

# Appendix H

## Clean Water Act

*Draft Definite Project Report with Integrated Environmental Assessment  
Clarence Cannon National Wildlife Refuge HREP*

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## Clean Water Act Appendix H

### Section 404(b)(1) Evaluation

#### Project Description

**Location.** The Clarence Cannon National Wildlife Refuge (CCNWR) Habitat Rehabilitation and Enhancement Project (HREP) is located in Pool 25 of the Upper Mississippi River (RM 261.1-263.8) on the right descending bank, adjacent to the town of Annada, MO in Pike County. The refuge area is approximately 3,750 acres. The project area is located on land owned by the Federal Government with management responsibility provided by the U.S. Fish and Wildlife Service (USFWS).

**General Description.** The goal of this HREP is to restore and improve the quality and diversity of wetland ecosystem resources in the project area. Implementation of the tentatively selected plan would increase the quality and quantity of ecosystem resources and meet the life requisites for a diverse suite of native floodplain species. Degrading interior berms to establish larger management units will reduce habitat fragmentation. Constructing a setback will increase floodplain connectivity and provide spawning and rearing opportunities for a wide variety of aquatic life. Improving water level management capability would provide more wetland habitat, greater vegetation diversity, a reliable food supply to resident and migratory wetland species, and better means to manage for invasive plant species. Reforestation would increase wetland habitat diversity. Restoring the historic meanders would increase aquatic habitat and improve floodplain topographic diversity. The following objectives and restoration features were considered in detail to achieve the project goal:

- 1) *Restore native wetland plant communities (forest and emergent wetlands) in areas of suitable elevation, hydrology, and soil*
  - a. No Action
  - b. Setback with water control structure
  - c. Setback with partially degrade exterior berm
  - d. Notch or fully degrade or partially degrade interior berms to establish larger connected management units
  - e. Restore native hard mast trees and herbaceous vegetation
- 2) *Improve aquatic ecosystem resources*
  - a. No Action
  - b. Excavate existing water bodies and historic meanders
  - c. Setback berm with water control structure
  - d. Setback berm with partially degrade exterior berm
- 3) *Improve water drainage and delivery*
  - a. No Action
  - b. Construct new water control structures
  - c. Construct new pump station

**Authority.** The Upper Mississippi River Restoration – Environmental Management Program was authorized by Congress in Section 1103 of the Water Resources Development Act of 1986 (Public Law 99-662), as amended. The proposed project would be funded and constructed under this authorization. The CCNWR HREP has no cost sharing requirement because all project features are located on Federally owned land managed by the USFWS as a refuge.

**Purpose.** The purpose of the evaluation portion of this document is to comply with Section 404 of the Clean Water Act pertaining to guidelines for the placement of fill material into waters of the United States. This evaluation, in conjunction with the *Definite Project Report with Integrated Environmental Assessment, Upper Mississippi River Restoration Environmental Management Program, Clarence Cannon National Wildlife Refuge Habitat Rehabilitation and Enhancement Project, Pike County, Missouri* will assist in analysis of alternatives for the proposed project, resulting in a designated Tentatively Selected Plan. Additionally, this evaluation will provide information and data to the state water quality certifying agency demonstrating compliance with state water quality standards.

#### **General Description of Excavated and Fill Material.**

1. General Characteristics of Material.
  - a. *Fill Material.* Fill materials will include quarry run limestone consisting of graded “C” stone, concrete, corrugated metal culvert pipes, water control structures and earthen materials including silt, sand, and clays.
  - b. *Excavated Material.* Excavated material is defined as material that is either hydraulically dredged or mechanically excavated from waters of the United States. Earthen material excavated historic meanders will consist of alluvial sand, silt, and clay and will be beneficially reused within the site for construction of the setback.
2. Quantity of Material. An estimated 115,000 cubic yards (CY) of material will be removed to restore the historic meanders. This material will be used to construct the setback. These estimates will be confirmed prior to construction.
3. Source of Material. Stone used for the project will be obtained from commercial stone quarries in the vicinity of the project area. Concrete will be obtained commercially. Earthen embankment will be obtained onsite from borrow areas associated with excavation and or exterior berm degrade.

#### **Description of Proposed Placement Sites**

1. Location. The proposed placement sites of excavated material are located in the interior of the project area and will be used to construct the setback; shown in the Project Features Map (Figure H.1). The placement of material from the excavation of historic meanders and the exterior berm degrade will be used to construct the setback to elevation of 452.0 NGVD. The setback follows existing access routes in the refuge which minimizes impacts to habitat. Approximately 10 acres would be converted to non-wetlands due to setback construction. Temporary stabilization measures will be employed on disturbed areas of the interior berm degrades, exterior berm degrades, and the historic meanders until stabilization occurs. Stabilization practices may include mulching, temporary seeding, and or erection of silt fencing.

In summary, the beneficial reuse of recovered soil will be used in proposed project features. The placement of excavated material and exterior berm degrade material will be used to construct the setback feature. In terms of interior berm degradation, this material will be used to fill in the adjacent, no longer needed ditch and/or side cast. The mechanically excavated material from the historic meanders would be used to construct the setback feature.

2. Size and Types of Habitat. Final placement of project features will result in loss or conversion of minor amounts of natural habitat. Existing areas of cropland that are annually disturbed will be used to the greatest extent possible. Approximately 300 acres of cropland will be converted to floodplain forest through reforestation. Prior to planting, these areas may be used for excess

soil placement if required. Previously disturbed sites such as existing berms, roads, and other existing infrastructure will also be used to the greatest extent possible to avoid loss of additional natural habitat.

Temporary, short-term impacts to wetlands would result from construction activities. New water control structures will be located where existing structures will be removed or along existing berms, avoiding loss of additional natural habitat.

The location of the setback follows an existing road and berm reducing conversion of wetland to non-wetland habitat. Permanent impacts from construction activities of the setback will result in the conversion of approximately 10 acres of wetland to non-wetland habitat.

The placement of the majority of material removed for proposed project features (excavating and berm degrades) will be beneficially reused to construct the setback feature. Permanent placement of material into the construction of the setback will result in approximately 10 acres of habitat conversion.

Overall, installation and construction of the project features will cumulatively enhance the functionality of these aquatic resources, making them more predictable for refuge management.

3. Type of Site

- a. *Permanent Deposits of Excavated or Fill Material.* The construction sites for the pump station, water control structures, and setback will be impacted by permanent placement of these features.

Material excavated from the historic meanders will be used setback construction.

- b. *Temporary Deposits of Excavated or Fill Material.* Temporary cofferdams may be used in some aquatic areas to construct water control structures; however, temporary placement of fill material will be done in such a manner as to avoid and minimize impacts to wetlands and other natural features. Temporary stockpiles of material may also be necessary during construction of the various project features. Construction staging areas will be created in a logical manner that avoids impacts to wetlands.

4. Timing and Duration of Placement. Work to be performed will need to be accomplished during normal (non-flood) pool conditions. Depending on local weather and river flooding conditions, the construction period may occur over several years.

**Description of Placement Method.** Material removed from the historic meanders and the exterior berm degrade will be mechanically excavated. The excavated material will be beneficially reused to construct the setback. Minor clearing and grubbing may be required in some areas. This earthen material will be transported via construction equipment along existing access or temporary access routes to the proposed setback alignment, which is located adjacent to the agricultural field (the historic meanders are located within this field and the exterior berm degrade borders this field to the south). During plans and specifications, the exact transportation path will be determined. Bulldozers or other earth-moving equipment will be used to grade and shape the material. After the material has been placed to the desired height for the setback (452.0 NGVD 1929), the sediments would be re-graded. After all features that require earth-moving in the agricultural field have been constructed, and after all material has dried sufficiently, the field will be planted with bottomland hardwood trees.

Material excavated from the interior berm degrades will be placed on adjacent lands (sidecast) by the use of backhoes or bulldozers. The material would be placed to no more than 1-foot depth and worked into the existing soil. After the material has dried sufficiently, the area would be graded and planted with native vegetation (*Carex* spp.).

Placement of material for water control structures includes: pumps, riprap, corrugated metal culverts, and concrete would typically involve use of trucks, backhoes, and bulldozers.

## **Factual Determinations**

### **Physical Substrate Determinations**

1. Substrate Elevation and Slope. Clarence Cannon National Wildlife Refuge lies in the floodplain of the Upper Mississippi River and consists of typical alluvial material. The project area is relatively flat, with the predominant elevations ranging from 444.0 to 442.0 ft NGVD. Much of the project area is sloped no greater than 1-2%. Construction specifications are provided in the full report.
2. Sediment Type. The soil in the project area has been characterized by the Natural Resources Conservation Service, Missouri as silt loams (Blackoar, Dockery, Dupo, Moniteau, and Twomile), silty clay (Carlow), silty clay loam (Chequest), and loam, sandy substratum (Klum). The project area is located entirely in bottomland composed of alluvium. The soils on the project area are found on 0-2% slope and are occasionally to frequently flooded. Soil boring information, obtained by the project partner, which are in the vicinity of proposed project features show these soils to be high plastic clays classified as CH and are suitable for use as embankment fill.
3. Excavation/Fill Material Movement. Earthen material used for setback construction will be compacted. This material is subject to erosion but will be stabilized through the use of appropriately designed side slopes and revegetation measures. Stone riprap used in water control structures and other project features on the exterior berm have been sized to withstand the force of floodwaters, and are not expected to move. Fill not incorporated into project features would be placed in one or several borrow sites, as needed.
4. Actions Taken to Minimize Impacts. Numerous actions will be taken to avoid adverse effects of sediment related impacts. Project features will be designed with stable slopes. Earthen embankments will be properly compacted and provided with proper re-vegetation features to minimize erosion. All excavated and filled areas would be planted with suitable native vegetation as soon as possible after disturbance. Project features will be positioned to minimize impacts to forest habitats. Faunal impacts from the construction of project features would be limited to short-term disruption of the aquatic and terrestrial communities in the areas of the disturbance. Construction would be scheduled in such a way as to avoid impacting threatened and endangered species. Additionally, best management practices for construction will be enforced to minimize impact to Bryants Creek and the Mississippi River.

### **Water Circulation, Fluctuation, and Salinity Determinations**

1. Water. Excavation would temporarily reduce water quality in the adjacent area. Turbidity and sedimentation would increase. This would cease after construction completion and the improved water conveyance capacity throughout Clarence Cannon National Wildlife Refuge would benefit fish and wildlife resources long-term.
2. Current Patterns and Circulation. One of the main objectives of this project is to alter water conveyance throughout the project area. The setback area will reconnect the main channel of

the Mississippi River to its floodplain which could slightly alter circulation and flow patterns; however, these alterations are not expected to significantly change river hydraulics.

3. Natural Water Level Fluctuations. Normal water level fluctuations in the Mississippi River would be unaffected. Restoration features would not detrimentally increase flood heights or adversely affect private property or infrastructure.
4. Actions That Will Be Taken to Minimize Impacts. Best management practices for construction will be enforced.

### **Suspended Particulate/Turbidity Determinations**

1. Expected Changes in Suspended Particles and Turbidity Levels in Vicinity of Placement Site. Short-term increases in suspended particulates and turbidity due to construction activities are expected within the vicinity of the water control structures, pump station, berm degradés, setback, and excavation sites. This will cease after construction completion and the improved water conveyance throughout Clarence Cannon National Wildlife Refuge would benefit fish and wildlife resources in the long-term.
2. Effects on Chemical and Physical Properties of the Water Column.
  - a. *Light Penetration*: There will be a temporary reduction until sediments suspended as part of the project activities settle out of the water column
  - b. *Dissolved Oxygen*: No adverse effects expected.
  - c. *Toxic Metals and Organics*: No adverse effects are expected. Results of sediment sample analysis have not been received.
  - d. *Aesthetics*: Aesthetics of work sites are likely to be adversely affected during construction, but are expected to be temporary and improve after construction.
  - e. *Water Temperature*: No adverse effects expected.
3. Effects on Biota. The project would likely result in some short-term displacement of biota in the immediate vicinity of construction activities due to temporary decreases in water quality and disturbance from construction equipment. Long-term beneficial effects should occur as aquatic species, especially riverine species, benefit from improved habitat within the setback area. Bottomland hardwood forest will also benefit from the improved water conveyance throughout Clarence Cannon National Wildlife Refuge.

**Contaminant Determinations.** The project is located in the Mississippi River floodplain which is primarily natural habitat with a history of agriculture. There is little evidence that the land has been used for other purposes. The Phase I Hazardous, Toxic, and Radioactive Waste survey is currently underway. Thus far, environmental database records and historical information have been reviewed. No obvious indications of potential contamination sources or migration pathways from surrounding properties have been identified to date in connection with the project area. Initial concerns for potential recognizable environmental conditions (REC) within the project area may include the old dumpsites, the lead shot that was used previous to 1991, and the location of an old sewage lagoon. These initial concerns will be resolved once the site reconnaissance has been conducted. It does not appear that there is a risk of HTRW contamination within the project area. No chemical testing is required. These findings should be considered preliminary since the HTRW study is not yet complete.

### **Aquatic Ecosystem and Organism Determinations.**

1. Effects on Plankton. The project could have temporary adverse affects on the plankton in the immediate vicinity of the project area. This would cease after construction completion.

2. Effects on Benthos. Negative effects to benthos would be limited to elimination of those organisms currently residing in the immediate excavation sites, and water control structure sites. Benthic organisms in the immediate vicinity of sites designated for the placement of earthen material or rock for the water control structures will be lost due to burial; however the benefits gained from improved aquatic habitat, reconnecting the floodplain, and water conveyance capacity would far outweigh any loss in benefits during the time of construction.
3. Effects on Nekton. Temporary adverse effects may be experienced by free-swimming aquatic life during construction, as with the benthic community; the long-term impact would be beneficial.
4. Effects on Aquatic Food Web. Effects on the aquatic food web are expected to be beneficial overall by increasing water conveyance capacity, reconnecting the floodplain, reducing habitat fragmentation, and increasing habitat diversity which would improve the overall health and food web of Clarence Cannon National Wildlife Refuge.
5. Effects on Special Aquatic Sites. Effects on special aquatic sites should be negligible in the project area; no sanctuaries or refuges would be adversely affected by the proposed action. Project goals and features have been developed in coordination with state and federal partners. Project goals and features have been specifically chosen to match the management objectives of the U.S. Fish and Wildlife Service, and these features are expected to be enhanced by implementation of the project.
  - a. *Sanctuaries and Refuges.* The project area is located within the Clarence Cannon National Wildlife Refuge, and is managed by USFWS. The project is expected to greatly benefit migratory and resident waterfowl, fisheries, and other wetland wildlife and vegetation.
  - b. *Wetlands, Mudflats, and Vegetated Shallows.* No wetlands or mudflats, vegetated shallows, coral reefs, or riffle and pool complexes would be adversely affected over the long-term by the proposed action. Berm degradation and setback construction may extend beyond existing berm footprints, affecting existing wetland areas and open water areas; however the floodplain connectivity and reduced habitat fragmentation provided by these features offset any impacts to wetlands by construction activities. The placement of the excavated material into other project features would avoid impacts to wetlands. Project planning considered the full extent the minimization of wetland loss, and it is intended that wetland values and extent would be improved as a result of a project implementation.
6. Threatened and Endangered Species. Presence, or use by, federally endangered and threatened species is discussed in the Biological Assessment in the Definite Project Report. No adverse impacts are expected to result from this project.
7. Other Wildlife. The Project would likely result in some short-term displacement of wildlife in the immediate vicinity of construction activities. Minimizing disruption of migratory waterfowl during fall and early winter will be considered during the development of plans and specifications. Wildlife, especially waterfowl, would benefit from the increase in habitat diversity and food resources made possible through improved water conveyance capacity.

#### **Proposed Placement Site Determinations**

1. Mixing Zone Determinations. A mixing zone is that volume of water at a placement site or discharge site required to dilute contaminant concentrations associated with discharge of excavated material to an acceptable level. The concentration of sediment material associated with construction of water control structures, degradation of berms, setback, and excavation will not be high enough to require a mixing zone.

2. Determination of Compliance with Applicable Water Quality Standards. This Clean Water Act Section 404(b)(1) provides the necessary compliance required by law. Section 401 Water Quality certification in compliance with the Clean Water Act, and all other permits necessary for the completion of the project, would be obtained prior to project construction.
3. Potential Effects on Human Use Characteristics. No long-term adverse impacts to municipal and private water supplies; water-related recreation; aesthetics; or parks, national and historic monuments, national seashores, wilderness areas, research sites or similar preserves would occur. Following construction, the proposed project would enhance fish and wildlife habitat and improve the overall condition of Clarence Cannon National Wildlife Refuge.

**Determination of Cumulative Effects on the Aquatic Ecosystem.** Although minor short-term construction-related impacts to local and wildlife populations are likely to occur, no negative cumulative impacts to fish and wildlife are identified. From a systemic approach, the proposed project would result in positive long-term benefits to wetland, bottomland hardwood, and aquatic habitats located in and around CCNWR.

**Determination of Secondary Effects on the Aquatic Ecosystem.** No adverse secondary effects should result from the proposed action. Long-term benefits to aquatic habitat and wildlife are expected.

## **Findings of Compliance or Non-Compliance with the Restrictions on Discharge**

- A. No significant adaptations of the 404(b)(1) guidelines were made relative to this evaluation.
- B. Alternatives that were considered for the proposed action included fewer features than the tentatively selected plan. All feasible combinations of features (408 total alternatives; 30 cost effective alternatives; 9 best buy alternatives including the no action) were analyzed for environmental benefits and costs. The tentatively selected plan provided a large number of environmental benefits and best met project objectives and the four plan formulation criteria of completeness, effectiveness, efficiency, and acceptability.
- C. Certification under Section 401 of the Clean Water Act would be obtained from the Missouri Department of Natural Resources.
- D. The project is not anticipated to introduce toxic substances into nearby waters or result in appreciable increases in existing levels of toxic materials. The proposed activity is in compliance with Applicable Toxic Effluent Standards or Prohibitions under Section 307 of the Clean Water Act.
- E. No significant impact to Federal or state listed threatened or endangered species would result from the proposed action. Prior to construction, full compliance with the Endangered Species Act would be documented.
- F. No municipal or private water supplies would be affected by the proposed action, and no degradation of waters of the United States is anticipated to result from the proposed action. The proposed construction activity would not have a significant adverse effect on human health and welfare, recreation and commercial fisheries, plankton, fish, shellfish, wildlife, or special aquatic sites. No significant adverse effects on life stages of aquatic life and other wildlife dependent on aquatic ecosystems are expected to result. The proposed construction activity would have no significant adverse effects on aquatic ecosystem diversity, productivity, and stability. No significant adverse effects on recreational, aesthetic, and economic values would occur.

- G. The materials used for construction would be chemically and physically stable and non-contaminating.
- H. No other practicable alternative less damaging to the aquatic environment has been identified that would address the project goals and objectives better than the tentatively selected plan. The proposed action is in compliance with Section 404(b)(1) of the Clean Water Act, as amended. The proposed action would not significantly impact water quality. On the basis of the guidelines the proposed disposal site for the discharge of excavated material is specified as complying with the inclusion of appropriate and practical conditions to minimize pollution or adverse effects to the aquatic ecosystem.



Date: 11-12-13

Christopher G. Hall  
Colonel, U.S. Army  
District Commander

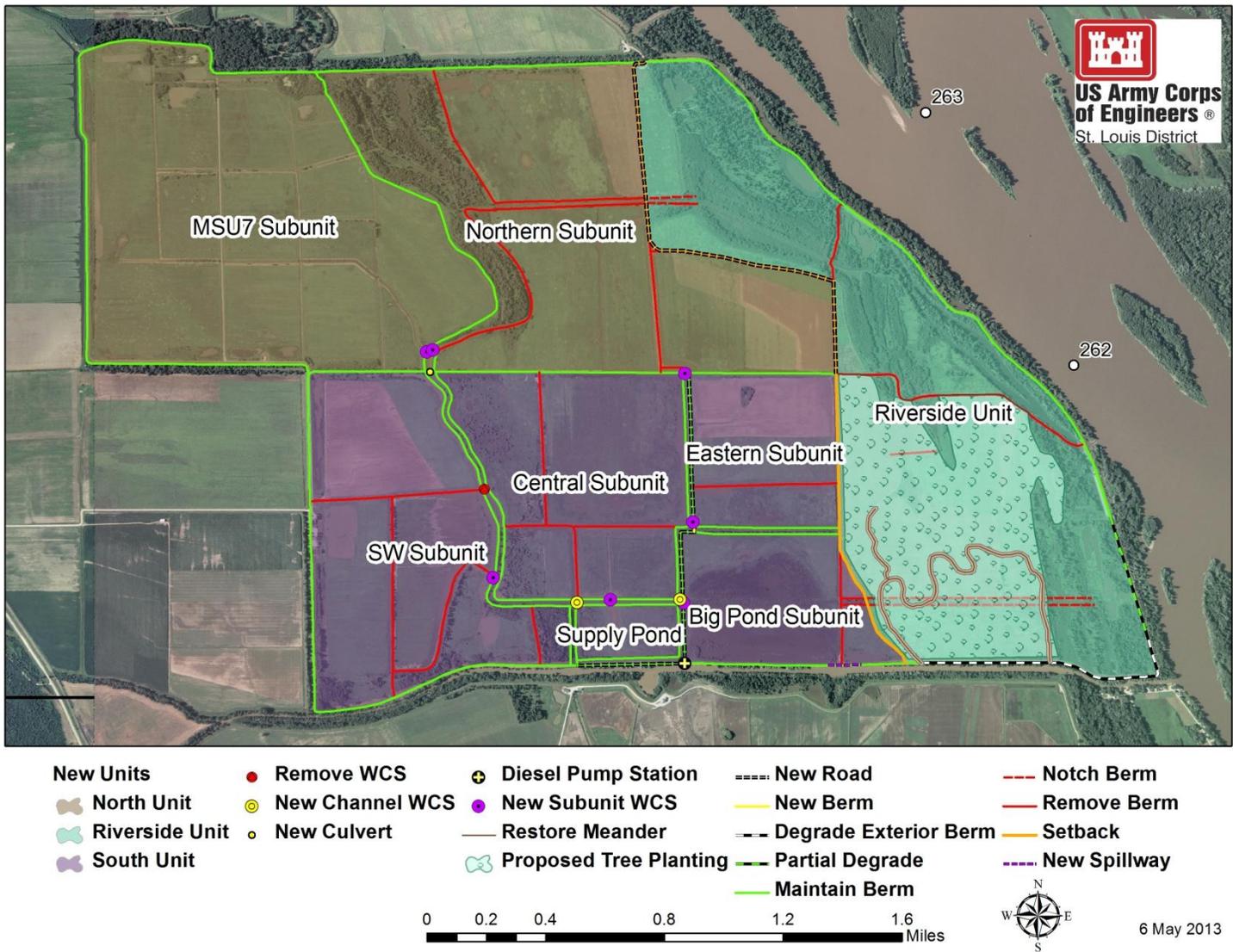


Figure H.1. Location of restoration features of the tentatively selected plan

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## **Section 404 Appendix H**

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Clarence Cannon National Wildlife Refuge HREP*

CEMVS-OD-F (1145b)

26 August 2013

File Number: MVS-2013-344

MEMORANDUM FOR CEMVP-PD-P (McCain)

SUBJECT: Clarence Cannon National Wildlife Refuge – Habitat Rehabilitation and Enhancement Project

1. The St. Louis District has considered the proposed plans for the Clarence Cannon National Wildlife Refuge (CCNWR) Habitat Rehabilitation and Enhancement Project (HREP). The goal of the HREP is to restore and improve the quality and diversity of wetland ecosystem resources. The proposed project consists of several parts. First, several existing internal levees will be degraded to combine approximately 27 small management units into 7 larger units. Notching the levees around any large trees will avoid any tree clearing during degradation. If needed, any large trees will be cleared during the winter months, between November 1 and March 31. Interior berm degradation in the northern subunit requires backfill and grading of a non-jurisdictional drainage ditch currently dividing two smaller management units. Second, the external riverside berm will be setback starting at approximately RM 261.9 to the southern part of the refuge, at RM 261.1, and adjacent to Bryants' creek. This will allow the riverside management unit to be periodically flooded naturally during a flood event. Fill material from the degradation of the management units will be used to construct the setback berm. Road gravel will not be used as fill material. Third, 10 water control structures and a diesel pump station will be installed. The diesel pump station will be constructed on a berm overbuild, requiring 0.2 acres of fill. Finally, the approximately 300 acres of the Riverside unit will be reforested and a historic meander within it will be restored. This project is considered to be self-mitigating by Regulatory Branch, St. Louis District. The Clarence Cannon National Wildlife Refuge is located on land owned by the Federal Government with management responsibility provided by the U.S. Fish and Wildlife Service (USFWS). It is located in Pool 25 of the Upper Mississippi River (RM 261.1-263.8) on the right descending bank, adjacent to the town of Annada, MO in Pike County.
2. Section 404 of the Clean Water Act assigns responsibility to the Secretary of the Army to administer a permit program to regulate the excavation or placement of dredged or fill material in waters of the United States. The excavation or placement of any dredged or fill material in waters of the United States below ordinary high water elevation or in wetlands, must be authorized by a Section 404 permit.
3. The St. Louis District has determined that this activity will have no affect on endangered species, and is authorized under Section 404 of the Clean Water Act by an existing Department of the Army General Permit Number 27 for *Aquatic Habitat Restoration, Establishment, and Enhancement Activities*, as described in the March 21, 2008, Public Notice. **This verification is valid until March 18, 2017.** Enclosed is a copy of the general permit authorization and conditions and management practices with which you must comply.
4. In accordance with Condition 30 of the Nationwide Permit, a compliance certification must be completed within 30 days of project completion or the permit issuance may be revoked and considered null and void.
5. The Missouri Department of Natural Resources Water Protection Program has conditionally issued Section 401 water quality certification for this permit, subject to special conditions (see enclosure). These

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Section 404 Authorization: Clarence Cannon National Wildlife Refuge – Habitat Rehabilitation and Enhancement Project

conditions are part of the Corps permit. If you have any questions regarding the water quality certification conditions, you may call Ms. Carrie Schulte at (573) 751-7023.

6. This determination is applicable only to the permit program administered by the Corps of Engineers. It does not eliminate the need to obtain other federal, state or local approvals before beginning work.

7. You are reminded that the permit is based on submitted plans. Variations from these plans may constitute a violation of Federal law and may result in the revocation of the permit.

8. If you have any questions please feel free to contact CPT Matthew Collins at (314) 331-8626.

**ROBERT S. GRAMKE**

Robert Gramke  
Missouri Section Chief  
Regulatory Branch

ENCLS

Definite Project Report with Integrated Environmental Assessment August 2013 Draft



U.S. Army Corps  
Of Engineers  
St. Louis District

# Nationwide Permit Summary

## No. 27, AQUATIC HABITAT RESTORATION, ESTABLISHMENT, AND ENHANCEMENT ACTIVITIES (NWP Final Notice, 77 FR 10275)

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

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

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

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

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

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement, or restoration agreement, or wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural

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

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

Notification. The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general condition 31), except for the following activities:

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(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding stream enhancement or restoration agreement of wetland enhancement, restoration, or establishment agreement between the landowner and the U. S. FWS, NRCS, FSA, NMFS, NOS, USFS or their designated state cooperating agencies;

(2) Voluntary stream or wetland restoration, or enhancement, action, or wetland establishment action, documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(3) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSMRE or the applicable state agency.

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

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

#### NATIONWIDE PERMIT CONDITIONS

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

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

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

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

**2. Aquatic Life Movements.** No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.

**3. Spawning Areas.** Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable.

Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

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

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

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

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

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

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

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

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

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

**13. Removal of Temporary Fills.** Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

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

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

16. **Wild and Scenic Rivers.** No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

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

18. **Endangered Species.** (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

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

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

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

(e) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.)

from the U.S. FWS or the NMFS. The Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word "harm" in the definition of "take" means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

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

19. **Migratory Birds and Bald and Golden Eagles.** The permittee is responsible for obtaining any "take" permits required under the U.S. Fish and Wildlife Service's regulations governing compliance with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. The permittee should contact the appropriate local office of the U.S. Fish and Wildlife Service to determine if such "take" permits are required for a particular activity.

20. **Historic Properties.** (a) In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the National Historic Preservation Act. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will review the documentation and determine whether it is sufficient to address section 106 compliance for the NWP activity, or whether additional section 106 consultation is necessary.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties on which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see

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36 CFR 800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

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

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

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

(b) For NWP 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with general condition 31, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

**23. Mitigation.** The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal:

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

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10 acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse effects of the proposed activity are minimal, and provides a project-specific waiver of this requirement. For wetland losses of 1/10 acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment. Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in minimal adverse effects on the aquatic environment.

(2) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, wetland restoration should be the first compensatory mitigation option considered.

(3) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2)-(14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

(4) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan only needs to address the baseline conditions at the impact site and the number of credits to be provided.

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

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream rehabilitation, enhancement, or preservation, to ensure that the activity results in minimal adverse effects on the aquatic environment.

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

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

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

(g) Permittees may propose the use of mitigation banks, in-lieu fee programs, or separate permittee-responsible mitigation. For activities resulting in the loss of marine or estuarine resources, permittee-responsible compensatory mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level.

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

**25. Water Quality.** Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA Section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

**26. Coastal Zone Management.** In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

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

**28. Use of Multiple Nationwide Permits.** The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of

waters of the United States for the total project cannot exceed 1/3-acre.

**29. Transfer of Nationwide Permit Verifications.** If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature: "When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below."

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

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

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

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

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

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

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

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

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or in

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the vicinity of the project, or to notify the Corps pursuant to general condition 20 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWP's 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

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

(2) Location of the proposed project;

(3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause, including the anticipated amount of loss of water of the United States expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. The description should be sufficiently detailed to allow the district engineer to determine that the adverse effects of the project will be minimal and to determine the need for compensatory mitigation. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

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

(5) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse effects are minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(6) 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, for non-Federal applicants the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work. Federal applicants must provide documentation demonstrating compliance with the Endangered Species Act; and

(7) For an activity that may affect a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, for non-Federal applicants

the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property. Federal applicants must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act.

(c) Form of Pre-Construction Notification: The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is a PCN and must include all of the information required in paragraphs (b)(1) through (7) of this general condition. A letter containing the required information may also be used.

(d) Agency Coordination: (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWP's and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(2) For all NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States, for NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed, and for all NWP 48 activities that require pre-construction notification, the district engineer will immediately provide (e.g., via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the preconstruction notification. The district engineer will fully consider agency comments received within the specified time frame, concerning the proposed activity's compliance with the terms and conditions of the NWP's, including the need for mitigation to ensure the net adverse environmental effects to the aquatic environment of the proposed activity are minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

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

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

D. District Engineer's Decision:

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. For a linear project, this determination will include an evaluation of the individual crossings to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant

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requests a waiver of the 300 linear foot limit on impacts to intermittent or ephemeral streams or of an otherwise applicable limit, as provided for in NWP 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51 or 52, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in minimal adverse effects. When making minimal effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

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

3. If the district engineer determines that the adverse effects of the proposed work are more than minimal, then the district engineer will notify the applicant either: (a) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (c) that the project is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period, with activity-specific conditions that state the mitigation

requirements. The authorization will include the necessary conceptual or detailed mitigation or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation..

**E. Further Information**

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

**F. Definitions**

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

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

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

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

**Discharge:** The term "discharge" means any discharge of dredged or fill material.

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

**Ephemeral stream:** An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

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

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

**Historic Property:** Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or

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eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

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

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

**Intermittent stream:** An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

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

**Non-tidal wetland:** A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

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

**Ordinary High Water Mark:** An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(e)).

**Perennial stream:** A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

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

**Pre-construction notification:** A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit

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

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

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

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

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

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

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

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

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

**Single and complete non-linear project:** For non-linear projects, the term "single and complete project" is defined at 33 CFR 330.2(i) as

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

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

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

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

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

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

**Tidal wetland:** A tidal wetland is a wetland (i.e., water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(d).

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

**Waterbody:** For purposes of the NWPs, a waterbody is a jurisdictional water of the United States. If a jurisdictional wetland is adjacent— meaning bordering, contiguous, or neighboring—to a waterbody determined to be a water of the United States under 33 CFR 328.3(a)(1)–(6), that waterbody and its adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of "waterbodies" include streams, rivers, lakes, ponds, and wetlands.

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## **Section 401 Appendix H**

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STATE OF MISSOURI  
CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION  
2012 GENERAL AND SPECIFIC CONDITIONS  
NWP 27 – AQUATIC HABITAT RESTORATION, ESTABLISHMENT, AND ENHANCEMENT ACTIVITIES

These conditions ensure that activities carried out under Nationwide Permits (NWPs) do not violate the Water Quality Standards of the State of Missouri resulting in permanent damage to habitat, increased turbidity, reduced bank and channel stability, and/or impacts to the biological and chemical integrity of the waters. These conditions are in addition to, not a replacement for, those conditions included by the federal authorities. Proposed projects authorized by the NWPs listed above that cannot be conducted within the conditions listed below must apply for individual Clean Water Act Section 401 Water Quality Certification (certification).

Applications for certification should be sent to the Missouri Department of Natural Resources, Water Protection Program, P.O. Box 176, Jefferson City, MO 65102-0176, or electronically to [wpsc401cert@dnr.mo.gov](mailto:wpsc401cert@dnr.mo.gov). A complete application consists of the application submitted to the U.S. Army Corps of Engineers (Corps) as well as additional information necessary for a complete review of the project. This may include but is not limited to topographical maps, locational maps, engineering plans, project diagrams and where applicable mitigation plans (10 CSR 20-6.060(5)).

An issued certification becomes part of the 404 Permit and; therefore, expires with the 404 Permit unless explicitly stated in the certification. Not all permit modifications require the certification to be modified and/or reissued. An example would be when a permit expiration date is extended or the permit is reissued and there are no changes to the original project, the certification may remain valid for that project.

The Department encourages, but does not require, the permittee to consider environmentally-friendly design techniques to include stormwater management strategies that maintain or restore the original site hydrology through infiltration, evaporation or reuse of stormwater. Designs might include creating vegetated swales or rain gardens, or using porous pavement. More information can be found at these websites: <http://www.epa.gov/owow/NPS/lid/> and [www.lid-stormwater.net/lid\\_techniques.htm](http://www.lid-stormwater.net/lid_techniques.htm).

GENERAL CONDITIONS for ALL NWPs

1. NWPs shall not allow the filling of jurisdictional springs.
2. Acquisition of a NWP(s) and the attendant certification(s) shall not be construed or interpreted to imply the requirements for other permits are replaced or superseded, including Clean Water Act Section 402 National Pollutant Discharge Elimination System (NPDES) Permits for land disturbance or return water from material deposition. Permits or any other requirements shall remain in effect. Applicants with questions are encouraged to contact the Missouri Department of Natural Resources' Regional Office in the project area. A regional office map with contact information can be located at [www.dnr.mo.gov/regions/regions.htm](http://www.dnr.mo.gov/regions/regions.htm).
3. Care shall be taken to keep machinery out of the waterway as much as possible. Fuel, oil and other petroleum products, equipment, construction materials and any solid waste shall not be stored below the ordinary high water mark at any time or in the adjacent floodway beyond normal working hours. All precautions shall be taken to avoid the release of wastes or fuel to streams and other adjacent waters as a result of this operation.
4. Petroleum products spilled into any water or on the banks where the material may enter waters of the state shall be immediately cleaned up and disposed of properly. Any such spills of petroleum shall be reported as soon as possible, but no later than 24 hours after discovery to the Missouri Department of Natural Resources' Environmental Emergency Response number at (573) 634-2436.
5. Only clean, nonpolluting fill shall be used. The following materials are not suitable for bank stabilization and shall not be used due to their potential to cause violations of the general criteria of the Water Quality Standards (10 CSR 20-7.031 (3)(A)-(H)):
  - a. Earthen fill, gravel, broken concrete where the material does not meet the specifications stated in the Missouri NWP Regional Conditions ([http://www.nwk.usace.army.mil/regulatory/NWP\\_2012/nwp.htm](http://www.nwk.usace.army.mil/regulatory/NWP_2012/nwp.htm)) and fragmented asphalt, since these materials are usually not substantial enough to withstand erosive flows;
  - b. Concrete with exposed rebar;
  - c. Tires, vehicles or vehicle bodies, construction or demolition debris are solid waste and are excluded from placement in the waters of the state;
  - d. Liquid concrete, including grouted riprap, if not placed as part of an engineered structure; and
  - e. Any material containing chemical pollutants (including but not limited to creosote or pentachlorophend).
6. Clearing of vegetation/trees shall be the minimum necessary to accomplish the activity. A vegetated corridor shall be maintained from the high bank on either side of the jurisdictional channel to protect water quality and to provide for long-term stability of the stream channel, unless physical barriers prevent such a corridor. For purposes of this NWP, lack of ownership or control of any portion of this corridor may be considered a legitimate and discretionary cause to waive this requirement on that portion.

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7. This certification is not valid for any Section 404 Permit issued on a water that is:
  - a. Listed as impaired by inorganic sediment, aquatic habitat alteration or unknown impairment as listed in the most current Water Quality Report (Section 305(b) Report). For convenience a table of these impaired waters is provided at the following website: [www.nwk.usace.army.mil/regulatory/NWP\\_2012/MO/MOWQC\\_Con7.pdf](http://www.nwk.usace.army.mil/regulatory/NWP_2012/MO/MOWQC_Con7.pdf);
  - b. Located in or occur within two miles upstream of a designated outstanding state or national resource water; or
  - c. Located in a designated metropolitan no-discharge stream.

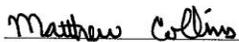
The most current Water Quality Report can be found at <http://www.dnr.mo.gov/env/wpp/waterquality/305b/>. A listing of *Outstanding National and State Resource Waters* and *Metropolitan No-Discharge Streams* can be found in 10 CSR 20-7.031, Tables D, E and F or at <http://www.sos.mo.gov/adrules/csr/current/10csr/10c20-7.pdf>.

The Department's geospatial data is available upon request, and all published data is available on the Missouri Spatial Data Information Services website at <http://msds.missouri.edu>.

Additional information to identify the project location may be obtained from the program at (573) 751-1300.

8. Streambed gradient shall not be permanently altered during project construction.
9. NWP's issued by the Corps for which the 300 linear foot threshold for stream impacts is waived by the district engineer shall require individual certification by the state. This is applicable to all NWP's where the permit has a 300 linear foot threshold including NWP's 21, 29, 39, 40, 42, 43, 44, 50, 51 and 52.
10. No project under a NWP shall accelerate bed or bank erosion.
11. Representatives from the Department shall be allowed on the project property to inspect the authorized activity at any time deemed necessary to ensure compliance with permit conditions.
12. You must submit a copy of the signed "Compliance Certification" referenced in NWP General Condition No. 30 as proof of project completion when the original is submitted to the Corps. This document is to be sent to the Missouri Department of Natural Resources, Water Protection Program, P.O. Box 176, Jefferson City, MO 65102-0176 or electronically to [wpsc401cert@dnr.mo.gov](mailto:wpsc401cert@dnr.mo.gov).
13. After avoidance and minimization for the project, unavoidable stream impacts shall be mitigated appropriately. Mitigation for loss of aquatic resources shall be in conformance with the currently approved "Missouri Stream Mitigation Method" and the "State of Missouri Wetland Assessment Method" as well as other mitigation guidance located on-line at <http://www.nwk.usace.army.mil/regulatory/CompMit/compmit.htm>.
14. Best Management Practices shall be used during all phases of the project to limit the amount of discharge of water contaminants to waters of the state. The project shall not involve more than normal stormwater or incidental loading of sediment caused by construction disturbances.
15. Pursuant to Chapter 644.038, RSMo, the Department certifies all NWP's for impacts in all waters of the state without the above-stated or any other conditions for the construction of highways and bridges approved by the Missouri Highway and Transportation Commission. The Memorandum of Understanding of 2009 and any subsequent modifications between the two agencies outline the requirements by which the Missouri Department of Transportation will design and construct projects in order to protect the water quality of waters of the state.

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<b>PRELIMINARY JURISDICTIONAL DETERMINATION FORM</b>			
<b>This preliminary JD finds that there "may be" waters of the United States on the subject project site, and identifies all aquatic features on the site that could be affected by the proposed activity, based on the following information:</b>			
District Office	St. Louis District	File/ORM #	MVS-2013-344
		PJD Date:	Feb 21, 2013
State	MO	City/County	Pike County
Nearest Waterbody:	Mississippi River		
Location: TRS, Lat/Long or UTM:	UTM Y = 4365863.34088239 UTM X = 249321.676624567		
Name/Address of Person Requesting PJD	Dr. Kathryn McCain U.S. Army Corps of Engineers, St. Louis District 1222 Spruce St. Saint Louis, MO 63103		
Identify (Estimate) Amount of Waters in the Review Area:	Name of Any Water Bodies on the Site Identified as		
Non-Wetland Waters:	Tidal: _____		
Stream Flow:	Section 10 Waters: _____ Non-Tidal: _____		
17160 linear ft width 0.5 acres Perennial			
Wetlands: 3200 acre(s) Cowardin Class: Palustrine, emergent	<input type="checkbox"/> Office (Desk) Determination <input checked="" type="checkbox"/> Field Determination: Date of Field Trip: Jul 24, 2013		
<b>SUPPORTING DATA: Data reviewed for preliminary JD (check all that apply - checked items should be included in case file and, where checked and requested, appropriately reference sources below):</b>			
<input checked="" type="checkbox"/> Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Dr. McCain <input type="checkbox"/> Data sheets prepared/submitted by or on behalf of the applicant/consultant. <input type="checkbox"/> Office concurs with data sheets/delineation report. <input type="checkbox"/> Office does not concur with data sheets/delineation report. <input type="checkbox"/> Data sheets prepared by the Corps <input type="checkbox"/> Corps navigable waters' study: _____ <input type="checkbox"/> U.S. Geological Survey Hydrologic Atlas: <input type="checkbox"/> USGS NHD data. <input type="checkbox"/> USGS 8 and 12 digit HUC maps. <input checked="" type="checkbox"/> U.S. Geological Survey map(s). Cite quad name: MO-Annada <input type="checkbox"/> USDA Natural Resources Conservation Service Soil Survey. Citation: _____ <input checked="" type="checkbox"/> National wetlands inventory map(s). Cite name: MO-Annada <input type="checkbox"/> State/Local wetland inventory map(s): _____ <input type="checkbox"/> FEMA/FIRM maps: _____ <input type="checkbox"/> 100-year Floodplain Elevation is: _____ <input checked="" type="checkbox"/> Photographs: <input checked="" type="checkbox"/> Aerial (Name & Date): Google Earth, 21 Feb 2013 <input type="checkbox"/> Other (Name & Date): _____ <input checked="" type="checkbox"/> Previous determination(s). File no. and date of response letter: PJD MVS 2013-26 and MVS 2013-99 <input type="checkbox"/> Other information (please specify): _____			
<b>IMPORTANT NOTE: The information recorded on this form has not necessarily been verified by the Corps and should not be relied upon for later jurisdictional determinations.</b>			
 Signature and Date of Regulatory Project Manager (REQUIRED)		 Signature and Date of Person Requesting Preliminary JD (REQUIRED unless obtaining the signature is impracticable)	
<b>EXPLANATION OF PRELIMINARY AND APPROVED JURISDICTIONAL DETERMINATIONS:</b>			
<p>1. The Corps of Engineers believes that there may be jurisdictional waters of the United States on the subject site, and the permit applicant or other affected party who requested this preliminary JD is hereby advised of his or her option to request and obtain an approved jurisdictional determination (JD) for that site. Nevertheless, the permit applicant or other person who requested this preliminary JD has declined to exercise the option to obtain an approved JD in this instance and at this time.</p> <p>2. In any circumstance where a permit applicant obtains an individual permit, or a Nationwide General Permit (NWP) or other general permit verification requiring "preconstruction notification" (PCN), or requests verification for a non-reporting NWP or other general permit, and the permit applicant has not requested an approved JD for the activity, the permit applicant is hereby made aware of the following: (1) the permit applicant has elected to seek a permit authorization based on a preliminary JD, which does not make an official determination of jurisdictional waters; (2) that the applicant has the option to request an approved JD before accepting the terms and conditions of the permit authorization, and that basing a permit authorization on an approved JD could possibly result in less compensatory mitigation being required or different special conditions; (3) that the applicant has the right to request an individual permit rather than accepting the terms and conditions of the NWP or other general permit authorization; (4) that the applicant can accept a permit authorization and thereby agree to comply with all the terms and conditions of that permit, including whatever mitigation requirements the Corps has determined to be necessary; (5) that undertaking any activity in reliance upon the subject permit authorization without requesting an approved JD constitutes the applicant's acceptance of the use of the preliminary JD, but that either form of JD will be processed as soon as is practicable; (6) accepting a permit authorization (e.g., signing a proffered individual permit) or undertaking any activity in reliance on any form of Corps permit authorization based on a preliminary JD constitutes agreement that all wetlands and other water bodies on the site affected in any way by that activity are jurisdictional waters of the United States, and precludes any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court; and (7) whether the applicant elects to use either an approved JD or a preliminary JD, that JD will be processed as soon as is practicable. Further, an approved JD, a proffered individual permit (and all terms and conditions contained therein), or individual permit denial can be administratively appealed pursuant to 33 C.F.R. Part 331, and that in any administrative appeal, jurisdictional issues can be raised (see 33 C.F.R. 331.5(a)(2)). If, during that administrative appeal, it becomes necessary to make an official determination whether CWA jurisdiction exists over a site, or to provide an official delineation of jurisdictional waters on the site, the Corps will provide an approved JD to accomplish that result, as soon as is practicable.</p>			

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**PRELIMINARY JURISDICTIONAL DETERMINATION FORM**

This preliminary JD finds that there "may be" waters of the United States on the subject project site, and identifies all aquatic features on the site that could be affected by the proposed activity, based on the following information:

Appendix A - Sites

District Office  File/ORM #  PJD Date:   
 State  City/County  Person Requesting PJD

Site Number	Latitude	Longitude	Cowardin Class	Est. Amount of Aquatic Resource in Review Area	Class of Aquatic Resource
001	39.26655	-90.76759	Palustrine, emergent	3200 acres	PEM
			n/a		
			n/a		

Notes:

3,200 acres of Clarence Cannon National Wildlife Refuge are managed as jurisdictional Moist Soil Units.