discharge of dredged or fill material into waters of the United States, it may be subject to the Corps of Engineers' jurisdiction under Section 404 of the Clean Water Act (CWA Section 404). Waters of the United States include navigable waters, their tributaries, and adjacent wetlands (33 CFR § 328.3). CWA Section 301(a) prohibits discharges of dredged or fill material into waters of the United States, unless the work has been authorized by a Department of the Army permit under Section 404. Information about the Corps permitting process can be obtained online at <http://www.mvp.usace.army.mil/regulatory>.

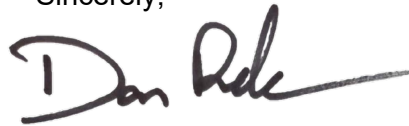
The Corps evaluation of a Section 10 and/or a Section 404 permit application involves multiple analyses, including (1) evaluating the proposal's impacts in accordance with the National Environmental Policy Act (NEPA) (33 CFR part 325), (2) determining whether the proposal is contrary to the public interest (33 CFR § 320.4), and (3) in the case of a Section 404 permit, determining whether the proposal complies with the Section 404(b)(1) Guidelines (Guidelines) (40 CFR part 230).

If the proposal requires a Section 404 permit application, the Guidelines specifically require that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences" (40 CFR § 230.10(a)). Time and money spent on the proposal prior to applying for a Section 404 permit cannot be factored into the Corps' decision whether there is a less damaging practicable alternative to the proposal.

If an application for a Corps permit has not yet been submitted, the project proposer may request a pre-application consultation meeting with the Corps to obtain information regarding the data, studies or other information that will be necessary for the permit evaluation process. A pre-application consultation meeting is strongly recommended if the proposal has substantial impacts to waters of the United States, or if it is a large or controversial project.

If you have any questions, please contact me in our La Crescent office at (651) 290-5900 or Daniel.c.reburn@usace.army.mil. In any correspondence or inquiries, please refer to the Regulatory file number shown above.

Sincerely,

A handwritten signature in black ink that reads "Dan Reburn". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Dan Reburn
Regulatory Specialist

Enclosure

Nationwide Permits

13. Bank Stabilization. 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.

2021 Nationwide Permits (NWP)

St. Paul District Regional Conditions for Minnesota and Wisconsin

To qualify for NWP authorization, the prospective permittee must comply with the following regional conditions, as applicable, in addition to any case specific conditions imposed by the division engineer. The St. Paul District Regulatory website will provide current information regarding NWPs and the necessary 401 Water Quality Certifications at <https://www.mvp.usace.army.mil/missions/regulatory/nwp/>. Every person who wishes 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.

The following NWPs have been revoked and are not available for use in St. Paul District: NWPs 8, 12, 14, 15, 21, 23, 24, 34, 48, 49, 50, 55, 56, 57, and 58.

Information on other permits available for use in St. Paul District can be found at: <https://www.mvp.usace.army.mil/Missions/Regulatory/Permitting-Process-Procedures/>.

Any regulated activity eligible for authorization under a St. Paul District Special Area Management Plan (SAMP) general permit is not eligible for authorization by NWPs.

The following regional conditions are applicable to all NWPs:

- A. **Linear Projects:** No linear utility or linear transportation projects are eligible for authorization by NWPs. These projects will be reviewed for authorization under the St. Paul District's regional general permits or an individual permit.
- B. **Temporary Impacts:** All regulated temporary impacts to waters of the U.S. must comply with the following criteria:
 - (1) If the temporary impacts in waters of the U.S., including wetlands, that occur as a result of the regulated activity would remain in place for longer than 90 days between May 15 and November 15, a PCN is required.
 - (2) Any PCN with temporary impacts must specify how long the temporary impact will remain and include a restoration and re-vegetation plan showing how all temporary fills and structures will be removed and the area restored to preconstruction contours and elevations. Native, non-invasive vegetation must be used unless otherwise authorized by a Corps NWP verification.
- C. **PCNs for Apostle Islands National Lakeshore and Madeline Island:** A project proponent must notify the District by submitting a PCN if the regulated activity would result in excavation, fill, or the placement of a new structure within the boundaries of Apostle Islands National Lakeshore and Madeline Island in Wisconsin. Regulated activities authorized under NWP 3 (Maintenance) are not subject to this condition unless they include bank shaping or excavation.
- D. **Calcareous fens:**

WISCONSIN: No work in a calcareous fen is authorized by a NWP unless the Wisconsin Department of Natural Resources (WI DNR) has approved a permit for the proposed regulated activity. Project proponents must provide evidence of an approved permit to the District.

MINNESOTA: No work in a calcareous fen is authorized by a NWP unless the Minnesota Department of Natural Resources (MN DNR) has approved a calcareous fen management plan specific to a project that otherwise qualifies for authorization by a NWP. Project proponents must provide evidence of an approved fen management plan to the District. A list of known Minnesota calcareous fens can be found at: http://files.dnr.state.mn.us/eco/wetlands/calcareous_fen_list.pdf.

E. **Special Aquatic Resources:** A project proponent must notify the District by submitting a PCN if a regulated activity would occur in any of the following aquatic resources:

- (1) State-designated wild rice waters^{1,2};
- (2) Bog wetland plant communities^{1,3};
- (3) Fens^{1,3};
- (4) Coastal plain marshes^{1,4};
- (5) Interdunal wetlands^{1,4};
- (6) Great Lakes ridge and swale complexes^{1,4};
- (7) Aquatic resources within Lake Superior National Estuarine Research Reserve;
- (8) Ramsar wetland sites, including: the Horicon Marsh, Upper Mississippi River Floodplain Wetland, Kakagon and Bad River Slough, Door Peninsula Coastal Wetlands, Chiwaukee Illinois Beach Lake Plain, and Lower Wisconsin Riverway. The complete up to date Ramsar list is available at <https://rsis Ramsar.org>.

The following regional conditions are applicable to a specific NWP:

F. **NWP 52. Water-Based Renewable Energy Generation Pilot Projects:** NWP 52 does not authorize structures or work in Lake Michigan and Lake Superior within the geographic regulatory boundaries of the St. Paul District.

G. **NWP 3, 33, and 41. Aquatic Resource Impacts:** A project proponent must notify the District by submitting a PCN if a regulated activity, including but not limited to, filling, flooding, excavating, or drainage of waters of the U.S., involves:

- (1) A permanent loss of greater than 1/10 acre of waters of the U.S. for NWP 3 and 41; or
- (2) over 1/2 acre of temporary impacts to waters of the U.S. for NWP 3, 33, and 41.

H. **NWP 27. Aquatic Habitat Restoration, Establishment and Enhancement Activities:** NWP 27 does not authorize the permanent conversion of forested, bog, fen, sedge meadow, or shrub-carr wetlands to other plant communities. A project proponent may request, in writing, a waiver from this condition from the District. The waiver will only be issued if it can be demonstrated that the conversion would restore wetland plant communities to the pre-settlement condition or a watershed approach and that the current landscape and hydrologic conditions would sustain the targeted community.

¹ Information about Wisconsin plant community types for 1-6 above may be obtained from: <http://dnr.wi.gov/topic/EndangeredResources/Communities.asp?mode=group&Type=Wetland>

² Information regarding wild rice waters and their extent may be obtained from: <https://www.dnr.state.mn.us/wildlife/shallowlakes/wildrice.html> and <https://gisdata.mn.gov/dataset/biota-wild-rice-lakes-dnr-wld> in Minnesota, <https://dnr.wisconsin.gov/topic/wildlifehabitat/rice.html> in Wisconsin, and an interactive map is provided at: <http://maps.glifwc.org/> (under Treaty Resources – Gathering).

³ Additional information on bog and fen communities can be found at: <http://www.mvp.usace.army.mil/missions/regulatory.aspx> and in Minnesota at <http://www.dnr.state.mn.us/npc/classification.html>.

⁴ Coastal plain marshes, interdunal wetlands, and Great Lakes ridge and swale complexes are specific to Wisconsin

2021 Nationwide Permit General Conditions

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 NWP.

(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 NWP.

(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.

Nationwide Permits

27. Aquatic Habitat Restoration, Enhancement, and Establishment Activities. Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of non-tidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To be authorized by this NWP, the aquatic habitat restoration, enhancement, or establishment activity must be planned, designed, and implemented so that it results in aquatic habitat that resembles an ecological reference. An ecological reference may be based on the characteristics of one or more intact aquatic habitats or riparian areas of the same type that exist in the region. An ecological reference may be based on a conceptual model developed from regional ecological knowledge of the target aquatic habitat type or riparian area.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to the removal of accumulated sediments; releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms are removed; the installation of current deflectors; the enhancement, rehabilitation, or re-establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to enhance, rehabilitate, or re-establish stream meanders; the removal of stream barriers, such as undersized culverts, fords, and grade control structures; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to restore or enhance wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; coral restoration or relocation activities; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., the conversion of a stream to wetland or vice versa) or uplands. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during wetland rehabilitation activities are not considered a conversion to another aquatic habitat type. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Compensatory mitigation is not required for activities authorized by this NWP since these activities must result in net increases in aquatic resource functions and services.

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge of dredged or fill material occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity, the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource functions and services does

not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

Reporting. For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) the binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general condition 32), except for the following activities:

- (1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS or their designated state cooperating agencies;
- (2) Activities conducted in accordance with the terms and conditions of a binding coral restoration or relocation agreement between the project proponent and the NMFS or any of its designated state cooperating agencies;
- (3) Voluntary stream or wetland restoration or enhancement action, or wetland establishment action, documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or
- (4) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSMRE or the applicable state agency.

However, the permittee must submit a copy of the appropriate documentation to the district engineer to fulfill the reporting requirement. (Authorities: Sections 10 and 404)

Note: This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee projects. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

2021 Nationwide Permits (NWP)

St. Paul District Regional Conditions for Minnesota and Wisconsin

To qualify for NWP authorization, the prospective permittee must comply with the following regional conditions, as applicable, in addition to any case specific conditions imposed by the division engineer. The St. Paul District Regulatory website will provide current information regarding NWPs and the necessary 401 Water Quality Certifications at <https://www.mvp.usace.army.mil/missions/regulatory/nwp/>. Every person who wishes 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.

The following NWPs have been revoked and are not available for use in St. Paul District: NWPs 8, 12, 14, 15, 21, 23, 24, 34, 48, 49, 50, 55, 56, 57, and 58.

Information on other permits available for use in St. Paul District can be found at: <https://www.mvp.usace.army.mil/Missions/Regulatory/Permitting-Process-Procedures/>.

Any regulated activity eligible for authorization under a St. Paul District Special Area Management Plan (SAMP) general permit is not eligible for authorization by NWPs.

The following regional conditions are applicable to all NWPs:

- A. **Linear Projects:** No linear utility or linear transportation projects are eligible for authorization by NWPs. These projects will be reviewed for authorization under the St. Paul District's regional general permits or an individual permit.
- B. **Temporary Impacts:** All regulated temporary impacts to waters of the U.S. must comply with the following criteria:
 - (1) If the temporary impacts in waters of the U.S., including wetlands, that occur as a result of the regulated activity would remain in place for longer than 90 days between May 15 and November 15, a PCN is required.
 - (2) Any PCN with temporary impacts must specify how long the temporary impact will remain and include a restoration and re-vegetation plan showing how all temporary fills and structures will be removed and the area restored to preconstruction contours and elevations. Native, non-invasive vegetation must be used unless otherwise authorized by a Corps NWP verification.
- C. **PCNs for Apostle Islands National Lakeshore and Madeline Island:** A project proponent must notify the District by submitting a PCN if the regulated activity would result in excavation, fill, or the placement of a new structure within the boundaries of Apostle Islands National Lakeshore and Madeline Island in Wisconsin. Regulated activities authorized under NWP 3 (Maintenance) are not subject to this condition unless they include bank shaping or excavation.
- D. **Calcareous fens:**

WISCONSIN: No work in a calcareous fen is authorized by a NWP unless the Wisconsin Department of Natural Resources (WI DNR) has approved a permit for the proposed regulated activity. Project proponents must provide evidence of an approved permit to the District.

MINNESOTA: No work in a calcareous fen is authorized by a NWP unless the Minnesota Department of Natural Resources (MN DNR) has approved a calcareous fen management plan specific to a project that otherwise qualifies for authorization by a NWP. Project proponents must provide evidence of an approved fen management plan to the District. A list of known Minnesota calcareous fens can be found at: http://files.dnr.state.mn.us/eco/wetlands/calcareous_fen_list.pdf.

- E. **Special Aquatic Resources:** A project proponent must notify the District by submitting a PCN if a regulated activity would occur in any of the following aquatic resources:
- (1) State-designated wild rice waters^{1,2};
 - (2) Bog wetland plant communities^{1,3};
 - (3) Fens^{1,3};
 - (4) Coastal plain marshes^{1,4};
 - (5) Interdunal wetlands^{1,4};
 - (6) Great Lakes ridge and swale complexes^{1,4};
 - (7) Aquatic resources within Lake Superior National Estuarine Research Reserve;
 - (8) Ramsar wetland sites, including: the Horicon Marsh, Upper Mississippi River Floodplain Wetland, Kakagon and Bad River Slough, Door Peninsula Coastal Wetlands, Chiwaukee Illinois Beach Lake Plain, and Lower Wisconsin Riverway. The complete up to date Ramsar list is available at <https://rsis Ramsar.org>.

The following regional conditions are applicable to a specific NWP:

- F. **NWP 52. Water-Based Renewable Energy Generation Pilot Projects:** NWP 52 does not authorize structures or work in Lake Michigan and Lake Superior within the geographic regulatory boundaries of the St. Paul District.
- G. **NWP 3, 33, and 41. Aquatic Resource Impacts:** A project proponent must notify the District by submitting a PCN if a regulated activity, including but not limited to, filling, flooding, excavating, or drainage of waters of the U.S., involves:
- (1) A permanent loss of greater than 1/10 acre of waters of the U.S. for NWP 3 and 41; or
 - (2) over 1/2 acre of temporary impacts to waters of the U.S. for NWP 3, 33, and 41.
- H. **NWP 27. Aquatic Habitat Restoration, Establishment and Enhancement Activities:** NWP 27 does not authorize the permanent conversion of forested, bog, fen, sedge meadow, or shrub-carr wetlands to other plant communities. A project proponent may request, in writing, a waiver from this condition from the District. The waiver will only be issued if it can be demonstrated that the conversion would restore wetland plant communities to the pre-settlement condition or a watershed approach and that the current landscape and hydrologic conditions would sustain the targeted community.

¹ Information about Wisconsin plant community types for 1-6 above may be obtained from: <http://dnr.wi.gov/topic/EndangeredResources/Communities.asp?mode=group&Type=Wetland>

² Information regarding wild rice waters and their extent may be obtained from: <https://www.dnr.state.mn.us/wildlife/shallowlakes/wildrice.html> and <https://gisdata.mn.gov/dataset/biota-wild-rice-lakes-dnr-wld> in Minnesota, <https://dnr.wisconsin.gov/topic/wildlifehabitats/rice.html> in Wisconsin, and an interactive map is provided at: <http://maps.glifwc.org/> (under Treaty Resources – Gathering).

³ Additional information on bog and fen communities can be found at: <http://www.mvp.usace.army.mil/missions/regulatory.aspx> and in Minnesota at <http://www.dnr.state.mn.us/npc/classification.html>.

⁴ Coastal plain marshes, interdunal wetlands, and Great Lakes ridge and swale complexes are specific to Wisconsin

2021 Nationwide Permit General Conditions

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 NWP.

(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.