

DEPARTMENT OF THE ARMY U.S. ARMY CORPS OF ENGINEERS, PORTLAND DISTRICT P.O. BOX 2946 PORTLAND, OR 97208-2946

July 10, 2023

Regulatory Branch Corps No. NWP-2022-443

Aaron Bretz Port of Newport 600 SE Bay Boulevard Newport, Oregon 97365 abretz@portofnewport.com

Dear Mr. Bretz:

The U.S. Army Corps of Engineers (Corps) received your request for Department of the Army authorization to weld fifty-five (55) steel piles measuring approximately 12 feet long by 1 foot wide by 0.1 feet thick onto the exterior of the existing Brewery Seawall support piles, approximately 10 feet apart, above and below the High Tide Line (HTL) resulting in approximately 23 cubic yards of permanent structure. The project is proposed in the Yaquina River, river mile 1, South Beach Marine at 2320 SE Marine Science Drive in Newport, Lincoln County, Oregon at Latitude/Longitude: 44.620282°, - 124.052248°. This letter verifies your project as depicted on the enclosed drawings (Enclosure 1) is authorized by Nationwide Permit (NWP) No. 3, Maintenance (Federal Register, December 27, 2021, Vol. 86, No. 245).

The Port of Newport would rehabilitate the over-water structure known as the Brewery Seawall that supports the Rogue Brewery Headquarters building. The seawall is approximately 540 feet long comprised of steel soldier piles and concrete lagging panels to support the backfill material. The piles are spaced 10 feet on center and tied back with steel rods connected to a deadman anchors. Fifty-five (55) Steel plates measuring approximately 12 feet long by 1 foot wide by 0.1 feet thick would be welded onto the exterior of the seawall support piles above and below the High Tide Line (HTL) resulting in approximately 23 cubic yards of permanent structure to reinforce the wall. The steel plates would be welded onto the steel soldier piles by floating dock, work barge or from existing shoreline with divers.

A floating dock is located along most of the face of the seawall connected by pipe and timber piles attached to the seawall. The dock would be disconnected during seawall repairs and replaced in its original location after construction. A containment system to collect debris from entering the water would be installed around the work barge and a turbidity curtain around the work area to collect and remove any material entering the water by hand or dip net. Access for construction equipment would be via the bay and marina or paved access roads. No parts or pieces of the seawall would be removed. No ground disturbance or vegetation removal would occur, and no new impervious surface would be created. No removal of sediment or placement of other fill would be required. No upland improvements would occur. No site restoration would be required.

In order for this authorization to be valid, you must ensure the work is performed in accordance with the enclosed Nationwide Permit 3 Terms and Conditions (Enclosure 2); the Oregon Department of Land Conservation and Development (DLCD) Coastal Zone Management Conditions (Enclosure 3); and the following special conditions:

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

b. Permittee shall submit an as built report to the Corps by December 31, of the year work occurs. The report shall contain photographs of the site and the initial grading survey. A map identifying the locations and directions of the photographs shall be included in the as-built report. The as-built report shall be provided by e-mail to cenwp.notify@usace.army.mil and the email subject line shall include: NWP-2022-443, County. If you are submitting files larger than 20 MB, contact your county Regulatory Project Manager for instructions.

c. All in-water work shall be performed during the in-water work period of November 1 to February 1 to minimize impacts to aquatic species.

d. This Corps permit does not authorize you to take an endangered species in particular those species identified in Enclosure 4. In order to legally take a listed species, you must have separate authorization under the Endangered Species Act (ESA) (e.g., an ESA Section 10 permit, or a biological opinion under ESA Section 7, with "incidental take" provisions with which you must comply). The National Marine Fisheries Service (NMFS) SLOPES IV In-water Over-water Structures programmatic biological opinion dated April 5, 2012 (NMFS Reference Number 2011/05585), contains mandatory terms and conditions to implement the reasonable and prudent measures that are associated with the "incidental take" that is also specified in the opinion. Your authorization under this Corps permit is conditional upon your compliance with all of the applicable mandatory terms and conditions associated with the incidental take

incidental take of this opinion, where a take of the listed species occurs, would constitute an unauthorized take, and it would also constitute noncompliance with your Corps permit. The NMFS is the appropriate authority to determine compliance with the terms and conditions of its opinion and with the ESA.

e. Permittee shall fully implement all applicable Proposed Design Criteria (PDC) of the SLOPES IV In-water Over-water Structures programmatic biological opinion. A detailed list of the PDCs are enclosed (Enclosure 4). The applicable PDCs for the project include numbers: 6, 11, and 15-19.

f. Permittee shall complete and submit an Action Completion Form, which is provided in Enclosure 4, within 60 days of completing all work below ordinary high water. Submit the form by email to cenwp.notify@usace.army.mil and include the Corps project number and county in the email subject line.

g. Permittee shall isolate and confine the worksite from the active channel to minimize turbidity and prevent pollutants from entering the waterbody.

h. Permittee shall take the necessary precautions to prevent any petroleum products, chemicals, or deleterious or toxic materials from entering waterways during construction.

i. Heavy equipment shall be clean and free of leaks when operated in or near the active channel. All vehicles shall be stored and fueled a minimum of 150 feet from any waterbody.

j. Permittee shall ensure all appropriate sediment, erosion control devices, and work area isolation measures are installed and maintained in proper working order prior to, and throughout construction to prevent unauthorized discharge of material into a wetland or tributary and to minimize increases in turbidity resulting from the work. Devices such as silt fences, turbidity curtains or other appropriate containment systems shall be installed in a manner to maximize their effectiveness, e.g., sediment fences shall generally be buried or similarly secured. These controls shall be maintained until permanent erosion controls are in-place or are no longer necessary. However, upon stabilization all devices shall be removed from the area and disposed of in an upland location.

k. Permittee shall dispose of any materials removed from the site at a suitable upland location, and materials shall be adequately stabilized to minimize increases in turbidity levels and indirect impacts to wetlands and other aquatic systems. The material shall be placed in a location and manner that prevents its discharge into waterways or wetlands. In the event of spills, affected material shall be taken to an appropriate upland location (and properly disposed of in accordance with any state standards or requirements).

I. Permittee shall inspect the erosion control devices on a daily basis to confirm that they are in proper working order. Any maintenance necessary shall be implemented immediately prior to the continuation of construction activities. In the event of rain or other event of sufficient intensity or duration to render erosion controls ineffective, permittee shall secure the project area and cease construction activity until water levels have sufficiently receded.

We have reviewed your project pursuant to the requirements of the Endangered Species Act, the Magnuson-Stevens Fishery Conservation and Management Act and the National Historic Preservation Act. We have determined the project complies with the requirements of these laws provided you comply with all of the permit general and special conditions. The requirements of the Endangered Species Act were met through a programmatic biological opinion as listed in the special condition above. The complete text of the biological opinion is available for your review on our website (https://www.nwp.usace.army.mil/environment/).

The authorized work does not require Section 401 Water Quality Certification from the Oregon Department of Environmental Quality (DEQ). The authorized work appears to comply with the DLCD Coastal Zone Management Act concurrence for this NWP. No further coordination with DEQ or DLCD is required provided the work is performed in accordance with all of the enclosed conditions.

Yaquina River is a water of the U.S. If you believe this is inaccurate, you may request a preliminary or approved jurisdictional determination (JD). If one is requested, please be aware that we may require the submittal of additional information to complete the JD and work authorized in this letter may not occur until the JD has been completed.

NWP General Condition 29, *Transfer of Nationwide Permit Verifications*, requires you to obtain the signatures(s) of the new owner(s) if you sell the property associated with this permit in order to transfer the permit to the new owner. For your convenience, the enclosed *Permit Transfer* form (Enclosure 5) can be prepared and submitted to document the permit transfer.

The verification of this NWP is valid until March 14, 2026, unless the NWP is modified, reissued, or revoked prior to that date. If the authorized work has not been completed by that date and you have commenced or are under contract to commence this activity before March 14, 2026, you will have until March 14, 2027, to complete the activity under the enclosed terms and conditions of this NWP. If the work cannot be

completed by March 14, 2027, you will need to obtain a new NWP verification or authorization by another type of Department of the Army permit.

Our verification of this NWP is based on the project description and construction methods provided in your permit application. If you propose changes to the project, you must submit revised plans to this office and receive our approval of the revisions prior to performing the work. Failure to comply with all terms and conditions of this NWP verification invalidates this authorization and could result in a violation of Section 10 of the Rivers and Harbors Act. You must also obtain all local, state, and other federal permits that apply to this project.

Upon completing the authorized work, you must fill out and return the enclosed *Compliance Certification* form (Enclosure 6). We would like to hear about your experience working with the Portland District, Regulatory Branch. Please complete a customer service survey form available on our website (https://regulatory.ops.usace.army.mil/customer-service-survey/).

If you have any questions regarding this NWP verification, please contact Kinsey M. Friesen by telephone at (503) 808-4378 or by email at kinsey.m.friesen@usace.army.mil.

FOR THE COMMANDER, MICHAEL D. HELTON, PMP, COLONEL, CORPS OF ENGINEERS, DISTRICT COMMANDER:

Katharine A. Mott

For: William D. Abadie Chief, Regulatory Branch

Enclosures

CC:

PBS Engineering and Environmental (Brian Kelly, Brian.Kelly@pbsusa.com) Oregon Department of State Lands (Carrie Landrum, Carrie.Landrum@dsl.oregon.gov) Oregon Department of Land Conservation and Development (coast.permits@dlcd.oregon.gov)

















NWP-2022-443

PILE	TIP ELEV	LENGTH
1 & 55	-14'-4"	30'
2	-19'-4"	35'
3 & 54	-24'-4"	40'
4	-29'-4"	45'
5 & 53	-34'-4"	50'
6	-39'-4"	55'
7 TO 52 INCL.	-44'-4"	60'
56	-4'-4"	20'

	M.L.L.W. (FT)	NAVD88 (FT)
BASE FLOOD	13.74	13.00
H.W.T.	12.25	11.51
M.H.H.W.	8.34	7.60
M.H.W.	7.65	6.91
M.T.L.	4.52	3.78
M.S.L.	4.46	3.72
D.T.L.	4.17	3.43
M.L.W.	1.38	0.64
NAVD88	0.74	0.00
M.L.L.W.	0.00	-0.74
MIN.	-3.52	-4.26
BASE FLOOD	100-YEAR FLOOD	

BASE FLOOD	100-YEAR FLOOD
H.M.T.	HIGHEST MEASURED TIDE (12-11-1969)
M.H.H.W/.	MEAN HIGHER-HIGH WATER
M.H.W.	MEAN HIGH WATER
M.T.L.	MEAN TIDE LEVEL
M.S.L.	MEAN SEA LEVEL
D.T.L.	MEAN DIURNAL TIDE LEVEL
M.L.W.	MEAN LOW WATER
NAVD88	NORTH AMERICAN VERTICAL DATUM OF 1988
M.L.L.W.	MEAN LOWER-LOW WATER
MIN.	LOWEST OBSERVED WATER LEVEL (06-01-1973





### Nationwide Permit 3 Terms and Conditions

Effective Date: February 25, 2022

- A. Description of Activities Authorized by Nationwide Permit 3
- B. Nationwide Permit General Conditions
- C. District Engineer's Decision
- D. Further Information
- E. Portland District Regional General Conditions

In addition to any special conditions that may be required on a case-by-case basis by the District Engineer, the following terms and conditions must be met, as applicable, for a Nationwide Permit authorization to be valid in Oregon.

### A. Description of Activities Authorized by Nationwide Permit (NWP) 3

3. *Maintenance*. (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This NWP also authorizes the removal of previously authorized structures or fills. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project. This NWP also authorizes the removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.). The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or

restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

(c) This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After conducting the maintenance activity, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

(d) This NWP does not authorize maintenance dredging for the primary purpose of navigation. This NWP does not authorize beach restoration. This NWP does not authorize new stream channelization or stream relocation projects.

<u>Notification</u>: For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. (Authorities: Sections 10 and 404)

<u>Note</u>: This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Clean Water Act Section 404(f) exemption for maintenance.

### **B. Nationwide Permit General Conditions**

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

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

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

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

2. Aquatic Life Movements. No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

3. *Spawning Areas*. Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

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

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

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

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

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

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

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

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

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

13. *Removal of Temporary Structures and Fills*. Temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. Temporary fills must be removed in their entirety and the affected areas returned to preconstruction elevations. The affected areas must be revegetated, as appropriate.

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

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

16. *Wild and Scenic Rivers*. (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for

such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. Permittees shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: http://www.rivers.gov/.

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

18. *Endangered Species*. (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless ESA Section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of "effects of the action" for the purposes of ESA Section 7 consultation, as well as 50 CFR 402.17, which provides further explanation under ESA Section 7 regarding "activities that are reasonably certain to occur" and "consequences caused by the proposed action."

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA Section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under Section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical

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

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

(e) Authorization of an activity by an NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word "harm" in the definition of "take" means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA Section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA Section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA Section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA Section 7 consultation conducted for the ESA Section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA Section 7 consultation for the ESA Section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA Section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete preconstruction notification whether the ESA Section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA Section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide web pages at http://www.fws.gov/ or http://www.fws.gov/ipac and http://www.nmfs.noaa.gov/pr/species/esa/ respectively.

19. *Migratory Birds and Bald and Golden Eagles*. The permittee is responsible for ensuring that an action authorized by an NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether "incidental take" permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. *Historic Properties*. (a) No activity is authorized under any NWP which may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)(1)). If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under Section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with Section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of,

or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts commensurate with potential impacts, which may include background research, consultation, oral history interviews, sample field investigation, and/or field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of Section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect.

(d) Where the non-Federal applicant has identified historic properties on which the proposed NWP activity might have the potential to cause effects and has so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA Section 106 consultation has been completed. For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA Section 106 consultation is required. If NHPA Section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until Section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that Section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties

of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

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

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

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, 52, 57 and 58 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed by permittees in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after she or he determines that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation*. The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

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

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless

the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 3/100-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of 3/100-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. If restoring riparian areas involves planting vegetation, only native species should be planted. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f).)

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)). If permittee-responsible mitigation is the proposed option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement.

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).

(6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is

provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

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

25. *Water Quality*. (a) Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA Section 401, a CWA Section 401 water quality certification for the proposed discharge must be obtained or waived (see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by certifying authority for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed discharge in order for the activity to be authorized by an NWP.

(b) If the NWP activity requires pre-construction notification and the certifying authority has not previously certified compliance of an NWP with CWA Section 401, the proposed discharge is not authorized by an NWP until water quality certification is obtained or waived. If the certifying authority issues a water quality certification for the proposed discharge, the permittee must submit a copy of the certification to the district engineer. The discharge is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied by the issuance of a water quality certification or a waiver.

(c) The district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. *Coastal Zone Management*. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). If the permittee cannot comply with all of the conditions of a coastal zone management consistency concurrence previously issued by the state, then the permittee must obtain an individual coastal zone management consistency concurrence or presumption of concurrence in order for the activity to be authorized by an NWP. The district engineer or a state may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

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

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is authorized, subject to the following restrictions:

(a) If only one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

(b) If one or more of the NWPs used to authorize the single and complete project has specified acreage limits, the acreage loss of waters of the United States authorized by those NWPs cannot exceed their respective specified acreage limits. For example, if a commercial development is constructed under NWP 39, and the single and complete project includes the filling of an upland ditch authorized by NWP 46, the maximum acreage loss of waters of the United States for the commercial development under NWP 39 cannot exceed 1/2-acre, and the total acreage loss of waters of United States due to the NWP 39 and 46 activities cannot exceed 1 acre.

29. *Transfer of Nationwide Permit Verifications*. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification

must be attached to the letter, and the letter must contain the following statement and signature:

"When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below."

(Transferee)

(Date)

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

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

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

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

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

31. Activities Affecting Structures or Works Built by the United States. If an NWP activity also requires review by, or permission from, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a "USACE project"), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires Section 408 permission and/or review is not authorized by an NWP until the appropriate Corps office issues the Section

408 permission or completes its review to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

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

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

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

- (1) Name, address and telephone numbers of the prospective permittee;
- (2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) (i) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures.

(ii) For linear projects where one or more single and complete crossings require preconstruction notification, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by an NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project, and does not change those non-PCN NWP activities into NWP PCNs.

(iii) Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

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

(6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed and a PCN is required, the prospective permittee must submit

a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-federal permittees, if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (or critical habitat proposed for such designation), the PCN must include the name(s) of those endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed for such designation) that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the "study river" (see general condition 16); and

(10) For an NWP activity that requires permission from, or review by, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the preconstruction notification must include a statement confirming that the project proponent has submitted a written request for Section 408 permission from, or review by, the Corps office having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification*: The nationwide permit pre-construction notification form (Form ENG 6082) should be used for NWP PCNs. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) *Agency Coordination*: (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the

terms and conditions of the NWPs and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) all NWP activities that require preconstruction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iii) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (e.g., via e-mail, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or e-mail that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure that the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

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

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

### C. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or

cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the single and complete crossings of waters of the United States that require PCNs to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings of waters of the United States authorized by an NWP. If an applicant requests a waiver of an applicable limit, as provided for in NWPs 13, 36, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than 1/10acre of wetlands or 3/100-acre of stream bed, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters. The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for

compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure that the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) that the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse environmental effects, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

### D. Further Information

1. District engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

### E. Portland District Regional Conditions

1. *Notification:* For permittees that received written NWP approval, upon starting the authorized activities, you shall notify the U.S. Army Corps of Engineers, Portland District, Regulatory Branch that the work has started. Notification shall be provided by e-mail to cenwp.notify@usace.army.mil and the email subject line shall include: Corps project number and the project location by county.

2. Aquatic Resources of Special Concern: Pre-construction notification to the District Engineer is required for all activities proposed in waters of the U.S. within, or directly affecting, an aquatic resource of special concern. Aquatic resources of special concern are resources that are difficult to replace, unique, and/or have high ecological function. For the purpose of this regional condition, aquatic resources of special concern are native eel grass (Zostera marina) beds, mature forested wetlands, bogs, fens, vernal pools, alkali wetlands, wetlands in dunal systems along the Oregon coast, estuarine wetlands, Willamette Valley wet prairie wetlands, marine gardens, marine reserves, kelp beds, and rocky substrate in tidal waters.

In addition to the content requirements of NWP General Condition (GC) 32, the preconstruction notification must include a statement explaining why the effects of the proposed activity are no more than minimal. Written approval from the District Engineer must be obtained prior to commencing work.

<u>Note</u>: If the District Engineer determines that the adverse effects of the proposed activity are more than minimal, then the District Engineer will notify the applicant that either:

a. the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit;

b. the activity is authorized under the NWP subject to submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or

c. the activity is authorized under the NWP with specific modifications or conditions.

3. *Cultural Resources and Human Burials-Inadvertent Discovery Plan*: In addition to the requirements in NWP GCs 20 and 21, the permittee shall immediately notify the District Engineer if, at any time during the course of the work authorized, human burials, cultural items, or historic properties, as defined by the National Historic Preservation Act and Native American Graves Protection and Repatriation Act, are discovered. The permittee shall implement the following procedures as outlined on the Inadvertent Discovery Plan posted on the Portland District Regulatory website at

https://www.nwp.usace.army.mil/Missions/Regulatory/Nationwide.aspx

Notify the Portland District Engineer as soon as possible following discovery but in no case later than 24 hours. Notification shall be sent electronically

(cenwp.notify@usace.army.mil) and shall identify the Corps project number and clearly specify the purpose is to report a cultural resource discovery. The permittee shall also notify the Corps representative (by email and telephone) identified in the verification letter.

4. *Essential Fish Habitat:* Activities which may adversely affect essential fish habitat, as defined under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), are not authorized by NWP until essential fish habitat requirements have been met by the applicant and the Corps. Non-federal permittees must submit a preconstruction notification to the District Engineer if essential fish habitat may be affected by, or is in the vicinity of, a proposed activity and shall not begin work until notified by the District Engineer that the requirements of the essential fish habitat provisions of the MSA have been satisfied and the activity is authorized. The notification must identify the type(s) of essential fish habitat (e.g., Pacific coast salmon, Pacific coast groundfish, and/or Coastal-pelagic species) managed by a Fishery Management Plan that may be affected. Information about essential fish habitat is available at NOAA's website: *http://www.westcoast.fisheries.noaa.gov* 

5. *Bank Stabilization:* Permittee shall include the use of bioengineering techniques and natural materials in the project design to the maximum extent practicable and shall minimize the use of rock. Bioengineering bank stabilization techniques are those that increase the strength and structure of soils with a combination of biological and mechanical elements (e.g., vegetation, root wads and woody debris, rock structures). Riparian plantings shall be included in all project designs unless the permittee can demonstrate that such plantings are not practicable.

6. *Work Area Isolation and Dewatering:* Appropriate best management practices shall be implemented to prevent erosion and to prevent sediments from entering waters of the U.S.

a. All in-water work shall be isolated from the active channel or conducted during low seasonal stream flows to the maximum extent practicable.

b. Cofferdams shall be constructed of non-erosive material, such as concrete jersey barriers, sand and gravel bag dams, or water bladders. Constructing a cofferdam by pushing material from the streambed or sloughing material from the streambanks is not authorized.

c. Sand and gravel bag dams shall be lined with a plastic liner or geotextile fabric to reduce permeability and prevent sediments and/or construction materials from entering waters of the U.S.

d. Upstream and downstream flows shall be maintained by routing flows around the construction site.

e. When dewatering is necessary for construction, a sediment basin, or other

applicable method, shall be used to settle sediments prior to releasing the water back into the waterbody. Settled water shall be returned to the waterbody in such a manner as to avoid erosion. Sediment basins shall be placed in uplands.

f. Fish and other aquatic species must be salvaged (i.e., safely captured and relocated away from the project or development site) prior to dewatering. Contact ODFW for additional information regarding fish salvage.

7. *Dredging:* For NWP-authorized activities that involve removal of sediment from waters of the U.S., the permittee shall ensure that any necessary sediment characterization regarding size, composition, and potential contaminants is conducted and reviewed prior to dredging. Sediment characterization must be conducted per the Sediment Evaluation Framework for the Pacific Northwest (available at:

http://www.nwp.usace.army.mil/Missions/Environmental-Stewardship/DMM.aspx).

<u>Note</u>: The return water from a contained disposal area is defined as a discharge of dredged material by 33 CFR part 323.2(d) and requires separate authorization from the District Engineer (*e.g.*, by NWP 16).

8. *Mechanized Equipment:* In addition to the requirements in NWP GC 11, permittee shall implement the following practices to prevent or minimize impacts to the aquatic environment from mechanized equipment:

a. Operate equipment from the top of a streambank and conduct work outside of the active stream channel, unless specifically authorized by the District Engineer.

b. Spill prevention and containment materials shall be maintained and be readily accessible at vehicle staging areas. The amount of spill response materials (such as straw matting/bales, geotextiles, booms, diapers, and other absorbent materials, shovels, brooms, and containment bags) maintained on-site must be appropriate for the size of the authorized activity.

Note: See Regional Condition 10 regarding timeframes for temporary fills.

9. *Erosion Control:* During construction and until the site is stabilized, the permittee shall ensure all practicable measures are implemented and maintained to prevent erosion and runoff. Temporary stockpiles of excavated or dredged material shall be stabilized to prevent erosion. Once soils or slopes have been stabilized, permittee shall completely remove and properly dispose of or re-use all non-biodegradable components of installed control measures.

10. *Temporary Fills and Impacts:* To ensure no more than minimal adverse environmental effects from temporary fills and impacts to waters of the U.S:

a. Temporary fills and/or impacts to waters of the U.S. shall not exceed six months unless otherwise approved by the District Engineer.

b. No more than one-half  $(\frac{1}{2})$  acre of waters of the U.S. may be temporarily filled or impacted unless otherwise approved by the District Engineer (temporary fills and impacts do not affect specified limits for loss of waters associated with specific nationwide permits).

c. Native soils and/or sediments removed from waters of the U.S. for project construction shall be stockpiled and used for site restoration to the maximum extent practicable.

d. Site restoration of temporarily filled or impacted areas shall include returning the area to pre-project ground surface contours. The permittee shall appropriately revegetate temporarily filled or impacted areas with native, noninvasive herbs, shrubs, and/or tree species sufficient in number, spacing, and diversity to replace affected aquatic functions.

<u>Note</u>: The Corps will determine compensatory mitigation requirements for temporary fills and impacts on a case-by-case basis depending on the duration and nature of the temporary fill or impact and the type of aquatic resource affected.

11. Contractor Notification of Permit Requirements: The permittee must provide a copy of the Nationwide Permit verification letter, conditions, and permit drawings to all contractors and any other parties performing the authorized work, prior to the commencement of any work in waters of theU.S.

12. *Inspection of the Project Site:* The permittee shall allow representatives of the District Engineer to inspect the authorized activity to confirm compliance with nationwide permit terms and conditions. A request for access to the site will normally be made sufficiently in advance to allow a property owner or representative the option to be on site during the inspection.

### Oregon Department of Land Conservation And Development Standard Oregon Coastal Management Program Coastal Zone Conditions for the 2021 U.S. Army Corps of Engineers Nationwide Permits

The federal Coastal Zone Management Act provides that federal actions affecting any use or resource of the coastal zone<sup>1</sup>, including projects permitted by the U.S. Army Corps of Engineers (USACE), must be consistent with the enforceable policies of a State's federally approved coastal management program. Oregon's approved program, the Oregon Coastal Management Program (OCMP), is a "networked" program that integrates authorities of local governments and other state agencies. The coastal zone conditions contained in this document reflect the networked nature or the OCMP, and reference the specific applicable enforceable policies.

# In addition to all USACE national and regional permit conditions, permitted projects in Oregon's coastal zone must comply with the following coastal zone conditions.

If an applicant chooses not to follow one or more of the coastal zone conditions, the Department of Land Conservation and Development (DLCD) will object to the permit issuance pursuant to 15 CFR § 930.63(e). In that instance, the permittee may appeal the state's objection by requesting that the Secretary of Commerce override the objection pursuant to 15 CFR 930, subpart H, within 30 days of receipt of the letter informing the applicant of the OCMP's objection. In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security, and that either of these findings outweigh the adverse coastal zone effects of the proposed project. Acopy of the request and supporting information must be sent to the OCMP and the USACE. The Secretary may collect fees from the permittee for administering and processing the override request.

### CZ Condition 1. Consistency with Local Comprehensive Plans

(1) Permitted projects must be consistent with or not subject to the applicable local comprehensive plan and implementing land use regulations, including the applicable estuary management plan, or the statewide land use planning goals where applicable. Permittee must obtain required permits or other authorizations from the applicable local government before initiating work under any USACE permit. Permittees are encouraged to provide USACE and the OCMP with verification of the local jurisdiction's approval in the form of a completed block eleven (11) of the Joint Permit

- (a) The Umpqua River basin, where the coastal zone extends to Scottsburg;
- (b) The Rogue River basin, where the coastal zone extends to Agness; and
- (c) The Columbia River basin, where the coastal zone extends to the downstream end of Puget Island.

<sup>&</sup>lt;sup>1</sup> Oregon's coastal zone generally includes the area lying between the Oregon/Washington border on the north, to the Oregon/California border on the south, seaward to the extent of the state's jurisdiction as recognized by federal law, and inland to the crest of the Coast Range Mountains, excepting:

Application. All appeals of the local jurisdiction's decision(s) must be resolved before any regulated work may begin.

(2) All conditions placed on an authorization or permit by the local government are incorporated by reference into the OCMP coastal zone conditions.

[Enforceable Policy: ORS chapter 197, Comprehensive Land Use Planning Coordination]

### CZ Condition 2. Consistency with Removal-Fill Law

(1) Permitted projects must be consistent with or not subject to the state requirements governing removal-fill in waters of the state. Permittee must obtain required permits or other authorizations from the Oregon Department of State Lands (DSL) before any regulated work maybegin.

(2) Projects requiring a DSL Removal-Fill permit must compensate for reasonably expected adverse impacts by complying to the full extent with DSL's compensatory mitigation requirements.

(3) Where DSL finds a project not subject to the Removal-Fill Law, permittee must submit toDSL any changes in project design or implementation that may reasonably be expected to require application of the Removal-Fill Law.

(4) All conditions placed on a Removal-Fill permit by DSL are incorporated by reference into the OCMP coastal zone conditions.

[Enforceable Policy: ORS chapter 196, Removal of Material; Filling]

### CZ Condition 3. Leases of State Lands

(1) Permitted projects must be consistent with or not subject to state requirements governing use of state lands. Permittee must obtain any required lease, license, or other authorization for the use of state lands or waters from the Oregon Department of State Lands (DSL) before any regulated work may begin.

(2) All conditions placed on a lease, license, or authorization by DSL are incorporated by reference into the OCMP coastal zone conditions.

[Enforceable Policy: ORS chapter 274, Submersible and Submerged Lands]

#### CZ Condition 4. Department of Environmental Quality

(1) Permitted projects must be consistent with or not subject to the state requirements governing water quality. Permittee must obtain certification, if required, from the Oregon Department of Environmental Quality (DEQ) through its 401 Water Quality Certification process before any regulated work may begin.

(2) All conditions placed on a license, permit, or authorization by DEQ are incorporated by reference into the OCMP coastal zone conditions.

[Enforceable Policy: ORS chapter 468B, Water Quality]

#### CZ Condition 5. Fish and Aquatic Life Passage

(1) Where applicable, all authorized projects shall be in conformance with ODFW standards forfish passage (http://www.dfw.state.or.us/fish/passage/). Decisions to abrogate ODFW fish passage standards shall be accompanied by written approval from ODFW.

(2) No work shall be authorized that does not provide for adequate passage of "aquatic life." Aquatic life shall be interpreted to include amphibians, reptiles, and mammals whose natural habitat includes waters of this state and which are generally present in or around, or pass through the project site.

(3) This condition is effective only where ODFW regulations apply.

[Enforceable Policy: ORS chapter 509, Additional Fishery Requirements]

### CZ Condition 6. Ocean Shore

(1) Permitted projects must be consistent with or not subject to state requirements governing use of the ocean shore. Permittee must obtain, if required, an ocean shore permit from the Oregon Parks and Recreation Department (OPRD) before any regulated work may begin.

(2) All conditions placed on an Ocean Shore permit by OPRD are incorporated by reference into the OCMP coastal zone conditions.

[Enforceable Policy: ORS chapter 390, Ocean Shores]

#### CZ Condition 7. Fish Screening

Where applicable, all authorized projects shall be in conformance with ODFW standards for fish screening and bypass devices. Decisions to abrogate ODFW fish passage standards shall be accompanied by written approval from ODFW.
 This condition is effective only where ODFW regulations apply.

[Enforceable Policy: ORS chapter 498, Fish Screening]

### Endangered Species Act - Section 7 Formal Programmatic Opinion, Letter Of Concurrence

and

### Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation

Revisions to Standard Local Operating Procedures for Endangered Species to Administer Actions Authorized or Carried Out by the U.S. Army Corps of Engineers in Oregon (SLOPES IV In-water Over-water Structures)

NMFS Consultation Number: 2011/05585

Federal Action Agency:

Army Corps of Engineers Portland District, Operations and Regulatory Branches

Date Issued: April 5, 2012

### **Affected Species and Determinations**

Lower Columbia River Chinook salmonTYesNoNoUpper Willamette River Chinook salmonTYesNoNoUpper Columbia River spring-run Chinook salmonEYesNoNoSnake River spring/summer run Chinook salmonTYesNoNoSnake River fall-run Chinook salmonTYesNoNoColumbia River chum salmonTYesNoNoColumbia River chum salmonTYesNoNoLower Columbia River coho salmonTYesNoNoOregon Coast coho salmonTYesNoNoSouthern Oregon/Northern California coasts coho salmonTYesNoNoSnake River sockeye salmonEYesNoNoLower Columbia River steelheadTYesNoNoSnake River sockeye salmonEYesNoNoLower Columbia River steelheadTYesNoNoUpper Willamette River steelheadTYesNoNoUpper Columbia River steelheadTYesNoNoUpper Columbia River steelheadTYesNoNoSnake River Basin steelheadTYesNoNoSouthern green sturgeonTYesNoNoSouthern green sturgeonTYesNoNoSouthern green sturgeonTYesNoNoSteller sea lionTYesNoNo	ESA-Listed Species	ESA Status	Is the action likely to adversely affect this species or it critical habitat?	Is this Action likely to jeopardize this species?	Is this Action likely to destroy or adversely modify critical habitat for this species?
Upper Willamette River Chinook salmonTYesNoNoUpper Columbia River spring-run Chinook salmonEYesNoNoSnake River spring/summer run Chinook salmonTYesNoNoSnake River fall-run Chinook salmonTYesNoNoColumbia River chum salmonTYesNoNoLower Columbia River coho salmonTYesNoNoOregon Coast coho salmonTYesNoNoSouthern Oregon/Northern California coasts coho salmonTYesNoNoSnake River sockeye salmonEYesNoNoLower Columbia River steelheadTYesNoNoUpper Willamette River steelheadTYesNoNoUpper Columbia River steelheadTYesNoNoSnake River Basin steelheadTYesNoNoSouthern green sturgeonTYesNoNoSouthern green sturgeonTYesNoNoSouthern SteelheadTYesNoNoSouthern SteelheadTYesNoNoSouthern green sturgeonTYesNoNo <t< td=""><td>Lower Columbia River Chinook salmon</td><td>Т</td><td>Yes</td><td>No</td><td>No</td></t<>	Lower Columbia River Chinook salmon	Т	Yes	No	No
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Steller sea lion T No N/A	Eulachon	Т	Yes	No	No
	Steller sea lion	Т	No	No	N/A

Fishery Management Plan that Describes EFH in the Action Area	Would the action adversely Affect EFH?	Are EFH conservation Recommendation provided?
Coastal Pelagic Species	Yes	Yes
Pacific Coast Groundfish	Yes	Yes
Pacific Coast Salmon	Yes	Yes

### Excerpt from SLOPES IV In-water Over-water Structures General Construction April 5, 2012 Proposed Design Criteria

### 1.3.1.1 Administrative

6. <u>Salvage Notice.</u> If a sick, injured or dead specimen of a threatened or endangered species is found during construction and within the action area, the finder must notify NMFS' Office of Law Enforcement at 503-231-6240 or 206-526-6133. The finder must take care in handling dead specimens to preserve biological material in the best possible condition for later analysis of cause of death. The finder also has the responsibility for carrying out instructions provided by the Office of Law Enforcement to ensure that evidence intrinsic to the specimen is not disturbed unnecessarily.

### **1.3.1.2 General Construction**

- 11. <u>Pollution and erosion control</u>. Any action that will require earthwork and may increase soil erosion and cause runoff with visible sediment into surface water, or that will require the use of materials that are hazardous or toxic to aquatic life (such as motor fuel, oil, or drilling fluid), must have a pollution and erosion control plan that is developed and carried out by the applicant, and commensurate with the scale of the action.
  - a. The plan must include practices to minimize erosion and sedimentation associated with all aspects of the project (*e.g.*, staging areas, stockpiles, grading); to prevent construction debris from dropping or otherwise entering any stream or waterbody; and to prevent and control hazardous material spills.
  - b. During construction, erosion controls and streams must be monitored and maintained daily during the rainy season and weekly during the dry season as necessary to ensure controls are properly functioning.
  - c. If monitoring shows that the erosion controls are ineffective at preventing visible sediment discharge, the project must stop to evaluate erosion control measures. Repairs, replacements or the installation of additional erosion control measures must be completed before the project resumes.
  - d. Proper maintenance includes removal of sediment and debris from erosion controls like silt fences or hay bales once it has reached on-third of the exposed height of the control.
- 12. <u>Stormwater management</u>. Any action that will expand, recondition, reconstruct, or replace pavement, replace a stream crossing, otherwise increase the contributing impervious surface within the project area, or create a new stormwater conveyance or discharge facility, must have a stormwater management plan that is developed and carried out by the applicant, commensurate with the scale of the action, and approved by NMFS. The stormwater plan submitted for approval must include all of the information called for by the "Checklist for Submission of a Stormwater Plan" (ODEQ 2008, or most recent version), or an explanation of why any missing information is not applicable to a specific project.
- **13.** <u>Site restoration</u>. Any action that results in significant disturbance of riparian vegetation, soils, streambanks, or stream channel must have a site restoration plan that is developed and carried out by the permittee (or Corps), that is commensurate with the scale of the action. The goal of the plan is to ensure that riparian vegetation, soils, streambanks, and stream channel are cleaned up and restored after the action is complete. No single criterion is sufficient to measure restoration success, but the intent is that the following features should be present in the upland parts of the project area, within reasonable limits of natural and management variation:
  - a. Human and livestock disturbance, if any, are confined to small areas necessary for access or other special management situations.

- b. Areas with signs of significant past erosion are completely stabilized and healed, bare soil spaces are small and well-dispersed.
- c. Soil movement, such as active rills and soil deposition around plants or in small basins, is absent or slight and local.
- d. Native woody and herbaceous vegetation, and germination microsites, are present and well distributed across the site.
- e. Plants are native species and have normal, vigorous growth form, and a high probability of remaining vigorous, healthy and dominant over undesired competing vegetation.
- f. Vegetation structure is resulting in rooting throughout the available soil profile.
- g. Plant litter is well distributed and effective in protecting the soil with little or no litter accumulated against vegetation as a result of active sheet erosion ("litter dams").
- h. A continuous corridor of shrubs and trees appropriate to the site are present to provide shade and other habitat functions for the entire streambank.
- i. Streambanks are stable, well vegetated, and protected at margins by roots that extend below baseflow elevation, or by coarse-grained alluvial debris.
- 14. <u>Compensatory mitigation</u>. Any action that will permanently displace riparian or aquatic habitats or otherwise prevent development of properly functioning condition of natural habitat processes will require compensatory mitigation to fully offset those impacts.
  - a. Examples of actions requiring compensatory mitigation include construction of a new or enlarged boat ramp or float, the addition of scour protection to a boat ramp, or construction of new impervious surfaces without adequate stormwater treatment.
  - b. For displaced riparian and aquatic habitat, the primary habitat functions of concern are related to the physical and biological features essential to the long-term conservation of listed species. Those are water quality, water quantity, channel substrate, floodplain connectivity, forage, natural cover, space, and free passage. Examples of acceptable mitigation for riparian losses includes planting trees or other woody vegetation in the riparian area, removal of existing overwater structures or restoration of shallow-water, off-channel, or beach habitat by adding features such as submerged or overhanging large wood, aquatic vegetation, large rocks and boulders, side channels and undercut banks.
  - c. For new impervious surfaces with inadequate stormwater treatment, the primary habitat functions of concern are water quality and water quantity. Examples of acceptable mitigation for inadequate stormwater management includes providing adequate stormwater treatment at an alternate site where it did not exist before or retrofitting an existing but substandard stormwater facility to provide capacity necessary to infiltrate and retain the proper volume of stormwater.
  - d. As part of NMFS's review under clause 3 above, NMFS will determine if the proposed compensatory mitigation fully offsets permanent displacement of riparian or aquatic habitats and/or impacts that prevent development of properly functioning processes.
- **15.** <u>Preconstruction activity</u>. Before alteration of the action area, flag the boundaries of clearing limits associated with site access and construction to minimize soil and vegetation disturbance, and ensure that all temporary erosion controls are in place and functional.
- **16.** <u>Site preparation</u>. During site preparation, conserve native materials for restoration, including large wood, vegetation, topsoil and channel materials (gravel, cobble and boulders) displaced by construction. Whenever practical, leave native materials where they are found and in areas to be cleared, clip vegetation at ground level to retain root mass and encourage reestablishment of native vegetation. Building and related structures may not be constructed inside the riparian management area.

- **17.** <u>Heavy equipment</u>. Heavy equipment will be selected and operated as necessary to minimize adverse effects on the environment (*e.g.*, minimally-sized, low pressure tires, minimal hard turn paths for tracked vehicles, temporary mats or plates within wet areas or sensitive soils); and all vehicles and other heavy equipment will be used as follows:
  - a. Stored, fueled and maintained in a vehicle staging area placed 150 feet or more from any waterbody, or in an isolated hard zone such as a paved parking lot.
  - b. Inspected daily for fluid leaks before leaving the vehicle staging area for operation within 50 feet of any waterbody.Steam-cleaned before operation below ordinary high water, and as often as necessary during operation to remain free of all external oil, grease, mud, seeds, organisms and other visible contaminants.
  - c. Generators, cranes and any other stationary equipment operated within 150 feet of any waterbody will be maintained and protected as necessary to prevent leaks and spills from entering the water.
- **18.** <u>In-water work period</u>. All work within the active channel will be completed in accordance with the Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife resources (ODFW 2000, or the most recent version), except as follows:
  - a. All in-water work in the Willamette River mainstem between Willamette Falls and the confluence with the Columbia River must be completed between July 1 and October 31.
  - b. All in-water work in the Columbia River mainstem below Bonneville Dam, except pile driving, must be completed between November 1 and December 31.
  - c. Pile driving in the Columbia River mainstem below Bonneville Dam must be completed between October 1 and November 31.
  - d. Hydraulic and topographic measurements and encased geotechnical drilling may be completed at any time, if a fish biologist determines that no adult fish are congregating for spawning and no redds are occupied by eggs or pre-emergent alevins within 300 feet of the work site.
- **19.** <u>Actions that require work area isolation</u>. Any action that involves excavation (other than access management), backfilling, embankment construction, or similar work below ordinary high water where adult or juvenile fish are reasonably certain to be present, or 300 feet or less upstream from spawning habitats, must be effectively isolated from the active stream.
- **20.** <u>**Fish capture and removal.**</u> Whenever work isolation is required and ESA-listed fish are likely to be present, the applicant must attempt to capture and remove the fish as follows:
  - a. A fishery biologist experienced with work area isolation and competent to ensure the safe capture, handling and release of all fish will supervise this part of the action, and complete the fish salvage form from Appendix C that will be submitted with the action completion report.
  - b. Any fish trapped within the isolated work area must be captured and released using a trap, seine, electrofishing, or other methods as prudent to minimize the risk of injury, then released at a safe release site.
  - c. If electrofishing is used to capture fish, that work must consistent with NMFS' electrofishing guidelines (NMFS 2000).
- **21.** <u>Piling installation</u>. Pilings may be concrete, steel round pile 24 inches in diameter or smaller, steel H-pile designated as HP24 or smaller, or wood that has not been treated with preservatives or pesticides. Any proposal to use wood pilings treated with preservatives or pesticides is not covered by this consultation and will require individual consultation.
  - a. When practical, use a vibratory hammer for piling installation. For pile driving in the Columbia River in the month of October, only a vibratory hammer may be used.

- b. Jetting may be used for piling installation in areas with coarse, uncontaminated sediments.
- 22. <u>Pile driving with an impact hammer</u>. When using an impact hammer to drive or proof steel piles, one of the following sound attenuation methods must be used:
  - a. Completely isolate the pile from flowing water by dewatering the area around the pile.
  - b. If water velocity is 1.6 feet per second or less, surround the piling being driven by a confined or unconfined bubble curtain (see NMFS and USFWS 2006, Wursig *et al.* 2000, and Longmuir and Lively 2001) that will distribute small air bubbles around 100% of the piling perimeter for the full depth of the water column.
  - c. If water velocity is greater than 1.6 feet per second, surround the piling being driven by a confined bubble curtain (*e.g.*, a bubble ring surrounded by a fabric or non-metallic sleeve) that will distribute air bubbles around 100% of the piling perimeter for the full depth of the water column.
- 23. <u>Pile driving where Steller sea lions may be present</u>. If the action area is between Bonneville Dam and the mouth of the Columbia River, or outside of the Columbia River but within 10-miles of a Steller sea lion haul-out<sup>1</sup>, the following conditions apply:
  - a. A biologist qualified in marine mammal identification will be on site during all pile driving and will notify the operator to cease operations if a Steller sea lion enters the 1,200 foot radius of the pile.
  - b. Pile driving may not begin if Steller sea lions are within 1,200 feet of the pile being driven.
  - c. Pile driving must cease if Steller sea lions approach to within 1,200 feet of the pile being driven.
- **24.** <u>**Pile removal**</u>. Use the following steps to minimize creosote release, sediment disturbance and sediment resuspension:
  - a. Install a floating surface boom to capture floating surface debris.
  - b. Keep all equipment (*e.g.*, bucket, steel cable, vibratory hammer) out of the water, grip piles above the waterline, and complete all work during low water and low current conditions.
  - c. Dislodge the piling with a vibratory hammer, when possible; never intentionally break a pile by twisting or bending.
  - d. Slowly lift the pile from the sediment and through the water column.
  - e. Place the pile in a containment basin on a barge deck, pier, or shoreline without attempting to clean or remove any adhering sediment a containment basin for the removed piles and any adhering sediment may be constructed of durable plastic sheeting with sidewalls supported by hay bales or another support structure to contain all sediment and return flow which may otherwise be directed back to the waterway.
  - f. Fill the holes left by each piling with clean, native sediments immediately upon removal.
  - g. Dispose of all removed piles, floating surface debris, any sediment spilled on work surfaces, and all containment supplies at a permitted upland disposal site.

### **25.** <u>Broken or intractable piling</u>. When a pile breaks or is intractable during removal, continue removal as follows:

- a. Make every attempt short of excavation to remove each piling, if a pile in uncontaminated sediment is intractable, breaks above the surface, or breaks below the surface, cut the pile or stump off at least 3 feet below the surface of the sediment.
- b. If dredging is likely where broken piles are buried, use a global positioning system (GPS) device to note the location of all broken piles for future use in site debris characterization.

<sup>&</sup>lt;sup>1</sup> Haul outs are located at 3 Arches Rock, Orford Reed, Rogue Reef, Sea Lion Caves, Cape Arago State Park, Oregon Islands National Wildlife Refuge and South Jetty Columbia River.

- **26.** <u>Pesticide-treated wood installation.</u> Use of lumber, pilings, or other wood products treated or preserved with pesticidal compounds may not be used below ordinary high water, or as part of an in-water or overwater structure<sup>2</sup>.
- **27.** <u>Pesticide-treated wood removal</u>. When it is necessary to remove pesticide-treated wood, the following conditions apply.
  - a. Ensure that, to the extent possible, no wood debris falls into the water. If wood debris does fall into the water, remove it immediately.
  - b. After removal, place wood debris in an appropriate dry storage site until it can be removed from the project area.
  - c. Do not leave wood construction debris in the water or stacked on the streambank at or below the ordinary high water.
  - d. Evaluate wood construction debris removed during a project, including pesticidetreated wood pilings, to ensure proper disposal of debris.

### 1.3.1.3 Types of Actions In-water or Over-water Structures

- **28.** <u>Boat ramps</u>. All boat ramps must consist of pre-cast concrete slabs below ordinary high water, and may be cast-in-place above ordinary high water if completed in the dry. Rock may be used to prevent scouring, down-cutting, or failure at the boat ramp, provided that the rock is no larger than necessary and does not extend further than 4-feet from the edge of the ramp in any direction.
- **29.** <u>Educational signs</u>. To educate the public about pollution from boating activities and its prevention, the Corps shall install (Corps project) or require the following information or its equivalent to be posted on a permanent sign that will be maintained at each permitted facility that is used by the public (*e.g.*, a public boat ramp or marina):
  - a. A description of the ESA-listed species which are or may be present in the project area.
  - b. Notice that adults and juveniles of these species are protected by the ESA and other laws so that they can successfully migrate, spawn, rear, and complete other behaviors necessary for their recovery.
  - c. Therefore, all users of the facility are encouraged or required to: (i) Follow procedures and rules governing use of sewage pump-out facilities; (ii) minimize the fuel and oil released into surface waters during fueling, and from bilges and gas tanks; (iii) avoid cleaning boat hulls in the water to prevent the release of cleaner, paint and solvent; (iv) practice sound fish cleaning and waste management, including proper disposal of fish waste; and (v) dispose of all solid and liquid waste produced while boating in a proper facility away from surface waters.

<sup>&</sup>lt;sup>2</sup> For alternatives sources of structural lumber and pilings designed for industrial and marine applications, but not based on pesticide-treated wood, including silica-based wood preservation, improved recycled plastic technology, and environmentally safe wood sealer and stains, see, *e.g.*, Resco Plastics (Coos Bay, Oregon; ph. 541.269.5485) and American Plastic Lumber (Shingle Springs, California; ph. 530.677.7700) for lumber from recycled plastic; Plastic Pilings, Inc. (Rialto, California; ph. 909.874.4080) for structural and non-structural lumber from recycled plastic; Timbersil (Placentia, California; ph. 714.223.1804) for outdoor lumber treated with silica; Kebony (ph. 888.914.9995) for outdoor lumber impregnated with a resin from furfuryl alcohol, a byproduct of sugar production; and Timber Pro Coatings (Portland, Oregon; ph. 503.232.1705) for a silica-based internal wood stabilizer, and a low-VOC wood sealer/stain. The use of trade, firm, or corporation names in this Opinion is for the information and convenience of the action agencies, and does not constitute an official endorsement or approval by the U.S. Department of Commerce or NMFS of any product or service to the exclusion of others that may be suitable.

**30.** <u>Flotation material</u>. All synthetic flotation material must be permanently encapsulated to prevent breakup into small pieces and dispersal in water.

**31.** <u>New or replacement floats</u>. Any new or replacement float must be placed at least 50 feet from the shoreline (100-feet from the shoreline in the Columbia River) as measured at ordinary low water or mean lower low water and may not be placed in an estuarine area with submerged aquatic vegetation. Any float wider than 6-feet must also include (a) an open area of grating that is at least 50% of the total surface area,; or (b) be placed where current velocity is at least 0.7 feet per second year-round. Floats may not exceed 10' in width or 40' in length or a total of 400 square feet.</u>

**32.** <u>**Piscivorous birds</u>**. All float pilings, mooring buoys, and navigational aids must be fitted with devices to prevent perching by piscivorous birds.</u>

**33**. <u>**Relocation of existing structures in a marina**</u>. Any existing structure that is relocated in a marina must remain within the existing overall footprint, but no closer than 50 feet of the shoreline (100 feet in the Columbia River) as measured at ordinary low water or mean lower low water.

**34.** <u>Repair or replacement of wall and roof components for a covered moorage or boat</u> <u>house</u>. Any replacement for a roof, wall, or garage door of a covered moorage or boat house must be made of translucent materials or incorporate skylights to allow light penetration.

### Dredging

- **35.** <u>**Dredging to Maintain Vessel Access</u>**. When dredging to maintain access to previously authorized docks, wharfs, mooring structures, and boat ramps, the following conditions apply:</u>
  - a. All dredged materials and subsequent leave surface must be suitable and approved for in-water disposal using newly acquired or historical data based on criteria in the Sediment Evaluation Framework ((USACE *et al.* 2009).
  - b. All dredged sediment and debris must be side cast or returned to the channel within the ordinary high-water line downstream from the dredging site where it will be recruited by the next annual high flow and continue to provide aquatic habitat functions.
  - c. The dredging must not alter the character, scope, size, or location of the project area or previously authorized dredge prism.
- **36.** <u>**Dredging to Maintain Functionality**</u>. When discharging or excavating to maintain the functionality of a channel, culvert, intake, or outfall, the following conditions apply:
  - a. Either the discharge or excavation may not exceed 25 cubic yards, or include any water intake or point of diversion that does not have a fish screen that is installed, operated and maintained according to NMFS fish screen criteria and meet NMFS fish passage criteria.
  - b. All dredged materials and subsequent leave surface must be suitable and approved for in-water disposal using newly acquired or historical data based on criteria in the Sediment Evaluation Framework.
  - c. All dredged sediment and debris must be side cast or returned within the annual high flow channel downstream from the dredging site where it will continue to provide aquatic habitat functions.
  - d. The dredging must not alter the character, scope, size, or location of the project area.

### SLOPES IV PROGRAMMATIC –IN-WATER OVER-WATER STRUCTURES ACTION COMPLETION FORM

Within 60 days of completing all work below ordinary high water (OHW) as part of an action completed under the SLOPES IV In-water Over-water Structures programmatic opinion, the permittee must submit a completed action completion form with the following information to the U.S. Army Corps of Engineers, Regulatory Branch at: cenwp.notify@usace.army.mil

Corps Permit #:		
Corps Contact:		
Action Title		
Start and End Dates for the completion of in-water work:	Start.	End
Any Dates work ceased due to high flows:		

#### Include With This Form:

- 1. Photos of habitat conditions before, during, and after action completion
- 2. Evidence of compliance with fish screen criteria for any pump used
- 3. A summary of the results of pollution and erosion control inspections, including any erosion control failure, contaminant release, and correction effort
- 4. Number, type, and diameter of any pilings removed or broken during removal
- 5. A description of any riparian area cleared within 150 feet of OHW
- 6. Linear feet of bank alteration
- 7. A description of site restoration
- 8. A completed Salvage Reporting Form from Appendix D for any action that requires fish salvage
- 9. As-Built drawings for any action involving riprap revetment, stormwater management facility, or bridge rehabilitation or replacement.

### SLOPES IV PROGRAMMATIC – IN-WATER OVER-WATER STRUCTURES SALVAGE REPORTING FORM

**If Applicable:** Within 10 days of completing a capture and release as part of an action completed under the SLOPES IV In-water Over-water Structures programmatic opinion, submit a completed Salvage Reporting Form, or its equivalent, with the following information to the Corps at cenwp.notify@usace.army.mil.

Corps Contact:	
Action Title	
Date of Fish Salvage Operation: Supervisory Fish Biologist (name,	
address & telephone number):	
Include With This Form:	

- 1. A description of methods used to isolate the work area, remove fish, minimize adverse effects on fish, and evaluate their effectiveness.
- 2. A description of the stream conditions before and following placement and removal of barriers.
- 3. A description of the number of fish handled, condition at release, number injured, and number killed by species.

Corps Permit #:

### SLOPES IV PROGRAMMATIC –IN-WATER OVER-WATER STRUCTURES RESTORATION/ COMPENSATORY MITIGATION REPORTING FORM

By December 31 of any year in which the Corps approves that the site restoration or compensatory mitigation is complete, submit a completed Site Restoration/Compensatory Mitigation Reporting Form, or its equivalent, with the following information to the Corps at cenwp.notify@usace.army.mil.

Corps Permit #:	
Corps Contact:	
Action Title	
Type of Activity:	

### Include With This Form:

- 1. Photos of habitat conditions before, during, and after action completion
- 2. Start and end date for the work
- 3. A summary of the results of mitigation or restoration work completed



## **Permit Transfer**

This form may be used to transfer a Department of the Army (DA) Nationwide Permit verification, Regional General Permit verification, or Letter of Permission permit.<sup>1</sup> When the structures or work authorized by a DA permit are still in existence at the time the property is sold or transferred, the permittee may transfer the DA permit to the new owner(s). The DA permit may also be transferred when the permittee does not own the underlying property (e.g., structures on state aquatic lands). For some DA permits the permit must be transferred when the property ownership changes.

When a DA permit is transferred the terms and conditions of the permit, including any special conditions, will continue to be binding on the transferee. To validate the transfer of the DA permit and to accept the liabilities associated with complying with the terms and conditions of the permit, the transferee must sign and date below. This permit transfer form can be submitted by email at cenwp.notify@usace.army.mil or by regular mail at the following address:

> U.S. Army Corps of Engineers CENWP-OD-G P.O. Box 2946 Portland, OR 97208-2946

To transfer a Nationwide Permit verification a copy of the Nationwide Permit verification letter must be attached as required by Nationwide Permit General Condition 29.

Corps Number: \_\_\_\_\_

TRANSFEREE:

Signature

Date

Name (Please print)

Email

Address

City, State, and Zip Code

<sup>&</sup>lt;sup>1</sup> This form may not be used to validate the transfer of a standard individual Department of the Army permit. The individual permit form includes a section for the transferee's signature.



### **Compliance Certification**

- 1. Permit Number: NWP-
- 2. Permittee Name:
- 3. County Location:

Upon completing the activity authorized by the permit, please complete the sections below, sign and date this certification, and return it to the U.S. Army Corps of Engineers, Portland District, Regulatory Branch. The certification can be submitted by email at cenwp.notify@usace.army.mil or by regular mail at the following address:

U.S. Army Corps of Engineers CENWP-OD-GL P.O. Box 2946 Portland, OR 97208-2946

- 4. Corps-required Compensatory Mitigation (see permit special conditions):
  - a. Mitigation Bank / In-lieu Fee Credit Transaction Documents:

Not Applicable	Submitted	Enclosed

- b. Permittee-responsible mitigation (e.g., construction and plantings) has been constructed (not including future monitoring). As-built report:
  - □ Not Applicable □ Submitted □ Enclosed
- 5. Endangered Species Act Standard Local Operating Procedures (SLOPES) (see permit special conditions):
  - a. SLOPES Action Completion Report:

□ Not Applicable □ Submitted □ Enclosed

- b. SLOPES Fish Salvage Report:

   Not Applicable
   Submitted
   Enclosed
  - ..
- c. SLOPES Site Restoration / Compensatory Mitigation Report:
  - □ Not Applicable □ Submitted □ Enclosed

I hereby certify the work authorized by the above-referenced permit has been completed in accordance with all of the permit terms and conditions.

Signature of Permittee