

TIER 3 CATEGORICAL EXCLUSION

**ARDOT JOB NUMBER 090435
FAP NUMBER NHPP-0008(46)
DRY FORK STR. & APPRS. (S)
ROUTE 21, SECTION 5
CARROLL COUNTY**

Submitted Pursuant to 42 U.S.C. 4332(2)

By the

U.S. Department of Transportation

Federal Highway Administration

And the

Arkansas Department of Transportation

October 2020

October 20, 2020
Date of Approval

Randal Looney
Randal Looney
Environmental Coordinator
Federal Highway Administration

The Environmental Division reviewed the referenced project and has determined it falls within the definition of the Tier 3 Categorical Exclusion as defined by the ARDOT/FHWA Programmatic Agreement on the processing of Categorical Exclusions. The following information is included for your review and, if acceptable, approval as the environmental documentation for this project.

The purpose of this project is to replace the Highway 21 Bridge over Dry Fork Creek in Carroll County. Total length of the project is 0.3 mile. A project location map is attached.

The existing roadway has two 11' wide paved travel lanes with 2' wide paved shoulders. The existing bridge (#03308) is a 182' x 24' structure. Existing right of way width is 80'.

Proposed improvements include two 12' wide paved travel lanes with 8' wide (2' paved) shoulders. The new bridge will be a 251' x 43' structure built 50' upstream. The proposed right of way width will be 160'. Approximately 1.8 acres of additional right of way and 0.1 acre of temporary construction easements will be required for this project. Of this additional acreage, approximately 0.9 acre of prime farmland and 0.9 acre of Farmland of Statewide Importance will be impacted. A NRCS-CPA-106 Form is attached.

Design data for this project is as follows:

Design Year	Average Daily Traffic	Percent Trucks	Design Speed
2021	2,700	12	55 mph
2041	3,400		

There are no relocations, environmental justice issues, or wetland impacts associated with this project. Field inspections found no evidence of existing underground storage tanks or hazardous waste deposits. No public involvement was held for this project.

A Phase I cultural resources survey was conducted for this project. Three previously undocumented archeological sites were identified (3CR0371, 3CR0372 and 3CR0376). Archeological testing by the ARDOT of 3CR0372 and 3CR0376 determined that they were not eligible for consideration for nomination to the National Register of Historic Places (NRHP). The State Historic Preservation

Officer (SHPO) concurred with the assessments of these sites, and no further work is warranted. Archeological testing at 3CR0371 determined that the site is eligible for inclusion in the NRHP. An MOA with a treatment plan was executed among the Federal Highway Administration, the SHPO, and the ARDOT to mitigate the adverse effect impacts to the portion of the site located within the project limits (see attached MOA). The mitigation will consist of Phase III data recovery, artifact and feature analysis, and report generation. The final report will be submitted to the SHPO for a determination of “no effect”.

Based on the ARDOT noise policy, a noise analysis is not required for this project. The bridge replacement will not involve adding capacity, substantially changing the roadway alignment, or exposing noise sensitive land uses to traffic noise sources. In compliance with federal guidelines, local authorities will not require notification.

This project has been determined to generate minimal air quality impacts for Clean Air Act criteria pollutants and has not been linked with any special mobile source air toxic (MSAT) concerns. As such, this project will not result in changes in traffic volumes, vehicle mix, basic project location, or any other factor that would cause a meaningful increase in MSAT impacts of the project from that of the no-build alternative.

The attached official species list obtained through the US Fish and Wildlife Service’s (USFWS) Information for Planning and Consultation website identified the following species as potentially occurring in the project area: gray bat (*Myotis grisescens*), northern long-eared bat (*Myotis septentrionalis*), Indiana bat (*Myotis sodalis*), Ozark big-eared bat (*Corynorhinus townsendii ingens*), Eastern Black Rail (*Laterallus jamaicensis ssp. Jamaicensis*), Red Knot (*Calidris canutus rufa*), Piping Plover (*Charadrius melodus*), and Missouri bladderpod (*Physaria filiformis*). The Missouri bladderpod is a glade species and is not known from Carroll County. The federally listed migratory bird species are known to nest around large rivers. Due to the lack of suitable habitat and distance to known occurrences, it has been determined that the project will have “no effect” on the bird species and the Missouri bladderpod.

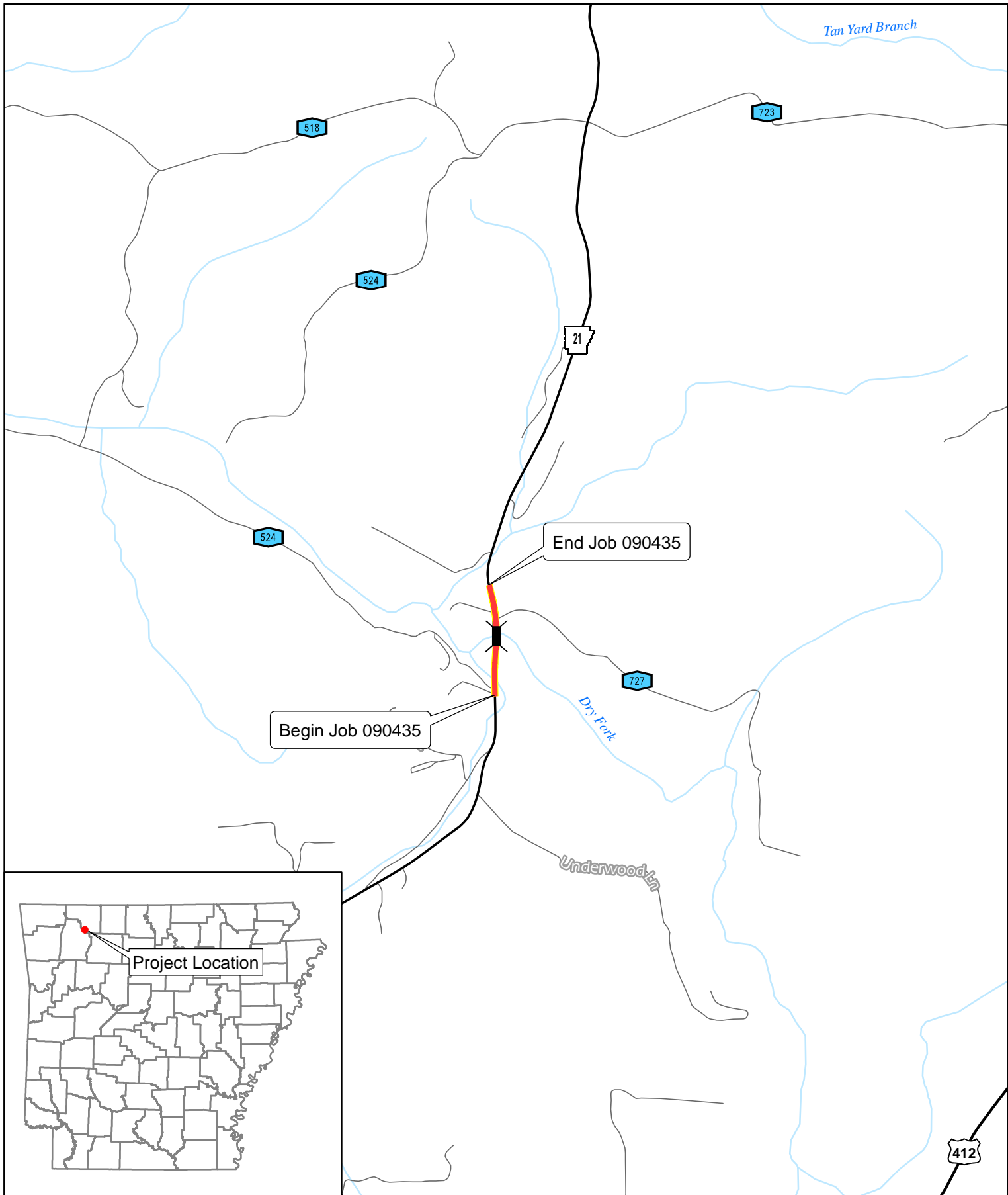
Using the FHWA Programmatic Biological Opinion for Transportation Projects within the Range of the Indiana Bat and Northern Long-eared Bat determination key, it has been determined that the project “may affect, but is not likely to adversely affect” (NLAA) the Indiana bat and the northern long-eared bat. Please see the enclosed NLAA concurrence verification letter. It has also been determined that the project “may affect, but is not likely to adversely affect” the Ozark big-eared bat and the gray bat; the USFWS concurred on June 19, 2019.

The project will have a discharge of dredged or fill material into waters of the United States associated with the bridges; therefore, a Section 404 permit will be required. The bridge construction will impact approximately 200' of Dry Fork Creek. The project should be authorized by Nationwide Permit 14 for Linear Transportation Projects as defined in Federal Register 82(4): 1860-2008.

Public drinking water wells are located in the vicinity of the project. A Wellhead Protection Special Provision will be included with the contract to minimize impacts to this resource.

Carroll County participates in the National Flood Insurance Program. The project lies within a Zone A, Special Flood Hazard Area. The final project design will be reviewed to confirm that the design is adequate and that the potential risk to life and property are minimized. Adjacent properties should not be impacted nor have a greater flood risk than existed before construction of the project. None of the encroachments will constitute a substantial floodplain encroachment or risk to property or life.

No other adverse environmental impacts were identified. The checklist used to verify consideration of potential environmental impacts is attached.



0 1,000 2,000
Feet

ARDOT - Environmental GIS - Dudley
March 13, 2020

Job 090435
Dry Fork Str. & Apprs.
(Hwy. 21)
Carroll County

Project Location



ARKANSAS HERITAGE



February 19, 2020

Mr. John Fleming
Division Head
Environmental Division
Arkansas State Highway and Transportation Department
P.O. Box 2261
Little Rock, AR 72203-2261

RE: Carroll County – General
Section 106 Review – FHWA
Dry Creek Str. and Apprs. (S)
Route 21, Sec. 5
ARDOT Job Number: 090435
AHPP Tracking Number: 105420

Dear Mr. Fleming:

The staff of the Arkansas Historic Preservation Program (AHPP) reviewed the Cultural Resources Survey (CRS) for the above-referenced job in Carroll County. As described, the undertaking entails replacing Bridge Number 0338 spanning Dry Creek. In correspondence dated June 7, 2018, the AHPP concurred that Bridge 03308 (referred to as Property 1 in the letter) is not eligible for inclusion in the National Register of Historic Places (NRHP).

A Phase I survey documented three archeological sites within the project limits: 3CR0371, 3CR0372, and 3CR0376. The AHPP concurs that based on information obtained from survey and additional testing, Site 3CR0371 is eligible for inclusion in the NRHP under Criterion D. The limits of the right-of-way (ROW) constrained the scope of the investigation. Therefore, the full extent of the site outside the ROW remains unknown. As per the Arkansas Department of Transportation (ARDOT) recommendation, the AHPP concurs with avoidance. If avoidance is not possible, we agree with resolving adverse effects through data recovery or another means of mitigation derived through consultation.

Similarly, ARDOT recommends the portion of Site 3CR0372 within the ROW is not eligible for inclusion in the NRHP. The AHPP does not concur with the practice of making differential NRHP determinations for portions of a site. The AHPP will concur that based on the results of the investigation, Site 3CR0372 is undetermined for NRHP eligibility, but that the undertaking within the ROW will not cause effects to the site.

The AHPP agrees that based on the results of the investigation, the portion of Site 3CR0376 within the ROW does not meet the criteria for inclusion in the NRHP. However, as noted in the report, project constraints did not allow for delineation of the site outside the ROW. Therefore, the AHPP will concur that Site 3CR0376 is undetermined for NRHP eligibility, but that the undertaking within the ROW will not cause effects to the site.


To summarize, the AHPP will concur with the following determinations: Site 3CE0371 is eligible for the NRHP. Sites 3CR0371 and 3CR0376 are undetermined for NRHP eligibility.

For the portions of the project not within the established boundaries of Site 3CR0371 within the ROW, the AHPP concurs with a finding of **no historic properties affected pursuant to 36 CFR § 800.4(d)(1)**. The AHPP also concurs with the proposed avoidance or mitigation of Site 3CR0371. In the event of a post-review discovery of historic properties within the area of potential effects, please contact the AHPP and other consulting parties in accordance with 36 CFR § 800.13(b)(3).

Tribes that have expressed an interest in the area include the Cherokee Nation (Ms. Elizabeth Toombs), the Delaware Nation (Ms. Nekole Alligood), the Osage Nation (Dr. Andrea Hunter), and the Shawnee Tribe (Ms. Tonya Tipton). We recommend consultation in accordance with 36 CFR § 800.2(c)(2).

Thank you for the opportunity to review this thorough CRS and undertaking. Please refer to the AHPP Tracking Number listed above in all correspondence. If you have any questions, please call Eric Mills of my staff at 501-324-9784 or email eric.mills@arkansas.gov.

Sincerely,



Scott Kaufman
Director, AHPP

cc: Ms. Elizabeth Toombs, Cherokee Nation
Ms. Nekole Alligood, Delaware Nation
Dr. Andrea Hunter, Osage Nation
Ms. Tonya Tipton, Shawnee Tribe
Mr. Randall Looney, Federal Highway Administration
Dr. Ann Early, Arkansas Archeological Survey

FARMLAND CONVERSION IMPACT RATING FOR CORRIDOR TYPE PROJECTS

PART I (To be completed by Federal Agency) Job 090435		3. Date of Land Evaluation Request		4. Sheet 1 of _____	
1. Name of Project		5. Federal Agency Involved			
2. Type of Project		6. County and State			
PART II (To be completed by NRCS)		1. Date Request Received by NRCS		2. Person Completing Form	
3. Does the corridor contain prime, unique statewide or local important farmland? (If no, the FPPA does not apply - Do not complete additional parts of this form). YES <input type="checkbox"/> NO <input type="checkbox"/>		4. Acres Irrigated		Average Farm Size	
5. Major Crop(s)	6. Farmable Land in Government Jurisdiction Acres: _____ %		7. Amount of Farmland As Defined in FPPA Acres: _____ %		
8. Name Of Land Evaluation System Used	9. Name of Local Site Assessment System		10. Date Land Evaluation Returned by NRCS		
PART III (To be completed by Federal Agency)		Alternative Corridor For Segment			
		Corridor A	Corridor B	Corridor C	Corridor D
A. Total Acres To Be Converted Directly					
B. Total Acres To Be Converted Indirectly, Or To Receive Services					
C. Total Acres In Corridor					
PART IV (To be completed by NRCS) Land Evaluation Information					
A. Total Acres Prime And Unique Farmland					
B. Total Acres Statewide And Local Important Farmland					
C. Percentage Of Farmland in County Or Local Govt. Unit To Be Converted					
D. Percentage Of Farmland in Govt. Jurisdiction With Same Or Higher Relative Value					
PART V (To be completed by NRCS) Land Evaluation Information Criterion Relative value of Farmland to Be Serviced or Converted (Scale of 0 - 100 Points)					
PART VI (To be completed by Federal Agency) Corridor Assessment Criteria (These criteria are explained in 7 CFR 658.5(c))		Maximum Points			
1. Area in Nonurban Use		15			
2. Perimeter in Nonurban Use		10			
3. Percent Of Corridor Being Farmed		20			
4. Protection Provided By State And Local Government		20			
5. Size of Present Farm Unit Compared To Average		10			
6. Creation Of Nonfarmable Farmland		25			
7. Availability Of Farm Support Services		5			
8. On-Farm Investments		20			
9. Effects Of Conversion On Farm Support Services		25			
10. Compatibility With Existing Agricultural Use		10			
TOTAL CORRIDOR ASSESSMENT POINTS		160			
PART VII (To be completed by Federal Agency)					
Relative Value Of Farmland (From Part V)		100			
Total Corridor Assessment (From Part VI above or a local site assessment)		160			
TOTAL POINTS (Total of above 2 lines)		260			
1. Corridor Selected:	2. Total Acres of Farmlands to be Converted by Project:	3. Date Of Selection:	4. Was A Local Site Assessment Used? YES <input type="checkbox"/> NO <input type="checkbox"/>		
5. Reason For Selection:					

Signature of Person Completing this Part:

DATE

Joshua Graham

NOTE: Complete a form for each segment with more than one Alternate Corridor



ARKANSAS DEPARTMENT OF TRANSPORTATION

ArDOT.gov | IDriveArkansas.com | Lorie H. Tudor, P.E., Director

ENVIRONMENTAL DIVISION

10324 Interstate 30 | P.O. Box 2261 | Little Rock, AR 72203-2261 | Phone: 501.569.2281 | Fax: 501.569.2009

August 5, 2020

Secretary Stacy Hurst
Arkansas Historic Preservation Program
1100 North Street
Little Rock, Arkansas 72201

RE: Job Number 090435
Dry Fork Str. & Apprs. (S)
Route 21, Section 5
Carroll County

Dear Secretary Hurst:

Enclosed is the executed Memorandum of Agreement (MOA) regarding the treatment of the archeological site, 3CR371 in Carroll County for your office's records. If you have any questions or need additional information, contact Kristina Boykin of my staff at (501) 569-2079.

Sincerely,

A handwritten signature in blue ink, appearing to read 'John Fleming'.

for John Fleming
Division Head
Environmental Division

Enclosure
MOA

JF:KB:cb

**MEMORANDUM OF AGREEMENT
AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE ARKANSAS STATE HISTORIC PRESERVATION OFFICER, AND
THE ARKANSAS DEPARTMENT OF TRANSPORTATION,
REGARDING
ARDOT JOB NUMBER 090435
DRY FORK STR. & APPRS. (S)
CARROLL COUNTY, ARKANSAS
SITE 3CR371**

WHEREAS, the Federal Highway Administration (FHWA) and the Arkansas Department of Transportation (ARDOT) plan to carry out Job Number 090435, which is a federal undertaking as defined under 36 CFR § 800.16(y); and

WHEREAS, the undertaking consists of replacing ARDOT Bridge Number 03308 that spans Dry Fork Creek on Highway 21 in Carroll County in order to improve safety and the transportation needs of the area; and

WHEREAS, the FHWA has defined the undertaking's area of potential effect as the proposed right-of-way acquired for the construction of the new bridge; and

WHEREAS, the Arkansas FHWA Division Administrator is the "Agency Official" responsible for ensuring that the Program in Arkansas complies with Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA) (54 U.S.C. § 306108), and codified in its implementing regulations, 36 *Code of Federal Regulations* (CFR) Part 800, as amended; and

WHEREAS, ARDOT administers Federal-aid projects throughout Arkansas as authorized by Title 23 U.S.C 302; and

WHEREAS, the responsibilities of the Arkansas State Historic Preservation Officer (SHPO) under Section 106 of the NHPA and 36 CFR Part 800 are to advise, assist, review, and consult with federal agencies as they carry out their historic preservation responsibilities; and

WHEREAS, the ARDOT has determined that the proposed undertaking will have an adverse effect on an archeological site (3CR371), which is eligible for listing in the National Register of Historic Places (NRHP); and

WHEREAS, the ARDOT and the SHPO have determined that 3CR371 is eligible under Criterion D (research potential) and that the successful implementation and completion of Appendix A, the attached treatment plan, will resolve the adverse effect finding through data recovery; and,

WHEREAS, FHWA has consulted with the Caddo Nation, the Osage Nation, Quapaw Nation, Cherokee Nation, and the United Keetoowah Band of Cherokee Indians, regarding the effects of the undertaking on historic properties of religious or cultural significance under job 090502; and

WHEREAS, in accordance with 36 CFR § 800.6(a)(1), FHWA has notified the Advisory Council on Historic Preservation (ACHP) of its adverse effect determination with specified documentation, and the ACHP has chosen *not* to participate in the consultation pursuant to 36 CFR § 800.6(a)(1)(iii); and

WHEREAS, the definitions set forth in 36 CFR Part 800 are applicable throughout this MOA;

NOW, THEREFORE, FHWA, SHPO, and ARDOT agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on the historic property.

STIPULATIONS

The FHWA, through ARDOT, will ensure that the following measures are carried out.

I. MITIGATION OF ADVERSE EFFECT TO THE HISTORIC PROPERTY: (Site 3CR371)

- A. The ARDOT will ensure that all stages of the field investigation, laboratory work, analysis, and report preparation comply with the *Secretary of the Interior's "Standards and Guidelines for Archeology and Historic Preservation" (48FR44716)* and those standards set forth in Appendix B of the State Plan (Early et al. 2010).
- B. The ARDOT will ensure that the selected contractor implements all provisions, stipulations, techniques, methods, analyses, interpretation, and documentation called for in the attached Treatment Plan (Appendix A).

- C. The ARDOT will ensure that the excavation site boundaries and GPS coordinates shall be determined and recorded. Statements regarding the potential significance of any site remnants not removed during data recovery will be included in the final report and added to the site files to ensure that any future projects that may affect the sites can be properly addressed. Sensitive locational data that would divulge the specific location of the sites or any remaining features will not be included in the final report; however, will be made available only to those parties specified below in Stipulation I.F.
- D. The ARDOT, in consultation with the SHPO, will ensure that all artifact collections (prehistoric ceramics and lithics, and historic artifacts) and their supporting documentation are curated at the University of Arkansas Collections Facility (UACF) in Fayetteville, Arkansas. If necessary, any human remains or grave goods may be curated together along with the site collections at UACF until determination of proper custody and disposition. All collections and documents will meet the Curation Standards set forth in 36 CFR Part 79 and in Appendix B of the State Plan (Early et al. 2010). Human remains and funerary objects or other items from sacred contexts may be exempt from such standards.
- E. The ARDOT will ensure that regular progress reports and copies of the final report are provided to the signatories.
- F. Precise location data will only be provided to the ARDOT, the SHPO, and the Arkansas Archeological Survey in a separate attachment to the report and shall otherwise be withheld from disclosure pursuant to Section 304 of the NHPA, Executive Order 13007 and other applicable authorities.

II. HUMAN REMAINS

Human remains are not expected to be discovered on this undertaking; however, if they are encountered during implementation of the project, all activity in the vicinity of the discovery shall cease. The treatment of human remains shall follow the guidelines developed for the *Arkansas Burial Law* (Act 753 of 1991, as amended) and the ACHP's *Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects* published February 23, 2007. As such a permit will be obtained from the AHPP prior to the excavation of any remains.

- A. If human remains are discovered, whether during archeological investigations or project construction, the applicant will temporarily suspend all activities in the area that could disturb the remains or any grave associated objects ("burial furniture"). The remains will be left as found, covered, and reasonable measures will be made to safeguard the find until the proper authorities can be identified.
- B. The ARDOT shall immediately contact SHPO and the appropriate law enforcement agency as required in Arkansas law.
- C. If law enforcement determines that the find is not a crime scene, the ARDOT, SHPO, federally recognized Indian tribe (as appropriate), and other interested parties will consult as per the guidelines of the Arkansas burial law (Act 753 of 1991, as amended) and the Advisory Council on Historic Preservation's "Policy Statement Regarding the Treatment of Burial Sites, Human Remains, and Funerary Objects" published February 23, 2007.

III. PROFESSIONAL QUALIFICATION STANDARDS

The FHWA shall ensure that all archeological investigations and other historic preservation activities to this MOA are carried out by, or under the direct supervision of, a person or persons meeting the appropriate qualifications set forth in the Secretary of the Interior's professional qualification standards (48 CFR 44739). In addition, both the Principal Investigator and any supervising archeologists will meet the professional qualification requirements for certification in the Register of Professional Archaeologists and follow the *Code of Conduct and Standards for Research and Performance*.

IV. POST-REVIEW DISCOVERY SITUATIONS

Pursuant to 36 CFR Part 800.13, if cultural material is discovered during implementation of the project, the FHWA shall ensure that all construction activities cease in the area of the discovery and the consulting parties are notified. The FHWA, in consultation with SHPO, shall determine if the discovery is eligible for inclusion in the NRHP, unless it is a continuation of site 3CR0371. Then, it will be assumed eligible and may warrant further analysis and consideration of effects in consultation with SHPO. If the discovery is not associated with site 3CR0371 and is considered eligible, the FHWA and the ARDOT will develop a treatment plan for the historic property,

which shall be reviewed by SHPO. Disputes arising from such review shall be resolved in accordance with Stipulation V.

V. DISPUTE RESOLUTION

Should the SHPO or any consulting party object within thirty (30) calendar days to any findings, proposed actions or determinations made pursuant to this MOA, the FHWA shall consult with the objecting party to resolve the objection. If the FHWA determines that the objection cannot be resolved, it shall request further comments from ACHP pursuant to 36 CFR Part 800.7. Any ACHP comment provided in response to such a request shall be taken into account by the FHWA in accordance with 36 CFR 800.7 with reference only to the subject of the dispute; the FHWA responsibility to carry out all actions under this MOA that are not subject to dispute shall remain unchanged.

VI. MONITORING

The consulting parties or one or more parties in cooperation may monitor the undertaking and stipulations carried out pursuant to this MOA.

VII. AMENDMENTS

Should any of the signatories to this MOA believe that the terms of this MOA are not being met or cannot be met, that party shall immediately notify the other signatories and request consultation to amend this MOA in accordance with 36 CFR Part 800. The process to amend this MOA shall be conducted in a manner similar to that leading to the execution of this MOA.

VIII. TERMINATION

Any signatory to this MOA may terminate it by providing a thirty (30) calendar days-notice to the other parties provided that the parties shall consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination of this MOA. In the event of termination, the FHWA shall comply with 36 CFR Part 800.4 through 800.6 with regard to the undertaking covered by this MOA.

IX. DURATION

This MOA will expire if its terms are not carried out within five (5) years from the date of its execution. Prior to such time, the FHWA may consult with the

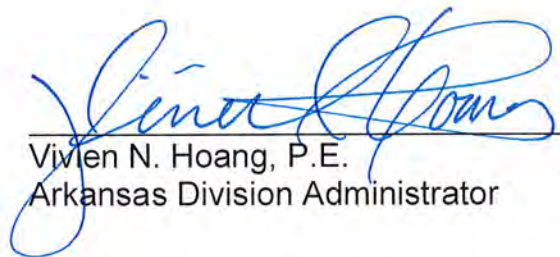
other signatories to reconsider the terms of the MOA and amend it in accordance with Stipulation VII.

X. FULFILLMENT OF SECTION 106 RESPONSIBILITIES

Execution of this MOA and treatment plan and implementation of its terms evidences that the FHWA has taken into account the effect of the undertaking on archeological site 3CR371 and has fulfilled its Section 106 responsibilities under the NHPA of 1966, as amended.

Signatory

FEDERAL HIGHWAY ADMINISTRATION

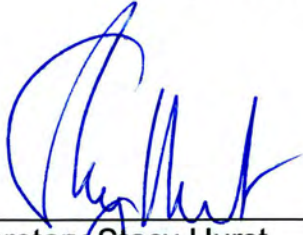


Vivien N. Hoang, P.E.
Arkansas Division Administrator

8/5/2020
Date

Signatory

ARKANSAS STATE HISTORIC PRESERVATION OFFICER




Secretary Stacy Hurst
Arkansas State Historic Preservation Officer

6-10-20

Date

Signatory

ARKANSAS DEPARTMENT OF TRANSPORTATION



Lorie H. Tudor, P.E.
Director



7-14-2020

Date



IN REPLY REFER TO:

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Arkansas Ecological Service Field Office
110 South Amity Road, Suite 300
Conway, Arkansas 72032



June 19, 2019

Mr. John Fleming
c/o Mickey Matthews
Arkansas Department of Transportation
10324 Interstate 30
Little Rock, Arkansas 72209

Consultation Code: 04ER1000-2019-I-0996

Dear Mr. Fleming:

Thank you for your email of June 12, 2019. The U.S. Fish and Wildlife Service (Service) is responding to your request, regarding Job Number 090502(b) Dry Fork Creek Strs. & Apprs. (S), Carroll County, Arkansas. The project was described and assessed as follows (abbreviated and summarized):

Dry Fork (Carroll County) affected species: Gray Bat (*Myotis grisescens*), Northern Long-eared Bat (*Myotis septentrionalis*), Indiana Bat (*Myotis sodalis*), Ozark Big-eared Bat (*Corynorhinus townsendii ingens*), Rabbitsfoot (*Theliderma cylindrica*), and Missouri Bladderpod (*Physaria filiformis*). The nearest site of Rabbitsfoot is over 20 miles downstream in the lower Kings River. Missouri Bladderpod is glade species not known to exist in this county.

FHWA, FRA, FTA Programmatic Biological Opinion for Transportation Projects within the Range of the Indiana Bat and Northern Long-eared Bat (PBO) determination key within IPaC provided not likely to adversely affect concurrence letter for the site. AMM's will be applied to the site of the job and is seeking concurrence with the determination of not likely to adversely affect Ozark Big-eared Bat and Gray Bat.

The Service has reviewed your determination that the proposed action will not result in any prohibited incidental take for Northern Long-eared Bat. This project may affect the Northern Long-eared Bat; however, there are no effects beyond those previously disclosed in the Service's programmatic biological opinion for the final 4(d) rule dated January 5, 2016. Any taking that may occur incidental to this project is not prohibited under the final 4(d) rule (50 CFR§17.40(o)).

This project is consistent with the description of the proposed action in the programmatic biological opinion, and the 4(d) rule does not prohibit incidental take of the Northern Long-eared Bat that may occur as a result of this project. Therefore, the programmatic biological opinion satisfies the "action agency" responsibilities under ESA section 7(a)(2) relative to the Northern Long-eared Bat for this project.

Please keep in mind that you must report any departures from the plans submitted; results of any surveys conducted; or any dead, injured, or sick Northern Long-eared Bats that are found to this office. If this project is not completed within one year of this letter, you must update your determination and resubmit the required information.

The Service has received your concurrence verification letter and request to verify that the Proposed Action may rely on the concurrence provided in the revised February 5, 2018, FHWA, FRA, FTA Programmatic Biological Opinion for Transportation Projects within the Range of the Indiana Bat and Northern Long-eared Bat (PBO) to satisfy requirements under Section 7(a)(2) of the

Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C 1531 et seq.). As previously stated, the 4(d) rule was applied for Northern Long-eared Bat and all further discussion related to the PBO will pertain to only Indiana Bat.

Based on the information you provided, you have determined that the Proposed Action is within the scope and adheres to the criteria of the PBO, including the adoption of applicable avoidance and minimization measures, may affect, but is not likely to adversely affect (NLAA) the endangered Indiana Bat.

The Service concurs that this action may rely on the PBO. Furthermore, due to the limited extent of clearing for the construction of a new bridge adjacent to the existing bridge and right-of-way, distance to known species locations or hibernacula, time of year clearing restriction, and the standard provisions for stream sediment control and water quality conservation measures, the Service agrees with your assessment and "not likely to adversely affect" determinations for Gray Bat and Ozark Big-eared Bat, along with the determination for Indiana Bat under the PBO. The Service also agrees with your assessment for all other species identified. No further consultation is necessary at this time.

If the Proposed Action is modified, or new information reveals that it may affect the Indiana Bat and/or Northern Long-eared Bat in a manner or to an extent not considered in the PBO, further review to conclude the requirements of ESA Section 7(a)(2) may be required. If the Proposed Action may affect any other federally-listed or proposed species, and/or any designated critical habitat, additional consultation is required. If the proposed action has the potential to take Bald or Golden Eagles, additional coordination with the Service under the Bald and Golden Eagle Protection Act may also be required. In either of these circumstances, please contact this Service Office.

For further assistance or if you have any questions, please contact Lindsey Lewis at (501) 513-4489 or lindsey_lewis@fws.gov.

Sincerely,



Melvin L. Tobin
Field Supervisor

cc: Project File
Read File

Filename: C:\Users\lilewis\Documents\PROJECTS\FY2019\ARDOT\090502(b) Dry Fork\Comments-ArDOT Job Number 090502(b) Dry Fork Creek Strs. & Apprs. (S).docx



United States Department of the Interior



FISH AND WILDLIFE SERVICE
Arkansas Ecological Services Field Office
110 South Amity Suite 300
Conway, AR 72032-8975
Phone: (501) 513-4470 Fax: (501) 513-4480
<http://www.fws.gov/arkansas-es>

In Reply Refer To:

February 20, 2020

Consultation Code: 04ER1000-2019-SLI-0996

Event Code: 04ER1000-2020-E-01308

Project Name: 090502 -Dry Fork, Little Sugar & Piney Creeks Strs. & Apprs. (S) - Dry Fork

Subject: Updated list of threatened and endangered species that may occur in your proposed project location, and/or may be affected by your proposed project

To Whom It May Concern:

The enclosed species list identifies endangered, threatened, proposed, and candidate species, as well as proposed and final designated critical habitat, that may occur within the boundary of your proposed project and/or may be affected by your proposed project. The species list fulfills the requirements of the U.S. Fish and Wildlife Service (Service) under section 7(c) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*). **This letter only provides an official species list and technical assistance; if you determine that listed species and/or designated critical habitat may be affected in any way by the proposed project, even if the effect is wholly beneficial, consultation with the Service will be necessary.**

If you determine that this project will have no effect on listed species and their habitat in any way, then you have completed Section 7 consultation with the Service and may use this letter in your project file or application.

The purpose of the Act is to provide a means whereby threatened and endangered species and the ecosystems upon which they depend may be conserved. Under sections 7(a)(1) and 7(a)(2) of the Act and its implementing regulations (50 CFR 402 *et seq.*), federal agencies are required to utilize their authorities to carry out programs for the conservation of threatened and endangered species and to determine whether projects may affect threatened and endangered species and/or designated critical habitat. More information on the regulations and procedures for section 7 consultation, including the role of permit or license applicants, can be found on our website.

Please visit our website at <http://www.fws.gov/arkansas-es/IPaC/home.html> for species-specific guidance to avoid and minimize adverse effects to federally endangered,

threatened, proposed, and candidate species. Our web site also contains additional information on species life history and habitat requirements that may be useful in project planning.

If your project involves in-stream construction activities, oil and natural gas infrastructure, road construction, transmission lines, or communication towers, please review our project specific guidance at <http://www.fws.gov/arkansas-es/IPaC/ProjSpec.html>.

The karst region of Arkansas is a unique region that covers the **northern third of Arkansas** and we have specific guidance to conserve sensitive cave-obligate and bat species. **Please visit <http://www.fws.gov/arkansas-es/IPaC/Karst.html> to determine if your project occurs in the karst region and to view karst specific-guidance.** Proper implementation and maintenance of best management practices specified in these guidance documents is necessary to avoid adverse effects to federally protected species and often avoids the more lengthy formal consultation process.

If your species list includes any mussels, Northern Long-eared Bat, Indiana Bat, Yellowcheek Darter, Red-cockaded Woodpecker, or American Burying Beetle, your project may require a presence/absence and/or habitat survey prior to commencing project activities. Please check the appropriate species-specific guidance on our website to determine if your project requires a survey. We strongly recommend that you contact the appropriate staff species lead biologist (see office directory or species page) prior to conducting presence/absence surveys to ensure the appropriate level of effort and methodology.

Under the ESA, it is the responsibility of the Federal action agency or its designated representative to determine if a proposed action "may affect" endangered, threatened, or proposed species, or designated critical habitat, and if so, to consult with the Service further. Similarly, it is the responsibility of the Federal action agency or project proponent, not the Service, to make "no effect" determinations. If you determine that your proposed action will have "no effect" on threatened or endangered species or their respective critical habitat, you do not need to seek concurrence with the Service. Nevertheless, it is a violation of Federal law to harm or harass any federally-listed threatened or endangered fish or wildlife species without the appropriate permit.

Through the consultation process, we will analyze information contained in a biological assessment that you provide. If your proposed action is associated with Federal funding or permitting, consultation will occur with the Federal agency under section 7(a)(2) of the ESA. Otherwise, an incidental take permit pursuant to section 10(a)(1)(B) of the ESA (also known as a habitat conservation plan) is necessary to harm or harass federally listed threatened or endangered fish or wildlife species. In either case, there is no mechanism for authorizing incidental take "after-the-fact." For more information regarding formal consultation and HCPs, please see the Service's Consultation Handbook and Habitat Conservation Plans at www.fws.gov/endangered/esa-library/index.html#consultations.

New information based on updated surveys, changes in the abundance and distribution of species, changed habitat conditions, or other factors could change this list. Please feel free to contact us if you need more current information or assistance regarding the potential impacts to

federally proposed, listed, and candidate species and federally designated and proposed critical habitat. Please note that under 50 CFR 402.12(e) of the regulations implementing section 7 of the Act, **the accuracy of this species list should be verified after 90 days.** This verification can be completed formally or informally as desired. The Service recommends that verification be completed by visiting the ECOS-IPaC website at regular intervals during project planning and implementation for updates to species lists and information. An updated list may be requested through the ECOS-IPaC system by completing the same process used to receive the enclosed list.

We appreciate your concern for threatened and endangered species. The Service encourages Federal agencies to include conservation of threatened and endangered species into their project planning to further the purposes of the Act. **Please include the Consultation Tracking Number in the header of this letter with any request for consultation or correspondence about your project that you submit to our office.**

Attachment(s):

- Official Species List

Official Species List

This list is provided pursuant to Section 7 of the Endangered Species Act, and fulfills the requirement for Federal agencies to "request of the Secretary of the Interior information whether any species which is listed or proposed to be listed may be present in the area of a proposed action".

This species list is provided by:

Arkansas Ecological Services Field Office

110 South Amity Suite 300

Conway, AR 72032-8975

(501) 513-4470

Project Summary

Consultation Code: 04ER1000-2019-SLI-0996

Event Code: 04ER1000-2020-E-01308

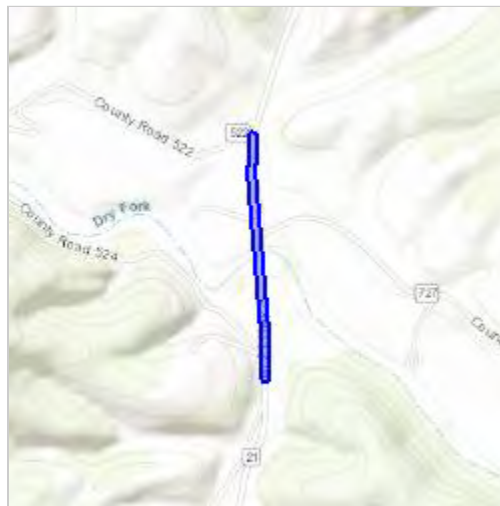
Project Name: 090502 -Dry Fork, Little Sugar & Piney Creeks Strs. & Apprs. (S) - Dry Fork

Project Type: TRANSPORTATION

Project Description: Replace the existing Hwy. 21 bridge on new location adjacent to the east.

Project Location:

Approximate location of the project can be viewed in Google Maps: <https://www.google.com/maps/place/36.168878167335166N93.53836926475992W>



Counties: Carroll, AR

Endangered Species Act Species

There is a total of 8 threatened, endangered, or candidate species on this species list.

Species on this list should be considered in an effects analysis for your project and could include species that exist in another geographic area. For example, certain fish may appear on the species list because a project could affect downstream species.

IPaC does not display listed species or critical habitats under the sole jurisdiction of NOAA Fisheries¹, as USFWS does not have the authority to speak on behalf of NOAA and the Department of Commerce.

See the "Critical habitats" section below for those critical habitats that lie wholly or partially within your project area under this office's jurisdiction. Please contact the designated FWS office if you have questions.

-
1. [NOAA Fisheries](#), also known as the National Marine Fisheries Service (NMFS), is an office of the National Oceanic and Atmospheric Administration within the Department of Commerce.

Mammals

NAME	STATUS
Gray Bat <i>Myotis grisescens</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/6329	Endangered
Indiana Bat <i>Myotis sodalis</i> There is final critical habitat for this species. Your location is outside the critical habitat. Species profile: https://ecos.fws.gov/ecp/species/5949	Endangered
Northern Long-eared Bat <i>Myotis septentrionalis</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/9045	Threatened
Ozark Big-eared Bat <i>Corynorhinus (=Plecotus) townsendii ingens</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/7245	Endangered

Birds

NAME	STATUS
Eastern Black Rail <i>Laterallus jamaicensis ssp. jamaicensis</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/10477	Proposed Threatened
Piping Plover <i>Charadrius melodus</i> Population: [Atlantic Coast and Northern Great Plains populations] - Wherever found, except those areas where listed as endangered. There is final critical habitat for this species. Your location is outside the critical habitat. Species profile: https://ecos.fws.gov/ecp/species/6039	Threatened
Red Knot <i>Calidris canutus rufa</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/1864	Threatened

Flowering Plants

NAME	STATUS
Missouri Bladderpod <i>Physaria filiformis</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/5361	Threatened

Critical habitats

THERE ARE NO CRITICAL HABITATS WITHIN YOUR PROJECT AREA UNDER THIS OFFICE'S JURISDICTION.



United States Department of the Interior



FISH AND WILDLIFE SERVICE
Arkansas Ecological Services Field Office
110 South Amity Suite 300
Conway, AR 72032-8975
Phone: (501) 513-4470 Fax: (501) 513-4480
<http://www.fws.gov/arkansas-es>

In Reply Refer To:

June 11, 2019

Consultation Code: 04ER1000-2019-I-0996

Event Code: 04ER1000-2019-E-01942

Project Name: 090502 -Dry Fork, Little Sugar & Piney Creeks Strs. & Apprs. (S) - Dry Fork

Subject: Concurrence verification letter for the '090502 -Dry Fork, Little Sugar & Piney Creeks Strs. & Apprs. (S) - Dry Fork' project under the revised February 5, 2018, FHWA, FRA, FTA Programmatic Biological Opinion for Transportation Projects within the Range of the Indiana Bat and Northern Long-eared Bat.

To whom it may concern:

The U.S. Fish and Wildlife Service (Service) has received your request dated to verify that the **090502 -Dry Fork, Little Sugar & Piney Creeks Strs. & Apprs. (S) - Dry Fork** (Proposed Action) may rely on the concurrence provided in the February 5, 2018, FHWA, FRA, FTA Programmatic Biological Opinion for Transportation Projects within the Range of the Indiana Bat and Northern Long-eared Bat (PBO) to satisfy requirements under Section 7(a)(2) of the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C 1531 *et seq.*).

Based on the information you provided (Project Description shown below), you have determined that the Proposed Action is within the scope and adheres to the criteria of the PBO, including the adoption of applicable avoidance and minimization measures, may affect, but is not likely to adversely affect (NLAA) the endangered Indiana bat (*Myotis sodalis*) and/or the threatened Northern long-eared bat (*Myotis septentrionalis*).

The Service has 14 calendar days to notify the lead Federal action agency or designated non-federal representative if we determine that the Proposed Action does not meet the criteria for a NLAA determination under the PBO. If we do not notify the lead Federal action agency or designated non-federal representative within that timeframe, you may proceed with the Proposed Action under the terms of the NLAA concurrence provided in the PBO. This verification period allows Service Field Offices to apply local knowledge to implementation of the PBO, as we may identify a small subset of actions having impacts that were unanticipated. In such instances, Service Field Offices may request additional information that is necessary to verify inclusion of the proposed action under the PBO.

For Proposed Actions that include bridge/structure removal, replacement, and/or maintenance activities: If your initial bridge/structure assessments failed to detect Indiana bats, but you later detect bats during construction, please submit the Post Assessment Discovery of Bats at Bridge/Structure Form (User Guide Appendix E) to this Service Office. In these instances, potential incidental take of Indiana bats may be exempted provided that the take is reported to the Service.

If the Proposed Action is modified, or new information reveals that it may affect the Indiana bat and/or Northern long-eared bat in a manner or to an extent not considered in the PBO, further review to conclude the requirements of ESA Section 7(a)(2) may be required. If the Proposed Action may affect any other federally-listed or proposed species, and/or any designated critical habitat, additional consultation is required. If the proposed action has the potential to take bald or golden eagles, additional coordination with the Service under the Bald and Golden Eagle Protection Act may also be required. In either of these circumstances, please contact this Service Office.

The following species may occur in your project area and **are not** covered by this determination:

- Gray Bat, *Myotis grisescens* (Endangered)
 - Missouri Bladderpod, *Physaria filiformis* (Threatened)
 - Ozark Big-eared Bat, *Corynorhinus (=Plecotus) townsendii ingens* (Endangered)
 - Rabbitsfoot, *Quadrula cylindrica cylindrica* (Threatened)
-

Project Description

The following project name and description was collected in IPaC as part of the endangered species review process.

Name

090502 -Dry Fork, Little Sugar & Piney Creeks Strs. & Apprs. (S) - Dry Fork

Description

Replace the existing Hwy. 21 bridge on new location adjacent to the east.

Determination Key Result

Based on your answers provided, this project(s) may affect, but is not likely to adversely affect the endangered Indiana bat and/or the threatened Northern long-eared bat. Therefore, consultation with the U.S. Fish and Wildlife Service pursuant to Section 7(a)(2) of the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended 16 U.S.C. 1531 *et seq.*) is required. However, also based on your answers provided, this project may rely on the concurrence provided in the revised February 5, 2018, FHWA, FRA, FTA Programmatic Biological Opinion for Transportation Projects within the Range of the Indiana Bat and Northern Long-eared Bat.

Qualification Interview

1. Is the project within the range of the Indiana bat^[1]?

[1] See [Indiana bat species profile](#)

Automatically answered

Yes

2. Is the project within the range of the Northern long-eared bat^[1]?

[1] See [Northern long-eared bat species profile](#)

Automatically answered

Yes

3. Which Federal Agency is the lead for the action?

A) Federal Highway Administration (FHWA)

4. Are *all* project activities limited to non-construction^[1] activities only? (examples of non-construction activities include: bridge/abandoned structure assessments, surveys, planning and technical studies, property inspections, and property sales)

[1] Construction refers to activities involving ground disturbance, percussive noise, and/or lighting.

No

5. Does the project include *any* activities that are **greater than** 300 feet from existing road/rail surfaces^[1]?

[1] Road surface is defined as the actively used [e.g. motorized vehicles] driving surface and shoulders [may be pavement, gravel, etc.] and rail surface is defined as the edge of the actively used rail ballast.

No

6. Does the project include *any* activities **within** 0.5 miles of a known Indiana bat and/or NLEB hibernaculum^[1]?

[1] For the purpose of this consultation, a hibernaculum is a site, most often a cave or mine, where bats hibernate during the winter (see suitable habitat), but could also include bridges and structures if bats are found to be hibernating there during the winter.

No

7. Is the project located **within** a karst area?

Yes

8. Will the project include *any* type of activity that could impact a **known** hibernaculum^[1], or impact a karst feature (e.g., sinkhole, losing stream, or spring) that could result in effects to a **known** hibernaculum?

[1] For the purpose of this consultation, a hibernaculum is a site, most often a cave or mine, where bats hibernate during the winter (see suitable habitat), but could also include bridges and structures if bats are found to be hibernating there during the winter.

No

9. Is there *any* suitable^[1] summer habitat for Indiana Bat or NLEB **within** the project action area^[2]? (includes any trees suitable for maternity, roosting, foraging, or travelling habitat)

[1] See the Service's [summer survey guidance](#) for our current definitions of suitable habitat.

[2] The action area is defined as all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action (50 CFR Section 402.02). Further clarification is provided by the [national consultation FAQs](#).

Yes

10. Will the project remove *any* suitable summer habitat^[1] and/or remove/trim any existing trees **within** suitable summer habitat?

[1] See the Service's [summer survey guidance](#) for our current definitions of suitable habitat.

Yes

11. Will the project clear more than 20 acres of suitable habitat per 5-mile section of road/rail?

No

12. Have presence/probable absence (P/A) summer surveys^{[1][2]} been conducted^{[3][4]} **within** the suitable habitat located within your project action area?

[1] See the Service's [summer survey guidance](#) for our current definitions of suitable habitat.

[2] Presence/probable absence summer surveys conducted within the fall swarming/spring emergence home range of a documented Indiana bat hibernaculum (contact local Service Field Office for appropriate distance from hibernacula) that result in a negative finding requires additional consultation with the local Service Field Office to determine if clearing of forested habitat is appropriate and/or if seasonal clearing restrictions are needed to avoid and minimize potential adverse effects on fall swarming and spring emerging Indiana bats.

[3] For projects within the range of either the Indiana bat or NLEB in which suitable habitat is present, and no bat surveys have been conducted, the transportation agency will assume presence of the appropriate species. This assumption of presence should be based upon the presence of suitable habitat and the capability of bats to occupy it because of their mobility.

[4] Negative presence/probable absence survey results obtained using the [summer survey guidance](#) are valid for a minimum of two years from the completion of the survey unless new information (e.g., other nearby surveys) suggest otherwise.

No

13. Does the project include activities **within documented Indiana bat habitat**^{[1][2]}?

[1] Documented roosting or foraging habitat – for the purposes of this consultation, we are considering documented habitat as that where Indiana bats and/or NLEB have actually been captured and tracked using (1) radio telemetry to roosts; (2) radio telemetry biangulation/triangulation to estimate foraging areas; or (3) foraging areas with repeated use documented using acoustics. Documented roosting habitat is also considered as suitable summer habitat within 0.25 miles of documented roosts.)

[2] For the purposes of this key, we are considering documented corridors as that where Indiana bats and/or NLEB have actually been captured and tracked to using (1) radio telemetry; or (2) treed corridors located directly between documented roosting and foraging habitat.

No

14. Will the removal or trimming of habitat or trees occur **within** suitable but **undocumented Indiana bat** roosting/foraging habitat or travel corridors?

Yes

15. What time of year will the removal or trimming of habitat or trees **within** suitable but **undocumented Indiana bat** roosting/foraging habitat or travel corridors occur^[1]?

[1] Coordinate with the local Service Field Office for appropriate dates.

B) During the inactive season

16. Does the project include activities **within documented NLEB habitat**^{[1][2]}?

[1] Documented roosting or foraging habitat – for the purposes of this consultation, we are considering documented habitat as that where Indiana bats and/or NLEB have actually been captured and tracked using (1) radio telemetry to roosts; (2) radio telemetry biangulation/triangulation to estimate foraging areas; or (3) foraging areas with repeated use documented using acoustics. Documented roosting habitat is also considered as suitable summer habitat within 0.25 miles of documented roosts.)

[2] For the purposes of this key, we are considering documented corridors as that where Indiana bats and/or NLEB have actually been captured and tracked to using (1) radio telemetry; or (2) treed corridors located directly between documented roosting and foraging habitat.

No

17. Will the removal or trimming of habitat or trees occur **within** suitable but **undocumented NLEB** roosting/foraging habitat or travel corridors?

Yes

18. What time of year will the removal or trimming of habitat or trees **within** suitable but **undocumented NLEB** roosting/foraging habitat or travel corridors occur?

B) During the inactive season

19. Will *any* tree trimming or removal occur **within** 100 feet of existing road/rail surfaces?

Yes

20. Will the tree removal alter *any* **documented** Indiana bat or NLEB roosts and/or alter any surrounding summer habitat **within** 0.25 mile of a documented roost?

No

21. Will *any* tree trimming or removal occur **between** 100-300 feet of existing road/rail surfaces?

No

22. Are *all* trees that are being removed clearly demarcated?

Yes

23. Will the removal of habitat or the removal/trimming of trees include installing new or replacing existing **permanent** lighting?

No

24. Does the project include wetland or stream protection activities associated with compensatory wetland mitigation?

No

25. Does the project include slash pile burning?

Yes

26. Does the project include *any* bridge removal, replacement, and/or maintenance activities (e.g., any bridge repair, retrofit, maintenance, and/or rehabilitation work)?

Yes

27. Is there *any* suitable habitat^[1] for Indiana bat or NLEB **within** 1,000 feet of the bridge? (includes any trees suitable for maternity, roosting, foraging, or travelling habitat)

[1] See the Service's current [summer survey guidance](#) for our current definitions of suitable habitat.

Yes

28. Has a bridge assessment^[1] been conducted **within** the last 24 months^[2] to determine if the bridge is being used by bats?

[1] See [User Guide Appendix D](#) for bridge/structure assessment guidance

[2] Assessments must be completed no more than 2 years prior to conducting any work below the deck surface on all bridges that meet the physical characteristics described in the Programmatic Consultation, regardless of whether assessments have been conducted in the past. Due to the transitory nature of bat use, a negative result in one year does not guarantee that bats will not use that bridge/structure in subsequent years.

Yes

SUBMITTED DOCUMENTS

- *Preliminary Report for a Phase 2 Mist Netting.pdf* <https://ecos.fws.gov/ipac/project/NATZUWYZFJH4NJ3RAS6D52CJG4/projectDocuments/16968889>

29. Did the bridge assessment detect *any* signs of Indiana bats and/or NLEBs roosting in/under the bridge (bats, guano, etc.)^[1]?

[1] If bridge assessment detects signs of *any* species of bats, coordination with the local FWS office is needed to identify potential threatened or endangered bat species. Additional studies may be undertaken to try to identify which bat species may be utilizing the bridge prior to allowing *any* work to proceed.

Note: There is a small chance bridge assessments for bat occupancy do not detect bats. Should a small number of bats be observed roosting on a bridge just prior to or during construction, such that take is likely to occur or does occur in the form of harassment, injury or death, the PBO requires the action agency to report the take. Report all unanticipated take within 2 working days of the incident to the USFWS. Construction activities may continue without delay provided the take is reported to the USFWS and is limited to 5 bats per project.

No

30. Will the bridge removal, replacement, and/or maintenance activities include installing new or replacing existing **permanent** lighting?

No

31. Does the project include the removal, replacement, and/or maintenance of *any* structure other than a bridge? (e.g., rest areas, offices, sheds, outbuildings, barns, parking garages, etc.)

No

32. Will the project involve the use of **temporary** lighting *during* the active season?

No

33. Will the project install new or replace existing **permanent** lighting?

No

34. Does the project include percussives or other activities (**not including tree removal/trimming or bridge/structure work**) that will increase noise levels above existing traffic/background levels?

No

35. Are *all* project activities that are **not associated with** habitat removal, tree removal/trimming, bridge and/or structure activities, temporary or permanent lighting, or use of percussives, limited to actions that DO NOT cause any additional stressors to the bat species?

Examples: lining roadways, unlighted signage , rail road crossing signals, signal lighting, and minor road repair such as asphalt fill of potholes, etc.

Yes

36. Will the project raise the road profile **above the tree canopy**?

No

37. Is the slash pile burning portion of this project consistent with a Not Likely to Adversely Affect determination in this key?

Automatically answered

Yes, because it is near suitable habitat and >0.5 miles from any hibernaculum

38. Are the project activities that are not associated with habitat removal, tree removal/trimming, bridge and/or structure activities, temporary or permanent lighting, or use of percussives consistent with a No Effect determination in this key?

Automatically answered

Yes, other project activities are limited to actions that DO NOT cause any additional stressors to the bat species as described in the BA/BO

39. Is the habitat removal portion of this project consistent with a Not Likely to Adversely Affect determination in this key?

Automatically answered

Yes, because the tree removal/trimming that occurs outside of the active season occurs greater than 0.5 miles from the nearest hibernaculum, is less than 100 feet from the existing road/rail surface, includes clear demarcation of the trees that are to be removed, and does not alter documented roosts and/or surrounding summer habitat within 0.25 miles of a documented roost

40. Is the habitat removal portion of this project consistent with a Not Likely to Adversely Affect determination in this key?

Automatically answered

Yes, because the tree removal/trimming that occurs outside of the active season occurs greater than 0.5 miles from the nearest hibernaculum, is less than 100 feet from the existing road/rail surface, includes clear demarcation of the trees that are to be removed, and does not alter documented roosts and/or surrounding summer habitat within 0.25 miles of a documented roost

41. Is the bridge removal, replacement, or maintenance activities portion of this project consistent with a No Effect determination in this key?

Automatically answered

Yes, because the bridge has been assessed using the criteria documented in the BA and no signs of bats were detected

42. **General AMM 1**

Will the project ensure *all* operators, employees, and contractors working in areas of known or presumed bat habitat are aware of *all* FHWA/FRA/FTA (Transportation Agencies) environmental commitments, including all applicable Avoidance and Minimization Measures?

Yes

43. **Hibernacula AMM 1**

Will the project ensure that on-site personnel will use best management practices^[1], secondary containment measures, or other standard spill prevention and countermeasures to avoid impacts to possible hibernacula?

[1] Coordinate with the appropriate Service Field Office on recommended best management practices for karst in your state.

Yes

44. **Hibernacula AMM 1**

Will the project ensure that, where practicable, a 300 foot buffer will be employed to separate fueling areas and other major containment risk activities from caves, sinkholes, losing streams, and springs in karst topography?

Yes

45. **Tree Removal AMM 1**

Can *all* phases/aspects of the project (e.g., temporary work areas, alignments) be modified, to the extent practicable, to avoid tree removal^[1] in excess of what is required to implement the project safely?

Note: Tree Removal AMM 1 is a minimization measure, the full implementation of which may not always be practicable. Projects may still be NLAA as long as Tree Removal AMMs 2, 3, and 4 are implemented and LAA as long as Tree Removal AMMs 3, 5, 6, and 7 are implemented.

[1] The word “trees” as used in the AMMs refers to trees that are suitable habitat for each species within their range. See the USFWS’ current summer survey guidance for our latest definitions of suitable habitat.

Yes

46. Tree Removal AMM 2

Can *all* tree removal activities be restricted to when Indiana bats are not likely to be present (e.g., the inactive season)^[1]?

[1] Coordinate with the local Service Field Office for appropriate dates.

Automatically answered

Yes

47. Tree Removal AMM 2

Can *all* tree removal activities be restricted to when Northern long-eared bats are not likely to be present (e.g., the inactive season)^[1]?

[1] Coordinate with the local Service Field Office for appropriate dates.

Automatically answered

Yes

48. Tree Removal AMM 3

Can tree removal be limited to that specified in project plans and ensure that contractors understand clearing limits and how they are marked in the field (e.g., install bright colored flagging/fencing prior to any tree clearing to ensure contractors stay within clearing limits)?

Yes

49. Tree Removal AMM 4

Can the project avoid cutting down/removal of *all* (1) **documented**^[1] Indiana bat or NLEB roosts^[2] (that are still suitable for roosting), (2) trees **within** 0.25 miles of roosts, and (3) documented foraging habitat any time of year?

[1] The word documented means habitat where bats have actually been captured and/or tracked.

[2] Documented roosting or foraging habitat – for the purposes of this consultation, we are considering documented habitat as that where Indiana bats and/or NLEB have actually been captured and tracked using (1) radio telemetry to roosts; (2) radio telemetry triangulation/triangulation to estimate foraging areas; or (3) foraging areas with repeated use documented using acoustics. Documented roosting habitat is also considered as suitable summer habitat within 0.25 miles of documented roosts.)

Yes

50. Lighting AMM 1

Will *all* **temporary** lighting used during the removal of suitable habitat and/or the removal/trimming of trees within suitable habitat be directed away from suitable habitat during the active season?

Yes

Project Questionnaire

1. Have you made a No Effect determination for *all* other species indicated on the FWS IPaC generated species list?

Yes

2. Have you made a May Affect determination for *any* other species on the FWS IPaC generated species list?

No

3. How many acres^[1] of trees are proposed for removal between 0-100 feet of the existing road/rail surface?

[1] If described as number of trees, multiply by 0.09 to convert to acreage and enter that number.

0.8

4. Please describe the proposed bridge work:

The Bridge will be replaced adjacent to the existing bridge to the east.

5. Please state the timing of all proposed bridge work:

The job is scheduled to go to letting in November 2020.

6. Please enter the date of the bridge assessment:

7/29/2017

Avoidance And Minimization Measures (AMMs)

This determination key result includes the commitment to implement the following Avoidance and Minimization Measures (AMMs):

GENERAL AMM 1

Ensure all operators, employees, and contractors working in areas of known or presumed bat habitat are aware of all FHWA/FRA/FTA (Transportation Agencies) environmental commitments, including all applicable AMMs.

HIBERNACULA AMM 1

For projects located within karst areas, on-site personnel will use best management practices, secondary containment measures, or other standard spill prevention and countermeasures to avoid impacts to possible hibernacula. Where practicable, a 300 foot buffer will be employed to separate fueling areas and other major containment risk activities from caves, sinkholes, losing streams, and springs in karst topography.

LIGHTING AMM 1

Direct temporary lighting away from suitable habitat during the active season.

TREE REMOVAL AMM 1

Modify all phases/aspects of the project (e.g., temporary work areas, alignments) to avoid tree removal.

TREE REMOVAL AMM 2

Apply time of year restrictions for tree removal when bats are not likely to be present, or limit tree removal to 10 or fewer trees per project at any time of year within 100 feet of existing road/rail surface and **outside of documented** roosting/foraging habitat or travel corridors; visual emergence survey must be conducted with no bats observed.

TREE REMOVAL AMM 3

Ensure tree removal is limited to that specified in project plans and ensure that contractors understand clearing limits and how they are marked in the field (e.g., install bright colored flagging/fencing prior to any tree clearing to ensure contractors stay within clearing limits).

TREE REMOVAL AMM 4

Do not remove **documented** Indiana bat or NLEB roosts that are still suitable for roosting, or trees within 0.25 miles of roosts, or **documented** foraging habitat any time of year.

Determination Key Description: FHWA, FRA, FTA Programmatic Consultation For Transportation Projects Affecting NLEB Or Indiana Bat

This key was last updated in IPaC on March 16, 2018. Keys are subject to periodic revision.

This decision key is intended for projects/activities funded or authorized by the Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), and/or Federal Transit Administration (FTA), which require consultation with the U.S. Fish and Wildlife Service (Service) under Section 7 of the Endangered Species Act (ESA) for the endangered **Indiana bat** (*Myotis sodalis*) and the threatened **Northern long-eared bat** (NLEB) (*Myotis septentrionalis*).

This decision key should only be used to verify project applicability with the Service's [February 5, 2018, FHWA, FRA, FTA Programmatic Biological Opinion for Transportation Projects](#). The programmatic biological opinion covers limited transportation activities that may affect either bat species, and addresses situations that are both likely and not likely to adversely affect either bat species. This decision key will assist in identifying the effect of a specific project/activity and applicability of the programmatic consultation. The programmatic biological opinion is not intended to cover all types of transportation actions. Activities outside the scope of the programmatic biological opinion, or that may affect ESA-listed species other than the Indiana bat or NLEB, or any designated critical habitat, may require additional ESA Section 7 consultation.

ARDOT ENVIRONMENTAL VERIFICATION CHECKLIST FOR CONSIDERATION OF POTENTIAL IMPACTS

ARDOT Job Number 090435 FAP Number NHPP-0008(46)

Job Title Dry Fork Str. & Apprs. (S)

Environmental Resource	None	Minimal	Major	Comments-required for each item
Air Quality	X			No air quality/MSAT impacts
Cultural Resources		X		MOA attached
Economic	X			No adverse impacts
Endangered Species		X		No effect and NLAA determinations
Environmental Justice/Title VI	X			EJ populations not impacted
Fish and Wildlife		X		Temporary impacts during construction
Floodplains		X		Zone A, Special Flood Hazard Area
Forest Service Property	X			None in project area
Hazardous Materials/Landfills	X			No impacts anticipated
Land Use	X			No land use issues
Migratory Birds		X		Migratory Bird SP included
Navigation/Coast Guard	X			None in project area
Noise Levels	X			No increases due to project
Prime Farmland		X		NRCS-CPA-106 attached
Protected Waters	X			None in the project area
Public Recreation Lands	X			None in the project area
Public Water Supply/WHPA		X		WHP SP for offsite areas
Relocates	X			No relocates
Section 4(f)/6(f)	X			No 4(f)/6(f) impacts
Social	X			No social impacts
Underground Storage Tanks	X			No UST's will be impacted
Visual	X			No visual impacts
Streams		X		Temporary impacts during construction
Water Quality		X		Temporary decline during construction
Wetlands	X			None in project area
Wildlife Refuges	X			None in project area

Section 401 Water Quality Certification Required? N
 Short-term Activity Authorization Required? Y
 Section 404 Permit Required? Y Type NWP 14

Remarks: _____

Signature of Evaluator  Date September 28, 2020

Date Sent: February 12, 2020

ROADWAY DESIGN REQUEST

Job Number 090435 FAP No. _____ County Carroll

Job Name Dry Fork Str. & Apprs. (S)

Design Engineer Crafton Tull Environmental Staff _____

Brief Project Description Bridge Replacement at Dry Fork Creek

A. Existing Conditions:

Roadway Width: 26' Shoulder Type/Width: 2' Paved

Number of Lanes and Width: 2-11' Existing Right-of-Way: 80'

Sidewalks? No Location: N/A Width: N/A

Bike Lanes? No Location: N/A Width: N/A

B. Proposed Conditions:

Roadway Width: 40' Shoulder Type/Width: 8' (2' Paved)

Number of Lanes and Width: 2-12' Proposed Right-of-Way: 160'

Sidewalks? No Location: N/A Width: N/A

Bike Lanes? No Location: N/A Width: N/A

C. Construction Information:

If detour: Where: none Length: _____

D. Design Traffic Data:

2021 ADT: 2,700 2041 ADT: 3,400 % Trucks: 12%
Design Speed: 55 m.p.h.

E. Approximate total length of project: 0.28 mile(s)

F. Justification for proposed improvements: Replace Deficient Bridge

G. Total Relocatees: 0 Residences: 0 Businesses: 0

H. Have you coordinated with any outside agencies (e.g., FHWA, City, County, etc.)? No

Agency/Official	Person Contacted	Date

Nationwide Permit No. 14

Linear Transportation Projects. Activities required for crossings of waters of the United States associated with the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than 1/2-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

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

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 32.) (Sections 10 and 404)

Note 1: For linear transportation projects crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Linear transportation projects must comply with 33 CFR 330.6(d).

Note 2: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Note 3: For NWP 14 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and

distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

Nationwide Permit General Conditions

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

Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

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

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

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

2. **Aquatic Life Movements.** No activity may substantially disrupt the necessary life cycle movements of those species of

aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

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

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

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

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

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

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

9. Management of Water Flows. To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the 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, or during low tides.

13. Removal of Temporary Fills. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

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

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

16. Wild and Scenic Rivers. (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

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

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

17. **Tribal Rights.** No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

18. **Endangered Species.** (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless ESA section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the NWP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the NWP activity and are later in time, but still are reasonably certain to occur.

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

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in 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 might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed activity. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction

notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have "no effect" on listed species or critical habitat, or until ESA section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps. (d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

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

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

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

19. Migratory Birds and Bald and Golden Eagles. The permittee is responsible for ensuring their action complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting appropriate local office of the U.S. Fish and Wildlife Service to determine applicable measures to reduce impacts to migratory birds or eagles, including whether “incidental take” permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. Historic Properties. (a) In cases where the district engineer determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

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

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP

activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect. Where the non-Federal applicant has identified historic properties on which the activity might have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed.

(d) For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps. (e) Prospective permittees should be aware that section 110k of the NHPA (54

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

21. Discovery of Previously Unknown Remains and Artifacts. If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer of what you have found, and to the maximum extent practicable, avoid construction activities that

may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

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

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

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed 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.

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

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

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

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory

mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation to ensure that the activity results in no more than minimal adverse environmental effects.

Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

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

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

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

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

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

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

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

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

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

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

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a

forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

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

25. Water Quality. Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. Coastal Zone Management. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

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

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

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

the letter, and the letter must contain the following statement and signature:

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

(Transferee)

(Date)

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

- (a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;
- (b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and
- (c) The signature of the permittee certifying the completion of the activity and mitigation.

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

31. Activities Affecting Structures or Works Built by the United States. If an NWP activity also requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army

Corps of Engineers (USACE) federally authorized Civil Works project (a “USACE project”), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission is not authorized by NWP until the appropriate Corps office issues the section 408 permission to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

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

- (1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or
- (2) 45 calendar days have passed from the district engineer’s receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is “no effect” on listed species or “no potential to cause effects” on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee’s right to proceed under the NWP

may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

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

(2) Location of the proposed activity;

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

(4) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. For single and complete linear projects, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

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

(6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal

and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

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

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

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

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

(c) Form of Pre-Construction Notification: The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is an NWP PCN and must include all of the applicable information required in paragraphs (b)(1) through (10) of this general condition. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) Agency Coordination: (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) all NWP activities that require pre-construction notification and result in the loss

of greater than 1/2-acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

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

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

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

In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the individual crossings of waters of the United States to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, 52, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects. For those NWPs that have a waivable 300 linear foot limit for losses of intermittent and ephemeral stream bed and a 1/2-acre limit (i.e., NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52), the loss of intermittent and ephemeral stream bed, plus any other losses of jurisdictional waters and wetlands, cannot exceed 1/2-acre.

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

District Engineer's Decision

2. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters (e.g., streams). The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

3. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) that the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse environmental effects, the activity will be authorized within the 45-day PCN period (unless

additional time is required to comply with general conditions 18, 20, and/or 31, or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.
2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.
3. NWPs do not grant any property rights or exclusive privileges.
4. NWPs do not authorize any injury to the property or rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31)