

**Information to assist in compliance with
Nationwide Permit General Condition 18, Endangered Species**

This document implements one of the protective measures identified in the November 24, 2014, programmatic biological opinion on the 2012 Nationwide Permits issued by NOAA Fisheries. It only addresses endangered and threatened species and their designated critical habitat under NOAA Fisheries jurisdiction. Nationwide Permit General Condition 18 also applies to endangered and threatened species and designated critical habitat under the jurisdiction of the U.S. Fish and Wildlife Service. Information on listed species and critical habitat under the jurisdiction of the U.S. Fish and Wildlife Service is available at:

<http://www.fws.gov/endangered/>

The purpose of this document is to provide information for prospective users of the Nationwide Permits (NWP) that are not federal agencies to help them determine whether a proposed NWP activity requires a pre-construction notification (PCN) to ensure compliance with the Endangered Species Act (ESA). For the 2012 NWPs, ESA Section 7 compliance is covered by NWP General Condition 18. Paragraph (c) of NWP General Condition 18 requires a non-federal user of an NWP to submit a PCN to the appropriate Corps District office if “any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat.”

Federal permittees are expected to follow their own procedures for complying with the ESA. If the proposed NWP activity requires a PCN the Federal permittee should submit a copy of its documentation demonstrating compliance with ESA Section 7 with its PCN (see paragraph (b)(6) of NWP General Condition 31).

All PCNs are reviewed by Corps staff and evaluated for potential effects to listed species and critical habitat. Paragraph (c) of NWP General Condition 18 also states that the project proponent cannot begin the NWP activity until he or she has been notified by the Corps that the proposed activity “will have ‘no effect’ on listed species or critical habitat, or until [Endangered Species Act] Section 7 consultation has been completed” if the Corps makes a “may affect” determination for the proposed NWP activity. The complete text of NWP General Condition 18 is provided in Appendix A.

In Appendix B of this document, there are definitions that can assist non-federal permittees in determining whether their proposed NWP activities might affect listed species or designated critical habitat. Any potential effect to listed species or critical habitat, no matter how small, requires submission of a PCN to the Corps district office, so that the district can evaluate the proposed activity and determine whether ESA Section 7 consultation is required.

Listed species under the jurisdiction of NOAA Fisheries that occur in the geographic area of responsibility of the Norfolk District are:

- **Humpback Whale (*Megaptera novaeangliae*)**
- **Blue Whale (*Balaenoptera musculus*)**
- **Fin Whale (*Balaenoptera physalus*)**
- **North Atlantic right whale (*Eubalaena glacialis*)**
- **Sei Whale (*Balaenoptera borealis*)**
- **Sperm Whale (*Physeter macrocephalus*)**
- **Green Turtle (*Chelonia mydas*)**
- **Hawksbill Turtle (*Eretmochelys imbricata*)**
- **Kemp's Ridley Turtle (*Lepidochelys kempi*)**
- **Leatherback Turtle (*Dermochelys coriacea*)**
- **Loggerhead Turtle (*Caretta caretta*)**
- **Atlantic Sturgeon (*Acipenser oxyrinchus oxyrinchus*)**
- **Shortnose Sturgeon (*Acipenser brevirostrum*)**

Information on these species is available at:

<http://www.nmfs.noaa.gov/pr/species/esa/>

Additional information on these species is available at the NOAA Greater Atlantic Regional Fisheries Office (GARFO) or their web site at:

<http://www.greateratlantic.fisheries.noaa.gov/protected/>

Within the Norfolk District, critical habitat has not been designated by NOAA Fisheries for any listed species:

Information on the critical habitat for these listed species can be found at:

<http://www.nmfs.noaa.gov/pr/species/esa/>

Determining whether pre-construction notification is required.

There are three situations that require PCNs: (a) when required specifically by the terms and conditions of the NWP; (b) when required by regional conditions for the NWPs; or (c) when a project is in or within the vicinity of occupied habitat or designated critical habitat of any of the species listed above as determined from the NOAA Fisheries websites referenced above.

Many of the NWPs require PCNs for all activities authorized by those NWPs. Some NWPs require PCNs only for certain types of activities. Please read the text of the NWP(s) you plan to use for your proposed activity. In the Norfolk District, regional conditions have been added to the NWPs to require pre-construction notification for additional activities. Please review those regional conditions, which are available at:

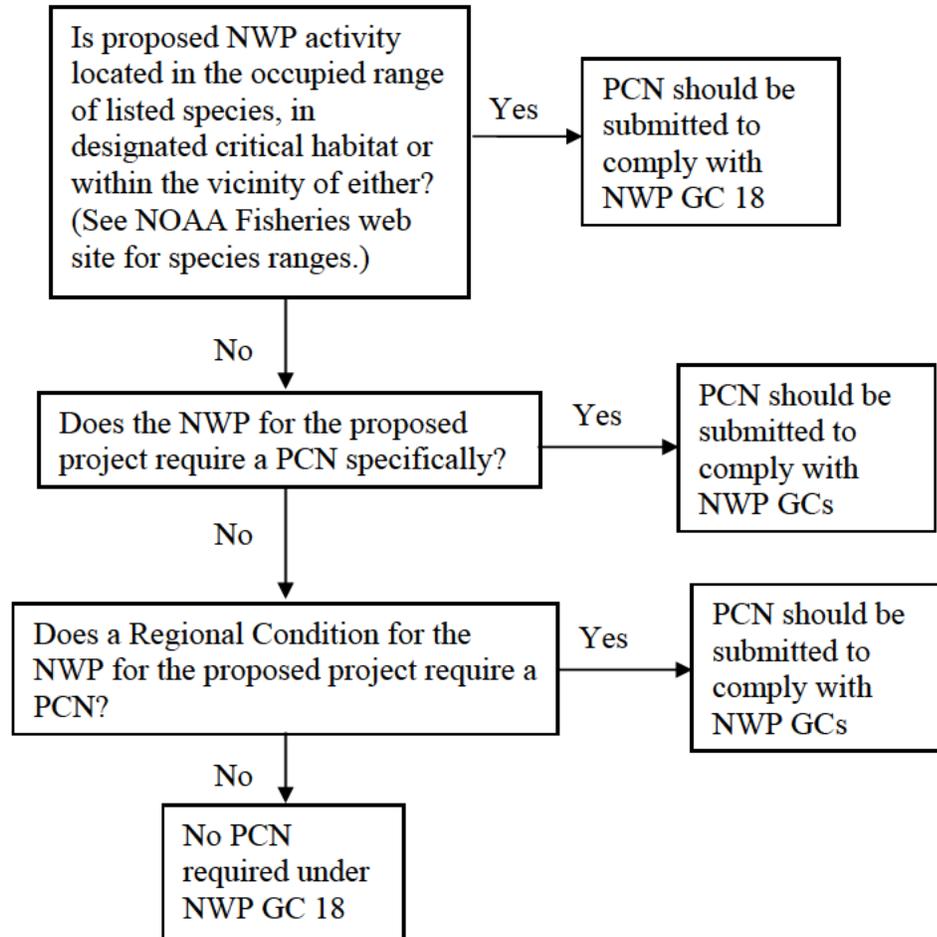
<http://www.nao.usace.army.mil/Missions/Regulatory/NationwidePermitConditions.aspx>

If your project is located in any of the areas inhabited by the species listed above, within designated critical habitat for those species or in the vicinity of these areas, a PCN is required, regardless of the lack of any specific requirements in the individual NWP or in the regional conditions for the NWPs. The information required for a PCN is listed in paragraph (b) of NWP General Condition 31. Additional information required for PCNs within Norfolk District is specified in the attached Enclosure 1, "Norfolk District Regional Conditions for the 2012 Nationwide Permits (NWPs)."

The Norfolk District will notify you within 45 days of receipt of your PCN whether formal or informal ESA Section 7 consultation needs to be conducted for the proposed NWP activity. You cannot conduct the NWP activity until notified by the Norfolk District that the proposed NWP activity will have "no effect" on listed species or critical habitat or the ESA Section 7 consultation has been completed. Please see the text of NWP General Condition 18, which is in Appendix A of this document, for more detail.

The flow chart provided below gives some guidance on determining when a PCN should be submitted for a proposed NWP activity to comply with NWP General Condition 18 and other general and regional conditions. If you are uncertain about whether a PCN should be submitted for a particular NWP activity to comply with NWP General Condition 18, or if you have any questions regarding the information in this document, you should contact the Norfolk District Regulatory Branch at (757) 201-7652 for additional guidance. Questions concerning whether your proposed NWP activity is in the vicinity of the occupied range of listed species or in the vicinity of designated critical habitat should also be directed to the Norfolk District, because the determination of "vicinity" is dependent on the characteristics of the project site, the listed species, and the NWP activity.

Pre-Construction Notification Determination Flow Chart



Appendix A – Text of Nationwide Permit General Condition 18

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 the critical habitat of such species. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will review the documentation and determine whether it is sufficient to address ESA compliance for the NWP activity, or whether additional ESA consultation is necessary.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, 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 designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed work or that utilize the designated critical habitat that might be affected by the proposed work. 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. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have “no effect” on listed species or critical habitat, or until Section 7 consultation 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 with the FWS or NMFS the district engineer may add species-specific regional endangered species conditions to the NWPs.

(e) Authorization of an activity by a 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 U.S. 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) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.noaa.gov/fisheries.html> respectively.

Appendix B – Definitions

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.

Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. [50 CFR 402.02]

Explanatory note – For the purposes of the NWP Program, the action is generally the activity that is authorized by one or more NWPs (item (c)). Those activities are: discharges of dredged or fill material into waters of the United States regulated under Section 404 of the Clean Water Act and structures or work in navigable waters of the United States regulated under Section 10 of the Rivers and Harbors Act of 1899.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action. [50 CFR 402.02]

Explanatory note – When a Corps district receives a PCN for a proposed NWP activity, it will identify the action area if it determines the proposed NWP activity may affect listed species or designated critical habitat and therefore requires ESA Section 7 consultation.

Effects of the action refers to the direct and indirect effects of a proposed action on listed species or critical habitat. [50 CFR 402.02]

Direct effect means the direct or immediate effects of the proposed action on a listed species or its habitat. [Services' 1998 Section 7 Consultation Handbook, page 4-25.]

Indirect effect means effects that are caused by the proposed action and are later in time, but still are reasonably certain to occur. [50 CFR 402.02]

Explanatory note – For the purposes of determining whether a PCN is required because a proposed NWP activity might affect listed species or critical habitat, non-federal applicants should submit a PCN when the proposed activity is located within or in the vicinity of any of the areas inhabited by the species listed above or in designated critical habitat for those species, regardless of the lack of any specific requirements in the individual NWPs or in the regional conditions for the NWPs. As described in NWP General Condition 18, paragraph (c), proposed activities in occupied habitats, within designated critical habitat, or in the vicinity of these areas “might affect” listed species. The Corps district will evaluate that PCN and make an effect determination to decide whether ESA Section 7 consultation is required. The Corps district will notify the applicant of its determination, and if ESA Section 7 consultation is required, then the activity is not authorized by NWP until that consultation is completed.

Destruction of adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. [50 CFR 402.02]

Explanatory note – Under NWP General Condition 18, pre-construction notification is required for any NWP activity that: (a) might affect designated critical habitat, (b) is in the vicinity of designated critical habitat, or (c) is located in critical habitat. The Corps district will evaluate the PCN to determine if the proposed NWP may affect designated critical habitat, and will conduct ESA Section 7 consultation if it makes a “may affect” determination. The Corps district will notify the applicant of its determination, and if ESA section 7 consultation is required, then the activity is not authorized by NWP until that consultation is completed.

No effect means the proposed action will not directly or indirectly affect listed species or destroy/adversely modify designated critical habitat.

Explanatory note – There has to be no potential for an NWP activity to affect listed species or critical habitat to be considered no effect. For example, an NWP activity and all of its components would have to be located outside of the range and designated critical habitat of listed species, beyond the distance where an indirect effect might occur to listed species or designated critical habitat.

ENCLOSURE 1

Norfolk District Regional Conditions for the 2012 Nationwide Permits (NWP)

THE FOLLOWING REGIONAL CONDITIONS ARE APPLICABLE TO SPECIFIC NWPS:

NWP 5 - Scientific Measurement Devices

Condition for Construction or Installation of Subaqueous Turbines:

A pre-construction notification is required if a prospective permittee proposes the construction or installation of subaqueous turbines because this work may have more than minimal impacts and the work will need to be coordinated with the federal, state, and/or local agencies.

NWP 7 - Outfall Structures and Associated Intake Structures

Conditions for Intakes in Anadromous Fish Waters:

When an intake is proposed in designated anadromous fish waters, the following design parameters will be incorporated as permit conditions to protect the sensitive life stages of anadromous fish:

1. Screening over the mouth of the intake with mesh size that does not exceed 1mm;
2. Intake velocities that do not exceed 0.25 feet per second;
3. Intake must be positioned such that an unimpeded flow of water parallel to the screen surface occurs along the entire surface of the screen to take advantage of sweeping velocity.

NWP 10 - Mooring Buoys

Condition for Sufficient Mooring Depths:

Water depths in the mooring areas should be sufficient that vessels moored float at all stages of the tide. Boats should not hit bottom during low water conditions.

NWP 11 - Temporary Recreational Structures

Condition for Sufficient Mooring Depths:

Water depths in the mooring areas should be sufficient that structures moored float at all stages of the tide or stoppers must be utilized to prevent the structures from resting on the bottom, so as to not damage the underlying benthic communities. Structures should not hit bottom during low water conditions.

NWP 12 - Utility Line Activities

Conditions Specific to NWP 12:

1. Construction of access roads may not result in more than 1/3 acre of impacts to waters of the United States.

2. A pre-construction notification is required for discharges associated with the construction of utility line substations that result in the loss of greater than 5000 square feet of waters of the United States.
3. For utility activities requiring notification the prospective permittee shall the following information:
 - a. A map of the entire utility corridor including a delineation of all wetlands and waters of the United States within the corridor. Aquatic resource information shall be submitted using the Cowardin Classification System mapping conventions (e.g. PFO, PEM, POW, etc.).
 - b. An alternatives analysis, which specifically addresses the following:
 - i. Selection of an alignment, which avoids and minimizes wetland impacts to the maximum extent practicable. The utility line should make a direct or perpendicular crossing of a stream. Directional drilling is the preferred method of installation when possible, especially in tidal waters.
 - ii. Selection of an alignment, which avoids fragmenting large tracts of forested wetlands by routing utility lines outside of forested tracts or on the edges of forested tracts.
 - iii. Minimizing clearing of wetlands. Grubbing shall be limited to the permanent easement for underground utility lines. Outside of the permanent easement, wetland vegetation shall be removed at or above the ground surface unless written justification is provided and the impacts are reviewed and approved by the Corps.
 - iv. For overhead utility lines, allowance of natural succession to restore and maintain the corridor in scrub-shrub wetlands except for a minimum corridor needed for access, to the maximum extent practicable.
 - v. For buried utility lines, allowance of natural succession to restore the area to tree and scrub/shrub except for a 20-foot wide access corridor, to the maximum extent practicable.
4. For all submerged utility lines across navigable waters of the United States, a location map and cross-sectional view showing the utility line crossing from bank to bank is required. In addition, the location and depth of any Federal Navigation Channels shall be shown in relation to the proposed utility line. In general, all utility lines shall be buried at least six (6) feet below the authorized bottom depth of Federal Navigation Channel and at least three (3) feet below the bottom depth in all subaqueous areas. When circumstances prevent the placement of at least three feet of cover over the line (outside of the Federal Navigation Channel), then written justification and an alternative method must be provided with the notification and the deviation must be reviewed and approved by the Corps.
5. Whenever possible, excavated material shall be placed on an upland site. However, when this is not feasible, temporary stockpiling is hereby authorized provided that:

- a. All excavated material stockpiled in a vegetated wetland area is placed on filter cloth, mats, or some other semi-permeable surface. The material will be stabilized with straw bales, filter cloth, etc. to prevent reentry into the waterway.
 - b. All excavated material must be placed back into the trench to the original contour and all excess excavated material must be completely removed from the wetlands within 30 days after the pipeline has been laid through the wetlands area. Permission must be granted by the District Commander or his authorized representatives if the material is to be stockpiled longer than 30 days.
6. When open-cut trenching in designated anadromous fish use areas or hydrostatic testing of a pipeline involving water withdrawals from tidal waters are proposed, the Corps will coordinate with the NOAA Fisheries Service and/or the Virginia Department of Game and Inland Fisheries. In most cases, the following time-of-year restrictions (TOYR) will apply:
- James River, below Rt. 17 bridge: No TOYR.
 - James River, at Jamestown Island (Gray's Creek) downstream to Rt. 17 bridge: TOYR from February 15 through June 15 of any given year.
 - James River, at Jamestown Island upstream to Boshers's Dam: TOYR from February 15 through June 30 of any given year.
 - James River, above Boshers's (including Rivanna River): TOYR from March 15 through June 30 of any given year.
 - Rappahannock River, below Route 360 bridge: TOYR from February 15 through June 15 of any given year.
 - York River, below Route 33 bridge: TOYR from February 15 through June 15 of any given year.
 - Nansemond River: TOYR from February 15 through June 15 of any given year.
 - Elizabeth River: A PCN is required for a case-by-case specific review.
 - Unless otherwise noted: TOYR from February 15 through June 30 of any given year.

NWP 14-Linear Transportation Projects

Restricted use of NWP 14 Linear Transportation Projects in Nontidal Waters

The nontidal portion of NWP 14 overlaps with the current State Program General Permit (SPGP-01); therefore, NWP 14 may not be used for projects impacting nontidal waters of the United States, including wetlands within the Norfolk District. NWP 14 may still be used for projects impacting tidal waters of the United States.

NWP 23 - Approved Categorical Exclusions

Conditions Specific to NWP 23:

1. The use of this NWP applies to an entire project addressed in the Categorical Exclusion prepared by another Federal agency. This NWP cannot be used separately at individual crossings/impact areas of a single project. However, multiple crossings/impact areas of a single project can be authorized by this NWP provided the combined impacts of all crossings/impact

areas do not exceed the thresholds described below. This NWP cannot be used in combination with other NWPs for a single project.

2. Discharges from an entire project must not cause a combined loss of greater than ½ acre of wetlands.
3. The prospective permittee must notify the District Commander, via a pre-construction notification (PCN) if there is a discharge in special aquatic sites, including wetlands, and/or resulting in combined impacts to more than 300 linear feet of streambed resulting from the entire project (send notification to the Norfolk District Corps of Engineers, Regulatory Branch, 803 Front St., Norfolk, VA 23510-1096). Written verification from this office must be received before performing the proposed work. The PCN must be in writing and include the following information (the Joint Permit Application may also be used; the Virginia Department of Transportation may use their application form):
 - Name, address, and telephone number of the prospective permittee.
 - Location of the proposed project.
 - Vicinity map and project drawings on 8.5-inch by 11-inch paper (plan view, profile, & cross section).
 - Brief description of the proposed project and the project purpose.
 - A delineation of affected special aquatic sites, including wetlands.
 - Statement describing how losses of the waters of the United States will be avoided and minimized to the maximum extent practicable.
 - Compensatory mitigation proposal to offset permanent losses of waters of the United States.

When all of the required information is received, the Corps will notify the prospective permittee within 45 days of receipt of all information either that the project may proceed under the nationwide permit or that an individual permit is required. If, after reviewing the PCN, the District Commander determines that the proposed activity would have more than a minimal individual or cumulative adverse impact on the aquatic environment or otherwise may be contrary to the public interest, then he/she will either condition the nationwide permit authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the activity is not authorized by the nationwide permit and will provide the prospective permittee with instructions on how to seek authorization under an individual permit. If the prospective permittee is not notified otherwise within the 45-day period, he/she may presume the activity is authorized under this NWP.

4. To ensure that permanent losses of waters of the United States do not result in more than minimal adverse effects to the aquatic environment, compensation will be required for all wetland impacts and for any single impact to a stream of greater than 300 linear feet. For projects where the combined impacts to streams due to the entire project exceed 300 linear feet, but no single impact exceeds 300 linear feet, the Corps will determine on a case-by-case basis whether compensation for stream impacts is required.

NWP 29-Residential Developments

Restricted use of NWP 29 for Multiple Unit Residential Developments and Residential Subdivisions

NWP 29 overlaps with the current State Program General Permit (SPGP-01); therefore, NWP 29 may not be used to authorize multiple unit residential developments and residential subdivisions. NWP 29 may still be used for a single residence and attendant features.

THE FOLLOWING REGIONAL CONDITIONS ARE APPLICABLE TO MULTIPLE AND/OR ALL NWPS:

1. Conditions for Waters Containing Submerged Aquatic Vegetation (SAV) Beds:

This condition applies to: NWPs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 44, 45, 48 and 52.

A pre-construction notification (PCN) is required if work will occur in areas that contain submerged aquatic vegetation (SAVs). Information about SAVs can be found at the Virginia Institute of Marine Science's website <http://www.vims.edu/bio/sav/>. Additional avoidance and minimization measures, such as relocating a structure or time-of-year (TOYR) restrictions may be required to reduce impacts to SAVs.

2. Conditions for Anadromous Fish Use Areas:

To ensure that activities authorized by ALL Nationwide Permits do not impact waterways documented to provide spawning habitat or a migratory pathway for anadromous fish, a check for anadromous fish use areas must be conducted via the Norfolk District's Regulatory GIS (for reporting permits) and/or the Virginia Department of Game and Inland Fisheries (VDGIF) Information System (by applicant for non-reporting permits) at <http://vafwis.org/fwis/>. If the project is located in an area documented as an anadromous fish use area (confirmed or potential), a time-of-year restriction (TOYR) prohibiting all in-water work will be required from February 15 to June 30 of any given year or any TOYR specified by VDGIF and/or Virginia Marine Resources Commission (VMRC). For permits requiring a PCN, if the Norfolk District determines that the work is minimal and the TOYR is unnecessary, informal consultation will be conducted with NOAA Fisheries Service (NOAA) to obtain concurrence that the TOYR would not be required for the proposed activity.

3. Conditions for Designated Critical Resource Waters, which include National Estuarine Research Reserves:

Notification is required for work under NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38 in the Chesapeake Bay National Estuarine Research Reserve in Virginia. This multi-site system along a salinity gradient of the York River includes Sweet Hall Marsh,

Taskinas Creek, Catlett Island, and Goodwin Islands. More information can be found at: <http://www.vims.edu/cbnerr/>.

NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 cannot be used to authorize the discharge of dredged or fill material in the Chesapeake Bay National Estuarine Research Reserve in Virginia.

4. Conditions for Federally Listed Species and Designated Critical Habitat

Notification for ALL NWPs will be required for any project that may affect a federally listed threatened or endangered species or designated critical habitat. The U.S. Fish and Wildlife Service (Service) has developed an online system that allows users to find information about sensitive resources that may occur within the vicinity of a proposed project. This system is named "Information, Planning and Conservation System," (IPaC), and is located at: <http://ecos.fws.gov/ipac/>. This system provides information regarding federally listed and proposed candidate, threatened, and endangered species, designated critical habitats, and Service refuges that may occur in the identified areas, or may be affected by the proposed activities. The applicant may use this system to determine if any federally listed species or designated critical habitat may be affected by their proposed project, ensuring compliance with the Endangered Species Act.

5. Conditions for Waters with Federally Listed Endangered or Threatened Species, Waters Federally Designated as Critical Habitat, and One-mile Upstream (including tributaries) of Any Such Waters:

A pre-construction notification (PCN) is required for work in the areas listed below for NWPs 3, 4, 5, 6, 7, 12, 13, 14, 16, 17, 18, 19, 21, 23, 25, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, and 50 for the Counties of Lee, Russell, Scott, Tazewell, Wise, and Washington in Southwestern Virginia within the following specific waters and reaches:

- 1) Powell River - from the Tennessee-Virginia state line upstream to the Route 58 Bridge in Big Stone Gap and one mile upstream of the mouth of any tributary adjacent to this portion of the River.
- 2) Clinch River - from the Tennessee-Virginia state line upstream to Route 632 at Pisgah in Tazewell County and one mile upstream of the mouth of any tributary adjacent to this portion of the River, the Little River to its confluence with Maiden Spring Creek, and one mile upstream of the mouth of any tributary adjacent to this portion of Little River.
- 3) North Fork Holston River - from the Tennessee-Virginia state line upstream to the Smyth County/Bland County line and one mile upstream of any tributary adjacent to this portion of the River.
- 4) Copper Creek - from its junction with the Clinch River upstream to the Route 58 bridge at Dickensonville in Russell County and one mile upstream of any tributary adjacent to this portion of the Creek.
- 5) Indian Creek - from its junction with the Clinch River upstream to the fourth Norfolk and Western Railroad bridge at Van Dyke in Tazewell County and one mile upstream of the mouth of any tributary adjacent to this portion of the Creek.

- 6) Middle Fork Holston River - from the Tennessee-Virginia state line to its junction with Walker Creek in Smyth County near Marion, Virginia.
- 7) South Fork Holston River - from its junction with Middle Fork Holston River upstream to its junction with Beech Creek in Washington County.

For the above listed NWP's that require a PCN to work in specific waters and reaches, as described above, in the counties of Lee, Russell, Scott, Smyth, Tazewell, Wise, and Washington in southwestern Virginia, it is recommended that the prospective permittee first contact the applicable Norfolk District Field Office, found at this web link:

http://www.nao.usace.army.mil/Regulatory_Branch/contact_geo_southwest.asp, to determine if the PCN procedures would apply. If required, the PCN must be submitted in writing and include the following information (the Joint Permit Application may also be used – be sure to mark it with the letters PCN at the top of the first page):

- Name, address, and telephone number of the prospective permittee.
- Location of the proposed project.
- Vicinity map and project drawings on 8.5-inch by 11-inch paper (including a plan view, profile, & cross-sectional view).
- Brief description of the proposed project and the project purpose.
- Where required by the terms of the NWP, a delineation of affected special aquatic sites, including wetlands.

When all required information is received by the appropriate field office, the Corps will notify the prospective permittee within 45 days whether the project may proceed under the NWP permit or whether an individual permit is required. If, after reviewing the notification, the District Commander determines that the proposed activity would have more than a minimal individual or cumulative adverse impact on the aquatic environment or otherwise may be contrary to the public interest, then he/she will either condition the nationwide permit authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the activity is not authorized by the nationwide permit and provide the prospective permittee with instructions on how to seek authorization under an individual permit.

Non-federal applicants shall notify the District Commander if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the District Commander 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 designated critical habitat, the PCN must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The District Commander 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 PCN. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have “no effect” on listed species or critical habitat, or until Section 7 consultation has been completed.

6. Conditions for Designated Trout Waters:

Notification is required for work in the areas listed below for NWPs 3, 4, 5, 6, 7, 12, 13, 14, 16, 17, 18, 19, 21, 23, 25, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, and 50.

This condition applies to activities occurring in two categories of waters; Class V (Put and Take Trout Waters) and Class VI (Natural Trout Waters), as defined by the Virginia State Water Control Board Regulations, Water Quality Standards (VR-680-21-00), dated January 1, 1991, or the most recently updated publication. The Virginia Department of Game and Inland Fisheries (VDGIF) designated these same trout streams into six classes. Classes I-IV are considered wild trout streams. Classes V and VI are considered stockable trout streams. Information on designated trout streams can be obtained via their Virginia Fish and Wildlife Information Service's (VAFWIS's) Cold Water Stream Survey database. Basic access to the VAFWIS is available via <http://vafwis.org/fwis/>.

The waters, occurring specifically within the mountains of Virginia, are within the following river basins:

- 1) Potomac-Shenandoah River Basins
- 2) James River Basin
- 3) Roanoke River Basin
- 4) New River Basin
- 5) Tennessee and Big Sandy River Basins
- 6) Rappahannock River Basin

VDGIF recommends the following time-of-year restrictions (TOYR) for any in-stream work within streams identified as wild trout waters in its Cold Water Stream Survey database. The recommended TOYR for trout species are:

- Brook Trout: October 1 through March 31
- Brown Trout: October 1 through March 31
- Rainbow Trout: March 15 through May 15

This condition applies to the following counties and cities: Albemarle, Allegheny, Amherst, Augusta, Bath, Bedford, Bland, Botetourt, Bristol, Buchanan, Buena Vista, Carroll, Clarke, Covington, Craig, Dickenson, Floyd, Franklin, Frederick, Giles, Grayson, Greene, Henry, Highland, Lee, Loudoun, Madison, Montgomery, Nelson, Page, Patrick, Pulaski, Rappahannock, Roanoke City, Roanoke Co., Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Staunton, Tazewell, Warren, Washington, Waynesboro, Wise, and Wythe.

Any discharge of dredged and/or fill material authorized by the NWPs listed above, which would occur in the designated waterways or adjacent wetlands of the specified counties, requires notification to the appropriate Corps of Engineers field office, and written approval from that office prior to performing the work. The Norfolk District recommends that prospective permittees first contact the appropriate field office by telephone to determine if the notification procedures would apply. The notification must be in writing and include the following information (the standard Joint Permit Application may also be used):

- Name, address, and telephone number of the prospective permittee.
- Location of the proposed project.
- Vicinity map and project drawings on 8.5-inch by 11-inch paper (plan view, profile, & cross-sectional view).
- Brief description of the proposed project and the project purpose.
- Where required by the terms of the nationwide permit, a delineation of affected special aquatic sites, including wetlands.

When all required information is received by the appropriate field office, the Corps will notify the prospective permittee within 45 days whether the project can proceed under the NWP or whether an individual permit is required. If, after reviewing the notification, the District Commander determines that the proposed activity would have more than minimal individual or cumulative adverse impacts on the aquatic environment or otherwise may be contrary to the public interest, then he/she will either condition the nationwide permit authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the activity is not authorized by the NWP and provide instructions on how to seek authorization under an individual permit. If the prospective permittee is not notified otherwise within the 45-day period the prospective permittee may assume that the project can proceed under the NWP.

7. Conditions Regarding Invasive Species

Plant species listed by the most current *Virginia Department of Conservation and Recreation's Invasive Alien Plant List* shall not be used for re-vegetation for activities authorized by any NWP. The list of invasive plants in Virginia may be found at: http://www.dcr.virginia.gov/natural_heritage/documents/invlist.pdf.

8. Conditions Pertaining to Countersinking of Pipes and Culverts in Nontidal Waters

This condition applies to: NWPs 3, 7, 12, 14, 17, 18, 21, 23, 25, 27, 29, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, and 50.

NOTE: COUNTERSINKING IS NOT REQUIRED IN TIDAL WATERS. However, replacement pipes/culverts in tidal waters must be installed with invert elevations no higher than the existing pipe/culvert invert elevation, and a new pipe/culvert must be installed with the invert no higher than the stream bottom elevation.

- Following consultation with the Virginia Department of Game and Inland Fisheries (DGIF), the Norfolk District has determined that fish and other aquatic organisms are most likely present in any stream being crossed, in the absence of site-specific evidence to the contrary. Although prospective permittees have the option of providing such evidence, extensive efforts to collect such information is not encouraged, since countersinking will in most cases be required except as outlined in the conditions below.
- All pipes: All pipes and culverts placed in streams will be countersunk at both the inlet and outlet ends, unless indicated otherwise by the Norfolk District on a case-by-case basis (see below). Pipes that are 24" or less in diameter shall be countersunk 3" below the natural

stream bottom. Pipes that are greater than 24" in diameter shall be countersunk 6" below the natural stream bottom. The countersinking requirement does not apply to bottomless pipes/culverts or pipe arches. All single pipes or culverts (with bottoms) shall be depressed (countersunk) below the natural streambed at both the inlet and outlet of the structure. In sets of multiple pipes or culverts (with bottoms) at least one pipe or culvert shall be depressed (countersunk) at both the inlet and outlet to convey low flows.

- c. Exemption for extensions and certain maintenance: The requirement to countersink does not apply to extensions of existing pipes or culverts that are not countersunk, or to maintenance to pipes/culverts that does not involve replacing the pipe/culvert (such as repairing cracks, adding material to prevent/correct scour, etc.).
- d. Floodplain pipes: The requirement to countersink does not apply to pipes or culverts that are being placed above ordinary high water, such as those placed to allow for floodplain flows. The placement of pipes above ordinary high water is not jurisdictional (provided no fill is discharged into wetlands).
- e. Hydraulic opening: Pipes should be adequately sized to allow for the passage of ordinary high water with the countersinking and invert restrictions taken into account.
- f. Pipes on bedrock or above existing utility lines: Different procedures will be followed for pipes or culverts to be placed on bedrock or above existing buried utility lines where it is not practicable to relocate the lines, depending on whether the work is for replacement of an existing pipe/culvert or a new pipe/culvert:
 - i. Replacement of an existing pipe/culvert: Countersinking is not required provided the elevations of the inlet and outlet ends of the replacement pipe/culvert are no higher above the stream bottom than those of the existing pipe/culvert. Documentation (photographic or other evidence) must be maintained in the permittee's records showing the bedrock condition and the existing inlet and outlet elevations. That documentation will be available to the Norfolk District upon request, but notification or coordination with the Norfolk District is not otherwise required.
 - ii. A pipe/culvert is being placed in a new location: If the prospective permittee determines that bedrock or an existing buried utility line that is not practicable to relocate prevents countersinking, he/she should evaluate the use of a bottomless pipe/culvert, bottomless utility vault, span (bridge) or other bottomless structure to cross the waterway, and also evaluate alternative locations for the new pipe/culvert that will allow for countersinking. If the prospective permittee determines that neither a bottomless structure nor an alternative location is practicable, then he/she must submit a pre-construction notification (PCN) to the Norfolk District in accordance with General Condition 31 of the NWPs. In addition to the information required by General Condition 31, the prospective permittee must provide documentation of measures evaluated to minimize disruption of the movement of aquatic life as well as documentation of the cost, engineering factors, and site conditions that prohibit countersinking the pipe/culvert. Options that must be considered include partial countersinking (such as less than 3" of countersinking, or

countersinking of one end of the pipe), and constructing stone step pools, low rock weirs downstream, or other measures to provide for the movement of aquatic organisms. The PCN must also include photographs documenting site conditions. The prospective permittee may find it helpful to contact his/her regional fishery biologist for the Virginia Department of Game and Inland Fisheries (VDGIF), for recommendations about the measures to be taken to allow for fish movements. When seeking advice from VDGIF, the prospective permittee should provide the VDGIF biologist with all available information such as location, flow rates, stream bottom features, description of proposed pipe(s), slopes, etc. Any recommendations from VDGIF should be included in the PCN. The Norfolk District will notify the prospective permittee whether the proposed work qualifies for the nationwide permit within 45 days of receipt of a complete PCN. NOTE: Blasting of stream bottoms through the use of explosives is not acceptable as a means of providing for countersinking of pipes on bedrock.

- g. Pipes on steep terrain: Pipes being placed on steep terrain (slope of 5% or greater) must be countersunk in accordance with the conditions above and will in most cases be non-reporting. It is recommended that on slopes greater than 5%, a larger pipe than required be installed to allow for the passage of ordinary high water in order to increase the likelihood that natural velocities can be maintained. There may be situations where countersinking both the inlet and outlet may result in a slope in the pipe that results in flow velocities that cause excessive scour at the outlet and/or prohibit some fish movement. This type of situation could occur on the side of a mountain where falls and drop pools occur along a stream. Should this be the case, or should the prospective permittee not want to countersink the pipe/culvert for other reasons, he/she must submit a Pre-Construction Notification to the Norfolk District in accordance with General Condition 31 of the Nationwide Permits. In addition to the information required by General Condition 31, the prospective permittee must provide documentation of measures evaluated to minimize disruption of the movement of aquatic life as well as documentation of the cost, engineering factors, and site conditions that prohibit countersinking the pipe/culvert. The prospective permittee should design the pipe to be placed at a slope as steep as stream characteristics allow, countersink the inlet 3-6", and implement measures to minimize any disruption of fish movement. These measures can include constructing a stone step/pool structure, preferably using river rock/native stone rather than riprap, constructing low rock weirs to create a pool or pools, or other structures to allow for fish movements in both directions. Stone structures should be designed with sufficient-sized stone to prevent erosion or washout and should include keying-in as appropriate. These structures should be designed both to allow for fish passage and to minimize scour at the outlet. The quantities of fill discharged below ordinary high water necessary to comply with these requirements (i.e., the cubic yards of stone, riprap or other fill placed below the plane of ordinary high water) must be included in project totals. The prospective permittee may find it helpful to contact his/her regional fishery biologist for the Virginia Department of Game and Inland Fisheries (DGIF), for recommendations about the measures to be taken to allow for fish movements. When seeking advice from DGIF, the prospective permittee should provide the DGIF biologist with all available information such as location, flow rates, stream bottom features, description of proposed pipe(s), slopes, etc. Any recommendations from DGIF should be included in the PCN. The Norfolk District will

notify the prospective permittee whether the proposed work qualifies for the nationwide permit within 45 days of receipt of a complete PCN.

- h. Problems encountered during construction: When a pipe/culvert is being replaced, and the design calls for countersinking at both ends of the pipe/culvert, and during construction it is found that the streambed/banks are on bedrock, then the permittee must stop work and contact the Norfolk District (contact by telephone and/or email is acceptable). The permittee must provide the Norfolk District with specific information concerning site conditions and limitations on countersinking. The Norfolk District will work with the permittee to determine an acceptable plan, taking into consideration the information provided by the permittee, but the permittee should recognize that the Norfolk District could determine that the work will not qualify for a nationwide permit.
- i. Emergency pipe replacements: In the case of an emergency situation, such as when a pipe/culvert washes out during a flood, a permittee is encouraged to countersink the replacement pipe at the time of replacement, in accordance with the conditions above. However, if conditions or timeframes do not allow for countersinking, then the pipe can be replaced as it was before the washout, but the permittee will have to come back and replace the pipe/culvert and countersink it in accordance with the guidance above. In other words, the replacement of the washed out pipe is viewed as a temporary repair, and a countersunk replacement should be made at the earliest possible date. The Norfolk District must be notified of all pipes/culverts that are replaced without countersinking at the time that it occurs, even if it is an otherwise non-reporting activity, and must provide the permittee's planned schedule for installing a countersunk replacement (it is acceptable to submit such notification by email). The permittee should anticipate whether bedrock or steep terrain will limit countersinking, and if so, should follow the procedures outlined in (f) and/or (g) above.

9. Conditions for the Repair of Pipes

This condition applies to: NWPs 3, 7, 12, 14, 17, 18, 21, 23, 25, 27, 29, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, and 50.

NOTE: COUNTERSINKING IS NOT REQUIRED IN TIDAL WATERS. However, replacement pipes/culverts in tidal waters must be installed with invert elevations no higher than the existing pipe/culvert invert elevation, and a new pipe/culvert must be installed with the invert no higher than the stream bottom elevation.

If any discharge of fill material will occur in conjunction with pipe maintenance, such as concrete being pumped over rebar into an existing deteriorated pipe for stabilization, then:

A. If the existing pipe or line of pipes are NOT currently countersunk:

- a. As long as the inlet and outlet invert elevations of at least one pipe located in the low flow channel are not being altered, and provided that no concrete apron is being constructed, then the work may proceed under the NWP for the other pipes, provided it complies with all other NWP General Conditions, including Condition 9 for

Management of Water Flows. In such cases, notification to the Norfolk District Commander is not required, unless specified in the NWP Conditions for other reasons, and the permittee may proceed with the work.

- b. Otherwise, the prospective permittee must submit a pre-construction notification (PCN) to the Norfolk District Commander prior to commencing the activity. For all such projects, the following information should be provided:
 - 1) Photographs of the existing inlet and outlet;
 - 2) A measurement of the degree to which the work will raise the invert elevations of both the inlet and outlet of the existing pipe;
 - 3) The reasons why other methods of pipe maintenance are not practicable (such as metal sleeves or a countersunk pipe replacement);
 - 4) Depending on the specific case, the Norfolk District may discuss potential fish usage of the waterway with the Virginia Department of Game and Inland Fisheries.

The Norfolk District will assess all such pipe repair proposals in accordance with guidelines that can be found under “Pipe Repair Guidelines” at:

http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/Guidance/guidance_documents.asp

- c. If the Norfolk District determines that the work qualifies for the NWP, additional conditions will be placed on the verification. Those conditions can be found at the web link above (in item ii).
 - d. If the Norfolk District determines that the work does NOT qualify for the NWP, the applicant will be directed to apply for either an LOP-I permit (applicable only for Virginia Department of Transportation projects) or an individual permit. However, it is anticipated that the applicant will still be required to perform the work such that the waterway is not blocked or restricted to a greater degree than its current conditions.
- B. If the existing pipe or at least one pipe in the line of pipes IS countersunk and at least one pipe located in the low flow channel will continue to be countersunk, and no concrete aprons are proposed:**

No PCN to the Norfolk District is required, unless specified in the NWP Conditions for other reasons, and the permittee may proceed with the work.

- C. If the existing pipe or at least one pipe in the line of pipes IS countersunk and no pipe will continue to be countersunk in the low flow channel:**

This work cannot be performed under the NWPs. The prospective permittee must apply for either a Letter of Permission 1 (LOP-1) permit (applicable only for VDOT projects) or an individual permit. However, it is anticipated that the prospective permittee will still be required to perform the work such that the waterway is not blocked or restricted more so than its current conditions.

D. Emergency situations:

In the case of an emergency situation, a prospective permittee is encouraged to follow the above guidelines at the time of repair. However, if conditions or timeframes do not allow for compliance with the procedure outlined herein, then the pipe can be repaired as it was before the washout, but the prospective permittee will have to come back and replace or reconstruct the pipe/culvert in accordance with these guidelines. In other words, the repair of the pipe is viewed as a temporary fix, and an appropriate repair should be made at the earliest possible date. The Norfolk District must be notified of all pipes/culverts that are repaired without compliance with these guidelines at the time that the repair occurs, even if it is an otherwise non-reporting activity, and that notification must provide the prospective permittee's planned schedule for following these procedures and constructing an appropriate repair (it is acceptable to submit such notification by email).