



**Prehearing Exchange: CWA-06-2011-2709 - Stevenson & Parkwood Land Co.**

**Russell Murdock** to: Chuck Kibler  
Cc: Barbara Aldridge, Lorena Vaughn, Patrick Rankin

10/31/2012 02:40 PM

From: Russell Murdock/R6/USEPA/US  
To: Chuck Kibler <chuck@kiblerlaw.com>  
Cc: Barbara Aldridge/R6/USEPA/US@EPA, Lorena Vaughn/R6/USEPA/US@EPA, Patrick Rankin/R6/USEPA/US@EPA

Mr. Kibler,

Please find attached the Second Supplement to Complainant's Initial Prehearing Exchange. As requested, I am directing this your way by e-mail rather than by traditional United States Mail. As the Certificate of Service notes, I delivered a hard copy of this supplemental Prehearing Exchange as well as all Exhibits to the Regional Hearing Clerk this afternoon.

Please note that EPA's e-mail client prevents me from sending attachments greater than a certain size. As a result, I am having to split up Exhibit 46 into nine parts. All other exhibits as well as a copy of the Filed Prehearing Exchange will be attached to this e-mail. At the Regional Hearing Clerk's request, I am CC'ing both her and the Regional Judicial Officer on this e-mail, but will not be copying them on the following e-mails containing portions of exhibit 46. Should either the Regional Hearing Clerk or Regional Judicial Officer like to receive digital copies of Exhibit 46, I will of course be happy to provide them.

Thank you.

Russell Murdock  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 6  
1445 Ross Ave. Suite 1200 (6RC-EW)  
Dallas, TX 75202  
(214) 665-3189  
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-  PrehearingExchange2FILED.pdf
-  Exhibit42.pdf
-  Exhibit43.pdf
-  Exhibit44.pdf
-  Exhibit45.pdf
-  Exhibit47.pdf
-  Exhibit48.pdf
-  Exhibit49.pdf
-  Exhibit50.pdf
-  Exhibit51.pdf

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2012 OCT 31 PM 4:17  
REGIONAL HEARING CLERK  
EPA REGION VI

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
DALLAS, TEXAS

FILED

2012 OCT 31 PM 2:25

REGIONAL HEARING CLERK  
EPA REGION VI

IN THE MATTER OF:

Mr. Henry R. Stevenson, Jr.  
Parkwood Land Co.

Respondents

§ Docket No. CWA-06-2011-2709  
§  
§  
§ COMPLAINANT'S SECOND SUPPLEMENT  
§ TO PREHEARING EXCHANGE  
§  
§

**COMPLAINANT'S SECOND SUPPLEMENT TO INITIAL PREHEARING EXCHANGE**

The Complainant, the Director of the Water Quality Protection Division, United States Environmental Protection Agency, Region 6, through its attorney, hereby files its Second Supplement to Initial Prehearing Exchange pursuant to the Scheduling Order, dated November 22, 2011, issued by the Presiding Officer and pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22. In the Order, the Presiding Officer instructed the Parties to file a Prehearing Exchange containing specific information. This document contains Complainant's second supplemental responses to the Presiding Officer's Order. During the September 19, 2012, prehearing conference, Complainant expressed its intent to file this second supplement to its initial Prehearing Exchange. Complainant's initial Prehearing Exchange dated January 9, 2012, and supplemental Prehearing Exchange dated January 24, 2012, are incorporated by reference.

A. **WITNESSES:**

The Complainant may call the following witnesses at the hearing:

**Expert and Fact Witness**

1. John Davidson - Mr. Davidson is the Team Lead employed in the Compliance Section of the Regulatory Branch in the Galveston District of the United States Army Corps of Engineers (USACE), in Galveston, Texas. Mr. Davidson has over 21 years of experience within the Regulatory Branch and is responsible for Section 404 of the CWA and Section 10 of the Rivers and Harbors Act jurisdictional determinations, compliance with USACE permits, and the investigation of alleged unauthorized activities of Section 10 and/or Section 404. In this capacity, he performed site investigations on the Respondents' property on September 3, 2009, and July 22, 2010. Thus, Mr. Davidson may testify as to what he observed at the Respondents' property when he conducted his investigations, including the unauthorized discharges of dredged and/or fill material into waters of the United States, and how the Respondents violated Section 404 of the CWA. He may testify as to his communications with the Respondents regarding the violation. Mr. Davidson also took wetland sample points on the property and mapped the fill/wetland line near Interstate Highway 10 using a GPS during the investigations. He can authenticate the data and testify as to what the data depicts. Mr. Davidson may offer specific testimony regarding the type of vegetation existing at the site, which indicated the type of wetlands on site. In so doing, Mr. Davidson will use his expertise to demonstrate that the relevant wetlands qualify as "baldcypress-tupelo swamps" for purposes of Nationwide Permit Regional Condition for the State of Texas 2(b) (1(b) under the 2002 version). He may also testify regarding the applicability of Nationwide Permit 3 given the aforementioned Regional Condition and Respondents' resultant requirement to submit pre-construction notification due to the nature of the relevant wetlands. Further, he may testify regarding communications between the USACE and Respondents in which the USACE told Respondents their fill activities were not authorized

by Nationwide Permit 3. Mr. Davidson may also testify regarding the USACE's past dealings with Respondents.

**Fact Witness**

1. Kristin Shivers - Ms. Shivers is a Regulatory Specialist employed in the Compliance Section of the Regulatory Branch in the Galveston District of the United States Army Corps of Engineers (USACE), Galveston, Texas. Ms. Shivers has over four years of experience within the Regulatory Branch and is responsible for Section 404 of the CWA and Section 10 of the Rivers and Harbors Act jurisdictional determinations, compliance with USACE permits, and the investigation of alleged unauthorized activities of Section 10 and/or Section 404. In this capacity, she performed site investigations on the Respondents' property on September 3, 2009, July 22, 2010, and December 9, 2010. Thus, Ms. Shivers may testify as to what she observed at the Respondents' property when she conducted her investigations, including the unauthorized discharges of dredged and/or fill material into waters of the United States, and how the Respondents violated Section 404 of the CWA. She may testify as to her communications with the Respondents regarding the violation. Ms. Shivers also took wetland sample points and photographs of the property during the investigations. She can authenticate the data and photographs and testify as to what these photographs depict. Ms. Shivers may offer testimony regarding the type of vegetation existing at the site, which indicated the type of wetlands on site. She may offer further testimony regarding the requirements for applicants for whom Nationwide Permit Regional Condition for the State of Texas 2(b) (1(b) under the 2002 version) applies. She may also testify regarding the applicability of Nationwide Permit 3 given the aforementioned Regional Condition and Respondents' resultant requirement to submit pre-construction

notification due to the nature of the applicable wetlands. Ms. Shivers may also testify regarding the USACE's past dealings with Respondents.

2. Barbara Aldridge - Ms. Aldridge is an Environmental Protection Specialist and Wetlands Inspector employed in the Marine & Coastal Section of the Ecosystems Protection Branch, Water Quality Protection Division, U.S. Environmental Protection Agency, Region 6, in Dallas, Texas. Ms. Aldridge has 15 years experience in regulatory enforcement under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and almost three years of experience within the wetlands program under the Clean Water Act (CWA), specifically Section 404. Ms. Aldridge is responsible for Public Notice Reviews under Section 404 of the CWA, compliance with United States Army Corps of Engineers (USACE) Section 404 permits, and the investigation of alleged unauthorized activities of Section 404. In this capacity, she performed a site investigation on the Respondents' property on December 9, 2010, in collaboration with Ms. Shivers, the USACE Regulatory Specialist. Thus, Ms. Aldridge may testify as to what she observed at the Respondents' property when she conducted her investigation, including the unauthorized discharge of dredged and/or fill material into waters of the United States, and how the Respondents violated Section 404 of the CWA. Ms. Aldridge may also testify with regard to the characteristics, conditions, and vegetation existing at the site. She may testify as to her communications with the Respondents regarding the violation. Ms. Aldridge took photographs of the property during the investigation. She can authenticate the photographs and testify as to what the photographs depict. Finally, Ms. Aldridge may testify regarding her penalty calculation in this matter and the general process of calculating penalties in similar actions.

**B. EXHIBITS:**

The Complainant may offer into evidence the following supplemental exhibits, in addition to exhibits 1-41 previously provided in the aforementioned Prehearing Exchange and Supplemental Prehearing Exchange dated January 9, 2012, and January 24, 2012, respectively:

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>
Complainant's Ex. 42	Nationwide Permit Regional Conditions for the State of Texas (both the 2002 and 2007 versions) and a General Explanation of U.S. Army Corps of Engineers Permitting pulled from the Fort Worth District's Internet site
Complainant's Ex. 43	Letter from U.S. Army Corps of Engineers, Galveston District, re: Jurisdictional Determination Associated with Grandfathering Provisions, Orange County, TX, dated May 08, 2008
Complainant's Ex. 44	Request for a Jurisdictional Determination by Parkwood Land Company dated October 11, 2006, with enclosed report by GTI Environmental, Inc. (exhibits omitted)
Complainant's Ex. 45	Summary of U.S. Army Corps of Engineers Regulatory Files involving Henry "Sonny" Stevenson, Jr.
Complainant's Ex. 46	Background Documentation and Files for the Interactions Summarized in Exhibit 45 between the U.S. Army Corps of Engineers and Henry "Sonny" Stevenson, Jr.

- Complainant's Ex. 47                      Aerial Photographs of Property
- Complainant's Ex. 48                      Nationwide Permit General Conditions (both the 2002 and  
2007 versions)
- Complainant's Ex. 49                      Memorandum of Agreement Between The Department of  
the Army and The Environmental Protection Agency  
Concerning Federal Enforcement for the Section 404  
Program of the Clean Water Act, dated January 19, 1989
- Complainant's Ex. 50                      Penalty Calculation Worksheet completed by Barbara  
Aldridge (previously submitted as an attachment to  
Complainant's June 6, 2012, Motion for Accelerated  
Decision as to Penalty)
- Complainant's Ex. 51                      Declaration of Barbara Aldridge regarding Penalty  
(previously submitted as an attachment to Complainant's  
June 6, 2012, Motion for Accelerated Decision as to  
Penalty)

The Complainant respectfully reserves the right to amend its prehearing exchange to add or subtract exhibits and/or documents.

**C. PLACE FOR HEARING AND ESTIMATED TIME NEEDED:**

Complainant neither changes its requested place for hearing nor its estimate of time needed.

**D. ASSESSMENT OF CIVIL PENALTY:**

The Complainant offers no changes to its initial Prehearing Exchange with regard to its assessment of a civil penalty.

**E. PAPERWORK REDUCTION ACT APPLICABILITY**

The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. §§ 3501 et seq. as amended, does not apply in this case. Also, there is not an Office of Management and Budget Control Number herein and the Provisions of Section 3512 of the PRA are not applicable.

Respectfully submitted,



Russell Murdock  
Assistant Regional Counsel (6RC-EW)  
Office of Regional Counsel  
U.S. EPA, Region 6  
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Tel.: (214) 665-3189  
Fax.: (214) 665-3177



**CERTIFICATE OF SERVICE**

I certify that the original of the foregoing Complainant's Prehearing Exchange was hand-delivered to and filed with the **Regional Hearing Clerk**, U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and a true and correct copy was sent to the following on this 31 day of October, 2012, in the following manner:

**Via E-mail**

Charles (Chuck) Kibler, Jr.  
The Kibler Law Firm  
765 N. 5<sup>th</sup> Street  
Silsbee, TX 77656  
Chuck@kiblerlaw.com

A handwritten signature in black ink, appearing to read "Chuck Kibler", is written over a horizontal line.



US Army Corps  
of Engineers  
Fort Worth District

**Nationwide Permit Regional  
Conditions for the State of Texas**  
March 2002



The following regional conditions apply throughout the State of Texas:

1. For all discharges proposed for authorization under nationwide permits (NWP) 3, 6, 7, 12, 14, 18, 19, 25, 27, 29, 39, 40, 41, 42, 43, and 44, into the following habitat types or specific areas, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 13. The Corps will coordinate with the resource agencies as specified in NWP General Condition 13(e). The habitat types or areas are:

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

b. Baldcypress-Tupelo Swamps: Wetlands comprised predominantly of baldcypress trees (Taxodium distichum), and water tupelo trees (Nyssa aquatica), that are occasionally or regularly flooded by fresh water. Common associates include red maple (Acer rubrum), swamp privet (Forestiera acuminata), green ash (Fraxinus pennsylvanica) and water elm (Planera aquatica). Associated herbaceous species include lizard's tail (Saururus cernuus), water mermaid weed (Proserpinaca spp.), buttonbush (Cephalanthus occidentalis) and smartweed (Polygonum spp.). (Eyre, F. H. Forest Cover Types of the United States and Canada. 1980. Society of American Foresters, 5400 Grosvenor Lane, Washington, D.C. 20014. Library of Congress Catalog Card No. 80-54185)

The following regional conditions apply only within the Fort Worth District:

2. For all discharges proposed for authorization under nationwide permits (NWP) 3, 6, 7, 12, 14, 18, 19, 25, 27, 29, 39, 40, 41, 42, 43, and 44, into the area of Caddo Lake within Texas that is designated as a "Wetland of International Importance" under the Ramsar Convention the applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 13. The Corps will coordinate with the resource agencies as specified in NWP General Condition 13(e).

3. For all discharges proposed for authorization under NWP 43, that occur in forested wetlands, the applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 13. The Corps will coordinate with the resource agencies as specified in NWP General Condition 13(e).

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

## Complainant's Ex. 42

— 2 —

The following regional conditions apply only within the Galveston District:

5. NWP 12 shall not be used to authorize discharges within 500 feet of a seagrass bed or oyster reef.
6. For all 3-D seismic test discharges conducted within the coastal zone of Texas pursuant to NWP 6, the applicant shall notify the District Engineer in accordance with the NWP General Condition 13.
7. Nationwide permits 7, 12, 14, 18, 19, 25, 29, 39, 40, 41, 42, 43, and 44 shall not be used to authorize discharges into the following waters of the United States within the coastal zone of Texas:

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

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

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

Recommended Information. The Corps advises applicants to discuss projects proposed for verification under NWPs with the Corps prior to submitting their applications, when practicable. In order to expedite the verification of a NWP action, the Corps recommends that applicants requesting verification of nationwide permit authorization provide the following information to the appropriate Corps District:

- a. An indication of possible areas of all waters of the United States in the project area, including wetlands and other special aquatic sites, using the current Corps regulation and wetland delineation method.
- b. A written statement detailing why the proposed discharge must occur in a water of the United States and how adverse impacts to these waters have been avoided and minimized to the maximum extent practicable. Photographs of the project are useful.

c. A mitigation proposal, if appropriate, that will offset the losses of waters of the United States. Vegetated buffers, such as riparian zones, should be an important part of most mitigation proposals.

d. A summary of any prior coordination with resource agencies.

e. For all PCNs requiring coordination with both the Corps and resource agencies, the applicant should simultaneously provide a copy of the PCN to the appropriate Corps District Engineer and to the resource agencies. The resource agencies include the U. S. Fish and Wildlife Service, U. S. Environmental Protection Agency, National Marine and Fisheries Service (when appropriate), Texas Parks and Wildlife Department, Texas Natural Resource Conservation Commission, Railroad Commission of Texas (when appropriate), and the Texas Historic Commission. Agency coordination is required for any NWP that results in the loss of greater than ½ acre of waters of the United States and NWPs referenced in regional conditions 1, 2, and 3. See Appendix A for addresses of the resource agencies in Texas.

f. Additional information regarding submittal information can be found at the appropriate District's website: Fort Worth [www.swf.usace.army.mil](http://www.swf.usace.army.mil) (select "Permits"), Galveston [www.swg.usace.army.mil](http://www.swg.usace.army.mil), Albuquerque [www.spa.usace.army.mil](http://www.spa.usace.army.mil), Tulsa [www.swt.usace.army.mil](http://www.swt.usace.army.mil)

General Information. The following information is provided to notify applicants of other authorizations that may be required by state agencies.

A permit may be required from the Texas Parks and Wildlife Department for disturbing or taking marl, sand, gravel, shell or mudshell, or operating in or disturbing any oyster bed or fishing water for any purpose other than that necessary or incidental to navigation or dredging under State or Federal authority.

Under State law, no person may take marl, sand, gravel, shell, or other material from any place between a seawall and the water's edge, from a beach or shoreline within 300 feet of the mean low tide, or within one-half mile of the end of any seawall, for any purpose other than that necessary or incidental to navigation or dredging under State or Federal authority.

All activities in Texas located on lands under the jurisdiction of the Texas General Land Office (GLO), 1700 North Congress Avenue, Austin, Texas 78701-1495, must have prior approval from that office. The placement of structures onto state-owned stream beds, state-owned uplands, or coastal public lands in Texas may require the issuance of a lease or easement from the GLO.

**APPENDIX A**

**USACE District Offices and Resource Agencies in the State of Texas**

U.S. Army Corps of Engineers

Fort Worth District  
ATTN: CESWF-EV-R  
P.O. Box 17300  
Fort Worth, Texas 76102-0300  
(817) 978-2681  
FAX (817) 978-7545

Galveston District  
ATTN: CESWG-PE-R  
P.O. Box 1229  
Galveston, Texas 77553-1229  
(409) 766-3930  
FAX (409) 766-3931

Tulsa District  
ATTN: CESWT-PE-R  
P.O. Box 61  
Tulsa, OK 74121-0061  
(918) 669-7400  
FAX (918) 669-4306

Albuquerque District  
ATTN: CESP-OD-R-EP  
P.O. Box 6096  
Fort Bliss, Texas 79906-0096  
(915) 568-1359  
(FAX) (915) 568-1348

U. S. Fish and Wildlife Service

Arlington:  
U.S. Fish and Wildlife Service  
Stadium Centre Building  
711 Stadium Drive East, Suite 252  
Arlington, Texas 76011  
(817) 277-1100  
FAX: (817) 277-1129

Corpus Christi:  
U.S. Fish and Wildlife Service  
TAMU-CC, Campus Box 338  
6300 Ocean Drive  
Corpus Christi, Texas 78412  
(512) 994-9005  
FAX: (512) 994-8262

Austin:  
U.S. Fish and Wildlife Service  
Hartland Bank Building  
10711 Burnet Road, Suite 200  
Austin, Texas 78758  
(512) 490-0057  
FAX: (512) 490-0974

Houston:  
U.S. Fish and Wildlife Service  
17629 El Camino Real, Suite 211  
Houston, Texas 77058  
(281) 286-8282  
FAX: (281) 488-5882

U. S. Environmental Protection Agency

Marine and Wetlands Section (6WQ-EM)  
U.S. Environmental Protection Agency, Region 6  
1445 Ross Avenue  
Dallas, Texas 75202  
(214) 665-6680  
FAX: (214) 665-6689

Texas Railroad Commission

Water Quality Certifying Agent  
Railroad Commission of Texas  
P. O. Box 12967  
Austin, Texas 78711-2967  
(512) 463-7308  
FAX: (512) 463-6780

Texas Parks and Wildlife Department

Habitat Assessment Branch  
Resource Protection Division  
Texas Parks and Wildlife Department  
4200 Smith School Road  
Austin, Texas 78744  
(512) 389-4639  
FAX: (512)389-8059

National Marine Fisheries Service

National Marine Fisheries Service  
4700 Avenue U  
Galveston, Texas 77550  
(409) 766-3699

Texas Natural Resource Conservation Commission

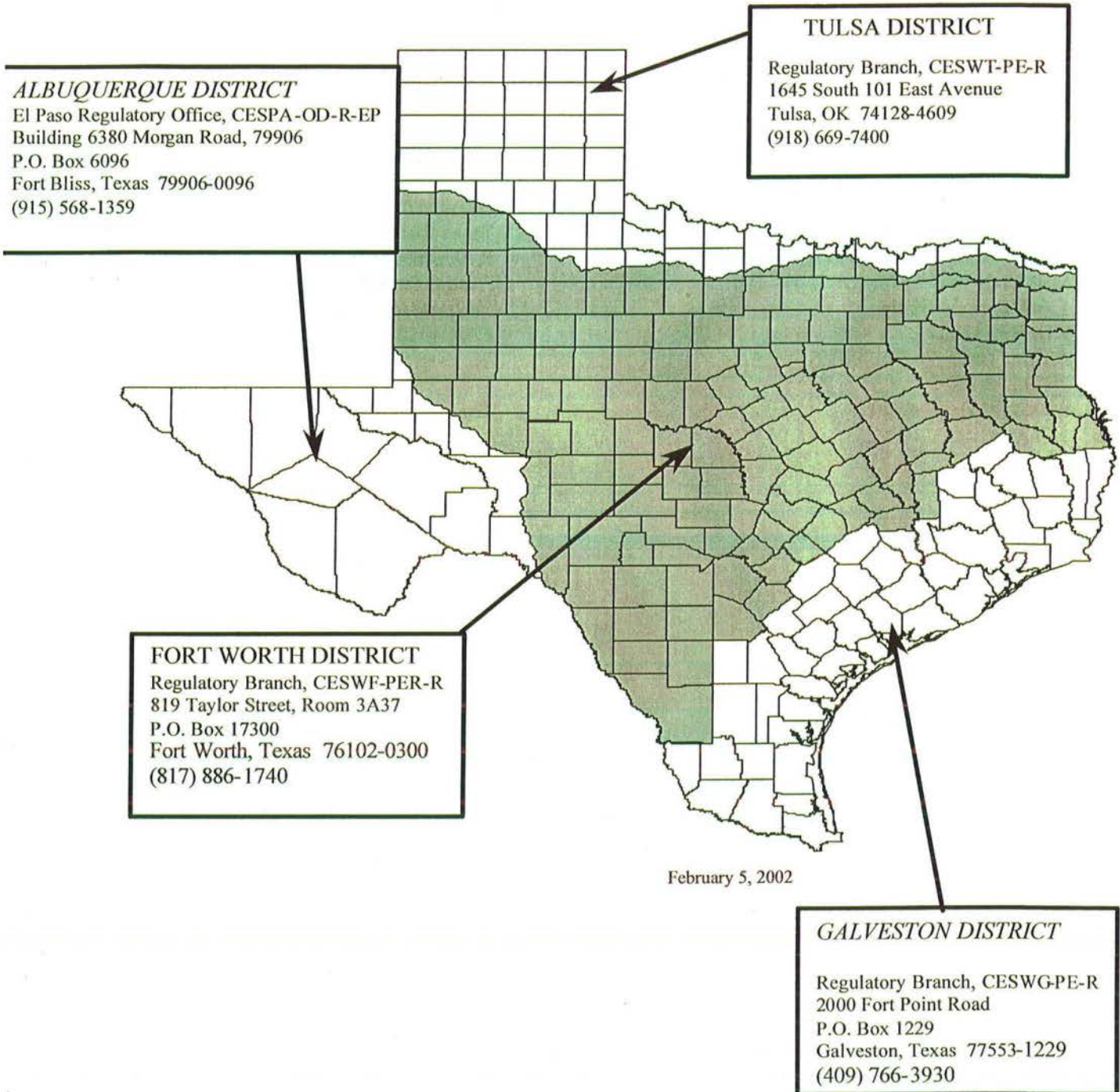
401 Coordinator  
Standards and Assessment Section  
Water Quality Division  
Texas Natural Resources Conservation Commission  
Mail Code 150  
12100 Park 35 Circle  
P.O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-4586  
FAX: (512) 239-4420

Texas Historical Commission

Deputy State Historic Preservation Officer  
Division of Antiquities Protection  
Texas Historical Commission  
P. O. Box 12276  
Austin, Texas 78711  
(512) 463-6096  
FAX: (512) 463-8927

**APPENDIX B**

**U.S. Army Corps of Engineers Districts within the State of Texas**



August 23, 2007

**NATIONWIDE PERMIT REGIONAL CONDITIONS  
FOR THE STATE OF TEXAS**

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

1. Compensatory mitigation is required at a minimum one-for-one ratio for all special aquatic site losses that exceed 1/10 acre and require pre-construction notification, and for all losses to streams that exceed 300 linear feet and require pre-construction notification, unless the appropriate District Engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement.
  
2. For all discharges proposed for authorization under nationwide permits (NWP) 3, 6, 7, 12, 14, 18, 19, 25, 27, 29, 39, 40, 41, 42, 43, and 44, into the following habitat types or specific areas, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 27. The Corps will coordinate with the resource agencies as specified in NWP General Condition 27(d). The habitat types or areas are:
  - a. Wetlands, typically referred to as pitcher plant bogs, that are characterized by an organic surface soil layer and include vegetation such as pitcher plants (Sarracenia sp.), sundews (Drosera sp.), and sphagnum moss (Sphagnum sp.).
  
  - b. Bald Cypress-Tupelo Swamps: Wetlands comprised predominantly of bald cypress trees (Taxodium distichum), and water tupelo trees (Nyssa aquatica), that are occasionally or regularly flooded by fresh water. Common associates include red maple (Acer rubrum), swamp privet (Forestiera acuminata), green ash (Fraxinus pennsylvanica) and water elm (Planera aquatica). Associated herbaceous species include lizard's tail (Saururus cernuus), water mermaid weed (Proserpinaca spp.), buttonbush (Cephalanthus occidentalis) and smartweed (Polygonum spp.). (Eyre, F. H. Forest Cover Types of the United States and Canada. 1980. Society of American Foresters, 5400 Grosvenor Lane, Bethesda, Maryland 20814-2198. Library of Congress Catalog Card No. 80-54185)
  
3. For all activities proposed for authorization under nationwide permit (NWP) 12 that involve mechanized land clearing in a forested wetland, the applicant must submit a pre-construction notification to the appropriate District Engineer in accordance with the NWP General Condition 27 prior to commencing the activity.
  
4. For all activities proposed for authorization under nationwide permit (NWP) 16, the applicant must submit a pre-construction notification to the appropriate District Engineer in accordance with the NWP General Condition 27, and work cannot begin under NWP 16 until the permittee has received written approval from the Corps.



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

5. For all discharges proposed for authorization under nationwide permits (NWPs) 3, 6, 7, 12, 14, 18, 19, 25, 27, 29, 39, 40, 41, 42, 43, and 44, into the area of Caddo Lake within Texas that is designated as a "Wetland of International Importance" under the Ramsar Convention, the applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 27. The Corps will coordinate with the resource agencies as specified in NWP General Condition 27(d).
6. For all discharges proposed for authorization under nationwide permit (NWP) 43 that occur in forested wetlands, the applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 27.
7. For all discharges proposed for authorization under any nationwide permit in Dallas, Denton, and Tarrant Counties that are within the study area of the "Final Regional Environmental Impact Statement (EIS), Trinity River and Tributaries" (May 1986), the applicant shall meet the criteria and follow the guidelines specified in Section III of the Record of Decision for the Regional EIS, including the hydraulic impact requirements. A copy of these guidelines is available upon request from the Fort Worth District and at the District website [www.swf.usace.army.mil](http://www.swf.usace.army.mil) (select "Permits").

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

8. Nationwide permit 12 shall not be used to authorize discharges within 500 feet of a seagrass bed or oyster reef.
9. Nationwide permit (NWP) 6 shall not be used to authorize 3-D seismic test discharges conducted within tidal waters of the United States within the coastal zone of Texas. For all 3-D seismic test discharges conducted within non-tidal waters of the United States within the coastal zone of Texas pursuant to NWP 6, the applicant shall notify the District Engineer in accordance with the NWP General Condition 27.
10. For all discharges exceeding 10 cubic yards below the plane of the ordinary high water mark or the high tide line proposed into special aquatic sites, including wetlands, under nationwide permit (NWP) 6, the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 27. The pre-construction notification must state the time period for which the temporary fill is proposed, and must include a restoration plan for the special aquatic sites.
11. Nationwide permits 6, 7, 12, 13, 14, 18, 19, 25, 29, 39, 40, 41, 42, 43, 44, 46, and 48 shall not be used to authorize discharges into the following waters of the United States within the coastal zone of Texas: Mangrove marshes, wetlands within the Texas Gulf Coastal Plain that are occasionally or regularly flooded by brackish or saline water and

Complainant's Ex. 42

NWP Regional Conditions, Texas.

August 23, 2007

have more than 40 percent cover by woody plants. The dominant woody species in this environment is the black mangrove (Avicennia germinans) with a dominant herbaceous species component of smooth cordgrass (Spartina alterniflora). (Preliminary Guide to Wetlands of the Gulf Coastal Plain. 1978. Technical Report - U.S. Army Engineer Waterways Experiment Station: Y-78-5. P.O. Box 631, Vicksburg, Miss. 39180.)

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

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



## General Permits

General Permits are issued nationwide or regionally for a category or categories of activities that are either similar in nature and cause only minimal individual and cumulative adverse impacts (Nationwide and Regional General Permits) or would result in avoiding unnecessary regulatory control exercised by another federal, state, or local agency and the environmental consequences of the activity would be individually and cumulatively minimal (Programmatic General Permit). General Permits always include terms and conditions for compliance and may require preconstruction notification of the U.S. Army Corps of Engineers (See 33 CFR 320.1 (c), 322.2 (f), 323.2 (h), 325.2 (e)(2), and 330).

### LINKS

The documents on this page require the Adobe PDF Reader. Click [here](#) to download the reader.

### Nationwide General Permits (NWP)

The Fort Worth Regulatory Branch has released electronic **application submittal forms** for some of the more commonly used Nationwide Permits (NWPs) in the Fort Worth District (currently: NWPs 3, 12, 13, 14, 21, 29, 39, & 43).

A Nationwide General Permit (NWP) is a type of general permit issued nationally. The regulations that govern NWPs are found at 33 CFR 330. There are currently 50 NWPs (published on February 19, 2012 and expire on March 18, 2017) with 31 general conditions. NWPs, like all general permits, are valid for 5 years from the date of issuance. NWP regional conditions for Texas and Louisiana have been adopted by the USACE.

Under Section 401 of the Clean Water Act, certification of compliance with state water quality standards by the State Water Quality Agency is required for any discharge of pollutants into waters of the United States. Section 401 water quality certification is conducted by the Texas Commission on Environmental Quality (TCEQ) in Texas and the Louisiana Department of Environmental Quality (LDEQ) in Louisiana. All Section 404 permits, individual or general, require Section 401 water quality certification.

The TCEQ issued conditional **water quality certification (WQC)** for the NWPs. The USACE considers WQC for NWP 16 denied.

The Texas Railroad Commission issued **water quality certification** for activities associated with exploration, development, and production of oil, gas or geothermal resources that may result in discharges of fill into waters of the United States.

There are no Indian Lands in the Fort Worth District, however, the EPA issued **water quality certification** for Indian Lands in Texas.

LDEQ issued **water quality certification** for NWPs 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 25, 27, 30, 31, 32, 33, 34, 36, 37, 38, 40, 41, 42, 43, 44, 45, 48, 49, 50, 51, and 52 without conditions. LDEQ denied water quality certification for NWPs 21, 29, and 39. Because NWPs 1, 2, 8, 9, 10, 11, 24, 28 and 35 cover only Section 10 waters, LDEQ did not act on water quality certification for those NWPs.

Preconstruction notification (PCN) to the USACE is required in many cases and resource agency coordination (Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (USFWS), Texas Commission on Environmental Quality (TCEQ), Texas Parks and Wildlife Department (TPWD), and Texas Historical Commission) is required in some cases. A PCN to the USACE is required (even if a PCN is not otherwise required) if **threatened or endangered species** or its critical habitat might be affected by the activity or is in the vicinity of the project; or if the activity may have the potential to cause effects to any **historic properties** listed, determined to be eligible for listing in, or potentially eligible for listing in the National Register of Historic Places, including previously unidentified properties. The applicant may not begin the activity until notified by the USACE that the requirements of the **Endangered Species Act** and/or the **National Historic Preservation Act** have been satisfied and that the activity is authorized.

Also, work cannot begin under NWPs 21, 49, or 50 until the applicant has received approval from the USACE. If the proposed activity requires a written waiver to exceed specified limits of NWPs 13, 29, 36, 39, 40, 42, and 43 the applicant cannot begin the activity until the USACE issues the waiver.

The USACE has 30 days to review a PCN to determine if it is complete. PCNs must include:

- Name, address, telephone number;

## Complainant's Ex. 42

- Location of the proposed project;
- Description of the proposed project;
- The project's purpose;
- Direct and indirect adverse environmental effects;
- Discussion regarding potential impacts to federally listed endangered or threatened species and historic properties;
- Mitigation Plan for greater than 1/10 acre impact to wetlands that are waters of the U.S.;
- Other nationwide permits or individual permits to be used;
- Jurisdictional Determination; and
- Other permit specific items for NWP 48

**Note:** As a practical matter, mitigation should be addressed in any PCN.

See **General Recommendations for Department of the Army Submittals** and **General Recommendations for Department of the Army Permit Submittals for Utility Lines** for additional guidance.

If the PCN is not complete, the USACE can generally request the required information only once. However, if the prospective permittee does not provide all of the requested information, then the USACE will advise 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 USACE. The prospective permittee shall not begin the activity: 1) until notified in writing by the USACE that the activity may proceed under the NWP with any special conditions imposed by the USACE; or 2) if 45 calendar days have passed from the USACE's receipt of the complete PCN and the prospective permittee has not received written notice from the USACE.

If the permittee is required to notify the USACE pursuant to **general condition 18** that listed endangered or threatened species or critical habitat might be affected or in the vicinity of the project, or pursuant to **general condition 20** that the activity may have the potential to affect historic properties, the permittee may not begin the activity until receiving written notification from the USACE that 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 and/or Section 106 of the National Historic Preservation Act is completed. Also, work may not begin under NWPs 21, 49, or 50 until the permittee has received written approval from the USACE. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the USACE issues the waiver. If the USACE notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee may not begin the activity until an individual permit has been obtained.

Resource agency coordination is required for NWP activities that require a preconstruction notification to the USACE and result in the loss of greater than 1/2-acre of waters of the U.S. If resource agency coordination is required, the agencies have 10 calendar days to notify the USACE that they intend to provide comments. If an agency so notifies the USACE, then the USACE must wait an additional 15 calendar days for the comments. A signed **compliance certification** must be submitted by every permittee who has received NWP verification from the Corps. NWPs 27 and 48 have specific detailed reporting requirements.

A permittee may use more than one NWP to authorize a single and complete project, provided the acreage loss of waters of the United States does not exceed the highest specified acreage limit of the NWPs used to authorize that single and complete project. Projects must be designed and constructed to avoid and minimize adverse effects to waters of the U.S. to the maximum extent practicable at the project site. Mitigation in all forms (avoidance, minimization, and compensation) may be required to the extent necessary to ensure minimal adverse impacts on the aquatic environment.

The **current NWPs** were effective on March 19, 2012 after a public comment period.

Previous versions of NWPs:

- **1977** (Effective dates: July 19, 1977 to July 22, 1982)
- **1982** (Effective dates: July 22, 1982 to October 5, 1984)
- **1984** (Effective dates: October 5, 1984 to January 21, 1992)
- **1992** (Effective dates: January 21, 1992 to February 11, 1997)
- **1997** (Effective dates: February 11, 1997 to June 7, 2000)
- **2000** (Effective dates: June 7, 2000 to March 18, 2002)
- **2002** (Effective dates: March 18, 2002 to March 19, 2007)
- **2007** (Effective dates: March 19, 2007 to March 18, 2012)

### **Regional General Permits (RGPs)**

A Regional General Permit (RGP) is a type of general permit that is issued regionally. Regulations addressing RGPs are found at **33 CFR 322.2(f)**, **323.2(h)**, and **325.2(e)(2)**. RGPs contain provisions intended to protect the environment, including natural and cultural resources. Work that would not comply with those provisions may require authorization by individual permit. However, compliance with the conditions contained in this RGP does not guarantee authorization of the work by a

regional general permit. Work or structures that would have unacceptable impacts on the public interest are not authorized. Activities requiring Department of the Army authorization that are not specifically authorized by an RGP are prohibited unless they are authorized by nationwide or individual permit.

There are currently 3 RGPs available for use in the Fort Worth District that are intended to expedite the authorization of minor, recurring work:

Permit Name	Number	Issue Date	Expiration Date
Utility Lines and Intake and Outfall Structures	CESWF-05-RGP-2	28 Nov 2005	Expired
Boat Ramps and Minor Facilities	CESWF-09-RGP-8	26 Aug 2009	26 Aug 2014
Exploration and Production Wells	CESWF-08-RGP-11	05 Nov 2008	05 Nov 2013
Modification and Alterations of Corps of Engineers Projects	CESWF-09-RGP-12	24 Feb 2010	23 Feb 2015

The TCEQ has certified pursuant to Section 401 of the CWA and Title 30, Texas Administrative Code, Chapter 279, for the activities for which it is responsible, that activities conducted under these RGPs would not result in a violation of established Texas Water Quality Standards provided the standard provisions and General Condition 33 are followed. The LDEQ has certified pursuant to Section 401 of the CWA and LAC 33:IX.1507.A-E that the requirements for water quality certification for the State of Louisiana have been met and that placement of fill material associated with these RGPs would not violate the water quality standards of Louisiana provided for under LAC 33:IX.Chapter 11.

#### Programmatic General Permits (PGPs)

A Programmatic General Permit (PGP) is a type of general permit that is issued to avoid unnecessary duplication of regulatory control exercised by another federal, state, or local agency. With a PGP, a permit applicant generally must only apply to one agency rather than applying to both agencies for permits for the same work.

One PGP is available in the Fort Worth District. This PGP authorizes discharges of dredged and fill material into waters of the United States, **excluding** wetlands, associated with activities specifically authorized by the Lower Colorado River Authority (LCRA) in a lakewide permit during planned lake drawdowns and other events that leave lake levels 5 feet or more below the when full elevation of the lake. This PGP applies to work in areas regulated by LCRA at Lakes Travis, Marble Falls, Lyndon B. Johnson, Inks, and Buchanan in Travis, Burnet, Llano, and San Saba Counties in the State of Texas. The permit applicant must possess a valid lakewide permit from LCRA prior to the start of work. LCRA will provide a copy of this PGP with each lakewide permit issued.

Permit Name	Number	Issue Date	Expiration Date
Activities Authorized by Lower Colorado River Authority Lakewide Permits	CESWF-10-PGP-02	20 Aug 2010	20 Aug 2015





REPLY TO  
ATTENTION OF:

DEPARTMENT OF THE ARMY  
GALVESTON DISTRICT, CORPS OF ENGINEERS  
P.O. BOX 1229  
GALVESTON, TEXAS 77553-1229

MAY 08 2008

Policy Analysis Section

SUBJECT: SWG-2007-84 and SWG-2007-1014; Jurisdictional Determination Associated with Grandfathering Provisions, Orange County, Texas

Mr. Robert T. Edgar  
Parkwood Land Company  
P.O. Box 5134  
Beaumont, Texas 77726-0233

Dear Mr. Edgar:

This letter is in reference to your May 25, 2007, letter requesting that the land enclosed by an existing levee be allowed to continue (be grandfathered) with its original previously-authorized (pre-Clean Water Act) use for dredged material disposal. The project site is located northeast of the intersection of the Neches River and Interstate 10, near Rose City, Orange County, Texas.

On April 17, 2007, we verified that the eroding levee surrounding the 70+ acre site was constructed prior to the inception of Section 404 of the Federal Water Pollution Control Act (now the Clean Water Act) and as such is considered authorized (grandfathered) since it is no longer a water of the United States. This April 17 letter authorized the fill into the waters associated with the repair of this levee pursuant to Nationwide Permit No. 3 (Maintenance), with conditions. Our July 5, 2007, letter to Mr. Henry R. Stevenson, Jr., of your company, verified that the site has approximately 71.2-acres of jurisdictional forested wetlands immediately adjacent to the Neches River, a navigable water of the United States and subject to Section 404 of the Clean Water Act. The letter also states that any discharge of dredged or fill material into this area will require a Department of the Army (DA) permit prior to the initiation of any work.

The placement of additional dredged material within the leveed area is not a maintenance activity, and as such is not authorized by Nationwide Permit No. 3. An individual DA permit is required prior to the discharge of any dredged or fill material into the area. To facilitate obtaining the necessary permit, an application form and instruction sheets, with sample project plans, are enclosed. These materials outline the required submittals to our office and are provided for your use.

5/17/08  
SLOAN/jw/3962  
CESWG-PE-RB

-2-

5/17  
JAMES  
PETERS

If you have any questions regarding this matter, please contact Regulatory Project Manager Denise Sloan at the letterhead address or at 409-766-3962.

Sincerely,

JORDAN  
OC  
7/11/08

Casey Cutler  
Chief, Policy Analysis Section

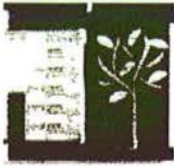
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Enclosures

Copy Furnished:

CESWG-PE-RC

OCT 13 2006



**Parkwood Land Company**

October 11, 2006

Mr. John Davidson  
North Compliance Unit Leader  
U.S. Army Corps of Engineers  
Galveston District  
2000 Fort Point Road  
Galveston, Texas 77550

Re: Request for a Jurisdictional Determination &  
Verification of a Delineation of Waters of the United  
States on a +- 79-Acre Tract Near Rose City,  
Orange County, Texas

Dear Mr. Davidson:

Please review this report mentioned above provided to Parkwood Land Company from GTI Environmental, Inc. We believe the property within the levy system fits the guidelines of no-jurisdiction by your entity. Due to on-going erosion, there exists the near-term potential that the Neches River will breach the perimeter levee, rapidly draining the interior of the tract and we hope to repair this portion of levee along the Neches as soon as possible to prevent this action.

If you need additional information, please give me a call at 1-409-781-3422. I will await hearing from you. Thanking you in advance for your cooperation to this matter.

Regards,

  
Henry R. Stevenson, Jr.  
Partner: Parkwood Land Company  
2085 Galway  
Vidor, Texas 77662-2954  
e-mail: [hstevenson@parkwoodland.com](mailto:hstevenson@parkwoodland.com)  
Home: 1-409-783-0940



OCT 13 2006



**GTI Environmental, Inc.**  
Environmental Consultants

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September 9, 2006

Mr. John Davidson  
North Compliance Unit Leader  
U.S. Army Corps of Engineers  
Galveston District  
2000 Fort Point Road  
Galveston, Texas 77550

Re: Request for a Jurisdictional Determination and Verification of a  
Delineation of Waters of the United States on a ± 79-Acre Tract near  
Rose City, Orange County, Texas

Dear Mr. Davidson:

Parkwood Land Company is submitting the enclosed Identification and Delineation of Waters of the United States on the subject tract to obtain a Jurisdictional Determination and Verification.

Please contact me should you require any additional information, or clarification of the information presented.

Thank you for your assistance.

Sincerely,

GTI ENVIRONMENTAL, INC.

James G. White  
Director - Ecology and Planning Division  
GTI Environmental, Inc.

Enc.

JGW:jgw

*Bo Mac*  
*Permit # 21497*  
*- wants to fill cut*  
*in levee from*  
*permit*

**IDENTIFICATION AND DELINEATION  
OF  
WATERS OF THE UNITED STATES**

**On A  
79-Acre Tract Within  
A 356-Acre Tract  
Orange County, Texas**

**October 2006**

**Prepared for  
Parkwood Land Company**



**GTI Environmental, Inc.**  
Environmental Consultants

OCT 13 2006



**GTI Environmental, Inc.**  
Environmental Consultants

---

October 9, 2006

Mr. Sonny R. Stevenson Jr.  
Parkwood Land Company  
2085 Galway  
Vidor, Texas 77662

Re: Identification and Delineation of a  $\pm$  79-Acre Tract on the  
Neches River located in Orange County, Texas

Dear Mr. Stevenson:

Pursuant to your request, GTI Environmental, Inc. (GTI) conducted an identification and delineation of waters of the United States within a  $\pm$  79-acre tract. Site visits were conducted on September 5 and 8, 2006 to conduct field investigations, collect required field data and GPS-map potential jurisdictional wetlands and other Waters. The investigation was conducted for the purpose of determining the existence and approximate extent, if any, of waters of the United States (jurisdictional waters), including wetlands, within the  $\pm$  79-acre tract, which would be subject to regulation under Section 404 of the Clean Water Act. The following is the summary of findings.

Located approximately 0.1 mile east of Beaumont, Texas, in the northeast quadrant of the intersection of IH-10 and the Neches River, the subject tract is situated on a nearly level landscape position. The site is bordered to the north, east, and west by the Neches River and its relict channels and to the south by IH-10. The southeastern portion of the tract is bordered by a tract owned by APAC construction company (Exhibit 13). Primary access to the site is from IH-10.

DATA COLLECTION

Site investigation involved the identification and delineation of waters of the United States, including wetlands, which are subject to the jurisdiction of the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act. Procedures used to identify potential jurisdictional wetlands followed the routine determination methodology established in the

GTI Environmental, Inc.

Mr. Sonny R. Stevenson, Jr.  
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*Corps of Engineers Wetlands Delineation Manual* (Technical Report Y-87-1) published in 1987 by the U.S. Army Corps of Engineers Waterways Experiment Station. Information reviewed prior to the site visit included the U.S. Department of Agriculture, Natural Resources Conservation Service (formerly the Soil Conservation Service) *Soil Survey--Orange County, Texas* (Exhibit 15); the U.S. Geological Survey, Beaumont East, Texas 7.5 minute quadrangle topographic maps (Exhibits 2-7); the U.S. Department of the Interior, National Wetlands Inventory Map (Exhibit 17); the Federal Emergency Management Agency, National Flood Insurance Program Map, Orange County, Texas, 1998 (Exhibit 16); and historic to recent (mid-1940's to 2004) black and white and color infrared aerial photographs.

The wetland boundary was determined through correlation of on-site observations and aerial photo interpretation regarding hydrophytic vegetation, indicators of wetland hydrology, and the presence of hydric soils within sampling points. Seven soil stations were investigated and evaluated. Potentially jurisdictional wetland boundaries were mapped with high-accuracy, corrected Global Positioning System (GPS) survey methods using a Trimble GeoXT GPS receiver and post-processed to sub-meter accuracy. GPS coordinates were logged and downloaded into ArcView™ Geographic Information System (GIS) software for constructing maps of delineated features.

SITE DESCRIPTION

At some point during the past (in the early 1900's), an unknown government agency (research to date indicates possibly either TxDOT or the USACE) constructed a 13+-foot levee around the entire tract and the adjoining tract to the east currently owned by APAC (Exhibits 2-7). The levee was still present and continuous during GTI's field investigations. This area was to be used as a settling pond for dredge material removed from the Neches River and its oxbows (Appendix B). Following levee construction, nearby Neches River ox-bows were dredged to

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provide fill material for US Highway 90 improvements and the construction of the IH-10 road bed. It is unknown how much dredge material was deposited within the subject tract. However, near the southwest corner of the tract it is apparent that spoil soils and construction debris was deposited decades ago. Dredged spoil appears to have been the basis for the existing APAC property as well.

The levee appears to have been constructed by digging a "moat" channel around the tract and depositing the spoil just inside the property from the new channel. These construction methods resulted in a protective barrier island along the entire perimeter. Being constructed approximately 13+ feet higher in elevation than the OHWM of the Neches River the levee acts as a retaining wall for storm water such that the water level within the levee can be 2-3 feet higher than the water level of the Neches River. Over time, river currents and wind generated wave action have caused erosion through the barrier islands and into the levee along portions of the northern and western perimeters. However, there remains a continuous non-wetland boundary between the interior and waters of the Neches River, it's oxbows and the moat channel.

Due to on-going erosion, there exists the near-term potential that the Neches River will breach the perimeter levee, rapidly draining the interior of the tract. Should this occur, existing barge traffic could be disrupted by spontaneous and unrecorded currents and by potential, localized temporary and/or permanent sedimentation of the river channel in the area of the breach, depending on the amount of storm water within the levee at the time of breach.

Two man-made relief areas have been cut into the levee system to allow storm water to sheet flow into the moat channel. It is unknown when the primary relief cut was made. The primary cut has yaupon (*Ilex vomitoria*) growing across it and would allow sheet flows to drain to the moat channel behind a barrier island near the southeastern corner of the tract. The second cut

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was made within the last few years as evidenced by exposed tree roots and near vertical walls within the cut. The second cut is approximately 485 feet east of the first cut and would also drain to the moat channel. Loblolly pine (*Pinus taeda*), sweetgum (*Liquidambar styraciflua*), yaupon and Chinese tallow (*Sapium sebiferum*) are the primary perennial species that have begun to develop within the second cut.

Due to the levee acting as a retaining wall wetlands have developed on the site. The 1943 historical aerial photograph depicts a much more densely wooded interior than what is found at present, suggesting that the site supported a drier plant community prior to levee construction. USGS maps dating back to 1932 depict areas in and around the subject tract both with the swamp symbol and without, further providing the possibility that drier conditions may have persisted prior to levee construction. Several dead snags (tree trunks) remain within the interior of the tract.

Cypress trees (*Taxodium distichum*), swamp tupelo (*Nyssa silvatica*), Drummond's rattle bush (*Sesbania drummondii*), and swamp smart-weed (*Polygonum hydropiperoides*) now dominate the central portion of the site. Vegetation along the base and up to the peak of the levee is dominated by mature loblolly pine, sweet gum, American holly (*Ilex opaca*), and yaupon.

RESULTS

In summary, previous construction activities occurring decades ago resulted in the planned placement of a spoil levee system around a then proposed spoil disposal area. Although the ± 79-acre tract maintains a non-wetland barrier along the moat channel and Neches River, physically separating the interior wetlands of the tract from navigable-in-fact Waters, areas of the levee have eroded to elevations of less than 13 feet. Without corrective measures, the levee could breach, negatively affecting existing barge traffic. While two man-made cuts in

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the levee have been made to allow excessive storm water to sheet flow across the levee to the moat channel, the presence of dead trees throughout the interior of the tract and historic USGS maps and aerial photographs indicate that the area was most likely drier prior to levee construction.

Should you have any questions regarding our findings, or if we may be of further assistance to you in any way, please do not hesitate to call.

Sincerely,

GTI ENVIRONMENTAL, INC.



James G. White  
Director  
Ecology and Planning Division

JGW:jgw

## Complainant's Ex. 45

### Summary of USACE Regulatory Files involving Henry "Sonny" Stevenson, Jr.

**SWG-0-1003365 (formally D-3365)** – Request on 11 January 1991 by Mr. Stevenson to construct an 80-acre sand pit and access road in Vidor, Orange County, Texas. USACE notified by letter dated 10 April 1991 that the sand pit did not require a DA permit and that the access road was authorized by Nationwide Permit 14 provided a culvert is installed.

**SWG-1999-00714 (formally D-10400)** – Request dated 3 May 1999 from Mr. Stevenson for a wetland delineation on a 33-acre tract in Vidor, Orange County, Texas. Mr. John Davidson of USACE delineated the wetlands on the tract, however, the wetlands were never surveyed by Mr. Stevenson as requested. Mr. Stevenson submitted a wetland delineation on the 33-acre tract conducted by Northrup Associates for verification (D-14242). Therefore, this file was closed.

**SWG-1999-00421 (formally I-3901)** – Received a report on 15 March 1999 that Mr. Stevenson discharged fill material into a wetland north of Tiger Creek and IH-10 intersection, in Vidor, Orange County, Texas. Site visits confirmed that Mr. Stevenson filled approximately 1.6 acres of bald cypress, red maple forested wetlands without a DA permit in violation of Section 404. Warning letter from USACE was sent to Mr. Stevenson on 7 April 1999. Stated purpose was to construct a building site and road. Mr. Stevenson was allowed to apply for an after-the-fact permit.

**SWG-1999-01342 (formally DA Permit 21790)** – Mr. Stevenson submitted an after-the-fact permit received on 15 July 1999 to resolve the Section 404 violation in SWG-1999-00421 (formally I-3901). DA Permit 21790 was issued to Mr. Henry Stevenson, Jr. on 10 April 2000 that authorized the retention of the fill in 1.58 acres of adjacent wetlands to construct a mobile home sales facility. Mr. Stevenson was required to place 7.9 acres of wetlands into a conservation easement as mitigation for the impacts.

**SWG-1999-01719 (formally 21859)** – d.p. Consulting Engineers submitted DA permit application, on behalf of Mr. Stevenson, that USACE received on 22 October 1999. Mr. Stevenson proposed to fill 0.99-acre of wetlands and construct 2 crossings of Tiger Creek to construct a hotel/convention center and to purchase 5 credits from the Neches River Cypress Swamp Preserve Mitigation Bank to compensate for the impacts. DA Permit 21859 was issued to Mr. Stevenson on 24 October 2000 as described above.

**SWG-1999-02205 [formally DA Permit 21790(01)]** – Mr. Stevenson submitted a letter dated 1 November 2000 that stated he was unable to secure the conservation easement on the 1.9 acre wetland for mitigation for DA Permit 21790. Mr. Stevenson requested to purchase 8 credits from the Neches River Cypress Swamp Mitigation Bank instead of placing to conservation easement on the 7.9 acre wetland. DA Permit 21790(01) was issued to Mr. Stevenson on 20 February 2001 and authorized the replacement of the conservation easement with the mitigation bank credit purchase.

**SWG-2001-00810 (formally DA Permit Application 22403)** - d.p. Consulting Engineers submitted DA permit application, on behalf of Mr. Stevenson, that USACE received on 24 May 2001. Mr. Stevenson proposed to fill 6.4 acres of wetlands to construct a manufactured home sales and service center located on west Freeway Boulevard in Vidor, Orange County, Texas. The permit application was withdrawn on 20 November 2001 due to Mr. Stevenson not submitting a requested response to the concerns raised during the public notice for the permit application.

**SWG-2001-01672 (formally I-4415)** – The USACE found an unauthorized discharge of fill material in adjacent wetlands on 1 November 2001 located northwest of the Tiger Creek and IH-10 intersection, near



#### Complainant's Ex. 45

Vidor, Orange County, Texas. The responsible parties were Williams Brother Construction Company and ACR, LP. Mr. Stevenson is one of parties that constitute ACR, LP. The unauthorized fill impacted 4.59 acres of adjacent wetlands at the hot mix site and 7.1 acres of adjacent wetlands at the borrow site. Both ACR, LP and Williams Brothers agreed to enter into a settlement agreement with USACE to resolve the violation. The settlement agreement required the parties to restore 7.11 acres of wetlands at the hot mix site and 5.19 acres of wetlands at the borrow site and each party pay a \$20,000 penalty. Both parties paid the penalties. The wetland restoration effort was not successful and a 19-acre preservation of bottomland hardwood wetlands was substituted for the restoration effort. The 19-acre preservation was executed on 10 August 2011. The case was closed on 22 August 2011.

**SWG-2001-00832 and SWG-2001-02326 (formally I-4345)** – USACE received a report on 6 June 2001 that Mr. Sonny Stevenson landcleared and filled floodplain along Tiger Creek near the intersection with IH-10, near Vidor, Orange County, Texas. Based on site visits, USACE determined that ACR, LP filled 1.21 acres of adjacent wetlands without a DA permit. This is the same property associated with ATF Permit 21790. ACR, LP and USACE signed a settlement agreement on 13 October 2004. The settlement agreement required ACR to purchase 5 credits from the Wetlands Mitigation Replacement of Southeast Texas, LTD and pay a \$20,000 penalty. ACR, LP met the conditions of the settlement agreement and USACE issued a Nationwide Permit 32 on 6 January 2005 to ACR, LP to retain 1.21 acres of fill in adjacent wetlands.

**SWG-2002-02477 (formally D-14242)** – Northrup Associates, by letter dated 19 December 2002 and on behalf of ACR, LP, requested a jurisdictional determination on a 33-acre tract located immediately south of the IH-10 and Tiger Creek intersection, in Vidor, Orange County, Texas. By letter dated 21 October 2003, USACE concurred with Northrup Associates delineation that the 33-acre tract contains 6.92 acres of adjacent wetlands and 1.35 acres of Tiger Creek subject to Section 404. Associated with DA Permit Application 23287.

**SWG-2002-02716 (formally DA Permit 23287)** – Northrup Associates, by letter dated 24 December 2003 and on behalf of ACR, LP, submitted a permit application to realign Tiger Creek, which would involve filling 1.35 acres of Tiger Creek and 6.84 acres of adjacent wetlands with 1.43 acres being preserved and 4.36 acres being mitigated for on-site. The project site is located on Tiger Creek, south of IH-10, in Vidor, Orange County, Texas. The purpose of the project is to develop the property for a retail store. USACE issued a permit to ACR, LP on 26 August 2005 that authorized the discharge of fill into 5.49 acres of adjacent wetlands and 1.35 acres of Tiger Creek. To compensate for the impacts, ACR, LP was required to avoid 1.43 acres of adjacent wetlands, construct 5.31 acres of wetlands on-site and purchase 28 credits at the Neches River Cypress Swamp Preserve Mitigation Bank.

**SWG-2004-01155 (formally D-16282)** – Northrup Associates, by letter dated 1 July 2004 and on behalf of ACR, LP, requested verification of a wetland delineation on a 74-acre tract located north of IH-10 and between Tiger Creek and Ten Mile Creek, north of Rose City, Orange County, Texas. By letter dated 2 August 2004, USACE concurred with Northrup Associates delineation that the 74-acre tract contains 8.5-acres of adjacent wetlands subject to Section 404.

**SWG-2004-01372 (formally D-16395)** – Northrup Associates, by letter dated 5 August 2004 and on behalf of ACR, LP, requested a jurisdictional determination on an active borrow pit located approximately 3 miles north of IH-10 in Vidor, Orange County, Texas. By letter dated 29 December 2004, USACE informed Northrup Associates that the borrow pit was not a water of the U.S. and was not subject to Section 404.

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**SWG-2004-02048 (formally D-16758)** - Northrup Associates, by letter dated 5 November 2004 and on behalf of ACR, LP, requested verification of a jurisdictional delineation on an existing 2,300-foot levee roadway located 0.2 mile north of the Bonner overpass in Vidor, Orange County, Texas. By letter dated 14 January 2005, USACE concurred with Northrup Associate's findings that the site does not contain areas subject to our jurisdiction.

**SWG-2005-00548 (formally D-17212)** – Mr. Stevenson, by letter dated 11 April 2005 and on behalf of Parkwood Land Company, requested a jurisdictional determination on a 162-acre tract located approximately 3,000 feet southeast of the SH 105 and FM 1132 (Evangeline Road) intersection, in Vidor, Orange County, Texas. The project site was reduced to 28 acres for a proposed borrow pit during the process. USACE, by letter dated 17 May 2005, informed Mr. Stevenson that the 28-acre tract does not contain waters of the U.S. and is not subject to Section 404. In that letter, we also informed Mr. Stevenson that the remaining 134 acres contains waters of the United States, specifically an unnamed tributary to Anderson Gully and adjacent wetlands, and the discharge of fill material into the waters requires a DA permit.

**SWG-2005-00787 [formally D-17212/(01)]** – Mr. Stevenson, by letter dated 26 May 2005, requested a delineation on Section 2 on Exhibit A. The tract is located within the 162-acre tract identified in SWG-2005-00548 (formally D-17212). By letter dated 8 December 2005, USACE informed Mr. Stevenson that the 23-acre tract does not contain waters of the U.S. and is not subject to Section 404.

**SWG-2005-02184 [formally D-17212/(02)]** – Mr. Stevenson, by letter dated 29 August 2005, requested a delineation on Sections 3 and 4 on Exhibit A. The two tracts are located within the 162-acre tract identified in SWG-2005-00548 (formally D-17212). Mr. Stevenson, by letter dated 19 December 2005, added a third tract to the request. By letter dated 24 February 2006, USACE informed Mr. Stevenson that the three tracts totaling 31.5 acres do not contain waters of the United States and are not subject to Section 404.

**SWG-2005-02298 [formally D-17212/(03)]** – Mr. Stevenson, by letter dated 20 April 2006 and on behalf of Parkwood Land Company, requested verification of a delineation prepared by GTI Environmental for Parkwood Land Company on a 53-acre tract located within the 162-acre tract identified in SWG-2005-00548 (formally D-17212). By letter dated 5 June 2006, USACE determined that the 53-acre tract contains 3 acres of waters of the United States, specifically, 0.85-acre of an unnamed tributary to Anderson Gully and a 2.15-acre adjacent wetland.

**SWG-2006-01949 (formally D-19144)** - Mr. Stevenson, by letter dated 11 October 2006 and on behalf of Parkwood Land Company, requested verification of a delineation prepared by GTI Environmental for Parkwood Land Company on a 79-acre tract located north of IH-10 and east of the Neches River, near Rose City, Orange County, Texas. By letter dated 19 January 2007, USACE concurred with GTI Environmental that the tract contains 71.2 acres of adjacent forested wetlands subject to Section 404.

**SWG-2007-00084 (formally D-19279)** – GTI Environmental, by letter dated 11 December 2006 and on behalf of Parkwood Land Company and Mr. Stevenson, requested a Nationwide Permit (NWP) 3 for maintenance of a levee located on a 79-acre tract located north of IH-10 and east of the Neches River, near Rose City, Orange County, Texas. By letter dated 17 April 2007, USACE issued a NWP 3 to repair the existing levee.

**SWG-2007-00084** – Mr. Stevenson of Parkwood Land Company applied for a permit received by USACE on 21 April 2009 to fill 71.22 acres of wetlands for a storing bridge discards from a TxDOT contractor and for commercial developments. Same project site as SWG-2006-01949 (formally D-19144). USACE withdrew the permit application by letter dated 24 August 2010 due to a lack of response from the applicant.

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**SWG-2007-00664** – GTI Environmental, by letter received on 12 March 2007 and on behalf of Parkwood Land Company, requested verification of a jurisdictional delineation on a 42-acre tract located near Rose City, Orange County, Texas. By letter dated 14 September 2007, USACE concurred with GTI that the 42-acre tract contains 11 acres of Baird's Bayou and 25.79 acres of adjacent wetlands and the discharge of dredged or fill material into these waters requires a DA permit.

**SWG-2007-01014** – Via e-mail on 17 May 2007, Mr. Stevenson requested a jurisdictional determination on the 79-acre tract identified in SWG-2006-01949 (formally D-19144). By letter dated 5 July 2007, USACE concurred that the tract contains 71.2 acres of adjacent forested wetlands. Mr. Stevenson of Parkwood Land Company appealed the approved jurisdictional determination to the Southwestern Division Commander on 23 July 2007. The Southwestern Division Commander, by letter dated 18 December 2007, found that the appeal did not have merit. Mr. Tim Edgar, by letter dated 9 January 2008 and on behalf of Parkwood Land Company, stated that the two cuts that were on the 79-acre tract were repaired, that the site should be outside the 100-year floodplain, and there should not be a hydrologic connection. Mr. Edgar requested a new determination. By letter dated 21 March 2008, USACE informed Mr. Edgar that wetlands separated from other waters of the U.S. by man-made dikes or barriers are adjacent and that our original determination remains valid.

**SWG-2007-00084 and SWG-2007-01014** – By letter dated 8 May 2008, USACE informed Mr. Edgar of Parkwood Land Company that the placement of additional material within the leveed area is not maintenance and is not authorized by NWP 3.

**SWG-2007-01461** – On 9 August 2007, USACE received a report that Mr. Stevenson was clearing trees and dumping trash, broken concrete sewer pipe, and broken cement in wetlands on the northeast side of the Neches River Bridge at IH-10 near Rose City, Orange County, Texas. On 22 July 2009, USACE received a report that while conducting repair of a levee, 1,200 loads of concrete may have fallen in the river. A site visit was conducted on 3 September 2009 which confirmed an unauthorized discharge of fill material into wetlands for a truck turn around. On 6 July 2010, USACE received a report that Mr. Stevenson was using trash to repair the levee. A site visit was conducted on 22 July 2010 which confirmed unauthorized fill material on the southwest portion of the tract by the large concrete pile, at the truck turnaround approximately 600 feet north of the large concrete pile, and several locations on the north portion of the property. USACE sent Mr. Stevenson a cease and desist order on 3 August 2010 notifying him that 1.25 acres of adjacent wetlands were filled without a DA permit in violation of Section 404. USACE referred the case to the EPA by letter dated 27 October 2010.

**SWG-2008-01040** – Mr. Stevenson of Parkwood Land Company, by application received on 14 October 2008, proposed to develop a 96-acre tract, of which 71.22 acres are wetlands, for a concrete plant and commercial use. The permit application was withdrawn on 26 February 2009 due to a lack of response from the applicant.

**SWG-2008-01341** – USACE received a report that Mr. Stevenson built a road to Ross Ridge to obtain sand from a borrow pit. A site visit was conducted on 3 September 2009 which revealed there was an existing road to Ross Ridge, however, unauthorized fill material was discharged into wetlands. ACR, LP had the unauthorized fill removed from the wetland to restore the violation. USACE received, on 21 October 2009, received photos confirming satisfactory restoration of the violation. The case was closed on 28 January 2010.

**SWG-2010-00349** – Mr. Stevenson of Parkwood Land Company, by letter dated 8 April 2010, requested a jurisdictional determination on a 45.9-acre tract located north of Bigner Road and west of the Neches River, near Beaumont, Jefferson County, Texas. USACE, by letter dated 5 April 2011, notified Mr. Stevenson that the tract contains wetlands adjacent to the Neches River subject to Section 404.

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2008





**Text of 2002 Nationwide Permit General Conditions**

- 1. Navigation.** No activity may cause more than a minimal adverse effect on navigation.
- 2. Proper Maintenance.** Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.
- 3. 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.
- 4. 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. Culverts placed in streams must be installed to maintain low flow conditions.
- 5. Equipment.** Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.
- 6. 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 or tribe in its Section 401 Water Quality Certification and Coastal Zone Management Act consistency determination.
- 7. Wild and Scenic Rivers.** No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status; unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation, or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).
- 8. 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.
- 9. Water Quality.** (a) In certain states and tribal lands an individual 401 Water Quality Certification must be obtained or waived (See 33 CFR 330.4(c)).  
(b) For NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, where the state or tribal 401 certification (either generically or individually) does not require or approve water quality management measures, the permittee must provide water quality management measures that will ensure that the authorized work does not result in more than minimal degradation of water quality (or the Corps determines that compliance with state or local standards, where applicable, will ensure no more than minimal adverse effect on water quality). An important component of

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water quality management includes stormwater management that minimizes degradation of the downstream aquatic system, including water quality (refer to General Condition 21 for stormwater management requirements). Another important component of water quality management is the establishment and maintenance of vegetated buffers next to open waters, including streams (refer to General Condition 19 for vegetated buffer requirements for the NWP).

This condition is only applicable to projects that have the potential to affect water quality. While appropriate measures must be taken, in most cases it is not necessary to conduct detailed studies to identify such measures or to require monitoring.

**10. Coastal Zone Management.** In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (see 33 CFR 330.4(d)).

**11. Endangered Species.** (a) No activity is authorized under any NWP which is likely to 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 destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall not begin work on the activity until notified by the District Engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. As a result of formal or informal consultation with the FWS or NMFS the District Engineer may add species-specific regional endangered species conditions to the NWPs.

(b) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the USFWS or the NMFS, both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the USFWS and NMFS or their world wide web pages at <http://www.fws.gov/r9endspp/endspp.html> and [http://www.nfms.noaa.gov/prot\\_res/overview/es.html](http://www.nfms.noaa.gov/prot_res/overview/es.html) respectively.

**12. Historic Properties.** No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the District Engineer has complied with the provisions of 33 CFR part 325, Appendix C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic

Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

**13. Notification.** (a) Timing; where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the notification is complete within 30 days of the date of receipt and can request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the notification 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:

(1) Until 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) If notified in writing by the District or Division Engineer that an Individual Permit is required; or

(3) Unless 45 days have passed from the District Engineer's receipt of the complete notification and the prospective permittee has not received written notice from the District or Division Engineer. 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 Notification: The notification must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; 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. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP (Sketches usually clarify the project and when provided result in a quicker decision.);

(4) For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 40, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (e.g., submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

(5) For NWP 7 (Outfall Structures and Maintenance), the PCN must include information regarding the original design capacities and configurations of those areas of the facility where maintenance dredging or excavation is proposed;

(6) For NWP 14 (Linear Transportation Projects), the PCN must include a compensatory mitigation proposal to offset permanent losses of waters of the US and a statement describing how temporary losses of waters of the US will be minimized to the maximum extent practicable;

(7) For NWP 21 (Surface Coal Mining Activities), the PCN must include an Office of Surface Mining (OSM) or state-approved mitigation plan, if applicable. To be authorized by this NWP, the District Engineer must determine that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing;



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(8) For NWP 27 (Stream and Wetland Restoration Activities), the PCN must include documentation of the prior condition of the site that will be reverted by the permittee;

(9) For NWP 29 (Single-Family Housing), the PCN must also include:

(i) Any past use of this NWP by the Individual Permittee and/or the permittee's spouse;

(ii) A statement that the single-family housing activity is for a personal residence of the permittee;

(iii) A description of the entire parcel, including its size, and a delineation of wetlands.

For the purpose of this NWP, parcels of land measuring 1/4-acre or less will not require a formal on-site delineation. However, the applicant shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than 1/4-acre in size, a formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See paragraph 13(f));

(iv) A written description of all land (including, if available, legal descriptions) owned by the prospective permittee and/or the prospective permittee's spouse, within a one mile radius of the parcel, in any form of ownership (including any land owned as a partner, corporation, joint tenant, co-tenant, or as a tenant-by-the-entirety) and any land on which a purchase and sale agreement or other contract for sale or purchase has been executed;

(10) For NWP 31 (Maintenance of Existing Flood Control Facilities), the prospective permittee must either notify the District Engineer with a PCN prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

(i) Sufficient baseline information identifying the approved channel depths and configurations and existing facilities. Minor deviations are authorized, provided the approved flood control protection or drainage is not increased;

(ii) A delineation of any affected special aquatic sites, including wetlands; and,

(iii) Location of the dredged material disposal site;

(11) For NWP 33 (Temporary Construction, Access, and Dewatering), the PCN must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources;

(12) For NWPs 39, 43 and 44, the PCN must also include a written statement to the District Engineer explaining how avoidance and minimization for losses of waters of the US were achieved on the project site;

(13) For NWP 39 and NWP 42, the PCN must include a compensatory mitigation proposal to offset losses of waters of the US or justification explaining why compensatory mitigation should not be required. For discharges that cause the loss of greater than 300 linear feet of an intermittent stream bed, to be authorized, the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

(14) For NWP 40 (Agricultural Activities), the PCN must include a compensatory mitigation proposal to offset losses of waters of the US. This NWP does not authorize the relocation of greater than 300 linear-feet of existing serviceable drainage ditches constructed in non-tidal streams unless, for drainage ditches constructed in intermittent non-tidal streams, the District Engineer waives this criterion in writing, and the District Engineer has determined that the project complies with all terms and conditions of this NWP, and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;

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(15) For NWP 43 (Stormwater Management Facilities), the PCN must include, for the construction of new stormwater management facilities, a maintenance plan (in accordance with state and local requirements, if applicable) and a compensatory mitigation proposal to offset losses of waters of the US. For discharges that cause the loss of greater than 300 linear feet of an intermittent stream bed, to be authorized, the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

(16) For NWP 44 (Mining Activities), the PCN must include a description of all waters of the US adversely affected by the project, a description of measures taken to minimize adverse effects to waters of the US, a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for all aggregate mining activities in isolated waters and non-tidal wetlands adjacent to headwaters and any hard rock/mineral mining activities);

(17) For activities that may adversely affect Federally-listed endangered or threatened species, the PCN must include the name(s) of those endangered or threatened species that may be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work; and

(18) For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

(c) Form of Notification: The standard Individual Permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b) (1)-(18) of General Condition 13. A letter containing the requisite information may also be used.

(d) District Engineer's Decision: 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. The prospective permittee may submit a proposed mitigation plan with the PCN to expedite the process. The District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the District Engineer will notify the permittee and include any conditions the District Engineer deems necessary. The District Engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. 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 plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

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If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then the District Engineer will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an Individual Permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project 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 effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the US will occur until the District Engineer has approved a specific mitigation plan.

(e) Agency Coordination: 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 project's adverse environmental effects to a minimal level.

For activities requiring notification to the District Engineer that result in the loss of greater than 1/2-acre of waters of the US, the District Engineer will provide immediately (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy to the appropriate Federal or state offices (USFWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. As required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act, the District Engineer will provide a response to NMFS within 30 days of receipt of any Essential Fish Habitat conservation recommendations. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(f) Wetland Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps (For NWP 29 see paragraph (b)(9)(iii) for parcels less than (1/4-acre in size). The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

**14. Compliance Certification.** Every permittee who has received NWP verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter and will include:

- (a) A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions;
- (b) A statement that any required mitigation was completed in accordance with the permit conditions; and
- (c) The signature of the permittee certifying the completion of the work and mitigation.

**15. Use of Multiple Nationwide Permits.** The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the US authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit (e.g. 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 US for the total project cannot exceed 1/3-acre).

**16. Water Supply Intakes.** No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

**17. Shellfish Beds.** No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

**18. Suitable Material.** No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the CWA).

**19. Mitigation.** The District Engineer will consider the factors discussed below when determining the acceptability of appropriate and practicable mitigation necessary to offset adverse effects on the aquatic environment that are more than minimal.

(a) The project must be designed and constructed to avoid and minimize adverse effects to waters of the US 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) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland impacts requiring a PCN, unless the District Engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement. Consistent with National policy, the District Engineer will establish a preference for restoration of wetlands as compensatory mitigation, with preservation used only in exceptional circumstances.

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(d) Compensatory mitigation (i.e., replacement or substitution of aquatic resources for those impacted) will not be used to increase the acreage losses allowed by the acreage limits of some of the NWPs. For example, 1/4-acre of wetlands cannot be created to change a 3/4-acre loss of wetlands to a 1/2-acre loss associated with NWP 39 verification. However, 1/2-acre of created wetlands can be used to reduce the impacts of a 1/2-acre loss of wetlands to the minimum impact level in order to meet the minimal impact requirement associated with NWPs.

(e) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or upland vegetated buffers to protect open waters such as streams; and replacing losses of aquatic resource functions and values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., easements, deed restrictions) of vegetated buffers to open waters. In many cases, vegetated buffers will be the only compensatory mitigation required. Vegetated buffers should consist of native species. The width of the vegetated buffers required will address documented water quality or aquatic habitat loss concerns. Normally, the vegetated buffer will be 25 to 50 feet wide on each side of the stream, but the District Engineers may require slightly wider vegetated buffers to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the Corps will determine the appropriate compensatory mitigation (e.g., stream buffers or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where vegetated buffers are determined to be the most appropriate form of compensatory mitigation, the District Engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland impacts.

(g) Compensatory mitigation proposals submitted with the "notification" may be either conceptual or detailed. If conceptual plans are approved under the verification, then the Corps will condition the verification to require detailed plans be submitted and approved by the Corps prior to construction of the authorized activity in waters of the U.S.

(h) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases that require compensatory mitigation, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

**20. Spawning Areas.** Activities, including structures and work in navigable waters of the US or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

**21. Management of Water Flows.** To the maximum extent practicable, the activity must be designed to maintain preconstruction downstream flow conditions (e.g., location, capacity, and flow rates). Furthermore, the activity must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The

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activity must, to the maximum extent practicable, provide for retaining excess flows from the site, provide for maintaining surface flow rates from the site similar to preconstruction conditions, and provide for not increasing water flows from the project site, relocating water, or redirecting water flow beyond preconstruction conditions. Stream channelizing will be reduced to the minimal amount necessary, and the activity must, to the maximum extent practicable, reduce adverse effects such as flooding or erosion downstream and upstream of the project site, unless the activity is part of a larger system designed to manage water flows. In most cases, it will not be a requirement to conduct detailed studies and monitoring of water flow.

This condition is only applicable to projects that have the potential to affect waterflows. While appropriate measures must be taken, it is not necessary to conduct detailed studies to identify such measures or require monitoring to ensure their effectiveness. Normally, the Corps will defer to state and local authorities regarding management of water flow.

**22. Adverse Effects From Impoundments.** If the activity creates an impoundment of water, adverse effects to the aquatic system due to the acceleration of the passage of water, and/or the restricting its flow shall be minimized to the maximum extent practicable. This includes structures and work in navigable waters of the US, or discharges of dredged or fill material.

**23. Waterfowl Breeding Areas.** Activities, including structures and work in navigable waters of the US or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

**24. Removal of Temporary Fills.** Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

**25. Designated Critical Resource Waters.** Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment. The District Engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the US are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the US may be authorized by the above NWPs in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the USFWS or the NMFS has concurred in a determination of compliance with this condition.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

**26. Fills Within 100-Year Floodplains.** For purposes of this General Condition, 100-year floodplains will be identified through the existing Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps.

(a) Discharges in Floodplain; Below Headwaters. Discharges of dredged or fill material into waters of the US within the mapped 100-year floodplain, below headwaters (i.e. five cfs), resulting in permanent above-grade fills, are not authorized by NWPs 39, 40, 42, 43, and 44.

(b) Discharges in Floodway; Above Headwaters. Discharges of dredged or fill material into waters of the US within the FEMA or locally mapped floodway, resulting in permanent above-grade fills, are not authorized by NWPs 39, 40, 42, and 44.

(c) The permittee must comply with any applicable FEMA-approved state or local floodplain management requirements.

**27. Construction Period.** For activities that have not been verified by the Corps and the project was commenced or under contract to commence by the expiration date of the NWP (or modification or revocation date), the work must be completed within 12-months after such date (including any modification that affects the project).

For activities that have been verified and the project was commenced or under contract to commence within the verification period, the work must be completed by the date determined by the Corps.

For projects that have been verified by the Corps, an extension of a Corps approved completion date maybe requested. This request must be submitted at least one month before the previously approved completion date.

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### 2007 NATIONWIDE PERMIT GENERAL CONDITIONS

Note: To qualify for Nationwide Permit (NWP) authorization, the prospective permittee must comply with the following general conditions, as appropriate, 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.

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

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

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

2. Aquatic Life Movements. No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

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



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directly related to a shellfish harvesting activity authorized by NWP 4 and 48.

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

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

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

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

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

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

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

13. Removal of Temporary Fills. Temporary fills must be removed in their entirety and the affected areas returned to pre-