

## **SUPPLEMENTAL DOCUMENT FOR NATIONWIDE PERMIT 21**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 21 and addresses the regional modifications and conditions for this NWP in the Norfolk District. In the Commonwealth of Virginia, the Norfolk District is the lead district for most of Virginia; however, the Baltimore District implements the NWP program in the Northern Virginia Military Installations within Baltimore District's Area of Responsibility. This supplement is prepared for the purposes of 33 CFR 330.5(c)(1)(iii). The North Atlantic Division Engineer has considered the potential individual and cumulative adverse environmental effects that could result from the use of this NWP in Norfolk District, including the need for additional modifications of this NWP by imposing regional conditions to ensure that those individual and cumulative adverse environmental effects are no more than minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to jurisdictional waters and wetlands. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual and cumulative adverse environmental effects. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should have regional conditions or be excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that have more than minimal individual and cumulative adverse environmental effects.

### **1.0 Background**

In the September 15, 2020, issue of the Federal Register (85 FR 57298), the U.S. Army Corps of Engineers (Corps) published its proposal to reissue 52 existing NWPs and issue five new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Norfolk District, issued a public notice on September 30, 2020. The issuance of the NWPs was announced in the January 13, 2021, issue of the Federal Register (86 FR 2744). After the issuance of the final NWPs, the Norfolk District considered the need for regional conditions for this NWP. The North Atlantic Division's findings are discussed below.

### **2.0 Consideration of Public Comments**

#### **2.1 General Comments**

Comments Received: In response to the Norfolk District's request for comments, the NOAA Fisheries Service (NOAA), Habitat Conservation Division, expressed concerns

about eliminating the pre-construction notification (PCN) requirement for federal agencies and indicated that it will not be possible for the Corps to determine if this requirement is being met on a cumulative basis. NOAA recommended that the PCN requirement remain unchanged for all applicants, both federal and non-federal. At a minimum, federal agencies should be required to send the Corps a PCN if a waiver of any Regional Condition is sought including time of year restrictions and whenever an activity occurs within or adjacent to mapped submerged aquatic vegetation (SAV) habitat as identified by the Virginia Institute of Marine Science (VIMS) SAV mapping and restoration program's annual surveys.

NOAA is also concerned that for some NWP's where a PCN has been required previously to ensure an evaluation by the Corps for potential impacts to EFH under Magnuson-Stevens (MSA), or other aquatic resources under the Fish and Wildlife Coordination Act (FWCA), non-Corps federal action agencies may be unaware of the consultation requirements with NOAA. NOAA suggested that language be added to the regional conditions to remind federal agencies of their responsibilities under the MSA and FWCA.

NOAA suggested text for a Regional Condition: "For NWP eligible activities undertaken by a federal entity, where the Corps is not the lead federal agency and a PCN to the Corps is not required, compliance with the requirements of the Magnuson-Stevens (MSA), Endangered Species Act (ESA), and the Fish and Wildlife Coordination Act (FWCA) are the responsibility of the lead federal action agency. Additional information on the MSA and EFH consultations can be found on the NOAA Fisheries, Greater Atlantic Region's Habitat and Ecosystem Services Division websites at: <https://www.fisheries.noaa.gov/new-england-mid-atlantic/habitat-conservation/essential-fish-habitat-consultations-greater-atlantic-region> ."

Response: The final NWP's do not eliminate the PCN requirement for federal agencies. Therefore, this reminder to federal permittees will not need to be added to the regional conditions.

Comments Received: NOAA, Habitat Conservation Division expressed concerns about the removal of the 300 linear foot limit on stream impacts. NOAA indicated that the change may allow significant losses of headwater streams, which, along with their adjacent wetlands, provide most of the sediment and nutrient filtration and water quality benefits in a watershed. The loss of headwater streams may likely increase downstream flooding frequency, severity and duration. NOAA noted that the proposed change to a 1/2 acre impact threshold would allow several thousand linear feet of relatively narrow streams to be filled, since 1/2 acre of fill in a 6-foot wide stream would result in 3,630 linear feet of stream loss. NOAA also stated that Virginia's stream mitigation banks currently use linear feet as the currency to determine credits and the conversion to acres would require bankers to calculate mitigation based on stream width, which could re-focus their restoration efforts on larger, wider streams thereby exacerbating the permitted loss of low-order streams and their water quality functions and benefits. NOAA believes there is the potential for increased impacts to anadromous fish resulting

from this change and they noted that many anadromous species stocks are at or near historic lows in the Mid-Atlantic where habitat loss and degradation have been identified as the primary cause. NOAA recommended retaining the 300-foot limit for waterways that are designated as confirmed or potential anadromous fish use areas by the Virginia Department of Wildlife Resources.

Response: The Norfolk District proposed to keep the 300 linear foot threshold in regional conditions and only comments supporting that proposal have been received. For the reasons stated above by NOAA, the Norfolk District has determined that it is beneficial to retain the 300 linear foot threshold in the final regional conditions.

Comments Received: One commenter strongly supported the proposed regional conditions that would be applicable to all the NWP's. The commenter was especially supportive of Conditions 6 (Invasive species), 7 (Countersinking of pipes and culverts), 9 (Impacts requiring compensatory mitigation, and 11 (Transportation projects funded in whole or part by federal, state, or local funds). The commenter indicated that compensatory mitigation plans associated with conditions 9 and 11 should be fully consistent with the 2008 Mitigation Rule, especially the mitigation plan elements identified at 33 CFR 332.4(c). The commenter also strongly supported the proposed regional conditions specific to NWP's 12, 54, NWP's C and D.

Response: The Norfolk District has only made minor changes to the regional conditions which are strongly supported by the commenter.

Comments Received: American Petroleum Institute (API) reviewed the regional conditions proposed for activities in Virginia and found the regional conditions, as proposed, are generally appropriate and narrowly tailored, with exception to the comments they provided on specific NWP's. API stated "where regional revisions and additions are deemed necessary to the comprehensive NWP's as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process." The comments on the regional conditions applicable to multiple NWP's and the comments on specific NWP's are addressed below.

API also provided a letter to the Norfolk District concerning the regional conditions proposed for activities in the District of Columbia and Virginia. This letter was in reference to the Public Notice issued by the Baltimore District. At one time the Baltimore District had proposed their own regional conditions for the Northern Virginia Military Installations within their Area of Responsibility. Since that time, the Baltimore District has clarified that they will be using the Norfolk District Regional Conditions in those military installations. The Baltimore District notified API that the Norfolk District is leading development of a set of consistent regional conditions within the Commonwealth of Virginia, including those military installations within Baltimore

District's area of jurisdiction. API's comments for the proposed regional conditions for the Commonwealth of Virginia will be considered as part of this evaluation. The Baltimore District will fully consider API's comments on the regional conditions for the District of Columbia during their evaluation process.

Response: As stated above, the comments on the regional conditions applicable to multiple NWP's and the comments on specific NWP's are addressed below.

Comments Received: American Electric Power (AEP) appreciated the opportunity to comment and stated "the NWP and the regional conditions applicable to the Norfolk District are valuable tools that allow the regulated community to efficiently design and implement projects with minimal adverse environmental impact. This allows the time to focus attention on consulting with the Corps' staff on complex projects within the Norfolk District. AEP hopes that the comments provided will help to produce regional conditions consistent with the NWP program and the country's energy policies."

Response: AEP also provided comments on specific NWP's and those comments are addressed below within the section for that particular regional condition.

## **2.2 General Comments on Nationwide Permit 21**

Norfolk District did not receive any general comments on this NWP. All comments were specific to a particular regional condition and those comments are addressed below.

## **2.3 Proposed Regional Conditions**

The following is a comprehensive discussion of all the NWP regional conditions proposed in our September 30, 2020 public notice, the comments that we received on each proposed regional condition, and our responses to the comments. The final text of all regional conditions (see Section 9.0 of this document) will be incorporated into each Norfolk District NWP Enclosure. Readers should refer to each regional condition for information about the NWP's to which the regional condition applies. For regional conditions that will apply to all NWP's, we do not provide a narrower range of applicability. In other words, if the regional condition is silent as to the NWP's to which it applies, the regional condition applies to all NWP's. For regional conditions that do not apply to all the NWP's, we have either specified (by NWP number) some narrower range of NWP's, or we have identified a single NWP to which the regional condition applies. In the interest of clarity, the following regional conditions apply specifically to NWP 21: SECTION I. REGIONAL CONDITIONS APPLICABLE TO ALL NWP'S UNLESS OTHERWISE STATED 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14; and Section II. Regional Conditions Applicable to Specific NWP's: NWP 21.

### **2.3.1 Proposed Regional Condition 1 Applicable to Multiple NWP's**

Waters Containing Submerged Aquatic Vegetation (SAV) Beds:

This condition applies to: NWP 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 25, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 39, 44, 45, 48, 52, 53, 54, A, B, C and D.

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

Comments received: Although API opposed the division of NWP 12 at the national level, if the utility line permits are split, they support the addition of NWP C and NWP D to the list of NWPs that should be included under this Regional Condition. API believes that, since the Clean Water Act Section 404 and Section 10 Rivers and Harbors Act impacts are largely indistinguishable among the permits, that any condition applied to one should apply to all. API stated, "In the absence of clear environmental justification, we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without equally being applied to NWP C and NWP D."

Response: Norfolk District proposed to include NWPs C and D under this Regional Condition and other regional conditions in a similar fashion as NWP 12. The final regional conditions reflect this decision and apply to NWP 57 (proposed as NWP C) and NWP 58 (proposed as NWP D). This regional condition was also modified to only include the applicable NWPs published in the January 13, 2021 Federal Register (86 FR 2744). This regional condition will apply to the following: NWPs 12, 29, 39, 48, 52, 55, 56, 57 and 58. We believe we have satisfied API's concerns about applying conditions equally to NWP 12, NWP 57, and NWP 58. There are no other comment periods or opportunities for API to challenge the conditions within the Corps' regional conditioning process. Any other challenges would need to be outside this process.

### **2.3.2 Proposed Regional Condition 2 Applicable to Multiple NWPs**

#### Anadromous Fish Use Areas:

Authorizations associated with the NWPs shall not adversely affect spawning habitat or a migratory pathway for anadromous fish. Areas of anadromous fish use are indicated on the Virginia Department of Wildlife Resources (DWR) information system at: <http://vafwis.org/fwis/>. If a project is located within an area documented as an anadromous fish use area (confirmed or potential), all in-stream work is prohibited from occurring between February 15 through June 30 of any given year or other time of year restriction (TOYR) specified by the DWR and/or the Virginia Marine Resources Commission (VMRC). Should the Norfolk District determine that the work is minimal and no TOYR is needed, the District will initiate consultation with NOAA Fisheries Service for their concurrence. A TOYR is not required for dredging activities in the Elizabeth

River upstream of the Mid-Town Tunnel on the main-stem and the West Norfolk Bridge (Route 164, Western Freeway) on the Western Branch of the Elizabeth River.

Comments received: API supported the revised, streamlined language for Regional Condition 2, as proposed.

Response: The revised language in the proposed Regional Condition 2 is also reflected in the final regional conditions.

### **2.3.3 Proposed Regional Condition 3 Applicable to Multiple NWP**

#### Designated Critical Resource Waters, which include National Estuarine Research Reserves:

A PCN is required for work under NWP 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38 and 54 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 Islands, 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.

Comments received: API opposed the exclusion of NWPs C and D from the list of NWPs that cannot be used within Designated Critical Resources Waters, since NWP 12 cannot be used. API believes that, since the Clean Water Act Section 404 and Section 10 Rivers and Harbors Act impacts are largely indistinguishable among the permits, that any condition applied to one should apply to all. In the absence of clear environmental justification, they reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without equally being applied to NWP C and NWP D.

Response: For the proposed regional conditions, the Norfolk District used the list of NWPs provided under General Condition 22-Designated Critical Resource Waters in the September 15, 2020 Federal Register notice. The list has been updated in the final NWPs to include NWP 57 (proposed as NWP C) and NWP 58 (proposed as NWP D) and the Norfolk District Final Regional Conditions reflect this change. This regional condition was also modified to only include the applicable NWPs published in the January 13, 2021 Federal Register (86 FR 2744). The first part of the regional condition is no longer applicable because those NWPs addressed were not included in the January 13, 2021 publication. This regional condition will apply to the following: NWPs 12, 29, 39, 40, 42, 43, 44, 50, 51, 52, 57, and 58.

### **2.3.4 Proposed Regional Condition 4 Applicable to Multiple NWP**

#### Federally Listed Threatened or Endangered Species and Designated Critical Habitat for

## Non-Federal Permittees

For ALL NWP's, a PCN is 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 (FWS) 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 named "Information, Planning and Conservation System" (IPaC), is located at: <http://ecos.fws.gov/ipac/> . The applicant may use IPaC to determine if any federally listed threatened or endangered species or designated critical habitat may be affected by their proposed project. If your Official Species List from IPaC identifies any federally listed threatened or endangered species, you are required to submit a PCN for the proposed activity, unless the project clearly does not impact a listed species or suitable habitat for the listed species. If you are unsure about whether your project will impact federally listed threatened or endangered species, please submit a PCN, so the Norfolk District may review the action. Further information about the Virginia Field Office "Project Review Process" may be found at: <http://www.fws.gov/northeast/virginiafield/endangered/projectreviews.html>.

Additional consultation may also be required with National Marine Fisheries Service (NOAA) for species or critical habitat under their jurisdiction, including sea turtles, marine mammals, shortnose sturgeon, and Atlantic sturgeon. For additional information about their jurisdiction in Virginia, please see <https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-consultations-greater-atlantic-region> .

Additional resources to assist in determining compliance with this condition can be found on our webpage: <http://www.nao.usace.army.mil/Missions/Regulatory/USFWS.aspx>

Comments received: DCR-DNH recommended that the applicant obtain information on state listed or other rare species by contacting the Virginia Department of Wildlife Resources (DWR) and the Virginia Department of Conservation and Recreation- Division of Natural Heritage (VDCR-DNH)" as stated on the U.S. Fish and Wildlife online project review webpage [https://www.fws.gov/northeast/virginiafield/endangered/projectreviews\\_step3.html](https://www.fws.gov/northeast/virginiafield/endangered/projectreviews_step3.html)

Response: The Norfolk District encourages applicants to use the process outlined in the U.S. Fish and Wildlife online project review page. We will consider impacts to state listed species and/or other rare species under the Fish and Wildlife Coordination Act and will consider all comments from state resource agencies. In addition, Norfolk District has developed a new Regional Condition 14, which requires applicants within Virginia's designated coastal zone to access the Virginia Department of Wildlife Resources' (DWR) Virginia Fish and Wildlife Information Service (VAFWIS) at <https://vafwis.dgif.virginia.gov/fwis/> to determine if a state-listed species or designated resource is known within 2 miles of the proposed activity being permitted. Further discussion about this condition can be found in Section 2.4 and in Section 10.

### 2.3.5 Proposed Regional Condition 5 Applicable to Multiple NWP

#### Conditions for Designated Trout Waters

A PCN is required for work in Designated Trout Waters, as defined by the Virginia State Water Control Board and the DWR. 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

Information on designated trout streams can be obtained via DWR's 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/>.

DWR recommends the following time-of-year restrictions (TOYRs) for any in-stream work within streams identified as wild trout waters in its Cold Water Stream Survey database. The recommended TOYRs 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 NWP, which would occur in the designated waterways or adjacent wetlands of the specified counties, requires a PCN to the appropriate Corps of Engineers field office, and written approval from that office prior to performing the work. The Norfolk District recommends that permittees first contact the applicable Norfolk District Field Office, found at this web link: <http://www.nao.usace.army.mil/Missions/Regulatory/Contacts.aspx>, to determine if the PCN procedures would apply.

Comments received: API indicated that in 2017, this condition had a specific list of NWP and they recommended that level of granularity again.



Response: Norfolk District determined that most of the NWP's have the potential to be used in trout waters, so keeping the list of NWP's did not seem necessary.

### **2.3.6 Proposed Regional Condition 6 Applicable to Multiple NWP's**

#### Invasive Species

Plant species listed in the most current Virginia Department of Conservation and Recreation's (DCR) Invasive Alien Plant List shall not be used for re-vegetation for activities authorized by any NWP. The list of invasive plants in Virginia is found at: <http://www.dcr.virginia.gov/natural-heritage/invspdflist>. DCR recommends the use of regional native species for re-vegetation as identified in the DCR Native Plants for Conservation, Restoration and Landscaping brochures for the coastal, piedmont and mountain regions <http://www.dcr.virginia.gov/natural-heritage/nativeplants#brochure> also see the DCR native plant finder: <https://www.dcr.virginia.gov/natural-heritage/native-plants-finder>.

Comments received: DCR-DNH indicated that the correct link for a list of invasive species is: <https://www.dcr.virginia.gov/natural-heritage/invspdflist>.

Response: We corrected the link in the final regional conditions.

Comments received: API proposed this provision be qualified with additional language such as "to the maximum extent practicable."

Response: The use of invasive species for re-vegetation activities authorized by an NWP would not be acceptable. The use of native vegetation is a recommendation. Therefore, Norfolk District believes that a qualifying statement is not necessary.

### **2.3.7 Proposed Regional Condition 7 Applicable to Multiple NWP's**

#### Countersinking Pipes and Culverts

This condition applies to: NWP's 3, 7, 12, 14, 17, 18, 21, 23, 25, 27, 29, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, C and D.

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.

Based on consultation with DWR, the Norfolk District has determined that fish and other aquatic organisms are most likely present in any nontidal stream being crossed, in the absence of site-specific evidence to the contrary. The following conditions will apply in nontidal waters:

- a. 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.
- b. When countersinking culverts, permittees must ensure reestablishment of a surface water channel (within 15 days post construction) that allows for the movement of aquatic organisms and maintains the same hydrologic regime that was present pre-construction (i.e. the depth of surface water through the permit area should match the upstream and downstream depths). This may require the addition of finer materials to choke the larger stone and/or placement of riprap to allow for a low flow channel.
- c. 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.
  - ii. A pipe/culvert is being placed in a new location: If the permittee determines that bedrock or an existing buried utility line that is not practicable to relocate prevents countersinking, they 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 permittee determines that neither a bottomless structure nor an alternative location is practicable, then a PCN is required. The 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. PCN must also include photographs documenting site conditions. 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 permittee not want to countersink the pipe/culvert for other reasons, they must submit a PCN. The 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 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.

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, a utility line, or other documentable obstacle, 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 NWP.

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.

Comments received: NOAA, Habitat Conservation Division requested that replacement culverts be held to the same standard as new pipes/culverts in order to restore upstream/downstream access for fish and other aquatic organisms during all stages of the tide.

Response: This Regional Condition currently specifies that 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. After further consultation with NOAA, the Norfolk District has revised the "Note" in this Regional condition to say:

"NOTE FOR WORK IN TIDAL WATERS: New and replacement pipes/culverts in tidal waters must be installed with the inverts no higher than the prevailing stream/channel bottom elevation. If the permittee determines that matching existing elevations is not practicable, then a PCN is required. This condition does not apply to pipe extensions in tidal waters."

Since we have not used this condition previously, we have indicated that if a permittee is not able to meet this condition, they can submit a PCN, so we may determine on a case-by-case basis whether the project may be authorized under a NWP.

This regional condition was also modified to only include the applicable NWPs published in the January 13, 2021 Federal Register (86 FR 2744). This regional condition will apply to the following: NWPs 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 52, 57 and 58.

## 2.3.8 Proposed Regional Condition 8 Applicable to Multiple NWPs

### 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, 50, 51, 52, C and D.

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.

For Nontidal Waters: 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 the following conditions apply:

- a. If the existing pipe or multi-barrel array of pipes are NOT currently countersunk:
  - i. 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. In such cases, a PCN is not required, unless specified in the regional conditions for other reasons, and the permittee may proceed with the work.
  - ii. Otherwise, the permittee must submit a PCN 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) A vicinity map showing the pipe locations.

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/Missions/Regulatory/GuidanceDocuments.aspx>

iii. 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).

iv. If the Norfolk District determines that the work does NOT qualify for the NWP, the applicant will be directed to apply for either Regional Permit 01,

applicable only for Virginia Department of Transportation (VDOT) 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 multi-barrel array 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 regional conditions for other reasons, and the permittee may proceed with the work.

c. If the existing pipe or at least one pipe in the multi-barrel array of pipes IS countersunk and no pipe will continue to be countersunk in the low flow channel:

This work cannot be performed under the NWP. The permittee must apply for either a Regional Permit 01 (applicable only for VDOT projects) or an Individual Permit. However, it is anticipated that the 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. In emergency situations, if conditions or timeframes do not allow for compliance with the procedure outlined herein, then the pipe can be temporarily repaired to the condition before the washout. If the temporary repair would require a PCN by the above procedures, the permittee must submit the PCN at the earliest practicable date, but no longer than 15 days after the temporary repair.

Comments received: NOAA, Habitat Conservation Division requested that replacement culverts be held to the same standard as new pipes/culverts in order to restore upstream/downstream access for fish and other aquatic organisms during all stages of the tide.

Response: This Regional Condition currently specifies that 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. After further consultation with NOAA, the Norfolk District has revised the "Note" in this Regional condition to say:

"NOTE FOR WORK IN TIDAL WATERS: New and replacement pipes/culverts in tidal waters must be installed with the inverts no higher than the prevailing stream/channel bottom elevation. If the permittee determines that matching existing elevations is not practicable, then a PCN is required. This condition does not apply to pipe extensions in tidal waters."

Since we have not used this condition previously, we have indicated that if a permittee is not able to meet this condition, they can submit a PCN, so we may determine on a case-by-case basis whether the project may be authorized under a NWP.

This regional condition was also modified to only include the applicable NWP published in the January 13, 2021 Federal Register (86 FR 2744). This regional condition will apply to the following: NWPs 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 52, 57 and 58.

### **2.3.9 Proposed Regional Condition 9 Applicable to Multiple NWPs**

#### Impacts Requiring a Compensatory Mitigation Plan

When a PCN is required, a compensatory mitigation plan must be submitted if the permanent loss of wetlands exceeds 1/10 acre and/or 300 linear feet of waters of the U.S., unless otherwise stated in the regional conditions (see Regional Condition 11 for Transportation Projects). Federal permittees are required to mitigate for losses of wetlands greater than 1/10 acre and 300 linear feet of stream, unless otherwise waived by the Norfolk District.

Comments received: API indicated that even though the Regional Condition is the same as 2017, they suggested removal of compensatory mitigation plan requirement and ask the district to defer to GC 32 and GC 23 requirements. For example, GC 32 already requires submission of any proposed mitigation measures.

Response: The proposed NWPs indicated that a PCN may not be required for federal agencies. To ensure that the federal agencies complied with the mitigation conditions, we added a sentence to the mitigation regional condition. Since federal permittees are still required to submit a PCN, the last sentence of this regional condition is not necessary. Norfolk District developed the Compensatory Mitigation Regional Condition for the 2017 NWPs to address when a mitigation plan should be submitted with a PCN, especially when a loss of stream channel was proposed. The 2017 NWPs did not provide a threshold for stream mitigation, so we developed the Regional Condition to specify the stream impact threshold for when a mitigation plan should be submitted. The proposed NWPs specified that compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 1/10-acre and require a PCN. For smaller stream systems, which are 3-4 feet wide, 1/10-acre of impacts could result in the loss of 1,000-1,450 feet of stream channel. Norfolk District determined that a compensatory mitigation plan should be required for losses greater than 300 linear feet as was required previously under the 2017 NWPs. The federally recognized Virginia Tribes specifically expressed concerns about the loss of stream channels and the change to the NWPs, which removes the 300 linear foot thresholds. The Tribes stated their beliefs that the 300 linear foot threshold should be included, and they supported the regional condition which requires a compensatory mitigation plan for the loss of greater than 300 linear feet of loss of stream bed. The final NWPs specify that a mitigation is required for all losses of stream bed that exceed 0.03 acre and require pre-construction notification, unless determined otherwise by the District Engineer. In Norfolk District, compensatory mitigation credits for stream channels are acquired in linear feet, so we felt that providing the information in linear feet is necessary for our

review. However, since the final NWP's will be reported in acreage, we will need to know the acreage of stream channel losses to determine if the NWP thresholds are met. We determined that it will be advantageous for the applicant to provide the amount of stream channel loss in both acreage and linear feet. Regional Condition 9 will be revised as follows:

#### Impacts Requiring a Compensatory Mitigation Plan

“When a PCN is required, a compensatory mitigation plan must be submitted if the permanent loss exceeds 0.1 acre of wetlands and/or the loss of 0.03 acre or 300 linear feet of stream bed, unless otherwise stated in the regional conditions (see Regional Condition 11 for Transportation Projects). The stream channel loss must be reported in acreage and linear feet.”

### **2.3.10 Proposed Regional Condition 10 Applicable to Multiple NWP's**

#### Removal of Temporary Fills and Impacts

The soils of any temporarily impacted areas located in wetlands that are cleared, grubbed, and/or filled, must be restored once these areas are no longer needed for their authorized purpose, no later than completion of project construction, and not to exceed twelve (12) months after commencing the temporary impacts. To restore, temporary fill must be removed in its entirety and the affected areas returned to pre-construction elevations, the soil surface loosened by ripping or chisel plowing to a depth of 8-12”, and then seeded using native wetland species. See Regional Condition 6: Invasive Species for more information on vegetation recommendations.

Fill or dredged material in waters of the U.S. that is not removed within the 12-month period will be considered a permanent impact, unless otherwise determined by the Corps. This additional impact to waters of the U.S. may result in the Corps initiating a permit non-compliance action, which may include a restoration order, after-the-fact permitting, and/or compensatory mitigation.

Comments received: No comments were received.

Response: This regional condition has been in place since the 2007 NWP's and the Norfolk District believes it conveys important information to the regulated public. We made minor changes to be consistent with conditions in other Norfolk District general permits and those changes were reflected in the proposed regional conditions.

### **2.3.11 Proposed Regional Condition 11 Applicable to Multiple NWP's**

#### Transportation Projects Funded in Part or in Total by Local, State or Federal Funds

For all impacts associated with transportation projects funded in part or in total by local, state or federal funds and requiring a PCN, compensatory mitigation will generally be



required for all permanent wetland impacts (including impacts less than 1/10 acre). Therefore, the PCN must include a compensatory mitigation plan.

Comments received: No comments were received.

Response: This regional condition has been in place since the 2007 NWP's and the Norfolk District believes it conveys important information to the regulated public; therefore, the condition will remain the same.

### **2.3.12 Proposed Regional Condition 12 Applicable to Multiple NWP's**

#### Activities Affecting Structures or Works Built by the United States

If the NWP activity also requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a Corps Federally authorized Civil Works project, the activity that requires section 408 permission is not authorized by the NWP until the appropriate Corps District office issues the section 408 permission to alter, occupy, or use the Corps Civil Works project, and the District Engineer issues a written NWP verification.

Contact a Norfolk District Regulatory Project Manager to assist in determining if your proposed activity might alter or temporarily or permanently occupy or use a Corps of Engineers Civil Works project.

Locations of Norfolk District Civil Works projects can be found at:  
[http://www.nao.usace.army.mil/Portals/31/docs/regulatory/RPSPdocs/RP-17\\_Corps\\_Project\\_Maps.pdf](http://www.nao.usace.army.mil/Portals/31/docs/regulatory/RPSPdocs/RP-17_Corps_Project_Maps.pdf)

For projects located within the Civil Works boundary of the Baltimore, Huntington, Nashville or Wilmington District, please contact a Norfolk District Project Manager for assistance.

Comments received: No comments were received.

Response: This regional condition has been in place since the 2007 NWP's and the Norfolk District believes it conveys important information to the regulated public. We made minor changes to be consistent with conditions in other Norfolk District general permits and those changes were reflected in the proposed regional conditions.

### **2.3.13 Proposed Regional Condition for NWP 12 - Oil or Natural Gas Pipeline Activities**

#### **Conditions Specific to NWP 12:**

1. Construction of access roads may not cause the loss of more than 1/3 acre of waters of the United States.

2. A PCN is required when the activity involves greater than 0.10 acre of mechanized landclearing in a forested wetland for the utility line right-of-way.
3. For utility activities requiring a PCN the permittee shall provide the following information:
  - a. A map of the entire utility corridor to assist with our completeness determination. The map should include 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 analysis of onsite minimization, which specifically addresses the following:
    - i. Selection of an alignment which avoids and minimizes wetland and stream impacts to the maximum extent practicable. The utility line should make a direct or perpendicular crossing of a stream. Directional drilling should be reviewed as an option. However, the Norfolk District recognizes that in certain areas (e.g. karst areas) directional drilling may not be the environmentally preferred option.
    - 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. Consult the Virginia Conservation Vision, a GIS analysis for identifying and prioritizing areas of un-fragmented natural cover in Virginia <http://www.dcr.virginia.gov/natural-heritage/vaconvision>.
    - 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 only 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 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.
  - c. Compensatory mitigation may be required for permanent conversion of wetlands within the utility line corridor.
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 Channels 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 PCN and the deviation must be reviewed and approved by the Norfolk District. Section 408 permission may be required (see Regional Condition 12 under Section I).

5. Whenever practicable, excavated material shall be placed on a Corps confirmed upland site, scow or barge. However, when this is not practicable, temporary stockpiling is 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 any 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 wetland areas. Permission must be granted by the Norfolk District if the material is to be stockpiled longer than 30 days.
6. The applicant must receive written verification before performing the work when open-cut trenching, temporary stockpiling dredge material, or hydrostatic testing of a pipeline involving water withdrawals in designated anadromous fish use areas is proposed. The Norfolk District will coordinate with NOAA and/or the DWR. In most cases, the following time-of-year restrictions (TOYRs) 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 Dam: TOYR from February 15 through June 30 of any given year.
  - James River, above Boshers Dam (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: If dredging upstream of the Mid-Town Tunnel on the mainstem and the West Norfolk Bridge (Route 164, Western Freeway) on the Western Branch of the Elizabeth River, then a TOYR is not required.
  - Unless otherwise noted: TOYR from February 15 through June 30 of any given year.
7. For utility lines landing in Virginia, from the Outer Continental Shelf (OCS), the applicant shall send the PCN to the following federal agencies:

Director, Naval Seafloor Cable Protection Office  
Naval Facilities Engineering Command  
1322 Patterson Ave SE, Suite 1000  
Washington DC 20374

Bureau of Ocean Energy Management (BOEM)  
Atlantic OCS Region  
1201 Elmwood Park Blvd.  
New Orleans, LA 70123-2394.

8. For utility line projects completed by horizontal directional drilling or other boring methods, include a plan to address the prevention, containment, and cleanup of sediment or other materials caused by inadvertent returns of drilling fluids to waters of the U.S. through sub-soil fissures or fractures with the PCN (if a PCN is required). If an inadvertent return of drilling fluids to waters of the U.S. occurs, and the remediation requires work within waters of the U.S., then the applicant must notify the Corps immediately and submit a remediation plan as soon as possible, regardless of whether a PCN was required for the original work.
9. 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:
- a. Screening over the mouth of the intake with mesh size that does not exceed 1mm;
  - b. Intake velocities that do not exceed 0.25 feet per second
  - c. 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.

Comments received: For NWP 12, NWP C and NWP D, DCR-DNH recommended adding “or the Virginia Natural Heritage Data Explorer (<http://vanhde.org/content/map>)” to Regional Condition 3. b. ii. which discusses the selection of an alignment that avoids fragmenting large tracts of forested wetlands for utility line placement.

Response: The additional weblink has been added to the final Regional Conditions as suggested.

Comments received: One commenter strongly recommended modifying the proposed Regional Condition 3.c to require compensatory mitigation for conversion of wetlands (for example from forested wetlands to emergent wetlands) within the utility line corridor. The commenter indicated that compensation should be required both for temporary and permanent conversions of wetland types.

Response: The commenter is referencing regional condition 3.c., which states that compensatory mitigation may be required for permanent conversion of wetlands within the utility line corridor. In most cases, Norfolk District will require compensatory mitigation for permanent conversion of wetlands within the easement; however, we have flexibility not to require compensation if we do not believe it is necessary to ensure that impacts are not more than minimal. We generally will not require compensatory mitigation for temporary conversion impacts, since the wetland areas will be allowed to restore back to their pre-existing condition and no permanent loss of wetland functions would be anticipated.

Comments received: AEP requested guidance on the interpretation on the term “permanent conversion” and the ratio to be used in determining the level of compensatory mitigation. The comment is in reference to Nationwide Permit C.3.c under NWP 12, NWP 57 and NWP 58, which states that “compensatory mitigation may be required for permanent conversion of wetlands within the utility line corridor.”

Response: If an applicant converts a forested wetland to an emergent wetland during utility line construction, and then undertakes routine maintenance so that the forested wetland is no longer allowed to revegetate back to its forested state, then permanent wetland conversion has occurred. Generally, we require a 1:1 ratio of compensatory mitigation for permanent conversion impacts, since the wetland still exists, but does not have the same functions and services as it did as a forested wetland. In most cases, Norfolk District will require compensatory mitigation for permanent conversion of wetlands within the easement; however, we have flexibility not to require compensation if we do not believe it is necessary to ensure that impacts are not more than minimal.

Comments received: API offered the following comments on NWP 12. API stated, “In the absence of clear environmental justification, we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without equally being applied to NWP C and NWP D.” API commented on the regional condition specific to NWP 12, which requires a PCN when the activity involves greater than 0.10 acre of mechanized land clearing in a forested wetland for the utility line right-of-way. API stated that the PCN and additional submittal requirements are over and above the requirements in NWP 12 and GC 32, and the PCN requirements at the national level should be sufficient.

Response: In response to API's comment about conditions being equally applied to NWP 12, NWP 57, NWP 58, we have used the same regional conditions for all three NWPs. Only a few do not pertain to all, for instance, the requirements for overhead electric lines only apply to NWP 57. As discussed under the comment for Regional Condition 3 for Designated Critical Resource Waters, the list in the final NWPs includes NWPs 57 and 58. We believe we have satisfied API's concerns about applying conditions equally to NWP 12, NWP 57, and NWP 58. There are no other comment periods or opportunities for API to challenge the conditions within the Corps' regional conditioning process. Any other challenges would need to be outside this process. API also expressed concerns about the regional condition specific to NWP 12, which requires a PCN when the activity involves greater than 0.10 acre of mechanized landclearing in a forested wetland for the utility line right-of-way. This regional condition requires PCNs for mechanized landclearing in the utility line right-of-way, so we can evaluate those proposed activities and determine whether they qualify for NWP authorization and whether compensatory mitigation is necessary to ensure no more than minimal adverse environmental effects. NWP 12, NWP 57, and NWP 58 require a PCN when the discharge will result in the loss of greater than 1/10-acre of waters of the United States; however, applicants may not equate mechanized landclearing to a loss of waters and not submit a PCN. We believe that this regional condition adds clarity for the applicant to know when to submit a PCN. As stated in the Final NWPs, division engineers can impose regional conditions to require PCNs for mechanized land-clearing in a forested wetland.

Comments received: VNG commented on Norfolk District's regional condition specific to NWP 12, which requires a PCN when the activity involves greater than 0.10 acre of mechanized land clearing in a forested wetland for the utility line right-of-way. VNG believes this requirement is not consistent with the USACE's strategy for the proposed 2020 NWP renewals. VNG stated that the mechanized land clearing threshold is proposed to be removed as a requirement for submission of a PCN. They believe that any loss of wetlands greater than 1/10 of an acre from mechanized land clearing will still require a PCN to accommodate review in these instances. VNG noted that in the Federal Register Public Notice for the Proposal to Reissue and Modify Nationwide Permits, "We [USACE] are proposing to remove this PCN threshold because mechanized land clearing of forested wetlands in the utility line right of way usually results in temporary impacts to the wetlands and other waters as the trees are removed to clear a right-of-way for the utility line. Even though the trees are removed, the disturbed wetland will develop a new plant community, and because of the maintenance that is normally required for utility line rights-of-way to protect the utility line, the plant community will likely consist primarily of herbaceous plants and shrubs. If mechanized land clearing of forested wetlands in the utility line right-of-way results in the loss of greater than 1/10 acre of wetland, then the proposed activity would require a PCN." VNG agrees with that analysis as the removal of vegetation, burial of pipe, restoration of the surface grades, restoration of any water crossings, and revegetation of the area does not typically result in any loss of wetland acreage nor does it alter the area such that it would no longer be a water of the United States. VNG notes that division engineers are authorized to add regional conditions specific to the needs and/or

requirements of a particular region or state and they believe that mechanized land clearing is not a condition that is unique to this region or state and should therefore not be further regulated from what is proposed by the USACE in the NWP General Conditions. VNG believes this condition would likely require most projects involving mechanized clearing within a wetland to require a PCN, as only projects within existing rights of way would not meet this requirement. They stated that this practice is contrary to the efforts to reduce PCN triggers by the USACE and is not supported by previous USACE regulatory rulemaking.

Response: As discussed above, a regional condition specific to NWP 12, requires PCNs for greater than 0.10 acre of mechanized landclearing within wetlands in the utility line right-of-way, so we can evaluate those proposed activities and determine whether they qualify for NWP authorization and whether compensatory mitigation is necessary to ensure no more than minimal adverse environmental effects. As stated in the Final NWPs, division engineers can impose regional conditions to require PCNs for mechanized land-clearing in a forested wetland and require compensatory mitigation. Norfolk District has chosen to require a PCN when greater than 0.10 acre of mechanized land clearing in a forested wetland for the utility line right-of-way will occur to address concerns expressed by our state and federal partners. Even though the affected area will remain a wetland, some of the functions and services will be lost due to a change in the wetland type. We will be able to evaluate whether compensatory mitigation for any permanent conversion is warranted.

Comments Received: VNG indicated that the requirement in 3.b.i under NWP 12 for perpendicular utility line crossings is not often feasible. Many instances occur where a perpendicular crossing of a stream would require additional workspace, tree clearing, and easement acquisition; especially when collocating the right of way with another existing utility easement or right of way. In these cases, it is often less of an environmental impact to cross the stream at a non-perpendicular angle. VNG recommended revising the condition to read:

“3 b. i. Selection of an alignment which avoids and minimizes wetland and stream impacts to the maximum extent practicable. Where possible, the utility line should make a direct or perpendicular crossing of a stream. Directional drilling should be reviewed as an option. However, the Norfolk District recognizes that in certain areas (e.g. karst areas) directional drilling may not be the environmentally preferred option.”

Response: Norfolk District agrees that in some cases it may not be feasible or environmentally preferred to make a perpendicular crossing of a stream. The requirement is for an analysis of onsite minimization. If the applicant has determined that a perpendicular crossing is not practicable, we would expect the applicant to provide documentation as to why a perpendicular crossing is not feasible and why a non-perpendicular crossing is environmentally preferred. This condition requests avoidance and minimization information and indicates that the utility line should make a direct or perpendicular crossing of a stream, when possible; however, the condition

does not prohibit the Norfolk District from authorizing a utility line crossing that is not perpendicular to the stream. Therefore, we believe it is not necessary to revise the condition as suggested. We will review the information submitted by the applicant on a case-by-case basis to determine if a non-perpendicular crossing is environmentally preferred or is the most practicable.

Comments Received: VNG stated that proposed condition 3.b.iv under NWP 12 appears to apply to all areas along a utility corridor, not just wetlands and streams regulated under the Norfolk District. VNG said the condition should be revised to clarify that it only applies to those areas that fall under the jurisdiction of the Norfolk District. VNG specified that pipeline utilities are required by regulations to maintain permanent rights of way clear and accessible for safety and maintenance and the Federal Pipeline Safety Administration regulations require that companies exercise all remedies to ensure the proper operation and maintenance of their pipeline systems. For this reason, VNG said a 20-foot wide access corridor may not be practicable where larger diameter pipes or depth of cover require heavy equipment to safely perform routine maintenance or repairs to systems and trees and large shrubs within the permanent right of way in wetlands are periodically cleared in order to maintain a clearly accessible right-of-way. VNG recommended that 3.b.iv be revised to read:

“3 b. iv. For buried utility lines, allowance of natural succession in wetlands under the jurisdiction of the District, to restore cleared areas outside of the permanent right of way to a tree and scrub/shrub community to the maximum extent practicable.”

Response: This regional condition requires an analysis of onsite minimization specifically addressing the allowance of natural selection to restore the cleared wetland areas within the right of way. The intention was to address only areas within the Corps' jurisdiction; however, we will add the word “wetland” before area to make that intention clearer. This is not an absolute condition, but more of an information request. We expect the applicant to provide a reasonable justification if an access corridor greater than 20 feet wide is necessary. The regional condition discussed has been revised to say:

“3 b. iv. For buried utility lines, allowance of natural succession to restore the wetland area to tree and scrub/shrub except for a 20-foot wide access corridor, to the maximum extent practicable. “

Comments Received: In reference to Condition 5 under NWP 12, VNG does not believe that these requirements should be included in the Norfolk District's Regional Conditions as it is redundant to the existing conditions for NWP 12. As required in the current and proposed NWP 12, trench spoil must be stored so that it is not dispersed; it must be returned to the trench; and the area must be restored to original contours and reseeded. VNG noted that the Federal Register Public Notice for the Proposal to Reissue and Modify Nationwide Permits specified that material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or



other forces. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. There must be no change in pre-construction contours of waters of the United States. VNG believes Regional Condition 5 for NWP 12 is duplicative and unnecessary. Furthermore, the requirement for trench spoil to be placed on filter cloth or other semi-permeable material and stabilized with hay bales will introduce additional foreign materials (i.e. non-native seeds and composite fabric) and debris into the wetland which can inhibit recovery of wetlands following construction. This requirement will often result in the need for a utility operator to excavate below the level of the materials to remove them, thereby disturbing additional topsoil and native seedbank instead of serving as protection for these areas. VNG believes that the existing conditions of the NWP sufficiently balance the need for ensuring that temporary impacts do not cause the loss of wetland areas through the reestablishment of pre-construction contours and stabilization and retention of sidecast materials while also minimizing adverse impacts from the removal of additional topsoil and seedbank by the need for excavating depressed soil to remove the underlayment materials.

Response: Norfolk District believes that the conditions in number 5 under NWP 12 are not redundant with the conditions in the Final NWP 12. The specifications in our regional conditions are more stringent to address Norfolk District concerns and concerns expressed by our state and federal partners. No other entity or contractor have indicated that placing stockpiled material on filter cloth, mats, or some other semi-permeable surface prior to placing in a wetland area has been problematic and these regional conditions have been in place since the 2012 NWPs. The Virginia DEQ 401 WQC reiterates similar requirements for stockpiling. Norfolk District does not propose to revise these conditions.

### **2.3.14 Proposed Regional Condition for 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, unless the Norfolk District determines that the SPGP-01 is not applicable. NWP 29 may still be used for a single residence and attendant features and in the Northern Virginia Military Installations within Baltimore District's Area of Responsibility.

Comments received: No comments were received.

Response: This regional condition has been in place since the 2012 NWPs. Norfolk District believes it conveys important information to the regulated public. We proposed minor changes to clarify when this NWP is applicable.

### **2.3.15 Proposed Regional Condition for NWP 39-Commercial and Institutional Developments**

NWP 39 overlaps with the current State Program General Permit (SPGP-01); therefore, NWP 39 may not be used, unless the Norfolk District determines that the SGPG-01 is not applicable. NWP 39 may still be used in the Northern Virginia Military Installations within Baltimore District's Area of Responsibility.

Comments received: No comments were received.

Response: This regional condition has been in place since the 2012 NWPs. Norfolk District believes it conveys important information to the regulated public. We proposed minor changes to clarify when this NWP is applicable.

### **2.3.16 Proposed Regional Condition for NWP 48-Commercial Shellfish Aquaculture Activities**

1. No aquaculture activity shall occur within beds of submerged aquatic vegetation (SAV) or saltmarsh, nor shall such vegetation be damaged or removed. Should an area become colonized by SAV or saltmarsh after an authorized aquaculture activity is installed, the activity shall be allowed to remain; however, no expansion of the aquaculture operation into newly colonized areas is authorized by this NWP. Information on the location of SAV beds can be found at: <http://mobjack.vims.edu/sav/savwabmap/> .
2. An aquaculture activity will not meet the terms for this NWP if it will have more than minimal adverse effects on avian resources such as, but not limited to: shore birds, wading birds, or waterfowl. This includes nesting, feeding or resting activities by migratory birds identified at 50 CFR 10.13.
3. An aquaculture activity will not qualify for this NWP if it will have more than minimal adverse effects on existing or naturally occurring beds or population of shellfish, marine worms or other invertebrates that could be used by man, other mammals, birds, reptiles, or fish. Feeding and harvesting plans, including the use of a hydraulic dredge, should be included in the application to evaluate impacts.
4. No aquaculture activity or vehicular access to the activity shall occur in such a way as to negatively impact coastal or wetland vegetation.
5. As-built drawings must be submitted with the certificate of compliance for all aquaculture projects.
6. The District Engineer will require an Individual Department of the Army permit for any project which they determine to have greater than minimal individual or cumulative impacts.

7. If the permittee decides to abandon the activity authorized under this NWP (unless such abandonment is merely the transfer of property to a third party), the permittee must notify the Corps and may be required to remove the structures and restore the area to the satisfaction of the Corps.

Comments received: No comments were received.

Response: This regional condition has been in place since the 2017 NWPs. Norfolk District believes it conveys important information to the regulated public. We proposed minor changes to clarify the language based on preliminary recommendations from MMFS.

### **2.3.17 Proposed Regional Condition for NWP 51-Land-Based Renewable Energy Generation Facilities**

If aerial transmission lines crossing navigable waters are proposed, please see NWP 57 Regional Condition 7.

Comments received: No comments were received.

Response: This regional condition has been in place since the 2017 NWPs. Norfolk District believes it conveys important information to the regulated public. No changes were proposed.

### **2.3.18 Proposed Regional Condition for NWP 52-Water-Based Renewable Energy Generation Pilot Projects**

If aerial transmission lines crossing navigable waters are proposed, please see NWP 57 Regional Condition 7.

Comments received: No comments were received.

Response: This regional condition has been in place since the 2017 NWPs. Norfolk District believes it conveys important information to the regulated public. No changes were proposed.

### **2.3.19 Proposed Regional Condition for NWP A- Seaweed Mariculture Activities**

The PCN should include the type of bottom substrate in the location where the project will occur.

Comments received: National Marine Fisheries, Habitat Conservation Division indicated that a PCN should be provided to them for all activities under this new NWP. NOAA also stated that the new NWPs or NAO's Regional Conditions should follow suit with NWP 48, which outright prohibits: (a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody; and (b) The cultivation of

an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990.

NOAA also requested that additional information be required in the PCN. The information requested is generally included with the Norfolk District Joint Permit Application (JPA); however, an applicant is not required to use the JPA when submitting a PCN. NOAA requested the following be included in the PCN for NWP A: 1. A description of the quantity and dimensions of all proposed structure(s), including: culture gear (lines, cages pens, etc.), anchors, and site markers; 2. A vicinity map showing the project location(s), including the longitude and latitude of the site boundaries; 3. A schematic or drawing showing how the gear will be deployed on the site (a formal engineered schematic is not required); 4. The name(s), including sub-species if applicable, and quantities of the species that will be cultivated; 5. General water depths, sediment characteristics, and benthic species present (including submerged aquatic vegetation) in the project area(s) (a detailed survey is not required).

Response: In response to NOAA's comment about this permit following the guidelines established in NWP 48, the proposed NWP A specified that it does not authorize the cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. The Note under this NWP further defines the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 and this NWP contains the same language as NWP 48. The final NWP 55 (proposed as NWP A) prohibits the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody. Therefore, we do not need to include this language as a regional condition for this NWP. However, the Norfolk District believes it is prudent to require the additional information with the PCN suggested by NOAA. The regional condition for NWP 55 (proposed as A)- Seaweed Mariculture Activities will be revised as follows:

### **NWP 55- Seaweed Mariculture Activities**

In addition to the information required under NWP 55, the following should be included in the PCN:

1. General water depths, sediment characteristics of the bottom substrate, and benthic species present (including submerged aquatic vegetation) in the project area(s) (a detailed survey is not required).
2. A description of the quantity and dimensions of all proposed structure(s), including: culture gear (lines, cages pens, etc.), anchors, and site markers.
3. A vicinity map showing the project location(s), including the longitude and latitude of the site boundaries.
4. A schematic or drawing showing how the gear will be deployed on the site (a formal engineered schematic is not required).

5. The name(s), including sub-species if applicable, and quantities of the species that will be cultivated.

### **2.3.20 Proposed Regional Condition for NWP B- Finfish Mariculture Activities**

The PCN should include the type of bottom substrate in the location where the project will occur.

Comments received: National Marine Fisheries, Habitat Conservation Division indicated that a PCN should be provided to them for all activities under this new NWP. NOAA also stated that the new NWPs or NAO's Regional Conditions should follow suit with NWP 48, which outright prohibits: (a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody; and (b) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990.

NOAA also requested that the additional information be required in the PCN. The information requested is generally included with the Norfolk District Joint Permit Application (JPA); however, an applicant is not required to use the JPA when submitting a PCN. NOAA requested the following be included in the PCN for NWP B: 1. A description of the quantity and dimensions of all proposed structure(s), including: culture gear (lines, cages pens, etc.), anchors, and site markers; 2. A vicinity map showing the project location(s), including the longitude and latitude of the site boundaries; 3. A schematic or drawing showing how the gear will be deployed on the site (a formal engineered schematic is not required); 4. The name(s), including sub-species if applicable, and quantities of the species that will be cultivated; 5. General water depths, sediment characteristics, and benthic species present (including submerged aquatic vegetation) in the project area(s) (a detailed survey is not required).

Response: In response to NOAA's comment about this permit following the guidelines established in NWP 48, the proposed NWP B specified that it does not authorize the cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. The Note under this NWP further defined the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 and this NWP contains the same language as NWP 48. The final NWP 56 (proposed as NWP B) prohibits the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody. Therefore, we do not need to include this language as a regional condition for this NWP. However, the Norfolk District believes it is prudent to require the additional information with the PCN suggested by NOAA. The regional condition for NWP 56 (proposed as B)- Seaweed Mariculture Activities will be revised as follows:

### **NWP 56- Seaweed Mariculture Activities**

In addition to the information required under NWP 56, the followings should be

included in the PCN:

1. General water depths, sediment characteristics of the bottom substrate, and benthic species present (including submerged aquatic vegetation) in the project area(s) (a detailed survey is not required).
2. A description of the quantity and dimensions of all proposed structure(s), including: culture gear (lines, cages pens, etc.), anchors, and site markers.
3. A vicinity map showing the project location(s), including the longitude and latitude of the site boundaries.
4. A schematic or drawing showing how the gear will be deployed on the site (a formal engineered schematic is not required).
5. The name(s), including sub-species if applicable, and quantities of the species that will be cultivated.

### **2.3.21 Proposed Regional Condition for NWP C- Electric Utility Line and Telecommunications Activities**

1. Construction of access roads may not result in more than 1/3 acre of impacts to waters of the United States.
2. A PCN is required when the activity involves greater than 0.10 acres of mechanized landclearing in a forested wetland for the utility line right-of-way.
3. For utility activities requiring a PCN the permittee shall provide the following information:
  - a. A map of the entire utility corridor to assist with our completeness determination. The map should include 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 analysis of onsite minimization, which specifically addresses the following:
    - i. Selection of an alignment which avoids and minimizes wetland and stream impacts to the maximum extent practicable. The utility line should make a direct or perpendicular crossing of a stream. Directional drilling should be reviewed as an option. However, the Norfolk District recognizes that in certain areas (e.g. karst areas) directional drilling may not be the environmentally preferred option.

- 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. Consult the Virginia Conservation Vision, a GIS analysis for identifying and prioritizing areas of un-fragmented natural cover in Virginia <http://www.dcr.virginia.gov/natural-heritage/vaconvision>.
    - 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 only 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.
  - c. Compensatory mitigation may be required for permanent conversion of wetlands within the utility line corridor.
- 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 Channels 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 PCN and the deviation must be reviewed and approved by the Corps. Section 408 permission may be required (see Regional Condition 13 under Section I).
- 5. Whenever practicable, excavated material shall be placed on a Corps confirmed upland site, scow or barge. However, when this is not practicable, 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 any 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 wetland areas. Permission must be granted by the Norfolk District if the material is to be stockpiled longer than 30 days.
6. The applicant must receive written verification before performing the work when open-cut trenching, temporary stockpiling dredge material, or hydrostatic testing of a pipeline involving water withdrawals in designated anadromous fish use areas is proposed. The Norfolk District will coordinate with NOAA and/or the DWR. In most cases, the following time-of-year restrictions (TOYRs) 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 Dam (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: If dredging upstream of the Mid-Town Tunnel on the mainstem and the West Norfolk Bridge (Route 164, Western Freeway) on the Western Branch of the Elizabeth River, then a TOYR is not required.
  - Unless otherwise noted: TOYR from February 15 through June 30 of any given year.
7. Aerial Transmission Lines Crossing Navigable Waters:
- a. The following minimum clearances are required for aerial electric power transmission lines crossing navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges, or the clearances which would be required by the United States Coast Guard for new fixed bridges, in the vicinity of the proposed aerial transmission line. These clearances are based on the low point of the line under conditions producing the greatest sag, taking into consideration temperature, load, wind, length of span, and type of supports as outlined in the National Electrical Safety Code:



<b>Nominal System Voltage (kV)</b>	<b>Minimum additional clearance (ft.) above clearance required for bridges</b>
115 and below	20
138	22
161	24
230	26
350	30
500	35
700	42
750 - 765	45

b. Clearances for communication lines, stream gaging cables, ferry cables, and other aerial crossings must be a minimum of ten feet above clearances required for bridges, unless otherwise specifically authorized by the District Engineer.

c. Corps of Engineer regulation ER 1110-2-4401 prescribes minimum vertical clearances for power communication lines over Corps lake projects. In instances where both this Regional Condition and ER 1110-2-4401 apply, the greater minimum clearance is required.

8. For utility lines landing in Virginia, from the Outer Continental Shelf (OCS), the applicant shall send the PCN to the following federal agencies:

Director, Naval Seafloor Cable Protection Office  
 Naval Facilities Engineering Command  
 1322 Patterson Ave SE, Suite 1000  
 Washington DC 20374

Bureau of Ocean Energy Management (BOEM)  
 Atlantic OCS Region  
 1201 Elmwood Park Blvd.  
 New Orleans, LA 70123-2394.

9. For utility line projects completed by horizontal directional drilling or other boring methods, a plan to address the prevention, containment, and cleanup of sediment or other materials caused by inadvertent returns of drilling fluids to waters of the U.S. through sub-soil fissures or fractures needs to be included with the PCN (if a PCN is required). If an inadvertent return of drilling fluids to waters of the U.S. occurs, and the remediation requires work within waters of the U.S., then the applicant must notify the Corps immediately and submit a remediation plan as soon as possible, regardless of whether a PCN was required for the original work.

10. 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:
- a. Screening over the mouth of the intake with mesh size that does not exceed 1mm;
  - b. Intake velocities that do not exceed 0.25 feet per second;
  - c. 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.

Comments received: For NWP 12, NWP C and NWP D, DCR-DNH recommended adding “or the Virginia Natural Heritage Data Explorer (<http://vanhde.org/content/map>)” to Regional Condition 3. B. ii. which discusses the selection of an alignment that avoids fragmenting large tracts of forested wetlands for utility line placement.

Response: The additional weblink has been added to the final Regional Conditions as suggested.

Comments received: One commenter strongly recommended modifying the proposed Regional Condition 3.c to require compensatory mitigation for conversion of wetlands (for example from forested wetlands to emergent wetlands) within the utility line corridor. The commenter indicated that compensation should be required both for temporary and permanent conversions of wetland types.

Response: The commenter is referencing regional condition 3.c., which states that compensatory mitigation may be required for permanent conversion of wetlands within the utility line corridor. In most cases, Norfolk District will require compensatory mitigation for permanent conversion of wetlands within the easement; however, we have flexibility not to require compensation if we do not believe it is necessary to ensure that impacts are not more than minimal. We generally will not require compensatory mitigation for temporary conversion impacts, since the wetland areas will be allowed to restore back to their pre-existing condition.

Comments received: AEP requested guidance on the interpretation on the term “permanent conversion” and the ratio to be used in determining the level of compensatory mitigation. The comment is in reference to Nationwide Permit C.3.c under NWP 12, NWP 57 and NWP 58, which states that “compensatory mitigation may be required for permanent conversion of wetlands within the utility line corridor.”

Response: If an applicant converts a forested wetland to an emergent wetland during utility line construction, and then undertakes routine maintenance so that the forested wetland is no longer allowed to revegetate back to its forested state, then permanent wetland conversion has occurred. Generally, we require a 1:1 ratio of compensatory mitigation for permanent conversion impacts, since the wetland still exists, but does not have the same functions and services as it did as a forested wetland. In most cases,

Norfolk District will require compensatory mitigation for permanent conversion of wetlands within the easement; however, we have flexibility not to require compensation if we do not believe it is necessary to ensure that impacts are not more than minimal.

Comments received: API offered the following comments on NWP 12. API stated, “In the absence of clear environmental justification, we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without equally being applied to NWP C and NWP D.” API commented on the regional condition specific to NWP 12, which requires a PCN when the activity involves greater than 0.10 acre of mechanized land clearing in a forested wetland for the utility line right-of-way. API stated that the PCN and additional submittal requirements are over and above the requirements in NWP 12 and GC 32, and the PCN requirements at the national level should be sufficient.

Response: In response to API’s comment about conditions being equally applied to NWP 12, NWP 57, NWP 58, we have used the same regional conditions for all three NWPs. Only a few do not pertain to all, for instance, the requirements for overhead electric lines only apply to NWP 57. As discussed under the comment for Regional Condition 3 for Designated Critical Resource Waters, the list in the final NWPs includes NWPs 57 and 58. We believe we have satisfied API’s concerns about applying conditions equally to NWP 12, NWP 57, and NWP 58. There are no other comment periods or opportunities for API to challenge the conditions within the Corps’ regional conditioning process. Any other challenges would need to be outside this process. API also expressed concerns about the regional condition specific to NWP 12, which requires a PCN when the activity involves greater than 0.10 acre of mechanized landclearing in a forested wetland for the utility line right-of-way. This regional condition requires PCNs for mechanized landclearing in the utility line right-of-way, so we can evaluate those proposed activities and determine whether they qualify for NWP authorization and whether compensatory mitigation is necessary to ensure no more than minimal adverse environmental effects. NWP 12, NWP 57, and NWP 58 require a PCN when the discharge will result in the loss of greater than 1/10-acre of waters of the United States; however, applicants may not equate mechanized landclearing to a loss of waters and not submit a PCN. We believe that this regional condition adds clarity for the applicant to know when to submit a PCN. As stated in the Final NWPs, division engineers can impose regional conditions to require PCNs for mechanized land-clearing in a forested wetland.

Comments Received: VNG stated that proposed condition 3.b.iv under NWP 12 appears to apply to all areas along a utility corridor, not just wetlands and streams regulated under the Norfolk District. VNG said the condition should be revised to clarify that it only applies to those areas that fall under the jurisdiction of the Norfolk District. VNG specified that pipeline utilities are required by regulations to maintain permanent rights of way clear and accessible for safety and maintenance and the Federal Pipeline Safety Administration regulations require that companies exercise all remedies to ensure the proper operation and maintenance of their pipeline systems. For this reason, VNG said a 20-foot wide access corridor may not be practicable where larger diameter

pipes or depth of cover require heavy equipment to safely perform routine maintenance or repairs to systems and trees and large shrubs within the permanent right of way in wetlands are periodically cleared in order to maintain a clearly accessible right-of-way. VNG recommended that 3.b.iv be revised to read:

“3 b. iv. For buried utility lines, allowance of natural succession in wetlands under the jurisdiction of the District, to restore cleared areas outside of the permanent right of way to a tree and scrub/shrub community to the maximum extent practicable.”

Response: This regional condition requires an analysis of onsite minimization specifically addressing the allowance of natural selection to restore the cleared wetland areas within the right of way. The intention was to address only areas within the Corps’ jurisdiction; however, we will add the word “wetland” before area to make that intention clearer. This is not an absolute condition, but more of an information request. We expect the applicant to provide a reasonable justification if an access corridor greater than 20 feet wide is necessary. The regional condition discussed has been revised to say:

“3 b. iv. For buried utility lines, allowance of natural succession to restore the wetland area to tree and scrub/shrub except for a 20-foot wide access corridor, to the maximum extent practicable. “

### **2.3.22 Proposed Regional Condition for NWP D- Utility Line Activities for Water and Other Substances**

1. Construction of access roads may not result in more than 1/3 acre of impacts to waters of the United States.
2. A PCN is required when the activity involves greater than 0.10 acres of mechanized landclearing in a forested wetland for the utility line right-of-way.
3. For utility activities requiring a PCN the permittee shall provide the following information:
  - a. A map of the entire utility corridor to assist with our completeness determination. The map should include 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 analysis of onsite minimization, which specifically addresses the following:
    - i. Selection of an alignment which avoids and minimizes wetland and stream impacts to the maximum extent practicable. The utility line should make a direct or perpendicular crossing of a stream. Directional drilling should be

reviewed as an option. However, the Norfolk District recognizes that in certain areas (e.g. karst areas) directional drilling may not be the environmentally preferred option.

- 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. Consult the Virginia Conservation Vision, a GIS analysis for identifying and prioritizing areas of un-fragmented natural cover in Virginia <http://www.dcr.virginia.gov/natural-heritage/vaconvision>.
  - 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 only 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.
- c. Compensatory mitigation may be required for permanent conversion of wetlands within the utility line corridor.
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 Channels 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 PCN and the deviation must be reviewed and approved by the Corps. Section 408 permission may be required (see Regional Condition 13 under Section I).
  5. Whenever practicable, excavated material shall be placed on a Corps confirmed upland site, scow or barge. However, when this is not practicable, 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 any 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 wetland areas. Permission must be granted by the Norfolk District Commander if the material is to be stockpiled longer than 30 days.
6. The applicant must receive written verification before performing the work when open-cut trenching, temporary stockpiling dredge material, or hydrostatic testing of a pipeline involving water withdrawals in designated anadromous fish use areas is proposed. The Norfolk District will coordinate with NOAA and/or the DWR. In most cases, the following time-of-year restrictions (TOYRs) 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 Dam (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: If dredging upstream of the Mid-Town Tunnel on the mainstem and the West Norfolk Bridge (Route 164, Western Freeway) on the Western Branch of the Elizabeth River, then a TOYR is not required.
  - Unless otherwise noted: TOYR from February 15 through June 30 of any given year.
7. For utility lines landing in Virginia, from the Outer Continental Shelf (OCS), the applicant shall send the PCN to the following federal agencies:

Director, Naval Seafloor Cable Protection Office  
Naval Facilities Engineering Command  
1322 Patterson Ave SE, Suite 1000  
Washington DC 20374

Bureau of Ocean Energy Management (BOEM)  
Atlantic OCS Region  
1201 Elmwood Park Blvd.

New Orleans, LA 70123-2394.

8. For utility line projects completed by horizontal directional drilling or other boring methods, a plan to address the prevention, containment, and cleanup of sediment or other materials caused by inadvertent returns of drilling fluids to waters of the U.S. through sub-soil fissures or fractures needs to be included with the PCN (if a PCN is required). If an inadvertent return of drilling fluids to waters of the U.S. occurs, and the remediation requires work within waters of the U.S., then the applicant must notify the Corps immediately and submit a remediation plan as soon as possible, regardless of whether a PCN was required for the original work.
9. 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:
  - a. Screening over the mouth of the intake with mesh size that does not exceed 1mm;
  - b. Intake velocities that do not exceed 0.25 feet per second;
  - c. 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.

Comments received: For NWP 12, NWP C and NWP D, DCR-DNH recommended adding “or the Virginia Natural Heritage Data Explorer (<http://vanhde.org/content/map>)” to Regional Condition 3. B. ii. which discusses the selection of an alignment that avoids fragmenting large tracts of forested wetlands for utility line placement.

Response: The additional weblink has been added to the final Regional Conditions as suggested.

Comments received: One commenter strongly recommended modifying the proposed Regional Condition 3.c to require compensatory mitigation for conversion of wetlands (for example from forested wetlands to emergent wetlands) within the utility line corridor. The commenter indicated that compensation should be required both for temporary and permanent conversions of wetland types.

Response: The commenter is referencing regional condition 3.c., which states that compensatory mitigation may be required for permanent conversion of wetlands within the utility line corridor. In most cases, Norfolk District will require compensatory mitigation for permanent conversion of wetlands within the easement; however, we have flexibility not to require compensation if we do not believe it is necessary to ensure that impacts are not more than minimal. We generally will not require compensatory mitigation for temporary conversion impacts, since the wetland areas will be allowed to restore back to their pre-existing condition.

Comments received: AEP requested guidance on the interpretation on the term “permanent conversion” and the ratio to be used in determining the level of compensatory mitigation. The comment is in reference to Nationwide Permit C.3.c under NWP 12, NWP 57 and NWP 58, which states that “compensatory mitigation may be required for permanent conversion of wetlands within the utility line corridor.”

Response: If an applicant converts a forested wetland to an emergent wetland during utility line construction, and then undertakes routine maintenance so that the forested wetland is no longer allowed to revegetate back to its forested state, then permanent wetland conversion has occurred. Generally, we require a 1:1 ratio of compensatory mitigation for permanent conversion impacts, since the wetland still exists, but does not have the same functions and services as it did as a forested wetland. In most cases, Norfolk District will require compensatory mitigation for permanent conversion of wetlands within the easement; however, we have flexibility not to require compensation if we do not believe it is necessary to ensure that impacts are not more than minimal.

Comments received: API offered the following comments on NWP 12. API stated, “In the absence of clear environmental justification, we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without equally being applied to NWP C and NWP D.” API commented on the regional condition specific to NWP 12, which requires a PCN when the activity involves greater than 0.10 acre of mechanized land clearing in a forested wetland for the utility line right-of-way. API stated that the PCN and additional submittal requirements are over and above the requirements in NWP 12 and GC 32, and the PCN requirements at the national level should be sufficient.

Response: In response to API’s comment about conditions being equally applied to NWP 12, NWP 57, NWP 58, we have used the same regional conditions for all three NWPs. Only a few do not pertain to all, for instance, the requirements for overhead electric lines only apply to NWP 57. As discussed under the comment for Regional Condition 3 for Designated Critical Resource Waters, the list in the final NWPs includes NWPs 57 and 58. We believe we have satisfied API’s concerns about applying conditions equally to NWP 12, NWP 57, and NWP 58. There are no other comment periods or opportunities for API to challenge the conditions within the Corps’ regional conditioning process. Any other challenges would need to be outside this process. API also expressed concerns about the regional condition specific to NWP 12, which requires a PCN when the activity involves greater than 0.10 acre of mechanized landclearing in a forested wetland for the utility line right-of-way. This regional condition requires PCNs for mechanized landclearing in the utility line right-of-way, so we can evaluate those proposed activities and determine whether they qualify for NWP authorization and whether compensatory mitigation is necessary to ensure no more than minimal adverse environmental effects. NWP 12, NWP 57, and NWP 58 require a PCN when the discharge will result in the loss of greater than 1/10-acre of waters of the United States; however, applicants may not equate mechanized landclearing to a loss of waters and not submit a PCN. We believe that this regional condition adds clarity for the applicant to know when to submit a PCN. As stated in the Final NWPs, division



engineers can impose regional conditions to require PCNs for mechanized land-clearing in a forested wetland.

Comments Received: VNG stated that proposed condition 3.b.iv under NWP 12 appears to apply to all areas along a utility corridor, not just wetlands and streams regulated under the Norfolk District. VNG said the condition should be revised to clarify that it only applies to those areas that fall under the jurisdiction of the Norfolk District. VNG specified that pipeline utilities are required by regulations to maintain permanent rights of way clear and accessible for safety and maintenance and the Federal Pipeline Safety Administration regulations require that companies exercise all remedies to ensure the proper operation and maintenance of their pipeline systems. For this reason, VNG said a 20-foot wide access corridor may not be practicable where larger diameter pipes or depth of cover require heavy equipment to safely perform routine maintenance or repairs to systems and trees and large shrubs within the permanent right of way in wetlands are periodically cleared in order to maintain a clearly accessible right-of-way. VNG recommended that 3.b.iv be revised to read:

“3 b. iv. For buried utility lines, allowance of natural succession in wetlands under the jurisdiction of the District, to restore cleared areas outside of the permanent right of way to a tree and scrub/shrub community to the maximum extent practicable.”

Response: This regional condition requires an analysis of onsite minimization specifically addressing the allowance of natural selection to restore the cleared wetland areas within the right of way. The intention was to address only areas within the Corps' jurisdiction; however, we will add the word “wetland” before area to make that intention clearer. This is not an absolute condition, but more of an information request. We expect the applicant to provide a reasonable justification if an access corridor greater than 20 feet wide is necessary. The regional condition discussed has been revised to say:

“3 b. iv. For buried utility lines, allowance of natural succession to restore the wetland area to tree and scrub/shrub except for a 20-foot wide access corridor, to the maximum extent practicable. “

## **2.4 Recommendations for Additional Regional Conditions**

In response to the Norfolk District's request for comments, the National Marine Fisheries, Habitat Conservation Division, expressed concerns about eliminating the PCN requirement for federal agencies and indicated that it will not be possible for the Corps to determine if this requirement is being met on a cumulative basis.

NOAA suggested text for a Regional Condition: “For NWP eligible activities undertaken by a federal entity, where the Corps is not the lead federal agency and a PCN to the Corps is not required, compliance with the requirements of the Magnuson-Stevens

(MSA), Endangered Species Act (ESA), and the Fish and Wildlife Coordination Act (FWCA) are the responsibility of the lead federal action agency. Additional information on the MSA and EFH consultations can be found on the NOAA Fisheries, Greater Atlantic Region's Habitat and Ecosystem Services Division websites at: <https://www.fisheries.noaa.gov/new-england-mid-atlantic/habitat-conservation/essential-fish-habitat-consultations-greater-atlantic-region> .” The final NWP's do not eliminate the PCN requirement for federal agencies. Therefore, this reminder to federal permittees will not need to be added to the regional conditions.

To comply with the DEQ's Clean Water Act Section 401 Water Quality Certification (WQC) Norfolk District has developed Regional Condition 13, which requires applicants to obtain either a Virginia Water Protection (VWP) permit or waiver from the DEQ. Further discussion about the Section 401 WQC may be found in Section 10 of this document. Regional Condition 13 states:

“Applicants are required to obtain either a Virginia Water Protection (VWP) permit, an individual Section 401 Water Quality Certification, or waiver from the Virginia Department of Environmental Quality (VADEQ).”

To comply with DEQ's Coastal Zone Management Act (CZMA) determination, Norfolk District has developed Regional Condition 14. This condition requires applicants to check for state listed species within Virginia's coastal zone. Further discussion about the CZMA may be found in Section 10 of this document. Regional Condition 14 states:

“For proposed activities located within Virginia's designated coastal zone, applicants are required to access the Virginia Department of Wildlife Resources' (DWR) Virginia Fish and Wildlife Information Service (VAFWIS) at <https://vafwis.dgif.virginia.gov/fwis/> to determine if a state-listed species or designated resource is known within 2 miles of the proposed activity being permitted. Should a state-listed species and/or designated resource be identified within 2 miles of the proposed activity, the applicant must coordinate with the DWR's Environmental Services Section (ESS) by submitting information on permit applications via email to: [ESSProjects@dwr.virginia.gov](mailto:ESSProjects@dwr.virginia.gov). Applicant shall allow at least 30 days for review and comment by the DWR ESS.”

In addition to the new Regional Conditions 13 and 14, Norfolk District also developed new regional conditions to address other aspects of DEQ's Section 401 WQC. Under NWP 12, the regional conditions specify that an individual Section 401 Water Quality Certification (or waiver) from the DEQ is required for any applicant to the Federal Regulatory Commission for a certificate of public convenience and necessity pursuant to § 7c of the federal Natural Gas Act (15 USC § 717f(c)) to construct any natural gas transmission pipeline greater than 36 inches in diameter. For all other proposed NWP 12 activities, project proponents are required to obtain either a Virginia Water Protection (VWP) permit, an individual Section 401 Water Quality Certification or waiver from the Virginia Department of Environmental Quality.

Specific regional conditions were added to NWP 21, NWP 29, NWP 39, NWP 40, NWP 42, NWP 43, NWP 44, NWP 50, NWP 51, and NWP 52. The regional conditions specify that an individual Section 401 Water Quality Certification (or waiver) from the DEQ is required for NWP 21, NWP 40, NWP 44, and NWP 50 for impacts to greater than 300 linear feet of stream bed or stream channel as defined in 9VAC25-210-10. An individual Section 401 Water Quality Certification (or waiver) from the DEQ is also required for NWP 29, NWP 39, NWP 42, NWP 43, NWP 51, and NWP 52 for projects that cumulatively impact more than 1/10 of an acre of wetlands or open water or more than 300 linear feet of stream bed or stream channel as defined in 9VAC25-210-10. An additional regional condition for NWP 40 specifies that discharges shall not increase the capacity of an impoundment or reduce instream flows unless otherwise authorized by a VADEQ VWP Permit. Further discussion about the Section 401 WQC process may be found in Section 10 of this document.

### **3.0 Alternatives**

#### **3.1 No Regional Conditions**

Regional conditions for this NWP will be necessary to ensure that impacts are not more than minimal and not adverse within the area regulated by the Norfolk District. The conditions that apply to certain waters and localities are necessary to allow the state and federal resource agencies the opportunity to comment and to ensure that impacts to federally listed threatened and endangered species and/or special aquatic habitats, are minimized and to allow, when necessary, time-of-year restrictions to be placed on this NWP verification. Therefore, an alternative imposing no regional conditions is not acceptable.

#### **3.2 Alternative Regional NWP Limits or Pre-Construction Notification Thresholds**

No commenters suggested additional PCN thresholds or lowering acreage limits of NWPs. Norfolk District did propose a new PCN threshold under NWP 12, NWP C (57) and NWP D (58). Regional Condition 2 under these NWPs specifies that a PCN is required when the activity involves greater than 0.10 acre of mechanized landclearing in a forested wetland for the utility line right-of-way. VNG commented on proposed Regional Condition 2 for NWP 12 and those comments are addressed in 2.3.13. Since mechanized landclearing may not result in a loss of wetlands, Norfolk District may not be notified of permanent conversion impacts in nontidal wetlands under NWP 12, NWP 57 or NWP 58 unless the project is greater than 250 miles long. In Norfolk District, many utility line projects need to be reviewed under Section 7 and Section 106 and this notification would allow for that necessary consultation. Norfolk District believes that compensatory mitigation generally should be required for a permanent conversion of forested wetlands to emergent wetlands, since a permanent conversion would result in the loss of high-quality functions and services associated with forested wetlands. Regional Condition 3. c. in NWP 12, NWP 57 and NWP 58 specifies that compensatory mitigation may be required for permanent conversion of wetlands within the utility line corridor. The final NWPs indicate that Division Engineers can impose regional

conditions to require PCNs for mechanized landclearing in forested wetlands and Norfolk District believes this regional condition will help ensure that impacts are not more than minimal. The PCN requirement for mechanized landclearing activities will allow us to determine if compensatory mitigation is necessary for any potential permanent conversion impacts; therefore, we have retained the condition in our final regional conditions.

### **3.3 Other Regional Conditions**

In our initial Public Notice on September 30, 2020, Norfolk District requested comments on whether to modify the regional conditions that require pre-construction notification (PCN) by removing the notification requirement from Federal permittees, as specified in the following regional conditions: Part I-1, 3, 4, 5, 7, 8, 9, 11, Part II- NWP 5, NWP 12, NWP 23, NWP 27, NWP 53, NWP A, NWP B, NWP C, and NWP D. If the PCN requirement was removed, the federal agencies would be required to mitigate for all wetland losses that exceed 0.1 acres and/or 300 linear feet of stream, unless waived by the Norfolk District, as clarified in the proposed Regional Condition 9. The final NWPs do not eliminate the requirement for federal agencies to submit a PCN; therefore, the Norfolk District does not need to modify the regional conditions to specify that federal permittees are not required to submit a PCN. Regional Condition 9 will be modified to remove the language specific to the mitigation requirement for federal permittees.

## **4.0 Section 7 of the Endangered Species Act**

### **4.1 General Considerations**

For all PCNs, the Norfolk District will ensure that activities authorized by the NWPs will comply with Section 7 through assessment tools, a specific review process and with regional conditions requiring notification in known areas of listed species and critical habitat. The regional conditions help ensure compliance with Section 7 for nonreporting projects. The Norfolk District project managers use project specific location information to define a project area in the Norfolk District's GIS-Regulatory Reporting Tool, which provides general information about listed species in the project review area. Project managers review the Norfolk District's ESA Project Review Process to determine when coordination with the Fish and Wildlife Service (FWS) and/or National Oceanic and Atmospheric Administration (NOAA)-Protected Resources Division (PRD) is required. The NAO ESA Project Review Process addresses impacts to both terrestrial and aquatic listed species. This process includes guidance on making "No Effect", "Not Likely to Adversely Affect" (NLAA), and "May Adversely Affect" calls. For reporting activities, the Norfolk District will coordinate with FWS and NOAA PRD in areas containing federally listed species and other designated areas of concern. For NWP activities in designated critical habitat or known locations of federally listed endangered or threatened species, the Norfolk District may: (1) consult with FWS or NOAA during the NWP review process, or (2) the Norfolk District may assert its discretionary authority to require an individual permit for proposed work and initiate consultation through the

individual permit process. If the consultation is conducted under the NWP process without the District asserting discretionary authority, then the applicant will be notified not to proceed until consultation is complete. If the Norfolk District determines that the activity would have no effect on any endangered species, then the District will complete the review, document the finding, and then issue the NWP verification.

For the 2021 NWP reauthorization, Norfolk District reviewed the Programmatic Consultation Verification process with the NOAA PRD staff. This is a checklist type of form that the Norfolk District project managers use to assess potential impacts to NOAA-listed species from various construction activities, and then coordinate with NOAA PRD staff. This form has been successfully used to coordinate for impacts verified under the 2017 NWPs.

The Norfolk District will include a paragraph stating that any injuries or mortalities occurring to sea turtles or Atlantic sturgeon as a result of discharges of dredged or fill material, or through the construction of structures or other work in navigable waters, must be reported to NOAA Fisheries, PRD and the Corps regulatory office.

#### **4.2 Local Operating Procedures for Section 7 of the Endangered Species Act**

Norfolk District project managers use the NAO ESA Project Review Process as developed in conjunction with FWS to ensure compliance with the Endangered Species Act. For reporting activities, the Norfolk District reviews all available information through the Regulatory Reporting Tool and the FWS' online "Information, Planning, and Conservation System," (IPaC). Project managers use IPaC to assess potential project impacts to federally listed and proposed candidate, threatened, and endangered species, designated critical habitats, and FWS refuges that may exist or occur in the identified areas or that may be affected by the proposed activities. If no potential or documented occurrence is found, the project manager documents the project file and does not notify the FWS. If a potential or documented occurrence is found, the project manager notifies FWS by email and the project manager waits 15 calendar days for a response. If FWS concurs with a NLAA determination or does not respond within 15 days, the project manager documents the finding and may proceed with issuing the permit verification. Applicants using nonreporting permits also may use IPaC to determine if listed species are present. Regional condition 4 indicates that applicants are required to submit a PCN for the proposed activity, unless the project clearly does not impact a listed species or suitable habitat for the listed species. If applicants are unsure about whether their project will impact listed species, they should submit a PCN, so the Norfolk District may review the action.

NOAA PRD has designated habitat, including critical habitat, in certain Virginia rivers for Atlantic Sturgeon and Shortnose Sturgeon, as well as for sea turtles and right whales. Project managers use the Regulatory Reporting Tool and IPaC to evaluate if potential habitat is present within the project action area. Project managers consult the "No Effect Matrix" and the Standard Operating Procedures (SOPs) for the NOAA GARFO PRD-USACE NAD 2017 NLAA Program to determine whether the activity will meet the

criteria of a No Effect and will not require any further consultation with NOAA or will meet the criteria under the NLAA programmatic agreement. If an activity is covered under the NLAA programmatic agreement, the project manager coordinates the project with NOAA PRD staff through the NLAA checklist form, which includes a description of the work, proposed conservation measures, and justifications for meeting the NLAA. The NLAA process has been successfully used for NWP coordination since 2017.

## **5.0 Section 106 of the National Historic Preservation Act**

### **5.1 General Considerations**

The Norfolk District Regulatory Branch ensures that activities authorized by NWPs will comply with Section 106 of the National Historic Preservation Act (NHPA) through agreements and procedures which have been implemented for many years and are continually updated to ensure compliance. The Norfolk District has a Programmatic Agreement (the Agreement) executed in 1996 with the Virginia Department of Historic Resources (VDHR) (Virginia State Historic Preservation Officer) and the Advisory Council on Historic Preservation (ACHP) to address the Corps requirements under NHPA. This Agreement established Programmatic Streamlined Review for certain Nationwide Permits whereby activities qualifying for streamlined permits do not require coordination with VDHR. Activities qualifying for programmatic streamlined review do not require coordination, provided VDHR's Virginia Cultural Resource Information System (V-CRIS) does not indicate the existence of inventory properties listed as eligible or potentially eligible for the National Register of Historic Places within the project area and the activity is not associated with other actions requiring coordination with VDHR. The Programmatic Streamlined Review list was updated in July 2018 in consultation with VDHR when the Norfolk District Regional Permits were last updated. The Norfolk District consulted with VDHR to update the Programmatic Streamlined Review list to incorporate the changes to the newly issued Nationwide Permits.

Norfolk District currently operates under guidelines developed in conjunction with VDHR in 1996, and most recently updated in November 2019. Through a cooperative agreement, VDHR has made their Virginia Cultural Resource Information System (V-CRIS) available to the Norfolk District. The V-CRIS is an online system that merges a geographic information system (GIS) with a comprehensive information database of known historic and prehistoric sites throughout Virginia. The V-CRIS identifies the location of known architectural and archaeological historic sites throughout the state and each resource is identified in the V-CRIS by a unique VDHR file number that is assigned after a property has been surveyed by professionals working in the field. Norfolk District project managers search V-CRIS using the project site locational information. In addition, the V-CRIS database has been incorporated in the District GIS Regulatory Reporting Tool. This ensures that Norfolk District project managers are using all available information in our decision-making process. If known historic resources are on the project site or are within the visual effects Area of Potential Effects (APE), then the project manager initiates further coordination with VDHR. Coordination

for the NWP is discussed in the next section. In addition, Norfolk District has specific procedures and template letters in place for coordinating with ACHP when a project manager determines that a project may have an adverse effect on a known historic property.

Many geographic areas that have a high site potential or contain known locations of cultural resources - including prehistoric sites, historic sites, battlefields, historic districts, traditional cultural properties, state landmarks or National Historic Landmarks - are within localities that require historic resources review. Norfolk District project managers conduct preapplication site visits/meetings for many projects and a review of historic properties through the Regulatory Reporting Tool and/or V-CRIS search. The project manager advises the applicant of any known historic properties located on or near the project site through the Supplemental Preapplication Information form, which is attached to the jurisdictional determination. Conducting this review at the preapplication stage provides project proponents with advance information to address historic property issues early in the planning stage and provides advice on required pre-construction notifications for activities that may have the potential to cause effects to historic properties. Applicants working under nonreporting permits can use the information in the Supplemental Preapplication Information form to help them comply with general condition 20. Norfolk District's Joint Permit Application, which may be completed for a pre-construction notification, requests information about known historic properties. This section asks applicants to provide information regarding historic properties on or near the project site, including historic districts, and provides a statement advising applicants about Section 110(k) of the NHPA.

In cases where potential historic properties are present, the District Commander may: (1) consult with VDHR during the NWP review process, or (2) the District Commander may assert his/her discretionary authority to require an individual permit for proposed work and initiate consultation through the individual permit process. If the consultation is conducted under the NWP process without the District asserting discretionary authority, then the applicant must be notified that work cannot be verified under the NWP until all Section 106 requirements have been satisfied. If the District determines that the activity would have no potential to cause effects on any historic properties, the District can complete the review, document the findings, and proceed to issue the NWP authorization without further consultation with the VDHR.

## **5.2 Local Operating Procedures for Section 106 of the National Historic Preservation Act**

The Norfolk District has developed specific procedures for coordinating with VDHR, and these procedures ensure that activities authorized by this NWP will comply with the NHPA. For individual permit applications with undertakings determined to have a potential to cause effects on historic properties, the project manager implements the local procedures for coordinating with VDHR. Project managers establish the Corps' permit area for the project and then determine, through review of the Regulatory Reporting Tool and/or V-CRIS, if there are any known historic properties in the Corps'

permit area or any National Register listed or potentially eligible historic resources (architectural, landscapes, battlefields, etc.) that could be affected visually by the undertaking. Provided V-CRIS does not indicate the existence of inventory properties listed as eligible or potentially eligible for the National Register of Historic Places within the project area, and the activity is not associated with other actions requiring coordination with VDHR, certain NWP activities are programmatically excluded from further review. The Norfolk District updated the list of NWPs, which meet the Streamlined Review criteria, and it has been reviewed and approved by VDHR.

When coordination is required, the Norfolk District project manager submits coordination to VDHR through the ePIX web portal. This system provides for submission of projects to VDHR electronically and allows uploading of digital versions of our coordination form, maps, project drawings, photographs, plans, Phase I cultural resource surveys, etc. The project manager completes the on-line form, which includes the project description, and information about historic properties and uploads any relevant documents. The project manager will receive an automatic notification that the submittal has been received by VDHR, and if complete, the 30-day review time frame by VDHR begins the next business day after submission. The project manager must also notify the applicant that they may not proceed with the work under the NWP until coordination for Section 106 has been completed as specified in General Condition 20. If the project manager decides that the undertaking will have “no effect” or “no adverse effect” on historic properties and VDHR either concurs or does not object within 30 days of receipt, then the Section 106 process ends. The project manager documents the file as appropriate. For projects, which require the identification of historic properties, the project manager ensures that reports of archeological and architectural surveys conducted by applicants are submitted to VDHR for review and comment. For projects with adverse effects, the project manager notifies ACHP to determine their participation and the project manager issues a public notice and requests that the applicant submit an announcement to a local newspaper in order to provide the public with an opportunity to participate in the Section 106 process. The project manager will consult with VDHR to identify consulting parties such as Tribes, local governments, historic preservation groups, and others with a demonstrated interest in the project. Consultation on measures to resolve the adverse effects involves the consulting parties through various consultation methods (emails, conference calls, face-to-face meetings), as determined appropriate for the project. In most cases, a Memorandum of Agreement (MOA) or Programmatic Agreement (PA) addressing how the adverse effects will be resolved is executed and incorporated as a special condition in any issued permit.

The Norfolk District follows the procedures outlined in Appendix C of 33 CFR Part 325 “Procedures for the Protection of Historic Properties”, 36 CFR Part 800 “Protection of Historic Properties”, and the “Revised Interim Guidance for Implementing Appendix C of 33 Part 325 with the New Advisory Council on Historic Preservation Regulations at 36 CFR Part 800 dated April 25, 2005”, which address the required consultation with SHPO and ACHP. The procedures in place in the Norfolk District will ensure that activities authorized by this NWP comply with the NHPA.



## **6.0 Government-to-Government Consultation with Tribes**

### **6.1 Consultation Summary**

On September 24, 2020, the Deputy Commanding General for Civil and Emergency Operations issued guidance for conducting government-to-government consultation with tribes on the proposed 2021 NWP. On October 5, 2020 the Norfolk District sent letters to the following tribes to initiate consultation on the 2021 NWP, including regional conditions, the potential for suspension or revocation of the NWP in specific geographic areas, and the development of coordination or consultation procedures for NWP PCNs: Chickahominy Indian Tribe, Chickahominy Indian Tribe-Eastern Division, Monacan Indian Nation, Nansemond Indian Nation, Pamunkey Tribe, Rappahannock Tribe, Inc., and the Upper Mattaponi Tribe.

Prior to sending the formal letter to the federally recognized tribes, who reside in Virginia, the Norfolk District initiated consultation by introducing the proposed NWPs to the Virginia Tribes during a regular Tribal Workshop (via webinar) on August 26, 2020. We discussed the NWP program in general terms, how the reissuance process works, including regional conditions, and briefly discussed proposed changes. Prior to issuing the public notice announcing the proposed NWPs, Norfolk District sent an email to the Virginia Tribes indicating that the public notice would be issued soon. We sent our September 30, 2020 Public Notice to all the Virginia Tribes and then followed up with a webinar on October 21, 2020 and requested comments by November 16, 2020 as specified in the public notice. Norfolk District also sent our proposed regional conditions to the following tribes, who no longer reside in Virginia, but have ancestral lands and an interest in Virginia: Absentee-Shawnee Tribe of Indians of Oklahoma, Catawba Indian Nation, Cherokee Nation, Delaware Nation-Oklahoma, Delaware Tribe of Indians, Eastern Band of the Cherokee Indians, Eastern Shawnee Tribe of Oklahoma, Oneida Tribe of Indians of Wisconsin, Oneida Indian Nation, and United Keetoowah Band of Cherokee.

During the October 21, 2020 webinar, we provided an overview of the proposed changes to the NWPs and the corresponding changes to the regional conditions. We provided a meaningful dialogue and the Tribes expressed their appreciation for the information. The Virginia Tribes specifically expressed concerns about the loss of stream channels and the change to the NWPs, which removes the 300 linear foot thresholds. The Tribes stated their beliefs that the 300 linear foot threshold should be included, and they supported the regional condition which requires a compensatory mitigation plan for the loss of greater than 300 linear feet of loss of stream bed. As discussed previously, the final regional conditions maintain the requirement to submit a compensatory mitigation plan for greater than 300 linear feet of stream bed loss when a PCN is required.

The Virginia Tribes also expressed concerns about the proposal for exempting federal permittees from submitting PCNs. They indicated that it is difficult now to keep up with

the permitting process when it is just managed by the Corps. If federal permittees were exempt from submitting PCNs, then they may have no way of knowing about projects that are proposed. Currently, the Tribes can see all Norfolk District pending projects on the Tribal Data Viewer, which is described in further detail in the next section. The final NWP's do not contain the exemption for federal permittees; therefore, the current process for pending NWP's will remain the same.

## **6.2 Local Operating Procedures for Protecting Tribal Rights**

The Virginia Tribes have expressed concerns about impacts to stream channels, anadromous fish waters and other sensitive habitats, such as those containing endangered species and SAVs. The Norfolk District regional conditions contain provisions to enhance protections to these resources. The Tribes have expressed support for these types of regional conditions. Due to the PCN requirements we receive notification about proposed projects that may impact these types of resources, which may be located within areas of tribal concerns. The Norfolk District has developed a Tribal Data Viewer, which allows the Tribes to see pending projects under review by the Norfolk District and they can select the project to view additional information and contact information for the Corps' project manager. The Tribal Data Viewer does not replace regular consultation with the Tribes, which is governed by the Norfolk District Standard Regulatory Standard Operating Procedures for Consulting with Federal Tribes last updated on January 30, 2020. The Tribal Data Viewer is an added tool, which allows the Tribes to see all pending PCNs. The Norfolk District will continue to consult with the Tribes on specific NWP's through the established process.

## **7.0 Essential Fish Habitat**

The Commonwealth of Virginia is located on the Atlantic coast of the Mid-Atlantic United States, between 36° 32' N to 39° 28' N and 75° 15' W to 83° 41' W. Virginia is situated between the Atlantic Ocean to the east, the Chesapeake Bay to the northeast, Potomac River to the north, and Appalachian Mountains to the west. Virginia has a variety of habitat designated as Essential Fish Habitat (EFH) as defined by NOAA Fisheries Service (NOAA) along with some unique or threatened habitats designated as Habitat Areas of Particular Concern (HAPC) such as submerged aquatic vegetation (SAV), oyster reefs and shellfish beds.

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) as amended by the Sustainable Fisheries Act of 1996 (Public Law 104-297; 11 October 1996) defines essential fish habitat as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." The MSA applies to federally managed species under the management of regional fishery management councils. Under the MSA, fishery management plans must identify and describe EFH for the fishery, minimize adverse effects from fishing on the fishery and sustainably manage the resource. The MSA also defines Habitat Areas of Particular Concern (HAPC). This designation identifies EFH that is particularly important to the long-term productivity of

the species, is particularly vulnerable to degradation, or both. The intent of the HAPC designation is to focus greater attention on conservation efforts.

Section 305(b)(2) of the MSA requires an EFH consultation of any action or proposed action authorized, funded, or undertaken by a federal agency that may adversely affect EFH. The EFH Designations within the Northeast Region (Maine to Virginia) dated March 1, 1999 has identified EFH for several species and their life stages.

For activities authorized by the 2021 NWP, the Norfolk District has the responsibility to preliminarily determine if the activities of the NWP would have minimal or no adverse effect to the quality and/or quantity of EFH for a variety of federally managed species. When the Norfolk District determines that an action may adversely affect EFH, the agency must initiate consultation with NOAA Fisheries Service [16 USC §1855(b)(2)]. To initiate EFH consultation, the Norfolk District must submit an EFH assessment containing “a description of the action; an analysis of the potential adverse effects of the action on EFH and the managed species; the Federal agency’s conclusions regarding the effects of the action on EFH; and proposed mitigation, if applicable” to NOAA Fisheries Service. NOAA Fisheries Service may request the responsible Federal agency to include additional information in the EFH assessment, such as the results of on-site inspections, view of recognized experts, a review of pertinent literature, an analysis of alternatives, and any other relevant information [50 CFR § 600.920(e)(4)]. Depending on the type and severity of the effects to EFH, compensatory mitigation may be necessary to offset temporary and/or permanent impacts of the project. If the project was expected to result in substantial adverse effects to EFH, an expanded EFH consultation may be required [50 CFR § 600.920(i)].

#### EFH of the Chesapeake Bay and its tidal tributaries

The mixing zone of the Chesapeake Bay mainstem and its tidal tributaries with salinities ranging between 0.5 ppt to <25ppt has EFH designations for windowpane flounder (*Scopthalmus aquosus*) juvenile and adult; bluefish (*Pomatomus saltatrix*) juvenile and adult; Atlantic butterfish (*Peprilus triacanthos*) eggs, larvae, juvenile and adult; summer flounder (*Paralichthys dentatus*) larvae, juvenile and adult; black sea bass (*Centropristus striata*) juvenile and adult; and the eggs, larvae, juvenile and adult life stages of the following: red drum (*Sciaenops ocellatus*), king mackerel (*Scomberomorus cavalla*), Spanish mackerel (*Scomberomorus maculatus*), and cobia (*Rachycentron canadum*). The seawater portions of the Chesapeake Bay with salinities  $\geq 25$  ppt has EFH designations for red hake (*Urophycis chuss*) juvenile and adult; windowpane flounder (*Scopthalmus aquosus*) juvenile and adult; Atlantic sea herring (*Clupea harengus*) adult; bluefish (*Pomatomus saltatrix*) juvenile and adult; Atlantic butterfish (*Peprilus triacanthos*) eggs, larvae, juvenile and adult; summer flounder (*Paralichthys dentatus*) larvae, juvenile and adult; scup (*Stenotomus chrysops*) juvenile and adult; black sea bass (*Centropristus striata*) juvenile and adult; and the eggs, larvae, juvenile and adult life stages of the following: red drum (*Sciaenops ocellatus*), king mackerel (*Scomberomorus cavalla*), Spanish mackerel (*Scomberomorus maculatus*), and cobia (*Rachycentron canadum*).

## EFH Effects Determination

For activities authorized by the 2021 NWP's, the Norfolk District has the responsibility to preliminarily determine if the activities of the 2021 Nationwide Permits, both individually and cumulatively, will have minimal or no adverse effect to the quality and/or quantity of EFH. The general conditions of the NWP's and the regional conditions have been developed in part to further reduce potential impacts to EFH to the maximum extent practicable. The Norfolk District project managers follow the NAO ESA Review Process (which contains the NOAA Fisheries Coordination Procedures for MSA and FWCA Revised August 2018) and coordinate with NOAA when proposed projects may potentially affect EFH or other species of concern as required under the MSA and Section 7 of the Endangered Species Act. The coordination will be either on an individual project basis when appropriate habitat occurs or through the development of a general concurrence. NOAA has indicated that many of the existing NWP's have received general concurrence, including some subject to our proposed regional conditions. They indicated that the general concurrence will continue with the proposed 2021 NWP's. The general concurrence is a procedure that identifies specific types of federal actions that may adversely affect EFH, but for which no further consultation is required because NOAA has determined, through analysis, that the actions will likely result in no more than minimal adverse effects individually and cumulatively.

However, when either the notification requirements of the regional conditions requires coordination, or when the proposed impacts to EFH or HAPC may be more than minimal as determined by the Norfolk District project manager, the project manager shall initiate EFH consultation with NOAA, Virginia Field Office. Per 50 CFR 600.920(h)(a), the MSA EFH consultation procedures require a minimum 30-day comment period for NOAA to review required PCNs. Because their EFH review extends into nontidal rivers and streams supporting migratory fish passage (important prey for federal predatory species), a 30-day review and comment period should be anticipated for all projects in tidal and nontidal rivers and streams.

The EFH regulations require that actions qualifying for general concurrence must be tracked to ensure that the cumulative effects are no more than minimal. Tracking should include numbers of actions and the amount and type of habitat adversely affected and should specify the baseline against which the actions will be tracked. NOAA suggested that the information be provided to them, the applicable fishery management councils, and the public on an annual basis. During our September 11, 2020 meeting with NOAA to discuss the proposed regional conditions, we discussed annual reporting on the NWP actions and EFH consultation. Norfolk District and NOAA are working together to develop a reporting template that will satisfy the tracking requirement and allow for an evaluation of cumulative effects.

We have determined that the activities covered under NWP's 21, 29, 39, 40, 42, 43, 50, and 51 will have no effect on EFH due to the type of activity and the location where these activities occur.

## 8.0 Supplement to the Analyses in the National Decision Document

Any public interest review factors that are affected by local concerns have been addressed below. Otherwise, the public interest review factors for this NWP have been discussed in the national decision documents.

### 8.1 Public interest review factors (33 CFR 320.4(a)(1))

In addition to the discussion in the national decision document for this NWP, the Norfolk District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

(a) Conservation: Same as discussed in the national decision document.

(b) Economics: Same as discussed in the national decision document.

(c) Aesthetics: Same as discussed in the national decision document.

(d) General environmental concerns: The Norfolk District's regional condition pertaining to invasive species will help reduce impacts to the environment from species that have been determined to be a nuisance.

(e) Wetlands: In addition to the information discussed in the national decision document, impacts to wetlands are expected to be minimal within the Norfolk District. Regional Condition 9 requires that a compensatory mitigation plan be submitted if the permanent loss exceeds 0.1 acre of wetlands and/or 0.03 acre of stream bed or 300 linear feet of stream bed. Regional Condition 11 requires a mitigation plan for all permanent wetland impacts associated with transportation projects. The duration of temporary impacts is addressed in Regional Condition 11 to help ensure that temporary impacts do not become more than minimal. The regional conditions for NWP 12, NWP 57 and NWP 58 require an alternatives analysis, which avoids and minimizes wetland and stream crossings, avoids fragmentation of large tracts of forested wetlands, and limits grubbing of wetlands to the permanent easement for underground utility lines. These measures will further minimize wetland impacts. For unavoidable wetland impacts, compensatory mitigation may be required for permanent conversion of wetlands within the utility corridors.

(f) Historic properties: To comply with General Conditions 20 and 32, permittees may use the V-CRIS system to determine if known resources are present within their project area. For projects requiring a PCN, project managers screen all projects using the Regulatory Reporting Tool, which includes the information available in V-CRIS. These actions have project managers determine when to consult with VDHR and/or the federally recognized tribes.

(g) Fish and wildlife values: The regional conditions contain notification requirements for designated trout waters and anadromous fish use areas. Time of year restrictions are required for certain activities to protect anadromous fish. Regional conditions require countersinking of pipes and culverts to help prevent impacts to instream habitat. The regional conditions protect the sensitive life stages of anadromous fish through specifications for intake screening and velocities. A regional conditional helps protect SAV areas, which provide food and habitat for birds and other wildlife.

(h) Flood hazards: Same as discussed in the national decision document.

(i) Floodplain values: Same as discussed in the national decision document.

(j) Land use: Same as discussed in the national decision document.

(k) Navigation: A regional condition provides the locations of Norfolk District Civil Works projects, so applicants may determine if their activity requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a Corps Federally authorized Civil Works project. These actions may affect navigation and the regional condition helps to ensure the appropriate coordination for nonreporting permits.

(l) Shore erosion and accretion: Same as discussed in the national decision document.

(m) Recreation: Same as discussed in the national decision document.

(n) Water supply and conservation: Same as discussed in the national decision document.

(o) Water quality: The State Water Control Board provided Section 401 Water Quality Certification (WQC) for Norfolk District's Regional Conditions applicable to the 2021 NWP's on December 21, 2020. The original NWP proposal was for all the NWP's, so Norfolk District requested 401 WQC for all NWP's. Since only 16 NWP's have been finalized, the 401 WQC just applies to those 16 NWP's currently. The Norfolk District has developed new regional conditions to address the Section 401 WQC. The regional conditions specify that applicants are required to obtain a VWP permit or waiver from DEQ for projects seeking NWP approval in Virginia. For some activities, applicants will be required to seek an individual WQC from DEQ.

(p) Energy needs: Same as discussed in the national decision document.

(q) Safety: Same as discussed in the national decision document.

(r) Food and fiber production: Same as discussed in the national decision document.

(s) Mineral needs: Same as discussed in the national decision document.

(t) Considerations of property ownership: Same as discussed in the national decision document.

## **8.2 Section 404(b)(1) Guidelines Impact Analysis (Subparts C-F)**

(a) Substrate: Same as discussed in the national decision document.

(b) Suspended particulates/turbidity: Same as discussed in the national decision document.

(c) Water: A regional condition for NWP 12, NWP 57 and NWP 58 requires a plan to address the prevention, containment, and cleanup of sediment or other materials caused by inadvertent returns of drilling fluids to waters of the U.S. during horizontal drilling or other boring methods.

(d) Current patterns and water circulation: Same as discussed in the national decision document.

(e) Normal water level fluctuations: Same as discussed in the national decision document.

(f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: Notification requirements for areas with an abundance of federally listed species have been incorporated as Regional Conditions in addition to the standard requirements for coordination under Section 7 of the Endangered Species Act.

(h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web: The regional conditions contain notification requirements for designated trout waters and anadromous fish use areas. Time of year restrictions are required for certain activities to protect anadromous fish. Regional conditions require countersinking of pipes and culverts to help prevent impacts to instream habitat. The regional conditions protect the sensitive life stages of anadromous fish through specifications for intake screening and velocities.

(i) Other wildlife: Regional Condition 1 helps protect SAV areas, which provide food and habitat for birds and other wildlife.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: Same as discussed in the national decision document.

(2) Wetlands: The regional conditions require the submission of a mitigation plan when the permanent loss of wetlands exceeds certain thresholds. Another regional condition addresses temporary impacts to wetlands and establishes criteria for when the impacts are considered permanent.

(2) Mud flats: Same as discussed in the national decision document.

(4) Vegetated shallows: Notification requirements for areas that contain submerged aquatic vegetation (SAVs) have been incorporated as regional conditions.

(5) Coral reefs: Same as discussed in the national decision document.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

(n) Aesthetics: Same as discussed in the national decision document.

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

### **8.3 Regional Cumulative Effects Analysis**

This section discusses the anticipated cumulative effects of the use of NWP 21 within the State of Virginia during the period this NWP is in effect.

The cumulative effects of this NWP are dependent upon the number of times the NWP is anticipated to be used in the region and the quantity and quality of waters of the United States anticipated to be impacted as a result of the activities authorized by this NWP (see 40 CFR 230.7(b)). The cumulative effects of this NWP are also dependent on compensatory mitigation that may be required during the period this NWP is in effect, when compensatory mitigation offsets impacts to waters of the United States authorized by this NWP.

Based on reported use of this NWP during the period of March 19, 2017, to December 19, 2020, the Norfolk District estimates that this NWP will be used less than 1 time per



year in Virginia, resulting in impacts to less than 0.01 acres of waters of the United States. The reported use includes pre-construction notifications submitted to the Norfolk District, as required by the terms and conditions of the NWP as well as regional conditions imposed by division engineers. The reported use also includes voluntary notifications to submitted to the Norfolk District where the applicants request written verification in cases when pre-construction notification is not required. The reported use does not include activities that do not require pre-construction notification and were not voluntarily reported to the Norfolk District.

Based on reported use of this NWP during that time period, Norfolk District estimates that 0 percent of the NWP 21 verifications will require compensatory mitigation to offset the authorized impacts to waters of the United States and ensure that the authorized activities result in only minimal individual and cumulative adverse environmental effects. The verified activities that do not require compensatory mitigation will have been determined by the Norfolk District Engineers to result in no more than minimal individual and cumulative adverse environmental effects without compensatory mitigation. During 2021-2026, the Norfolk District expects little change to the percentage of NWP 21 verifications requiring compensatory mitigation, because there have been no substantial changes in the mitigation general condition or the NWP regulations for determining when compensatory mitigation is to be required for NWP activities. The Norfolk District estimates that approximately 0 acres of compensatory mitigation will be required each year to offset authorized impacts. The demand for these types of activities could increase or decrease over the five-year duration of this NWP.

Based on these annual estimates, the Norfolk District estimates that approximately 5 activities could be authorized over a five-year period until this NWP expires, resulting in impacts to less than 0.05 acres of waters of the United States. Approximately 0 acres of compensatory mitigation would be required to offset those impacts. Compensatory mitigation is the restoration (re-establishment or rehabilitation), establishment, enhancement, and/or preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. [33 CFR 332.2]

The regulatory jurisdiction of the Norfolk District encompasses the entire state of Virginia, with the exception of certain military installations in Northern Virginia. Virginia is approximately 40,767 square miles in size and can be subdivided into five physiographic regions. From west to east, these are the Appalachian Plateau, the Valley and Ridge province, the Blue Ridge, the Piedmont Plateau, and the Coastal Plain. Virginia's aquatic resources include tidal and nontidal wetlands, and ephemeral, intermittent, and perennial streams. Based on data from the U.S. Geologic Service, the Virginia Department of Environmental Quality (DEQ) estimates that there are approximately 50,000 miles of perennial streams in the state.

In the period from 1955 to 1978, Virginia lost an estimated total of 63,000 acres of wetlands, roughly 40%, with the losses attributable mainly to agricultural, residential, and commercial development. The rate of wetland losses has since been reduced,

primarily through state and federal regulatory protection and permitting programs. Virginia has approximately 1,000,000 acres of wetlands remaining, with 25% being tidal wetlands and 75% being nontidal wetlands (source: Virginia State Wetlands Program Plan, Plan Years 2015-2020).

The primary activities that affect, directly and indirectly, the aquatic resources of Virginia include commercial and residential development, coal and other mining activities, forestry practices, agricultural conversion of wetlands, stream impoundment, and hydrologic modifications including stream channelization and ditching for mosquito control. Stormwater runoff, which changes the frequency and intensity of runoff, modifications to riparian areas and upland buffers, ecosystem degradation due to invasive species, shoreline erosion, and saltmarsh dieback, point and nonpoint source pollution, and shoreline hardening due to bulkheads and revetments also affect Virginia's aquatic resources. The Corps of Engineers, the DEQ, and the Virginia Marine Resources Commission (VMRC) all have regulatory authority over Virginia's aquatic resources in differing capacities.

Virginia's streams and wetlands are often impacted through activities permitted by these regulatory agencies. Permitted actions include the placement of fill, stream channelization, road and other transportation crossings, stream impoundments, water withdrawals, dredging of rivers and estuaries, the construction of armored or hardened shorelines, utility line crossings, and point source discharges of stormwater and industrial effluent. In addition to these anthropogenic changes, sea level rise, coastal storms, and floods result in shoreline erosion and subsidence and additional wetland loss.

In addition to verifying projects using NWP's, the Norfolk District also issues letters of permission (LOP) and regional general permits (RGP), which are used to authorize activities such as the construction of small impoundments, the maintenance of drainage and mosquito ditches, private open-pile piers and mooring piles, commercial piers, and activities also authorized by VMRC (e.g. beach nourishment, living shorelines, maintenance dredging, bulkheads and riprap, boat ramps, certain aquaculture activities construction of reefs for fish and shellfish, and commercial moorings). The State Program General Permit (SPGP) authorizes impacts due to residential, commercial and institutional developments as well as transportation projects. The Norfolk District's SPGP is administered by the Virginia DEQ. The projects authorized under SPGP are often most similar to those that could qualify for NWP's 14, 18, 29, 39, and 43. However, projects authorized under SPGP's may have up to one acre of impacts. NWP's 14, 29 and 39 are regionally conditioned as to not overlap with the SPGP and can only be used when the SPGP is not applicable or within the Northern Virginia Military installations under Baltimore District's AOR. Standard permits (SP), which are sometimes referred to individual permits, typically authorize projects with more than one acre of impacts, or those projects which do not meet the conditions of the NWP's, RGP's or the SPGP.

During the time period from March 19, 2017 through December 19, 2020, Norfolk District verified 4,038 projects using the NWP's; issued 0 LOP's; 3,600 RGP's, and 131

SPs. These totals show that most of the District’s permitted projects qualified for general permits, which typically have minimal adverse impacts to Virginia’s aquatic resources. The acreage of impacts under the RGPs includes large environmental restoration projects, most of which were oyster reefs. These aquatic habitat restoration projects mostly impacted subaqueous bottom and were not wetland losses. The impact acreages below include temporary impacts and impacts associated with beach nourishment, which generally do not require mitigation. Temporary impacts are restored to pre-existing conditions, so the acres of wetland loss are much smaller than reported below.

Permit type	Acres of Impacts Avoided	Acres of Impacts Authorized	Acres of Mitigation
NWP	497	1,005	193
LOP	0	0	0
RGP	2	3,144	19
SP	26	588	242

This NWP cycle was an accelerated timeframe for authorizing the NWPs, so the review period is closer to four years rather than the normal five-year cycle. The number of permitted activities during this four-year period is on track to be similar to the previous five-year cycle. Potential decreases in the number of permits could be due to the economic factors and most likely the recent pandemic. The number of NWP verifications may increase slightly during the next five-year NWP cycle, depending on economic recovery and other factors which are difficult to accurately forecast. If the number of permits and verifications increase, the impact acreages may also increase. If the economy recovers and trends upward, then there may likely be a corresponding increase in commercial, institutional, and residential development. If the number of permits and letters of permission increase, and impacts increase, then mitigation acreage would also be expected to increase to offset the increased impacts.

DEQ reports that 319 acres of wetlands were lost through permit actions and 13 acres were lost due to unauthorized impacts from 2017 through 2020. DEQ also reports that 670 acres/credits of compensatory mitigation were required for those impacts. The wetland impacts were associated with general permit coverages, individual permits, or unauthorized activities and include non-tidal and isolated wetlands that were permanently impacted (Source: VDPB State Agency Planning & Performance Measures).

Both the Corps of Engineers and the DEQ implement “no net loss” policies in their permitting programs. The Norfolk District determines wetland mitigation on a project-specific basis and may not always require compensation for wetland impacts less than 1/10 of an acre or for stream impacts less than 0.03 acres or 300 linear feet. The

District Commander can add special conditions to NWP's, including wetland or stream compensation, to ensure that the permitted activities will result in minimal adverse effects on the aquatic environment.

The "no net loss" wetlands goal may still be met even though compensation may not be required for projects with smaller individual impacts. The Norfolk District generally requires 2:1 replacement for forested wetland impacts, 1.5:1 for scrub-shrub wetland impacts, and 1:1 for emergent wetlands. Stream channel compensation depends upon calculations using the United Stream Methodology, and compensation for dredged mudflats, filled or dredged submerged aquatic vegetation (SAV) beds, and open water varies according to the functions and services of the impacted aquatic resource. These compensation ratios help to reduce the magnitude and significance of cumulative impacts within Virginia.

Two regional conditions help ensure that impacts are compensated appropriately. Regional Condition 9 specifies that a mitigation plan is required when the permanent loss exceeds 0.1 acre of wetlands and/or 0.03 acre of stream bed or 300 linear feet of stream bed. Regional Condition 11 further specifies that when a PCN is required, compensatory mitigation is generally required for all wetland impacts (including impacts less than 1/10 acre) associated with transportation projects funded in part or in total by local, state or federal funds.

As of January 8, 2021, the Norfolk District has 149 operational mitigation banks (banks) and in-lieu fee sites (sites) throughout Virginia; these banks/sites currently have 1,528 non-tidal wetland credits, 370,224 tidal wetland credits and 228,200 stream credits available for purchase or use. These credits equate to 12,628 acres of wetland and 1,359,611 linear feet of stream channel. The wetland mitigation banks are constructed before permitted impacts are taken and therefore can be considered as an offset for the temporal losses that are associated with permittee-responsible mitigation. Due to their larger size and landscape locations, wetland and stream banks usually offer ecological advantages over smaller individual permittee-responsible mitigation sites.

In addition to its wetland and stream banks, the Norfolk District has agreements with entities that provide additional methods of satisfying compensatory mitigation requirements. Both the Nature Conservancy's Virginia Aquatic Resources Trust Fund and the Elizabeth River Living River Restoration Trust provide compensatory mitigation. The Virginia Aquatic Resources Trust Fund uses funds for aquatic resource creation, establishment, re-establishment, and enhancement throughout the Virginia. The Living River Restoration Trust concentrates on sediment remediation projects within the Elizabeth River watershed in southeastern Virginia.

The Norfolk District's regional conditions and the standard operating procedures for complying with Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act and the Magnuson-Stevens Fishery Conservation and Management Act will help ensure that the NWP's do not result in more than minimal individual and cumulative adverse environmental effects.

## **9.0 List of Final Corps Regional Conditions for NWP 21:**

See attached list of Regional Conditions.

## **10.0 Water Quality Certification and Coastal Zone Management Act consistency determinations**

Norfolk District requested a Clean Water Act (CWA) Section 401 water quality certification (WQC) pre-filing meeting with DEQ on September 22, 2020 and a pre-filing meeting was held with DEQ on October 6, 2020. On October 22, 2020, Norfolk District sent a WQC request to DEQ that included a 60-day “reasonable period of time” to complete the WQC determination. Norfolk District submitted a Coastal Zone Management Act (CZMA) consistency determination to DEQ on October 22, 2020.

Norfolk District received the Section 401 WQC and the CZMA from the DEQ for the proposed NWPs on December 21, 2020. Norfolk District sent the WQC certification to U.S. EPA to determine if the discharge may affect water quality in a neighboring jurisdiction. Norfolk District has reviewed the 401 WQC and CZMA determination and the associated conditions to assure that they are reasonably implementable or enforceable, according to 33 CFR 325.4(c). Norfolk District has incorporated the applicable 401 WQC and CZMA conditions into the regional conditions in accordance with 33 C.F.R. 330.4(c)(2) and 33 C.F.R. 330.4(d)(2). The specific regional conditions are discussed in Section 2.4 of this document. Norfolk District also incorporates conditions into the NWP verification letters, which require applicants to seek approval from the Virginia Marine Resource Commission (VMRC) and/or the Local Wetlands Board prior to commencement of work in tidal and nontidal waters under the jurisdiction of those agencies to address the CZMA consistency determination.

## **11.0 Measures to Ensure No More Than Minimal Adverse Environmental Effects**

The terms and conditions of the NWP, including the pre-construction notification requirements [and the regional conditions listed in Section 9.0 of this document], will ensure that this NWP authorizes only activities with no more than minimal individual and cumulative adverse environmental effects. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Norfolk District will review certain activities on a case-by-case basis to ensure that those activities result in no more than minimal adverse environmental effects, individually and cumulatively. Through the pre-construction notification review process, the district engineer can add special conditions to an NWP authorization to ensure that the NWP activity results in no more than minimal adverse environmental effects, individually and cumulatively. During the pre-

construction notification process, the district engineer will exercise discretionary authority and require an individual permit for a proposed activity that will result in more than minimal individual and cumulative adverse environmental effects.

The Norfolk District has established regional conditions that apply to this NWP to ensure that activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. These regional conditions help prevent adverse impacts in areas containing SAVs, anadromous fish and federally listed species. The regional conditions also require submission of a mitigation plan to help ensure that impacts will be not more than minimal.

If, at a later time, there is clear, unequivocal evidence that the use of this NWP would result in more than minimal individual and cumulative adverse environmental effects, the modification, suspension, or revocation procedures at 33 CFR 330.4(e) or 33 CFR 330.5 will be used.

## **12.0 Final Determination**

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, as well as these regional conditions, will authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects.

## **13.0 References**

Virginia Water Protection Permit Program Overview 2015; Virginia DEQ Office of Wetlands and Stream Protection.

Virginia State Wetlands Program Plan, Plan Years 2015-2020; Submitted by The Department of Environmental Quality In Collaboration with Virginia Institute of Marine Science - Center for Coastal Resources Management And Virginia Marine Resources Commission.