

# **Regulatory and Permitting Issues Relating to Desalination Seawater Intakes and Concentrate Disposal in Coastal Texas (Task 2.3)**

For Corpus Christi Variable Salinity Desalination Demonstration Project

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## **1.0 Introduction to Legal Issues Uniquely Associated with Construction and Operation of Intake and Discharge Facilities in Coastal and Ocean Areas**

The Corpus Christi Variable Salinity Desalination Demonstration Project is an initiative investigating the feasibility of alternative desalination technology options for the Coastal Bend Region. After examining the suitability of six candidate intake sites and five candidate discharge facility sites a demonstration-scale desalination plant will be built. The purpose of this paper is to identify and describe the regulatory and permitting requirements associated with the construction and operation of several varieties of seawater intake facilities and concentrate discharge facilities at the candidate sites.

A unique set of legal rules and principles must be taken into consideration whenever construction, such as building a desalination facility, is contemplated in coastal areas (Rieser, et al. 2013). Regulatory requirements may change depending on the ownership of coastal property and the distance from shore the facility extends. Privately owned lands bordering the oceans are subject to a complex mix of private and public rights and interests. In Texas, legal title to land located upland of the mean high-tide line (or mean higher-high tide line on Mexican land grants) is in private hands, while legal title to lands seaward of the mean high-tide line belongs to the state and is held in public trust for the benefit of all of Texas' citizens. In addition, jurisdiction over the nation's ocean areas is divided between the federal government and the coastal states. The Submerged Lands Act (SLA), 43 U.S.C. 1301 *et seq.* granted coastal state ownership of the submerged lands and natural resources "to a line three geographical miles distant from the coast of each such state... or as heretofore approved by Congress,...beyond three geographical miles..." "SLA 43 U.S.C. 1301(a)(2). Congress has approved Texas' historical claim to jurisdiction of submerged lands out to nine nautical miles (10.3 statute miles).

Although the SLA grants legal authority to the State of Texas to manage lands beneath navigable waters out to nine nautical miles offshore, that authority is not absolute. The federal government retains paramount rights, grounded in the commerce and property clauses of the Constitution, to regulate state waters for the purposes of navigation, commerce, national defense, and international affairs. A variety of federal statutes dealing with issues such as navigational

safety, environmental protection and land-use conflict avoidance are applicable in coastal areas, even though those areas fall within Texas state jurisdiction.

Permitting and regulating the construction and operation of a desalination plant in the Coastal Bend Region will likely involve a complex mixture of private and public ownership interests combined with federal, state and local regulatory authority. This report will summarize the numerous environmental and safety permits, approvals, and compliance documents that will be required in regards to intake and discharge facilities associated with constructing and operating a desalination plant in the Coastal Bend Region of Texas. In some instances, these governmental permit and approval processes will vary depending on the locations and alternative design approaches to saltwater intake and concentrate discharge that are adopted. Please note that the contents of this report are provided for informational purposes only and are not intended to provide legal advice.

The following design alternatives will be included in this analysis:

## **2.0 Design Alternatives Being Considered**

### Intake Facilities

- a. Onshore open intakes (near shore using channels or other intake facilities)
- b. Offshore open intakes (screened intake pipe extending hundreds of meters or more offshore)
- c. Subsurface intakes (horizontal or vertical beach wells, infiltration galleries, or seabed filtration systems)

### Discharge Facilities

- a. Onshore open discharge (disposal into surface waters of bays or estuaries)
- b. Offshore submerged discharge (disposal to sub-surface using long pipes into the ocean)
- c. Subsurface discharge (deep well injection)

## **3.0 Federal Permits and Regulatory Approvals**

### **3.1 U.S. Army Corps of Engineers Permits Under Section 404 of the Clean Water Act and Section 10 of Rivers and Harbors Act of 1899**

Although states such as Texas bear some role in regulating construction activities in U.S. waters including coastal wetlands, the federal government has the primary regulatory responsibility. Five Federal agencies share this responsibility including the U.S. Army Corps of

Engineers (USACE), the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), the National Ocean and Atmospheric Administration (NOAA) and the Department of Agriculture's Natural Resources Conservation Service (NRCS). USACE is the lead federal agency which evaluates construction activities and issues permits in U.S. waters, including coastal wetlands. The other federal agencies are less involved in day to day permitting decisions and, instead, primarily provide broader policy development and expertise in the form of permitting reviews and comments.

Section 404 of the Clean Water Act (33 U.S.C. 1344) coupled with Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) provide federal authority to regulate construction activities in coastal wetlands and navigable waters. USACE has been designated, under both pieces of legislation, to administer permitting decisions. Section 404 was created to control the discharge of dredged or fill material into wetlands and other "Waters of the United States". Discharges of dredged or fill material are commonly associated with construction activities near coastal waters. Construction activities that will likely occur when building a saltwater desalination plant such as filling, grading, mechanized land clearing, ditching and other excavation activity, and piling installation are likely to require a Section 404 permit.

Important and legally unsettled issues relating to the precise geographic scope and location of wetlands subject to Section 404 federal permitting authority have been the subject of a number of recent U.S. Supreme Court judicial decisions as well as federal agency rules. However, because all of the candidate intake and discharge facility sites in the Coastal Bend are located directly adjacent to or within tidal waters of the Gulf of Mexico, the federal government should have authority to regulate these areas.

Section 10 of the Rivers and Harbors Act of 1899 was designed to regulate construction activities that may pose a hazard to navigation. Under the statute, it is unlawful to build any structure in navigable waters without a permit from USACE. Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide seaward of mean high waters mark and/or are presently used, or have been used in the past or may be susceptible to use to transport interstate or foreign commerce. This definition has been interpreted quite broadly by the courts. Consequently, the construction of any intake or discharge facility within the tidally influenced waters of the Gulf of Mexico will generally require a Section 10 permit.

Depending on the specific circumstances and potential environmental impacts of activities, Section 404 and Section 10 permits may be granted either individually or as a Nationwide Permit. Nationwide Permits may be granted if the proposed activity falls within an existing category and would have only a minimal individual or cumulative adverse environmental effect. The time that it takes to receive a Nationwide Permit is much less than would be the case if an individual permit is required. Nationwide Permit #7, (See Appendix I), which applies to "Outfall Structures and Associated Intake Structures" may be available for the intake and outflow facilities associated with desalination plants depending on specific activities and circumstances. There are currently 52 Nationwide Permits. However, it is important to note that some apply to both Section 404 and Section 10 permits (Nationwide Permit #7 falls into this category), others apply to only one type. In addition to nationally required conditions, the permit may also require that regional and case by case conditions be met.

If a Nationwide Permit is not feasible, the approval process for an individual permit will take significantly longer. It may take many months to several years to receive a permit depending on the complexity and potential impact of the proposed activity.

An Individual Permit is processed through detailed public interest review procedures, including public notice, opportunity for a public hearing, and receipt of public comments. It is evaluated on a case-by-case basis of a specific activity. Minor or routine activities with minimum impacts and little or no public objection may qualify for a Letter of Permission (LOP). The LOP process takes less time than an Individual Permit because it does not require complying with all of the public notice procedures.

All decisions to grant or deny Section 404 and Section 10 permits are based on a public interest review of the likely impact of the proposed activity and its intended use. The general criteria used for this review include:

- 1) the relative extent of the public and private need for the proposed activity;
- 2) the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed activity;
- 3) and the extent and permanence of the beneficial and/or detrimental effects which the proposed activity is likely to have on the public and private uses to which the area is suited.

No permit will be granted for projects that are found to be contrary to the public interest. This generally means providing evidence that the proposed construction project will not significantly degrade the nation's waters and that no practicable alternative exist that are less damaging to the aquatic environment. Applicants must also be willing to provide appropriate mitigation, such as restoring or creating wetlands, if there are any unavoidable impacts to the environment.

Corps districts have some autonomy and regulate coastal areas within their respective jurisdictions somewhat differently. The USACE Galveston District and the State of Texas have created a joint application system that allows applicants to apply for permits from federal and state administrative agencies through an integrated submittal process (USACE, Galveston District, 2014; Brownsville Pub. Utilities Bd., 2010) Permit requests are submitted to the USACE Galveston District, which coordinates with other federal agencies such as EPA, NOAA, FWS, and NRCS as well as Texas State agencies such as the Texas Commission on Environmental Quality (TCEQ), Texas Parks and Wildlife Department (TPWD), Texas General Land Office (GLO), and the Texas Historical Commission (THC) (for a more detailed discussion of Texas State Agency requirements see below sections 4.1-4.8) Importantly, although the USACE Galveston District coordinates the permit submission process, it is up to each applicant to make sure that separate approvals from each agency have been received.

Applications for both Section 404 and Section 10 permits can be made by submitting one application form to USACE. Information submitted with the application will include a description of the proposed project's purpose; the reasons, size, and excavation methods of the material being discharged into U.S. waters; descriptions of the possible wetlands being affected; the names and contact information for adjacent property owners; maps and engineering drawings showing the location and extent of the proposed work; and information regarding approvals or denials by other agencies, both federal and state, including a statement of compliance with the Texas Coastal Management Program required under Section 401 of the Clean Water Act and a Section 401 certification from TCEQ that water quality would not be impaired (see section 4.1 below for additional information). The applicant need not have obtained all of these permits and certifications before applying to USACE for a Section 404 and Section 10 permit.

Prior to submitting an application, an initial consultation with the USACE Galveston District is necessary to gauge whether a Nationwide or Individual Permit is required. All aspects

of the intake and outfall facilities and other offshore infrastructure associated with the seawater desalination plant must be well defined prior to consulting with the USACE to avoid delays and to receive the most beneficial permitting options available.

Anticipated permits for each of the proposed intake and discharge design options are identified below:

### Intakes

- a. Onshore open intakes (near shore using channels or other intake facilities) will likely either require a Section 404 Nationwide Permit 7 (Outfall Structures and Associated Intake Structures) or an Individual Permit depending on specific circumstances such as the amount of disturbance to waters of the U.S. A Section 10 Permit may or may not be required depending on whether the channels or other intake facilities are in waters susceptible to navigation.
- b. Offshore open intakes (screened intake pipe extending hundreds of meters or more offshore) will likely require a Section 404 Nationwide Permit 7 or Individual Permit because the construction of offshore pipelines and associated on-shore intake facilities will likely cause discharge into waters of the U.S. A Section 10 Permit will likely be required for any pipeline that extends into navigable waters.
- c. Subsurface intakes (horizontal or vertical beach wells, infiltration galleries, or seabed filtration systems) may or may not require a Section 404 Permit depending on the extent to which its construction causes discharge into jurisdiction wetlands or waters of the U.S. A Section 10 Permit may or may not be required depending on the location of the facility and whether it has a potential impact on navigation either during construction or while it is operating.

### Discharge

- a. On-shore open discharge (disposal into surface waters of bays or estuaries) will likely require a Section 404 Permit Nationwide Permit 7 or an Individual Permit due to the disturbance and discharge to Waters of the U.S. during construction and maintenance of the pipeline and outflow structures. A Section 10 permit may or may not be required depending on whether the receiving waters are susceptible to navigation.
- b. Offshore submerged discharge (disposal to sub-surface using long pipes into the ocean) will likely require a Section 404 Permit due to the discharge into Waters of the U.S. during construction of the pipeline. Section 10 Permit will likely be required because of the pipelines' potential impact on navigation.
- c. Subsurface discharge (deep well injection) may or may not require a Section 404 Permit depending on whether the location affects jurisdiction wetlands. A Section 10 permit will not be required because there is no potential for disruption of navigation.

## **3.2 Coast Guard Approval**

Activities within the Coastal Bend Region of Texas fall within the jurisdiction of the U.S. Coast Guard Eighth District. Structures in navigable waters, such as intake or outfall pipelines, may require Coast Guard approval if they present a potential hazard to navigation. Under certain conditions, detailed information will need to be provided for the purpose of incorporating the structures into nautical charts. Depending on depth and other conditions, the structures may also be required to be marked by lighted or unlighted buoys.

### Intake

An off-shore open water intake that involves a structure that extends into navigable waters would likely require consultation and approval by the Coast Guard.

### Discharge

An off-shore submerged discharge facility that employs pipelines extending into navigable waters would likely need consultation and approval by the Coast Guard.

## **3.3 Section 316(b) of the Clean Water Act**

Recent events relating to the implementation of Clean Water Act Section 316(b) (33 U.S.C. 1326(b)) may impact how desalination intake facilities are designed and operated in the future. As currently interpreted, 316(b) is not applicable to desalination plants and instead is limited to water intake structures of power and manufacturing plants. However, many commentators have advocated that the same standards be expanded to include desalination inflow facilities (Kelley 2011). In light of these growing calls to expand the law to desalination facilities, it is important to take the new standards into consideration during the planning process.

Clean Water Act Section 316(b) provides that National Pollutant Discharge Elimination System (NPDES) Permits must require “for each new or expanded coastal power plant or other industrial installation using seawater for cooling, heating, or industrial processing, the best available site, design, technology, and mitigation measures feasible shall be used to minimize the intake and mortality of all forms of marine life...” In May, 2014 the EPA promulgated final standards resulting from a court settlement agreement with environmental groups. These standards require that seawater intake facilities use the best technology available to minimize impingement (being pinned against water intake structures), entrainment (being drawn into intake structures) and other harmful impacts on the environment. The final regulation requires that certain facilities reduce impingement by choosing one of seven options for meeting Best Technology Available (BTA) standards. Larger facilities are also required to conduct studies to help their permitting authority determine the type of site-specific controls necessary to reduce the number of aquatic organisms entrained by the intake systems. Finally, new units at existing facilities are required to add technology that achieves one of two alternatives under the national BTA standard for entrainment (U.S. EPA, Office of Water, 2014).

In light of the fact that desalination plants are not currently mandated to meet the new EPA regulations, the requirements established under Section 316(b) of the Clean Water Act are not applicable to the proposed desalination projects in the Coastal Bend. However, if the new EPA standards relating to intake structures can be incorporated into the proposed projects with minimal financial or operational cost, it may reduce the need to potentially upgrade facilities in the future as well as enhance the likelihood of receiving governmental regulatory approval.

### **3.4 National Environmental Policy Act (NEPA)**

The National Environmental Policy Act (42 U.S.C. 4331) creates a process that requires federal agencies to consider the environmental impacts of their proposed actions and to compare those impacts with alternative courses of action. NEPA requirements are triggered whenever a federal agency recommends or reports on "...major Federal actions significantly affecting the quality of the human environment." (42 U.S.C. 4332(2)(C)). The statute defines federal actions broadly to include even actions by private parties on private lands as long as the proposed action requires a federal permit or some other federal approval before that activity can proceed. NEPA requires agencies to collect relevant information to enhance the statutory goals for the protection, maintenance, and enhancement of the environment and to employ a "systematic, interdisciplinary approach" in their decision-making. The primary tool for implementing NEPA is the environmental impact statement or EIS. The EIS must contain a detailed statement by the agency with the following components:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Because EIS preparation is so expensive and time-consuming (sometimes running to thousands of pages and taking many years to complete), agencies generally try to limit EIS preparation to only those proposed actions that are truly important from an environmental standpoint or are highly politically controversial (Rasband et al., 2004). NEPA does provide some flexibility to relieve agencies from having to prepare a full EIS. For example, a proposed action may be categorically excluded from a detailed environmental analysis if it meets certain criteria indicating that it has no significant environmental impact. Agencies generally have lists of activities that meet these criteria that are categorically excluded from environmental evaluation.

A second alternative that allows federal agencies to refrain from having to produce a full EIS is for them to prepare an Environmental Assessment or EA. Agencies may not have enough information to determine whether a full EIS is warranted and preparation of a shorter EA provides sufficient information to decide whether to go forward with a full EIS. In addition, it allows agencies to analyze potential alternatives to the proposed action even in the absence of a full EIS. If the EA allows the agency to conclude that the proposed action will not significantly affect the environment, and that an EIS is not necessary, the agency will issue a FONSI (Finding of No

Significant Impact). The FONSI may include a statement of actions that the agency will take to mitigate any remaining environmental problems.

If there is no categorical exclusion or FONSI, the agency must prepare an EIS containing a longer and more detailed evaluation of the proposed action. However, studies have shown that agencies are quite reluctant to do EISs and that 100 EAs are produced for every EIS that is required (Council on Environmental Quality 1997). Although NEPA requires that agencies comply with the administrative process and fully consider all environmental options, it does not require the agency to choose the least environmentally damaging alternative. Other legal and political considerations may dictate the ultimate choice that an agency makes concerning a proposed activity such as constructing a coastal desalination plant.

The USACE Galveston District Commander is the lead federal official responsible for compliance of NEPA within district boundaries. The question of what NEPA requirements will likely apply to proposed desalination intake and discharge facilities depends on what type of Section 404 and Section 10 permits are applicable to the project as well as the political climate and public reaction to the proposed project. For example, if a Nationwide Permit 7 is granted, any additional NEPA-based evaluation may be categorically excluded. Conversely, should another commenting agency express environmental concern or the proposed project generate significant political controversy, an EIS may be prepared regardless of whether it is mandated by NEPA. Because significant discretion is granted to the USACE District Commander to determine how NEPA will be implemented, early dialogue and consultation with the USACE and other commenting agencies is essential. Anticipated NEPA requirements for each of the intake and discharge design options are described below:

### Intake Facilities

- a. Onshore open intakes (near shore using channels or other intake facilities) will likely require that an EA or possibly an EIS be prepared. If a Section 404/10 Nationwide Permit is granted, a categorical exclusion may apply. However, if an individual permit is required, an EA or EIS is likely. The type of NEPA evaluation required will depend on factors such as the size and location of the proposed facilities, the possible jeopardy to protected flora and fauna as well as the public interest it has generated.
- b. Offshore open intakes (screened intake pipe extending hundreds of meters or more offshore) will likely require an EA or EIS regardless of whether a Nationwide Permit is granted given the possible environmental impacts associated with protected species/critical habitat and potential impingement and entrainment of marine organisms.
- c. Subsurface intakes (horizontal or vertical beach wells, infiltration galleries, or seabed filtration systems) will likely require an EA or EIS. Even though a Section 404/10 permit may not be required and the likelihood of impingement and entrainment of marine organisms has been eliminated, potential environmental issues relating to effects on existing aquifers, potential groundwater contamination and other factors make it highly likely that an EA/EIS will be required.

### Discharge Facilities

- a. Onshore open discharge (disposal into surface waters of bays or estuaries) will likely require an EA or EIS because of the proximity to population and recreational centers, and the varying environmental impacts caused by the construction process as well as the type of dispersion and natural dilution of the concentrate at the discharge site (Younos, 2005).
- b. Offshore submerged discharge (disposal to sub-surface using long pipes into the ocean) will likely require an EA or EIS because of the varying impacts of the discharge concentrate on marine organisms depending on tides, bathymetry, currents, and other factors influencing natural mixing at the concentrate disposal point (Younos, 2005). If a Section 404/10 Nationwide Permit is granted, this may or may not preclude the requirement of an EA/EIS depending on other considerations such as public interest, possible impact on protected species, etc.
- c. Subsurface discharge (deep well injection) is least likely to require an EA/EIS. All deep well injection of waste products is subject to federal regulation under the Safe Drinking Water Act (SDWA) (42 U.S.C. 300f et seq.) The EPA is the lead agency under SDWA. NEPA has specifically exempted the SDWA Underground Injection Control Program from having to perform EA/EIS requirements. However, significant federal and state regulatory oversight will still be required under the SDWA program.

### **3.5 Coastal Zone Management Act**

The federal Coastal Zone Management Act of 1972 (16 U.S.C. 1452 et seq.) encourages coastal States to establish voluntary coastal zone management plans under NOAA's Coastal Zone Management Program. Federal funds are provided for developing and implementing plans that meet federally mandated standards that advance the conservation and environmentally sound development of coastal resources. The program provides participating States with some control and additional protection over their coastal areas by requiring that Federal activities be consistent with approved State coastal management programs. For example, before the USACE can issue a Section 404/Section 10 permit, the project must be consistent with the State plan.

Texas has a federally approved Coastal Zone Management Program that is overseen by the Texas General Land Office (GLO) (see section 4.6). All of the potential desalination plant sites are located within the boundaries of the State's Coastal Zone Management Program. Consequently, a federal consistency review will be conducted by the GLO prior to construction beginning in the Texas Coastal Zone. This review will occur as part of the more comprehensive USACE Section 404/Section 10 permitting process. A joint permitting process has been designed so that the USACE provides the GLO with project plans for its review and approval.

### Intake and Discharge Facilities

Because all intake and discharge design options will be located within Texas' designated coastal zone boundaries, they must be reviewed and approved by the GLO Coastal Zone

Management Program. This will most likely occur as part of the joint permitting process coordinated by the USACE.

### **3.6 Endangered Species Act, Marine Mammal Protection Act, and Magnuson-Stevens Fishery Conservation and Management Act**

NOAA and FWS share responsibility for implementing the Endangered Species Act (ESA), (16 U.S.C. 1531 et seq.). The National Marine Fisheries Service (NMFS) within NOAA is primarily responsible for implementing the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 et seq.), and the Essential Fish Habitat (EFH) provisions of the Magnuson-Stevens Fishery Conservation and Management Act (FCMA) (16 U.S.C. 1801 et seq.). These statutes are intended to conserve threatened and endangered species and ensure that proposed actions do not jeopardize listed species or damage critical habitat. The FWS has authority over freshwater and terrestrial species while NMFS is responsible for listed marine mammals and other living marine species. Federal agencies must consult with FWS and NMFS to determine whether a proposed action may have a negative impact on a protected species. An Incidental Take Statement in conformance with Section 7 of the ESA is sometimes required. A so-called Section 7 consultation is an element of the USACE Section 404/Section 10 permitting process. Coordination with NMFS under Section 104 of the MMPA and Section 305(b) of the MFA dealing with essential fish habitat would take place simultaneously with the Section 7 consultation.

Required Federal interagency consultations under these statutes are the federal agency's responsibility (most likely USACE as part of a Section 404/Section 10 permitting process) and not the applicant's. However, although the consultation responsibility is not with the permit applicant, the applicant should provide appropriate information and documentation to help guide the process. It should also be noted that before either an individual or a nationwide permit may be issued by USACE, all requirements of the ESA must have been satisfied. This means that a Section 7 consultation will have to occur prior to a permit being granted. Moreover, should there be a finding that a proposed activity is likely to result in a lethal or non-lethal take of a threatened or endangered species, an Incidental Take Permit must be obtained from FWS or NMFS. Early consultation with all involved agencies is essential to avoid delays in the permitting process.

#### Intake Facilities

- a. Onshore open intakes (near shore using channels or other intake facilities) will likely require consultation with FWS and NMFS. Possible impacts relating to threatened or endangered species being impinged or entrained by intake structures (especially threatened or endangered sea turtles) will have to be examined prior to any USACE permits being granted.
- b. Offshore open intakes (screened intake pipe extending hundreds of meters or more offshore) will likely require FWS and NMFS consultation for the same reason as above. The likelihood of impacting marine mammals and essential fish habitat are also significantly higher under this option.

- c. Subsurface intakes (horizontal or vertical beach wells, infiltration galleries, or seabed filtration systems) will not likely require consultation under the ESA, MMPA, or FMA because of the unlikelihood that the structure will have impacts on threatened or endangered species and critical habitat. However, this may change depending on the type and location of construction activities required for the subsurface intakes and their possible impact on the environment.

### Discharge Facilities

- a. Onshore open discharge (disposal into surface waters of bays or estuaries) will likely require consultation with FWS and NMFS. Dispersal of concentrated discharge may have an impact on threatened and endangered species, critical habitat or essential fish habitat.
- b. Offshore submerged discharge (disposal to sub-surface using long pipes into the ocean) will likely require consultation with FWS and NMFS. Although mixing and dilution of the concentrated discharge may be better than disposal in onshore waters, there still may be impacts to protected species, critical habitat or essential fish habitat that will require agency consultation.
- c. Subsurface discharge (deep well injection) will not require FWS or NMFS consultation because it will not have an impact on any protected species or critical habitat.

## **3.7 National Historic Preservation Act Section 106**

The National Historic Preservation Act (NHPA) (16 U.S.C. 470 et seq.) was enacted in 1966 to preserve historical and archeological sites in the U.S. NHPA Section 106 provides a mechanism to grant legal status to historic preservation in federal planning, decision-making and project execution. It requires all federal agencies to take into account the effects of their actions on historical properties. Whenever a federal agency engages in an “undertaking” that may impact cultural or historical resource sites, it must undertake a NHPA consultation. Because the construction and operation of a desalination site in coastal Texas will probably involve a variety of federal permits and regulatory actions, it is likely that a NHPA Section 106 consultation will be required. Ultimately, it is the responsibility of each federal agency to determine whether a proposed project requiring federal authorization should be considered an undertaking subject to Section 106 review. This is a case by case determination based on the application of federal regulations and the historical characteristics of the desalination site.

## **4.0 Texas State Permits and Regulatory Approvals**

### **4.1 TCEQ Water Quality Certification under Section 401 of the Clean Water Act**

The Texas Commission on Environmental Quality (TCEQ) oversees permitting and enforcement of water quality and water quantity issues in the state of Texas. TCEQ works with the USACE to certify that any project subject to a Section 404/Section 10 permit complies with the state's water quality standards. TCEQ relies on the Clean Water Act Section 401 certification process as its primary authority for regulation of most coastal construction projects such as desalination plants (Assoc. of State Wetland Managers, 2011). The state has entered into a memorandum of understanding with USACE under which the state waives certification of small projects that affect less than three acres of waters or less than 1500 linear feet of streams, provided that best management practices (BMPs) defined by the state are followed. These are known as Tier I projects and no further review is required if the permittee agrees to include these BMPs as part of their Section 404/Section 10 permit. Projects that may impact rare and ecologically important wetlands including RAMSAR Wetlands of International Importance, mangrove marshes and coastal dune swales do not qualify for Tier I status, regardless of size.

Larger projects are given Tier II status, which requires the state to comment to the USACE through the public notice process and to utilize a full suite of numeric and narrative water quality standards and "No Net Loss" of wetlands policies. Tier II applicants must submit a Tier II Section 401 Certification Questionnaire that includes information describing project alternatives in regard to location, size and technical feasibility.

Importantly, the state has conditioned some USACE Nationwide Section 404/Section 10 Permits with their BMPs as a requirement. Consequently, if a project qualifies for a USACE Nationwide Permit, it would likely receive Tier I status. Projects that affect more than 3 acres of waters and require an Individual Permit likely would receive a Tier II Section 401 certification.

#### Intake Facilities

- a. Onshore open intakes (near shore using channels or other intake facilities) will likely be treated as a Tier I project if it qualifies for a Nationwide Section 404/Section 10 Permit. If it requires an Individual Permit and construction affects more than 3 acres of waters of the state, it will likely need a Tier II Section 401 certification from TCEQ.
- b. Offshore open intakes (screened intake pipe extending hundreds of meters or more offshore) will be treated similarly to onshore open intakes and receive Tier I status if it qualifies for a Nationwide Permit or affects less than 3 acres of waters of the state.
- c. Subsurface intakes (horizontal or vertical beach wells, infiltration galleries, or seabed filtration systems) may not require any Section 401 review if a Section 404/Section 10 Permit is not required. If it requires a 404/10 Permit, it will likely be treated as a Tier I project unless it impacts more than 3 acres of waters of the state. TCEQ defines waters of the state as surface or ground water.

#### Discharge Facilities

- a. Onshore open discharge (disposal into surface waters of bays or estuaries) would only be treated as having Tier I status if it qualifies for a Nationwide Section 404/10 Permit.

Because discharge of concentrate would likely affect more than 3 acres of waters of the state it may need Tier II Section 401 certification from TCEQ.

- b. Offshore submerged discharge (disposal to sub-surface using long pipes into the ocean) will be treated similarly to onshore open intakes and receive Tier I status if it qualifies for a Nationwide Permit or affects less than 3 acres of waters of the state.
- c. Subsurface discharge (deep well injection) will not require a Section 401 certification from TCEQ, but will likely need an Injection Well Authorization.

#### **4.2 TCEQ Texas Pollutant Discharge Elimination System Construction Stormwater and Industrial Wastewater Permits under Section 402 of the Clean Water Act**

Section 402 of the Clean Water Act requires any discharge of a pollutant (other than dredged or fill material) into waters of the United States from a point source to receive a NPDES permit. EPA has granted the state of Texas authority to administer the NPDES program. This program is known as the Texas National Pollutant Discharge Elimination System (TPDES). TCEQ manages this program and grants permits contingent on state regulations that meet federal requirements. There are two primary types of TPDES permits that will likely be required relating to the construction and operation of the proposed desalination plant. First is a Construction General Permit required for storm water discharges from construction activities. The second is an Industrial Wastewater Permit for the discharge of concentrate or other industrial pollutants into surface waters of the state.

The Texas Pollutant Discharge Elimination System Construction General Permit, TXR150000, was issued on February 19, 2013, and became effective on March 5, 2013. Under this new General Permit, activities are regulated according to the amount of land that is disturbed. Large construction projects that disturb 5 or more acres are regulated by the General Permit. Small construction projects that disturb 1-5 acres are also regulated by the General Permit, but are exempted from certain requirements on a case by case basis. Construction projects that disturb less than 1 acre are not regulated by the General Permit.

Desalination plant activities will not likely fit within any existing TPDES Industrial Wastewater General Permit. Consequently, it is likely that an Individual Permit to Discharge Wastewater into or Adjacent to “Waters in the State” will be required. Because these permits are determined individually and depend to a great extent on the specific discharge characteristics, it is important to contact TCEQ staff very early in the permitting process. Moreover, both Construction General Permits and Individual Industrial Wastewater Permits may not allow or will place stringent restrictions if the receiving water is defined as threatened or impaired or if the discharge would adversely affect a listed endangered or threatened aquatic species or critical habitat.

A TPDES Industrial Wastewater Permit will not be required if the surface water discharge of concentrate is through an existing wastewater treatment plant. Under these circumstances only a local permit for discharge into the wastewater treatment plant will be required.

### Intake Facilities

- a. Onshore open intakes (near shore using channels or other intake facilities) may require some variety of General Construction Stormwater Permit depending on amount of land that is disturbed by construction. TPDES Wastewater Permit is not required.
- b. Offshore open intakes (screened intake pipe extending hundreds of meters or more offshore) will be treated similarly to onshore open intakes and may require some variety of General Construction Stormwater Permit depending on amount of land that is disturbed by construction. TPDES Wastewater Permit is not required.
- c. Subsurface intakes (horizontal or vertical beach wells, infiltration galleries, or seabed filtration systems) may require some variety of General Construction Storm water Permit depending on amount of land that is disturbed by construction. TPDES Wastewater Permit is not required.

### Discharge Facilities

- a. Onshore open discharge (disposal into surface waters of bays or estuaries) may require some variety of General Construction Stormwater Permit depending on the amount of land that is disturbed by the construction. It will likely require a TPDES Individual Industrial Wastewater Permit, unless it discharges through an existing wastewater treatment plant.
- b. Offshore submerged discharge (disposal to sub-surface using long pipes into the ocean) may require some variety of General Construction Stormwater Permit depending on the amount of land that is disturbed by the construction. It will likely require a TPDES Individual Industrial Wastewater Permit.
- c. Subsurface discharge (deep well injection) may require some variety of General Construction Stormwater Permit depending on the amount of land that is disturbed by the construction. It will not require a TPDES Individual Industrial Wastewater Permit because it does not discharge wastewater into the waters of the state.

## **4.3 Texas Water Rights Permit**

Water taken from bays and arms of the Gulf of Mexico within 10 leagues (30 nautical miles) of shore is considered state water and requires a Water Rights Permit from TCEQ (Steiman, 2004). The purpose of this permit is to evaluate the impact of the water use on the rights of other

users, the environmental integrity of bays and estuaries, water availability, and its overall effect on the public welfare. The federal government currently does not exercise proprietary control over coastal seawater. Some commentators have argued that, under the Submerged Lands Act, the federal government only granted the states ownership over “submerged lands” and “natural resources” and that the federal government remains the relevant sovereign over seawater (Pappas, 2011). At this time, there are no indications that the federal government seeks to assert any sovereign claim over seawater used for desalination. At this time, the only water permit required is from the State of Texas.

#### Intake Facilities

- a. Onshore open intakes (near shore using channels or other intake facilities) will likely require a TCEQ Water Rights Permit because the saltwater source is within 10 leagues of shore.
- b. Offshore open intakes (screened intake pipe extending hundreds of meters or more offshore) will likely require a TCEQ Water Rights Permit if the offshore intake is less than 10 leagues from shore.
- c. Subsurface intakes (horizontal or vertical beach wells, infiltration galleries, or seabed filtration systems) may or may not require a TCEQ Water Rights Permit depending on how deep the well may be and how closely connected it is with the surrounding seawater.

#### Discharge Facilities

Although a determination of how and where the water is discharged and what role it potentially plays in that location’s water cycle may be considered by the TCEQ in granting a Water Rights Permit, no specific permit is required. Water Rights Permits pertain to surface or seawater raw water sources and not to discharges.

### **4.4 Discharge of Hydrostatic Test Water Permit**

Construction and operation of desalination facilities will require hydrostatic testing of pipelines, tanks, and other containers. Discharges relating to these activities will likely find their way into waters of the state and will require a Hydrostatic Test Water Permit. It is likely that these discharges will qualify for a TCEQ General Permit (TXG670000). As part of the General Permit, TCEQ requires the discharger to provide a Notice of Intent (NOI) form that describes the type of tests and where they will occur. A regular schedule of water quality sampling and monitoring must also be conducted. A General Permit will generally not be granted if the discharge affects impaired waters or would adversely affect endangered or threatened species or critical habitat. If a General Permit is not granted, an Individual TPDES Permit, described above in Section 4.2, will be required.

### **4.5 Texas Parks and Wildlife Department (TPWD) Protected Species Consultation**

In addition to federally protected endangered and threatened species, Texas maintains its own list of state protected animals and plants. Species may be listed as state endangered or threatened and not federally listed. For example, the Brown Pelican continues to receive protected status under Texas state law despite being removed from federal protection in 2009.

Prior to granting any federal or state permit, TPWD must be consulted to determine whether construction, operations, or maintenance activities could have a detrimental impact on any state-listed endangered or threatened species. This process will generally be coordinated by USACE if a Section 404/Section 10 permit is required. If potential habitat for a protected species is found, construction impacts to these areas should be avoided to the greatest extent practicable. No Incidental Take Permits are available for activities that may result in the death or injury to a State-listed endangered or threatened species.

#### Intake Facilities

- a. Onshore open intakes (near shore using channels or other intake facilities) will likely require TPWD Protected Species Consultation due to the multiple federal or state permits that will be required as well as the possibility that Texas state-listed terrestrial and aquatic species may be impacted during the construction process or may be impinged and/or entrained by intake structures.
- b. Offshore open intakes (screened intake pipe extending hundreds of meters or more offshore) will likely also require TPWD Protected Species Consultation for the same reasons as onshore open intakes.
- c. Subsurface intakes (horizontal or vertical beach wells, infiltration galleries, or seabed filtration systems) will likely require TPWD Protected Species Consultation, despite the lack of impingement/entrainment, due to potential impacts caused by the construction, maintenance and operation of the intake facilities.

#### Discharge Facilities

- a. Onshore open discharge (disposal into surface waters of bays or estuaries) will likely require consultation with TPWD because discharging the concentrate in bays and estuaries may impact state-listed species.
- b. Offshore submerged discharge (disposal to sub-surface using long pipes into the ocean) will also likely require consultation with TPWD due to the possibility of impacting state-listed aquatic species.
- c. Subsurface discharge (deep well injection) may or may not require TPWD consultation depending on the possible impacts during construction.

## **4.6 Texas General Land Office Coastal Zone Consistency Approval**

The Coastal Zone Management Act (CZMA) (16 U.S.C 1452 et seq.) is a federal-state partnership providing federal funds for states to administer federally approved coastal programs (see section 3.5). The Texas Coastal Management Program was finalized in 1997 and the Texas Land Commissioner, through the General Land Office, has been delegated the authority to manage the state program. Federal and state permits issued for projects within the formally-designated state coastal zone are reviewed for consistency with the goals and policies of the Texas Coastal Management Program (CMP). Federal permitting authorities such as the USACE and state authorities such as the TCEQ must perform a consistency review to make sure that any activities “directly affecting” a state’s coastal zone be conducted in a manner consistent with the state coastal program “to the maximum extent practicable.” Complying with all rules and permit conditions of the issuing agencies generally satisfies project consistency.

Because all of the proposed desalination plant sites are located within Texas’ formally designated coastal zone boundaries and will require federal and state permits to proceed, a consistency review by the GLO will likely be required.

#### **4.7 Texas Historical Commission Antiquities Permit**

The Texas Historical Commission (THC) has been delegated the authority to preserve and protect Texas’ archeological sites and historic buildings on state and local public land. Governing this task is the Antiquities Code (Texas Natural Resource Code, Title 9, Chapter 191). The Code requires state agencies and political subdivisions of the state, such as cities, counties, water districts, and municipal utility districts, to notify the THC of any ground-disturbing activity on public land that will involve five or more acres; 5,000 or more cubic yards of earth moving; will occur in a historic district; or will affect a recorded archeological site. An Antiquities Permit may or may not be needed for a proposed desalination plant depending on the amount of land that will be disturbed, its location, and whether there are records of historical or archeological sites nearby. It is important to recognize that submerged land below the high tide line is state public land. Any disturbance from pipelines or other facilities on submerged land will also be subject to the Antiquities Code.

#### **4.8 Texas Department of Transportation**

The Texas Department of Transportation (TxDOT) has authority to designate the location and conditions that govern the installation and maintenance of pipelines on TxDOT right of ways. The Corpus Christi District Engineer should be contacted early in the planning process to receive approval for any pipelines or other utilities that may cross or run along state highway right of ways. Additional permits may also be required from TxDOT for access roads or driveways that connect to a state highway.

#### **4.9 Leases and Easements on State Owned Submerged Lands and Uplands**

The GLO issues leases on public lands, both submerged and upland. A lease may be required for permanent structures such as pumping stations, docks, and tank farms. An easement may be necessary for rights of way for pipelines, water lines, power lines, communication lines, roads, and certain other structures. Fees for leases and easements are based on published rate schedules.

## **5.0 Local Permits and Regulatory Approval**

### **5.1 Corpus Christi City Approvals**

The City of Corpus Christi has authority under the Texas Constitution to regulate a wide range of activities relating to the construction and operation of desalination plants within the city's jurisdictional boundaries. Depending on the specific circumstances of the plant and associated facilities, the city may require regulatory approvals to include zoning and land use restrictions; floodplain management and other environmental controls; water, wastewater and stormwater planning; safety and construction codes; beachfront and dune protection; and transportation-related standards. In July 2011, the city enacted the Corpus Christi Unified Development Code (City of Corpus Christi 2014), which is a comprehensive document designed to consolidate the city's former Zoning Ordinance, Platting Ordinance, and other developmental regulations.

Close collaboration with the Corpus Christi Development Services Early Assistance Program is essential in light of the breadth and number of possible permits and other regulatory approvals that may be required depending on the case specific characteristics of the desalination plant and its associated infrastructure. For example, a TPDES Industrial Waste Water Permit may not be required if the City of Corpus Christi agrees to accept the discharge to a municipal wastewater treatment plant. Because this potential option is heavily dependent on the location of the proposed desalination plant and its proximity to suitable waste water treatment facilities, early consultation with the Development Services Department regarding the suitability of candidate sites would be highly beneficial.

### **5.2 Nueces/San Patricio County Approvals**

Unlike incorporated cities, counties in Texas have limited regulatory authority regarding land use issues. The state carefully prescribes what kinds of land use controls a county may exercise. Nueces and San Patricio Counties rely to a great extent on state and federal permitting and regulatory authorities to control land use. However, they do exercise control over several issues including floodplain development; beach and dune protection; storm water and drainage planning; some transportation issues; and utility line installation. The respective Public Works Departments should be consulted at an early stage, if the desalination plant site selected falls within either Nueces or San Patricio County jurisdiction.

### **5.3 Port District Approvals**

The Port of Corpus Christi Authority (PCCA) district boundaries encompass all of Nueces and San Patricio Counties. PCCA owns land that is devoted to port infrastructure and operations. Although PCCA holds title to more than 20,000 acres of land, about 90 percent is submerged lands or as designated dredge material placement areas. Should the desalination plant be located on Port-owned land (either upland or submerged) it will require a lease from the PCCA and will have to comply with all federal, state, and local regulatory requirements in addition to PCCA mandated

conditions. In December, 2013, the PCCA adopted Strategic Plan 2014-2020, which requires that port land be put to its highest and best use (Port of Corpus Christi Authority, 2013). Whether placing a desalination plant within PCCA boundaries meets that standard remains to be seen. Again, PCCA staff should be consulted at an early stage, if a port location for the plant is being considered.

## **6.0 Summary of Conclusions**

- 6.1.** A unique set of legal rules and principles must be taken into consideration whenever construction, such as building a desalination facility, is contemplated in coastal areas.
- 6.2** It is likely that regardless of the inflow and discharge option selected, USACE Section 404 and/or Section 10 Permits will be required. A Section 404 Nationwide Permit 7 (Outfall Structures and Associated Intake Structures) would be highly advantageous (see Appendix I)
- 6.3** Structures in navigable waters, such as intake or outfall pipelines, may require approval from the U.S. Coast Guard Eighth District if they present a potential hazard to navigation.
- 6.4** Desalination plants are not currently mandated to meet the new EPA regulations established under Section 316(b) of the Clean Water Act relating to intake structures. However, if the new EPA standards can be incorporated into the proposed projects with minimal financial or operational cost, it may reduce the need to potentially upgrade facilities in the future as well as enhance the likelihood of receiving governmental regulatory approval.
- 6.5** A NEPA mandated EIS/EA will likely be required. The type of NEPA evaluation required will depend on factors such as the size and location of the proposed facilities, the possible jeopardy to protected flora and fauna as well as the level of public interest that is generated by the project. If a Section 404 Nationwide Permit 7 is granted, any additional NEPA-based evaluation may be categorically excluded.
- 6.6** Because all of the proposed desalination plant sites are located within Texas' formally designated coastal zone boundaries and will require federal and state permits to proceed, a consistency review by the GLO will likely be required prior to construction.
- 6.7** Regardless of the intake or discharge option selected, it is likely that formal FWS and NMFS consultation will be required because of the potential impact on threatened and endangered species, critical habitat or essential fish habitat. Early consultation with these federal agencies is recommended.
- 6.8** A TCEQ Water Quality Certification under Section 401 of the Clean Water Act will likely be required. It will be treated as a Tier I project (only requiring best management practices) if it qualifies for a Nationwide Section 404/Section 10 Permit. If it requires an

Individual Permit and construction affects more than 3 acres of waters of the state, it will likely need a Tier II certification from TCEQ, which require additional standards and public hearings.

- 6.9** Any intake or discharge option selected will likely require some variety of General Construction Stormwater Permit from the TCEQ depending on the amount of land disturbed during construction.
- 6.10** Any discharge option, with the exception of deep well injection, will likely require a TPDES Individual Industrial Wastewater Permit from TCEQ unless it discharges through an existing wastewater treatment plant.
- 6.11** If the intake facility is less than 10 leagues from shore, a Texas Water Rights Permit from TCEQ will likely be required.
- 6.12** Discharges relating to hydrostatic testing of pipelines, tanks, and other containers will likely qualify for a TCEQ General Permit (TXG670000).
- 6.13** In addition to federal consultation, all of the intake and discharge options will likely require TPWD Protected Species Consultation due to the possibility that Texas state-listed terrestrial and aquatic species may be impacted during the construction process, impinged and/or entrained by intake structures or impacted by discharged concentrate.
- 6.14** An Antiquities Permit from THC may or may not be needed depending on the amount of land that will be disturbed, its location, and whether there are records of historical or archeological sites nearby.
- 6.15** Pipelines or other utilities that may cross or run along state highway right of ways as well as access roads or driveways that connect to a state highway will likely need permits from TxDOT.
- 6.16** Leases and easements on state-owned submerged lands and uplands may be required by the GLO depending on the location and purposes of structures.
- 6.17** Construction and operation of a desalination plant within the jurisdictional boundaries of the City of Corpus must comply with the recently adopted Corpus Christi Unified Development Code, which is a comprehensive document designed to consolidate the city's former Zoning Ordinance, Platting Ordinance, and other developmental regulations. If discharge to a municipal wastewater treatment plant is contemplated, early consultation with the City's Development Services Department regarding the suitability of candidate sites would be highly beneficial.
- 6.18** Counties in Texas have limited, but still important, authority over land use issues. The respective Public Works Departments should be consulted at an early stage, if the desalination plant site selected falls within either Nueces or San Patricio County jurisdiction.

- 6.19 Should the desalination plant be located on the Port of Corpus Christi Authority-owned and (either upland or submerged) it will require a lease from the PCCA and will have to comply with all federal, state, and local regulatory requirements in addition to PCCA mandated conditions.

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## APPENDIX I

### **Nationwide Permit 7**

#### **Outfall Structures and Associated Intake Structures**

Federal Register / Vol. 77, No. 34 / February 21, 2012

**Effective Date: March 19, 2012**

**Expiration Date: March 18, 2017**

**Outfall Structures and Associated Intake Structures.** Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (Section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

#### **Nationwide Permit General 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.

##### **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 stormwater 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.

**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 Wide 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 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 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; an
- (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 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 NWPs 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 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 pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure 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.

### **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 rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project.

## **NATIONWIDE PERMIT (NWP) REGIONAL CONDITIONS FOR THE STATE OF TEXAS**

### **The following regional conditions apply within the entire State of Texas:**

1. Compensatory mitigation is required at a minimum one-for-one ratio for all special aquatic site losses that exceed 1/10 acre and require pre-construction notification (PCN), and for all losses to streams that exceed 300 linear feet and require PCN, unless the appropriate District Engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement.

2. For all discharges proposed for authorization under nationwide permits (NWP) 3, 6, 7, 12, 14, 18, 19, 25, 27, 29, 39, 40, 41, 42, 43, 44, 51, and 52, into the following habitat types or specific areas, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 31, Pre-Construction Notification (PCN). The Corps of Engineers (Corps), except for the Tulsa District, will coordinate with the resource agencies as specified in NWP General Condition 31(d) (PCN). The habitat types or areas are:

a. Pitcher Plant Bogs: Wetlands typically characterized by an organic surface soil layer and include vegetation such as pitcher plants (*Sarracenia* sp.), sundews (*Drosera* sp.), and sphagnum moss (*Sphagnum* sp.).

b. Bald Cypress-Tupelo Swamps: Wetlands comprised predominantly of bald cypress trees (*Taxodium distichum*), and water tupelo trees (*Nyssa aquatica*), that are occasionally or regularly flooded by fresh water. Common associates include red maple (*Acer rubrum*), swamp privet (*Forestiera acuminata*), green ash (*Fraxinus pennsylvanica*) and water elm (*Planera aquatica*). Associated herbaceous species include lizard's tail (*Saururus cernuus*), water mermaid weed (*Proserpinaca* spp.), buttonbush (*Cephalanthus occidentalis*) and smartweed (*Polygonum* spp.). (Eyre, F. H. Forest Cover Types of the United States and Canada. 1980. Society of American Foresters, 5400 Grosvenor Lane, Bethesda, Maryland 20814-2198. Library of Congress Catalog Card No. 80-54185)

3. For all activities proposed for authorization under NWP 12 that involve a discharge of fill material associated with mechanized land clearing in a forested wetland, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 31 (Pre-Construction Notification) prior to commencing the activity.

4. For all activities proposed for authorization under NWP 16, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 31 (Pre-Construction Notification), and work cannot begin under NWP 16 until the applicant has received written approval from the Corps.

### **The following regional conditions apply only within the Fort Worth District in the State of Texas:**

5. For all discharges proposed for authorization under all NWPs, into the area of Caddo Lake within Texas that is designated as a "Wetland of International Importance" under the Ramsar Convention, the applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 31.

The Corps will coordinate with the resource agencies as specified in NWP General Condition 31(d) (Pre-Construction Notification).

6. For all discharges proposed for authorization under NWP 43 that occur in forested wetlands, the applicant shall notify the Fort Worth District Engineer in accordance with the General Condition 31 (Pre-Construction Notification).
7. For all discharges proposed for authorization under any nationwide permit in Dallas, Denton, and Tarrant Counties that are within the study area of the “Final Regional Environmental Impact Statement (EIS), Trinity River and Tributaries” (May 1986), the applicant shall meet the criteria and follow the guidelines specified in Section III of the Record of Decision for the Regional EIS, including the hydraulic impact requirements. A copy of these guidelines is available upon request from the Fort Worth District and at the District website [www.swf.usace.army.mil](http://www.swf.usace.army.mil) (select “Permits”).
8. Federal Projects. The applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 31, Pre-Construction Notification (PCN) for any regulated activity where the applicant is proposing work that would result in the modification or alteration of any completed Corps of Engineer projects that are either locally or federally maintained and for work that would occur within the conservation pool or flowage easement of any Corps of Engineers lake project. PCN's cannot be deemed complete until such time as the Corps has made a determination relative to 33 USC Section 408, 33 CFR Part 208, Section 208.10, 33 CFR Part 320, Section 320.4.
9. Invasive and Exotic Species. Best management practices are required where practicable to reduce the risk of transferring invasive plant and animal species to or from project sites. Information concerning state specific lists and threats can be found at: <http://www.invasivespeciesinfo.gov/unitedstates/tx.shtml>. Best management practices can be found at: <http://www.invasivespeciesinfo.gov/toolkit/prevention.shtml>. Known zebra mussel waters within can be found at: <http://nas.er.usgs.gov/queries/zmbyst.asp>.
10. For all discharges proposed for authorization under NWPs 51 and 52, the Corps will provide the PCN to the US Fish and Wildlife Service as specified in NWP General Condition 31(d)(2) for its review and comments.

**The following regional conditions apply only within the Galveston District in the State of Texas:**

11. Nationwide permit (NWP) 12 shall not be used to authorize discharges within 500 feet of vegetated shallows and coral reefs; as defined by 40 CFR 230.43 and 230.44 respectfully. Examples include, but not limited to: seagrass beds, oyster reefs, and coral reefs.
12. For all 3-D seismic testing activities proposed for authorization under NWP 6, the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 31 (Pre-Construction Notification). The pre-construction notification must state the time period for which the temporary fill is proposed, and must include a restoration plan for the special aquatic sites. 3-D seismic testing will not be authorized under NWP 6 within the Cowardin Marine System, Subtidal Subsystem; as defined by the U.S. Fish and Wildlife, Classification of Wetlands and Deepwater Habitats of the United States, December 1979/Reprinted 1992.
13. All NWPs, except NWP 3, shall not be used to authorize discharges into mangrove marshes. Mangrove marshes are dominated by mangroves (*Avicennia sp.* and *Rhizophora sp.*). (Preliminary Guide to Wetlands of the Gulf Coastal Plain. 1978. Technical Report - U.S. Army Engineer Waterways Experiment Station: Y-78-5. P.O. Box 631, Vicksburg, Miss. 39180.)
14. All NWPs, except NWP 3, shall not be used to authorize discharges into the following waters of the United States within the coastal zone of Texas: Coastal Dune Swales, “wetlands and other waters of the United States that are formed as depressions within and among multiple beach ridge barriers, dune complexes, or dune areas adjacent to beaches fronting the tidal waters of the Gulf of Mexico and adjacent to the tidal waters of bays and estuaries. Coastal dune swales are generally comprised either of

impermeable muds that act as reservoirs which collect precipitation or of groundwater nourished wetlands in sandy soils. As such, they generally have a high fresh to brackish water table. Vegetation species characteristically found in coastal dune swales include but are not limited to marshhay cordgrass (*Spartina patens*), gulfdune paspalum (*Paspalum monostachyum*), bulrush (*Scirpus* spp.), seashore paspalum (*Paspalum vaginatum*), common reed (*Phragmites australis*), groundsel bush (*Baccharis halimifolia*), rattlebush (*Sesbania drummondii*), camphor weed (*Pluchea camphorata*), smartweed (*Polygonum* spp.), water hyssop (*Bacopa monnieri*), cattail (*Typha* spp.), umbrella sedge (*Cyperus* spp.), softrush (*Juncus* spp.), sedge (*Carex* spp.), beakrush (*Rhynchosporaspp.*), frog-fruit (*Phyla* spp.), duckweed (*Lemna* spp.), buttonweed (*Diodia virginiana*), mist flower (*Eupatorium coelestinum*), creeping spotflower (*Acmella oppositifolia* var. *repens*), pennywort (*Hydrocotyle* spp.), and bushy bluestem (*Andropogon glomeratus*).” (U.S. Fish and Wildlife Service, Houston, Texas, and the Texas General Land Office, Austin, Texas).

15. For all discharges and work proposed in tidal waters under NWPs 14 and 18 the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 31 (Pre-Construction Notification). The Corps will coordinate with the National Marine Fisheries Service in accordance with NWP General Condition 31(d) (Pre-Construction Notification).

16. For all work in the San Jacinto River Waste Pits (SJWP) Area of Concern (AOC), authorized under a NWP, requires a waiver from the Galveston District Engineer. The applicant shall notify the Galveston District Engineer (DE) in accordance with the NWP General Condition 31, Pre-Construction Notification (PCN). This PCN shall be used to review the project to determine if it will result in more than minimal effects to the region, and does not lessen the restriction provided by any General Condition of the NWPs. The applicant must receive written approval, including a waiver from the Galveston DE prior to starting work in jurisdictional areas of waters of the United States.

17. The use of NWP 51 and 52 are administratively denied, within the Galveston District boundaries.

**The following regional conditions apply only within the Albuquerque District in the State of Texas:**

18. Nationwide Permit No. 23 – Approved Categorical Exclusions. Notification to the District Engineer in accordance with General Condition 31 (Pre-Construction Notification) is required for all proposed activities under nationwide permit 23.

19. Nationwide Permit No. 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities. For all proposed activities under Nationwide Permit 27 that require Pre-Construction Notification, a monitoring plan commensurate with the scale of the proposed restoration project and the potential for risk to the aquatic environment must be submitted to the Corps. (See “Guidelines for Nationwide Permit 27 Submittals” at <http://www.spa.usace.army.mil/reg/>).

20. Nationwide Permits No. 29 - Residential Developments, and No. 39 – Commercial and Institutional Developments. These permits do not authorize channelization or relocation of any intermittent or perennial water course regardless of size or rate of flow, except when, as determined by the Albuquerque District, the proposed channelization would impact a previously channelized stream reach, or the relocation would result in a net increase in functions of the aquatic ecosystem within the watershed.

21. Activities in Special Aquatic Sites, Including Wetlands. Notification to the District Engineer in accordance with General Condition 31 (Pre-Construction Notification) is required for all proposed impacts that exceed 1/10 acre in special aquatic sites, including wetlands.

22. Activities in Intermittent and Perennial Streams. Notification to the District Engineer in accordance with General Condition 31 (Pre-Construction Notification) is required for all proposed activities that involve fills greater than 1/10 acre in perennial or intermittent streams and is not covered by other notification requirements.

23. Springs. All nationwide permits require preconstruction notification pursuant to General Condition 31 for discharges of dredged or fill material within 100 feet of the point of groundwater discharge of natural springs. A spring source is defined as any location where ground water emanates from a point in the ground and a jurisdictional nexus to another water of the United States. For purposes of this regional condition, springs do not include seeps or other discharges which lack a jurisdictional nexus to another water of the United States.

24. Suitable Fill. Use of broken concrete or used tires formed into bales as fill or bank stabilization material requires notification to the District Engineer in accordance with General Condition 31 (Pre-Construction Notification). Applicants must demonstrate that soft engineering methods utilizing native or non-manmade materials are not practicable (with respect to environment, cost, existing technology, and logistics), before broken concrete or used tires as bales are allowed as suitable fill.