DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

RIN 0710-AA71

Reissuance of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final notice.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is reissuing 48 of the 49 existing nationwide permits (NWPs), general conditions, and definitions, with some modifications. The Corps is also issuing two new NWPs, three new general conditions, and three new definitions. The effective date for the new and reissued NWPs will be March 19, 2012. These NWPs will expire on March 18, 2017. The NWPs will protect the aquatic environment and the public interest while effectively authorizing activities that have minimal individual and cumulative adverse effects on the aquatic environment.

DATES: The NWPs and general conditions will become effective on March 19, 2012.


FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202-761-4922 or by e-mail at david.b.olson@usace.army.mil or access the U.S. Army Corps of Engineers Regulatory Home Page at http://www.usace.army.mil/CECW/Pages/cecw_reg.aspx

SUPPLEMENTARY INFORMATION:

Executive Summary

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. The purpose of this regulatory action is to reissue 48 existing NWPs and issue two new NWPs. In addition, three new general conditions and three new definitions will be issued. The NWPs may be issued for a period of no more than five years. Therefore, the Corps must reissue the NWPs every five years to continue to authorize these activities. These 50 NWPs will go into effect on March 19, 2012.

The NWPs authorize activities that have minimal individual and cumulative adverse effects on the aquatic environment. The NWPs authorize a variety of activities, such as aids to
navigation, utility lines, bank stabilization activities, road crossings, stream and wetland restoration activities, residential developments, mining activities, commercial shellfish aquaculture activities, and agricultural activities. Some NWP activities may proceed without notifying the Corps, as long as those activities satisfy the terms and conditions of the NWPs. Other NWP activities cannot proceed until the project proponent has submitted a pre-construction notification to the Corps, and for most NWPs the Corps has 45 days to notify the project proponent whether the activity is authorized by NWP.

Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the U.S. Army Corps of Engineers (Corps) published its proposal to reissue 48 existing nationwide permits (NWPs), issue two new NWPs, and not reissue one NWP. The Corps also proposed to reissue its general conditions and add two new general conditions.

After evaluating the comments received in response to the February 16, 2011, proposal, we have made a number of changes to the NWPs, general conditions, and definitions to further clarify the permits, general conditions, and definitions, facilitate their administration, and strengthen environmental protection. Examples of improved environmental protection include: imposing limits on surface coal mining activities authorized by NWP 21; modifying NWP 27 to authorize additional aquatic resource restoration and enhancement activities such as the rehabilitation and enhancement of tidal streams, wetlands, and open waters; and providing flexibility in designing crossings of streams and other waterbodies so that movements of aquatic species can be maintained after taking into account the characteristics of the stream or waterbody and the surrounding landscape (see general condition 2, aquatic life movements). These changes are discussed in the preamble.

The Corps is reissuing 48 existing NWPs, issuing two new NWPs, reissuing 28 existing general conditions, and issuing three new general conditions. The Corps is also reissuing all of the NWP definitions, and adding three new definitions. The Corps is also splitting one existing definition into two definitions as they relate to single and complete projects. The effective date for these NWPs, general conditions, and definitions is March 19, 2012. These NWPs, general conditions, and definitions expire on March 18, 2017.

Grandfather Provision for Expiring NWPs

In accordance with 33 CFR part 330.6(b), activities authorized by the current NWPs issued on March 12, 2007, that have commenced or are under contract to commence by March 18, 2012, will have until March 18, 2013, to complete the activity under the terms and conditions of the current NWPs. Nationwide permit 21 activities that were authorized by the 2007 NWP 21 may be reauthorized without applying the new limits imposed on NWP 21, provided the permittee submits a written request for reauthorization to the district engineer by February 1, 2013, and the district engineer determines that the on-going surface coal mining activity will result in minimal adverse effects on the aquatic environment and notifies the permittee in writing that the activity is authorized under the 2012 NWP 21.

Clean Water Act Section 401 Water Quality Certifications (WQC) and Coastal Zone Management Act (CZMA) Consistency Determinations
The NWPs issued today will become effective on March 19, 2012. This Federal Register notice begins the 60-day Clean Water Act Section 401 water quality certification (WQC) and the 90-day Coastal Zone Management Act (CZMA) consistency determination processes.

After the 60-day period, the latest version of any written position taken by a state, Indian tribe, or EPA on its WQC for any of the NWPs will be accepted as the state’s, Indian tribe’s, or EPA’s final position on those NWPs. If the state, Indian tribe, or EPA takes no action by [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER], WQC will be considered waived for those NWPs.

After the 90-day period, the latest version of any written position taken by a state on its CZMA consistency determination for any of the NWPs will be accepted as the state’s final position on those NWPs. If the state takes no action by [INSERT DATE 90 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER], CZMA concurrence will be presumed for those NWPs.

While the states, Indian Tribes, and EPA complete their WQC processes and the states complete their CZMA consistency determination processes, the use of an NWP to authorize a discharge into waters of the United States is contingent upon obtaining individual water quality certification or a case-specific WQC waiver. Likewise, the use of an NWP to authorize an activity within a state’s coastal zone, or outside a state’s coastal zone that will affect land or water uses or natural resources of that state’s coastal zone, is contingent upon obtaining an individual CZMA consistency determination, or a case-specific presumption of CZMA concurrence. We are taking this approach to reduce the hardships on the regulated public that would be caused by a substantial gap in NWP coverage if we were to wait until the WQC 60-day period and the CZMA 90-day period ended before these NWPs would become effective.

Discussion of Public Comments

I. Overview

In response to the February 16, 2011, Federal Register notice, we received more than 26,600 comment letters, of which approximately 26,300 were form letters pertaining to NWP 21. The non-form letters we received contained a few thousand comments on various components of the NWPs and NWP Program implementation. We reviewed and fully considered all comments received in response to the proposed rule.

General comments

Many commenters expressed support for the proposed permits. Some commenters stated that the changes are a step forward in improving consistency in the NWP program. Many commenters endorsed the fundamentals of the NWP program, stating that the permits could have a beneficial impact to conducting infrastructure and mining projects important to the country. Some stated that permitting delays and an increase in individual permits would result without the NWP program, creating a backlog for the Corps and resource agencies, while placing a burden on regulated industries. Another commenter urged the Corps to increase flexibility to allow for project modifications when needed due to unanticipated challenges encountered during construction. Some commenters stated that further streamlining is needed for increased efficiency and reducing administrative burden while maintaining a high level of environmental
effects caused by activities authorized by this NWP. One commenter recommended that district engineers evaluate impacts to natural heritage resources during their review of pre-construction notifications.

For those activities authorized by this NWP, the district engineer will review the pre-construction notification and determine whether the activity results in only minimal adverse effects, including whether compensatory mitigation is necessary to ensure that the authorized activity results in minimal adverse effects on the aquatic environment, including water quality. During the review of a pre-construction notification, the district engineer may consult natural heritage resource databases to more effectively evaluate the potential adverse effects on the aquatic environment.

This NWP is reissued as proposed.

NWP 47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs. We proposed to not reauthorize this NWP because it was issued in 2007 in reliance on the development of the Pipeline Repair and Environmental Guidance System (PREGS) by the Pipeline and Hazardous Materials Safety Administration. Since PREGS was not developed and deployed, and paragraph (h) of the NWP required permittees to use PREGS to submit post-construction reports, no activity could be authorized by NWP 47.

Two commenters asked why this NWP was not proposed to be reissued. Three commenters agreed with allowing the NWP to expire and supported the Corps position that designated time sensitive inspections and repairs can be authorized under NWP 3, Maintenance and NWP 12, Utility Line Activities. One commenter said that there should be an NWP to authorize emergency repair activities to fix natural gas pipeline leaks, pressure malfunctions, natural disaster damage, terrorist threats, or other events that pose a danger to public safety. One commenter suggested issuing a new NWP to authorize activities licensed by the Federal Energy Regulatory Commission’s blanket certificate program.

Existing NWPs, such as NWPs 3 and 12, may be used to authorize discharges of dredged or fill material or structures or work in navigable waters of the United States associated with pipeline inspections and repairs. Some of these activities do not require pre-construction notification to qualify for NWP authorization. There are other approaches available, such as emergency permitting procedures, to allow emergency repair activities that do not qualify for general permit authorization to proceed if there is “an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship” (see 33 CFR 325.2(e)(4)). We do not believe it is necessary to develop a new NWP to authorize activities that are granted blanket certificates by the Federal Energy Regulatory Commission. Many of these activities may be authorized by existing NWPs, such as NWPs 3 and 12.

This NWP is not reissued.

NWP 48. Commercial Shellfish Aquaculture Activities. We proposed to modify this NWP by removing the reporting requirement, which applied to all activities that did not require pre-construction notification. We also proposed to add the information previously required in that report to the PCN information requirements. This information includes: a map showing the boundaries of the project area, with latitude and longitude coordinates for each corner of the project area; the name(s) of the cultivated species; and whether canopy predator nets are being used. In addition, we proposed to remove the pre-construction notification requirement for
changes in species cultivated, as long as those species had been previously cultivated in the waterbody. We proposed to modify this NWP to authorize activities associated with the expansion of existing commercial shellfish aquaculture operations. We requested comments on modifying this NWP or issuing a new NWP to authorize new commercial shellfish aquaculture activities.

Many commenters said the NWP should be reissued, and recommended many changes. Several commenters stated that this NWP should not be reissued. Most commenters expressed support for removing the reporting requirements for all activities that did not require pre-construction notification, stating that the paperwork was unnecessary given the current regulation of the industry by other entities, such as state and local governments. One commenter said that the reporting requirements should be maintained to ensure protection of resources. Other commenters suggested that pre-construction notification should be required for all activities. Several commenters said that the NWP should only authorize maintenance activities. One commenter stated that shellfish aquaculture methods are sufficiently different for the species cultivated that issuing a single NWP to authorize these activities is inappropriate. Another commenter said that all commercial shellfish aquaculture activities should be authorized under one NWP. Two commenters stated that the NWP should only authorize harvesting that occurs by hand. One commenter stated that these activities may impact tribal fishery access and fishing rights, and coordination with the affected tribes should be required.

We have reissued this NWP and made several changes. Properly sited, operated, and maintained commercial shellfish aquaculture activities support populations of shellfish that provide important ecological functions and services for coastal waters, and should be authorized by a single NWP. We have removed the reporting requirements for this NWP and substantially reduced the number of pre-construction notification thresholds. Division engineers may regionally condition this NWP to establish additional pre-construction notification thresholds if necessary to ensure that this NWP authorizes only those activities that have minimal adverse effects on the aquatic environment. We do not agree that pre-construction notification should be required for all activities authorized by this NWP, because these activities are regulated by a number of other government agencies, especially at the federal and state government levels. In addition, the discharges of dredged or fill material into waters of the United States authorized by this NWP will result in minimal adverse environmental effects to the environmental criteria established under the Clean Water Act. The shellfish populations supported by the activities authorized by this NWP help support the objective of the Clean Water Act because they improve water quality through the conversion of nutrients into biomass (i.e., shellfish growth) and the removal of suspended materials through filter feeding. Commercially grown shellfish also provide some habitat functions for the aquatic environment. Impacts to submerged aquatic vegetation will, in many cases, be evaluated through the pre-construction notification review process. For commercial shellfish aquaculture activities in new project areas, adverse effects to submerged aquatic vegetation will be minimal because of the 1/2-acre limit. Impacts to coastal aquatic habitat and species of concern in those habitats are more appropriately addressed through consultation conducted under the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act and/or Section 7 of the Endangered Species Act.

We do not agree that the NWP should be limited to hand harvesting activities. We have retained the pre-construction notification requirement for activities involving dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation. General condition 17,
tribal rights, states that NWP activities may not impair reserved tribal rights, including treaty fishing and hunting rights. In addition, division engineers may regionally condition this NWP to identify areas where Tribes must be notified of these activities and government-to-government consultation conducted to avoid or minimize impacts to tribal fishery access and fishing rights.

One commenter said that the restoration of indigenous species would be prevented if cultivation was limited to only those species that were previously commercially cultivated. Another commenter recommended requiring pre-construction notification if there were a proposed change in species cultivated that was not part of a state-approved list. Some commenters suggested that pre-construction notification should not be required for changes in harvesting methods. Another commenter said that pre-construction notification should be required if the culture method changed from bottom culture to floating or suspended culture to allow district engineers to evaluate potential navigation issues. One commenter indicated that the NWP should authorize demonstration projects less than one acre in size and another said that non-commercial shellfish aquaculture activities should be authorized, since states, local governments, and non-governmental organizations engage in recreational and commercial aquaculture. One commenter recommended adding a provision that would require the permittee to implement measures to prevent the spread of aquatic nuisance species, such as prohibiting the transfer of materials used for commercial shellfish aquaculture activities from one project site to another unless appropriate measures have been taken to ensure that those materials are free of aquatic nuisance species. This commenter said a note should be added to the NWP, to prohibit the transfer of equipment used in commercial shellfish aquaculture activities from one waterbody to another waterbody, unless that equipment has been allowed to dry out for a minimum of 90 days or treated in accordance with a regional aquatic nuisance control plan, to prevent the introduction of aquatic nuisance species into the other waterbody.

We have modified this NWP to provide more flexibility in the species cultivated, specifically, to allow the cultivation of nonindigenous species as long as those species have been previously cultivated in the waterbody. We recognize that there has been commercial production of nonindigenous species over many years in certain waterbodies, and activities requiring Department of the Army authorization associated with those commercial operations should be authorized by this NWP. We have retained the prohibitions against cultivating aquatic nuisance species defined by the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. We have also added Note 2 to the NWP, to reduce the risk of introducing aquatic nuisance species by requiring treatment of materials taken from one waterbody to another in accordance with the applicable regional aquatic nuisance species management plan. Division engineers may add regional conditions to the NWP to make permittees aware of the regional aquatic nuisance species management plan that may be applicable to NWP 48 activities.

We agree that pre-construction notification should not be required for changes in harvesting methods because harvesting methods have temporary impacts and result in minimal adverse effects. A possible exception is dredge harvesting in areas inhabited by submerged aquatic vegetation, which still requires pre-construction notification. We also agree that pre-construction notification should be required if the grower proposes to change from bottom culture to floating or suspended culture in a project area, or if it is an activity in a new project area that requires the installation and use of floating or suspended gear, so that effects to navigation can be evaluated. This NWP authorizes commercial shellfish aquaculture activities undertaken by states, local governments, and non-governmental organizations. Shellfish seeding
activities to improve shellfish populations may be authorized by NWP 27. Small recreational
shellfish aquaculture activities may be authorized by other applicable NWPs, such as NWP 4.
Other recreational shellfish aquaculture activities may be authorized by regional general permits
or individual permits. Restoration aquaculture activities may be authorized by NWP 27.

One commenter stated that the structures and fill activities authorized by the NWP were
too broad and should be refined. This commenter recommended prohibiting the long-term use of
trays if sediment is compacted and diversity is diminished. One commenter said that structures
and fill should be limited to shell spat only, while another commenter stated that shell planting
should be allowed on any size parcel without pre-construction notification.

The structures and fills authorized by this NWP are limited to those necessary to conduct
commercial shellfish aquaculture activities. We have retained the provision that states that the
NWP does not authorize attendant features such as docks, piers, boat ramps, stockpiles or staging
areas, or the deposition of shell material back into waters of the United States as waste. We have
removed the pre-construction notification threshold for commercial shellfish aquaculture
activities that are more than 100 acres in size, because we do not believe it is necessary to require
pre-construction notification for existing operations with a valid lease, permit, or other
appropriate instrument that has been approved by the appropriate state or local government
agency, unless the activity triggers any of the pre-construction notification thresholds.

One commenter requested changes to the definition of shell seeding, citing concerns over
the use of potentially environmentally damaging materials. Another commenter supported the
use of terms such as “suitable substrate” and “appropriate materials” due to the decreasing
availability of shell cultch and new research on and development regarding materials. One
commenter said that use of the term “submerged aquatic vegetation” allowed for the destruction
of eelgrass, because eelgrass is often not inundated with tidal waters. One commenter asked
whether traditional oyster culture practices were of special concern.

The definition of the term “shellfish seeding” in the Definitions section of the NWP
provides examples of appropriate materials that may be used for shellfish seeding activities.
Through the issuance of regional conditions, division engineers can restrict or prohibit the use of
certain materials for shellfish seeding. In response to a pre-construction notification, district
engineers may add activity-specific conditions to an NWP authorization to prohibit the use of
certain materials for shellfish seeding. Eelgrass is commonly considered to be a species of
submerged aquatic vegetation and we intend it to be covered by the provisions regarding
submerged aquatic vegetation, regardless of whether it is fully submerged in all tidal conditions
or not.

Many commenters requested clarification as to when pre-construction notification is
required and what constitutes a project area for the purposes of this NWP. Several commenters
recommended that pre-construction notifications should only be required once and not for each
subsequent reissuance of this NWP if the commercial shellfish aquaculture operation has not
changed. One commenter asked if the lease holder is required to provide pre-construction
notifications annually if the lease covers an area greater than 100 acres. One commenter
inquired whether pre-construction notification is required when the operator is only working on
30 acres of a 200-acre project site. One commenter said that multiple pre-construction
notifications should not be required from a lease holder that has multiple 100-acre leases;
instead, one pre-construction notification should cover all those leases.
We have reduced the number of pre-construction notification thresholds in this NWP. The pre-construction notification thresholds in this NWP focus on those activities that should be reviewed by district engineers: (1) ensure that floating or suspended aquaculture facilities do not cause more than minimal adverse effects on navigation or, (2) ensure that both cultivating species that have not been previously cultivated in the waterbody and dredge harvesting, tilling, or harrowing in areas of submerged aquatic vegetation do not cause more than minimal adverse effects on the aquatic environment.

To support our objective to be more consistent with state and local agencies that regulate commercial shellfish aquaculture activities, we have redefined project area so that it is based on leases or permits issued by an appropriate state or local government agency that is responsible for allocating subtidal or intertidal lands for commercial shellfish production. The project area may also be based on rights to conduct shellfish aquaculture that are established by treaty, such as treaties executed between the United States Government and Indian Tribes. Project area may also be identified through an easement, lease, deed, or contract which establishes an enforceable property interest to conduct aquaculture activities on subtidal or intertidal lands.

We have removed the pre-construction notification requirement for relocating existing operations into portions of the project area not previously used for aquaculture activities, since the permit or lease issued by the state or local government agency has already authorized that area for use in commercial shellfish aquaculture. There is no need to address expansions in this NWP if the proposed expansions are within the project area authorized by the state or local government lease or other appropriate instrument. For example, pre-construction notification is not required if an operator who is only working on 30 acres of a 200-acre project area decides to conduct operations beyond those 30 acres within the 200 acre project area.

We have removed the pre-construction notification threshold for project areas greater than 100 acres. Since we have limited the pre-construction notification thresholds to focus on activities that may adversely affect submerged aquatic vegetation and changes in operations that may adversely affect navigation or involve species not previously cultivated in the waterbody, most on-going activities will not require pre-construction notification, thereby substantially decreasing the paperwork burden on current commercial shellfish aquaculture operators. The lease holder is not required to provide a pre-construction notification annually no matter what the size of the project area as long as the lease holder has a valid lease, permit, or other appropriate instrument that has been approved by the appropriate state or local government agency for the project area, and none of the pre-construction notification thresholds are triggered. For example, pre-construction notification is not required if the lease holder is only working within an existing authorized 200-acre project area no matter how much or little of that area is cultivated.

However, if the lease holder proposes to cultivate a species of oyster in the 200-acre project area not currently present in the waterbody, pre-construction notification would be required. The activities also do not require pre-construction notification unless the activities involve dredge harvesting, tilling, or harrowing in areas of submerged aquatic vegetation. If the lease holder’s operations within the 200-acre project area change from one on-bottom technique to another on-bottom technique, pre-construction notification is not required. However, if the operations are proposed to change from an on-bottom culture method to a floating or suspended culture method, pre-construction notification is required. Lastly, if an operator obtains a lease for a new project area and wishes to conduct any commercial shellfish aquaculture activities in the new project area, pre-construction notification is required.
One commenter said that requiring pre-construction notification for aquaculture relocation and expansion is unnecessary if the area is already leased but transferred to another owner. Another commenter recommended that any NWP authorizations should still be valid when the lease is transferred to another operator and use has not changed. One commenter stated that pre-construction notification should not be required for expansions into newly leased areas since the site conditions are usually the same.

Pre-construction notification is not required for expansions of commercial shellfish activities as long as the expansion occurs within the project area specified by an permit, lease, or other instrument issued by the appropriate state or local agency, and as long as none of the pre-construction notification thresholds are triggered. This would apply to an activity in a new location within the project area, or to an activity that would utilize a larger acreage of the project area, as long as none of those activities require pre-construction notification. If an activity is proposed by an operator in a new project area, however, pre-construction notification is required. An NWP verification can be transferred to a new project proponent, if he or she has obtained an interest in the subtidal or intertidal lands, provided appropriate procedures are followed for the transfer of the NWP verification (see general condition 29, transfer of nationwide permit verifications).

One commenter asked whether or not an NWP verification can be issued prior to a state issuing a lease. Another commenter said that NWP 48 should be delegated to the states who issue leases to reduce duplicative paperwork. One commenter stated that pre-construction notification should not be required when a state already evaluates impacts to submerged aquatic vegetation prior to granting leases. Another commenter said that certain states do not issue leases in areas with submerged aquatic vegetation, so it is not necessary for the Corps to address that issue.

The district engineer may issue an NWP verification before the state makes its decision on a lease application. It is necessary to respond to a complete pre-construction notification within 45 days to retain the authority to add activity-specific conditions, which would ensure that the NWP activity results in minimal adverse effects on the aquatic environment. Since there is not consistent regulation of commercial shellfish aquaculture activities among all of the states, we do not agree that certain Federal interests, such as navigation and impacts to special aquatic sites, should be delegated to the states. In evaluating a pre-construction notification triggered by potential impacts to submerged aquatic vegetation, the district engineer would consider any evaluation of such impacts that had been previously conducted by the state if this is submitted with the PCN.

Many commenters expressed concerns regarding impacts to species protected under the Endangered Species Act, designated critical habitat, and essential fish habitat. One commenter asked if compliance with the Endangered Species Act was required for both existing and new activities. Another recommended that a detailed eelgrass, macroalgae, and forage fish survey should be required for each pre-construction notification. One commenter stated that NWP authorization should not be granted in areas adjacent to forage fish or critical habitat.

Activities authorized by this NWP must comply with general condition 18, endangered species. Any new or existing activity that involves discharges of dredged or fill material or structures or work in navigable waters of the United States that might affect listed species or designated critical habitat require pre-construction notification to the district engineer, so that Section 7 consultation can be conducted. We do not agree that pre-construction notifications
should include surveys for eelgrass, microalgae, or forage fishes. The district engineer may request additional information from the project sponsor if needed to conduct Section 7 consultation. An activity may be authorized in critical habitat if a section 7 biological opinion is issued and impacts to critical habitat are authorized.

One commenter recommended that the Corps work closely with the National Oceanic and Atmospheric Administration to streamline the review and approval of aquaculture projects. Some commenters said that the commercial shellfish aquaculture industry is not sufficiently regulated at the local, state, or federal level. One commenter said that enforceable conditions need to be added to NWP 48 authorizations to protect the aquatic environment. One commenter recommended implementing a regional ecosystem-based management approach.

We have worked closely with the National Oceanic and Atmospheric Administration and other Federal agencies to develop this NWP, and we disagree that there is not already sufficient government oversight of these activities at the various levels of government. In response to a pre-construction notification, the district engineer may add activity-specific conditions to the NWP authorization to ensure that the authorized activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. A regional ecosystem-based management approach is more appropriately undertaken by Corps districts and interested Federal, state, and local government agencies, not at the national level.

Many commenters expressed concern regarding the environmental impacts associated with expansions of commercial shellfish aquaculture activities and for new activities. One commenter said that expansion proposals should not be reviewed as restoration activities since non-native species are a serious threat. Several commenters stated that the environmental benefits do not offset the environmental impacts, introduction of invasive species, impacts to native species such as flatfish and other sandy bottom species, reduction of species diversity, elimination of native animal and plant species, harassment and destruction of migrating birds, and the introduction of plastics. Other commenters expressed concern regarding impacts from geoduck cultivation and harvesting on the environment as well as on wild geoduck populations, and the cultivation and harvesting of other non-native species. Two commenters stated that geoduck cultivation and harvesting has only minimal impacts.

When properly sited, operated, and maintained, commercial shellfish aquaculture activities generally result in minimal adverse effects on the aquatic environment and in many cases provide environmental benefits by improving water quality and wildlife habitat, and providing nutrient cycling functions. These activities are subjected to an extensive amount of regulation at the Federal and state government levels, and often the local government level. The introduction of invasive species can occur through many mechanisms, and the types of species approved for commercial aquaculture activities are regulated. This NWP does not authorize discharges of dredged or fill material or structures or work in navigable waters of the United States associated with the cultivation of nonindigenous species that have not been previously cultivated in the waterbody or the cultivation of aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. Furthermore, division engineers may add regional conditions to the NWP to require permittees to use specific practices that will prevent the spread of aquatic nuisance species. Such measures may vary, depending on the species of concern and which techniques would be the most effective means to prevent the spread of such species. Adverse effects that may result from geoduck cultivation are more appropriately addressed by Corps districts, since this activity is limited in geographic scope.
Division engineers may regionally condition this NWP to restrict or prohibit its use to authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States associated with geoduck production.

Several commenters stated that the expansion of commercial shellfish aquaculture activities will result in more than minimal cumulative adverse effects and should not be authorized by NWP. One commenter said that all activities authorized by this NWP should require reporting to assess cumulative effects. Another commenter suggested that cumulative effects on water quality should be evaluated for water bodies with multiple aquaculture facilities.

As stated above, commercial shellfish aquaculture activities provide habitat, water quality, and nutrient cycling functions and when properly sited, operated, and maintained are unlikely to result in more than minimal cumulative adverse effects on the aquatic environment. Division engineers may restrict or prohibit use of this NWP in geographic regions or specific waterbodies where more than minimal cumulative adverse effects may occur.

One commenter stated that shellfish aquaculture activities have economic impacts that were not sufficiently addressed in the draft decision documents. For example, county and state health agencies are required to regulate water quality, which costs taxpayer money. This commenter said that changes to aesthetics associated with expansion of these activities, such as noise, odor, and viewed impacts should also be considered. Impacts to recreational uses of the affected waterbodies could occur if expansions greater than 100 acres in size are authorized. This commenter also said that new and expanded operations should not be proposed in national parks or historic monuments, but existing operations should be allowed to continue. The commenter also stated that any projects in river delta regions should be carefully evaluated due to the sensitive nature of these brackish environments.

The draft decision documents briefly discuss economics as one of the public interest review factors that are considered before the Corps issues a permit, including a general permit. Shellfish aquaculture activities, in general, help improve water quality because many of the commercially cultivated species are filter feeders that remove nutrients and suspended materials from the water column. By removing nutrients, eutrophication and similar water quality problems are lessened. Water quality benefits provided by commercially grown shellfish help reduce costs of remediating local water quality problems. Commercial shellfish aquaculture activities have minimal adverse effects to aesthetics, and are likely to result in little change in local baseline levels of noise, odor, or views when compared to other waterfront uses in coastal residential areas, such as private and commercial boats, as well as the piers, wharves, marinas, and anchorage or mooring areas where those vessels are kept. Coastal areas are used by a wide variety of people. Effects on recreational uses of the waterbody should also be considered during the review of specific commercial shellfish aquaculture activities. Division engineers may regionally condition this NWP to restrict or prohibit its use to authorize new project areas and/or new activities in existing project areas in national parks or in the vicinity of historic monuments. The protection of waters near river deltas or other categories of waters is more appropriately accomplished through regional conditions imposed by division engineers.

One commenter stated that because commercial shellfish aquaculture may be limited by farm runoff, increasing production could require farmland to cease in operation. Another commenter stated that shellfish farming is a good gauge of water quality in an area since poor water quality necessitates closure of shellfish farms. In contrast, another commenter said the
potential for aquaculture operations to harvest continuously as farm size increased would result in permanently suspended particulates and increased turbidity which would damage ecosystems.

Changes in farming operations that may be related to commercial shellfish aquaculture activities in nearby waters is outside of the Corps regulatory authority. Such issues are more appropriately addressed by state or local governments, who have the primary responsibility for land use decisions. We recognize that commercial shellfish aquaculture can help improve water quality. Harvesting operations may increase turbidity, but we believe such impacts are temporary and minor.

We received many comments in response to our proposal to consider issuing a new NWP or modifying NWP 48 to authorize new commercial shellfish aquaculture activities. Many commenters supported modifying NWP 48 to authorize new activities, and suggested terms and conditions. One commenter recommended limiting new activities to ten acres or less. One commenter stated that there should be no limits on new activities because shellfish aquaculture has only minimal, short-term adverse environmental impacts, and the shellfish themselves provide valuable ecological services. Two commenters stated that all new shellfish aquaculture activities except floating culture should be authorized under the NWP, because floating facilities have potential to impact navigation. One commenter said limitations on new activities should be imposed on NWP 48 and reconsidered when the proposal to reissue the NWPs is developed in 2016. Other commenters said that new activities should not be authorized by NWP because of their environmental impacts. Another commenter stated that new activities should not be authorized by NWP unless bottom culture methods are used (except for grow-out bags), harvesting is done by hand, and only native species are cultivated. One commenter stated that baseline habitat assessments should be provided and no operations should occur within 180 feet of marine vegetation, eelgrass, or sand dollar beds.

We are modifying NWP 48 to authorize commercial shellfish aquaculture activities in new project areas, provided the project proponent obtains a valid authorization (e.g., a lease or permit from the appropriate state or local government agency responsible for granting such leases or permits) and the activity will not directly affect more than 1/2-acre of submerged aquatic vegetation beds. Pre-construction notification is required for all commercial shellfish aquaculture activities in new project areas. Pre-construction notification is also required for activities in a project area if they involve dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation or if the activities involve the change from bottom culture to floating or suspended culture in order to assess potential impacts to navigation. In addition, general condition 14, proper maintenance, requires the permittee to properly maintain any authorized structure or fill. Therefore, any authorized commercial shellfish aquaculture activity and its associated equipment shall be properly maintained so as to not pose a hazard to navigation. The pre-construction notification thresholds will provide an opportunity for district engineers to evaluate the potential adverse effects to navigation and vegetated shallows, conservation, and other applicable public interest review factors, and ensure that those adverse effects are minimal. We agree that commercial shellfish aquaculture activities can provide important functions and services to the aquatic environment and should be authorized by NWP, with appropriate notification thresholds and limits. Division engineers may regionally condition this NWP to restrict or prohibit its use in specific waters or geographic areas, if there are concerns that these activities may have more than minimal adverse effects on certain species or specific types of aquatic resources.
This NWP is reissued with the modifications discussed above.

NWP 49, Coal Remining Activities. We proposed to clarify how the 40 percent of newly mined area is determined. We also proposed to modify the pre-construction notification provision to require the prospective permittee to submit documentation describing how the overall mine plan will result in a net increase in aquatic resource functions.

Several commenters supported the reissuance of NWP 49 and said no restrictions should be imposed because remining permits are one of the most significant tools to alleviate the environmental effects of past mining activities. Many commenters said this NWP should not be reissued. Some of these commenters stated that these activities result in more than minimal cumulative adverse effects. Many commenters objected to the lack of limits for filling stream channels and said this NWP should not authorize the construction of valley fills or refuse fills. Other commenters stated that the functional increase associated with re-mining will still be insufficient to offset adverse effects of filling stream beds and that stream mitigation will not effectively replace lost stream functions.

We believe authorizing remining of an unreclaimed site and requiring actions to restore unreclaimed areas is one of the most effective ways to reverse degraded water quality in a watershed. Therefore, we have not imposed any new limits or restrictions on this NWP. All activities authorized by this NWP must result in net increases in aquatic resource functions, which will help manage cumulative effects on a watershed basis. Cumulative effects assessments have revealed the reduction in acid mine drainage and/or sedimentation in downstream segments of stream channels has resulted in functional improvements in many watersheds. The states of Ohio, Pennsylvania, Virginia, and West Virginia frequently use remining activities to reduce acid mine drainage and sedimentation and have data to demonstrate these improvements.

We do not believe this permit should have linear foot or acreage limits, since this NWP authorizes discharges of dredged or fill material into waters of the United States to reclaim previously mined sites that were unreclaimed, abandoned, forfeited, and typically exhibit poor water quality and present safety hazards. These unreclaimed mines may have unreclaimed highwalls, unvegetated mine spoil, disconnected stream segments, and/or pit impoundments. We, as well as other state and federal agencies, recognize that remining and reclaiming these areas is one of the most successful means for improving water quality, because these activities reduce sedimentation and acid mine drainage. Due to advances in mining technology and equipment, it is now economically viable to remove coal from these unreclaimed and abandoned mine sites. These sites can be combined with adjacent unmined areas to develop a project that is economically viable. In many cases the net result of combining remining of a previously mined site with new surface coal mining activities in adjacent areas is to facilitate reclamation of the older mine site and reduce acid mine drainage and sediment from the older mine site to downstream stream segments. Furthermore, this NWP provides an incentive to remine degraded areas, similar to the 1987 Rahall Amendments to the Clean Water Act, which enables mine operators to apply for the U.S. Environmental Protection Agency’s modified effluent limits developed specifically for remining projects.

Project proponents who want to use this NWP must submit pre-construction notifications. The pre-construction notification describes how the overall mining plan will result in a net increase in aquatic resource functions. If there is an appropriate functional assessment protocol available for the types of aquatic resources in that geographic area, project proponents are