Nationwide and Other General 404 Permits:  
A Primer and Recent Developments

by
Zach C. Miller  
Steven E. Marlin  
Davis Graham & Stubbs LLP  
Denver, Colorado  
303-892-9400  
zach.miller@dgslaw.com  
steven.marlin@dgslaw.com  
March 29, 2007

I. INTRODUCTION

Section 404 of the federal Clean Water Act requires a permit from the U.S. Army Corps of Engineers (the “Corps”) for nearly all discharges of dredged or fill material into any water of the United States, including most wetlands. 33 U.S.C. § 1344. Because of the enormous breadth of regulated “waters of the U.S.,” as well as the activities considered to constitute a regulated “discharge of dredged or fill material,” the Corps is expressly authorized to issue “general” permits after public notice and comment on a state, regional or nationwide basis for activities considered to have only minimal impacts. 33 U.S.C. § 1344(e). A party who meets the eligibility criteria and conditions for an existing general permit may generally proceed under that general permit, without the need to obtain an “individual” 404 permit from the Corps. This “general” permitting scheme is intended to create a simplified, streamlined process for authorizing minimal impact discharges, in order to ease the regulatory burden on both the Corps and the public and to allow the Corps to focus its efforts on higher impact activities.

By far the most widely used of these three types of general permits are so-called “nationwide” permits (“NWPs”). During the first three decades the Corps has administered Section 404, well over 80% of 404-regulated activities have been authorized under NWPs and other general permits. As a result, NWPs have been heavily relied on by the development sector and strongly criticized by the environmental community as “loopholes” responsible for inappropriate wetlands and riparian area destruction. Accordingly, NWPs and other general 404 permits have been extremely controversial and subject to several recent judicial challenges.

Since its inception over 30 years ago, the 404 NWP and general permit program has shown a clear trend of becoming increasingly complex, restrictive, regionally uneven and subject to case-by-case Corps review. In addition, NWP-authorized discharges, although generally relatively small in size, are increasingly being subjected to “compensatory mitigation” requirements, which in turn has increased the demand for and use of mitigation banks.

Most recently, on March 12, 2007, effective March 18, 2007, the Corps reissued all 43 previously existing NWPs, issued six (6) new NWPs, reissued 26 existing NWP General Conditions, and issued two (2) new General Conditions. Of the reissued NWPs and Conditions, the Corps modified most existing NWPs and General Conditions. Key aspects of those latest revisions and new provisions are described in Part IV below and the attached Exhibit D.

This paper briefly describes: (1) what a NWP is; (2) how NWPs have evolved; (3) how they work today; (4) how the Corps recently has reissued and revised them; (5) complications from regional conditions; (6) recent litigation challenging NWPs and other general permits; (7) some of the most useful NWPs in the West and the procedural steps to use them; and (8) measures that prudent operators should
take to avoid potential problems under the existing and future NWP Program. The paper also describes general statewide or regional 404 permits that may be available as an alternative or in addition to NWPs.

II. WHAT IS A NATIONWIDE PERMIT?

A NWP is a general permit issued by the Corps after public notice and comment that authorizes throughout the United States certain designated 404-regulated activities deemed to have only minimal adverse environmental effects, upon a showing that the criteria and conditions of the NWP are met, without the need to obtain an “individual” 404 permit. Regional and statewide general 404 permits operate in the same fashion but are adopted by Corps District or Division Offices and are available only in specified geographic areas.

A. Statutory Authority

The use of NWPs and other general 404 permits is expressly authorized under Section 404(e)(1) of the Clean Water Act, 33 U.S.C. § 1344(e)(1), which states in pertinent part:

“... the Secretary [of the Army, acting through the Corps] may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.” (Emphasis added.)

Section 404(e)(2) further provides that nationwide and other general permits:

1. May be issued for no longer than a five-year term, after which they must either expire or be reissued; and
2. May be modified or revoked if, after opportunity for a public hearing, the authorized activities are determined to have an adverse impact on the environment or be more appropriate for individual 404 permits.

In its March 12, 2007 rulemaking, the Corps reissued all 43 existing NWPs and created six (6) new NWPs, for a current total of 49 NWPs, and reissued 26 existing NWP General Conditions, deleted one General Condition and added two new General Conditions, for a current total of 28 General NWP Conditions, as listed on Exhibits C-1 and C-2 attached and described further below.

B. Corps’ NWP Rules

The Corps’ regulations governing the issuance and administration of NWPs are set out in 33 C.F.R. Part 330. The NWPs were formerly set out in Appendix A to those rules, but the Corps in the 1990s decided, unwisely in this author’s view, to discontinue publishing the NWPs in the Code of Federal Regulations. As a result, while NWPs and NWP General Conditions are published in the Federal Register at the time they are formally issued by the Corps, they are not published from year to year in any nationally available general publication and must be obtained directly from the national or a district office.
of the Corps. Although not a legally “official” source of the Corps’ rules and requirements, probably the best, most up-to-date source regarding the currently applicable NWPs and any binding general or regional conditions is the **Corps’ national Internet Website** at: [http://www.usace.army.mil/cw/cecwo/reg/nationwide_permits.htm](http://www.usace.army.mil/cw/cecwo/reg/nationwide_permits.htm). The home page for this website also has information regarding Internet websites of the division and district offices of the Corps, which contain information regarding existing and proposed future state, local and regional conditions applicable to various NWPs and available regional general permits.\(^1\)

### C. NWP General Conditions and Notice Requirements

In addition to the criteria and limits listed in each NWP, all NWPs are also subject to “general conditions” that are adopted at the time the NWPs are issued. Unless otherwise indicated, all 28 of the currently listed General Conditions generally apply to each NWP, with the exception of Condition No. 27 (formerly 13), which requires pre-construction notification to the Corps before proceeding under a NWP. Condition No. 27 applies only where so indicated in a specific NWP or other condition. That notification condition is a critical one because, once notified, the Corps then can, and often does, either reject, modify or substantially condition a proposed NWP authorization. As discussed below, one clear trend under the NWP Program is increasingly to require pre-construction notification to the Corps in more circumstances and for more NWPs.

One unique characteristic of nearly all NWPs that require notice, however, is that, if the Corps fails to respond to the notice after 45 days, the permittee is automatically authorized to proceed under the NWP. This is fundamentally different than an “individual” permit, which must formally be “issued” and approved for the permittee to act under the permit. This 45-day limit also serves to prevent the lengthy delays associated with individual permits.

There are several important exceptions to this “pass-go-after-45-days” provision. If a permittee is required under a NWP to confirm the absence of adverse effects on endangered species or historic properties pursuant to General Conditions 17 and 18, they may not proceed until receiving a “no effect” notification from the Corps. The new or modified NWPs 21, 49 and 50 for coal mining and remining also uniquely require the permittee to receive actual approval from the Corps in order to proceed. Finally, if the Corps determines that an individual permit will be required, the NWP process is terminated, and an individual permit application must be submitted. See General Condition 27(a)(2).

It is important to note that many regional or statewide general 404 permits that require pre-construction notification often also require that the Corps actively approve the noticed activity and do not include this “pass-go-after-45-days” provision.

### D. Basic characteristics of NWPs

It is critical to bear in mind, as summarized in **Exhibit A**, that all NWPs have the following fundamental characteristics:

1. NWPs are not an “entitlement.” The Corps is expressly authorized in its discretion to deny, modify or revoke a NWP or require an applicant to apply for an individual permit. 33 C.F.R. §§ 330.1(d), 330.4(e) and 330.5;

2. NWPs when issued are generally subject to and must comply with EPA’s 404(b)(1) Guidelines;

\(^1\) These and other useful websites and related information are listed in Section X at the end of this paper.
3. Most NWPs are very activity-specific, but several refer to broader topical subjects, such as NWP 23 (for federal actions constituting “categorical exclusions” under NEPA) and NWP 32 (for completed 404 enforcement actions).  

4. NWP permitted activities may cause only minimal individual and cumulative environmental impacts;

5. Full compliance with all NWP conditions, including pre-construction notification where required, is a prerequisite to relying on a particular NWP. If any condition is not fully complied with at the time of the discharge, the Corps generally will consider the NWP inapplicable and the action to be an unauthorized, unlawful discharge. 33 C.F.R. § 330.1(c); and

6. NWP conditions can vary by region, so some NWPs may either be wholly unavailable or have more stringent requirements in certain states, watersheds or Corps districts.

These key characteristics, and misunderstandings or disagreements about them, have led to numerous violations, as well as some recent litigation described below.

E. Prerequisites to Use a NWP

In order to be eligible for and duly authorized to proceed under a current NWP, a regulated person or entity must:

1. Meet the eligibility criteria of a specific NWP (i.e., fit the description of the described category of activities or other subject matter);

2. Satisfy the conditions of the NWP itself (e.g., not exceed any specific acreage or linear disturbance limits outlined in a particular NWP);

3. Satisfy all “general” NWP conditions that are applicable to all NWPs;

4. Satisfy all regional conditions applicable to the specific NWP relied on;

5. Satisfy any State-imposed conditions on the NWP resulting from the State 401 certification process;

6. If the particular NWP requires compliance with NWP General Condition No. 27, give pre-construction notification (“PCN”) to the Corps, including (for wetland fills) submittal of a proper wetland delineation (Condition No. 27 also contains a long list of specific information that must also be submitted for particular NWPs);

7. Under revised General Condition 20, if the use of a NWP requires PCN and will cause the loss of over 1/10 acre of wetlands, a mitigation plan must be submitted with the PCN to perform compensatory mitigation on at least a one-for-one ratio, unless the Corps waives that requirement and finds that some other form of mitigation is more appropriate;

---

2 The greatest exception to that activity-specific characteristic was former NWP 26, which was by far the most widely used and most controversial general permit. Before it was terminated effective June 7, 2000, NWP 26 authorized all discharges affecting up to 3 acres in any waters that are either “isolated” or located “above headwaters.”
8. Where PCN is required, either receive specific Corps “confirmation” of authorization to proceed under the NWP OR have the Corp fail to respond within 45 days following receipt of the PCN, at which point authorization is legally deemed to be confirmed, except for a few NWPs (21, 49 and 50) that specifically require written approval, and except where the permittee must wait to receive a “no effect” determination from the Corps if endangered species or historic properties may be affected. See NWP General Condition No. 27(A) and 33 C.F.R. § 330.1(e);

9. Where PCN has been given, or the Corps has otherwise verified use of the NWP, the operator is required under General Condition 26, upon completion of the project, to confirm that it has complied with all terms, conditions and mitigation requirements, if any, by a sworn compliance certification; and

10. Under revised General Condition 20, in addition to the mandatory compensatory mitigation noted above, the Corps has broad discretion to decide when and to what extent compensatory mitigation will be required. Where PCN is required, the Corps as a matter of practice increasingly conditions its “approval” of the PCN “request” to proceed under a NWP on performance of compensatory mitigation for the disturbed wetlands. In the past, the relatively small size and often ephemeral nature of most NWP-authorized fills and projects caused the Corps to be skeptical of the viability and utility of very small, on-site wetland restoration, creation or enhancement projects. The increasing availability of wetland mitigation banks, however, has recently increased the viability of demanding compensatory mitigation for relatively small parcels. Ironically, that increased viability in itself has led to Corps increasingly to demand such mitigation as a condition for “approval” of a NWP authorization. That trend, and the resulting greater significance of mitigation banks, is expected to continue.

Space does not permit either a detailed description or the attachment of all 49 current NWPs and 28 NWP General Conditions listed on Exhibits C-1 and C-2. The official text of those NWPs and conditions can be found on the Corps’ Internet website listed above in this Section II and at the end of this paper in Section X. Section IV below describes the new NWPs issued and other key broadly-applicable NWP revisions made in the Corps’ recent, March 12, 2007 rulemaking. As noted in Section VIII below, operators in the West should become conversant with roughly a dozen of these NWPs that are particularly useful to a wide range of operations throughout the West.

III. HISTORICAL BACKGROUND: HOW NATIONWIDE PERMITS HAVE EVOLVED

The nationwide permit program has changed substantially since it was first created by the Corps in 1975. Due to the unique and evolving nature of this program, it is helpful in fathoming how it works and the directions in which it is changing to understand its historical background. In addition, when performing due diligence at sites that have past discharges of dredged or fill material, it is necessary to evaluate what NWPs were available at the time of the historic discharge, in order to assess whether the discharge was unlawful.

This section briefly highlights some of the key points in the development of the NWP program that have led to the current NWPs and the Corps’ recent amendments. These key developments are also listed in summary form on the attached Exhibit B.

1. **1972 FWPCA**. The Federal Water Pollution Control Act Amendments of 1972 created Section 404 and delegated authority to the Corps (rather than EPA) to issue permits for discharges of “dredged or fill material” into “navigable waters.” 33 U.S.C. § 1344. From
1972 through 1975, the Corps confined its oversight to waters traditionally considered “navigable” in fact under the 1890 and 1899 Rivers and Harbors Act.

2. **1975 Callaway Decision.** The D.C. District Court in NWF v. Callaway, 392 F. Supp. 685 (D.D.C. 1975), held that “navigable waters” subject to Section 404 regulation include all “waters of the U.S.” subject to federal regulation under the Commerce Clause of the U.S. Constitution. This ruling expanded the scope of the Corps’ regulatory jurisdiction, and also thereby its workload, by many orders of magnitude to include wetlands and other traditionally non-navigable waters.

3. **1975-1977 Initial General “Permits-By-Rule.”** In response to the enormous expansion of its responsibilities resulting from the Callaway decision, the Corps in 1975 issued its initial set of rules identifying certain types of discharges that would be considered authorized and “permitted by regulation,” without the need to obtain an individual 404 permit. These rules were refined over the next two years and resulted in the first “nationwide permits” issued by the Corps in “interim final rules” adopted in 1977. 42 Fed. Reg. 37,121 (1977). Among other things, these initial “authorizations by rule” broadly authorized all discharges into remote waters and waters located above low flow areas. These initial rules had few or no acreage limitations or other conditions.

4. **1977 CWA Amendments.** Shortly after issuance of those rules, Congress in 1977 substantially amended the Clean Water Act. In doing so, Congress was considered in effect to have ratified the broader meaning of “navigable waters” adopted in the Callaway case and also expressly ratified the Corps’ resulting practice of using “general” permits-by-rule by adopting Section 404(e), quoted above. Section 404(e) requires that these “general” permits cover only activities that are “similar in nature,” have “minimal adverse effects” and be subject to five-year terms and EPA’s 404(b)(1) Guidelines, but otherwise the Corps was given extremely broad discretion in adopting and administering these general permits.

5. **1980 Basic NWP Rules.** To implement the provisions of new Section 404(e), the Corps in 1980 adopted its first “formal” NWP program rules. These rules established a list of specific NWPs and authorized all discharges “above the headwaters” (defined to be less than 5 cfs average annual flow) and in defined “isolated” waters. These rules, as revised in 1982, were the first step in a five-year pattern of renewing and increasingly tightening NWPs that continues to this day.

6. **1982 Expanded “Reagan” Rules.** When the Reagan administration arrived in 1981, “loosening” the Section 404 wetlands permitting program was a high priority. As a result, in 1982 the Corps adopted rules attempting to expand the scope of NWP 26 by, inter alia, including discharges to natural lakes larger than 10 acres. 47 Fed. Reg. 31,794 (1982).

7. **1982 Marsh Case Settlement.** These rules and objections to the prior NWP rules resulted in an immediate lawsuit by the National Wildlife Federation and other environmental groups. NWF v. Marsh, 14 Envt’l L. Rep. 20,262, 22 E.R.C. 1,417 (D.D.C. 1982). The Corps settled that lawsuit in 1982 and made three significant concessions that materially changed the NWP program: (i) the acreage that could be impacted by NWP 26 was strictly limited; (ii) compliance with the 404(b)(1) Guidelines was acknowledged to be a prerequisite for issuance of a NWP or any Corps 404 permit; and (iii) the Corps agreed to involve all key resource agencies in the 404 permitting process.
8. **1984 Rules Revising NWP 26.** In 1984, the Corps issued a rule establishing for the first time a 10-acre limit on fills authorized under NWP 26 and requiring notice to the Corps for any fill over 1 acre, to implement part of the Marsh case settlement. 49 Fed. Reg. 39,478 (1984).

9. **1986 “Modern” NWP Rules.** In 1986 the Corps adopted comprehensive rules revising and “tightening” the 26, then-existing NWPs to fully implement the Marsh case settlement and to reissue those NWPs for an additional five-year term. These rules established the basic framework for the current, “modern” NWP program and conditions. 51 Fed. Reg. 41,206 (11/13/86).

10. **1991 Rules Tightening NWP Conditions.** In 1991 the Corps reissued the existing NWPs for another five years, significantly revised and restructured its NWP rules and created 10 new NWPs, for a total of 36. These revisions continued the trend of tightening the conditions and restrictions for various NWPs and significantly expanded both the circumstances when prior notification to the Corps is required, as well as the Corps’ discretion to deny or modify a NWP. 56 Fed. Reg. 59,110 (11/22/91).

11. **1993 Clinton Wetlands Policy.** This policy affirmed the Bush administration’s “no net loss” of wetlands policy but aimed to simplify and ease some of the burden of the 404 program by reducing the requirements of 404 permitting for single-family homeowners.

12. **1995 NWP 29 for Single-Family Homesites and Resulting Lawsuit.** To implement the above Clinton administration policy, the Corps in 1995 adopted NWP 29, which authorized the construction or alteration of a single-family homesite affecting up to a 1/2 acre of wetlands. 60 Fed. Reg. 38,652 (1995). This new NWP was challenged in 1996, was stricken in 1998 by a federal District Court in Alaska, and was revised pursuant to that Court’s Order on August 30, 1999 (see ¶ 15 below). This lawsuit and the Court’s resulting decision required strict compliance with the NWP criteria set out in Section 404(e) as well as the Corps’ procedural duties under NEPA and was a harbinger of both future NWP challenges as well as the Corps’ future, tighter approach to NWP authorizations.

13. **1996 NWP Reauthorizations and Revisions.** In December 1996, the Corps reauthorized all 37 NWPs for another five years and made a number of significant NWP program revisions. 61 Fed. Reg. 65,873 (12/13/96). Most importantly, these 1996 rules reduced the size limits for NWP 26 from 10 down to 3 acres with notice to the Corps and from 1 to 1/3 acre without prior notice and announced the Corps’ plan to phase out NWP 26 in two years and replace it with more tailored, activity-specific NWPs. These 1996 rules also significantly limited the “stacking” or use of multiple NWPs at a single project. These rules also required notice to the Corps if any NWPs numbered 12 through 40 are combined. The Corps here also continued the trend started in 1991 by increasing the NWPs and circumstances where pre-construction notification is required, expanding that requirement, e.g., to the widely used NWP 12 (for utility crossings). The Corps also created two new NWPs for “moist soil management for wildlife” (NWP 30) and “maintenance of existing flood control projects” (NWP 31), which were issued in large measure to implement the Corps’ then-recent “excavation” or “Tulloch” rule, which was subsequently extended several times, ultimately to June 7, 2000, when NWP 26 was finally terminated. 65 Fed. Reg. 14255 (3/16/2000).


15. **8/30/99 Revision to NWP 29.** As a result of the Alaska case noted in ¶ 12 above, the Corps on August 30, 1999 issued a revised version of NWP 29 (for fills relating to the construction or expansion of single-family homesites). 64 Fed. Reg. 47,145 (8/30/99). That revised NWP 29 was again significantly modified in the March 2007 rulemaking described below.

16. **3/9/00 Major Revisions to NWP Program.** On March 9, 2000, effective as of June 7, 2000, the Corps made substantial revisions to the NWP Program. The Corps terminated NWP 26, adopted 5 new NWPs and two new NWP general conditions, and modified 6 existing NWPs and 9 existing general conditions.


18. **3/12/07 Reissuance and Revisions of NWPs.** On March 12, 2007, the Corps reissued all 43 existing NWPs and 26 General Conditions, with revisions to most NWPs and Conditions, issued six (6) new NWPs and two (2) new General Conditions, and deleted one (1) General Condition. 72 Fed. Reg. 11092 (3/12/07). This rulemaking became effective March 18, 2007, but each NWP must receive State-specific 401 certification to become effective.

### IV. 2007 CHANGES TO THE NWP PROGRAM

As noted above, The Corps’ March 12, 2007 rulemaking created six (6) new NWPs and two new NWP Conditions and modified numerous existing NWPs and General Conditions. A complete list of those new and modified NWPs and conditions is set out on attached Exhibits C-1 and C-2, respectively.

Space does not allow for a detailed discussion of all of those relatively complex new and modified provisions. Those NWPs and conditions added or revised in 2007 are described in detail in the above Federal Register Notice and at the following Corps Internet Website: [http://www.spk/usace.army.mil/cespk-co/regulatory](http://www.spk/usace.army.mil/cespk-co/regulatory). These new provisions are outlined briefly below and summarized on Exhibit D attached.

#### A. Six New NWPs Added in 2007

The six (6) new NWPs added effective March 18, 2007, briefly, consist of the following:

1. **NWP 45 – Repair of Uplands Damaged by Discrete Events:** This new NWP authorizes discharges for activities associated with the restoration of upland areas damaged by storms, floods or other discrete events.
a. Not intended as an “emergency” NWP.

b. True “emergencies” can be dealt with under the Corps’ rules, 33 CFR §§ 323.4(a)(2) or 325.2(e), or NWP 3, which usually does not require PCN.

c. Restoration of damaged uplands must not exceed the original contours or ordinary high water mark (“OHWM”) that existed before the damage occurred.

d. Pre-construction Notification (“PCN”) is always required and must be given within 12 months of the damage (i.e., before you start work but within a year after the damage occurred).

e. The PCN should include available information to justify the extent of proposed restoration.

f. Covers bank stabilization to restore uplands.

g. Does not cover “normal erosion” over an extended period.

h. “Minor dredging” is allowed up to the amount required to restore the damaged upland but cannot “significantly alter” pre-existing bottom contours.

i. The “Note” at the end of NWP 45 acknowledges that “uplands lost as a result of a storm, flood or other discrete event can be replaced without a section 404 permit, if the uplands are replaced to the OHWM . . . (see also 33 CFR 328.5).” (Emphasis added.)

j. The final rulemaking and the NWP itself do not clearly explain the distinction between upland restoration projects that do or do not require a 404 permit. The proposed rulemaking, however, clarifies that this Note refers to actions in which the “discharges” of fill material to restore the upland area “occur landward of the OHWM,” so no discharge into a jurisdictional water would occur. See 71 Fed. Reg. 56258, 56274 (9/26/06). As a practical matter, however, it might be very difficult to conduct such work completely on the “landward” side of the OHWM. Due to probable future controversy and confusion regarding this Note, the overlap with NWP 3, when an “emergency” situation is present, and the precise location of the pre-existing OHWM and contours, using this new NWP 45, or determining that no permit is needed for this work, should be done with great care.

2. **NWP 46 – Discharges in Ditches:** This new NWP covers discharges into certain non-tidal ditches that are constructed in uplands and “determined to be waters of the United States.” As many commenters on this NWP noted, it is highly debatable whether and when such ditches may ever be properly determined to be “jurisdictional” waters after the *Rapanos* case, but the Corps emphasized in this rulemaking that “[t]his preamble does not address the limits of jurisdiction [sic] after Rapanos and Carabell.” 72 Fed. Reg. 11092, 11142
Only ditches and discharges covered by the following narrow criteria are covered:

a. Only ditches in upland areas, not ditches located in jurisdictional waters.

b. Must “receive” water from AND “divert” water back to an area determined to be a “water of the U.S,” so THREE jurisdictional determinations may be required to confirm eligibility!

c. **One-acre limit** for fill.

d. **PCN/notification** is always required.

e. Cannot use to increase the capacity of the ditch or drain jurisdictional waters.

f. **Note:** The construction and maintenance of irrigation ditches is exempt from 404 regulation by statute. 33 U.S.C. § 1344(f).

g. Best use of NWP 46 will likely be to fill and return ditches to their prior upland condition or to relocate or reshape eligible ditches.

### 3. NWP 47 – Pipeline Safety Program Designated Time Sensitive Inspections and Repairs:

This new NWP narrowly covers certain activities required for the inspection, repair, rehabilitation or replacement of any currently serviceable structure or fill for certain pipelines:

a. Only covers activities and participants in U.S. DOT’s Pipeline Repair and Environmental Guidance System (“PREGS”).

b. Only covers the above activities identified by U.S. DOT’s Pipeline and Hazardous Materials Safety Administration (“PHP”) as “time-sensitive.”

c. Must give post-construction report within seven (7) days of completion to the PHP via PREGS, not to the Corps.

d. Several specific construction “BMPs” are mandated in the NWP.

e. The Corps is uniquely prohibited from adding regional conditions that would require PCN or otherwise delay time-sensitive pipeline inspections or repairs. Additional BMPs are acceptable.

### 4. NWP 48 – Existing Commercial Shellfish Aquaculture Activities:

This new NWP narrowly covers certain activities necessary for the continued operation of existing commercial aquaculture operations. Covered activities include the installation of buoys, nets and other structures and discharges necessary for shellfish seeding, harvesting and related activities.

a. **Not cover new operations.**

b. **Not** cover the cultivation of a species new to the water body.

-10-
c. Not cover “attendant features” such as docks, stockpiles or the disposal of shell material.

d. PCN/notification required if (i) the project area is over 100 acres, (ii) there is a reconfiguration in operations, (iii) there is a change in species cultivated, (iv) there is a change to culture methods, or (v) dredge-related operations are conducted in areas with submerged aquatic vegetation.

e. If no PCN is required, operators must file a report to the Corps containing specified information within 90 days after March 18, 2007.

5. **NWP 49 – Coal Remining Activities**: This new NWP covers discharges associated with the remining or reclamation of certain lands that were previously mined for coal.

   a. Activities must be authorized by a mining or reclamation permit issued by the U.S. DOI Office of Surface Mining (“OSM”) or a delegated State agency under the Surface Mining Control and Reclamation Act (“SMCRA”).

   b. “Lands previously mined” covers reclaimed mine sites, abandoned mine sites, or lands under bond forfeiture contracts.

   c. No acreage or linear limits (will likely draw a judicial challenge).

   d. Mining on new adjacent areas is allowed if it is less than 40% of the area being remined.

   e. PCN/notification is always required.

   f. Unique, heavy burden: Must “clearly demonstrate” to Corps that the proposed reclamation plan will “result in a net increase in aquatic resource functions.”

   g. Must receive written approval from Corps to proceed.

   h. These atypical NWP criteria and processes are likely to lead to further disputes and litigation.

6. **NWP 50 – Underground Coal Mining**: This new NWP is the third-coal mining-related NWP and covers discharges associated with certain underground coal mining and reclamation operations.

   a. Projects must be authorized by OSM or States with delegated SMCRA abandoned mined lands (“AML”) programs.

   b. No acreage limit: The former 1/2-acre limit in NWP 21 was dropped.

   c. Not cover coal preparation and processing activities outside of the mine site.
d. **PCN/notification** is always required. Like NWPs 21 and 49, the permittee must receive written approval from the Corps before beginning the activity.

e. The three (3) new or modified coal mining NWPs (21, 49 and 50) are nearly certain to result in continued litigation, so watch those developments closely when relying on any of those NWPs.

B. **Key NWPs Modified in 2007**

Under the Corps’ March 12, 2007 rulemaking, numerous previously existing NWPs were modified. Many of those changes were minor clarifications or merely entailed moving certain requirements from various NWPs to the NWP General Conditions. A number of NWPs, however, were substantively modified in significant ways. Following are some of the most critical changes to some of the more widely-used NWPs:

1. **NWP 3 – Maintenance**: This NWP for maintenance and repairs of existing, currently serviceable structures was clarified to confirm that it authorizes temporary structures or fills, as necessary to conduct repair or maintenance. Other major proposed revisions were rejected, and this NWP otherwise was ultimately left largely unchanged.

2. **NWP 5 – Scientific Measuring Devices**: This NWP for the installation and operation of measuring devices was revised to delete the former PCN requirement for fill discharges of 10-25 cubic yards when installing weirs or flumes. The 25 cubic yard limit for that work was retained.

3. **NWP 6 – Survey Activities**: This NWP for survey, sampling and seismic activities was clarified to confirm that it covers exploratory trenching, so long as the trenches are reclaimed as specified.

4. **NWP 12 – Utility Line Activities**: This NWP for the construction, maintenance, repair and removal of pipelines and utility lines was clarified to confirm that it covers temporary structures and fills necessary to conduct the above work, so long as the temporary fills are removed and restored as specified. Extensive other proposed changes were rejected, and the previous provisions setting an overall limit of 1/2 acre for permanent fills (temporary fills do not count towards the limit) and the complex criteria for triggering PCN (including > 1/10 acre of fill) were generally retained.

5. **NWP 13 – Bank Stabilization**: This NWP authorizing activities necessary for erosion prevention was revised to prohibit discharges into wetlands, unless the Corps receives PCN and issues a written waiver that the fill will not cause more than a minimal impact. PCN and waivers are similarly required in order to impact over 500 feet of bank or deposit more than one cubic yard per running foot below the ordinary high water mark (“OHWM”).

6. **NWP 14 – Linear Transportation Projects**: This NWP for activities required for the construction, expansion, modification or improvement of roads and other linear transportation projects was also clarified to confirm that it authorizes temporary structures and fills necessary to the above work, which must be removed and restored as specified. It was also revised to provide that stream
channel modifications must be (1) limited to the minimum necessary to construct or protect the project and (2) must be in the immediate vicinity of the project. Other proposed changes were rejected, and the 1/2-acre limit and PCN triggers of 1/10 acre and any fill into wetlands were all retained.

7. **NWP 18 – Minor Discharges**: This useful NWP authorizes discharges for any purpose that are under 25 cubic yards below the OHWM and cause losses of less than 1/10 acre of any water of the U.S. The latter acreage limit was revised in 2007 to cover other waters in addition to wetlands, which will greatly restrict its applicability. The former PCN triggers of 10 cubic yards of fill or discharges into wetlands were retained.

8. **NWP 21 – Surface Coal Mining**: The 2007 revisions to this controversial NWP greatly simplified this NWP by removing certain requirements and shifting some activities to new NWPs 49 and 50.
   a. Removed statement that Corps can require a bond for required mitigation work.
   b. Covers surface coal mining operations authorized by the integrated permit processing procedure by OSM (or a state with delegated SMCRA authority) and other agencies.
   c. Pre-construction notification is always required.
   d. Must receive written authorization from Corps to proceed.
   e. Rejected proposed language requiring submittal of a mitigation plan.
   f. New NWPs 49 and 50 cover some activities formerly covered by 21.

9. **NWP 23 – Approved Categorical Exclusions**: This NWP covers activities taken, funded or approved by a federal agency where the agency has determined that the activity is categorically excluded from the need to perform a detailed analysis under the National Environmental Policy Act (“NEPA”). The 2007 revisions provide that only categorical exclusions specifically approved and listed by the Corps are subject to this NWP:
   a. The specific categorically excluded activities that have been approved by the Corps and eligible for this NWP are listed in a designated Corps Regulatory Guidance Letter (“RGL”).
   b. Only certain activities of the Bureau of Reclamation, Federal Highway Administration and the U.S. Coast Guard have been approved to date.
   c. Additional RGLs adding more categorically excluded activities might be issued in the future.
   d. PCN/notification is required for certain categorically excluded activities, as specified in RGL 05-07 and any subsequent RGLs.
10. **NWP 27 – Aquatic Habitat Restoration, Establishment and Enhancement Activities:** This NWP authorizing the above activities was revised in 2007 to clarify the activities that it covers and prohibits:

   a. Only covers activities shown to “result in net increases in aquatic resource functions and services.”

   b. Allows mitigation bank work, relocation of non-tidal waters, dam removal activities, construction of open water areas, installation of small dikes, removal of non-native vegetation, and similar activities.

   c. Prohibits stream channelization, new impoundments, or the conversion of a stream or natural wetlands to uplands on a different type of aquatic habitat.

   d. Also covers future discharges associated with the reversion of the area to its use prior to restoration, if the activities occur within 5 years after expiration of the pertinent wetland agreement or permit.

   e. PCN/notification is always required, except when the work is under a wetlands enhancement agreement with the USFWS, NRCS, NMFS or other designated federal agency or under a SMCRA coal mine reclamation permit.

   f. If PCN is not required, the permittee must submit a “report” to the Corps at least 30 days before starting work, which includes the referenced agreement or permit and related information.

11. **NWP 29 – Residential Developments:** This NWP formerly covered only one single-family home. The 2007 revisions stripped the provisions relating to multiple residential unit developments from former NWP 39 and consolidated all residential development activities into NWP 29. As revised, NWP 29 now:

   a. Covers discharges associated with the construction or expansion of any residential unit or subdivision.

   b. Authorizes the construction of building pads and foundations and “attendant features” necessary for the use of such developments, such as roads, garages and storm-water management facilities.

   c. “Attendant features” may also include recreational facilities, such as sports fields and even golf courses, provided they are an “integral part of the development.”

   d. Is limited to 1/2 acre and 300 linear feet of stream bed for the entire development.

   e. Can “stack” (use in conjunction) with other NWPs, but is still subject to the overall 1/2-acre limit.

   f. PCN/notification is now always required.

   g. Is likely to lead to continued litigation.
12. **NWP 31 – Maintenance of Existing Flood Control Facilities:** This NWP authorizes discharges associated with the maintenance of existing flood control facilities, such as debris basins and channels, so long as the work is within the “Maintenance Baseline” filed with and approved by the Corps. This NWP was amended in 2007 to:

a. Add the maintenance of levees to the examples of authorized activities.
b. Delete the former exclusive list of authorized maintenance activities.
c. Allow maintenance work for which there is no approved Maintenance Baseline in an emergency situation.
d. PCN/notification is always required.

13. **NWP 39 – Commercial and Institutional Development:** This NWP was revised in 2007 to transfer all provisions relating to residential development to revised NWP 29, as noted above. As revised, this NWP now closely parallels NWP 29 but covers discharges associated with the construction of expansion of building pads or foundations and “attendant features” for commercial and institutional developments. As revised NWP 39:

a. Always requires PCN/notification.
b. Retains a 1/2-acre and 300 linear feet limits.
c. Authorizes “attendant features,” as in NWP 29, such as roads, parking lots and recreational facilities.
d. Still prohibits new golf courses, ski areas and oil and gas wells.

14. **NWP 40 – Agricultural Activities:** This complex and controversial NWP authorizing discharges associated with agricultural activities was greatly simplified and expanded in 2007:

a. Deleted the former distinction of USDA-participant-farms and the related separate process administered by the NRCS (formerly SCS) instead of the Corps.
b. PCN/notification is now always required.
c. Retained the 1/2-acre total limit.
d. Authorizes the construction of farm ponds, except in perennial streams, when such ponds are not eligible for the 404(f) exemption.

15. **NWP 41 – Reshaping Existing Drainage Ditches:** This NWP narrowly authorizes the reshaping (but not relocating or enlarging) of existing drainage ditches. The 2007 revisions further narrowed its applicability by limiting its use solely to reshaping performed for the purpose of improving water quality and also prohibiting the drainage of any additional wetlands. PCN/notification is required if over 500 linear feet of ditch will be reshaped. These limitations severely restrict the utility of this NWP.
16. **NWP 42 – Recreational Facilities:** This NWP authorizes discharges into non-tidal wetlands and other waters for the construction or expansion of recreational facilities. It was substantially revised, simplified and expanded in 2007.
   
   a. **Deleted** the former restriction to facilities that would not substantially change preconstruction grades or contours. All recreation facilities are now authorized.
   
   b. **Golf courses** and **ski areas** are now authorized. Deleted the former prohibitions and limits on these facilities.
   
   c. **PCN/notification** is now **always required**.
   
   d. Deleted the former requirement that a **Water Quality Management Plan** must be in place.
   
   e. Authorizes “**small support facilities**” (such as maintenance and storage buildings) but **not** restaurants, hotels, race tracks, arenas and similar facilities.
   
   f. **Acreage Limit** was left at 1/2 acre.

17. **NWP 43 – Stormwater Management Facilities:** This NWP authorizes discharges associated with the construction and maintenance of stormwater management facilities, such as spillways and retention ponds. The 2007 revisions simplified this NWP in several respects but also tightened the **PCN** requirement as follows:
   
   a. **PCN/notification** is always required for the construction of new or expanded facilities. **PCN** is **not** required for maintenance if it merely restores the original design.
   
   b. The former requirement to submit maintenance plans and compensatory mitigation proposals was deleted.
   
   c. **Does not** authorize new facilities in **perennial streams**.
   
   d. The 300-foot linear limit was expanded to **intermittent and ephemeral streams**, unless waived by the Corps.
   
   e. Retained overall 1/2-acre limit.

18. **NWP 44 – Mining Activities:** This controversial NWP adopted in 2002 initially created a very complex system authorizing **aggregate** mining only in certain low-flow waters, and **“hardrock”** mining in even more restricted waters. The 2007 revisions totally eliminated the specific, complex restrictions and requirements for this NWP and now simply authorize any discharges in non-tidal waters associated with any mining activities, subject to the following few criteria:
   
   a. **Not cover coal** mining activities (see NWP 21, 49 and 50);
   
   b. **Not cover non-tidal wetlands adjacent to tidal waters**;
c. **Acreage Limit:** still up to a total of 1/2 acre; and
d. **PCN/notification** to the Corps is still always required.
e. Unlike the coal-related NWPs, 44 does not require the permittee to receive written authorization, so can proceed 45 days after PCN if the Corps fails to reply.

C. **Two New General Conditions Added in 2007**

The Corps’ March 12, 2007 amendments created two (2) new and deleted one (1) former NWP General Condition:

1. **Condition No. 25 – Transfer of Nationwide Permit Verifications:** This helpful new General Condition confirms that a Corps-verified NWP can be transferred to a new owner of the affected property. The Condition sets out the specific language required to request the Corps to confirm that the verification and associated authorizations and obligations under the NWP are transferred to the new owner. If the new owner wishes to take an amended or different course of action, of course, it can choose not to transfer and proceed under the originally-approved NWP. This transfer confirmation provision should help resolve past confusion by buyers and lenders about whether and how Corps-verified NWPs can be transferred.

2. **Condition No. 28 – Single and Complete Project:** This second new General Condition clarifies that a NWP can only be used once to authorize a “single and complete project.” Language to that effect formerly was included in several NWPs (13, 15, 18, 19, 29, 39, 42, 43 and 44) but has now been stated in this new Condition to confirm that it applies to all NWPs. A “single and complete project” is defined in the Corps’ regulations, 33 C.F.R. § 320.2(i), and in the “NWP Definitions” that accompany the issued NWPs, as “the total project proposed or accomplished by one owner/developer [at a site, which] . . . must have independent utility.” “Independent Utility” is then defined in the NWP Definitions as a project that “would be constructed absent the construction of other projects in the project area.” The classic example is a golf course and adjacent real estate development. Whether either is an “independent” project that would be built even if the other project is not is always a site-specific question of fact. This condition further confirms that portions of a multi-phase project that depend on other phases of the project do not have independent utility, so a NWP could only be used once for the entire, multi-phase projects. Significantly, the definition of “single and complete project” in the revised NWP Definitions confirms that, “[f]or linear projects [like roads or utility lines] crossing a single water body several times at separate and distant locations, each crossing is considered a separate and complete project.” Developers should take particular care to confirm that related projects are separate and independent under this General Condition before attempting to use NWPs at both projects.

3. **Deletion of Former Condition No. 27 – Construction Period:** The Corps in 2007 deleted the former General Condition No. 27 adopted in 2002, which provided that the Corps could set a due date in a NWP verification for the permittee to commence and complete the works and what the duration of the NWP authorization would be in the absence of setting those timelines. The
Corps was concerned that this former condition might allow the Corps’ District Offices to set time lines beyond the statutory 5-year limits for all NWPs. Rather than fixing that potential problem, however, the Corps instead deleted this Condition altogether. The Corps confirmed in its 3/12/07 rulemaking that it will now simply proceed under the Corps’ existing NWP rules, which provide that Corps verification letters are valid for only two (2) years, but a permittee may still proceed under the NWP after the verification letter has expired, and may proceed for one (1) year after the NWP itself has expired, so long as construction commenced or is under contract to commence before the NWP expired. 33 C.F.R. § 330.6(b). It is unfortunate the Corps chose to delete, rather than correct, this helpful General Condition, but NWP permittees must now review and comply with the provisions of the NWP rules to determine the “shelf-life” of their NWPs.

D. Key General Conditions Modified in 2007

Under the March 12, 2007 amendments, modifications were also made to the following key NWP General Conditions, which were completely re-ordered and re-numbered from the previously existing Conditions:

1. **Condition No. 9 – Management of Water Flows**: This controversial Condition was simplified in 2007 to require that permittees must maintain “the pre-construction course, condition, capacity and location of open waters” to the maximum extent practicable, except where the primary purpose of the activity is to impound water or manage high flows, or where it benefits the aquatic environment.

2. **Condition No. 10 – Fills Within 100-Year Floodplains**: This extremely controversial condition adopted in 2002 was very greatly simplified and narrowed in 2007 to provide simply that a NWP permittee must comply with the applicable state or local floodplain management plans and requirements that have been approved by the Federal Emergency Management Agency (“FEMA”). Unlike the former floodplain condition, the revised Condition No. 10 does not apply to 100-year floodplains where FEMA-approved floodplain plans and requirements have not yet been established. The revised Condition also does not require any documentation or confirmation of compliance with a FEMA-approved plan. These revisions very significantly reduce both the former limitations and the former documentation requirements of this floodplain condition.

3. **Condition No. 17 – Endangered Species**: This Condition was revised in 2007 to provide that, if an activity proposed to be authorized by a NWP “might affect” a species listed under the Endangered Species Act (“ESA”) or its critical habitat, the permittee may not proceed until it receives a determination of “no effect” from the Corps, or the Corps otherwise completes any ESA-required consultation process, even if that takes more than 45 days. Where it is applicable, this ESA review process could add appreciably to the time required to obtain NWP verification.

4. **Condition No. 18 – Historic Properties**: This Condition was similarly revised in 2007 to provide that, if an activity proposed to be authorized by a NWP might adversely affect properties protected under the National Historic Preservation Act
“NHPA”), the permittee again may not proceed until it receives a “no effect” determination from the Corps or other authorization under the NHPA, even if it takes over 45 days. As with revised Condition No. 17, this amended Condition No. 18 could cause major delays in receiving NWP verification.

5. **Condition No. 20 – Mitigation:** The most significant revisions made in 2007 to the NWP General Conditions were those made to this Mitigation Condition. As revised, Condition No. 20 now requires that compensatory mitigation will generally be required for all wetland losses over 1/10-acre that require PCN, unless the Corps waives this requirement because some other form of mitigation is more appropriate. It was further revised to confirm that the Corps has broad discretion to require compensatory mitigation for smaller wetland losses and for all other jurisdictional waters. This heightened mitigation requirement for very small fills may greatly expand the use of and demand for mitigation banks.

6. **Condition No. 27 – Pre-Construction Notification:** This Condition contains the requirements and procedures for how and when PCN must be given for NWPs and activities that trigger that requirement. As revised in 2007, Condition No. 27 (formerly No. 13) was simplified by the removal of former text that was redundant with the requirements in various NWPs, but it simultaneously became further complex by incorporating the new notice and approval requirements of the six (6) new NWPs and the “receipt of approval” requirements under NWPs 21, 49 and 50 and for activities with ESA or NHPA issues. For any activity under a NWP that triggers PCN, a permittee should carefully review and comply with the requirements of this revised Condition No. 27.

E. **Trends and Potential Responses**

Through 2002, the evolution of the NWP Program generally reflected a clear trend of NWPs becoming increasingly subject to pre-construction notification, mitigation requirements and specific BMPs, more activity-specific, more limited in size and scope, and substantially more complicated. That increasing complexity was greatly multiplied by the divergent regional NWP conditions.

The Corps’ latest, March 12, 2007 rulemaking is a “mixed-bag” and somewhat of a divergence from that trend, in the sense that it makes some NWPs less restrictive, but it also tightens other requirements and expands the instances where pre-construction notification will be required. This will further increase the ability and discretion of District Engineer personnel to deny or stringently condition various NWPs on a site-specific basis. The sheer number of changes in this latest rulemaking is also likely to result in some confusion during the transition to these revised NWPs.

In response to the above changes, before proceeding under a NWP where no PCN is required, a potential NWP permittee should consider voluntarily seeking and obtaining Corps verification of the propriety of the presumed NWP authorization, as expressly provided in 33 C.F.R. § 330.6(a), to avoid the risk of confusion from these complex NWP amendments.

V. **SUPPLEMENTAL REGIONAL CONDITIONS**

Compounding the complexity of the existing NWP Program and its recent amendments is the requirement for compliance with any regional conditions imposed by the Corps on individual NWPs, in addition to the 28 General Conditions noted above. Such conditions can be imposed either by a State in the course of its CWA 401 certification of each NWP or by any one or more of the Corps’ District Offices on a State, regional or other identified-area basis within that Corps District. Unfortunately, those regional
conditions are not officially noticed or published in any national forum or publication and generally are not widely known or recognized.

Regional NWP conditions are particularly problematic in Colorado, because it contains the headwaters of several major river systems and thus is uniquely subject to three different Corp Districts in different parts of the State. The Platte River drainage, including the Denver metro area and the northern Front Range, is covered by the Corps’ Omaha District. The western part of Colorado is covered by the Sacramento District, and the Rio Grande and Arkansas River drainages and remaining part of the State is within the Albuquerque District. Although each District office in theory can impose different conditions in the portion of Colorado falling within its District boundaries, these three Districts to date have generally coordinated and adopted parallel NWP conditions applicable throughout Colorado.

The State of Colorado itself is uniquely prohibited by State statute from adding conditions to any NWP in its 401 certification process, C.R.S. § 25-8-302, so any regional or state-wide conditions in Colorado are adopted solely by the Corps District Offices noted above. Colorado is still required formally to confirm its 401 certification of the new and reissued NWPs, however, and the NWPs technically are not effective in a State until the proper State agency has done so.

Some of the key NWP regional conditions previously applicable in Colorado include prohibitions on the use of NWPs (1) in important fish spawning areas, (2) in “fens” [peat bogs], and (3) within 100 feet of the water source of any natural spring. In New Mexico, previous regional conditions (1) require pre-construction notification under all NWPs for all non-water dependent wetland fills and any fills exceeding 1/10 acre, (2) prohibit fills over 1/2 acre under any NWP, and (3) wholly revoke NWP 44 for mining activities.

Because the current NWPs are brand new, the Corps District Offices had not finalized and issued the Regional Conditions applicable to NWPs in Colorado, as of the date of this paper. However, the Regional Conditions applicable to the previous NWPs, as described above, are expected to be re-adopted and potentially expanded in the near future. Those final Regional Conditions should be carefully reviewed and complied with before proceeding under any NWP.

VI. STATEWIDE AND REGIONAL GENERAL PERMITS

In addition to NWPs, a number of general 404 permits have been adopted on a statewide or regional basis. These statewide and regional general permits operate as “permits-by-rule” in the same fashion as NWPs but are adopted by local Corps District or Division offices through their own notice and comment procedures, and not by a nationwide rulemaking process through the Federal Register. In some instances, a regional general permit may be more favorable or appropriate for certain activities within that region.

Regional permits available within Colorado are listed in the Corps Sacramento, Omaha and Albuquerque District websites noted in Section X below and include the following permits:

1. **Stream Bank or Bed Stabilization in Western Colorado (#37) (Expires 5/3/09):**
   a. Authorizes discharges associated with actions to stabilize stream banks and beds, including installation of riprap to prevent erosion.
   b. 1,000 linear feet limit.
   c. Up to two cubic yards of material per linear foot.
d. Covers drop structures and jetties.

e. Not allow fills into wetlands.

f. Notice and prior Corps approval required.

g. Covers “West Slope” only.

2. **Projects Beneficial to Upper Colorado River Endangered Fish Species (#057) (Expires 5/18/08):**

a. Authorizes discharges associated with projects that benefit ESA-listed fish species, including the construction or removal of levees, dikes and rip-rap, excavation of channels, ponds or pits, and similar actions.

b. Must be performed during low water periods.

c. Notice and prior Corps approval is required.

3. **Flood-related Activities in Colorado (#96-07) (Expires 7/31/11):**

a. Authorizes discharges associated with flood control and repair work in Colorado, including repair and reconstruction of roads, bridge embankments, utility structures and similar features.

b. Limit of 1 acre for non-wetlands and 1/3 acre for wetlands (unless the Corps issues waiver allowing wetlands fill up to 1 acre).

c. Mitigation is required for all wetland fills.

d. Must apply to do floor repair work within one (1) year following the floor event.

e. Notice and prior Corps approval is required.

4. **Channel and Bank Protection Structures on the South Platte River (in Denver Metro Area) (#87-01) (Expires 12/31/07):**

a. Authorizes discharges associated with certain channel and bank protection and repair projects on the South Platte River within the Urban Drainage and Flood Control District in the Denver metropolitan area.

b. Detailed specifications for the types and placement of materials.

c. Notice and prior Corps approval is required.

5. **Check Websites of Applicable Corps District Offices for Available RGPs at Time of Use:** Operators planning on relying on one or more NWPs should double-check first to confirm whether an alternative regional general permit might be more appropriate and also is still valid at the time of proposed use.
VII. RECENT LITIGATION CHALLENGING GENERAL 404 PERMITS

The following recent cases are illustrative of increasing judicial challenges to the Corps’ issuance of general permits or the approval of use of some general permit(s) to a particular project. As noted below, the Corps’ positions on both fronts have generally been upheld.


Sierra Club and NRDC challenged the Corps’ issuance of a regional general 404 permit covering residential, commercial, recreational and institutional projects in a 75 square-mile area in Florida on several grounds, including that (1) the regional permit exceeds the scope of Clean Water Act’s general permitting scheme; (2) the categories of covered activities are not “similar in nature;” (3) the categories of covered activities will not cause “minimal” environmental effects; (4) the Corps failed to follow 404(b)(1) guidelines in implementing the regional permit; and (5) the Corps failed to comply with NEPA. The Court found for the Corps on all claims. Among the Court’s notable conclusions were that in considering a proposed general permit, the Corps is not required to conduct a full review of the individual projects being considered for authorization under a general permit, that the authorized activities are “similar in nature” because they are components of a similar category (in this case, suburban development) and general and specific permit conditions limit the activities to the similar category; and that the Corps can rely on future special permit conditions, including mitigation, to support its determination that no minimal individual and cumulative environmental effects will occur. NRDC has appealed this decision, and the District Court denied motion for injunction pending appeal in February 2007.


Plaintiffs construction associations challenged, as too stringent, the Corps’ replacement of former NWP 26 and certain General Conditions with new and modified NWPs and General Conditions on the grounds that (1) the Corps improperly performed a regional analysis on and failed to specifically define the “minimal adverse environmental effects” of the NWPs; (2) the Corps had no reasonable basis for the acreage limitations, pre-construction notification requirements, floodplain restrictions and vegetation buffer mitigation requirements imposed; and (3) the Corps does not have the authority to impose water quality conditions under NWPs. The Court granted summary judgment for the Corps on all the claims. In particular, in upholding the vegetated buffer mitigation requirement in certain NWPs and General Conditions, the Court noted that permit conditions imposed are valid as long as they are reasonably related to the discharge of dredged or fill material, whether indirectly or directly. Plaintiffs filed a notice to appeal this decision in December 2006.

C. Ripplin Shoals Land Co., LLC v. United States Army Corps of Engineers, 440 F.3d 1038 (8th Cir. 2006)

In this case, Ripplin Shoals sought 404 permit coverage for two projects: additions to a low-water bridge and construction of a new bridge span. The Corps issued a Letter of Permission (LOP) for the low-water bridge project first. However, following a challenge brought by environmental groups, the District Court ordered the Corps to revoke the LOP and issue an EIS as part of the application process. Ripplin Shoals then withdrew the low-water bridge project application and submitted a notice for NWP 14 coverage for the bridge span project. Based on the District Court’s earlier order, the Corps denied NWP coverage for the bridge span project, and the developer brought an action against the Corps, claiming the second project was a completely different and distinct project requiring new consideration by the Corps. The District Court granted the Corps’ motion to dismiss Ripplin Shoals’ complaint, holding that under the doctrines of collateral estoppel and res judicata, the District Court’s first order barred...
developer’s claim against the Corps. The Eighth Circuit reversed and held that Ripplin Shoals’ claims were not barred, because the bridge span was a separate new project that the Corps must consider on its own merits. The Eighth Circuit remanded to the District Court for further proceedings, and the District Court has since dismissed the case but retained jurisdiction while the Corps evaluates the bridge span project.


OVEC brought suit asserting that the Corps’ issuance of NWP 21 for surface coal mining violated the Clean Water Act and NEPA on several grounds. Without addressing all these grounds, the District Court held NWP 21 facially invalid for several reasons, including that (1) the Corps improperly opted to make its minimal environmental impact determinations on a project-specific basis after issuance of NWP 21; (2) 404 prohibits the Corps from issuing a general permit that requires post-issuance consideration and authorization of individual projects; and (3) public notice and hearings are required prior to the Corps’ authorization of each individual project under NWP 21. The Fourth Circuit rejected the District Court’s ruling on each of these points, holding that the Corps may use procedural and substantive parameters to define “categories of activities,” and may partially (but not solely) rely on post-issuance procedures to make its minimal environmental impact determinations on a case-by-case basis. The Court also concluded that nothing in 404(e) prohibits the Corps from issuing a general permit that also requires post-issuance authorization of each individual project covered by the general permit, and that 404(e) requires public notice and hearings only before issuance of the general permit, not before authorization of each individual project covered by the general permit. A petition for rehearing en banc was denied in February 2006.


NWF brought an action asserting that the Corps’ issuance of NWPs 12, 14, 39 and 40 violated the Clean Water Act, the Endangered Species Act and NEPA. The Court held that although all four NWPs are subject to General Condition 11, which prohibits activities likely to jeopardize continued existence of threatened or endangered species, the Corps violated the Endangered Species Act by failing to consult with the Fish and Wildlife Service prior to issuing the four NWPs. The Court reached this conclusion despite the Corps’ intent to consult with the Fish and Wildlife Service as needed at the time each individual proposed project is considered for authorization under the NWPs. The Court denied the parties’ summary judgment motions as to the Clean Water Act and NEPA claims. This case was appealed, but the D.C. Circuit granted a joint motion to dismiss the appeals in April 2005, and the Corps agreed to conduct further analyses of the NWPs to satisfy ESA, Clean Water Act and NEPA requirements.


In this case, WOC challenged the Corps’ issuance of Regional General Permit 98-08 for oil and gas exploration and production activities in the state of Wyoming on the grounds that (1) GP 98-08 violated 404(e) because the covered activities are not “similar” in nature and impacts; (2) GP 98-08 violated 404(e) because the cumulative impacts are not “minimal;” and (3) the Corps failed to conduct an adequate NEPA analysis when it issued GP 98-08 in June 2000. As to the 404(e)-based challenges, the Court rejected the Corps’ minimal impacts analysis because the Corps failed to consider the cumulative impacts on non-wetland environments and also relied too much on wetland mitigation to support its finding of no significant impacts. However, the Court upheld the Corps’ determination that activities covered by GP 98-08 (surveys, roads, well pads, reservoirs, etc.) are “similar in nature” because they are narrowly tailored to oil and gas development. The Court also concluded that the permit conditions imposed by the Corps’ rendered any dissimilar impacts of the covered activities “similar.” As to the
NEPA based challenges, the Court held that the Corps’ analysis of the cumulative impacts of GP 98-08 on environmental resources as well as the impacts on private lands was deficient. However, the Court found the Corps’ consideration of water quality impacts reasonable and its assessment of the impacts of GP 98-08 on threatened and endangered species sufficient. The Court remanded to the Corps for reassessment of the permit’s impacts on environmental resources, but the Corps declined to address the noted deficiencies because the permit had only three months left on its five-year term and most covered activities are covered by other general permits. This case is of great interest for its general precedence regarding the NWP Program and its specific precedence regarding other regional general 404 permits for oil and gas activities in the Corps’ New Orleans, Fort Worth and Galveston districts.


MNPS challenged the Corps’ authorization of construction of a sewer line and road crossing serving two developments under a statewide general permit issued in the state of Maryland. MNPS claimed that the Corps violated the Clean Water Act and NEPA by failing to determine the minimal adverse impacts of the projects, and that the projects in fact did not have a minimal adverse impact because the acreage of impacted wetlands exceeded the one-acre limit set by the general permit. The Court held that the Corps has a duty, but failed that duty here, to adequately explain in the authorization decision document its conclusions that the projects would cause minimal adverse environmental impacts and that the approved activities would not impact more than one acre of wetlands. The Court also held, however, that the Corps need not conduct an alternatives analysis for each individual project for purposes of NEPA once the general permit has been issued. The Court remanded to the Corps for further explanation of its decisions.


Trout Unlimited alleged in this case that the Corps’ approval of the use of NWPs for a Utah water pipeline and treatment plant was unlawful because (1) the Corps failed to perform a proper 404(b)(1) alternatives analysis when it approved use of the NWPs; (2) it failed to perform a proper NEPA analysis at that time; and (3) it improperly “stacked” or used multiple NWPs. The District Court rejected all of TU’s arguments and held, most importantly, that the Corps must comply with applicable NEPA and 404(b)(1) alternatives analysis and procedures only at the time NWPs are issued and adopted, but not when they are applied and approved for use at individual projects. The Court also held that the use of two different NWPs for the project was permissible “stacking” because the fills cumulatively were lower than the highest applicable acreage limit of the subject NWPs. The District Court subsequently vacated the portion of this decision pertaining to East Canyon Pipeline based on the Tenth Circuit’s April 11, 2003 Order to vacate due to mootness. In April 2004, the District Court ordered the entire case closed for mootness with the parties’ agreement.

VIII. NWPS MOST USEFUL FOR WESTERN AREA OPERATORS

A number of general 404 permits are particularly useful to developers in the western U.S. Use of these and similar general permits can save developers substantial time and expense and avoid costly potential 404 violations. All developers in the Western U.S. should become conversant with the terms of these critical general permits. (See Exhibit E for a list of these key Western U.S. General 404 permits). In addition to these broadly applicable NWPs, mineral developers should familiarize themselves with NWPs 21, 49 and 50 for surface and underground coal mining, NWP 44 for non-coal mining, and the various regional permits for mineral development, as listed on Exhibit F.
The most useful NWPs for all western area operators include the following:

1. **NWP 3 for Maintenance Activities:** As revised and described above, this NWP authorizes activities related to the repair, rehabilitation or replacement of any existing, currently serviceable structure that does not qualify for the 404(f) maintenance exemption. Unlike that exemption, this NWP allows “minor deviations” from the structure’s original design or filled area. Pre-construction notification is required for the removal of accumulated sediments or debris and for the placement of additional riprap.

2. **NWP 6 for Survey Activities:** Including soil samples and subsurface seismic work, as well as standard above-ground survey operations.

3. **NWP 12 for Utility Line Discharges:** Authorizes fills up to 1/2 acre for the construction and repair of utility lines, including pipelines as well as electric lines and related maintenance roads. Pre-construction notification is required for all fills over 1/10 acre, mechanized landclearing in “forested wetlands,” utility lines in waters for over 500 feet, impervious access roads, land other specified instances.

4. **NWP 13 for Bank Stabilization Activities:** Authorizes activities necessary to prevent erosion in regulated waters other than wetlands. Fill must be less than 500 linear feet and under one cubic yard per running foot, unless the permittee gives notice to and gets approval from the Corps that the impacts will be minimal.

5. **NWP 14 for Linear Transportation Crossings:** Authorizes fills up to 1/2 acre for crossings by railroads and airplane runways as well as roads. Pre-construction notification plus compensatory mitigation is required for all fills in wetlands and fills over 1/10 acre in all other waters. Non-linear features like parking areas or storage buildings are not covered by this NWP.

6. **NWP 18 for Minor Discharges:** Authorizes small discharges under 10 cubic yards without notice, and from 10-25 cubic yards with pre-construction notification, if less than 1/10 acre is disturbed.

7. **NWP 20 for Oil Spill Cleanup Activities:** Covers only cleanups performed under a valid Spill Control and Countermeasure (SPCC) Plan or EPA’s PCB Spill Cleanup Rules and only if the Regional Response Team, if one exists, concurs with the cleanup action.

8. **NWP 29 for Residential Developments:** As revised and described above, this NWP authorizes discharges up to 1/2 acre and 300 linear feet of stream bed for the construction or expansion of any residential structure or development and “attendant features,” such as roads and recreation facilities. Pre-construction notification is always required.

9. **NWP 33 for Temporary Construction, Access and Dewatering:** Authorizes temporary fills at construction sites, so long as the primary construction activity is not subject to 404 regulation and the site is restored to pre-project conditions under a Corps-approved restoration plan.

10. **NWP 38 for Cleanup of Hazardous and Toxic Waste:** Authorizes discharges associated with the containment or removal of these materials under an order by either a court or an agency, after pre-construction notice to the Corps.
11. **NWP 39 for Commercial and Institutional Developments:** As revised and described above, this NWP authorizes discharges up to 1/2 acre for the construction or expansion of commercial and institutional building foundations and building pads and “attendant features” that are necessary for the use and maintenance of the structures, with a number of key exclusions and limitations. Pre-construction notification is always required.

12. **NWP 44 for Mining Activities:** As revised and described above, this NWP now broadly covers all non-coal mining activities up to 1/2 acre of fill in non-tidal waters. Pre-construction notification is always required.

IX. **PRACTICE POINTERS IN USING NWPS AND OTHER GENERAL PERMITS**

One might ask, given the complexity and changing nature of the NWP and 404 General Permit Program, why a regulated person would even bother to proceed under a NWP or other general permit, instead of simply obtaining an individual 404 permit? One answer is that in some cases it might in fact be just as quick and simple and less risky to obtain an individual permit. In most other cases, however, it will likely still be very advantageous to proceed under one or more NWPs, in order to accelerate the permit processing period, avoid individual permit public notice and potential hearings, avoid individual NEPA review and, in increasingly fewer instances, avoid notification to the Corps altogether. Nevertheless, because of the recent changes to and complexity of the NWP and General Permit Program, reliance on a NWP or other general permit should be done only with great caution and care.

Attached on **Exhibit H** are several tips and practical pointers for regulated persons and entities to consider if and when they contemplate proceeding under a NWP or other general permit. The cardinal rules in this respect are to confirm that one is proceeding only under NWPs or other general permits and related conditions that are applicable at that particular location at that particular time and, if there is any doubt, to obtain Corps verification under 33 C.F.R. § 330.6(a).

X. **SOURCES OF NWP AND RELATED INFORMATION**

Corps National Headquarters Regulatory Program Internet Website:

www.usace.army.mil/cw/cecwol/reg/

Corps Omaha District/Tri-Lakes (Littleton) Office Internet Website and phone numbers:

Phone: 303-979-4120 (Littleton Field Office)
402-221-4211 (Omaha)

Corps Albuquerque District Internet Website and phone number:

www.spa.usace.army.mil
Phone: 505-342-3283

Corps Sacramento District Internet Website and phone numbers:

www.spk.usace.army.mil
Phone: 916-557-5252 (Sacramento)
970-243-1119 (Grand Junction Field Office)
WHAT IS A NATIONWIDE PERMIT?

• General “Permit-by-Rule”
• Expressly Authorized and Limited by 404(e)
• Adopted by Corps After Notice and Opportunity for Public Comment
• Only for Activities with Minimal Individual and Cumulative Adverse Environmental Effects
• Each NWP has 5-Year Term
• Avoids Need for an “Individual” 404 Permit
• Avoids Need for Separate NEPA Compliance
• Have Both General and Region-Specific Conditions
• Where NOTICE Required, Must Give PRIOR to Construction
• Full Compliance with ALL Criteria and Conditions Is a PREREQUISITE to Use NWP
• Must Comply with 404(b)(1) Guidelines
• Conditional Authorization: NOT an “Entitlement”
EXHIBIT B

HISTORICAL EVOLUTION OF NWP PROGRAM

1972  § 404 Adopted in FWPCA (CWA)

1975  NWF v. Callaway: “Navigable Waters” = All “Waters of U.S.” under Commerce Clause

1975-77  First Corps Permits-by-Rule (“Above Headwaters” w/ No Conditions)

1977  CWA Amendments: Congress Ratifies and Outlines “General” Permits-by-Rule by Adopting § 404(e)

*1980  First Post-’77 Amendment NWP Rules: List Specific NWPs


1982  NWF v. Marsh Lawsuit and Settlement

1984  “Marsh Settlement” Rules: Set First NWP 26 Acreage (10/1) Limits

*1986  First “Reissuance” of NWPs: Increase Restrictions/Notice

*1991  Second “Reissuance” of NWPs: 10 New Narrow NWPs and Stricter Notice and Conditions

1993  Clinton Wetlands Policy

1995  New NWP 29 Adopted (Single-Family Homes) and Alaska Litigation

*1996  Third “Reissuance” of NWPs: 2 New NWPs, Limit/Phase-out of NWP 26, “Anti-Stacking” and More Notice and Mitigation

1998-99  Extensive Amendments Proposed to NWP Program

8/30/99  NWP 29 Revised per Alaska Court Order

3/9/00  Effective 6/7/00, NWP 26 Terminated, 5 New NWPs, 6 Modified NWPs, 2 New General Conditions, and 9 Modified Conditions

*1/15/02  Fourth Reissuance of NWPs: Effective 3/18/02, Reissued All 43 NWPs and Revised 9 NWPs and 6 General Conditions and Added 1 New Condition (Expired 3/18/07)

*3/12/07  Fifth Reissuance of NWPs: Effective 3/18/07, Reissued All 43 NWPs, Issued 6 New NWPs and 2 New General Conditions, and Revised Various NWPs, Conditions and Definitions
## EXHIBIT C-1
### 49 CURRENT NATIONWIDE PERMITS
*(All Issued or Reissued Effective 3/18/07 and Expire 3/18/2012)*

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Aids to Navigation</td>
</tr>
<tr>
<td>2</td>
<td>Structures in Artificial Canals</td>
</tr>
<tr>
<td>3</td>
<td><strong>MAINTENANCE</strong></td>
</tr>
<tr>
<td>4</td>
<td>Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities</td>
</tr>
<tr>
<td>5</td>
<td>Scientific Measurement Devices</td>
</tr>
<tr>
<td>6</td>
<td><strong>SURVEY ACTIVITIES</strong> (including seismic)</td>
</tr>
<tr>
<td>7</td>
<td>Outfall Structures</td>
</tr>
<tr>
<td>8</td>
<td>Oil and Gas Structures (OCS Only)</td>
</tr>
<tr>
<td>9</td>
<td>Structures in Fleeting and Anchorage Areas</td>
</tr>
<tr>
<td>10</td>
<td>Mooring Buoys</td>
</tr>
<tr>
<td>11</td>
<td>Temporary Recreational Structures</td>
</tr>
<tr>
<td>12</td>
<td><strong>UTILITY LINE ACTIVITIES</strong></td>
</tr>
<tr>
<td>13</td>
<td><strong>BANK STABILIZATION</strong></td>
</tr>
<tr>
<td>14</td>
<td><strong>LINEAR TRANSPORTATION PROJECTS</strong></td>
</tr>
<tr>
<td>15</td>
<td>U.S. Coast Guard Approved Bridges</td>
</tr>
<tr>
<td>16</td>
<td>Return Water From Upland Contained Disposal Areas</td>
</tr>
<tr>
<td>17</td>
<td>Hydropower Projects</td>
</tr>
<tr>
<td>18</td>
<td><strong>MINOR DISCHARGES</strong></td>
</tr>
<tr>
<td>19</td>
<td>Minor Dredging (Nav. Waters Only)</td>
</tr>
<tr>
<td>20</td>
<td><strong>OIL SPILL CLEANUP</strong> (Under SPCC or PCB Plans Only)</td>
</tr>
<tr>
<td>21</td>
<td><strong>SURFACE COAL MINING OPERATIONS</strong></td>
</tr>
<tr>
<td>22</td>
<td>Removal of Vessels</td>
</tr>
<tr>
<td>23</td>
<td><strong>APPROVED CATEGORICAL EXCLUSIONS (under NEPA)</strong></td>
</tr>
<tr>
<td>24</td>
<td>Tribe or State Administered Section 404 Programs</td>
</tr>
<tr>
<td>25</td>
<td>Structural Discharges</td>
</tr>
<tr>
<td>26</td>
<td>Aquatic Habitat Restoration, Establishment and Enhancement Activities</td>
</tr>
<tr>
<td>27</td>
<td>Modifications of Existing Marinas</td>
</tr>
<tr>
<td>28</td>
<td><strong>RESIDENTIAL DEVELOPMENTS</strong></td>
</tr>
<tr>
<td>29</td>
<td>Maintenance of Existing Flood Control Projects</td>
</tr>
<tr>
<td>30</td>
<td>Moist Soil Management for Wildlife</td>
</tr>
<tr>
<td>31</td>
<td><strong>COMPLETED ENFORCEMENT ACTIONS</strong></td>
</tr>
<tr>
<td>32</td>
<td><strong>TEMPORARY CONSTRUCTION, ACCESS AND DEWATERING</strong></td>
</tr>
<tr>
<td>33</td>
<td>Cranberry Production Activities</td>
</tr>
<tr>
<td>34</td>
<td><strong>MAINTENANCE</strong></td>
</tr>
<tr>
<td>35</td>
<td>Maintenance Dredging of Existing Basins</td>
</tr>
<tr>
<td>36</td>
<td>Boat Ramps</td>
</tr>
<tr>
<td>37</td>
<td>Emergency Watershed Protection and Rehabilitation</td>
</tr>
<tr>
<td>38</td>
<td><strong>CLEANUP OF HAZARDOUS AND TOXIC WASTE</strong></td>
</tr>
<tr>
<td>39</td>
<td><strong>COMMERCIAL AND INSTITUTIONAL DEVELOPMENTS</strong></td>
</tr>
<tr>
<td>40</td>
<td><strong>AGRICULTURAL ACTIVITIES</strong></td>
</tr>
<tr>
<td>41</td>
<td>Reshaping Existing Drainage Ditches</td>
</tr>
<tr>
<td>42</td>
<td><strong>RECREATIONAL FACILITIES</strong></td>
</tr>
<tr>
<td>43</td>
<td><strong>STORMWATER MANAGEMENT FACILITIES</strong></td>
</tr>
<tr>
<td>44</td>
<td><strong>MINING ACTIVITIES</strong></td>
</tr>
<tr>
<td>45</td>
<td><strong>REPAIR OF UPLANDS DAMAGED BY DISCRETE EVENTS</strong> (New in 2007)</td>
</tr>
<tr>
<td>46</td>
<td><strong>DISCHARGES IN DITCHES</strong> (New in 2007)</td>
</tr>
<tr>
<td>47</td>
<td>Pipeline Safety Program Inspections and Repairs (New in 2007)</td>
</tr>
<tr>
<td>48</td>
<td>Existing Commercial Shellfish Activities (New in 2007)</td>
</tr>
<tr>
<td>49</td>
<td><strong>COAL REMINING ACTIVITIES</strong> (New in 2007)</td>
</tr>
<tr>
<td>50</td>
<td><strong>UNDERGROUND COAL MINING ACTIVITIES</strong> (New in 2007)</td>
</tr>
</tbody>
</table>
EXHIBIT C-2

28 CURRENT NWP GENERAL CONDITIONS
(As of 3/18/07)
(Under 40 C.F.R. § 330.4)

1. Navigation
2. Aquatic Life Movements
3. Spawning Areas
4. Migratory Bird Breeding Areas
5. Shellfish Beds
6. SUITABLE MATERIAL
7. Water Supply Intakes
8. Adverse Effects From Impoundments
9. MANAGEMENT OF WATER FLOWS
10. FIllS WITHIN 100-YEAR FLOODPLAINS
11. Equipment
12. Soil Erosion and Sediment Controls
13. Removal of Temporary Fills
14. Proper Maintenance
15. Wild and Scenic Rivers
16. Tribal Rights
17. ENDANGERED SPECIES
18. Historic Properties
19. Designated Critical Resource Waters
20. MITIGATION
21. Water Quality
22. Coastal Zone Management
23. REGIONAL AND CASE-BY-CASE CONDITIONS
24. USE OF MULTIPLE NATIONWIDE PERMITS
* 25. TRANSFER OF NWP VERIFICATIONS (New in 2007)
26. COMPLIANCE CERTIFICATION
27. PRE-CONSTRUCTION NOTIFICATION
* 28. SINGLE AND COMPLETE PROJECT (New in 2007)

State and Regional Conditions
(Check with local ACOE District Office or website)
EXHIBIT D

2007 NWP RULEMAKING

• Reissued All 43 NWPs and 26 General Conditions

• Created 6 New NWPs

• Added 2 New General Conditions; Deleted 1 Condition

• Modifications to Most Existing NWPs and General Conditions

• Common (3/18/12) Termination Date for All 49 NWPs

• Key Changes to NWP Definitions
EXHIBIT E
GENERAL 404 PERMITS USEFUL FOR ALL WESTERN OPERATORS

- **NWP 3**: Maintenance
- **NWP 6**: Survey Activities (including seismic)
- **NWP 12**: Utility Line Activities (including pipelines)
- **NWP 13**: Bank Stabilization
- **NWP 14**: Linear-Transportation Projects
- **NWP 18**: Minor Discharges
- **NWP 20**: Oil Spill Cleanup (Under SPCC & PCB Plans only)
- **NWP 29**: Residential Developments
- **NWP 33**: Temporary Construction, Access and Dewatering
- **NWP 38**: Hazardous Waste Cleanup
- **NWP 39**: Commercial & Institutional Developments
- **NWP 40**: Agricultural Activities
- **NWP 42**: Recreational Facilities
- **NWP 44**: Mining Activities
EXHIBIT F

GENERAL 404 PERMITS USEFUL FOR WESTERN MINERAL DEVELOPERS

• **NWP 21**: Surface Coal Mining Operations
• **NWP 44**: Mining Activities
• **NWP 49**: Coal Remining Activities
• **NWP 50**: Underground Coal Mining Activities

• Regional Permits for O&G E&P Activities:
  • Wyoming (Expired 6/05)
  • Galveston District of COE
  • Fort Worth District of COE
  • New Orleans District of COE

• Regional Permits for Mining Activities:
  • Alaska Permit for Placer Mining Activities
  • Wyoming Surface Coal Mining Activities
EXHIBIT G

HYPOTHETICAL USE AND “STACKING” OF MULTIPLE NWPs

- **NWP 6**: Survey Activities (including soil sampling)
- **NWP 12**: Utility Line Activities
- **NWP 13**: Bank Stabilization Activities
- **NWP 14**: Road/Transportation Crossings
- **NWP 29**: Residential Developments
- **NWP 39**: Commercial and Institutional Developments (foundations, building pads and “attendant features”)

EXHIBIT H

TOP 10 TIPS
(For Avoiding Problems With NWPs and General 404 Permits)

1. CHECK FOR AVAILABILITY OF MOST SUITABLE NWP OR GENERAL REGIONAL PERMITS

2. NOTIFICATION: ASSUME IS REQUIRED AND GIVE TIMELY
   • Assume is required unless confirmed to be unnecessary
   • Must give before commence ANY construction
   • Check required submittals (wetland delineation, etc.)
   • Failure timely to make DISQUALIFIES use of NWP

3. CHECK AND COMPLY WITH ALL NWP GENERAL AND REGIONAL CONDITIONS
   • General Conditions Are Critical and Complicated by Locally-Adopted Regional Conditions
   • See Website of local Corps District
   • May exclude NWP altogether
   • May affect notification, approval, timing, conditions, BMPs

4. ASSUME WILL NEED SOME COMPENSATORY MITIGATION
   • Legally not always required for NWP activities
   • Generally required if need PCN and > 1/10 acre wetlands loss
   • Trend is for Corps to require more frequently
   • Timing problems if wait
   • Consider mitigation banks

5. BEWARE OF FLOODPLAIN AND OTHER GEOGRAPHIC LIMITS
   • See GCs 10 and 19
   • Review FEMA floodplain maps and plans
• “DCR” waters are more obscure
• See Corps and Colo. DPHE maps/info.
• May disqualify or limit use of NWP

6. CAREFUL WITH NWP ACREAGE AND LINEAR DISTURBANCE LIMITS
   • Ensure are counting all applicable areas
   • If “stacking” multiple NWPs, ensure below highest limit
   • If wrong, NWP not apply at all (= violation)

7. USE QUALIFIED EXPERTS
   • Need technical and legal expertise
   • “Near miss” is likely “fatal”

8. USE CORPS “VERIFICATION” PROCEDURE FOR CLOSE CALLS
   • Provided under 33 C.F.R. § 330.6(a)
   • Gives formal assurance where Corps notice/approval not required
   • Factor into timing

9. BEWARE OF PERSONAL “COMPLIANCE CERTIFICATION”
   • Required by NWP Condition No. 26 whenever have Corps NWP approval/verification
   • Don’t take lightly!
   • Personal civil/criminal liability of certifier if wrong ("designated felon")

10. DON’T RELY ON OLD NEWS!
    • Check current status of both applicable NWPs and conditions
    • Avoid “it worked last time” approach