

## **SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 38**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 38 and addresses the regional modifications and conditions for this NWP in the Norfolk District. In the State of Virginia, the Norfolk District is the lead district, and the Baltimore District also implements the NWP program within Military Installations in Northern Virginia. 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 Virginia, 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 or cumulative adverse environmental effects. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the no more than minimal adverse effects threshold.

### **1.0 Background**

In the June 1, 2016, issue of the Federal Register (81 FR 35186), the U.S. Army Corps of Engineers (Corps) published its proposal to reissue 50 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Norfolk District issued a public notice on June 13, 2016. The issuance of the NWPs was announced in the January 6, 2017, Federal Register notice (82 FR 1860). After the publication of the final NWPs, the Norfolk District considered the need for regional conditions for this NWP. The Norfolk District issued a public notice on January 24, 2017 to solicit comments on the revised version of the regional conditions. The North Atlantic Division's findings are discussed below.

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

#### **2.1 General Comments**

Comments Received: National Marine Fisheries, Habitat Conservation Division, recommended that we reorder the sections of the regional conditions so that Section II:

Regional Conditions Applicable to Multiple and/or All NWP appears before the Section I: Regional Conditions Applicable to Specific NWP. Changing the order in which Regional Conditions for Multiple and/or All NWP versus specific NWP are presented should help increase permittee awareness and understanding of their obligations and responsibilities for work under the NWP.

Response: We agree that switching the order of the conditions may help with clarity, so regional conditions applying to multiple and/or all NWP will be presented first in the final version of our regional conditions.

Comments Received: The Chesapeake Bay Foundation (CBF) expressed concern that the public does not have access to Corps of Engineers data for the individual or summary information about avoidance, minimization or compensation for project impacts under the NWP. They would like for the Corps to evaluate and quantify cumulative impacts on an annual basis for each NWP at the District or state level. Plus, they want to see how many waivers have been authorized, the cumulative impact of the waivers and any level of programmatic avoidance, minimization or compensation summarized on an annual basis. CBF believes that annual reports would help maintain public confidence that the NWP program results in no more than minimal adverse environmental effects.

Response: NWP are a type of general permit. General permits are developed to authorize projects that have only minimal cumulative adverse effects on the environment, which refers to the collective direct and indirect adverse environmental effects caused by all the activities authorized by a particular NWP in a specific geographic region during the time period that the NWP is in effect. Since general permits are only valid for five years, impact data is reviewed every five years to determine whether the impacts are still only minimal and if the general permit should be reauthorized. In addition, Headquarters USACE responded to similar comments with a commitment to increase transparency of NWP decisions by developing quarterly reports that will be posted on the USACE website. For more information on the information to be included in these reports, please refer to page 1872 of the USACE Final Rule on Issuance and Reissuance of Nationwide Permits, dated January 6, 2017 (82 Fed Reg 1860). In addition to the measures described by Headquarters USACE, the Norfolk District posts certain information on issued permits, including NWP, on a monthly basis. The District report shows the number of permits issued, the description and the location of the project site.

Comments Received: The Norfolk District received comments from the Virginia Department of Environmental Quality (VDEQ) regarding the conditions of NWP 3. VDEQ commented that they are concerned that work under the NWP 3 sometimes is more than the minimum necessary to undertake repairs and are beyond the general scope of maintenance. VDEQ suggested that the permit conditions should stipulate that any emergency repair work beyond the original size and design of the original structure should require additional permitting authorization. VDEQ requested that a preconstruction notification be submitted for projects where there is more than a minor

deviation from the original approved structures. VDEQ also requested that the Corps clarify the allowable extent of maintenance under the NWP.

Response: NWP 3 authorizes activities that repair a structure or fill to its previous condition only. This NWP allows for minor deviations due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement, and the Norfolk District has determined that the impacts associated with those minor deviations are typically minimal. The NWP 3 only allows for minor deviations from the original approved structures; therefore if the project proposes more than a minor deviation, then the project will not qualify for the NWP 3 and it will need to be reviewed under another permit. This NWP covers a large variety of projects and it is too difficult to define maintenance based on the large number of differences among projects and the fact that materials, construction techniques, requirements of other regulatory agencies and construction codes and safety standards often change over time. Therefore, Norfolk District feels that the current language specifying that only minor deviations to the existing structures are authorized by this permit is sufficient. In addition, the applicant must abide by the conditions of the 401 certification.

Comments received: The Sierra Club indicated that it is unclear whether Division Engineers will invite public comment on these supplemental NEPA analyses. While Corps regions did recently hold 45-day comment periods on proposed regional conditions on NWP 12, none of those announcements contained any supplemental NEPA analyses or invited public comment regarding environmental impacts.

Response: The Corps national decision document addressed this comment.

Comments received: The Sierra Club opposes the reissuance of NWP 12 and the Corps' use of NWP 12 to approve massive oil and gas pipelines with no project-specific environmental review or opportunity for public involvement. NWP violates Section 404(e) of the Clean Water Act by permitting pipelines with more than minimal environmental impacts, as these pipelines pose grave risks of massive oil spills and gas explosions, and have significant on-the-ground impacts resulting from the construction and permanent maintenance of pipeline rights-of-way.

Response: The Corps national decision document addressed this comment.

Comments received: The U.S. Environmental Protection Agency (EPA) requested clarification of the term "stand-alone" utility lines. A new "Note 2" was added to the NWP 12 which states, "for utility lines, §330.6(d) applies in cases where one or more crossings for a "stand-alone" utility line are not eligible for NWP authorization, but the remaining crossing for the utility line could satisfy the NWP terms and conditions". The preamble explains that if an individual permit is required for one or more crossing then all the crossings necessary to construct that "stand-alone" utility line would require an individual permit. EPA recommended that the Norfolk District consider including the

definition and examples of a “stand-alone” utility line.

Response: The Corps national decision document addressed this comment.

Comments Received: CBF requested the revocation of NWP 13 in general and maintains that regional conditions offered by some districts are insufficient to protect the natural transport of sediment along shorelines, which becomes necessary substrate for beaches, marshes and other natural shoreline features and their associated biota. They believe that cumulative impacts of NWP 13 have created devastating impacts to nearshore habitats throughout the country.

Response: The Norfolk District cannot support the general revocation of NWP13. It is the District's position that, in concert with our State and local counterparts in Virginia, institutionalized requirements for shoreline stabilization structures currently in place do protect natural sediment transport along the shoreline and therefore protect beaches, marshes, and other shoreline features. These requirements include a strong emphasis on avoidance of unnecessary impacts, design criteria that incorporate minimal footprint concepts, consideration of location and associated attributes (fetch, tidal range, orientation to prevalent storm winds and tides, etc.) in the development of solutions and promotion of living shoreline solutions wherever feasible. Lastly, used when only absolutely necessary, tidal wetland mitigation banking affords an ecologically sound remedy for unavoidable tidal wetland losses.

Comments Received: VDEQ was concerned about NWP 32 being used for after-the-fact permitting, so they recommended that it only be used as part of a formal enforcement action for knowing, intentional, willful violations that warrant a penalty, rather than an after-the-fact authorization. VDEQ further commented that this NWP should not preclude a state's ability to pursue enforcement actions under state laws and regulations.

Response: NWP 32 is only applicable after there has been an unauthorized discharge of dredged/fill material into waters of the U.S., so it will always be an after-the-fact permit to some degree. Norfolk District agrees that that the DE has flexibility to resolve enforcement actions with other NWPs if the unauthorized action meets all of the conditions for that NWP and would likely have been permitted if the applicant had initially gone through the permit process.

Per the 19 January 1989 Memorandum of Agreement between the Corps and the Environmental Protection Agency (EPA), the EPA is the lead federal enforcement agency when an unpermitted activity involves a repeat or flagrant violator, or when the Norfolk District recommends that an EPA administrative penalty action may be warranted. These are the same categories of enforcement cases that the VDEQ recommends should solely be authorized under this NWP. However, enforcement actions where willful intent is clear and penalties might be warranted would likely not be good candidates for resolution by NWP (33 CFR 330.6(e)). Norfolk District does not see any benefits that would be derived from restricting the use of this NWP to those

actions recommended by the VDEQ.

Per 33 CFR 330.4(b)(2) NWP's do not obviate the need to obtain other Federal, state, or local permits, approvals, or authorizations required by law. Therefore, the Norfolk District does not believe it is necessary to regionally condition this NWP as proposed by VDEQ.

Comments Received: CBF expressed concern that since NWP 35 does not have a limit on the volume of dredged material, upland placement sites could discharge so much nutrient laden water that it could affect local or Chesapeake Bay nutrient management efforts.

Response: NWP 35 does require that all dredged material be placed in upland, unless authorized by separate Corps authorization. NWP 35 authorizes only Section 10 maintenance dredging. The appropriate control of return water from upland contained disposal sites is NWP 16; therefore the CBF comment is not applicable for NWP 35. NWP 16 does address water quality, in that the quality of the return water is controlled by section 401 certification. Therefore, any concern regarding the effect of return water will be addressed by a Virginia Water Protection permit, and need not be added as a NWP regional condition.

## **2.2 Proposed Regional Conditions**

The following is a comprehensive discussion of all the NWP regional conditions proposed in our June 13, 2016 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 of 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 to NWP 38: Section I, Regional Conditions Applicable to Multiple and/or All NWP's, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13.

In our responses to comments, we will indicate whether any changes have been made to the text of regional conditions as published in our January 23, 2017 public notice.

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

#### **Conditions for 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, 24, 25, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 44, 45, 48, 52, 53 and 54.

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

Comments received: During an August 3, 2016 meeting, National Marine Fisheries Service (NMFS) Habitat Conservation Division, suggested that we change the regional condition to say a "(PCN) is required if work will occur in 'or adjacent' areas that contain submerged aquatic vegetation (SAVs). The comment was reiterated in a draft letter to the Norfolk District.

Response: We discussed the comment further with NMFS to determine an appropriate distance for review and NMFS relayed their satisfaction with the way consultation has occurred in the past. After the discussion, NMFS determined that the condition can remain as it was originally proposed based on the type and frequency of coordination for past projects in areas that are mapped with SAVs. In a January 18, 2017 email, NMFS suggested simply leaving the existing regional condition language as: "A pre-construction notification (PCN) is required if work will occur in areas that contain submerged aquatic vegetation (SAV)." NMFS also recommended that the regional conditions be discussed with Norfolk District staff after they are finalized. Norfolk District plans to discuss the final regional conditions at a Regulatory Branch staff meeting. In addition, the process for coordination with NMFS is included in the Norfolk District's Standard Operating Procedures (SOP).

## **2.2.2 Proposed Regional Condition 2 Applicable to all NWPs**

### **Conditions for Anadromous Fish Use Areas:**

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

consultation will be conducted with NOAA Fisheries Service (NOAA) to obtain concurrence that the TOYR would not be required for the proposed activity.

Comments received: National Marine Fisheries Service (NMFS), Habitat Conservation Division discussed the need for time of year restrictions (TOYR) for projects. The Elizabeth River is identified as an anadromous fish use area by the Virginia Department of Game and Inland Fisheries (VDGIF), specifically for yellow perch. For work in the Elizabeth River system, NMFS supports the Virginia Institute of Marine Science (VIMS) recommendation to relax the TOYR above Lambert's Point for certain construction activities such as dredging. They recommended using the Mid-Town Tunnel on the mainstem of the Elizabeth River and the West Norfolk Bridge (Rt. 164, Western Freeway) on the Western Branch of the Elizabeth River as landmarks, above which (upriver from) the use of a TOYR protective of anadromous fish is unnecessary.

Response: We agree with the comments and this regional condition has been modified, as follows:

### **Revised Conditions for Anadromous Fish Use Areas:**

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

### **2.2.3 Proposed Regional Condition 3 Applicable to Multiple NWPs**

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

Notification is required for work under NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 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: The only comment received about this condition was from the Chesapeake Bay Foundation, and they were in favor of the condition as proposed.

Response: This regional condition points back to general condition 22 of the NWPs and, except for the addition of NWP 54 in the first paragraph, the Norfolk District has had this condition in place since the 2007 NWPs. No changes are recommended.

## **2.2.4 Proposed Regional Condition 4 Applicable to all NWPs**

### **Conditions for Federally Listed Species and Designated Critical Habitat**

Notification for ALL NWPs will be required for any project that “may affect” a federally listed threatened or endangered species or designated critical habitat. The U.S. Fish and Wildlife Service (Service) has developed an online system that allows users to find information about sensitive resources that may occur within the vicinity of a proposed project. This system is named “Information, Planning and Conservation System,” (IPaC), and is located at: <http://ecos.fws.gov/ipac/>. This system provides information regarding federally listed and proposed candidate, threatened, and endangered species, designated critical habitats, and Service refuges that may occur in the identified areas, or may be affected by the proposed activities. The applicant may use this system to determine if any federally listed species or designated critical habitat may be affected by their proposed project, ensuring compliance with the Endangered Species Act. If your Official Species List from IPAC identifies any federally listed endangered or threatened species, you are required to submit a PCN for the proposed activity, unless you can clearly make a “no effect” determination (e.g., no tree clearing onsite within an area designated as Northern Long-eared Bat habitat or only nontidal waters in your project review area and IPAC lists Atlantic Sturgeon). If you are unsure about making a “no effect” determination for your project, 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 for species or critical habitat under their jurisdiction. For additional information about their jurisdiction in Virginia, please see <http://www.greateratlantic.fisheries.noaa.gov/>.

Comments received: National Marine Fisheries Service (NMFS), Habitat Conservation Division recommended specifically listing “sea turtles, marine mammals, shortnose sturgeon and Atlantic sturgeon” as managed species under their jurisdiction. They suggested that we provide the website address for the Greater Atlantic Region’s



Protected Resource Division (PRD), so applicants can obtain additional information.

Response: The Norfolk District agrees with the comments and this regional condition has been modified. We also made changes to some of the wording to add clarity for project proponents using nonreporting permits. The wording has been changed as follows:

### **Revised Conditions for Federally Listed Species and Designated Critical Habitat**

For ALL NWP's, Notification 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 (Service) has developed an online system that allows users to find information about sensitive resources that may occur within the vicinity of a proposed project. This system is named "Information, Planning and Conservation System," (IPaC), and is located at: <http://ecos.fws.gov/ipac/> . The applicant may use IPaC to determine if any federally listed species or designated critical habitat may be affected by their proposed project. If your Official Species List from IPaC identifies any federally listed endangered or threatened 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 listed 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 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.greateratlantic.fisheries.noaa.gov/protected/index.html>.

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>

### **2.2.5 Proposed Regional Condition 5 Applicable to Multiple NWP's**

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

A pre-construction notification (PCN) is required for work in the areas listed below for NWP's 3, 4, 5, 6, 7, 12, 13, 14, 16, 17, 18, 19, 21, 23, 25, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, and 54 for the Counties of Lee, Russell, Scott, Tazewell, Wise, and Washington in Southwestern Virginia within the following specific waters and reaches:

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

For the above listed NWP's that require a PCN to work in specific waters and reaches, as described above, in the counties of Lee, Russell, Scott, Smyth, Tazewell, Wise, and Washington in southwestern Virginia, the Norfolk District recommends that the prospective permittee 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. If required, the PCN must be submitted in writing and include the following information (the Joint Permit Application may also be used – be sure to mark it with the letters PCN at the top of the first page):

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

When all required information is received by the appropriate field office, the Corps will notify the prospective permittee within 45 days whether the project may proceed under the NWP permit or whether an individual permit is required. If, after reviewing the notification, the District Commander determines that the proposed activity would have

more than a minimal individual or cumulative adverse impact on the aquatic environment or otherwise may be contrary to the public interest, then he/she will either condition the nationwide permit authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the activity is not authorized by the nationwide permit and provide the prospective permittee with instructions on how to seek authorization under an individual permit.

Non-federal applicants shall notify the District Commander if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the District Commander that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the PCN must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The District Commander will determine whether the proposed activity “may affect” or will have “no effect” to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps’ determination within 45 days of receipt of a complete PCN. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have “no effect” on listed species or critical habitat, or until Section 7 consultation has been completed.

Comments received: The Fish and Wildlife Service indicated that we could probably delete this condition, since it is redundant with regional condition 4 and IPAC review should cover these situations.

Response: The Norfolk District agrees with the FWS; however, Norfolk District believes that keeping a modified version is beneficial to the regulated public. This regional condition, which will now be applicable to all NWPs, has been modified as follows:

**Revised Condition for Waters with Federally Listed Endangered or Threatened Species, Waters Federally Designated as Critical Habitat, and One-mile Upstream (including tributaries) of Any Such Waters**

Any work proposed in critical habitat, as designated in regional condition 4, requires a PCN.

**2.2.6 Proposed Regional Condition 6 Applicable to Multiple NWPs**

**Conditions for Designated Trout Waters:**

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

45, 46, 49, 50, 51, 52, 53, and 54.

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

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

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

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

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

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

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

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

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

Comments received: No comments were received.

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

## **2.2.7 Proposed Regional Condition 7 Applicable to all NWPs**

### **Conditions Regarding Invasive Species**

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

Comments received: The Virginia Department of Conservation and Recreation (DCR) supports the regional condition regarding invasive species and recommended the use of native species for revegetation as identified in the DCR Native Plants for Conservation, Restoration and Landscaping brochures for the coastal, piedmont and mountain regions.

Response: We agree with DCR's recommendation and added the language to the regional condition prior to the January 23, 2017 public notice. Since the January public

notice, we changed the condition slightly to clarify that DCR recommends the use of the website for further information. The language has been revised as follows:

### **Revised Condition Regarding Invasive Species**

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

### **2.2.8 Proposed Regional Condition 8 Applicable to Multiple NWPs**

#### **Conditions Pertaining to Countersinking of Pipes and Culverts in Nontidal Waters**

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

**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.

- a. Following consultation with the Virginia Department of Game and Inland Fisheries (DGIF), the Norfolk District has determined that fish and other aquatic organisms are most likely present in any stream being crossed, in the absence of site-specific evidence to the contrary. Although prospective permittees have the option of providing such evidence, extensive efforts to collect such information is not encouraged, since countersinking will in most cases be required except as outlined in the conditions below.
- b. All pipes: All pipes and culverts placed in streams will be countersunk at both the inlet and outlet ends, unless indicated otherwise by the Norfolk District on a case-by-case basis (see below). Pipes that are 24" or less in diameter shall be countersunk 3" below the natural stream bottom. Pipes that are greater than 24" in diameter shall be countersunk 6" below the natural stream bottom. The countersinking requirement does not apply to bottomless pipes/culverts or pipe arches. All single pipes or culverts (with bottoms) shall be depressed (countersunk) below the natural streambed at both the inlet and outlet of the structure. In sets of multiple pipes or culverts (with bottoms) at least one pipe or culvert shall be depressed (countersunk) at both the inlet and outlet to convey low flows.

- c. Following excavation of the stream bottom and the placement of a pipe/culvert, clean fill material (comparable to the original stream bottom material, including soil, fines and clay), shall be used to bring the stream bottom elevation outside of the pipe openings both upstream and downstream back to pre-construction elevations, rather than filling the excavated stream bottom with riprap. Riprap may be placed on top of the restored stream bottom to the length required to meet Virginia stormwater requirements, but to a minimum depth. Clean fill and/or riprap may be placed in the pipe up to the elevation of the pre-construction stream bottom. The purpose of this requirement is to insure re-establishment of a surface water channel to allow for the movement of aquatic organisms.
- d. Exemption for extensions and certain maintenance: The requirement to countersink does not apply to extensions of existing pipes or culverts that are not countersunk, or to maintenance to pipes/culverts that does not involve replacing the pipe/culvert (such as repairing cracks, adding material to prevent/correct scour, etc.).
- e. 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).
- f. 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.
- g. Pipes on bedrock or above existing utility lines: Different procedures will be followed for pipes or culverts to be placed on bedrock or above existing buried utility lines where it is not practicable to relocate the lines, depending on whether the work is for replacement of an existing pipe/culvert or a new pipe/culvert:
  - i. Replacement of an existing pipe/culvert: Countersinking is not required provided the elevations of the inlet and outlet ends of the replacement pipe/culvert are no higher above the stream bottom than those of the existing pipe/culvert. Documentation (photographic or other evidence) must be maintained in the permittee's records showing the bedrock condition and the existing inlet and outlet elevations. That documentation will be available to the Norfolk District upon request, but notification or coordination with the Norfolk District is not otherwise required.
  - ii. A pipe/culvert is being placed in a new location: If the prospective permittee determines that bedrock or an existing buried utility line that is not practicable to relocate prevents countersinking, he/she should evaluate the use of a bottomless pipe/culvert, bottomless utility vault, span

(bridge) or other bottomless structure to cross the waterway, and also evaluate alternative locations for the new pipe/culvert that will allow for countersinking. If the prospective permittee determines that neither a bottomless structure nor an alternative location is practicable, then he/she must submit a pre-construction notification (PCN) to the Norfolk District in accordance with General Condition 32 of the NWPs. In addition to the information required by General Condition 32, the prospective permittee must provide documentation of measures evaluated to minimize disruption of the movement of aquatic life as well as documentation of the cost, engineering factors, and site conditions that prohibit countersinking the pipe/culvert. Options that must be considered include partial countersinking (such as less than 3" of countersinking, or countersinking of one end of the pipe), and constructing stone step pools, low rock weirs downstream, or other measures to provide for the movement of aquatic organisms. The PCN must also include photographs documenting site conditions. The prospective permittee may find it helpful to contact his/her regional fishery biologist for the Virginia Department of Game and Inland Fisheries (VDGIF), for recommendations about the measures to be taken to allow for fish movements. When seeking advice from VDGIF, the prospective permittee should provide the VDGIF biologist with all available information such as location, flow rates, stream bottom features, description of proposed pipe(s), slopes, etc. Any recommendations from VDGIF should be included in the PCN. The Norfolk District will notify the prospective permittee whether the proposed work qualifies for the nationwide permit within 45 days of receipt of a complete PCN. NOTE: Blasting of stream bottoms through the use of explosives is not acceptable as a means of providing for countersinking of pipes on bedrock.

- h. Pipes on steep terrain: Pipes being placed on steep terrain (slope of 5% or greater) must be countersunk in accordance with the conditions above and will in most cases be non-reporting. It is recommended that on slopes greater than 5%, a larger pipe than required be installed to allow for the passage of ordinary high water in order to increase the likelihood that natural velocities can be maintained. There may be situations where countersinking both the inlet and outlet may result in a slope in the pipe that results in flow velocities that cause excessive scour at the outlet and/or prohibit some fish movement. This type of situation could occur on the side of a mountain where falls and drop pools occur along a stream. Should this be the case, or should the prospective permittee not want to countersink the pipe/culvert for other reasons, he/she must submit a Pre-Construction Notification to the Norfolk District in accordance with General Condition 32 of the Nationwide Permits. In addition to the information required by General Condition 32, the prospective permittee must provide documentation of measures evaluated to minimize disruption of the movement of aquatic life as well as documentation of the cost, engineering factors, and site conditions that prohibit countersinking the pipe/culvert. The prospective permittee should design the pipe to be placed at a slope as steep



as stream characteristics allow, countersink the inlet 3-6", and implement measures to minimize any disruption of fish movement. These measures can include constructing a stone step/pool structure, preferably using river rock/native stone rather than riprap, constructing low rock weirs to create a pool or pools, or other structures to allow for fish movements in both directions. Stone structures should be designed with sufficient-sized stone to prevent erosion or washout and should include keying-in as appropriate. These structures should be designed both to allow for fish passage and to minimize scour at the outlet. The quantities of fill discharged below ordinary high water necessary to comply with these requirements (i.e., the cubic yards of stone, riprap or other fill placed below the plane of ordinary high water) must be included in project totals. The prospective permittee may find it helpful to contact his/her regional fishery biologist for the Virginia Department of Game and Inland Fisheries (DGIF), for recommendations about the measures to be taken to allow for fish movements. When seeking advice from DGIF, the prospective permittee should provide the DGIF biologist with all available information such as location, flow rates, stream bottom features, description of proposed pipe(s), slopes, etc. Any recommendations from DGIF should be included in the PCN. The Norfolk District will notify the prospective permittee whether the proposed work qualifies for the nationwide permit within 45 days of receipt of a complete PCN.

- i. 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 nationwide permit.
- j. 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 (g) and/or (h) above.

Comments received: On February 14, 2017 Norfolk District staff met with staff from the Virginia Department of Transportation (VDOT). During the meeting VDOT expressed concerns that the proposed condition within 8.c. is too restrictive and not practicable and could contribute to offsite sedimentation as written. They requested that the Norfolk District rewrite the condition.

Response: To address VDOT's concerns, we revised the language in condition 8. c. to allow some flexibility, but still keeping the spirit of the condition to protect the aquatic environment. To provide additional clarification, Norfolk District also made minor revisions to some of the language in this regional condition. The full text is shown on Section 9.0 of this document.

Condition 8.c. has been revised as follows:

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.

## **2.2.9 Proposed Regional Condition 9 Applicable to Multiple NWP's**

### **Conditions for the Repair of Pipes**

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, and 52.

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

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

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

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, including Condition 9 for Management of Water Flows. In such cases, notification to the Norfolk District Commander is not required, unless specified in the NWP Conditions for other reasons, and the permittee may proceed with the work.

ii. Otherwise, the prospective permittee must submit a pre-construction notification (PCN) to the Norfolk District Commander prior to commencing the activity. For all such projects, the following information should be provided:

- 1) Photographs of the existing inlet and outlet;
- 2) A measurement of the degree to which the work will raise the invert elevations of both the inlet and outlet of the existing pipe;
- 3) The reasons why other methods of pipe maintenance are not practicable (such as metal sleeves or a countersunk pipe replacement);
- 4) Depending on the specific case, the Norfolk District may discuss potential fish usage of the waterway with the Virginia Department of Game and Inland Fisheries.

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

<http://www.nao.usace.army.mil/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 projects) or an Individual permit. However, it is anticipated that the applicant will still be required to perform the work such that the waterway is not blocked or restricted to a greater degree than its current conditions.

b. If the existing pipe or at least one pipe in the line of pipes IS countersunk and at least one pipe located in the low flow channel will continue to be countersunk, and no concrete aprons are proposed:

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

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

This work cannot be performed under the NWP's. The prospective permittee must apply for either a Regional Permit 01 (applicable only for VDOT projects) or an Individual permit. However, it is anticipated that the prospective permittee will still be required to perform the work such that the waterway is not blocked or restricted more so than its current conditions.

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

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. To provide additional clarification, Norfolk District made minor revisions to some of the language in this regional condition. The full text is shown on Section 9.0 of this document.

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

##### **Condition for Transportation Projects Funded in Part or in Total by State or Federal Funds**

When a PCN is required, compensatory mitigation is required for all wetland impacts (including impacts less than 1/10 acre) associated with transportation projects funded in part or in total by state or federal funds.

Comments received: Regional Condition 12 was not part of the regional conditions when they were originally put on public notice in June 2016. However, Norfolk District developed the condition based on a long standing practice. Norfolk District offered the opportunity for public comment on this condition in the January 2017 public notice. On February 14, 2017 Norfolk District staff met with staff from the Virginia Department of Transportation (VDOT). During the meeting VDOT expressed concerns that the proposed condition was locking them into a practice that was generally understood, but

not in writing. They also felt that their projects were being singled out.

Response: Norfolk District added some flexibility by saying that compensatory mitigation is generally required. The condition was modified to just address permanent wetland impacts. In addition, the Norfolk District added projects that are funded by local funds.

This condition was revised as follows:

### **Revised Condition for Transportation Projects Funded in Part or in Total by 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 mitigation plan addressing the proposed compensatory mitigation.

#### **2.2.11 Proposed Regional Condition 13 Applicable to all NWP**

##### **Condition for Projects Requiring Coordination Under Section 408**

Under 33 USC 408, the Secretary of the Army must determine whether to grant permission to alter a U.S. Army Corps of Engineers civil works project. The District Engineer may grant this authorization if the work does not impair usefulness of the project and does not harm the public interest. In order to comply with Section 408, perspective permittees need to submit a pre-construction notification (PCN) prior to working under a NWP within the following waterways, which contain either a Federal Navigation Channel, Flood Risk Management project (FRM), or an Environmental Restoration project:

- 1) Lower North Landing River from Blackwater Creek to the North Carolina State Line (Atlantic Intracoastal Waterway).
- 2) Hampton Roads (Channel to Newport News, Norfolk Harbor and anchorages).
- 3) Chincoteague Channel and Inlet.
- 4) The Elizabeth River, the Eastern Branch of the Elizabeth River to the Norfolk and Western Railroad Bridge, the Southern Branch of the Elizabeth River to a point 0.8 miles upstream of the I-64 Bridge, and the Western Branch of the Elizabeth River to a point 0.34 miles upstream of the West Norfolk Bridge.
- 5) The James River from Richmond to Hopewell and including Richmond Harbor and the Richmond Deepwater Terminal.
- 6) Little River (Creek) except the Northwest Branch and Pretty Lake.
- 7) Norfolk Harbor Channel, all reaches.
- 8) The York River from the Poropotank River to the Virginia Highway 33 Bridge at West Point.

Notification is required if your project will be within a waterway containing a Federal Navigation Channel and the required 85-foot setback cannot be met. Written authorization will be given, if appropriate, after coordination with the Norfolk District Corps of Engineers Operations Branch has been completed.

Maps showing the locations of these projects can be viewed 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)

Comments received: No comments were received.

Response: However, the Norfolk District revised the language in this condition to provide more clarity. In addition, the specification for waterways may change, so we have incorporated that language into a document that will be available online with the map.

This regional condition was revised as follows:

### **Revised Condition for Projects Requiring Coordination Under Section 408**

General Condition 31 of the NWP's requires that prospective permittees submit a pre-construction notification (PCN) if an 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 US Army Corps of Engineers (USACE) federally authorized civil works project. For information on the location of Norfolk District projects, prospective permittees are directed to the maps showing the locations of Norfolk District projects located 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)

If the prospective permittee is uncertain whether the proposed activity might alter or temporarily or permanently occupy or use a Norfolk District federally authorized civil works project, the prospective permittee shall submit a PCN.

## **2.2.12 Proposed Regional Condition for NWP 10**

### **NWP 10 - Mooring Buoys**

#### **Condition for Sufficient Mooring Depths:**

Water depths in the mooring areas should be sufficient that vessels moored float at all stages of the tide. Boats should not hit bottom during low water conditions. The swing radius of the vessel plus the mooring chain should not result in the vessel becoming an

obstruction to navigation.

Comments Received: The Chesapeake Bay Foundation indicated that all the districts within the Chesapeake Bay should be consistent in requiring a PCN, especially as it pertains to avoidance, minimization and compensation of negative impacts to SAVs. Response: Under regional condition 1 for multiple and/or all NWP's, the Norfolk District requires a PCN if work will occur in SAV areas for several NWP's, including NWP 10.

Comments Received: National Marine Fisheries Service (NMFS) recognized that the existing condition requires a PCN for certain activities, including mooring buoys in mapped SAV habitat, they recommended prohibiting the use of NWP 10 in or adjacent areas supporting SAV beds to be consistent with other districts in the Chesapeake Bay.

Response: Norfolk District is in agreement with NMFS and has revised the regional condition as follows:

### **NWP 10 - Mooring Buoys**

#### **Revised Condition for Sufficient Mooring Depths:**

Water depths in the mooring areas should be sufficient that vessels moored float at all stages of the tide. Boats should not hit bottom during low water conditions. The swing radius of the vessel plus the mooring chain should not result in the vessel becoming an obstruction to navigation. Use of this NWP is prohibited in and around SAV beds. Information about SAV habitat can be found at the Virginia Institute of Marine Science's website <http://web.vims.edu/bio/sav/>.

### **2.2.13 Proposed Regional Condition for NWP 11**

#### **NWP 11 - Temporary Recreational Structures**

##### **Condition for Sufficient Mooring Depths:**

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

Comments Received: National Marine Fisheries Service (NMFS) recognized that the existing condition requires a PCN for certain activities, including temporary recreational structures in mapped SAV habitat, they recommended prohibiting the use of NWP 11 in or adjacent areas supporting SAV beds to be consistent with other districts in the Chesapeake Bay.

Response: Norfolk District is in agreement with NMFS and has revised the regional condition as follows:

## **NWP 11 - Temporary Recreational Structures**

### **Revised Condition for Sufficient Mooring Depths:**

Water depths in the mooring areas should be sufficient that structures moored float at all stages of the tide or stoppers must be utilized to prevent the structures from resting on the bottom, so as to not damage the underlying benthic communities. Structures should not hit bottom during low water conditions. Use of this NWP is prohibited in and around SAV beds. Information about SAV habitat can be found at the Virginia Institute of Marine Science's website <http://web.vims.edu/bio/sav/>.

### **2.2.14 Proposed Regional Condition for NWP 12**

#### **NWP 12 - Utility Line Activities**

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

1. Construction of access roads may not result in more than 1/3 acre of impacts to waters of the United States.
2. A PCN is required for discharges associated with the construction of utility line substations that result in the permanent loss of greater than 5000 square feet of waters of the United States.
3. For utility activities requiring a PCN the prospective permittee shall provide the following information:
  - a. A map of the entire utility corridor including a delineation of all wetlands and waters of the United States within the corridor. Aquatic resource information shall be submitted using the Cowardin Classification System mapping conventions (e.g. PFO, PEM, POW, etc.).
  - b. An alternatives analysis, which specifically addresses the following:
    - i. Selection of an alignment, which avoids and minimizes wetland impacts to the maximum extent practicable. The utility line should make a direct or perpendicular crossing of a stream. Directional drilling should be reviewed as a possible 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.
    - iii. Minimizing clearing of wetlands. Grubbing shall be limited to the permanent easement for underground utility lines. Outside of the permanent easement, wetland vegetation shall be removed at or above the ground surface unless



written justification is provided and the impacts are reviewed and approved by the Corps.

- iv. For overhead utility lines, allowance of natural succession to restore and maintain the corridor in scrub-shrub wetlands except for a minimum corridor needed for access, to the maximum extent practicable.
  - v. For buried utility lines, allowance of natural succession to restore the area to tree and scrub/shrub except for a 20-foot wide access corridor, to the maximum extent practicable.
4. For all submerged utility lines across navigable waters of the United States, a location map and cross-sectional view showing the utility line crossing from bank to bank is required. In addition, the location and depth of any Federal Navigation Channels shall be shown in relation to the proposed utility line. In general, all utility lines shall be buried at least six (6) feet below the authorized bottom depth of Federal Navigation Channel and at least three (3) feet below the bottom depth in all subaqueous areas. When circumstances prevent the placement of at least three feet of cover over the line (outside of the Federal Navigation Channel), then written justification and an alternative method must be provided with the notification and the deviation must be reviewed and approved by the Corps. Section 408 permission may be required. See #10 under Regional Conditions that are applicable to multiple NWP's.
  5. Whenever possible, excavated material shall be placed on an upland site. However, when this is not feasible, temporary stockpiling is hereby authorized provided that:
    - a. All excavated material stockpiled in a vegetated wetland area is placed on filter cloth, mats, or some other semi-permeable surface. The material will be stabilized with straw bales, filter cloth, etc. to prevent reentry into the waterway.
    - b. All excavated material must be placed back into the trench to the original contour and all excess excavated material must be completely removed from the wetlands within 30 days after the pipeline has been laid through the wetland areas. Permission must be granted by the District Commander or his authorized representatives if the material is to be stockpiled longer than 30 days.
  6. When open-cut trenching in designated anadromous fish use areas or hydrostatic testing of a pipeline involving water withdrawals from tidal waters are proposed, the Corps will coordinate with the NOAA Fisheries Service and/or the Virginia Department of Game and Inland Fisheries. Written verification from this office must be received before performing the proposed work. In most cases, the following time-of-year restrictions (TOYR) will apply:
    - James River, below Rt. 17 bridge: No TOYR.

- James River, at Jamestown Island (Gray's Creek) downstream to Rt. 17 bridge: TOYR from February 15 through June 15 of any given year.
- James River, at Jamestown Island upstream to Boshers Dam: TOYR from February 15 through June 30 of any given year.
- James River, above Boshers (including Rivanna River): TOYR from March 15 through June 30 of any given year.
- Rappahannock River, below Route 360 bridge: TOYR from February 15 through June 15 of any given year.
- York River, below Route 33 bridge: TOYR from February 15 through June 15 of any given year.
- Nansemond River: TOYR from February 15 through June 15 of any given year.
- Elizabeth River: A PCN is required for a case-by-case specific review.
- Unless otherwise noted: TOYR from February 15 through June 30 of any given year.

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:

Nominal System Voltage (kV)	Minimum additional clearance (ft.) above clearance required for bridges
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.

### **Comments received from the Virginia Department of Environmental Quality (DEQ)**

Comment received: Due to the increasing number of large transmission lines causing the permanent conversion of forested wetlands to scrub-shrub wetlands, VDEQ recommended that the NWP 12 specifically identifies permanent conversion of forested wetlands to scrub-shrub wetlands as an impact that requires compensatory mitigation.

Response: The Norfolk District's regional conditions for NWP 12 requires that the applicant submits an alternatives analysis. This alternatives analysis shall address the selection of an alignment which avoids fragmenting large tracts of forested wetlands and the allowance of natural succession to maintain the corridor in scrub-shrub wetlands except for a minimum corridor needed for access. Also, the District Engineer has the discretion to require compensatory mitigation for the permanent conversion of forested wetlands to scrub-shrub wetlands, if that permanent conversion is conducted as a result of activities that require Corps authorization.

Comment received: The NWP 12 states that frack-out material is not regulated as a fill by the Corps but there is new language allowing the District Engineer to require activity-specific remediation plans to address these potential releases instead of addressing them through enforcement actions. Since this material can negatively affect water quality and aquatic life, DEQ and other state 401 Certification Programs should be included on any reviews and approvals of activity-specific remediation plans.

Response: Condition 9 of the NWP 12 Regional Condition requires that the applicant include a plan in the PCN (if a PCN is required) to address the prevention, containment, and cleanup of sediment or other materials caused by the inadvertent returns of drilling fluids to waters of the U.S. (WOUS) through sub-soil fissures or fractures. If an inadvertent return of drilling fluids to WOUS occurs, and the remediation requires work within WOUS, then the applicant must notify the Corps immediately and submit a remediation plan as soon as possible.

### **Comments received from the Chesapeake Bay Foundation**

Comment received: The regional condition for pre-construction notification for utility lines in Virginia was well written and should be applied consistently across the Chesapeake Bay watershed and should strengthen the language about directional drilling in all three states.

Response: This comment expresses support for our proposed regional conditions for NWP 12, which were retained in the final version. No response is necessary.

## **Comments received from the Environmental Protection Agency**

Comment received: The U.S. Environmental Protection Agency (EPA) recommended that the District regionally condition NWP 12 to require that any directional drilling or boring activities include a plan to address the prevention, containment, and cleanup of sediment or other materials caused by “frac-outs” (inadvertent returns of drilling muds). In addition, the EPA recommended that notification be made to the District should a “frac-out” occur and that the remediation plan provided in the PCN is being followed.

Response: We have added the following regional condition which addressed EPA’s concerns regarding inadvertent returns of drilling muds from directional drilling or boring activities in waters of the U.S.: “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.”

## **Comments received from the Bureau of Ocean Energy Management (BOEM)**

Comments received: BOEM submitted comments on NWP 12 and the potential conflicts between subsea cables and BOEM ocean management activities. BOEM suggested that a general condition be added that would require consultation with them to help prevent potential conflicts.

Response: BOEM notes that the Outer Continental Shelf Lands Act (OCSLA) grants BOEM the authority to issue leases, easements, and right of way (ROW) authorizations for certain specific activities. OCSLA also extends Section 10 (Rivers and Harbors Act) Corps permit authority to prevent obstructions to navigation to the limit of the OCS.

We acknowledge BOEM's concern about potential conflicts that subsea utility lines may have on certain BOEM ocean management activities or authorizations. The Norfolk District agrees that applicants for subsea utility lines installed on the Outer Continental Shelf (OCS) landing in the United States, and not otherwise subject to BOEM regulation, should notify BOEM of those proposed lines. For this reason, we are including a regional condition requiring that, for utility lines landing in Virginia from the Outer Continental Shelf, the applicant shall submit a copy of the PCN to BOEM and the Naval Seafloor Cable Protection Office. We feel that this notice requirement will allow any potential conflicts to be addressed by the agencies in the best position to address them.

The Norfolk District has added condition 8 as follows:

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

### **Comments received from the Virginia Department of Conservation and Recreation (VDCR)**

Comment received: The Virginia Department of Conservation and Recreation (VDCR) stated they do not recommend the use of directional drilling for stream crossings in karst areas, where loss of drilling fluid into voids can damage habitat and contaminate ground and surface water.

Response: The proposed language for the final regional conditions was revised to include the following statement to address VDCR's concerns: 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.

Comment received: VDCR supported the condition which requires an alternatives analysis which avoids fragmenting large tracts of forested wetlands by routing utility lines outside of forested tracts or on the edges of forested tracts. It recommended consulting 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>.

Response: The proposed language for the final regional conditions was revised to include VDCR's recommendation to consult the Virginia Conservation Vision, and included the link to this website.

Comment received: In the NWP 12 Regional Condition 5. VDCR recommended inserting the word "approved" in front of "upland site".

Response: The proposed language for the final regional conditions was revised to say: "Whenever practicable, excavated material shall be placed on a Corps confirmed upland site."

Comment received: VDCR recommended including a latitude/longitude for the project location to make it easier to locate the project.

Response: The proposed language for the final regional conditions includes a requirement to provide the location of the proposed project, which could include the latitude/longitude, but provides flexibility for other methods of providing locational information. Not all applicants have the tools to provide an exact latitude/longitude of a project site.

Comments received: VDCR commented that they supported Regional Condition 6 which is applicable to Multiple or/all NWP's which prevents re-vegetation using invasive plant species listed on the most current DCR invasive species list. VDCR further recommended 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.

Response: The proposed language for the final regional conditions was revised to include VDCR's recommendation regarding 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.

Comments received: DCR-DNH supports 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.

Response: The Norfolk District's Regional Conditions for NWP 12 requires that the applicant submit an alternatives analysis. This alternatives analysis shall address the selection of an alignment which avoids fragmenting large tracts of forested wetlands and the allowance of natural succession to maintain the corridor in scrub-shrub wetlands except for a minimum corridor needed for access. Also, the District Engineer has the discretion to require compensatory mitigation for the permanent conversion of forested wetlands to scrub-shrub wetlands, if that permanent conversion is conducted as a result of activities that require Corps authorization.

### **Comments received from Dominion Resources Services, Inc.**

Comment received: Dominion requests clarification that "anadromous fish waters" are only those waters that have been identified by the Virginia Geographic Information System. Additional clarification is needed because individual practitioners may have differing views of what are or are not "anadromous fish waters."

Response: The Norfolk District staff checks for anadromous fish use areas through its Norfolk District Regulatory GIS (for reporting permits) and/or the Virginia Department of Game and Inland Fisheries (VDGIF) Information System (by applicant for non-reporting permits) at <http://vafwis.org/fwis>. This is included in Regional Condition 2, Conditions for Anadromous Fish Use Areas. Norfolk District PMs have access to this information so there should not be differing views about anadromous fish waters. When questions do arise, Norfolk District staff will coordinate with staff from VMRC and/or NOAA Fisheries

as needed to clarify specific issues regarding these waters.

Comment received: The proposed condition (NWP 12, Condition 10 Intake in Designated Anadromous Fish Waters) is new and would establish a specific design requirement for flow rate, screen size, and location when an intake is proposed in anadromous fish waters. The design parameters are meant to protect the sensitive life stages of anadromous fish but they are not only pre-determined but the design values and/or requirements are fixed and lack the flexibility to consider the nature of the water withdrawal (e.g. duration, timing), local conditions or sensitive species. Dominion believes that managing intake water in designated anadromous fish water should not take this singular approach but should allow for site specific evaluation of appropriate measures. Also, the proposed condition is unnecessary because the Commonwealth of Virginia already addresses water withdrawals and their associated intakes in designated anadromous fish waters under the Virginia Water Protection (VWP) Permit program. Dominion recommends deleting the proposed condition because it is duplicative and water withdrawals are adequately protected through the VWP program.

Response: The Norfolk District added this regional condition to NWP 12 because NWP 12 can be used to authorize intake and outfall structures associated with utility projects. Adding this condition to NWP 12 makes the permit consistent with NWP 7. These changes were previously recommended by NOAA Fisheries. This regional condition has not been overly burdensome for activities authorized under NWP 7 and the District does not expect that it will be under NWP 12 either. If flexibility is needed to assess site-specific outfall/intake issues, the applicant can propose specific reasons why they believe that the design parameters would not apply to a particular project. The Norfolk District would evaluate these reasons and coordinate with NOAA, DEQ, and/or DGIF as appropriate. There are other cases of regulatory overlap between DEQ and the Corps programs, but the Norfolk District does not consider this to be a valid reason for deleting the proposed condition. It will remain as proposed.

## **2.3 Recommendations for Additional Regional Conditions**

### **2.3.1 Comments on Waivers**

General Comments Received: The U.S. Environmental Protection Agency (EPA) requested the opportunity to discuss the use of waivers. EPA is concerned that since many of the NWPs allow for waivers for greater than 300 linear feet of streambed loss, the NWPs could result in impacts that may be more than minimal individually and cumulatively. EPA recommended a regional condition that would put limits on the use of waivers and a cap on the amount of impacts allowed. EPA also recommended that the NWPs be regionally conditioned to require mitigation for stream impacts that receive a waiver over the 300 linear foot threshold.

Response: The Norfolk District staff discussed the NWP comments with EPA staff. We anticipate that the Norfolk District Commander (District Commander) will only waive

these criterion sparingly, on a project-specific basis, and only after the project manager has determined that such a waiver would still result in minimal adverse effects to the aquatic environment. A waiver must be justified and approved by a Regulatory Branch Section Chief. Best management practices such as sediment and erosion controls and the countersinking of drainage structures in most cases would further minimize environmental impacts. Database reviews by the Regulatory project managers will also ensure that high value streams, including those with federally listed threatened or endangered species and native trout waters, will continue to be evaluated carefully in order to minimize adverse aquatic impacts. In response to the comments concerning mitigation for stream impacts, we have added regional condition 10 that requires submission of a mitigation plan if the project results in a permanent loss of greater than 300 linear feet of waters of the U.S. This condition applies to multiple NWPs.

### **Regional Condition 10 Applicable to Multiple NWPs-Condition for Impacts Requiring a Mitigation Plan**

When a PCN is required, a mitigation plan needs to be submitted when 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 12).

#### **2.3.2 Comments on Surface Water Withdrawals**

Comments Received: The Virginia Department of Environmental Quality (VDEQ) Office of Water Supply regulates surface water withdrawals in the Commonwealth. DEQ expressed concern about the use of certain NWPs to enable surface water withdrawals without VDEQ oversight. To prevent unauthorized surface water withdrawals, VDEQ recommended a regional condition for all NWPs relating to water withdrawals, which may be otherwise exempt from their permitting.

Response: The Norfolk District had further discussions with VDEQ to clarify this comment. VDEQ indicated that they planned to address this issue through the 401 certification process and no longer request a regional condition to address their concerns.

#### **2.3.3 Comments on NWP 18**

Comments Received: EPA recommends regional conditions that would exclude the use of NWP 18 for stream elimination, stream relocation, and the construction of impoundments.

Response: NWP 18 has an acreage limits of 1/10 acre and 25 cubic yards of dredged or fill material below ordinary water mark or high tide line. For discharges greater than 10 cubic yards and for discharges proposed in special aquatic sites a pre-construction notification is required. The PCN requirements allow the district engineer to review



proposed activities to ensure that the individual and cumulative adverse environmental effect are no more than minimal. This NWP does not authorize stream diversion activities; therefore stream relocation projects are not likely to be authorized under this NWP. The NWP authorizes only activities that have small discharge of dredged and fill material. Review of the PCNs will ensure that activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. Therefore, the Norfolk District does not believe that a regional conditions is necessary.

#### **2.3.4 Comments on NWP 21**

Comments Received: the Chesapeake Bay Foundation stated that the Norfolk District should develop a regional condition for NWP 21 that includes reasonable thresholds for permanent loss of stream bed on a cumulative impact assessment.

Response: NWP 21 already caps the loss of waters at no more than 1/2 acres of nontidal waters of the U.S. and no more than 300 linear foot of stream bed. For any loss of more than 300 linear foot of stream bed (ephemeral/intermittent only) the applicant must show that the discharges will not result in no more than minimal individual and cumulative adverse environmental effects. With the limits in the NWP already stated, there is no need to duplicate these conditions with a regional condition that says the same thing as the NWP.

#### **2.3.5 Comments on NWP 33**

Comment received: EPA recommends a PCN for all activities under NWP 33. At a minimum, EPA recommends that the Norfolk District include a regional condition requiring a PCN for all activities in perennial waters, particularly high quality resources that support shellfish and reproduction of fish populations, including trout streams. As part of the PCN, photo documentation should be provided after construction to ensure that the activity in compliance with the permit conditions.

Response: Due to the minimal nature of some of the permitted activities for temporary impacts in non-Section 10 waters, a PCN requirement for all activities would not be justified due to the burden it would create on both the applicant and the permitting process. The NWPs are a type of general permit designed to authorize certain activities that have no more than minimal individual and cumulative adverse environmental effects, and the types of activities authorized by this permit generally meet that requirement. In addition, NWP 33 only authorizes temporary impacts to jurisdictional waters and wetlands, including perennial streams.

The Norfolk District regional conditions do address EPA's concerns regarding activities that may affect high quality resources, including certain perennial waters. The regional conditions include PCN requirements for waters with submerged aquatic vegetation (SAV), agency coordination requirements and time-of-year restrictions (TOYRs) for

essential fish habitat and anadromous fish use areas, PCN requirements for work in all waters with federally listed endangered or threatened species (including waters with critical habitat), and PCN requirements for designated trout waters.

All general permits require a certificate of compliance to be signed and submitted upon the completion of construction. This certifies that the applicant has met the terms and conditions as outlined in the NWP, including compliance with all of the applicable regional conditions. Monitoring, which may include photographic documentation, surveys, and revegetation success criteria may be required for certain projects by adding permit-specific special conditions. On-site compliance inspections are conducted on a regular basis by the District Engineer; these ensure that the project is being constructed (or has successfully been restored) as outlined in the permit conditions.

Comment: EPA recommended defining the length of time for an activity to be considered temporary. They suggested a limit of no more than one year for construction, access, and dewatering.

Response: The Norfolk District has added Regional Condition 11 for Temporary Impacts for all nationwide permits. It requires that all temporarily impacted waters and wetlands be restored to pre-construction contours within 12 months of commencing the temporary impacts. Impacts not restored within that time will be considered permanent and may require mitigation.

### **Regional Condition 11 Applicable to all NWPs-Condition for Temporary Impacts**

All temporarily disturbed waters and wetlands must be restored to their pre-construction contours within 12 months of commencing the temporary impacts' construction. Impacts that will not be restored within 12 months (calculated from the start of the temporary impacts' construction) will be considered permanent, unless otherwise approved by the Corps, and mitigation may be required. Once restored to their natural contours, soil in these areas must be mechanically loosened to a depth of 12 inches and wetland areas must be seeded or sprigged with appropriate native vegetation (see Regional Condition 7 regarding revegetation).

Comments Received: EPA recommends a regional condition for NWP 33 that would require that any activity in wetlands require the use of construction pads, timber matting, and/or geotextile fabric to prevent compaction of wetland systems as a result of the construction and/or access.

Response: The use of timber mats (or equivalent) in waters of the U.S. is considered a best management practice which may further minimize the adverse effects of activities authorized by the NWPs. While NWP 33 does not specifically require the use of timber mats, construction pads, or geotextile fabric, these BMPs are routinely used for activities authorized under NWP 12 and NWP 3. This NWP authorizes temporary construction impacts, and is often used in conjunction with other NWPs. The District Engineer has the option to require the use of timber mats and other access BMPs

through permit conditions if he determines that their use will further minimize construction impacts to waters of the U.S.

Also, Regional Condition 11 requires that soils in temporarily impacted areas are mechanically loosened to a depth of 12 inches and then stabilized with native vegetation. This also addressed the issue of soil compaction.

### **2.3.6 Comments on NWP 40**

Comment received: EPA recommends a mitigation plan be required for stream impacts over 300 linear feet for projects authorized under NWP 40.

Response: Regional condition 10 requires a mitigation plan when the permanent loss of wetlands exceeds 1/10 of an acre and/or 300 linear feet of waters of the U.S.

Comments received: EPA recommended that NWP 40 not be used in intermittent waters, that this NWP be conditioned such that the pond is the minimum size required for farm use, and that the size of in-stream ponds be avoided to the maximum practicable extent.

Response: Intermittent stream impacts are generally minimal in nature and the Norfolk District will not exclude intermittent waters from NWP 40. Also, the 300 linear foot threshold applies to intermittent waters, and the cost of stream mitigation encourages avoidance and minimization efforts.

When Norfolk District staff evaluates proposed ponds, they work with applicants to ensure that the pond size is the minimum required to meet the project purpose, and then incorporate avoidance and minimization measures into the final design. These measures include reducing the pond size, siting them in upper reaches of streams instead of further down in the systems, and maintaining flows at the outlet end of any in-stream ponds. After avoidance and minimization measures are incorporated, stream and/or wetland compensation may be required. Projects with more than minimal individual or cumulative impacts would not be authorized using NWP 40. The Norfolk District will not prohibit NWP 40 use in intermittent streams but will work with applicants to minimize aquatic resource impacts from pond construction.

### **2.3.7 Comments on NWP 43**

Comments Received: EPA recommends a regional condition that would exclude the use of this permit in perennial and intermittent streams.

Response: This NWP does not authorize discharges of dredged or fill material into waters of the United States for the construction of new stormwater management facilities in perennial streams.

The review of PCNs by district engineers and resource agencies for the construction of new facilities and for the undertaking of certain maintenance activities combined with the ½-acre limit of losses of waters of the United States and mitigation requirements, will ensure that activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects.

Excluding use of this NWP in perennial and intermittent streams would disallow certain critical maintenance activities including upgrades and retrofits in existing stormwater management facilities that could result in reduced water quality.

Rather than limit the use of this NWP to ephemeral streams only, case by case reviews of PCNs as required, will ensure that activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. Therefore, the Norfolk District does not believe it is necessary to limit this NWP to only ephemeral streams.

### **2.3.8 Comments on NWP 48**

Comment received: CBF indicated that Pennsylvania has a regional condition that requires the removal of all structures from waters of the U.S. if and when the aquaculture activity is abandoned. That is a good condition for all three states.

Response: The Norfolk District has added this regional condition: “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.”

Comment received: NMFS recommend requiring the Activity Specific Special Conditions as provided by the Norfolk District’s Regional Permit 19 (13-RP-19), Section V, 6. Aquaculture and Mariculture Activities, and Section VI: Special Conditions for Discharges. Also, we recommend that all buoys, floats, PVC pipe, equipment, gear, cages, etc. be removed by the permittee when aquaculture operations have been abandoned.

Response: The Norfolk District incorporated the relevant RP-19 conditions into the NWP regional conditions.

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 into newly colonized areas is authorized by this NWP. Information on the location of SAV beds can be found at: <http://web.vims.edu/bio/sav/maps> .

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 other 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 predatory fish. Feeding and harvesting plans 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 he/she determines 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.

### **2.3.9 Comments on NWP 53**

Comments Received: The Virginia Department of Environmental Quality (VDEQ) recognized that the ecological and safety benefits of removing "low-head" dams are well-documented and provide good support for instituting this NWP. However, classifying a dam as "low-head" is insufficient evidence that the sediments held in the lacustrine reach above the dam do not pose significant ecological threat due to contamination, should the dam removal result in a discharge of stored sediments. One definition of "low-head dam" referenced dams as high as 16 feet spanning any width stream or river could qualify for removal under the proposed NWP.

One article cited by VDEQ suggested contaminant concentrations are less likely to be any more an issue behind low-head dams than in the rest of the river because they do not store much sediment. Unfortunately, this interpretation oversimplifies the ecological risk based primarily on dam height. The potential for a low-head dam 15 feet high spanning 120 feet across a river to harbor a large volume of sediments can be substantial. If the NWP allows for this sort of removal without any additional checks, the risk of remobilizing toxic contaminants like PCBs into the river may also be substantial.

An approach whereby the risk of contaminant release is screened in the absence of actual sediment testing (i.e. a review of historic land use and upstream point sources that might indicate if sediments are contaminated, coupled with an assessment of in situ sediment quantity) and reported to the DE who would make the determination if the NWP could be applied or if an individual permit would be required instead. If an individual permit would be required, presumably sediment testing would be required and if a high risk of downstream contamination was discovered, sediment removal and appropriate land storage might be prescribed with a gradual breach approach to the dam removal.

VDEQ recommended additional language establishing criteria related to physical removal of the dam structure. Such additional criteria should include: timing and rate of the drawdown of an impoundment to avoid or minimize downstream flooding and excessive sedimentation to downstream areas, re-establishment and stabilization of the stream channel, and avoidance of other environmental impacts. Where the use of construction equipment in the stream channel is necessary, appropriate conditions limiting that use and associated impacts, such as the use of construction mats or barges, should be included as conditions in the authorization.

Accumulated sediments should be tested and disposal plans for contaminated sediments should be required, where appropriate. They suggest that such testing criteria be developed in cooperation with VDEQ and other states as a component of §401 Water Quality Certification and that regional conditions include information regarding this process. VDEQ also recommended additional clarification regarding authorization of activities related to channel re-establishment, and restoration/stabilization of stream banks and adjacent wetlands. In some instances, dam removal may necessitate active reestablishment of the stream channel and stabilization of new stream banks. Further, existing wetlands could be partially or fully drained by drawdown of the impoundment. Criteria should be established to monitor existing wetlands adjacent to the impoundment for some period of time before, during, and after the dam removal to determine if secondary impacts to wetlands occur. If secondary impacts do occur, then compensatory mitigation for these impacts may be required.

Finally, where there are competing uses of the waterbody above the dam, additional input through a public notice may be appropriate. Notification to downstream property owners who hold riparian rights, stream users, and appropriate agencies regarding the release of water and sediment during the drawdown should also be considered to avoid property damage or hazards to those using the stream for recreational purposes.

Response: This NWP authorizes the removal of the low-head dam structure. It does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to restore the river or stream channel or its riparian areas after the low-head dam is removed. The restoration of the river or stream channel and associated riparian areas may be authorized by NWP 27, if the project proponent wants to do restoration work beyond removing the low-head dam. The

project proponent may also choose to allow the river or stream and its riparian areas to recover through natural processes.

In addition, the Regional Conditions will require that the following information related to physical removal of the dam structure be included in the PCN:

1. Timing and rate of the drawdown of the impoundment to avoid and minimize downstream flooding and excessive sedimentation to downstream areas.
2. Method of re-establishment and stabilization of the stream channel, and avoidance of other environmental impacts, including the potential for drainage of adjacent wetlands.
3. Construction equipment to be used in the stream channel and appropriate measures that will be taken, such as the use of construction mats or barges, to minimize impacts.
4. Information sufficient to ensure that accumulated sediments are free from contaminants and are disposed of properly. If testing is required, the testing criteria shall be developed in cooperation with Virginia Department of Environmental Quality.
5. Information concerning competing uses of the waterbody above the dam if the impoundment is not fully owned by the applicant.

Comments Received: National Marine Fisheries Service indicated that since there is no acreage limit on activities authorized by NWP 53, which may impact NOAA Fisheries resources, they recommend coordination of the PCN for all projects in tidal waters.

Response: NWP 53 requires a PCN for all activities. As required under general condition 32 (d) agency coordination is required for all activities that require a PCN and result in the loss of greater than ½ acre of waters of the U.S. In addition, the Norfolk District project managers follow the ESA Review Process and will coordinate with the NMFS when proposed projects may potentially affect EFH or other species of concern as required under the MSA.

### **2.3.10 Comments on NWP 54**

Comment received: NMFS recommend requiring the Activity Specific Special Conditions as provided by the Norfolk District's Regional Permit 19 (13-RP-19), Section V, 1. Living Shorelines Group 1: Non-Structural Activities, Section V, 2. Living Shorelines Group 2: Sill with Tidal Marsh.

Response: All activity-specific special conditions in the Regional Permit 19, activities 1 and 2, are included in the NWP 54 regional conditions.

The following conditions were added:

1. This activity authorizes the placement of sandy fill material, including the placement of sandy fill material landward of the sills provided the fill is for erosion control and/or wetland enhancement (and not solely recreational activities). The maximum fill area within waters of the United States that can be authorized under this NWP is one (1) acre. For the purpose of this NWP, a sill is defined as a low, detached structure constructed near shore and parallel to the shoreline for the purpose of building up an existing beach by trapping and retaining sand in the littoral zone. Because a sill acts like a natural bar, it is most effective when constructed at or near the mean low water line and low enough to allow wave overtopping.
2. The grain size of the source material used for fill must be quality beach sand that is the same size or larger than that of the native beach material and suitable for the proposed project. Excess silt/clay fraction and grain sizes slightly smaller than the former native sands will perform poorly. In most cases, sand material with no more than 10% passing a #100 sieve will be appropriate. All material will be obtained from either an upland source, a borrow pit, or dredge material approved by the Corps.
3. Coir logs, coir mats, and native oyster shell should be of sufficient weight, adequately anchored, or placed in a manner to prevent them from being dislodged and carried away by wave action.
4. Sills may be constructed of riprap, gabion baskets, or clean broken concrete free of metal and re-bar. Alternative materials may be considered for use during the permit review process. The materials should be of sufficient weight or adequately anchored to prevent them from being dislodged and carried away by wave action. Asphalt and materials containing asphalt or other toxic substances shall not be used in the construction of sills.
5. Sills will be designed with at least one 5 foot window/gap per property and per 100 linear feet of sill unless waived by the District Engineer.
6. The sill height should be a maximum of +1 foot above mean high water and should be placed at a distance no greater than 30 feet from mean low water to the landward side of the sill unless waived by the District Engineer.
7. The total amount of vegetated wetlands which may be filled, graded, or excavated, in square feet, may not exceed the length of the activity along the shoreline in linear feet unless the District Engineer waives this criterion by making a written determination concluding that the project will result in minimal adverse effects. All impacts to sub-tidal, inter-tidal, and/or existing wetland vegetation may require a wetland vegetation planting plan and must result in no net loss of vegetated wetlands.



8. If the proposed project results in impacts to existing wetland vegetation, then a written monitoring report may be required at the end of the first full growing season following planting, and after the second year of establishment. If required, the monitoring should be undertaken between June and September of each year and should include at a minimum: the project location, the Corps project number, representative photos of the site, and a brief statement on the success of the project.

9. As the design of a living shoreline project is site specific, it is suggested that the applicant refer to the Virginia Institute of Marine Sciences Living Shoreline Design Guidelines for Shore Protection in Virginia's Estuarine Environments and other reference documents which can be found at:

<http://ccrm.vims.edu/livingshorelines/agencies/index.html>

10. The District Engineer will require an individual Department of the Army permit for any project which he/she determines to have greater than minimal individual or cumulative impacts.

11. Projects which include placement of sandy fill material may result in creation of suitable habitat for various federally listed threatened or endangered species. If this occurs and the applicant seeks to either add to or replenish the area previously filled, the Corps will consult with the U.S. Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Act to ensure work is not likely to adversely affect proposed or listed species or proposed or designated critical habitat. Specific requirements on the type of sand allowed for beach and dune work may be required.

Comment received: NMFS recommend requiring RP 19 Section VI: Special Conditions for Discharges to NWP 54.

Response: All conditions within Section VI of the RP 19 are covered in the nationwide permit general conditions and regional conditions. See general conditions 6,7,9 and 19, and regional conditions 1,2,6 and 11.

### **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 counties 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**

As discussed in Section 2.3, EPA recommended a regional condition that would put limits on the use of waivers and a cap on the amount of impacts allowed and EPA recommended that the NPWs be regionally conditioned to require mitigation for stream impacts that receive a waiver over the 300 linear foot threshold. The Norfolk District determined that placing a cap on the amount of impacts would not be necessary to ensure that the NWP's were not having more than minimal impacts. Each of these projects are reviewed on a case-by-case basis to ensure that impacts are not more than minimal. Norfolk District has added regional condition 10 that requires submission of a mitigation plan if the project results in a permanent loss of greater than 300 linear feet of waters of the United States. This condition will also encourage applicants to minimize their impacts.

EPA recommended that NWP 40 not be used in intermittent waters, that this NWP be conditioned such that the pond is the minimum size required for farm use, and that the size of in-stream ponds be avoided to the maximum practicable extent. Norfolk District has determined that intermittent stream impacts are generally minimal in nature and the Norfolk District will not exclude intermittent waters from NWP 40. Also, the 300 linear foot threshold applies to intermittent waters, and the cost of stream mitigation encourages avoidance and minimization efforts. When Norfolk District staff evaluates proposed ponds, they work with applicants to ensure that the pond size is the minimum required to meet the project purpose, and then incorporate avoidance and minimization measures into the final design. These measures include reducing the pond size, siting them in upper reaches of streams instead of further down in the systems, and maintaining flows at the outlet end of any in-stream ponds. After avoidance and minimization measures are incorporated, stream and/or wetland compensation may be required. Projects with more than minimal individual or cumulative impacts would not be authorized using NWP 40. The Norfolk District will not prohibit NWP 40 use in intermittent streams but will work with applicants to minimize aquatic resource impacts from pond construction.

EPA recommended a regional condition that would exclude the use of NWP 43 in perennial and intermittent streams. NWP 43 does not authorize discharges of dredged or fill material into waters of the United States for the construction of new stormwater management facilities in perennial streams. The review of PCNs by district engineers and resource agencies for the construction of new facilities and for the undertaking of certain maintenance activities combined with the ½-acre limit of losses of waters of the United States and mitigation requirements, will ensure that activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. Excluding use of this NWP in perennial and intermittent streams would disallow certain critical maintenance activities including upgrades and retrofits in existing stormwater management facilities that could result in reduced water quality. Rather than limit the use of NWP 43 to ephemeral streams only, case by case reviews of PCNs as required, will ensure that activities authorized by this NWP will result in no

more than minimal individual and cumulative adverse environmental effects. Therefore, the Norfolk District does not believe it is necessary to limit NWP 43 to only ephemeral streams.

### **3.3 Other Regional Conditions**

As discussed in Section 2.3, EPA recommended a regional condition for NWP 33 that would require that any activity in wetlands require the use of construction pads, timber matting, and/or geotextile fabric to prevent compaction of wetland systems as a result of the construction and/or access. The Norfolk District determined that the use of timber mats (or equivalent) in waters of the U.S. is considered a best management practice, which may further minimize the adverse effects of activities authorized by the NWPs. While NWP 33 does not specifically require the use of timber mats, construction pads, or geotextile fabric, these BMPs are routinely used for activities authorized under NWP 12 and NWP 3, as well as NWP 33. NWP 33 authorizes temporary construction impacts, and is often used in conjunction with other NWPs. The District Engineer has the option to require the use of timber mats and other access BMPs through permit conditions if he determines that their use will further minimize construction impacts to waters of the U.S. In response to other comments from EPA, Norfolk District developed Regional Condition 11, which requires that soils in temporarily impacted areas to be mechanically loosened to a depth of 12 inches and then stabilized with native vegetation. This practice may need to occur even if construction pads, timber matting, and/or geotextile fabric was used. Due to the reasons discussed above, the Norfolk District does not believe that a regional condition requiring an applicant to use construction pads, timber matting, and/or geotextile fabric in all cases is necessary.

## **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 database-CorpsMap, 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 NMFS 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 may issue the NWP verification.

For the 2017 NWP reauthorization, Norfolk District worked with NOAA PRD staff to develop a Programmatic Consultation Verification Form. This is a checklist type of form that the Norfolk District project managers will use to assess potential impacts to NOAA-listed species from various construction activities, and then to coordinate with NOAA PRD staff. To date, this form has been used for Regional Permits, but NOAA PRD staff has encouraged the North Atlantic Division (NAD) of the Corps to develop an activity-based assessment form that can be also be used to ensure compliance with the 2017 NWPs. That effort is still underway and is expected to be completed before the 2017 NWPs go into effect.

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. To date, there have been no reports of injuries or mortalities resulting from Norfolk District-authorized work under the 2012 NWPs.

#### **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 in CorpsMaps and the FWS' online "Information, Planning, and Conservation System," (IPaC), which is located at: <http://ecos.fws.gov/ipac/>. This tool is used 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 file is documented but the FWS is not notified. If a potential or documented occurrence is found, the FWS is notified by email and given 15 calendar days to respond. Project proponents using nonreporting permits also may use IPAC to determine if listed species are present. Regional condition 4 indicates that they 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.

NMFS PRD has tentatively designated five proposed rivers in the state of Virginia, which may have critical habitat for Atlantic Sturgeon. Project managers use CorpsMaps and IPAC to evaluate potential habitat, and if the work is located in water deeper than 3 feet or if the shoreline structure is more than 2 foot channelward of Mean High Water, additional coordination may be required. The project manager also includes such factors as pile size, pile installation methods, potential turbidity, and any proposed conservation measures to determine if the proposed project is “No effect” or “Not likely to adversely affect”.

If a project is NLAA, then the project manager coordinates the project with NOAA PRD staff through the expedited coordination process as outlined on the NOAA Fisheries Greater Atlantic Region website. At the encouragement of NOAA management, and in effort to streamline the permit process for NWPs and other general permits, NAD is in the process of developing a programmatic agreement which will enable the project managers to coordinate a project using a checklist form which will include a description of the work, proposed conservations, and a text box with room to provided additional project details. The final versions of the form are being reviewed by NOAA PRD.

Even after the 2017 NWPs go into effect, continued coordination will occur between NAO and the NOAA PRD. As part of the NAD work to develop its programmatic coordination form, the Norfolk District has developed its own programmatic consultation table. By using the table, the Norfolk District project managers will determine which activities may result in “no effect” determinations. By implementing various conservation measures, the project managers may also be able to use the NAD regional consultation form to coordinate with NOAA PRD staff to determine if a particular project is “not likely to adversely affect” a listed species.

The proposed critical habitat areas and rivers for the Atlantic sturgeon (Chesapeake Bay Distinct Population Segment) may be refined within the next year. As these critical habitat areas are better defined, further coordination, including permit conditioning with the implementation of effective conservation measures, will also take place.

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

### **5.1 General Considerations**

The Norfolk District Regulatory Branch ensures that activities authorized by NWP 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

Section 106 of the National Historic Preservation Act (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 June, 2014 in consultation with VDHR when we finalized our most current Standard Operating Procedures (SOP) with VDHR. The Norfolk District is in the process of consultation 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 back in 1996, and most recently updated in June 2014. 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 personnel search the V-CRIS using the project site locational information. In addition, the V-CRIS database has been incorporated in the District GIS system (CorpsMaps). This ensures that all available information is being used in Norfolk District's decision making process. If known historic resources are on the project site or are within the visual effects Area of Potential Effects (APE), then further coordination with VDHR is initiated. Coordination for the NHPAs is discussed in the next section. In addition, specific procedures and a template letter are in place for coordinating with ACHP when an adverse effect finding is made.

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. In addition, the Norfolk District conducts preapplication site visits/meetings for many projects and a review of historic properties through a GIS and/or V-CRIS search is conducted. The project proponent is advised 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 preconstruction notifications for activities that may have the potential to cause effects to historic properties. Project proponents 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

preconstruction notification, requests information about known historic properties in question number 8, "Historic Resources Information". 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 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 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, local procedures for coordinating with VDHR are implemented. Project managers determine the Corps' permit area for the project and then determine, through review of the District GIS database and/or the VDHR's Data Sharing System (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 list of NWPs, which meet the Streamlined Review criteria is currently under review by VDHR, due to the changes to the NWPs.

When coordination is required, the Norfolk District PM submits coordination to VDHR through the ePIX web portal at <http://apps.cao.virginia.gov/epix>. 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 PM completes the on-line form, which includes the project description, and information about historic properties and uploads any relevant documents. The PM 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 PM must also notify the applicant that he/she

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 PM makes a determination 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 PM documents the file as appropriate. For projects, which require the identification of historic properties, reports of archeological and architectural surveys conducted by applicants are coordinated with the VDHR for review and comment. For projects with adverse effects, ACHP is notified to determine their participation. A public notice or announcement in a local newspaper provides an opportunity for public participation in the Section 106 process. The PM 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 particular 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 the 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 March 10, 2016, the Deputy Commanding General for Civil and Emergency Operations issued guidance for conducting government-to-government consultation with tribes on the proposed 2017 NWPs. The Norfolk District consulted with certain tribes, as discussed below, to initiate consultation on the 2017 NWPs, 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.

The Norfolk District Regulatory Branch’s territory includes the Commonwealth of Virginia. Only the Pamunkey Tribe has tribal lands within Virginia, and the tribe very recently received recognition as a Federally Recognized Tribe in January, 2016. The Norfolk District Commander sent a letter to the Chief of the Pamunkey Tribe on May 31, 2016 regarding the reissuance of the Nationwide Permits, and providing information on



the proposed changes to the NWP's and a copy of the proposed draft regional conditions. This letter was a follow-up to a more general letter to the tribe dated March 4, 2016 which congratulated the Tribe on gaining Federal recognition and expressed the Commander's interest in arranging a face-to-face meeting with the tribe. The May 31, 2016 letter requested the Pamunkey Tribe to advise if they were interested in consulting on the NWP's, the extent to which the Tribe wished to participate, and how best to address tribal rights and resources. Robert Gray, the Chief of the Pamunkey Tribe, responded in a letter dated June 5, 2016. The letter declined a meeting, and indicated that the tribe was relying on volunteer labor to address the overwhelming number of issues and consultation/meeting requests they had received since receiving Federal recognition. The letter asked that our office keep the Pamunkey Tribe informed of issues we believe would be pertinent so that the tribe could evaluate and choose which issues they are able to address.

Although only the Pamunkey Tribe has tribal lands, other Federally recognized Tribes, which consider portions of Virginia within their aboriginal lands, have occasionally expressed an interest in consultation for some projects in some areas of Virginia. As other districts coordinated with these tribes for the overall NWP's, the Norfolk District sent a copy of the June 13, 2016 NWP Regional Conditions public notice to 18 Tribes. The notice was mailed to the tribes on June 14, 2016. The 18 Tribes which received the notice included:

Pamunkey Tribe  
Absentee-Shawnee Tribe of Indians of Oklahoma  
Catawba Indian Nation  
Cherokee Nation  
Delaware Nation, Oklahoma  
Delaware Tribe of Indians  
Eastern Band of Cherokee Indians  
Eastern Shawnee Tribe of Oklahoma  
Oneida Nation of New York  
Oneida Tribe of Indians of Wisconsin  
Onondaga Nation  
Saint Regis Mohawk Tribe  
Seneca Nation of Indians  
Seneca-Cayuga Nation  
Shawnee Tribe  
Tonawanda Band of Seneca  
Tuscarora Nation  
United Keetoowah Band of Cherokee Indians in Oklahoma

The Norfolk District did not receive any comments from any tribe, other than the response from the Pamunkey Tribe, as noted above. No tribe has commented on our regional conditions, recommended suspension or revocation of NWP's in specific geographic areas, or suggested the development of coordination or consultation procedures for NWP PCNs. For specific NWP PCNs, on a case-by case basis,

consultation with affected tribes will be conducted when the proposed NWP activity is determined to have more than minimal adverse effects to tribal rights, protected tribal resources, or tribal lands.

## **6.2 Local Operating Procedures for Protecting Tribal Rights, Tribal Trust Resources, and Tribal Lands**

As noted above, the only Tribal Lands within the Norfolk District belong to the Pamunkey Tribe. The Norfolk has consulted with the tribe, including a face-to-face meeting on October 31, 2016 between the Chief of the Pamunkey and several Tribal Council members, and the Norfolk District Commander, the District Tribal liaison, and Regulatory staff. The Pamunkey Tribe recently gained Federal recognition and is working to obtain funding to hire paid staff for Section 106 consultations, along with other tribal matters. In the interim, the Norfolk District, after discussions with the Pamunkey Tribe and VDHR, has developed interim guidance for staff regarding consultation with the Tribe (dated September, 2016). The consultation guidance outlines specific localities where the Pamunkey Tribe may be interested and certain situations of potential interest to the tribe, such as Native American (prehistoric) archeological sites. The guidance further recommends coordination with the District tribal liaison. The interim consultation guidance is a living document which will be revisited once the tribe is in a better position to address consultation protocol.

For other Federally recognized Tribes, on June 21, 2016, the Norfolk District sent letters to 17 Federally recognized Tribes outside the state of Virginia. The letters discussed the programs within the Norfolk District (including Regulatory), and referenced the June 13, 2016 public notice on the regional conditions which was mailed to all of these tribes. A pamphlet about the Norfolk District Regulatory program was provided in the letter to the tribes. The letter requested the tribes contact the District Tribal Liaison if they had an interest in any of our programs. At this time, no responses have been received for any of the tribes. However, the district will continue consultation with these tribes to determine their interest in consultation with the Norfolk District. For specific NWP PCNs, on a case-by case basis, consultation with affected tribes will be conducted when the proposed NWP activity is determined to have more than minimal adverse effects to tribal rights, protected tribal resources, or tribal lands.

## **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 a number of species and their life stages.

For activities authorized by the 2017 NWP, the Norfolk District has the responsibility to preliminarily determine if the activities of the 2017 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 (*Scophthalmus 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 2017 NWP, the Norfolk District has the responsibility to preliminarily determine if the activities of the 2017 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 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 ESA Review Process and will coordinate with the 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. NMFS has indicated that many of the existing NWP have received general concurrence, including some subject to our proposed regional conditions. They indicated that the general concurrence will continue with the proposed 2017 NWP. 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, EHF consultation with NOAA Fisheries Service, Virginia Field Office shall be initiated by contacting David O'Brien at 804-684-7828 or (david.l.o'brien@noaa.gov).

A minimum 30-day comment period is required for NMFS to review required preconstruction notifications (PCNs) under the MSA for EFH consultation procedures [50 CFR 600.920(h)(a)]. 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. However, a 15-day comment period (with the option to extend to 30-days) is typically sufficient if they determine no additional information is necessary to complete their EFH review.

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. NMFS suggested that the information should be provided to them, the applicable fishery management councils, and the public on an annual basis. During the July 14, 2016 meeting at the NMFS Sandy Hook, NJ Field Office, the North Atlantic Division (NAD) and Districts within NAD discussed the possibility of annual reporting on the NWP actions. NAD and NMFS will work 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 NWPs 21, 29, 30, 39, 40, 41, 42, 43, 46, 50, and 51 will have no effect on EFH due to the type of activity and the location where these activities occur.

## **8.0 Regional 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 10 requires a mitigation plan when a permanent loss of wetlands exceeds 1/10 acres of wetlands and/or 300 linear feet of waters of the U.S. Regional Condition 12 requires a mitigation plan for 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.

- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (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: Same as discussed in the national decision document.
- (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: In February 15, 2017, the State Water Control Board posted their notice of intent regarding Section 401 Water Quality Certification of Norfolk District's 2017 NWP's. All conditions of the 401 certification will be made part of the NWP conditions.
- (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: Same as discussed in the national decision document.
- (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. The Norfolk District ESA SOP will help ensure compliance with Section 7.
- (h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web: Notification requirements for designated trout waters and anadromous fish use areas have been incorporated as Regional Conditions. Time of year restrictions are required for certain activities to protect anadromous fish. Conditions requiring countersinking of pipes and culverts have been established to help prevent impacts to instream habitat.
- (i) Other wildlife: Same as discussed in the national decision document.
- (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. These regional conditions will help ensure that wetland impacts are not more than minimal.
  - (3) Mud flats: Same as discussed in the national decision document.
  - (4) Vegetated shallows: Notification requirements for areas that contain submerged aquatic vegetation (SAV) have been incorporated as Regional Conditions to ensure that impacts to SAV areas will not be more than minimal.
  - (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 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 38 in 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 used in the region and the quantity and quality of waters of the United States impacted as a result of the activities authorized by this NWP (see 40 CFR 230.7(b)).

Based on reported use of this NWP during the period of March 19, 2012 to December 27, 2016, the Norfolk District estimates that this NWP will be used approximately 2 times per year in Virginia, resulting in impacts to approximately 1.57 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 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, the Norfolk District estimates that 25 percent of the NWP 38 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 adverse environmental effects. The verified activities that do not require compensatory mitigation will have been determined by the Norfolk District to result in no more than minimal individual and cumulative adverse environmental effects without compensatory mitigation. During 2017-2022, the Norfolk District expects little change to the percentage of NWP 38 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.



Based on these annual estimates, the Norfolk District estimates that approximately 8 activities could be authorized over a five year period until this NWP expires, resulting in impacts to approximately 7.9 acres of waters of the United States. Approximately 0.25 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 Norfolk District encompasses the entire state of 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, it is estimated that Virginia's wetland losses totaled 63,000 acres, with the losses attributable mainly to agricultural, residential, and commercial development. The rate of wetland losses have since been reduced, primarily through state and federal regulatory protection and permitting programs. Virginia has approximately 1,000,000 acres of wetlands remaining. The amount of tidal and saltwater tidal wetlands is about 216,000 acres, with the remaining 784,000 acres nontidal wetlands (source: Water Atlas of Virginia; van der Leeden, Frits; 1993, Tennyson Press). According to DEQ figures, from July 1, 2001 to June 30, 2015, impacts to 2,523 acres of wetlands and open water and approximately 1.8 million linear feet of streams were permitted or authorized in the Commonwealth (source: VA DEQ, Office of Wetlands and Stream Protection, Virginia Water Protection Permit Program Overview, 2015; <http://deq.state.va.us/Portals/0/DEQ/Water/WetlandsStreams/revise>).

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 NWPs, 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 NWPs 14, 18, 29, 39, and 43. However, projects authorized under SPGPs may have up to one acre of impacts. NWPs 14, 29 and 39 are regionally conditioned as to not overlap with the SPGP. Standard permits (SP), which are sometimes referred to individual permits, typically authorize projects with more than one acre of impacts, or those projects which may not be authorized under NWPs, RGPs or the SPGP.

During the last five years, from March 19, 2012 through December 27, 2016, Norfolk District verified 5,089 projects using the NWPs; issued 15 LOPs; 3,265 RGPs, and 199 SPs. During the time period of June 1, 2012 through August 31, 2015 630 SPGP projects were issued. These totals show that the majority of the District's permitted projects qualified for NWPs, which typically have minimal adverse impacts to Virginia's aquatic resources. It should be noted that the acreage of impacts under the RGPs includes some fairly large environmental restoration projects, most of which were oyster reefs. These ranged up to a maximum amount of approximately 400 acres per year, depending on available funding. It should be noted that these aquatic habitat restoration projects mostly impacted subaqueous bottom, and were not wetland losses.

Permit type	Acres of Impacts Avoided	Acres of Impacts Authorized	Acres of Mitigation
NWP	25	186	88
LOP	0	3	0
RGP	2	1,008	8
SP	121	405	903
SPGP	6	119	55

The number of permitted activities during this last five year period slightly decreased due to the economic downturn which began in 2008. 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. Likewise, if the number of permits and verifications increase, the number of acreages of impacts 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.

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 300 linear feet. The District Commander can add special conditions to NWPs, 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. For creation, enhancement, and preservation, the replacement ratios are usually much higher, such as 10:1 for preservation. Stream 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 values of the impacted aquatic resource. These compensation ratios help to reduce the magnitude and significance of cumulative impacts within Virginia.

We have developed two new regional conditions that will also help ensure that impacts are compensated appropriately. Regional condition 10 specifies that a mitigation plan is required when the permanent loss of wetlands exceeds 1/10 acre and/or 300 linear feet of waters of the U.S. Regional condition 12 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.

The Norfolk District also has 79 operational mitigation banks throughout Virginia; these banks currently have 10,803 wetland credits and 219,726 stream credits available for purchase. These credits equate to 3,388 acres of wetland and 469,360 linear stream 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 can be used to 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 U.S. Fish and Wildlife Service administers a Partners Program in Virginia which fosters cooperation between its agency and private landowners. Since 1989, 9,322 acres of wetlands have been voluntarily restored, 2,692 acres have been enhanced, 1,251 acres have been established, and 7,475 acres have been protected. The Partners Program also restored 264 miles of riparian habitat, which may reduce stream erosion and enhance water quality.

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 38:**

This section includes a comprehensive list of all regional conditions that are applicable in Virginia. The following regional conditions apply to NWP 38: Section I, Regional Conditions Applicable to Multiple and/or All NWP's, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13.

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

This condition applies to: NWP's 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 and 54.

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://web.vims.edu/bio/sav/>. 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.

## **2. Conditions for Anadromous Fish Use Areas:**

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

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

Notification is required for work under NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 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.

## **4. Conditions for Federally Listed Species and Designated Critical Habitat**

For ALL NWPs, notification 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 (Service) has developed an online system that allows users to find information about sensitive resources that may occur within the vicinity of a proposed project. This system is named "Information, Planning and Conservation System," (IPaC), and is located at: <http://ecos.fws.gov/ipac/> . The applicant may use IPaC to determine if any federally listed species or designated critical habitat may be affected by their proposed project. If your Official Species List from IPaC identifies any federally listed endangered or threatened 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 listed 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 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.greateratlantic.fisheries.noaa.gov/protected/index.html> .

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>

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

Any work proposed in critical habitat, as designated in regional condition 4, requires a PCN.

#### **6. Conditions for Designated Trout Waters:**

Notification is required for work in the areas listed below for NWP's 3, 4, 5, 6, 7, 12, 13, 14, 16, 17, 18, 19, 21, 23, 25, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, and 54.

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

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

- 1) Potomac-Shenandoah River Basins

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

VDGIF recommends the following time-of-year restrictions (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's listed above, which would occur in the designated waterways or adjacent wetlands of the specified counties, requires notification to the appropriate Corps of Engineers field office, and written approval from that office prior to performing the work. The Norfolk District recommends that prospective permittees first contact the 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. The notification must be in writing and include the following information (the standard Joint Permit Application may also be used):

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

When all required information is received by the appropriate field office, the Corps will notify the prospective permittee within 45 days whether the project can proceed under the NWP or whether an individual permit is required. If, after reviewing the PCN, the District Commander determines that the proposed activity would have more than minimal individual or cumulative adverse impacts on the aquatic environment or otherwise may be contrary to the public interest, then he/she will

either condition the nationwide permit authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the activity is not authorized by the NWP and provide instructions on how to seek authorization under an individual permit. If the prospective permittee is not notified otherwise within the 45-day period, the prospective permittee may assume that the project can proceed under the NWP.

## 7. Conditions Regarding Invasive Species

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

## 8. Conditions Pertaining to Countersinking of Pipes and Culverts

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, and 52.

**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: Following consultation with the Virginia Department of Game and Inland Fisheries (VDGIF), the Norfolk District has determined that fish and other aquatic organisms are most likely present in any stream being crossed, in the absence of site-specific evidence to the contrary. Although prospective permittees have the option of providing such evidence, extensive efforts to collect such information is not encouraged, since countersinking will in most cases be required except as outlined in the conditions below. The following conditions will apply in nontidal waters:

- a. All pipes: All pipes and culverts placed in streams will be countersunk at both the inlet and outlet ends, unless indicated otherwise by the Norfolk District on a case-by-case basis (see below). Pipes that are 24" or less in diameter shall be countersunk 3" below the natural stream bottom. Pipes that are greater than 24" in diameter shall be countersunk 6" below the natural stream bottom. The countersinking requirement does not apply to bottomless pipes/culverts or pipe arches. All single pipes or culverts (with bottoms) shall be depressed (countersunk) below the natural streambed at both the inlet and outlet of the



structure. In sets of multiple pipes or culverts (with bottoms) at least one pipe or culvert shall be depressed (countersunk) at both the inlet and outlet to convey low flows.

- 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. Exemption for extensions and certain maintenance: The requirement to countersink does not apply to extensions of existing pipes or culverts that are not countersunk, or to maintenance to pipes/culverts that does not involve replacing the pipe/culvert (such as repairing cracks, adding material to prevent/correct scour, etc.).
- d. Floodplain pipes: The requirement to countersink does not apply to pipes or culverts that are being placed above ordinary high water, such as those placed to allow for floodplain flows. The placement of pipes above ordinary high water is not jurisdictional (provided no fill is discharged into wetlands).
- e. Hydraulic opening: Pipes should be adequately sized to allow for the passage of ordinary high water with the countersinking and invert restrictions taken into account.
- f. Pipes on bedrock or above existing utility lines: Different procedures will be followed for pipes or culverts to be placed on bedrock or above existing buried utility lines where it is not practicable to relocate the lines, depending on whether the work is for replacement of an existing pipe/culvert or a new pipe/culvert:
  - i. Replacement of an existing pipe/culvert: Countersinking is not required provided the elevations of the inlet and outlet ends of the replacement pipe/culvert are no higher above the stream bottom than those of the existing pipe/culvert. Documentation (photographic or other evidence) must be maintained in the permittee's records showing the bedrock condition and the existing inlet and outlet elevations. That documentation will be available to the Norfolk District upon request, but notification or coordination with the Norfolk District is not otherwise required.
  - ii. A pipe/culvert is being placed in a new location: If the prospective permittee determines that bedrock or an existing buried utility line that is not practicable to relocate prevents countersinking, he/she should evaluate the use of a bottomless pipe/culvert, bottomless utility vault, span

(bridge) or other bottomless structure to cross the waterway, and also evaluate alternative locations for the new pipe/culvert that will allow for countersinking. If the prospective permittee determines that neither a bottomless structure nor an alternative location is practicable, then he/she must submit a pre-construction notification (PCN) to the Norfolk District in accordance with General Condition 32 of the NWPs. In addition to the information required by General Condition 32, the prospective permittee must provide documentation of measures evaluated to minimize disruption of the movement of aquatic life as well as documentation of the cost, engineering factors, and site conditions that prohibit countersinking the pipe/culvert. Options that must be considered include partial countersinking (such as less than 3" of countersinking, or countersinking of one end of the pipe), and constructing stone step pools, low rock weirs downstream, or other measures to provide for the movement of aquatic organisms. The PCN must also include photographs documenting site conditions. The prospective permittee may find it helpful to contact the regional fishery biologist for the VDGIF, for recommendations about the measures to be taken to allow for fish movements. When seeking advice from VDGIF, the prospective permittee should provide the VDGIF biologist with all available information such as location, flow rates, stream bottom features, description of proposed pipe(s), slopes, etc. Any recommendations from VDGIF should be included in the PCN. The Norfolk District will notify the prospective permittee whether the proposed work qualifies for the nationwide permit within 45 days of receipt of a complete PCN. NOTE: Blasting of stream bottoms through the use of explosives is not acceptable as a means of providing for countersinking of pipes on bedrock.

- g. Pipes on steep terrain: Pipes being placed on steep terrain (slope of 5% or greater) must be countersunk in accordance with the conditions above and will in most cases be non-reporting. It is recommended that on slopes greater than 5%, a larger pipe than required be installed to allow for the passage of ordinary high water in order to increase the likelihood that natural velocities can be maintained. There may be situations where countersinking both the inlet and outlet may result in a slope in the pipe that results in flow velocities that cause excessive scour at the outlet and/or prohibit some fish movement. This type of situation could occur on the side of a mountain where falls and drop pools occur along a stream. Should this be the case, or should the prospective permittee not want to countersink the pipe/culvert for other reasons, he/she must submit a PCN to the Norfolk District in accordance with General Condition 32 of the Nationwide Permits. In addition to the information required by General Condition 32, the prospective permittee must provide documentation of measures evaluated to minimize disruption of the movement of aquatic life as well as documentation of the cost, engineering factors, and site conditions that prohibit countersinking the pipe/culvert. The prospective permittee should design the pipe to be placed at a slope as steep as stream characteristics

allow, countersink the inlet 3-6", and implement measures to minimize any disruption of fish movement. These measures can include constructing a stone step/pool structure, preferably using river rock/native stone rather than riprap, constructing low rock weirs to create a pool or pools, or other structures to allow for fish movements in both directions. Stone structures should be designed with sufficient-sized stone to prevent erosion or washout and should include keying-in as appropriate. These structures should be designed both to allow for fish passage and to minimize scour at the outlet. The quantities of fill discharged below ordinary high water necessary to comply with these requirements (i.e., the cubic yards of stone, riprap or other fill placed below the plane of ordinary high water) must be included in project totals. The prospective permittee may find it helpful to contact the regional fishery biologist for the VDGIF for recommendations about the measures to be taken to allow for fish movements. When seeking advice from DGIF, the prospective permittee should provide the DGIF biologist with all available information such as location, flow rates, stream bottom features, description of proposed pipe(s), slopes, etc. Any recommendations from DGIF should be included in the PCN. The Norfolk District will notify the prospective permittee whether the proposed work qualifies for the nationwide permit within 45 days of receipt of a complete PCN.

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

The permittee should anticipate whether bedrock or steep terrain will limit countersinking, and if so, should follow the procedures outlined in (g) and/or (h) above.

## 9. Conditions for the Repair of Pipes

This condition applies to: NWP 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, and 52.

**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, including Condition 9 for Management of Water Flows. In such cases, notification to the Norfolk District Commander is not required, unless specified in the NWP Conditions for other reasons, and the permittee may proceed with the work.
  - ii. Otherwise, the prospective permittee must submit a pre-construction notification (PCN) to the Norfolk District Commander prior to commencing the activity. For all such projects, the following information should be provided:
    - 1) Photographs of the existing inlet and outlet;
    - 2) A measurement of the degree to which the work will raise the invert elevations of both the inlet and outlet of the existing pipe;
    - 3) The reasons why other methods of pipe maintenance are not practicable (such as metal sleeves or a countersunk pipe replacement);
    - 4) A vicinity map showing the pipe locations.

Depending on the specific case, the Norfolk District may discuss potential fish usage of the waterway with the Virginia Department of Game and

Inland Fisheries.

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

<http://www.nao.usace.army.mil/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 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 NWP Conditions for other reasons, and the permittee may proceed with the work.

- c. If the existing pipe or at least one pipe in the 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 NWPs. The prospective permittee must apply for either a Regional Permit 01 (applicable only for VDOT projects) or an Individual Permit. However, it is anticipated that the prospective permittee will still be required to perform the work such that the waterway is not blocked or restricted more so than its current conditions.

- d. 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.

## **10. Condition for Impacts Requiring a Mitigation Plan**

When a PCN is required, a mitigation plan needs to be submitted when 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 12).

### **11. Condition for Temporary Impacts**

All temporarily disturbed waters and wetlands must be restored to their pre-construction contours within 12 months of commencing the temporary impacts' construction. Impacts that will not be restored within 12 months (calculated from the start of the temporary impacts' construction) will be considered permanent, unless otherwise approved by the Corps, and mitigation may be required. Once restored to their natural contours, soil in these areas must be mechanically loosened to a depth of 12 inches and wetland areas must be seeded or sprigged with appropriate native vegetation (see Regional Condition 7 regarding revegetation).

### **12. Condition for Transportation Projects Funded in Part or in Total by 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 mitigation plan addressing the proposed compensatory mitigation.

### **13. Condition for Projects Requiring Coordination Under Section 408**

General Condition 31 of the NWP's requires that prospective permittees submit a pre-construction notification (PCN) if an 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 US Army Corps of Engineers (USACE) federally authorized civil works project. For information on the location of Norfolk District projects, prospective permittees are directed to the maps showing the locations of Norfolk District projects located 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)

If the prospective permittee is uncertain whether the proposed activity might alter or temporarily or permanently occupy or use a Norfolk District federally authorized civil works project, the prospective permittee shall submit a PCN.

## **II. REGIONAL CONDITIONS APPLICABLE TO SPECIFIC NWPS:**

### **NWP 5 - Scientific Measurement Devices**

#### **Condition for Construction or Installation of Subaqueous Turbines:**

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

### **NWP 7 - Outfall Structures and Associated Intake Structures**

#### **Conditions for Intakes in Anadromous Fish Waters:**

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

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

### **NWP 10 - Mooring Buoys**

#### **Condition for Sufficient Mooring Depths:**

Water depths in the mooring areas should be sufficient that vessels moored float at all stages of the tide. Boats should not hit bottom during low water conditions. The swing radius of the vessel plus the mooring chain should not result in the vessel becoming an obstruction to navigation. Use of this NWP is prohibited in and around SAV beds. Information about SAV habitat can be found at the Virginia Institute of Marine Science's website <http://web.vims.edu/bio/sav/>.

### **NWP 11 - Temporary Recreational Structures**

#### **Condition for Sufficient Mooring Depths:**

Water depths in the mooring areas should be sufficient that structures moored float at all stages of the tide or stoppers must be utilized to prevent the structures from

resting on the bottom, so as to not damage the underlying benthic communities. Structures should not hit bottom during low water conditions. Use of this NWP is prohibited in and around SAV beds. Information about SAV habitat can be found at the Virginia Institute of Marine Science's website <http://web.vims.edu/bio/sav/>.

## **NWP 12 - Utility Line Activities**

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

1. Construction of access roads may not result in more than 1/3 acre of impacts to waters of the United States.
2. A PCN is required for discharges associated with the construction of utility line substations that result in the permanent loss of greater than 5000 square feet of waters of the United States.
3. For utility activities requiring a PCN the prospective 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 alternatives analysis, 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 Channel and at least three (3) feet below the bottom depth in all subaqueous areas. When circumstances prevent the placement of at least three feet of cover over the line (outside of the Federal Navigation Channel), then written justification and an alternative method must be provided with the notification and the deviation must be reviewed and approved by the Corps. 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. 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 District Commander or his authorized representatives if the material is to be stockpiled longer than 30 days.
6. When open-cut trenching in designated anadromous fish use areas or hydrostatic testing of a pipeline involving water withdrawals from tidal waters are proposed, the Corps will coordinate with the NOAA Fisheries Service and/or the Virginia Department of Game and Inland Fisheries. Written verification from this office must be received before performing the proposed work. 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.

**NWP 14-Linear Transportation Projects**  
**Restricted use of NWP 14 Linear Transportation Projects in Nontidal Waters**

A portion of NWP 14 overlaps with the current State Program General Permit (SPGP-01); therefore, NWP 14 may not be used for projects impacting Section 404 only, nontidal waters of the United States, including wetlands within the Norfolk District. NWP 14 may still be used for projects impacting tidal waters of the United States and other nontidal, Section 10 waters of the United States.

### **NWP 23 - Approved Categorical Exclusions Conditions Specific to NWP 23:**

1. The use of this NWP applies to an entire project addressed in the Categorical Exclusion prepared by another Federal agency. This NWP cannot be used separately at individual crossings/impact areas of a single project. However, multiple crossings/impact areas of a single project can be authorized by this NWP provided the combined impacts of all crossings/impact areas do not exceed the thresholds described below. This NWP cannot be used in combination with other NWPs for a single project.
2. Discharges from an entire project must not cause a combined permanent loss of greater than ½ acre of wetlands or 1,000 linear feet of stream.
3. The prospective permittee must notify the District Commander, via a pre-construction notification (PCN) if there is a discharge in special aquatic sites, including wetlands, and/or resulting in combined impacts to more than 300 linear feet of streambed resulting from the entire project (send notification to the Norfolk District Corps of Engineers, Regulatory Branch, 803 Front St., Norfolk, VA 23510-1096) or email to [CENAO.REG\\_ROD@usace.army.mil](mailto:CENAO.REG_ROD@usace.army.mil) Written verification from this office must be received before performing the proposed work. The PCN must be in writing and include the information shown in general condition 32 of the NWPs or use the Joint Permit Application. The Virginia Department of Transportation may use their application form.
4. To ensure that permanent losses of waters of the United States do not result in more than minimal adverse effects to the aquatic environment, compensation will be required for all wetland impacts and for any single impact to a stream of greater than 300 linear feet. For projects where the combined impacts to streams due to the entire project exceed 300 linear feet, but no single impact exceeds 300 linear feet, the Corps will determine on a case-by-case basis whether compensation for stream impacts is required.

### **NWP 27-Aquatic Habitat Restoration, Establishment, and Enhancement Activities**

1. For all projects proposing stream restoration, when notification is required proponents must provide a completed Natural Channel Design Review Checklist and

Selected Morphological Characteristics form, including the name and location of the reference reach. These forms and the associated manual can be located at: <https://www.fws.gov/chesapeakebay/StreamReports/NCD%20Review%20Checklist/Natural%20Channel%20Design%20Checklist%20Doc%20V2%20Final%2011-4-11.pdf>.

2. Proponents must provide a monitoring plan in accordance with the 401 certificate conditions for NWP 27.

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

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

### **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 if the SPGP-01 is applicable. However, if the SPGP-01 is not applicable, then NWP 39 may be considered.

### **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 into newly colonized areas is authorized by this NWP. Information on the location of SAV beds can be found at: <http://web.vims.edu/bio/sav/maps> .

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 other 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 predatory fish. Feeding and harvesting plans 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 he/she determines 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.

### **NWP 51-Land-Based Renewable Energy Generation Facilities**

If aerial transmission lines crossing navigable waters are proposed, please see NWP 12 Condition number 7.

### **NWP 52-Water-Based Renewable Energy Generation Pilot Projects**

If aerial transmission lines crossing navigable waters are proposed, please see NWP 12 Condition number 7.

### **NWP 53-Removal of Low-Head Dams**

The following information related to physical removal of the dam structure should be included in the PCN:

1. Timing and rate of the drawdown of the impoundment to avoid and minimize downstream flooding and excessive sedimentation to downstream areas.
2. Method of re-establishment and stabilization of the stream channel, and avoidance of other environmental impacts, including the potential for drainage of adjacent wetlands.
3. Construction equipment to be used in the stream channel and appropriate measures that will be taken, such as the use of construction mats or barges, to minimize impacts.

4. Information sufficient to ensure that accumulated sediments are free from contaminants and are disposed of properly. If testing is required, the testing criteria shall be developed in cooperation with Virginia Department of Environmental Quality.
5. Information concerning competing uses of the waterbody above the dam if the impoundment is not fully owned by the applicant.

### **NWP 54-Living Shorelines**

1. This activity authorizes the placement of sandy fill material, including the placement of sandy fill material landward of the sills provided the fill is for erosion control and/or wetland enhancement (and not solely recreational activities). The maximum fill area within waters of the United States that can be authorized under this NWP is one (1) acre. For the purpose of this NWP, a sill is defined as a low, detached structure constructed near shore and parallel to the shoreline for the purpose of building up an existing beach by trapping and retaining sand in the littoral zone. Because a sill acts like a natural bar, it is most effective when constructed at or near the mean low water line and low enough to allow wave overtopping.
2. The grain size of the source material used for fill must be quality beach sand that is the same size or larger than that of the native beach material and suitable for the proposed project. Excess silt/clay fraction and grain sizes slightly smaller than the former native sands will perform poorly. In most cases, sand material with no more than 10% passing a #100 sieve will be appropriate. All material will be obtained from either an upland source, a borrow pit, or dredge material approved by the Corps.
3. Coir logs, coir mats, and native oyster shell should be of sufficient weight, adequately anchored, or placed in a manner to prevent them from being dislodged and carried away by wave action.
4. Sills may be constructed of riprap, gabion baskets, or clean broken concrete free of metal and re-bar. Alternative materials may be considered for use during the permit review process. The materials should be of sufficient weight or adequately anchored to prevent them from being dislodged and carried away by wave action. Asphalt and materials containing asphalt or other toxic substances shall not be used in the construction of sills.
5. Sills will be designed with at least one 5 foot window/gap per property and per 100 linear feet of sill unless waived by the District Engineer.
6. The sill height should be a maximum of +1 foot above mean high water and should be placed at a distance no greater than 30 feet from mean low water to the landward side of the sill unless waived by the District Engineer.

7. The total amount of vegetated wetlands which may be filled, graded, or excavated, in square feet, may not exceed the length of the activity along the shoreline in linear feet unless the District Engineer waives this criterion by making a written determination concluding that the project will result in minimal adverse effects. All impacts to sub-tidal, inter-tidal, and/or existing wetland vegetation may require a wetland vegetation planting plan and must result in no net loss of vegetated wetlands.

8. If the proposed project results in impacts to existing wetland vegetation, then a written monitoring report may be required at the end of the first full growing season following planting, and after the second year of establishment. If required, the monitoring should be undertaken between June and September of each year and should include at a minimum: the project location, the Corps project number, representative photos of the site, and a brief statement on the success of the project.

9. As the design of a living shoreline project is site specific, it is suggested that the applicant refer to the Virginia Institute of Marine Sciences Living Shoreline Design Guidelines for Shore Protection in Virginia's Estuarine Environments and other reference documents which can be found at:

<http://ccrm.vims.edu/livingshorelines/agencies/index.html>

10. The District Engineer will require an individual Department of the Army permit for any project which he/she determines to have greater than minimal individual or cumulative impacts.

11. Projects which include placement of sandy fill material may result in creation of suitable habitat for various federally listed threatened or endangered species. If this occurs and the applicant seeks to either add to or replenish the area previously filled, the Corps will consult with the U.S. Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Act to ensure work is not likely to adversely affect proposed or listed species or proposed or designated critical habitat. Specific requirements on the type of sand allowed for beach and dune work may be required.

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

As of the date of this supplemental decision document, the Corps has not received certifications regarding water quality (WQC) under Section 401 of the Clean Water Act or the consistency determination (determination) under the Coastal Zone Management Act (CZMA) for this particular NWP. However, on February 15, 2017, the State Water Control Board posted their notice of intent regarding Section 401 Water Quality Certification of Norfolk District's 2017 NWPs. After the Norfolk District receives the WQC certification and CZMA determination from the respective agencies, the District will review the certification/determination and any associated conditions to assure that they are reasonably implementable or enforceable, according to 33 CFR 325.4(c). Until such



time as a WQC certification and CZMA determination is obtained, any person or entity proposing to perform work or activities pursuant to or under the authority of this NWP must obtain individual WQC and CZMA certifications before initiating work.

### **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.

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**

Water Atlas of Virginia; van der Leeden, Frits; 1993, Tennyson Press.

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

<http://deq.state.va.us/Portals/0/DEQ/Water/WetlandsStreams/revised>.