

## **SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 14**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 14 (Linear Transportation Projects) in the State of Texas, and addresses the regional modifications and conditions for this NWP. The Albuquerque, Fort Worth, Galveston, and Tulsa districts are the four Corps of Engineers (Corps) districts that have regulatory jurisdiction in Texas. The Albuquerque District is in the South Pacific Division and the Fort Worth District, Galveston District, and Tulsa District are in the Southwestern Division. The South Pacific Division Engineer and the Southwestern Division Engineer have considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineers have also considered the exclusion of this NWP from certain geographic areas or specific water bodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

### **1.0 Background**

In the September 26, 2006, issue of the Federal Register (71 FR 56258), the Corps published its proposal to reissue the existing NWPs and issue six new NWPs. To solicit comments on its proposed regional conditions for the NWPs, the Corps districts with regulatory jurisdiction in Texas concurrently issued public notices on or about October 12, 2006. Additionally, the Tulsa District mailed a full copy of the proposed 2007 NWPs to each of the Recognized Tribes having prehistoric affiliation, historic tribes or aboriginal use in the Tulsa District, with a copy of the public notice and a letter requesting consultation on the proposed NWPs. The Galveston District mailed a copy of the public notice to each of the Recognized Tribes having prehistoric affiliation, historic tribes, or aboriginal use in the Galveston District.

The issuance of the NWPs was announced in the March 12, 2007, Federal Register notice (72 FR 11092). After the publication of the final NWPs, the Corps districts with regulatory jurisdiction in Texas collectively considered the need for regional conditions for this NWP. The findings of the Corps districts with regulatory jurisdiction in Texas are discussed below.

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

## 2.1 General Comments

a. The Caddo Tribe of Oklahoma stated in a letter dated November 27, 2006, that areas proposed for activity under NWP's should be surveyed for historic properties to comply with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulation 36 CFR Part 800. The Caddo Tribe of Oklahoma also asked for government-to-government consultation regarding the NWP's and the revision of the Regulatory Program's Historic Properties counterpart regulation to 36 CFR Part 800.

Response: The Tulsa District contacted the Caddo Tribe of Oklahoma about the requested government-to-government consultation on the NWP's, but the Caddo Tribe did not respond. The comment letter from the Caddo Tribe of Oklahoma was forwarded to the Corps Headquarters Regulatory Office. The Corps is in the process of revising the Regulatory Program historic properties counterpart regulation to 36 CFR Part 800. Procedures for tribal coordination for the potential NWP-authorized activities are being addressed as part of the revision process. The process is intended to consult government-to-government with the Indian Nations when proposed activities may affect Tribal lands or trust resources, and to comply with Section 106 of the NHPA. Government-to-government meetings will be held between the Corps and the Recognized Tribes in July 2007 to discuss the revision of the Corps' Regulatory Program regulation relative to effects on historic properties, including those in the State of Texas. The Southwestern Division and the Tulsa District are coordinating the meetings.

b. The Texas Commission on Environmental Quality (TCEQ) stated in a letter dated November 28, 2006, that best management practices (BMPs) should be included for the protection of waters in the state specific to each NWP as part of the regional conditions. Additionally, on April 26, 2007, the TCEQ issued conditional Section 401 water quality certification (WQC) and Consistency with the Texas Coastal Management Program for the reissued NWP's. The TCEQ stated that it is conditionally certifying NWP general condition 12 (Soil Erosion and Sediment Controls) and NWP general condition 21 (Water Quality) by adding BMPs in order to enhance the water quality protection of these general conditions. The TCEQ stated it would like to include the provided BMPs for the protection of waters in the state specific to each NWP as part of the regional conditions for Texas.

Response: Since the general conditions to the NWP's can only be modified by the Chief of Engineers, we cannot comply with the TCEQ request to modify NWP general conditions 12 and 21. However, we find that to the degree that waters in the State and waters of the United States coincide (are the same), we will consider the TCEQ BMPs as an additional condition to its WQC and Consistency.

c. The TCEQ also recommended a regional condition that requires mitigation for impacts to streams and special aquatic sites, to adequately compensate for their functions and values.

Response: General condition 20 (Mitigation), paragraph (d) states that the district engineer may require compensatory mitigation for losses of streams and other waters of the United States. The Corps requires appropriate and practicable mitigation for all waters of the United States,

including streams and special aquatic sites, as provided for in 33 CFR 320-331 and related guidance – primarily Corps Regulatory Guidance Letter 02-02. We believe that it is appropriate to add a regional condition to require compensatory mitigation at a minimum one-for-one ratio for all special aquatic site losses that exceed 1/10 acre and require PCN, and for all losses to streams that exceed 300 linear feet and require PCN, unless the district engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement.

d. The TCEQ also recommended a statewide regional condition that gives the district engineer discretion whether to notify TCEQ according to general condition 27 (Pre-Construction Notification), which, requires that the district engineer provide a copy of the PCN to the state water quality agency for activities that result in the loss of greater than one half acre of waters of the United States. The TCEQ stated it does not have the staff resources to review every NWP.

Response: The reissued NWP general condition 27(d)(2) includes a resource agency notification requirement for all cases that require a PCN and result in greater than ½ acre loss of waters of the United States, and an added category for all NWP 48 activities, for which interagency coordination is required. Corps regional conditions cannot remove or weaken any of the terms and conditions of the NWPs, including general conditions and PCN requirements. Under the NWP general condition, the Corps is required to immediately provide a copy of the PCN to the appropriate Federal or state offices, including the state water quality agency. Therefore, while we cannot comply with the TCEQ’s requested regional condition, we are willing to work with the TCEQ to identify streamlining processes which may be beneficial to both the TCEQ and the Corps.

e. The TCEQ also recommended a statewide regional condition that explains how the Corps districts in Texas will distinguish between ephemeral, intermittent, and perennial streams.

Response: The reissued 2007 NWPs (as regulation) contain definitions of these stream types. On June 5, 2007, Corps Headquarters (HQUSACE) issued guidance to the districts regarding the Rapanos/Carabell Supreme Court decision on Corps jurisdiction over such water features as ephemeral and intermittent streams. We will not add a regional condition redefining or clarifying definitions of the three stream types.

f. The TCEQ also recommended a statewide regional condition that defines a drainage ditch.

Response: We believe that district engineers should maintain the discretion to determine on a case-by-case basis whether particular features are drainage ditches, and will not add the recommended definition.

g. The Texas Parks and Wildlife Department (TPWD), in a letter dated November 27, 2006, requested that the Corps formalize the Mission-Aransas National Estuarine Research Reserve, Armand Bayou Coastal Preserve, Christmas Bay Coastal Preserve, Welder Flats Coastal Preserve, and South Bay Coastal Preserve, which are located in the Galveston District, for the application of general condition 19 (Designated Critical Resource Waters). The TPWD offered to work with Corps staff to establish the boundaries of these areas and their adjacent wetlands for

application of general condition 19 and also in the identification of other waters that may meet the criteria of a designated critical resource water.

Response: Discharges of dredged or fill material into waters of the United States are not authorized by NWP 14, for any activity within, or directly affecting critical resource waters, including wetlands adjacent to such waters. General condition 19 requires notice and opportunity for public comment prior to identification or designation of critical resource waters by the district engineer. Due to workload constraints, the Galveston District has not undertaken the steps necessary to identify or designate additional critical resource waters during this 2007 NWP regional condition reissuance process. However, we are willing to undertake those efforts, and will work with the TPWD to obtain information needed to facilitate the identification and/or designation process for the waters listed by the TPWD that meet the critical resource waters criteria. Subsequent to the letter, Mr. J. Rollin MacRae and Mr. Jarrett Woodrow of the TPWD agreed with the Galveston District that adjacent wetland boundaries will not be established for the critical resource waters identification and/or designation process, due to the impracticality of such a manpower-intensive task. Instead, the public notice issued to solicit public comment will state that critical resource waters include their adjacent wetlands.

h. The Greater Edwards Aquifer Alliance (GEAA), in a letter dated November 27, 2006, recommended a regional condition to all NWPs in the Fort Worth District that prohibits the NWPs use within the recharge and contributing zones of the Edwards Aquifer in Texas, or, alternatively, that PCN, Endangered Species Act (ESA) consultation, and full compliance with the National Environmental Policy Act (NEPA) process should be required for all activities conducted under the NWPs in the recharge and contributing zones. The GEAA stated that the recommended regional condition is needed because work performed under NWPs will have substantial cumulative impacts on the aquifer and the endangered species that so heavily rely on it.

Response: We considered the need to add regional conditions in the Edwards Aquifer recharge and contributing zones (EARCZ) based on factors including the unique social, economic, and environmental factors in the area, but do not believe any to be warranted at this time. The GEAA provided no case- or region-specific documentation that unique social, economic, or environmental factors in the EARCZ would require a regional condition limiting the use of the NWPs. We believe the terms and conditions of the NWPs, particularly general condition 17 (Endangered Species), to which each activity authorized by a NWP is subject, are adequate to protect the federally-listed threatened and endangered species in the EARCZ. General condition 17 provides that no activity is authorized under any NWP that may affect a listed species or critical habitat unless ESA Section 7 consultation addressing the effects of the proposed activity has been completed. General condition 17 also requires prospective non-federal permittees to notify the Corps if any federally-listed threatened or endangered species, or designated critical habitat might be affected, or is in the vicinity of the project, or if the project is located in designated critical habitat. In such cases, general condition 17 provides that the prospective permittee shall not begin work until notified by the Corps that the requirements of the ESA have been satisfied and that the activity is authorized. If the Corps determines that the activity may affect any federally-listed species or critical habitat, the Corps must initiate Section 7 consultation with the U.S. Fish and Wildlife Service (USFWS) under the ESA. The Corps may

authorize the activity under a NWP by adding, if appropriate, activity-specific conditions; or assert discretionary authority and require an individual permit (see 33 CFR 330.4 and 330.5) prior to, or concurrent with Section 7 consultation. The ESA requirements are the same for NWPs as for any other Corps permit type, including standard individual permits in that no activity is authorized to affect a threatened or endangered species until the appropriate consultation with the USFWS had occurred and the activity is expressly authorized. The Corps has an ongoing and continuing commitment to consult with the USFWS case-by-case when the Corps receives pre-construction notifications, and other requests for verification, for authorization under the NWPs. We believe the NEPA analysis conducted prior to the reissuance of the 2007 NWPs was adequate, as is the NEPA analysis conducted for the supplemental decision documents for NWPs in the State of Texas, and we will continue to address cumulative impacts in judging whether specific activities are authorized by NWPs on a case-by-case basis.

## **2.2 Comments on Proposed Regional Conditions**

### **2.2.1 Proposed Regional Condition 1**

Proposed Regional Condition 1, which is a statewide regional condition (PCNs and agency coordination for discharges under NWPs 3, 6, 7, 12, 14, 18, 19, 25, 27, 29, 39, 40, 41, 42, 43, and 44 in pitcher plant bogs and bald cypress-tupelo swamps): The Marathon Oil Company, in a letter dated November 27, 2006, commented that while the Corps does not appear to be altering regional condition 1, it has concerns that the regional condition requires PCN for a number of NWPs- above and beyond what the Corps requires, which adds further regulatory burden to the Corps' existing NWP program and may delay Marathon operations and increase the company's compliance costs.

Response: The proposed regional condition is not new, as it originally applied to the NWPs reissued in 2002. The two habitat types, pitcher plant bogs and bald cypress-tupelo swamps, are limited in extent within the State of Texas. Pitcher plant bogs primarily occur in East Texas, with the largest component occurring in the Big Thicket National Preserve. Bald cypress and tupelo gum swamps occur adjacent to rivers located in southeast Texas and along the upper and mid Texas coast. In many cases these habitat types may be practicably avoided. Trees in these areas are slow growing and thus take many years to mature. Experience to date with permitting a limited number of actions in these two habitat areas has demonstrated that impacts are long lasting and new habitat is difficult to recreate using conventional mitigation techniques. Therefore, the proposed regional condition is needed to enable Corps review of proposed projects that might otherwise result in more than minimal adverse impacts to the aquatic environment in the two habitat types. This regional condition should not increase requirements, Corps regulatory workload, delay energy projects, or increase compliance costs appreciably, if at all.

### **2.2.2 Proposed Regional Condition 2**

Proposed Regional Condition 2 applies only to the Fort Worth District (PCNs and resource agency coordination for discharges under NWPs 3, 6, 7, 12, 14, 18, 19, 25, 27, 29, 39, 40, 41, 42, 43, and 44 in portions of the Caddo Lake area): The Marathon Oil Company, in a letter dated

November 27, 2006, commented that while the Corps does not appear to be altering regional condition 2, it requires the use of PCN in certain circumstances, adding further regulatory burden to the Corps' existing NWP program and delaying Marathon operations.

Response: Impacts in area of Caddo Lake within Texas that is designated as a "Wetland of International Importance" under the Ramsar Convention are long-lasting and new habitat is difficult to recreate using conventional mitigation techniques. Case-by-case reviews of activities that could potentially impact these areas would provide an opportunity to add project-specific conditions to the authorizations, if applicable, in order to reduce individual and cumulative impacts to this important resource that could result from NWP permitting activity. The proposed regional condition was applied to the NWPs reissued in 2002. The Fort Worth District has received 1 PCN that was required because of this regional condition. Rarely are applicants subject to this regional condition in the Fort Worth District because this area is limited to a relatively small area in northeast Texas. However, there is a strong emphasis from many sources to protect the existing aquatic environment in this area. The Ramsar Wetland of International Importance area of Caddo Lake has been recognized as being one of the more ecologically important types because of its rarity and deserves a case-by-case review by the Corps with resource agency coordination, to ensure that impacts associated with the use of NWPs are minimal. This regional condition should not increase requirements, Corps regulatory workload, delay energy projects, or increase compliance costs appreciably, if at all.

### **2.2.3 Proposed Regional Condition 8**

The TCEQ, in a letter dated November 28, 2006, commented that Galveston District's Proposed Regional Condition 8 (PCN required for discharges in coastal dune swales under NWPs 6, 7, 12, 13, 14, 18, 19, 25, 29, 39, 40, 41, 42, 43, 44, 46, and 48 ) appears to be less stringent than the 2002 NWP regional condition prohibiting using certain NWPs to authorize discharges into coastal dune swales, and recommends that the current regional condition for coastal dune swales remain in effect.

Response: The coastal dune swale waters are scarce along the Texas coast, and they provide habitat to many wildlife species, reduce erosion, and act as reservoirs for runoff. Therefore, we agree that the listed NWPs should not be used to authorize discharges into waters of the United States in coastal dune swales from the listed NWPs, and will add a regional condition prohibiting use of the listed NWPs for discharges.

### **2.2.4 Proposed Regional Condition 9**

The Marathon Oil Company, in a letter dated November 27, 2006, commented that Galveston District's regional condition 9 (requiring PCNs and coordination with the National Marine Fisheries Service for discharges and work under NWP 14 and NWP 18 in tidal waters) add further regulatory burden to the Corps' existing NWP program and may delay Marathon Oil Company operations and increase its compliance costs.

Response: The reissued NWP 14 allows up to 0.3-acre of tidal waters and wetlands to be filled. Additionally, it allows up to 0.1-acre of waters of the United States to be lost without prior

notification to the Corps. The National Marine Fisheries Service (NMFS) provided an Essential Fish Habitat Conservation (EFH) Recommendation during the 2002 reissuance of NWP 14 that the proposed regional condition be required so that NWP 14 would not result in adverse impacts to EFH. Therefore, the regional condition was established in 2002. We believe that since NWP 14 was reissued in 2007 with the same PCN requirements, the regional condition is needed to ensure that the authorization of activities under NWP 14 in tidal waters does not cause more than minimal impact on aquatic resources.

### **3.0 Waters Excluded from NWP or Subject to Additional Pre-Construction Notification Requirements**

#### **3.1 Waters excluded from use of this NWP**

**3.1.1 Mangrove Marshes.** Wetlands within the Texas Gulf Coastal Plain that are occasionally or regularly flooded by brackish or saline water and have more than 40 percent cover by woody plants. The dominant woody species in this environment is the black mangrove (Avicennia germinans) with a dominant herbaceous species component of smooth cordgrass (Spartina alterniflora). (Preliminary Guide to Wetlands of the Gulf Coastal Plain. 1978. Technical Report - U.S. Army Engineer Waterways Experiment Station: Y-78-5. P.O. Box 631, Vicksburg, Miss. 39180.)]

Reason for Exclusion: Of the four species of mangroves common to the Gulf of Mexico, the black mangrove is the only species able to sufficiently tolerate Texas winters. Even so, their extent within the Galveston District is limited. Black mangrove communities are most prevalent from central Texas, southward. They reach their greatest development on warm bay shores that are protected from exposure to high waves or strong currents. Black mangroves have one of the highest salt tolerances of all mangrove species, however, they lack the stereotypical aerial prop roots that facilitate exploitation of permanently subtidal, near shore waters. Hence, their seaward extent at any one location is limited. Black mangroves occupy the same ecological niche and perform the same ecological functions within central and southerly located Texas estuaries, as do the salt marshes that are more commonly located within the less saline estuaries of the upper Texas coast. Within each stand of mangroves, sediment accretion takes place as root systems effectively stabilize the mud. Leaf litter is broken down by primary consumers such as small crustaceans and decomposed by bacteria and fungi; thereby resulting in detritus that adds bulk and substance to the soil. Spring tides regularly inundate these areas, depositing fine sediments, strands of algae and other debris, which together with progressively decomposing leaf litter, turn the water into rich organic soup. Molluscs, and larger crustaceans (mainly crabs and shrimp species), feed on this organic material. Juvenile fish, utilizing the mangroves as protective nursery habitat, ingest these organisms and, in turn, become food for many species of wading shorebirds (e.g. herons, egrets, bitterns). In spite of their ecological importance, black mangrove communities are still one of the least studied habitats of the western Gulf of Mexico. Efforts at reproducing mangrove habitats have been largely unsuccessful. The Galveston District therefore believes that it is necessary to examine with greater scrutiny, via the individual permit process, both the individual and cumulative impacts to black mangrove habitat that may result from discharges potentially authorized by this NWP.

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

Reason for Exclusion: Few waters of the United States of this type exist along the Texas coast. While relatively small, freshwater wetland dune swales are extremely important foraging, nesting and cover sites for several species of migratory and resident aquatic birds. These wetlands often provide a rare source of fresh water for avian species such as mottled duck (Anas fulvigula), and the white-faced ibis (Plegadis chihi). These swales are also the only available habitat in their locality for many amphibians. For example, all eight species of frogs and toads that are known to exist on Galveston Island, Texas, require habitat such as this for their existence. Seven species of reptiles such as the gulf salt marsh snake (Nerodia (fasciata) clarki), found on Galveston Island, utilize freshwater wetland swales. Of these reptiles, the red-eared turtle (Chrysemys scripta) and the western ribbon snake (Thamnophis proximus) are totally restricted to freshwater habitats. It is likely that similar relationships between birds, reptiles, and amphibians exist on other barrier islands of the Texas coast which contain freshwater wetland dune swales. Dune swales also reduce erosion by stabilizing and anchoring soil. They act as reservoirs for runoff during periods of high rainfall. From 1981-1989, the acreage of wetland swales on Galveston Island decreased from 32 to 25 acres, and approximately 12 acres remained in 1994. The Galveston District is concerned about the cumulative losses that have occurred thus far to this type of wetland, due to both regulated and non-regulated activities. The District is therefore excluding the use of this NWP for discharges in these aquatic resource areas. Such activities will instead have to be reviewed via the individual permit process. They will be subject to a review of alternatives and other public interest factors.

## **3.2 Waters Subjected to Additional Pre-construction Notification Requirements**

**3.2.1 Pitcher Plant Bogs** Pitcher plant bogs are wetlands characterized by an organic surface soil layer and include vegetation such as pitcher plants (Sarracenia sp.), sundews (Drosera sp.), and sphagnum moss (Sphagnum sp.).

Reason for Notification Requirement: Pitcher plant bogs are limited in extent within the state of Texas. Pitcher plant bogs primarily occur in east Texas with the largest component occurring in the Big Thicket National Preserve. Experience to date with permitting a limited number of actions in this habitat has demonstrated that impacts are long-lasting and new habitat is difficult to recreate using conventional mitigation techniques. The Corps has therefore determined that PCNs will be required for all discharges proposed under this NWP within pitcher plant bogs. The Corps will also coordinate with the resource agencies as specified in NWP general condition 27(d). Case-by-case reviews of activities that could potentially impact these areas will provide an opportunity to add project-specific conditions to the authorizations, if applicable, in order to reduce individual and cumulative impacts to the resource that could result from NWP permitting activity. This type of review also provides an opportunity for the Corps to take discretionary authority, if appropriate, and require that the project be evaluated via the individual permit process. It would then be subject to a review of alternatives and other public interest factors.

### **3.2.2 Bald Cypress-Tupelo Swamps**

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

Reason for Notification Requirement: Bald cypress-tupelo swamps are limited in extent within the state of Texas. Bald cypress and tupelo swamps occur adjacent to rivers located in east and northeast Texas and along the upper to mid Texas coast. Trees in these areas are slow growing and thus take many years to mature. Experience to date with permitting a limited number of actions in these habitat areas has demonstrated that impacts are long-lasting and new habitat is difficult to recreate using conventional mitigation techniques. The Corps has therefore determined that PCNs will be required for all discharges proposed under this NWP within these aquatic resource areas. Case-by-case reviews of activities that could potentially impact these areas will provide an opportunity to add project-specific conditions to the authorizations, if applicable, in order to reduce individual and cumulative impacts to the resource that could result from NWP permitting activity. This type of review also provides an opportunity for the Corps to take discretionary authority, if appropriate, and require that the project be evaluated via the individual permit process. It would then be subject to a review of alternatives and other public interest factors.

### **3.2.3 Areas of Caddo Lake Within Texas Designated as a “Wetland of National Importance” Under the Ramsar Convention**

Reason for Notification Requirement: The Caddo Lake complex has been classified as a

Resource Category One Habitat by the U.S. Fish and Wildlife Service (USFWS) and in October 1993, 6500 acres were declared the United States' thirteenth Wetland of International Importance by the Ramsar Convention. The Ramsar Convention is an intergovernmental treaty that provides a framework for international cooperation for the conservation and management of wetland habitats. The present Caddo Lake Ramsar property is owned and managed by the Texas Parks and Wildlife Department (TPWD) as a wildlife management area. Caddo Lake has a surface area of over 30,000 acres although it is shallow, with an average depth one meter and a maximum of about three meters. There are three major habitat types at Caddo Lake: riverine, wetland, and open water. A bald cypress swamp dominates approximately 1/3 of the lake while the remainder is open water with interspersed bald cypress islands. Several major tributaries that enter the lake: Kitchen Creek and James Bayou, Big Cypress Bayou, and Harrison Bayou represent the riverine habitat. At the east end of the lake is a Corps-constructed dam which maintains the water at 168.5 National Geodetic Vertical Datum (NGVD). The lake and its watershed support a high biodiversity. The lake is also important in the region for economic benefits gained from tourism, nature-related activities, hunting, and fishing. The Corps will coordinate with the resource agencies as specified in NWP General Condition 27(d).

### **3.3 Waters Subjected to Additional Criteria and Guidelines**

#### **3.3.1 Fort Worth District Only: The areas in Dallas, Denton, and Tarrant Counties that are within the Study Area of the "Final Regional Environmental Impact Statement (EIS), Trinity River and Tributaries" (May 1986)**

Reason for Requirement: Late in 1984 and early in 1985, it became apparent that numerous unrelated development projects were being proposed along the Trinity River and its tributaries in Dallas, Denton, and Tarrant Counties, Texas. Most involved modification of the river channel and/or flood plain in some form or another and most required a Department of the Army permit as a result. Because, individually or cumulatively, these projects were felt to have the potential to compromise the existing protection offered to flood plain residents, because of perceived impacts to streams, wetlands, and other natural resources, and because of competing public demands for other uses of the river channel and flood plain, the Fort Worth District Engineer determined it was necessary to develop a regional perspective in order to properly evaluate the impacts of permit decisions in accordance with the spirit and intent of NEPA and other applicable laws. This study resulted in the publication of draft and final Environmental Impact Statements (EIS) followed by a Record of Decision (ROD) that identified criteria established on environmental quality and hydraulic and hydrologic impacts to be met associated with evaluations of application for Department of the Army permits in the study area. The Corps has therefore determined that all discharges proposed for authorization under all NWPs in these areas must meet the criteria and follow the guidelines specified in Section III of the ROD for the Regional EIS

### **4.0 Alternatives**

#### **4.1 No Regional Conditions**

No additional regional conditions would be issued for this NWP. All work authorized by this NWP would be subject to its current terms and conditions, as well as the NWP general conditions. However, experience with previously permitted activities in these habitats has shown that these resources need to be protected to a greater degree to prevent adverse cumulative impacts from occurring. Proposed impacts involving these resources need to be evaluated through a thorough permit process. By not implementing regional conditions, this NWP has the potential to result in more than minimal impacts to the aquatic environment. As such, this alternative is not practicable.

#### **4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds**

An alternative requiring a PCN for all activities conducted in the Fort Worth District under the NWPs in the recharge and contributing zones of the Edwards Aquifer in Texas, because of cumulative impact and endangered species concerns, would increase Corps workload without reducing adverse impacts to the aquatic environment, as discussed in Section 2.0 of this document.

#### **4.3 Alternative Regional Nationwide Permit Conditions**

A regional condition to all NWPs in the Fort Worth District that prohibits their use within the recharge and contributing zones of the Edwards Aquifer in Texas was recommended, primarily due to cumulative impacts on the aquifer and the endangered species that so heavily rely on it. Adopting the suggested regional condition would increase the Fort Worth District's workload without added value for protection of the aquatic environment. Requiring compensatory mitigation for special aquatic site losses and losses to streams under some circumstances could minimize impacts to the aquatic environment.

### **5.0 Endangered Species Act (ESA)**

#### **5.1 General Considerations**

In addition to being subject to the requirements of general condition 17 (Endangered Species), under the current Corps regulations (33 CFR 325.2(b)(5)), the district engineer must review all permit applications for potential impact on threatened and endangered species or critical habitat. For the NWP program, this review occurs when the district engineer evaluates the PCN or request for verification. General condition 17 of the NWPs provides that no activity is authorized under any NWP that may affect a listed species or critical habitat unless ESA Section 7 consultation addressing the effects of the proposed activity has been completed. General condition 17 also requires prospective non-federal permittees to notify the Corps if any federally-listed threatened or endangered species, or designated critical habitat might be affected, or is in the vicinity of the project, or if the project is located in designated critical habitat. In such cases, general condition 17 provides that the prospective permittee shall not begin work until notified by the Corps that the requirements of the ESA have been satisfied and that the activity is authorized. If the Corps determines that the activity may affect any federally-listed species or critical habitat, the Corps must initiate Section 7 consultation with the USFWS or the

NMFS under the ESA. The Corps may authorize the activity under a NWP by adding, if appropriate, activity-specific conditions; or assert discretionary authority and require an individual permit (see 33 CFR 330.4 and 330.5) prior to, or concurrent with, Section 7 consultation. The ESA requirements are essentially the same for NWPs as for any other Corps permit type, including standard individual permits in that no activity is authorized to affect a federally-listed threatened or endangered species, or its critical habitat, until the appropriate consultation with the USFWS or NMFS has occurred and the activity is expressly authorized.

Based on the evaluation of all available information, the district engineer initiates consultation with the USFWS or the NMFS, as appropriate, if he or she determines that the regulated activity may affect any threatened and endangered species or critical habitat. Consultation may occur during the NWP authorization process or the district engineer may exercise discretionary authority to require an individual permit review for the proposed activity and initiate consultation through the individual permit process, if appropriate. If ESA consultation is conducted during the NWP authorization process without the district engineer exercising discretionary authority, then the applicant will be notified that he or she cannot proceed with the proposed activity until ESA consultation is complete. If the district engineer determines that the activity will have no effect on any threatened and endangered species or critical habitat, then the district engineer will notify the applicant that he or she may proceed under the NWP authorization.

## **5.2 Local Operating Procedures for Endangered Species**

The Corps has an ongoing commitment to consult, informally and formally, with the USFWS and NMFS, as appropriate, on a case-by-case basis when the Corps receives PCNs, and other requests for verification, for authorization under the NWPs. The NEPA analysis conducted prior to the reissuance of the 2007 NWPs was adequate, as is the NEPA analysis conducted for the supplemental decision documents for NWPs in the State of Texas. The Corps will continue to address cumulative impacts in judging whether specific activities are authorized by NWPs on a case-by-case basis.

The Corps districts coordinate regularly with local USFWS and NMFS officials responsible for Texas and continue to update established informal local operating procedures that assist the Corps districts in determining whether the proposed activity may affect a federally-listed threatened or endangered species or its critical habitat. The Corps will review available information and work with permit applicants to gather other necessary information, to determine whether a proposed activity may affect listed species or critical habitat. If the activity is located within a habitat area of concern, the Corps would contact the USFWS or the NMFS, as appropriate. These procedures help to ensure that proposed Corps permit actions will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat of a listed species.

## **6.0 National Historic Preservation Act**

Current regulatory procedures are outlined in the 25 April 2005 Appendix C interim guidance,

and 31 January 2007 Clarification of the Revised Interim Guidance, provided by the U.S. Army Corps of Engineers, Directorate of Civil Works. The Corps is in the process of revising its regulatory program procedures, Appendix C of 33 CFR 325 “Procedures for the Protection of Historic Properties”, for compliance with Section 106 of the NHPA and its implementing regulations codified by the Advisory Council on Historic Preservation (ACHP) in 36 CFR Part 800. The revisions to the regulatory program procedures have been necessitated by the 2004 revisions to 36 CFR Part 800.

## **6.1 General Considerations**

Under the current Corps regulations (33 CFR 325.2(b)(3), the Corps must review all permit applications for potential impact on properties listed or eligible for listing in the National Register of Historic Places (NRHP) and comply with the NHPA and implementing regulations. The Corps follows the interim guidance procedures referenced in Section 6.0 above to that end. NWP general condition 18 provides that no activity is authorized under any NWP that may affect properties listed, or eligible for listing, in the National Register of Historic Places, until the requirements of Section 106 of the NHPA have been satisfied. General condition 18 also requires prospective non-federal permittees to notify the Corps if any authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places (NRHP), including previously unidentified properties. The Corps, working with the prospective permittee, must make a reasonable and good faith effort to carry out appropriate identification efforts. Where historic properties have been identified that have the potential to be affected by the proposed activity, the prospective permittee may not begin work until notified by the Corps that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

NWP activities are evaluated by the Corps Staff Archeologist to determine if a proposed permit action has the potential to affect historic properties. The initial evaluation process includes the review of existing cultural resource site records and reports and an evaluation of the permit area to determine the potential for the presence of cultural resources that are, or have the potential to be, eligible for listing in the National Register of Historic Places (NRHP). If the Corps determines that the action has no potential to affect cultural resources, the Corps will proceed to verify the NWP authorization without further consultation with the State Historic Preservation Officer (SHPO). If the Corps determines that there will be no effect or no adverse effect to any NRHP-eligible historic property, the Corps will provide the SHPO a 30-day review of that determination prior to verifying authorization. If the Corps determines that the action may affect an NRHP-eligible historic property, the Corps will coordinate the PCNs with the SHPO. Following the initial evaluation, the Corps may either: (1) consult with the SHPO during the NWP review process, or (2) require an individual permit for the proposed work and initiate consultation through the individual permit process.

## **6.2 Local Operating Procedures for National Historic Preservation Act**

In addition to the procedures outlined in 6.1, permit areas that contain previously recorded cultural resources and/or have the potential for the presence of significant cultural resources will

require a cultural resource investigation. Investigations may include, but not be limited to, cultural resources inventories (terrestrial, aquatic, and/or marine, reconnaissance and/or intensive), site delineation and NRHP testing, data recovery, avoidance plans and historic structures analysis. The level of effort involved in any cultural resource investigation is coordinated with the Corps Staff Archeologist and the SHPO by the applicant and their contracted professional archeologist. The prospective permittee compiles the results of initial work in a report and forwards the report to the SHPO for review and comment and the Corps for approval. After site identification, the Corps will select sites potentially eligible for the NRHP in consultation with the prospective permittee and the SHPO for testing. The permittee tests these sites according to a research design developed prior to this phase of field work. The permittee forwards the research design to the SHPO for review and comment and to the Corps for approval prior to implementation of testing. After testing is completed, the prospective permittee forwards a testing report to the SHPO for review and comment and the Corps for approval. The prospective permittee develops a plan for data recovery if NRHP-eligible properties are identified during the testing phase. The permittee forwards this plan to the SHPO for review and comment and the Corps for approval. The permittee compiles and forwards a completed report of the data recovery phase of work to the SHPO for review and comment and the Corps for approval. All historic properties/cultural resources work is undertaken by qualified personnel. The work is accomplished in conformance with Council of Texas Archeologists Guidelines for Field Investigations and Reporting, and the Department of the Interior's "Archeology and Historic Preservation; Secretary of the Interior's Standards and Guidelines" (FR, Vol. 48, No. 190). All sites are assigned trinomial numbers and are assessed according to the criteria for the NRHP contained in 36 CFR 60.4. As noted above, prospective permittees are not authorized to initiate any construction for any undertaking that would affect an NRHP-eligible property until the significance of the property and the effects of the undertaking on the property are determined and any necessary treatment is complete. Prospective permittees may not begin work in the permit area until the Corps has verified that the requirements of 36 CFR Part 800 have been met. The Corps also considers that if a previously unknown cultural resource site is encountered in the permit area during work authorized by an NWP, the permittee must contact the Corps and avoid further impact to the site until assessment by State and Federal cultural resource specialists is complete and the Corps has verified that the requirements of 36 CFR Part 800 have been met and the Corps has notified the permittee that work may resume in the affected area.

### **6.3 Local Operating Procedures for Tribal Consultation**

In the Galveston District, at the request of the Tribes, only those NWP actions either in or near Tribal lands is coordinated. If the NWP action may affect Tribal lands, the Corps will follow tribal consultation procedures as outlined in the 2004 revised ACHP, 36 CFR Part 800 procedures; Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" dated 6 November 2000; and through Corps Policy Guidance Letter No. 57, "Indian Sovereignty and Government-to-Government Relations with Indian Tribes", dated 18 February 1998. In the Fort Worth District, at the request of a tribe, or based on ethnographic documentation, the Corps may choose to coordinate with Recognized Tribes known to have been resident in the area. The Corps will request that the Recognized Tribe provide comments on the proposed NWP action.

### **7.0 Essential Fish Habitat**

The Galveston District consulted with the National Marine Fisheries Service (NMFS) under the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act. The NMFS stated that it had no Essential Fish Habitat concerns.

### **8.0 Supplement to National Impact Analysis**

#### **8.1 Public Interest Review Factors (33 CFR 320.4(a)(1))**

In addition to the discussion in the national decision document for this NWP, the Corps districts with regulatory jurisdiction in Texas have considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.

- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

## **8.2 Section 404(b)(1) Guidelines Impact Analysis (Subparts C-F)**

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: Same as discussed in the national decision document.
- (h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web: Same as discussed in the national decision document.
- (i) Other wildlife: Same as discussed in the national decision document.
- (j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

- (1) Sanctuaries and refuges: Same as discussed in the national decision document.
- (2) Wetlands: Same as discussed in the national decision document.
- (3) Mud flats: Same as discussed in the national decision document.
- (4) Vegetated shallows: Same as discussed in the national decision document.
- (5) Coral reefs: Same as discussed in the national decision document.
- (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

## **9.0 List of Final Corps Regional Conditions for NWP 14**

### **9.1 Regional Condition 1**

The following regional condition applies only within the State of Texas:

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

### **9.2 Regional Condition 2**

The following regional condition applies only within the State of Texas:

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

a. Wetlands, typically referred to as pitcher plant bogs, that are characterized by an organic surface soil layer and include vegetation such as pitcher plants (Sarracenia sp.), sundews (Drosera sp.), and sphagnum moss (Sphagnum sp.).

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

### **9.3 Regional Condition 5**

The following regional condition applies only within the Fort Worth District:

5. For all discharges proposed for authorization under nationwide permits (NWP) 3, 6, 7, 12, 14, 18, 19, 25, 27, 29, 39, 40, 41, 42, 43, and 44, into the area of Caddo Lake within Texas that is designated as a “Wetland of International Importance” under the Ramsar Convention, the applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 27. The Corps will coordinate with the resource agencies as specified in NWP General Condition 27(d).

### **9.4 Regional Condition 7**

The following regional condition applies only within the Fort Worth District:

7. For all discharges proposed for authorization under any NWP in Dallas, Denton, and Tarrant Counties that are within the study area of the “Final Regional Environmental Impact Statement (EIS), Trinity River and Tributaries” (May 1986), the applicant shall meet the criteria and follow the guidelines specified in Section III of the Record of Decision for the Regional EIS, including the hydraulic impact requirements. A copy of these guidelines is available upon request from the Fort Worth District and at the District website [www.swf.usace.army.mil](http://www.swf.usace.army.mil) (select “Permits”).

### **9.5 Regional Condition 11**

The following regional condition applies only within the Galveston District:

11. Nationwide permits 6, 7, 12, 13, 14, 18, 19, 25, 29, 39, 40, 41, 42, 43, 44, 46, and 48 shall not be used to authorize discharges into the following waters of the United States within the coastal zone of Texas: Mangrove marshes, wetlands within the Texas Gulf Coastal Plain that are occasionally or regularly flooded by brackish or saline water and have more than 40 percent cover by woody plants. The dominant woody species in this environment is the black mangrove

(Avicennia germinans) with a dominant herbaceous species component of smooth cordgrass (Spartina alterniflora). (Preliminary Guide to Wetlands of the Gulf Coastal Plain. 1978. Technical Report - U.S. Army Engineer Waterways Experiment Station: Y-78-5. P.O. Box 631, Vicksburg, Miss. 39180.)

## 9.6 Regional Condition 12

The following regional condition applies only within the Galveston District:

12. Nationwide permits 6, 7, 12, 13, 14, 15, 17, 18, 19, 22, 25, 29, 30, 31, 32, 33, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, and 48 shall not be used to authorize discharges into the following waters of the United States within the coastal zone of Texas: Coastal Dune Swales, “wetlands and other waters of the United States that are formed as depressions within and among multiple beach ridge barriers, dune complexes, or dune areas adjacent to beaches fronting the tidal waters of the Gulf of Mexico and adjacent to the tidal waters of bays and estuaries. Coastal dune swales are generally comprised either of impermeable muds that act as reservoirs which collect precipitation or of groundwater nourished wetlands in sandy soils. As such, they generally have a high fresh to brackish water table. Vegetation species characteristically found in coastal dune swales include but are not limited to marshhay cordgrass (Spartina patens), gulfdune paspalum (Paspalum monostachyum), bulrush (Scirpus spp.), seashore paspalum (Paspalum vaginatum), common reed (Phragmites australis), groundsel bush (Baccharis halimifolia), rattlebush (Sesbania drummondii), camphor weed (Pluchea camphorata), smartweed (Polygonum spp.), water hyssop (Bacopa monnieri), cattail (Typha spp.), umbrella sedge (Cyperus spp.), sofrush (Juncus spp.), sedge (Carex spp.), beakrush (Rhynchospora spp.), frog-fruit (Phyla spp.), duckweed (Lemna spp.), buttonweed (Diodia virginiana), mist flower (Eupatorium coelestinum), creeping spotflower (Acmella oppositifolia var. repens), pennywort (Hydrocotyle spp.), and bushy bluestem (Andropogon glomeratus).” (U.S. Fish and Wildlife Service, Houston, Texas, and the Texas General Land Office, Austin, Texas).

## 9.7 Regional Condition 13

The following regional condition applies only within the Galveston District:

13. For all discharges and work proposed in tidal waters under nationwide permits (NWP) 14 and 18, the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 27. The Corps will coordinate with the National Marine Fisheries Service in accordance with NWP General Condition 27(d).

## **10.0 Water Quality Certification and Coastal Zone Management Act Consistency Determinations**

a. In its letter dated April 30, 2007, the U.S. Environmental Protection Agency (EPA), Region 6, issued conditional water quality certification (WQC) of the 2007 NWP's for use in Indian country in Texas where a tribe has not received treatment in the same manner as a state for the Clean Water Act (CWA) Section 401 program. The EPA stated that at this time, no Indian tribes in Texas have CWA Section 401 authority. A copy of the Section 401 water quality regional conditions for Indian country in Texas is attached. Subsequent to the letter, Mr. Tom Nystrom, EPA, confirmed that condition number 7 of EPA's WQC is intended to allow for the placement of cured concrete as fill.

b. In its letter dated April 26, 2007, the TCEQ conditionally certified that the activities authorized by NWP's 3, 6, 7, 12, 13, 14, 15, 17, 18, 19, 21, 22, 25, 27, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, and 50 should not result in a violation of established Texas Surface Water Quality Standards as required by Section 401 of the Federal Clean Water Act and pursuant to Title 30, TAC, Chapter 279. A copy of the TCEQ's Section 401 water quality regional conditions and associated Best Management Practices is attached.

c. The TCEQ stated that inclusion of a Corps regional condition consistent with the 2002 Texas regional conditions prohibiting use of certain NWP's in coastal dune swales is a condition of its 401 certification, and listed the TCEQ-conditioned NWP's as 7, 12, 14, 15, 17, 18, 19, 22, 25, 29, 30, 31, 32, 33, 36, 37, 39, 40, 41, 42, 43, 44, 45, and 46. However, we found that the TCEQ listed ten NWP's (15, 17, 22, 30, 31, 32, 33, 36, 37, and 45) that were not included in the 2002 regional condition or the Corps-proposed 2007 regional condition. Additionally, the TCEQ did not include two NWP's (6 and 13) which were in the Corps-proposed 2007 regional condition. We believe it is appropriate to add the NWP's listed by the TCEQ to the regional condition, and to also include NWP's 6 and 13. Therefore, the Corps regional condition will prohibit discharges into waters of the United States in coastal dune swales for the following NWP's: 6, 7, 12, 13, 14, 15, 17, 18, 19, 22, 25, 29, 30, 31, 32, 33, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, and 48.

d. The TCEQ conditionally certified NWP general condition 12 (Soil Erosion and Sediment Controls) and general condition 21 (Water Quality) by addressing three broad categories of water quality management with specific recommendations for best management practices (BMPs) for each category. The TCEQ stated that it would like to include the BMPs for the protection of waters in the state specific to each NWP as part of the regional conditions for Texas. Since the general conditions to the NWP's can only be modified by the Chief of Engineers, we cannot comply with the TCEQ's request to modify general conditions 12 and 21. However, we will consider TCEQ's BMPs as an additional condition to its water quality certification and consistency.

e. The TCEQ conditionally certified NWP general condition 20 (Mitigation) to require the Corps to copy the TCEQ on any written notification of a mitigation waiver. Since the general conditions to the NWP's can only be modified by the Chief of Engineers, we cannot comply with the TCEQ request to modify general condition 20. It is not appropriate for water quality certification conditions to require the Corps to do additional work. However, we

agree to copy the TCEQ on written mitigation waivers.

f. The TCEQ stated that it understands that a regional condition will be added that requires mitigation for streams and special aquatic sites, such as pools/riffles, seagrass, and mudflats, that will adequately compensate for their functions and values.

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

g. The TCEQ has reviewed the Notice of Reissuance of Nationwide Permits for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

h. The TCEQ stated that the water quality certification was reviewed for consistency with the CMP's development in critical areas policy and dredging and dredged material disposal and placement policy, and the certification complies with the CMP goals applicable to these policies.

i. In its letter dated May 10, 2007, the Railroad Commission of Texas (RRC) certified that the activities authorized by NWPs 2, 8, and 20, unconditionally, and by NWPs 3, 6, 7, 12, 14, 16, 18, 19, 25, 38, 43, 46, and 47 with conditions, should not result in a violation of the established Texas Surface Water Quality Standards as required by Section 401 of the Federal Clean Water Act and pursuant to 30 TAC Chapter 279. The RRC stated that it has reviewed the TCEQ's certification and concurs with the certification determination for activities to be performed under these NWPs that are associated with oil and gas activities under the jurisdiction of the RRC (exploration, development, and production of oil and gas and geothermal resources, including pipeline transportation). Additionally, the RRC determined that the action is consistent with the applicable goals and policies of the CMP, with the following condition:

As soon as the Corps and the Texas Parks and Wildlife Department complete work to establish the boundaries and adjacent wetlands, for all discharges proposed for authorization under nationwide permits (NWP) 3, 6, 7, 12, 14, 18, and 19 associated with oil and gas exploration, development and production under the jurisdiction of the Railroad Commission of Texas and into coastal natural resource areas in the following areas, the applicant shall notify the appropriate district engineer in accordance with the NWP General condition 27 and the Corps will coordinate with the resource agencies as specified in the NWP General Condition 27(d):

1. Mission-Aransas National Estuarine Research Reserve;
2. Armand Bayou Coastal Preserve;
3. Christmas Bay Coastal Preserve;
4. Welder Flats Coastal Preserve; and
5. South Bay Coastal Preserve.

Concerning the RRC condition for discharges proposed in the five coastal preserves and national estuarine research reserve recommended by the TPWD for identification as designated critical resource waters, we note that NWP general condition 19 requires notice and opportunity for public comment prior to identification or designation of critical resource waters by the district engineer. Due to workload constraints, the Galveston District has not undertaken the steps necessary to identify or designate additional critical resource waters during this 2007 NWP regional condition reissuance process. However, we are willing to undertake those efforts, and will work with the TPWD to obtain information needed to facilitate the identification and/or designation process for the waters listed by the TPWD that meet the critical resource waters criteria. The TPWD agrees with the Galveston District that adjacent wetland boundaries will not be established for the critical resource waters identification and/or designation process, due to the impracticality of such a work-intensive task. Instead, the public notice issued to solicit public comment will state that critical resource waters include their adjacent wetlands. Three of the NWPs (7, 12, and 14) conditioned by the RRC to require PCNs and agency coordination for discharges in the listed waters are, in fact, prohibited in designated critical resource waters under general condition 19. Subsequent to the May 10, 2007 RRC letter, Ms. Leslie Savage of the RRC stated that coordination with resource agencies should follow general condition 27(d)(2) requirements, including the acreage threshold.

## **11.0 Cumulative Impacts**

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. NWP 14 has had a PCN requirement, and based on reported use during previous years, the Corps districts with regulatory jurisdiction in Texas estimate that: NWP 14 will be used in Texas approximately 331 times per year, resulting in the

loss of approximately 150 acres of waters of the United States, and requiring compensatory mitigation to ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively.

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 9.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 19, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the PCN process, the Corps districts with regulatory jurisdiction in Texas will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to the NWP authorization on a case-by-case basis to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the PCN process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

If, at a later time, there is clear, unequivocal evidence that the NWP would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, the modification, suspension, or revocation procedures at 33 CFR 330.4(e) or 33 CFR 330.5 will be used.

## **12.0 Final Determination**

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, all regional conditions, and limitations, will authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively.

Date: 23 August 2007

Signed  
KENDALL P. COX  
Colonel, EN  
Commanding

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