Appendix A

CERTILMAN BALIN
ATTORNEYS

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JOHN M. WAGNER
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May 7, 2008

VIA MESSENGER

Nicholas M. Ward-Willis, Esq.
Keane & Beane, P.C.
445 Hamilton Avenue
White Plains, NY 10601

Re: **Applications of KF (Rye Brook), LLC for Proposed Residential Development on 15.44 +/- acres of Property at Southerly Corner of Anderson Hill Road and King Street – Westchester County Tax Map Section 129.035, Block 1, Lot 13 and Map 28, Lot 1 of the Town of Greenwich, Connecticut**

Dear Mr. Ward-Willis:

Based on (1) the March 3, 2008 meeting between representatives of the applicant (i.e., John Sullivan, Michelle Lee, Theresa Elkowitz, Michael Marinis, Buddy Johnson, and me) and the Village (i.e., Christopher Bradbury, Victor G. Carosi, Michael Izzo, Dolph Rotfeld, and Marilyn Timpone Mohamed), at which meeting were discussed (a) a February 27, 2008 memorandum to you from Dolph Rotfeld, with regard to the above-referenced project, and (b) a February 29, 2008 memorandum to Gary Zuckerman, Chairman, and the Village Planning Board, from Frederick P. Clark Associates, Inc. (hereinafter "FP Clark"), also with regard to the above-referenced project, (2) an April 3, 2008 memorandum to the Village Engineer from Mr. Rotfeld, which was sent to the applicant's engineering consultant, Mr. Marinis, and (3) subsequent discussions among the applicant's wetlands consultant, Mr. Rotfeld, and Debora Fillis of FP Clark, the applicant's engineering, architectural, landscaping, wetlands, and environmental consultants have further revised their plans and other submissions.

Accordingly, we are sending you, with this letter, one copy of each of the following plans and other responsive documents, which are also being delivered to the Village Engineer, Mr. Carosi (original and one copy), Marilyn Timpone Mohamed of FP Clark (one copy), and the Village's Engineering consultant, Mr. Rotfeld (one copy), as directed by your February 8, 2007 e-mail to me:

1. The following plans and drawings:

   (a) Revised "Subdivision Map of Kingswood," prepared by Barrett, Bonacci & Van Weele, P.C., and dated April 28, 2008;

(b) "Site Development Plan List of Drawings," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08;

(c) "Existing Conditions Plan," prepared by Ward Carpenter Engineers Inc., dated 12/4/06 (Sheet 1 of 16);

(d) "Alignment Plan," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 2 of 16);

(e) "Grading & Drainage Plan (North)," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 3 of 16);

(f) "Grading & Drainage Plan (South)," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 4 of 16);

(g) "Road Profiles," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 5/4/07 (Sheet 5 of 16);

(h) "Utility Plan and Profiles," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 6 of 16);

(i) "Utility Plan and Profiles," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 7 of 16);

(j) "Utility Plan and Profiles," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 8 of 16);

(k) "Tree Preservation Plan," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 9 of 16);

(l) "Storm Water Pollution Prevention Plan," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 10 of 16);

(m) "Overall Landscape Plan," prepared by Barrett, Bonacci & Van Weele, P.C. (by William [Buddy] Johnson, Landscape Architect), dated 12/21/06, and last revised 4/22/08 (Sheet 11 of 16);

(n) "Typical Unit Landscape Plans," prepared by Barrett, Bonacci & Van Weele, P.C. (by William [Buddy] Johnson, Landscape Architect), dated 12/20/06, and last revised 4/23/08 (Sheet 12 of 16);

(o) "Wetland Impact Map," prepared by Barrett, Bonacci & Van Weele, P.C. (by Evans Associates Environmental Consulting, Inc.), dated 5/22/07, and last revised 5/2/08 (Sheet 13A of 16);

(p) "Overall Wetland Mitigation Plan," prepared by Barrett, Bonacci & Van Weele, P.C. (by Evans Associates Environmental Consulting, Inc.), dated 5/22/07, and last revised 5/2/08 (Sheet 13B of 16);

(q) "Wetland Mitigation Enlargement Plan – Areas 1, 2, 3," prepared by Barrett, Bonacci & Van Weele, P.C. (by Evans Associates Environmental Consulting, Inc.), dated 5/22/07, and last revised 5/2/08 (Sheet 13C of 16);

(r) "Wetland Mitigation Enlargement Plan – Areas 5, 6, 7, 8a, 8b, 9," prepared by Barrett, Bonacci & Van Weele, P.C. (by Evans Associates Environmental Consulting, Inc.), dated 5/22/07, and last revised 5/2/08 (Sheet 13D of 16);

(s) "Wetland Mitigation Enlargement Plan – Off-Site Sewer and Area 4," prepared by Barrett, Bonacci & Van Weele, P.C. (by Evans Associates Environmental Consulting, Inc.), dated 5/22/07, and last revised 5/2/08 (Sheet 13E of 16);

(t) "Stormwater Basins Planting Plan," prepared by Barrett, Bonacci & Van Weele, P.C. (by Evans Associates Environmental Consulting, Inc.), dated 5/22/07, and last revised 5/2/08 (Sheet 13F of 16);

(u) "Details," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 14 of 16);

(v) "Details," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 15 of 16);

(w) "Details," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 16 of 16);

(x) "Architectural Site Plan & Entry Sign & Entry Wall Elevation" (Sheet A1), prepared by Sullivan Architecture, P.C., and dated 4/18/08;

(y) "Units A & B Plans" (Sheet A2), prepared by Sullivan Architecture, P.C., and dated 4/18/08;

(z) "Units A & B Elevations" (Sheet A3), prepared by Sullivan Architecture, P.C., and dated 4/18/08;

(aa) "Unit C Plans & Elevations" (Sheet A4), prepared by Sullivan Architecture, P.C., and dated 4/18/08;

(bb) "Unit D Plans & Elevations" (Sheet A5), prepared by Sullivan Architecture, P.C., and dated 4/18/08;

(cc) "Diagrams for Fire Dept Ladder Access & Height/Setback Diagrams" (Sheet A6), prepared by Sullivan Architecture, P.C., and dated 4/18/08;

(dd) "Diagrams for Fire Dept Ladder Access & Height/Setback Diagrams" (Sheet A7), prepared by Sullivan Architecture, P.C., and dated 4/18/08;

(ee) "Site Lighting Plan" (Sheet SL-1), prepared by Accurate Engineering Associates, dated 3/29/07 and last revised 4/22/08;

(ff) "Site Lighting Plan" (Sheet SL-2), prepared by Accurate Engineering Associates, dated 3/29/07 and last revised 4/22/08;

(gg) "Fixture Schedule and Details" (Sheet SL-3), prepared by Accurate Engineering Associates, dated 3/29/07 and last revised 4/22/08;

(hh) "Photometric Plan" (Sheet SL-4), prepared by Accurate Engineering Associates, dated 4/21/08 and last revised 4/22/08; and

(ii) "Photometric Plan" (Sheet SL-5), prepared by Accurate Engineering Associates, dated 4/21/08 and last revised 4/22/08;

2. Copy of a letter (original letter is being sent to Mr. Carosi), dated April 28, 2008, from Michael C. Marinis, P.E. of Barrett Bonacci & Van Weele, P.C. to Victor Carosi, P.E., which addresses the comments in the February 27, 2008 memorandum to you from Dolph Rotfeld, P.E., DEE;

3. Copy of a "Kingswood Stormwater Management Narrative," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08; and

4. "Autoturn Analysis" (Sheet 1 of 1), prepared by Barrett, Bonacci & Van Weele, P.C., and dated 3/31/08.

A revised report of the flow monitoring for the existing 10" sanitary sewer main on the Blind Brook Club, as well as analysis of same, will be sent to you under separate cover.

In addition to the foregoing, please consider the following responses to the comments set forth in (1) the February 27, 2008 memorandum from Dolph Rotfeld, P.E., DEE, to Victor Carosi, Village Engineer, (2) the February 29, 2008 memorandum from FP Clark to Gary Zuckerman, Chairman, and the Planning Board of the Village of Rye Brook, and (3) the April 3, 2008 memorandum from Dolph Rotfeld, P.E., DEE, to Victor Carosi, P.E.

FEBRUARY 27, 2008 MEMORANDUM OF DOLPH ROTFELD ENGINEERING, P.C.

The comments in the February 27, 2008 memorandum from Dolph Rotfeld, P.E. DEE, to Victor Carosi (hereinafter the "2/27/08 Rotfeld Engineering Memorandum") are specifically addressed in the enclosed letter, dated April 28, 2008, from Michael C. Marinis, P.E. of Barrett Bonacci & Van Weele, P.C. to Victor Carosi, P.E. (hereinafter the "4/28/08 BBV letter").

With regard to "Sanitary Sewers" Comment 2, on Page 5 of the 2/27/08 Rotfeld Engineering Memorandum, the 4/28/08 BBV letter indicates that New England Pipe Cleaning Company is continuing to monitor the flow in the existing sewer main since a two-inch rainfall has not been experienced in recent weeks, and such monitoring information will be submitted under separate cover. It should be noted, however, that the 4/28/08 BBV letter also states that "[b]ased upon the preliminary data previously provided to the Village, we see no issues with the capacity of the existing sewer."

FEBRUARY 29, 2008 MEMORANDUM OF FP CLARK

Please note the following responses to the 2/29/08 memorandum from FP Clark (hereinafter the "2/29/08 Clark Memorandum"):

1. Comment 1 on Pages 3-4 of the 2/29/08 Clark Memorandum:

This comment incorrectly suggests that the subject project continues to "require" a Nationwide Permit from the Army Corps of Engineers.

As noted in my prior letter, dated January 24, 2008, the applicant applied to the Army Corps of Engineers, in July 2007, for authorization of the subject project under Nationwide Permit 29 ("Residential Developments"), as set forth in the Federal Register of March 12, 2007. As also indicated in my prior letter, Michael G. Vissichelli, Chief of the Eastern Permits Section of the Department of the Army, New York District, Corps of Engineers, sent a letter to the applicant dated September 21, 2007 (a copy of which was enclosed with my prior letter). In that letter, Mr. Vissichelli acknowledged the applicant's letter, dated July 6, 2007, requesting Nationwide Permit verification, and stated:

> ". . .Once 45 days have passed from submission of a Pre-Construction Notification, the permittee may presume that their project qualifies for the Nationwide Permit provided that the permittee has carefully reviewed and meets the terms, conditions, and language of the Nationwide Permits. (See 33 CFR Section 325.2(a) and 330.1(e).)" (emphasis added)

It is evident, from the foregoing language, that the applicant has completed the Army Corps permitting requirements for the subject project.

As also noted in my prior letter, the applicant intends to comply with all the terms, conditions, and language of Nationwide Permit 29 in its implementation of the subject development.

With regard to the suggestion that the Planning Board request the Army Corps to delineate the wetlands on site, the wetlands have been flagged and confirmed several times over the time the subject property has been proposed for development, and wetlands issues were conclusively addressed in the SEQRA findings statement adopted by the Board of Trustees for the proposed hotel development of the subject property. There is simply no sound reason to revisit the wetlands with regard to this site.

It is the applicant's understanding that the "Water Quality Certification" referred to in the final paragraph of the comment is issued in connection with the review by the New York State Department of Environmental Conservation ("DEC") of the stormwater pollution prevention plan ("SWPPP"). The SWPPP will be submitted for DEC review once the Village has completed its comments on the plan. Similarly, any required coastal consistency determination will be obtained from the New York State Department of State.

2. Comment 2 on Pages 4-5 of the 2/29/08 Clark Memorandum:

Responses to the various stormwater management, erosion control, drainage, and engineering issues raised by this comment -- which are beyond the stated scope of FP Clark's review, as

described on Page 3 of the 2/29/08 Clark Memorandum -- are contained in (1) the enclosed 4/28/08 BBV letter, (2) the various revised plans described above, and (3) the "Kingswood Stormwater Management Narrative," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08, a copy of which is submitted with this letter.

It should be noted that the modifications to the proposed site drainage, which are set forth in the revised plans submitted with this letter, were coordinated with Debora Fillis of FP Clark.

It should also be noted that the functional performance of proposed new and enhanced wetland areas is to be monitored, subsequent to completion of the wetland mitigation work, pursuant to the document entitled "Post Construction Monitoring and Maintenance of Stormwater Basin and Wetland Mitigation Plantings," prepared by Evans Associates Environmental Consulting, Inc., and dated June 2007. A copy of this document was included, as "Appendix D," in the previously-submitted "Supplemental Environmental Information -- 'Kingswood,'" prepared by Freudenthal & Elkowitz Consulting Group, Inc., and dated July 2007.

3. Comment 4 on Pages 6-7 of the 2/29/08 Clark Memorandum:

As appears from the accompanying "Overall Landscape Plan," prepared by Barrett, Bonacci & Van Weele, P.C. (by William [Buddy] Johnson, Landscape Architect), dated 12/21/06, and last revised 4/22/08 (Sheet 11 of 16), the landscaping plans have been modified to show that all grading for the proposed landscaping berm along the property line with the Blind Brook Club will be located entirely on the "Kingswood" property.

4. Comment 5(b) on Pages 8-9 of the 2/29/08 Clark Memorandum:

As noted above, an "Autoturn Analysis" (Sheet 1 of 1), prepared by Barrett, Bonacci & Van Weele, P.C. and dated 3/31/08, is submitted with this letter. This analysis includes a title block and scale, as well as information on who prepared the analysis and the vehicle size used for the analysis. In addition, (a) the aforesaid "Autoturn Analysis," as well as the "Alignment Plan," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 2 of 16) and other revised plans submitted herewith, indicate that the emergency access road has been redesigned to accommodate an emergency vehicle arriving from King Street, (b) the aforesaid "Autoturn Analysis" shows an emergency vehicle arriving at the site access drive and making a left turn into the access drive, and (c) the site entrance has been redesigned, on the plans submitted herewith, to allow an emergency vehicle to access the project site without needing to cross the centerline of Anderson Hill Road.

5. Comment 5(c) on Page 9 of the 2/29/08 Clark Memorandum:

As noted in my prior letter dated January 24, 2008, the project architect has advised that Unit 13 and the garages therefor have been designed to minimize impacts on wetlands. The concern expressed in the comment appears to be that a car may be parked in the northerly portion of the driveway for the Unit 13 garages such that the car projects into the site access roadway. The applicant respectfully submits that no rational driver would park their vehicle in such a manner, so the expressed concern is unwarranted. In any event, the Board of Trustees may, if it deems it necessary, make it a condition of site plan approval that the northerly portion of the Unit 13 driveway not be used for parking.

6. Comment 5(f) on Page 9 of the 2/29/08 Clark Memorandum:

The project landscaping consultant advises the applicant that the proposed landscaping will not restrict sight distance either for persons backing out of the head-in parking spaces along the loop road or at driveway locations.

7. Comment 5(g) on Page 10 of the 2/29/08 Clark Memorandum:

As noted in my prior letter dated January 24, 2008, the "Alignment Plan," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 11/20/07 (Sheet 2 of 16) -- a copy of which was provided to FP Clark -- included a "sight distance triangle" indicating the required unobstructed sight lines for vehicles exiting the proposed development. This triangle was designated as "UNOBSTRUCTED SITE [sic] DISTANCE TRIANGLE (390' -- TYP)" on the said plan. The same triangle and designation appear on the Alignment Plan," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 2 of 16).

8. Comment 7 on Pages 10-11 of the 2/29/08 Clark Memorandum:

As explained in my prior letter and at our March 3, 2008 meeting, properties along King Street, in the vicinity of the subject property, are developed with structures that are plainly visible from the roadway and also have several unappealing stockade fences adjacent to the roadway. However, in order to address this comment, as appears from the accompanying "Overall Landscape Plan," prepared by Barrett, Bonacci & Van Weele, P.C. (by William [Buddy] Johnson, Landscape Architect), dated 12/21/06, and last revised 4/22/08 (Sheet 11 of 16), the landscaping plans have been modified to provide for a more extensive landscape screening buffer, including several different species, between the proposed detention/water quality basins and King Street.

9. Comment 8 on Page 11 of the 2/29/08 Clark Memorandum:

I am advised that the proposed wetlands mitigation for the subject project -- which includes wetland buffer enhancement (see the accompanying "Overall Wetland Mitigation Plan," prepared by Barrett, Bonacci & Van Weele, P.C. [by Evans Associates Environmental Consulting, Inc.], dated 5/22/07, and last revised 5/2/08 [Sheet 13B of 16]) -- achieves the maximum amount of wetland and wetland buffer mitigation possible, while still permitting residential development of the subject property pursuant to the mandates of the "Stipulation of Settlement between Petitioners/Plaintiffs and Respondents/Defendants" in the Supreme Court, Westchester County action and proceedings bearing Index Nos. 18632-2004, 19939-2004, and 02532-2005, which was "so ordered" on December 23, 2005.

Moreover, I am advised by the applicant's wetlands and landscaping consultants that the proposed plantings in the wetlands buffer areas of the subject property consist of native and non-invasive species.

10. Comment 9 on Page 11 of the 2/29/08 Clark Memorandum:

I am advised by the applicant's wetlands consultant that the goal of the proposed wetlands mitigation plan is to restore and reintegrate wetlands that have been historically degraded or that will be impacted by the proposed project, and that the mitigation plan will improve the functional value of the wetlands on the subject property by adding diversity to the biotic communities, while also preserving the hydrologic continuity within the wetlands. Moreover, the document entitled "Post Construction Monitoring and Maintenance of Stormwater Basin and Wetland Mitigation Plantings," prepared by Evans Associates Environmental Consulting, Inc., and dated June 2007, which was included, as "Appendix D," in the previously-submitted "Supplemental Environmental Information -- 'Kingswood,'" prepared by Freudenthal & Elkowitz Consulting Group, Inc., states that the purpose of the proposed wetland plantings is to "provide a diverse habitat that will be attractive to wildlife, including songbirds, amphibians and reptiles, as well as some mammals."

The proposed development does not include any proposed restoration or improvement of the "stream" on the southeasterly portion of the property because (1) changes to the "stream" would create additional project impacts, and (2) such additional impacts are unnecessary, given that, as set forth on the first page of the 4/28/08 BBV letter, peak flows to the "stream," under the proposed development of the subject property, will be reduced from the existing condition.

11. Comment 11 on Page 12 of the 2/29/08 Clark Memorandum:

The locations and extents of existing wetlands are depicted on the revised "Subdivision Map of Kingswood," prepared by Barrett, Bonacci & Van Weele, P.C., and dated April 28, 2008, and also upon the "Wetland Impact Map," prepared by Barrett, Bonacci & Van Weele, P.C. (by Evans Associates Environmental Consulting, Inc.), dated 5/22/07, and last revised 5/2/08 (Sheet 13A of 16).

12. Comment 13 on Pages 12-13 of the 2/29/08 Clark Memorandum:

As noted in my prior letter dated January 24, 2008, the applicant does not propose to install sidewalk or additional street lighting on Anderson Hill Road, as such improvements are not necessary for the proposed development.

Moreover, with regard to proposed snow storage, the accompanying "Alignment Plan," prepared by Barrett, Bonacci & Van Weele, P.C., dated 1/5/07, and last revised 4/28/08 (Sheet 2 of 16) depicts snow storage areas adjacent to the shoulders of the proposed site access roadway, but outside the roadway curbing, which are presumably acceptable locations.

13. Comment 16 on Page 14 of the 2/29/08 Clark Memorandum:

As appears from the "Typical Unit Landscape Plans," prepared by Barrett, Bonacci & Van Weele, P.C. (by William [Buddy] Johnson, Landscape Architect), dated 12/20/06, and last revised 4/23/08 (Sheet 12 of 16), submitted with this letter, the proposed planting list has been revised to eliminate the two species -- *euonymus fortunei coloratus* and *spirea "Gold Flame"* -- mentioned in this comment.

14. Comment 19 on Pages 14-15 of the 2/29/08 Clark Memorandum:

The requested note regarding micro-topographical relief appears on both the "Overall Wetland Mitigation Plan," prepared by Barrett, Bonacci & Van Weele, P.C. (by Evans Associates Environmental Consulting, Inc.), dated 5/22/07, and last revised 5/2/08 (Sheet 13B of 16) and the "Wetland Mitigation Enlargement Plan – Off-Site Sewer and Area 4," prepared by Barrett, Bonacci & Van Weele, P.C. (by Evans Associates Environmental Consulting, Inc.), dated 5/22/07, and last revised 5/2/08 (Sheet 13E of 16), which are submitted with this letter.

15. Comment 20 on Page 15 of the 2/29/08 Clark Memorandum:

As noted in my prior letter dated January 24, 2008, the applicant has determined that placement of barriers eliminating access to the wetlands are unnecessary and inappropriate because the

wetlands do not present any safety concerns for residents and visitors, the wetlands are proposed to be covered by a conservation easement, and the requested barriers would detract from the scenic beauty of the wetlands and the residents' enjoyment thereof. However, the applicant will further review this issue in advance of the Planning Board's and Village Trustees' consideration of the subject applications.

APRIL 3, 2008 MEMORANDUM OF DOLPH ROTFELD ENGINEERING, P.C.

It is respectfully submitted that the drainage issues set forth in this memorandum have been fully addressed by the drainage system described in the response to "Drainage" Comment 1 on the first page of the 4/28/08 BBV letter, as well as in the accompanying revised plans.

CONCLUSION

We believe that the accompanying plans and other documents, together with the previously-submitted "Expanded Environmental Assessment Form," dated January 2007, and "Supplemental Environmental Information," dated July 2007, and the documents and plans included therein, are fully responsive to the various comments received for the subject applications to date.

Moreover, as you and I have previously discussed, it is the applicant's position that (a) the various issues that have been raised with regard to the applicant's submissions do not involve the "completeness" of the subject applications, and (b) some of the issues raised relate to design preferences of the applicant, which, I respectfully submit, are not relevant to the technical review of the application. In any event, the four (4)-month time frame set forth in Paragraph "10(b)" of the "Stipulation of Settlement between Petitioners/Plaintiffs and Respondents/Defendants" in the Supreme Court, Westchester County action and proceedings bearing Index Nos. 18632-2004, 19939-2004, and 02532-2005, which was "so ordered" on December 23, 2005, does not depend upon when the Village or its consultants deem the subject applications to be "complete."

In accordance with our discussions, I respectfully submit that the subject applications should now be considered by the Planning Board, and such applications, as well as the remaining obligations under the aforesaid "Stipulation of Settlement," should be brought to conclusion.

If you have any questions, please call or e-mail me. Thank you for your anticipated cooperation.

Very truly yours,

John M. Wagner

Enclosures
cc: Victor G. Carosi, P.E.
Marilyn Timpone Mohamed
Dolph Rotfeld Engineering, P.C.

Appendix B

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------X

KF (RYE BROOK), LLC, and BORDER PROPERTIES, INC.,

Plaintiffs,

- against –

VILLAGE OF RYE BROOK and BOARD OF TRUSTEES OF THE VILLAGE OF RYE BROOK,

Defendants.

----------X

FILED
AND
ENTERED
ON Dec 23 2005
WESTCHESTER
COUNTY CLERK

In the Matter of

KF (RYE BROOK), LLC, and BORDER PROPERTIES, INC.,

Petitioners,

- against -

VILLAGE OF RYE BROOK and BOARD OF TRUSTEES OF THE VILLAGE OF RYE BROOK,

Respondents.

----------X

STIPULATION OF SETTLEMENT BETWEEN PETITIONERS/PLAINTIFFS AND RESPONDENTS/ DEFENDANTS

Index Nos. 18632-2004; 19939-2004; and 02532-2005

In the Matter of

KF (RYE BROOK), LLC, and BORDER PROPERTIES, INC.,

Petitioners,

- against –

VILLAGE OF RYE BROOK and BOARD OF TRUSTEES OF THE VILLAGE OF RYE BROOK,

Respondents.

----------X

WHEREAS, Petitioner/Plaintiff BORDER PROPERTIES, INC. ("Border Properties"), a business corporation created under the laws of the State of New York, is

the owner in fee of a certain 15.44-acre parcel of real property located on the southerly corner of Anderson Hill Road and King Street, partially in the Village of Rye Brook, County of Westchester, and State of New York, and partially in the Town of Greenwich, State of Connecticut (the "subject property"); and

WHEREAS, Petitioner/Plaintiff KF (RYE BROOK), LLC ("KF [Rye Brook]"), a limited liability company created under the laws of the State of Delaware, is authorized to do business in the State of New York and is a contract-vendee with respect to the subject property; and

WHEREAS, KF (Rye Brook) and Border Properties (collectively "Plaintiffs") are and have been co-applicants before the Respondent/Defendant VILLAGE OF RYE BROOK (the "Village") for the proposed development of a portion of the subject property for hotel use, in accordance with the Village's zoning classification of the subject property; and

WHEREAS, the Respondent/Defendant BOARD OF TRUSTEES OF THE VILLAGE OF RYE BROOK (the "Board of Trustees") was and is the elected legislative body of the Village; and

WHEREAS, at all times relevant, the Board of Trustees was and is also the agency of the Village that reviews and approves site plans for proposed land developments within the Village, and is currently reviewing Plaintiffs' pending site plan application, described below; and

WHEREAS, the portion of the subject property that is located within the Village was and is, at all times relevant, classified in the "H-1 Hotel District," as such district is shown on the Village's zoning map and otherwise is set forth in Chapter 250 of the Code

of the Village of Rye Brook (the "Village Code," with Chapter 250 thereof being referred to as the "Zoning Code"); and

WHEREAS, a "hotel" is the only principal use permitted in the Village's "H-1 Hotel District" in which the subject property is classified pursuant to the Zoning Code; and

WHEREAS, Plaintiffs have had an application (the "Hotel Application") pending before the Village and the Board of Trustees to develop a portion of the subject property with a 145-room hotel, together with accessory parking areas and other related improvements, which application includes, among other things, an application to the Board of Trustees for site plan approval of the proposed hotel development; and

WHEREAS, the current Hotel Application includes a hotel and improvements located on 3.03 acres of the subject property, situated wholly within the jurisdictional limits of the Village; and

WHEREAS, pursuant to Article 8 of the New York State Environmental Conservation Law and the rules and regulations promulgated at 6 N.Y.C.R.R. Part 617 (collectively "SEQRA"), the Board of Trustees adopted a Positive Declaration determining that an Environmental Impact Statement ("EIS") was required to be filed by Plaintiffs in connection with the Hotel Application; and

WHEREAS, in accordance with SEQRA, a Draft EIS ("DEIS") was submitted to the Board of Trustees by Plaintiffs for the Hotel Application, which DEIS was accepted as complete and, thereafter, a duly-noticed public hearing was held thereon; and

WHEREAS, five (5) versions of a proposed Final EIS ("FEIS") were submitted by Plaintiffs to the Village over a period of approximately four (4) years in connection

with the Hotel Application, the last of which versions was dated August 2004, but the Board of Trustees has neither accepted any such documents as being complete, nor filed any other FEIS as of the date of this Stipulation of Settlement (hereinafter the "Stipulation"), pursuant to SEQRA; and

WHEREAS, the Board of Trustees, by Local Law No. 10 of 1994, adopted on September 27, 1994, enacted the Village's first regulations regarding "wetlands" within the Village, which regulations were codified as Chapter 245 of the Village Code, entitled "Wetlands and Watercourses;" and

WHEREAS, the Board of Trustees, on November 12, 2003, adopted Local Law No. 15 of 2003 (hereinafter the "2003 Wetlands Law"), which sought to amend the entirety of Chapter 245 ("Wetlands and Watercourses") of the Village Code; and

WHEREAS, portions of the subject property have been deemed to constitute "wetland" or "wetland/watercourse buffer" areas, as defined by Chapter 245 of the Village Code; and

WHEREAS, in order to minimize potential adverse impacts to designated "wetlands," Plaintiffs presented to the Village several plans for development alternatives for the Hotel Application that were and are designed to locate as much as of the disturbance for the proposed development as possible outside of "wetlands" areas; and

WHEREAS, the Board of Trustees, on August 10, 2004, adopted Local Law #13-2004 regarding a "Scenic Roads Overlay District," the text of which, among other things, lists the road frontages of the subject property as being within a "Scenic Roads Overlay District," and details additional setback requirements for development of the subject property; and

WHEREAS, Plaintiffs have commenced the above-captioned litigations (the "Litigations") against the Respondents/Defendants Village and Board of Trustees (the Village and Board of Trustees are sometimes collectively referred to as the "Municipal Defendants"), which Litigations include:

1. A declaratory judgment action that seeks to declare illegal, invalid, null, and void, and to annul, reverse, and set aside, the 2003 Wetlands Law, which purported to amend the entirety of Chapter 245 ("Wetlands and Watercourses") of the Village Code;

2. A CPLR Article 78 proceeding that seeks, among other things, to annul, reverse, and set aside the Village's Local Law #13-2004 regarding a "Scenic Roads Overlay District"; and

3. A CPLR Article 78 proceeding to compel the Board of Trustees to file a Final Environmental Impact Statement ("FEIS") for the above-referenced Hotel Application, as required by SEQRA; and

WHEREAS, the Plaintiffs and Municipal Defendants wish to resolve the Litigations in accordance with the terms and conditions of this Stipulation.

NOW THEREFORE, without any admission of wrongdoing or violation of law by any party, the Plaintiffs and Municipal Defendants (the "Parties") stipulate as follows:

1. The Municipal Defendants acknowledge that the Zoning Code currently restricts the principal use of the subject property solely to a "hotel," and that such use is compatible and harmonious with the surrounding properties.
2. The Municipal Defendants have reviewed the record of proceedings before the Village and the above-captioned Court, including, but not limited to, the August 2004

FEIS submitted by Plaintiffs to the Board of Trustees (the "Proposed FEIS"), which contains, among other things:

a. Responses to the comments upon the DEIS for the Hotel Application;

b. Site plan drawings for the proposed hotel and several alternatives, as requested by the Village; and

c. Photographic simulations of the proposed hotel and several alternatives, as viewed from several vantage points along Anderson Hill Road and King Street, as also requested by the Village.

3. In connection with this Stipulation, Plaintiffs have provided the Municipal Defendants with a conceptual site plan (copy annexed hereto as Exhibit "A" and made a part hereof) showing a possible residential development of the subject property with forty-three (43) residential dwelling units, gatehouse, parking areas and structures, drainage facilities, and appurtenances (collectively the "Concept Plan"), which Concept Plan the Municipal Defendants have reviewed.

4. Within ninety (90) days of the date this Stipulation is "so-ordered" (which "so-ordered" date is referred to as the "Consent Date"), the Village and Board of Trustees shall consider taking the following actions:

a. Filing the Proposed FEIS for the pending Hotel Application, revised only to include the revisions set forth in the Memorandum annexed hereto as Exhibit "B" and made a part hereof;

b. Issuing a "Findings Statement" for the Hotel Application, pursuant to SEQRA; and

c. Issuing a site plan approval and wetlands permit, pursuant to Chapter 245

of the Village Code, valid for construction of a hotel containing no fewer than 125 guest rooms, together with appurtenances (including, but not limited to roadways, drainage structures, utilities, signs, landscaping), on the subject property, as more particularly detailed in the Proposed FEIS (as revised in accordance with Paragraph "4.a.") and the plans included in same (the said approved and permitted hotel development is hereinafter referred to as the "Approved Hotel Development"), which approval and permit shall be:

i. Valid for no fewer than five (5) years; and

ii. Conditioned only upon the issuance of (a) the variances specified as necessary in the Proposed FEIS, and (b) any variances of the aforesaid Local Law #13-2004 (regarding the restrictions of the "Scenic Roads Overlay District") and any other permits from the Village that are necessary for construction of the Approved Hotel Development.

5. Each and every one of the Litigations shall proceed as if this Stipulation had never been signed or existed if:

a. Within thirty (30) days after the Consent Date, the Board of Trustees does not file the Proposed FEIS (as revised in accordance with Paragraph "4.a."); or

b. Within ninety (90) days after the Consent Date, the Board of Trustees does not issue a SEQRA Findings Statement supporting approval of the Hotel Application or one of the 125-room alternative hotel developments

included in the Proposed FEIS; or

c. Within ninety (90) days after the Consent Date, the Board of Trustees does not grant site plan approval and a wetlands permit for a hotel containing no fewer than 125 guest rooms, together with appurtenances (including, but not limited to roadways, drainage structures, utilities, signs, landscaping), on the subject property, in accordance with one of the alternative plans contained in the Proposed FEIS; or

d. Within ninety (90) days after the Consent Date, the Board of Trustees does not: (1) duly file in the office of the Clerk of the Village of Rye Brook the resolutions for the aforesaid (a) filing of an FEIS, (b) issuance of a Findings Statement, (c) site plan approval, and (d) wetlands permit; and (2) comply with all the filing, notice, publication, and distribution requirements of SEQRA with respect to the aforesaid filing of an FEIS and issuance of a Findings Statement in connection with the Hotel Application.

6. The Parties confirm that none of them is in default in the performance of anything required to timely address the Litigations and, although no answer or "return" has been served or filed by the Municipal Defendants, they continue to have time to answer and/or respond to the Litigations, if they are pursued before the Courts. Further, since no monetary claims have been asserted by Plaintiffs, the Municipal Defendants hereby waive the right to conduct examinations of Plaintiffs, pursuant to Section 50-h of the General Municipal Law, in connection with the various Notices of Claim heretofore filed by Plaintiffs against the Village. Notwithstanding the

foregoing, in the event that the stay of the Litigations is lifted pursuant to Paragraph "17" of this Stipulation, the Municipal Defendants agree to serve and file all answers and "returns" for the Litigations within thirty (30) days after written demand for such service and/or filing by any of Plaintiffs' counsel.

7. The Board of Trustees shall:

   a. Within ninety (90) days after the Consent Date, introduce legislation (hereinafter the "Residential Amendments") to amend the Zoning Code and other provisions of the Village Code (including, but not limited to, Chapter 245 ["Wetlands and Watercourses"] and the "Scenic Roads Overlay District" provisions of the Zoning Code) as necessary to allow the portion of the subject property lying within the Village to be used, in addition to the hotel use permitted under the subject property's "H-1" zoning classification (which zoning classification and permitted hotel use shall not be altered by the Municipal Defendants), and without need of any variances, for (1) conservation subdivisions, as described in Section 219-42 of the Village Code, and (2) no fewer than forty-three (43) attached or detached single-family or multi-family residential dwelling units averaging no less than 2,600 square feet of habitable floor area (i.e., floor area not including areas devoted to cellars, basements, garages, attics, storage areas, or exterior structures) per unit, together with appurtenances substantially as shown on the Concept Plan annexed hereto as Exhibit "A" (the "Specified Residential Development"); and

   b. Within ten (10) months after the Consent Date adopt a determinative and

final decision regarding the Residential Amendments.

c. Notwithstanding the foregoing ten (10) month mandatory time period set forth in subparagraph "b." above, if the Village has performed in accordance with this Stipulation, acted favorably with regard to the Approved Hotel Development, and is in good faith diligently processing the review of the Residential Amendments, then the aforesaid ten (10) month time period shall automatically be extended by sixty (60) days to a maximum of twelve (12) months from the Consent Date, but no longer.

8. The Residential Amendments described in the preceding paragraph:

   a. Shall not alter the current "H-1" zoning of the subject property, eliminate the hotel use that is allowed in the "H-1" zoning district as of the date of this Stipulation, or impose additional or different restrictions upon the hotel use that is allowed in the "H-1" zoning district as of the date of this Stipulation; and

   b. Shall expressly provide that, notwithstanding the Residential Amendments, the subject property may continue to be used for hotel use pursuant to the provisions of the "H-1" zoning district.

9. Prior to any action upon the Residential Amendments described in Paragraph "7" above, the Board of Trustees:

   a. Shall undertake and complete review, as "lead agency" pursuant to SEQRA, of both:

      i. the proposed Residential Amendments, and

      ii. the Specified Residential Development; and

b. Shall comply with all the requirements of SEQRA and its implementing regulations in connection with such review, which review shall include but not be limited to, consideration of impacts upon visual and aesthetic resources, traffic, wetlands, flora and fauna, schools, recreational facilities, municipal infrastructure, water, sewerage, telecommunications, energy supplies, and community character.

10. In the event that the Board of Trustees shall adopt the Residential Amendments described in Paragraphs "7" and "8" above:

a. Within ninety (90) days after the date of adoption of the Residential Amendments (the "Residential Date"), Plaintiffs, at their sole cost and expense, shall submit to the Village, and thereafter diligently pursue, applications for all Village approvals (e.g., site plan approval, subdivision approval, wetland permit, tree removal permit) required to develop the Specified Residential Development; and

b. Within four (4) months after the date (the "Residential Submission Date") on which Plaintiffs submit the last of their applications for Village approvals/permits regarding the Specified Residential Development, the Board of Trustees and the Village shall (1) complete their obligations under SEQRA with respect to the Specified Residential Development, and (2) adopt determinative and final decisions whether to permit the Specified Residential Development on the subject property, including but not limited to issuance of final determinations with respect to all the applications for approvals/permits for such development submitted by Plaintiffs.

11. The actions required to be taken by the Board of Trustees and the Village, as specified in Paragraphs "7" through "10" above hereinafter are collectively referred to as the "Residential Planning Actions."

12. Notwithstanding any provision of this Stipulation, Plaintiffs shall have the right, until Plaintiffs' rights to construct the Approved Hotel Development are relinquished as provided in Paragraph "20" of this Stipulation, to obtain written confirmation from the Village's Building Inspector of the variances and permits necessary from the Village for construction of the Approved Hotel Development and, thereafter, to apply for such variances and permits. The Municipal Defendants agree to reasonably, rationally, timely, and properly process any and all applications for such variances and permits.

13. For a period extending seven (7) years after the Consent Date, five (5) years after completion of the last of the Residential Planning Actions, or until the date of issuance of the final Certificate of Occupancy for the last building in the Specified Residential Development, whichever occurs first, the Municipal Defendants shall not:

    a. Establish, either by new legislation or amendments or by modifications of existing laws or regulations, any additional, further, different, or more restrictive limitations on (1) subdivision or development of the subject property, whether for hotel, residential, or any other use; and/or (2) any hotel use in the Village's "H-1" zoning district; or

    b. Change the zoning classification of the subject property from "H-1," other than to allow, in addition to the "H-1" zoning classification, the application of the Residential Amendments to the subject property.

14. The Municipal Defendants shall comply with all applicable laws and regulations in connection with the Residential Amendments, application to the subject property of such Residential Amendments, and issuance of all decisions regarding subdivision, site plan, wetlands, building, and other approvals and/or authorizations necessary for the Specified Residential Development.

15. Plaintiffs shall reimburse the Village for the reasonable costs and expenses the Village actually incurs for environmental review for the Residential Planning Actions, provided that such reasonable costs and expenses do not exceed Fifty-eight Thousand ($58,000) Dollars. Notwithstanding the foregoing, Plaintiffs shall pay all application fees in accordance with the Village's schedule of fees in effect on the date this Stipulation is first signed on behalf of the Plaintiffs, but other than as set forth in this Paragraph "15," Plaintiffs shall have no obligation to fund any escrow account or to otherwise pay Village costs or expenses in connection with the processing of any applications for the Specified Residential Development on the subject property.

16. The Parties acknowledge and agree that no fees, costs, expenses, or escrow payments are owed by Plaintiffs in connection with the Hotel Application and the review thereof by the Village and its consultants, and further acknowledge and agree that no additional fees, costs, expenses, or escrow payments will be charged to Plaintiffs in connection with the Hotel Application or the review thereof by the Village and its consultants.

17. For a period extending ten (10) months from the Consent Date, or four (4) months from the Residential Submission Date, whichever is later, the Litigations shall be stayed to allow time for the Residential Planning Actions to occur, provided,

however, that:

a. During and after the period of such stay, the Court shall retain jurisdiction to entertain and determine applications by the Parties to resolve any disputes regarding this Stipulation; and

b. Notwithstanding the foregoing, the aforesaid stay shall automatically dissolve if the Municipal Defendants (1) do not fully and timely perform each and every action detailed in Paragraph "5.a., b., c. and d." of this Stipulation, or (2) violate any other term or provision of this Stipulation.

18. Plaintiffs shall have no obligation or responsibility to discontinue the Litigations unless and until all of the following have occurred:

a. The Board of Trustees shall have filed the Proposed FEIS (as revised pursuant to Paragraph "4.a.") within thirty (30) days after the Consent Date; and

b. The Board of Trustees shall have, within ninety (90) days after the Consent Date, issued a SEQRA Findings Statement supporting approval of the Hotel Application or one of the alternative hotel developments included in the Proposed FEIS; and

c. The Board of Trustees shall have, within ninety (90) days after the Consent Date, granted and/or issued site plan approval and a wetlands permit for a hotel containing no fewer than 125 guest rooms, together with appurtenances (including, but not limited to roadways, drainage structures, utilities, signs, landscaping), on the subject property, in accordance with one of the alternative plans contained in the Proposed FEIS; and

d. The Board of Trustees shall have, within ninety (90) days after the Consent Date, (1) duly filed in the office of the Clerk of the Village of Rye Brook the resolutions for the aforesaid (a) filing of an FEIS, (b) issuance of a Findings Statement, (c) site plan approval, and (d) wetlands permit; and (2) complied with all the filing, publication, and distribution requirements of SEQRA with respect to the aforesaid filing of an FEIS and issuance of a Findings Statement in connection with the Hotel Application; and

e. All variances and permits referred to in Paragraph "4.c.ii." above and in any written confirmation issued by the Village's Building Inspector shall have been issued for the Approved Hotel Development referred to in Paragraph "4.c." above; and

f. Within ten (10) months after the Consent Date (or twelve (12) months after the Consent Date, if such time has been extended by the sixty (60) day extension period set forth in Paragraph "7" hereof), or four (4) months after the Residential Submission Date, whichever is later:

   i. the Residential Planning Actions have been completed; and

   ii. all subdivision, site plan, wetlands, building, and other permits, authorizations, and approvals are issued enabling the construction of the Specified Residential Development; and

g. No administrative or Court action or proceeding has been commenced by any person or entity with respect to either (i) this Stipulation, (ii) the site plan approval(s), wetlands permit(s), variances, building permit(s), and/or

any other permits, authorizations, or approvals granted or issued with respect to the Approved Hotel Development, (iii) the Residential Amendments, (iv) the subdivision approval(s), site plan approval(s), wetlands permit(s), building permit(s), and/or any other permits, authorizations, or approvals granted or issued with respect to the Specified Residential Development, (v) the SEQRA review, determinations, or findings conducted, made, or filed with respect to this Stipulation, the Approved Hotel Development, the Residential Amendments, or the Specified Residential Development, and/or (vi) any other matter related to the subject property, unless all such actions or proceedings have been withdrawn and/or discontinued with prejudice by all parties thereto, as provided in Paragraph "19.b." of this Stipulation.

19. At any time following issuance of the necessary variances and permits identified in Paragraph "4.c.ii.," Plaintiffs may apply for and obtain a building permit to construct the Approved Hotel Development (the "Hotel Building Permit"), provided, however, that Plaintiffs and the Municipal Defendants agree that, upon receipt of the Hotel Building Permit, Plaintiffs shall immediately deliver the Hotel Building Permit, in escrow, to the Village's counsel, Keane & Beane, P.C. (the "Village Attorney"), and the Village Attorney shall thereafter immediately release the Hotel Building Permit to Plaintiffs if:

    a. The Municipal Defendants do not, within ten (10) months after the Consent Date (or twelve (12) months after the Consent Date, if such time has been extended by the sixty (60) day extension period set forth in

Paragraph "7" hereof), or within four (4) months after the Residential Submission Date, whichever is later, (i) complete the Residential Planning Actions, and (ii) grant all subdivision, site plan, wetlands, building, and other permits, authorizations, and approvals for construction of the Specified Residential Development; or

b. Any person or entity commences any of the actions or proceedings set forth in Paragraph "18.g." of this Stipulation (the "Related Actions"), and all such Related Actions are not withdrawn or discontinued with prejudice by all the parties thereto within thirty (30) days after the delivery into the custody of an overnight delivery service, for next business day delivery, of written notice, addressed to the Village and the Village Attorney, of the commencement or pendency of any such action or proceeding; or

c. The Village fails to issue any building permit for the Specified Residential Development promptly following the submission of an application for such permit.

20. Plaintiffs agree that, upon issuance of the last Certificate of Occupancy for all the buildings and structures comprising the Specified Residential Development, they shall have no further rights to construct the Approved Hotel Development on the subject property. Plaintiffs further agree that, upon issuance of the last required Certificate of Occupancy for the buildings and structures comprising the Specified Residential Development, they will execute any and all documents reasonably necessary to confirm their relinquishment of rights to construct the Approved Hotel Development. This provision shall be binding upon the successors and assigns in title

to the subject property.

21. Other than as expressly provided for herein, the Parties reserve and retain all rights, including, but not limited to, the right to commence, prosecute and defend additional actions and proceedings, as appropriate, with respect to the subject property.

22. This Stipulation shall be interpreted as if it is drafted by or on behalf of all Parties.

23. This Stipulation shall not be effective until it has been "so-ordered" by the Court.

24. Notwithstanding any other provision of this Stipulation, the Court shall retain jurisdiction, at all times, of the Parties and the issues in the Litigations for purposes of enforcing this Stipulation and resolving any other matters that may arise in connection with this Stipulation, including the hearing and determination of any Related Actions.

25. The terms and conditions of this Stipulation and the fact of its execution shall not be deemed to constitute an admission by any of the Parties hereto regarding the allegations pleaded in the above-captioned Litigations, nor the responses, if any, filed by the Municipal Defendants in the Litigations.

26. Each of the Parties shall bear its own costs and attorneys fees in the above-captioned Litigations and hereby waives its claims, if any, against any other of the Parties for attorneys' fees or costs in the Litigations.

27. The terms and conditions of this Stipulation shall be binding upon and inure to the benefit of the successors and assigns of the Parties hereto.

28. This Stipulation constitutes the full and complete agreement among the Parties and the terms and conditions hereof shall not be modified except by a writing or writings

executed by authorized representatives of the Parties and "so ordered" by the Court.

DEFENDANTS/RESPONDENTS VILLAGE OF RYE BROOK AND BOARD OF TRUSTEES OF THE VILLAGE OF RYE BROOK

By: _____ Dec 17 ~~October~~, 2005
Hon. Lawrence Rand, Mayor, as authorized by a resolution of the Board of Trustees annexed hereto as Exhibit "C."

PLAINTIFF/PETITIONER KF (RYE BROOK), LLC

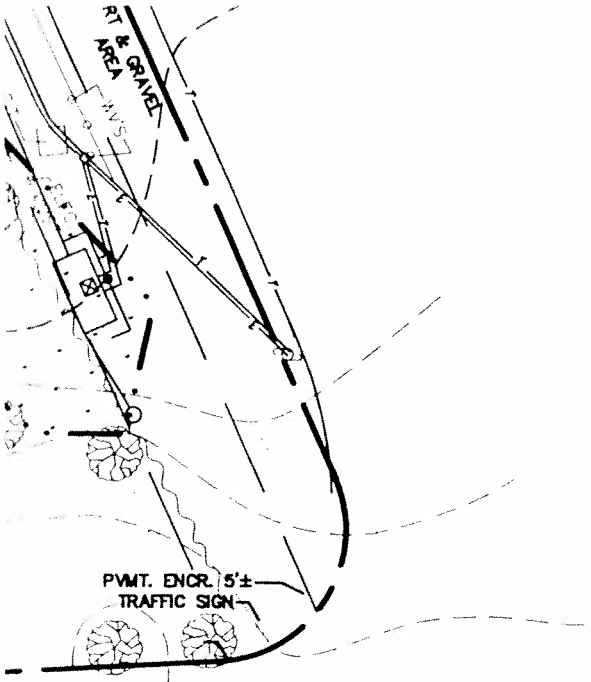
By: _____ December 8 ~~October~~, 2005
David Feinberg, General Manager

PLAINTIFF/PETITIONER BORDER PROPERTIES, INC.

By: _____ October , 2005
Ken O'Gara, _____

SO ORDERED:

_____
Hon. Louis A. Barone, Justice
Supreme Court of the State of New York
County of Westchester
Dated: December 23, 2005



REVISIONS

7/14/05 BUILDING ORIENTATION

Barrett, Bonacci & VanWeele, P.C.

CIVIL ENGINEERS/SURVEYORS/PLANNERS
175A Commerce Drive, Hauppauge, NY 11788
TEL 631/435-1111 FAX 631/435-1022
www.bbvpc.com

ALTERATION OF THIS DOCUMENT, EXCEPT BY A LICENSED PROFESSIONAL ENGINEER IN ACCORDANCE WITH SECTION 7.209 OF NYS EDUCATION LAW, IS ILLEGAL

KF Rye Brook, LLC

Village of Rye Brook

Westchester County, NY New York

Conceptual Site Plan

SHEET 1 OF 1

© 2005 B.B.V., P.C.

DESIGNED BY	DRAWN BY	CHECKED BY
KW/DW	KW/DW	

DATE	SCALE	PROJECT NO.
JUNE 24, 2005	1"=50'	A050030

FREDERICK P. CLARK ASSOCIATES, INC.
Planning/Development/Environment/Transportation
Rye, New York and Fairfield, Connecticut

350 Theodore Fremd Avenue
Rye, New York 10580

(914) 967-6540 • FAX (914) 967-6615

David H. Stolman, AICP, PP
Michael A. Galante

Joanne P. Meder, AICP
Daniel K. Wery, AICP

David J. Portman, FAICP

MEMORANDUM

To: Lawrence A. Rand, Mayor, and the
Village of Rye Brook Board of Trustees

Date: March 15, 2005

Subject: **Garden Inn - Continuing FEIS Review**

As requested, we completed our review of the revised Final Environmental Impact Statement (FEIS), Volumes I, II and III, dated August 2004, for the Hilton Garden Inn Hotel. This memorandum includes all outstanding comments from this office submitted to the Board by memoranda dated November 16, 2004 and November 23, 2004 as well as additional comments generated during completion of our review for adequacy and accuracy.

In addition, we reviewed the following revised site plans:

For a 145-room, three-story hotel:

Sheet Number	Sheet Title	Dated
Sheet #1	*Title Sheet*	*rev. 07/02/04*
Sheet #2	*Existing Conditions Plan*	*rev. 07/02/04*
Sheet #3	*Layout Plan*	*rev. 07/02/04*
Sheet #4	*Grading Plan*	*rev. 07/02/04*
Sheet #5	*Utility Plan*	*rev. 07/02/04*
Sheet #6	*Erosion Control Plan*	*rev. 07/02/04*
Sheet #7	*Landscape Plan*	*rev. 07/02/04*
Sheet #8	*Details - Sheet 1*	*rev. 07/02/04*
Sheet #9	*Details - Sheet 2*	*rev. 07/02/04*
Sheet #10	*Details - Sheet 3*	*rev. 07/02/04*
Sheet #11	*Composite Plan*	*rev. 07/02/04*
Sheet #12	*Site Lighting Plan*	*rev. 07/02/04*
Sheet #13	*Site Sections – Sheet 1*	*rev. 07/02/04*
Sheet #14	*Site Sections – Sheet 2*	*rev. 07/02/04*

For a 125-room, three-story hotel:

Sheet Number	Sheet Title	Dated
Sheet #1	*Title Sheet*	*rev. 07/02/04*
Sheet #2	*Existing Conditions Plan*	*rev. 07/02/04*
Sheet #3	*Layout Plan*	*rev. 07/02/04*
Sheet #4	*Grading Plan*	*rev. 07/02/04*
Sheet #5	*Utility Plan*	*rev. 07/02/04*
Sheet #6	*Erosion Control Plan*	*rev. 07/02/04*
Sheet #7	*Landscape Plan*	*rev. 07/02/04*
Sheet #8	*Details - Sheet 1*	*rev. 07/02/04*
Sheet #9	*Details - Sheet 2*	*rev. 07/02/04*
Sheet #10	*Details - Sheet 3*	*rev. 07/02/04*
Sheet #11	*Composite Plan*	*rev. 07/02/04*
Sheet #12	*Site Lighting Plan*	*rev. 07/02/04*
Sheet #13	*Site Sections – Sheet 1*	*rev. 07/02/04*
Sheet #14	*Site Sections – Sheet 2*	*rev. 07/02/04*

For a 125-room, four-story hotel:

Sheet Number	Sheet Title	Dated
Sheet #1	*Title Sheet*	*rev. 07/02/04*
Sheet #2	*Existing Conditions Plan*	*rev. 07/02/04*
Sheet #3	*Layout Plan*	*rev. 07/02/04*
Sheet #4	*Grading Plan*	*rev. 07/02/04*
Sheet #5	*Utility Plan*	*rev. 07/02/04*
Sheet #6	*Erosion Control Plan*	*rev. 07/02/04*
Sheet #7	*Landscape Plan*	*rev. 07/02/04*
Sheet #8	*Details - Sheet 1*	*rev. 07/02/04*
Sheet #9	*Details - Sheet 2*	*rev. 07/02/04*
Sheet #10	*Details - Sheet 3*	*rev. 07/02/04*
Sheet #11	*Composite Plan*	*rev. 07/02/04*
Sheet #12	*Site Lighting Plan*	*rev. 07/02/04*
Sheet #13	*Site Sections – Sheet 1*	*rev. 07/02/04*
Sheet #14	*Site Sections – Sheet 2*	*rev. 07/02/04*

Please note that our review is limited to planning, zoning, land use, site design, transportation, and environmental items. We did not conduct a review of engineering-related matters. Dolph Rotfeld, Engineering reviewed engineering items and submitted comments to the Village Engineer in a memorandum dated November 9, 2004.

Incomplete Planning, Zoning, Land Use, Site Design, Transportation, and Environmental Information

We have updated or elaborated on comments included in our memoranda to the Board of Trustees dated November 16, 2004 and November 23, 2004.

1. **Erosion and sediment control and steep slopes**. The erosion and sediment control plan will need to be reviewed by the Village Engineer or engineering consultant regarding compliance with the requirements of Chapter 118 of the Village Code prior to the issuance of any building permit. In addition, any steep slopes created by grading operations during construction should comply with the provisions of Chapter 213. Any findings statement as a condition of Site Plan Approval should require that the Applicant comply with Chapters 118 and 213 of the Code.

   Disclosure of all applicable regulations and compliance with those regulations, in this case, the amended erosion and sediment control regulations of Chapter 118 and the steep slopes requirements of Chapter 213 of the Village Code, completed prior to issuance of a building permit.

2. **Grading plan**. Sheet 6 of 14, *Erosion Control Plan,* of the set of plans for the proposed action and the 125-room alternatives shows the locations of regulated trees and a tree preservation list keyed to the map. For the proposed action, 466 inches Diameter at Breast Height (DBH) would be removed and 384.5 inches would be replaced by planting three-inch caliper shade trees and 2.5-inch caliper flowering and evergreen trees.

   We recommend that trees proposed to be planted be of sufficient quantity, and size and of appropriate species to mitigate the impact, especially in winter, of the removal of so many inches of DBH of mature trees. The applicant should increase the size of new shade trees to 3.5 to 4 inches caliper and ornamental and evergreen trees to 3 to 3.5 inches caliper.

   With these changes, it is our opinion that the planting plans would provide mitigation for removal of mature trees and provide mitigation of potential visual impacts associated with construction of retaining walls on the site.

The following comments are organized according to the Table of Contents of the revised FEIS:

Project Summary

3. **Page 3, second paragraph.** The word "final" should be removed from the beginning of the third sentence. Neither of the two parties sending the memoranda referenced here characterized either one as final.

A. Project Description

4. **Response A-9, Page 22, last paragraph.** The fifth sentence should be prefaced by "Based on data supplied to the applicant by HVS International ..." The Board of Trustees would have no way to determine the economic feasibility of a reduced-room-count hotel on the site.

5. **Response A-23, Page 37, first paragraph.** The last sentence should be qualified as the Applicant's opinion as the Board of Trustees would have no way to determine whether the estimated returns might be lower for a restricted use hotel. The sentence should read "...based on information supplied to the applicant by HVS International, the estimated returns will likely be lower..."

6. **Response A-28, Page 43.** In a letter to the Planning Board dated October 14, 2004 the Town Planner for Greenwich states that the Inland Wetlands and Watercourses Agency (IWWCA) recently adopted revised wetland regulations. For completeness and accuracy, the latest version of the Town of Greenwich wetland regulations should be included here as well as in Appendix P.

   The applicant will be required as a mitigation measure in the Findings Statement and as a condition of any wetlands permit to provide a post-construction monitoring plan and a maintenance/management plan for the bio-filtration basins and created or restored wetlands and wetland buffers that complies with Section 245-9 C, Subsections (b), (c), (d), (e), (f), (g), and Section 245-10.

B. Zoning and Land Use

7. **Scenic Roads Overlay District requirements.** Discussion regarding the requirements of the Scenic Roads Overlay District for portions of the site adjacent to Anderson Hill Road and King Street in Rye Brook should be included in the FEIS as well as discussion regarding compliance with required setbacks and other regulations of the district, including any variances from the requirements that would be necessary to implement the proposed plan. The list of variances in Response A-39 on Page 52 should be updated as necessary.

C. Noise

8. **Response J-2, Page 203.** The last sentence of the response states that the distance to the nearest residences and vegetation, both existing and proposed, would adequately buffer any noise generated by the project. While we agree that sufficient distance from a source of noise could diminish the impact at a location, we do not agree that

vegetation can adequately perform the same task. Therefore, we request removal of "and the extensive amount of existing and proposed vegetation will adequately buffer any noise generated by the project."

9. **Response M-1, Page 215.** Discussion regarding the requirements of the Scenic Roads Overlay District on Anderson Hill Road and King Street should be added to the last paragraph as well as descriptions of any variances from the requirements sought by the applicant.

It is our opinion that upon receipt of these revisions, the August 2004 version of the FEIS is complete. We recommend that the applicant provide the additional information requested and make the revisions indicated in an updated version of the FEIS.

Marilyn Timpone Mohamed, ASLA, AICP
Senior Associate/Planning/Environment

Lawrence K Bice
Associate/Planning

Jill A. Heller, AICP
Associate/Planning/GIS

Chan Timmis
Associate/Planning

Donald R. Tone, Jr., PE
Senior Associate/Transportation

cc: Warren S. Agatston, Chairman, and the Rye Brook Planning Board
Christopher Bradbury, Village Administrator
Edward F. Beane, Esq., Village Attorney
John M. Wagner, Esq., for the Applicant

On a motion made by Trustee Feinstein and seconded by Trustee Rosenberg, the following resolution was adopted:

RESOLUTION

CONSIDERING A RESOLUTION REGARDING KF LLC RYE BROOK LITIGATION

WHEREAS, the Board of Trustees has reviewed a Stipulation of Settlement (the "Stipulation") in various litigations all of which are entitled KF (Rye Brook), LLC and Border Properties, Inc v Village of Rye Brook and Board of Trustees of the Village of Rye Brook, bearing Index Nos 18632-2004, 19939-2004, and 02532-2005; and

WHEREAS, the Stipulation was considered at a public meeting on September 13, 2005; and

WHEREAS, the public was afforded an opportunity to comment on the Stipulation

NOW THEREFORE, BE IT RESOLVED, the Board of Trustees hereby authorizes the Mayor to execute the Stipulation, subject to the terms and conditions contained therein, on behalf of the Village of Rye Brook and the Board of Trustees of the Village of Rye Brook.

TRUSTEE BROWN	**VOTING AYE**
TRUSTEE BUZIN	**VOTING AYE**
TRUSTEE FEINSTEIN	**VOTING AYE**
TRUSTEE ROSENBERG	**VOTING AYE**
MAYOR RAND	**VOTING AYE**

State of New York
County of Westchester } ss.:
Village of Rye Brook

I hereby certify that this is the Resolution adopted by the Board of Trustees of the Village of Rye Brook which was duly passed by said Board on September 13, 2005.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Village of Rye Brook, this 14 day of September, 2005

Christopher J. Bradbury, Village Clerk

Appendix C

STATE ENVIRONMENTAL QUALITY REVIEW ACT
APPLICATIONS FOR SITE PLAN APPROVAL, PERMIT TO PERFORM REGULATED ACTIVITIES IN A WETLAND AND STEEP SLOPES WORK PERMIT
HILTON GARDEN INN AT RYE BROOK

FINDINGS STATEMENT

Date: February 28, 2006

This Findings Statement is issued pursuant to Article 8 of the Environmental Conservation Law (State Environmental Quality Review Act ["SEQRA"]) and the implementing regulations therefor at 6 NYCRR Part 617.

Name of Action: Applications for Site Plan Approval, Permit to Perform Regulated Activities in a Wetland and Steep Slopes Work Permit
Hilton Garden Inn at Rye Brook

Project Location: Southwest corner of the intersection of Anderson Hill Road and King Street (Section 1 – Block 4 – Lots 5, 6, 7A and 7A1)
Incorporated Village of Rye Brook, Westchester County

Lead Agency: Board of Trustees of the
Incorporated Village of Rye Brook

Contact Person: Christopher Bradbury, Village Administrator/Clerk
Village of Rye Brook
Village Hall
938 King Street
Rye Brook, New York 10573

Telephone Number: (914) 939-1121

SEQRA Classification: Type I

Approvals Required:

Village of Rye Brook
- Board of Trustees: Site Plan and Permit to Perform Regulated Activities in a Wetland
- Planning Board: Steep Slopes Work Permit

Westchester County
- Department of Public Works: Approval of curb cuts

Health Department: Sewer and Water Permits

New York State
Department of Environmental Conservation: State Pollutant Discharge Elimination System (SPDES) Permits

United States Department of the Army
Corps of Engineers: Nationwide Wetlands Permit

The Board of Trustees of the Incorporated Village of Rye Brook (hereinafter the "Board of Trustees"), as lead agency, subsequent to review of the Draft Environmental Impact Statement ("DEIS") and the Final Environmental Impact Statement ("FEIS") (hereinafter collectively referred to as the "EIS"), hereby certifies that:

- it has considered the relevant environmental impacts, facts and conclusions disclosed in the EIS;
- it has weighed and balanced relevant environmental impacts with social, economic and other considerations;
- the requirements of 6 NYCRR Part 617 have been met;
- consistent with social, economic and other essential considerations from among the reasonable alternatives available, the selected alternative described below is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable; and
- adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating, as conditions to the decision, those mitigative measures that were identified as practicable during the environmental review process.

SEQRA AND PROJECT HISTORY

SEQRA History

The Hilton Garden Inn at Rye Brook was originally proposed by the Applicant, KF (Rye Brook), LLC, as a145-room, limited-service hotel to be situated on an approximately 15.44-acre property at the intersection of Anderson Hill Road and King Street, in the Incorporated Village of Rye Brook, Westchester County, New York and the Town of Greenwich, Connecticut (hereinafter the "subject property").

The Board of Trustees, after review of the application, declared itself to be the "lead agency," and issued a positive declaration, on or about June 15, 1999, thereby requiring the preparation of a Draft Environmental Impact Statement ("DEIS"). The DEIS was prepared and submitted by the

applicant, and the Board of Trustees held a hearing on the DEIS, the then-proposed zoning amendments, the site plan application, and the wetlands permit application on September 26, 2000. Numerous oral and written comments were made on the DEIS.

In January 2001, the Applicant, through its then-primary environmental and planning consultant, Cleary Consulting (hereinafter "Cleary"), submitted an initial FEIS addressing oral comments made at a public hearing for the DEIS held on September 26, 2000 as well as written comments received by the lead agency. Since the initial preparation of the FEIS in January 2001, the responses to some of the comments have been revised to address various issues raised by the Village and its consultants in correspondence from, and in meetings with, the Planning Board, Village staff and Village consultants.

Following submission of the January 2001 initial draft of the FEIS, the lead agency and its consultants, Frederick P. Clark Associates, Inc. (hereinafter "FPC"), reviewed the document and issued comments, by memoranda prepared by FPC dated March 15, 2001 and March 20, 2001. The Applicant's consultant, Cleary, responded to those comments by a memorandum dated April 16, 2001. The Village and its consultants reviewed those responses and issued additional comments, which are set forth in a memorandum dated September 6, 2001. Cleary submitted responses thereto in a letter dated October 29, 2001, and FPC provided a summary memorandum to the Incorporated Village of Rye Brook Board of Trustees and Planning Board dated November 1, 2001.

Thereafter, the Planning Board of the Incorporated Village of Rye Brook prepared a comment letter dated November 20, 2001, and Cleary submitted a response thereto dated December 3, 2001.

The Village's consultant, FPC, then prepared a December 7, 2001 memorandum to the Incorporated Village of Rye Brook Board of Trustees and Planning Board summarizing outstanding issues required to be addressed in order for the FEIS to be deemed complete by the lead agency. A subsequent memorandum from FPC, dated December 14, 2001, and sent to the Mayor and the Board of Trustees, summarized the outstanding issues since submission of the initial draft of the FEIS.

In order to address the outstanding comments regarding the FEIS and to update prior responses to comments, the Applicant secured additional consultants and counsel. These parties met with representatives of the Village on June 18, 2002, in an attempt to clarify the outstanding issues. A revised FEIS was submitted to the Board of Trustees in July 2002, and the matter was referred to the Planning Board by the Board of Trustees. Subsequently, the Applicant's representatives attended Planning Board meetings on October 10, 2002 and November 14, 2002 to discuss the revised FEIS, and a list of outstanding questions was set forth in a memorandum from FPC on November 5, 2002.

Based upon the prior correspondence of the Village and its consultants, the substance of the aforesaid meetings, and additional Planning Board meetings on January 9 and February 13, 2003, the Applicant prepared and submitted additional drafts of the FEIS in December 2002 and April 2003. As part of the April 2003 draft FEIS, among other things, the Applicant indicated that it would no longer be seeking zoning text amendments, but would seek variances from the provisions of the

Zoning Code that could not be met, and also added detailed hotel alternatives (75-Room Layout, 100-Room Layout, 125-Room Layout, 125-Room, Four-Story Layout [Modified Construction Method], and 125-Room, Three-Story Layout [Modified Construction Method]).

The Applicant attended additional meetings of the Planning Board on May 8, and June 12, 2003. Comment memoranda were issued by Dolph Rotfeld Engineering, P.C., on May 23, 2003, and by FPC, on June 4, 2003. Representatives of the Village and the Applicant met on June 20, 2003 to discuss the remaining issues that the Village wanted addressed in the FEIS. A summary letter was then provided by Nicholas Ward-Willis, Counsel to the Planning Board, on June 24, 2003. A subsequent comment memorandum from FPC, dated March 15, 2005, (hereinafter the "March 15, 2005 FPC memorandum") was also provided.

The Applicant submitted another revised draft of the FEIS in August 2004. Thereafter, the Applicant commenced litigation against the Village. The litigation culminated in a "Stipulation of Settlement between Petitioners/Plaintiffs and Respondents/Defendants," which was so-ordered by the Hon. Louis A. Barone, Justice of the Supreme Court (hereinafter the "Stipulation"). As part of the aforesaid Stipulation, the Applicant was required to revise the FEIS, and the Applicant submitted the required revised FEIS in December 2005. The Board of Trustees filed the FEIS. This Findings Statement is being adopted by the Board of Trustees, pursuant to the provisions of the aforesaid Stipulation.

Project History

As indicated above, the Applicant has proposed the construction of a 145-room, three-story hotel on the subject property, with 145 at-grade off-street parking spaces proposed to surround the hotel building on its northern and eastern sides. A grass-crete emergency accessway was also proposed to circulate around the southern edge of the building. The gross floor-to-area ratio ("FAR") for the 145-room, three-story hotel would be 12.83 percent, and the building coverage would be 4.28 percent.

A 5.27-acre freshwater wetland runs through the central-eastern portion of the site and represents a natural feature on the property. The hotel has been sited to avoid impacts to this wetland area to the maximum extent practicable. Wetland impacts were proposed to be mitigated by various wetland mitigation planting.

Access into the facility has been designed via a two-way curb cut directly aligned with the Doral Greens driveway on Anderson Hill Road. The proposed development also includes substantial landscaping and an extensive wetland mitigation plan. In addition to the wetland mitigation plan, the project includes a Stormwater Pollution Prevention Plan, which contains a stormwater management plan as well as an erosion and sedimentation control plan. The developed area will total approximately 3.03 acres, or approximately 19.6 percent of the 15.44-acre site.

The 2.71-acre triangular portion of the site located within the Town of Greenwich,

Connecticut, is proposed to be permanently preserved. The owner of the subject property proposes to restrict the use of the portion of the subject property within the Town of Greenwich by means of a filed declaration of covenants or grant of conservation or scenic easement, or the equivalent instrument under Connecticut law. By such instrument, the landowner will expressly prohibit any disturbance (including clearing of vegetation, discharge of wastewater or other wastes, draining, grading, removal or deposit of soils or other materials, and placement of buildings or structures) of the portions of the subject property located within the Town of Greenwich.

As indicated above, various alternatives to the Applicant's 145-room hotel were considered and evaluated in the FEIS including, a 75-Room Layout, a 100-Room Layout, and three 125-Room Layouts (of three-stories and four-stories). The Board of Trustees has carefully evaluated the Applicant's proposed 145-room hotel and each of the aforesaid alternatives, and has considered the environmental impacts and the feasibility thereof.

The Board of Trustees, as lead agency, has also carefully reviewed the DEIS and the FEIS, including all of the alternatives included therein, and has determined that the 125-room, three-story hotel, included in the December 2005 FEIS, filed by the Board of Trustees, is the alternative that, consistent with social, economic and other essential considerations from among the reasonable alternatives available, minimizes adverse environmental impacts to the maximum extent practicable.

DESCRIPTION OF SELECTED ALTERNATIVE - 125-ROOM, THREE-STORY HOTEL

The alternative selected by the Board of Trustees includes the construction of a 125-room, three-story hotel that will not exceed 44.55 feet in height. One hundred twenty-nine at-grade off-street parking spaces will surround the hotel building on its northern, eastern and southern sides. A grass-crete emergency accessway will circulate around the southern edge of the building. The gross floor-to-area ratio ("FAR") for the 125-room, three-story hotel would be 11.32 percent, and the building coverage would be 3.77 percent.

The proposed project has been designed in a manner to minimize the physical impact on the 15.44-acre site, and to avoid impacts to the 5.27-acre freshwater wetland that runs through the central-eastern portion of the site. This development will cause some wetland impacts, which will be mitigated via a wetland mitigation plan.

The developed area will total approximately 3.03 acres, or approximately 19.6 percent of the 15.44-acre site, all of which are situated on the 12.73 acres that are within the Incorporated Village of Rye Brook. The remaining 2.71 acres of the site, situated within the Town of Greenwich, will not be developed.

The facility will be accessed via a two-way curb cut directly aligned with the Doral Greens driveway on Anderson Hill Road. The project will include substantial landscaping and an extensive wetland mitigation plan. A Stormwater Pollution Prevention Plan, which contains a stormwater management plan as well as an erosion and sedimentation control plan, will also be developed and

implemented.

The 2.71-acre triangular portion of the site located within the Town of Greenwich, Connecticut, will be permanently preserved by means of a filed declaration of covenants or grant of conservation or scenic easement, or the equivalent instrument under Connecticut law, which will expressly prohibit any disturbance (including clearing of vegetation, discharge of wastewater or other wastes, draining, grading, removal or deposit of soils or other materials, and placement of buildings or structures) of the portions of the subject property located within the Town of Greenwich.

FINDINGS AND MITIGATION MEASURES

Upon due consideration and among the reasonable alternatives available, the Board of Trustees has determined that the following represents a statement of (a) its findings, and (b) the mitigation measures to be incorporated into the decision to ensure that potential significant adverse environmental impacts will be avoided or minimized to the maximum extent practicable:

Construction Phasing and Scheduling

1. During construction, the Applicant shall comply with the *Construction Staging Plan,* included in Appendix V of the December 2005 FEIS, to ensure that construction materials, vehicles, etc. are properly managed and that off-site impacts are minimized. Specifically, the Applicant will ensure that material storage, parking, trailer locations and construction staging are confined to the areas set forth on the aforesaid *Construction Staging Plan.*

2. In order to further mitigate potential impacts to wetlands during construction activities, the Applicant shall provide a qualified monitor, at its expense, to monitor construction activities at times when any wetland disturbance and/or restoration is being conducted. Prior to receipt of final site plan approval, the Applicant shall submit to the Board of Trustees a wetland monitoring plan identifying the monitor, his/her qualifications, specific activities to be monitored, actions to be undertaken in the event that the monitor identifies construction activities in or adjacent to wetlands that are contrary to the approvals granted by the Village and/or activities that threaten to cause damage to the wetlands.

3. To minimize impacts associated with construction activities to area roadways, the Applicant shall ensure that the majority of the construction workers and vehicles destined to the site will not travel during the roadway peak hours. The construction schedule for the workers shall generally be from 7:30 AM to 3:30 PM, such that workers' trips will occur outside the peak roadway hours. The construction workers shall generally arrive at the site between 7:00 to 8:00 AM, and leave the site between 3:00 to 4:00 PM. Truck trips shall be scheduled, to the greatest possible extent, to occur outside of the roadway peak hours. These schedules shall be coordinated with the construction contractors and established in the construction contracts.

Natural Resources

1. As indicated in the December 2005 FEIS, any hotel development on the subject property would require areas of permanent wetland impacts and an area of temporary impact associated with installation of the sanitary sewer. The temporary wetland impact area would only be disturbed during installation of the sanitary sewer line, and would be restored thereafter, in substantial compliance with the *Landscape Plan* included in Appendix H of the December 2005 FEIS.

2. With regard to permanent wetland impacts, the 125-room, three-story alternative selected by the Board of Trustees will result in permanent wetland and wetland buffer impacts, as follows: 3,772 square feet of disturbance to actual wetland areas, and 75,757 square feet of disturbance to wetland buffer areas. To minimize the impacts associated with this disturbance, the applicant shall develop, in substantial compliance with the *Landscape Plan* included in Appendix H of the December 2005 FEIS, a 4,000-square-foot "wetland mitigation area," a 115,500-square-foot "wetland enhancement area," and a 41,300-square-foot "wetland buffer enhancement area." Following construction, the temporary wetland impact area would be restored to its pre-construction grade, and new wetland plant materials would be planted, in substantive compliance with the *Landscape Plan* included in Appendix H of the December 2005 FEIS.

3. In addition to the wetland mitigation, the Applicant shall also plant native trees and shrubs to enhance other buffers on the subject property, in substantive compliance with the *Landscape Plan* included in Appendix H of the December 2005 FEIS. Furthermore, shrubs and herbaceous plant materials shall also be planted in masses, with typical separations of individual plant materials of two to six feet, depending on the growth habits of the particular species. Seed mixes of native herbaceous plant materials shall be used within the enhancement area to create planted areas of even greater densities. Within wetland buffer enhancement areas, surface roots, vegetation and leaf litter trap sediment before it reaches the wetlands. The planting areas would not only serve as a buffer between the developed and natural areas on the property, but would provide improved wildlife habitat and diversity of food sources for the existing wildlife. Moreover, a biofilter basin shall be developed and planted with wetland trees, shrubs and emergent herbaceous vegetation. The proposed wetland mitigation and other landscape planting will serve to enhance the existing vegetated portions of the site and will provide long-term benefits to the wetlands and adjacent buffer areas.

4. To permanently protect areas that are not to be disturbed as part of the development, the Applicant shall place conservation easements on all wetland areas of the project site, as well as on the portions of the site that are situated within the "R-20" zoning district.

5. To ensure protection of water quality, a stormwater management system has been designed to ensure that the peak rate of runoff following development is less than or equal to the peak

rate of runoff prior to development. In addition, the stormwater management system has been designed to provide a high degree of treatment of the stormwater that meets or exceeds the guidelines of the State Pollutant Discharge Elimination System (SPDES) General Permit of Stormwater Discharges from Construction Activities and Westchester County's recommendations for controlling pollutants discharged to Long Island Sound.

Specifically, during precipitation events, all of the runoff from developed areas of the project site will be collected by strategically placed catch basins throughout the parking area and driveways, and by roof drains. This runoff will be conveyed to a subsurface storm drainage system (consisting of underground pipes) and discharged to the stormwater management basin. The flow from the stormwater management basin will be controlled by an outlet control structure. This system will ensure that there will be no significant surface water impacts (such as erosion to stream banks or stream bottoms) from the proposed development. Moreover, no changes to the local hydrology would be expected from the proposed development.

6. To help ensure protection of water quality over the long-term, monitoring and maintenance of the stormwater management facility will be employed. The maintenance measures shall include checking the embankment (i.e., the berm that forms the basin) for subsidence, erosion, tree growth and the presence of burrowing animals. In addition to periodic removal of accumulated sediment, the condition of the outlet control structure and the discharge pipe would also be observed. Other maintenance activities include periodic mowing on the top of the berm and the upper portions of the embankment, and removal of litter and debris. Maintenance activities would be the responsibility of, and be paid for by, the Hilton Garden Inn at Rye Brook. The inspection of the basin would be conducted by a qualified firm or individual (an engineer and wetlands expert) acceptable to the Village. Sediment removal and mowing would be performed by a qualified grounds maintenance firm under contract to the owner.

   To facilitate maintenance activities, the stormwater detention basin includes a stabilized path for access from the site driveways to the proposed stormwater management basin. This path would permit access by personnel and/or equipment for maintenance purposes (i.e., for removal of sediment, installation of new plantings, mowing of turf and meadow grasses on the upper slopes of the basin, etc.). The basin also includes a forebay at the discharge locations of the stormwater runoff into the basin. The forebay is a shallow water area, and is designed to promote settling of sediment in runoff. It is anticipated that sediment would need to be removed from the forebay at the discharge point approximately once every five years.

7. In order to further minimize the potential for pollutant loadings and associated water quality impacts, the Applicant shall employ Integrated Pest Management ("IPM") techniques.

8. To mitigate potential impacts to wildlife, only 3.03 acres of the 15.44-acre subject property

will be disturbed. Moreover, the entire eastern and southern portion of the property will not be developed, and will continue as a wildlife habitat (see Layout Plan in Appendix H). Also, the Applicant will be implementing substantial wetland mitigation and enhancement, as described above, which will further augment wildlife habitat.

Zoning and Land Use

1. To minimize potential precedent-setting zoning impacts to other properties within the "H-1" zoning district, the action shall not include text amendments to that district.

2. No microwave ovens or other cooking facilities shall be placed in sleeping rooms, to avoid potential conversion of the hotel to residential use.

3. The 125-room, three-story hotel will provide for a front building setback of 175 feet, and a minimum parking setback of 100 feet, which will help mitigate potential adverse land use impacts. While a variance will be required for the front yard building setback for the "Scenic Roads Overlay District." the granting of this variance will not result in significant adverse land use impacts.

4. The Applicant has secured a *DETERMINATION OF NO HAZARD TO AIR NAVIGATION* from the Federal Aviation Administration indicating that the proposed hotel ". . .does not exceed obstruction standards and would not be a hazard to air navigation. . ." and that ". . .marking and lighting are not necessary for aviation safety"

Traffic

1. As part of FEIS process, the Board of Trustees required that the Applicant provide updated traffic information. In response to this requirement, several traffic evaluations were conducted by Applicant, which were reviewed by the Board of Trustees and its consultants. On behalf of the Applicant, TRC Raymond Keyes Associates (hereinafter "TRC") prepared a *Technical Memorandum - Updated Traffic Analysis*, dated July 12, 2002 (hereinafter the "*Technical Memorandum*"). The *Technical Memorandum* (annexed as Appendix E to the December 2005 FEIS) includes traffic counts from 1998 through 2002 and provides a table of all the latest information collected at each intersection studied. The *Technical Memorandum* also incorporates updated information on proximate developments that have been constructed or proposed since preparation of the traffic analysis included in the DEIS for the Hilton Garden Inn at Rye Brook.

   As explained in detail in Appendix E of the December 2005 FEIS, the majority of the most recently-counted time periods indicate that the traffic counts for those periods were lower at the overall intersection of King Street and Anderson Hill Road (i.e., the nearest intersection to the proposed Hilton Garden Inn at Rye Brook) than the volumes utilized as the base traffic in the DEIS. Thus, the *Technical Memorandum* found that ". . .the volumes utilized in the

DEIS appropriately reflected the traffic conditions." The *Technical Memorandum* went on to explain that the recent traffic counts conducted for the proposed Stanwich School along Anderson Hill Road indicate volumes very similar to those used in the DEIS for the Hilton Garden Inn at Rye Brook. The *Technical Memorandum* also noted that some of the proximate developments that were proposed at the time of the preparation of the DEIS have since been constructed and occupied, which results in an increase in traffic. These developments include the majority of the Belle Fair Residential Community, Brunswick School and Arrowwood Conference Center Expansion, among others. The increase in traffic associated with these developments, the general background growth, and identified potential future developments were also evaluated in the *Technical Memorandum.*

Based upon the updated traffic analysis, the *Technical Memorandum* concluded that:

> *. . .the proposed Hilton Garden Inn will not have a significant impact on the adjacent roadway network. With the traffic signal timing changes recommended as part of the Stanwich School Study. . .the overall intersections will operate at the same or better Levels of Service, even with the proposed Hotel.*

The *Technical Memorandum* also indicated that, to reduce traffic generated by the proposed Hilton Garden Inn at Rye Brook, a shuttle would be provided to bring guests to and from the airport or to and from other local venues such as the Arrowwood Conference Center.

Subsequent to review of the *Technical Memorandum,* the Planning Board requested that a sensitivity analysis be prepared addressing the number of vehicular trips that would be generated between the proposed Hilton Garden Inn at Rye Brook and the Westchester County Airport, particularly during the morning peak hour. In response to this request, TRC prepared a *Sensitivity Analysis*, which doubled the trips projected to exit the site during the peak AM roadway hour and applied that traffic to the roadway network (a copy of the *Sensitivity Analysis* is included in Appendix E of the December 2005 FEIS). The *Sensitivity Analysis* concluded that:

> *. . . even if the projected existing traffic generation is double the amount actually anticipated, the project will not have a significant impact on traffic operating conditions.*

TRC also provided correspondence dated July 6, 2004, which confirmed that the data and analyses contained in the *Technical Memorandum* remain valid. The aforesaid correspondence is also included in Appendix E of the December 2005 FEIS. TRC's conclusions have been reviewed and confirmed by the Village consultants.

Based on the foregoing, the Board of Trustees finds that the Applicant shall provide the aforesaid shuttle service to mitigate potential adverse traffic impacts.

2. To help ensure that access to public transportation is adequate for those patronizing the hotel, the Applicant shall consult with the Westchester County Beeline Bus Service to determine if any additional bus stops are required, and shall cooperate with the Westchester County Beeline Bus Service if additional bus stops are required.

3. With regard to site access, the peak hour conditions for the proposed 125-room, three-story hotel were analyzed, and the analysis indicated that appropriate Levels of Service will be maintained for the proposed site driveway.

4. With regard to parking, the 125-room, three-story hotel will provide 129 parking spaces, which is a ratio of 1.032 parking spaces per room, which conforms to the requirements of the Code of the Village of Rye Brook. Moreover, review of parking ratios of other hotels in the area confirms that most hotels have a parking ratio of one parking space per room. Accordingly, the proposed parking would be sufficient for the hotel.

Infrastructure

1. Regarding the impacts of water consumption by the proposed 125-room, three-story hotel on water pressure in the area, the Applicant consulted with the New York-American Water Company (now known as Aquarian Water Company) and received correspondence therefrom, dated December 15, 2000, indicating, in pertinent part, that:

   > *. . .New York-American Water Company can provide adequate water and minimum pressures for service to the 148* [sic] *unit hotel -- Rye Brook Garden Inn without adversely affecting water pressures and supply in the surrounding area or adversely affecting any current water company customers.*
   >
   > *Upon review of final design, New York-American will verify whether it will be required to tap water from the sixteen-inch (16") discharge of the Bellefair Booster Pump Station or from the sixteen-inch (16") suction side of the station and looping it with the twelve-inch (12") DICL pipe that borders the Blind Brook Country Club. Any modifications to the booster station required to meet the needs of the Garden Inn will be the responsibility of the developer.*

   The Applicant shall provide final design to the Aquarian Water Company and shall comply with all requirements thereof to ensure that no significant adverse water supply impacts will result.

2. With regard to sanitary flow, the Westchester County Department of Environmental Facilities has indicated its ability to handle 27,000 gallons per day of sanitary flow, which exceeds the expected flow from the 125-room, three-story hotel.

Community Facilities

1. Since the time of preparation of the DEIS, a new fire station has been constructed in the Village of Rye Brook, which is situated on King Street, less than one-mile from the subject property. This fire station will be able to provide protection services to the proposed hotel.

2. As the proposed use will not include residential dwellings, no adverse impacts to the school district will result.

Economic Impacts

1. With regard to taxes, information contained in the December 2005 FEIS indicated that the annual tax revenue generated by the subject property is approximately $95,000 per year. According to information supplied by the Applicant,upon redevelopment with a hotel, tax revenues are expected to increase to over $500,000 per year, representing an economic benefit to the taxing districts.

Noise

1. To minimize potential noise impacts, it is anticipated that each guest room will have its own HVAC system. These systems will be similar to those used in residential air conditioning, and shall not protrude outside the building. Condenser fans, which are part of the common area heating and cooling system, shall be mounted on the roof of the building, inside an enclosed recessed area. Parapet walls shall be constructed around the units to form a complete barrier. The location of the fans on the roof, coupled with the parapet walls, shall serve to completely block the view of these units from the ground, and will help to attenuate noise generated by the fans.

2. Regarding noise impacts to dwellings, including HVAC noise, the nearest residence to the east of the site is on the opposite side of King Street and on the corner of Mansion Place, is 550 feet away. The nearest residence to the south of the proposed hotel is over 800 feet away, and the nearest residence to the north, within the Doral Greens development, is 375 feet away. The extensive spatial separation between the hotel and these dwellings will serve to diminish noise generated by the project.

3. The project site is located within a Critical Environmental Area designated by Westchester County, which corresponds to the 65 LdN noise contour surrounding the Westchester County Airport. A review of the Federal Land Use Compatibility Guidelines (FLUGG) and the Airport Noise and Capacity Act of 1990 (ANCA) reveals that the federal government is appropriately concerned about the relationship between airports and surrounding land uses, particularly noise impacts created by aircraft flights. In all instances, the impact is attributable to the airport facility and operation. To minimize airport-related noise to future hotel guests, the building will be constructed with insulation materials, double-paned

windows and noise-attenuating materials that will buffer and mitigate noise levels inside the building to commonly acceptable standards.

Historic/Cultural Resources

1. A Phase 1A and 1B archaeological survey was carried out on the subject property to determine if any significant archaeological features were present. No cultural resources of any kind were found during the course of this physical investigation of the property.

Visual Impacts

1. In order to minimize potential visual impacts, the Board of Trustees has selected the 125-room, three-story alternative, and has caused the size of the proposed building to be reduced.

2. Substantial natural vegetation will be retained and extensive landscaping will be installed to minimize potential views from neighboring properties and area roadways.

3. The proposed hotel will not exceed the height requirements of the "H-1" zoning district.

4. At the request of the Planning Board, a visual impact analysis was prepared, which demonstrated the post-development visual character of the subject site from the following vantage points: Anderson Hill Road, opposite the proposed entrance to the site and on the west side of the existing driveway of Doral Greens; Anderson Hill Road, from the approximate center of the site frontage; King Street, at the intersection with Anderson Hill Road; and King Street, at the approximate center of the site's frontage thereon. The results of the visual impact analysis confirm that with the retention of native vegetation and the installation of supplemental landscaping, potential significant adverse impacts would be mitigated.

As indicated in the foregoing, the Board of Trustees, as lead agency, has considered the relevant environmental impacts, facts and conclusions disclosed in the EIS and has weighed and balanced relevant environmental impacts with social, economic and other considerations. The Board of Trustees hereby certifies that, consistent with social, economic and other essential considerations from among the reasonable alternatives available, the 125-Room, Three-Story Alternative is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable.

In accordance with 6 NYCRR §617.11, the Board of Trustees has considered the EIS for the Hilton Garden Inn at Rye Brook, and certifies that it has met the requirements of 6 NYCRR Part 617. This Findings Statement contains the facts and conclusions in the EIS relied upon to support this decision and indicates those factors that formed the basis of its decision.

A Copy of this Findings Statement has been Sent To:

Village of Rye Brook Planning Board

Village of Rye Brook Zoning Board of Appeals

Westchester County Department of Public Works, 148 Martine Avenue, White Plains, NY 10601

Westchester County Planning Board, 432 Michaelian Office Building, 148 Martine Avenue, White Plains, NY 10601

Westchester County Department of Health, Attn: Gregory Carmichael, Deputy Commissioner, 145 Huguenot Street, New Rochelle, NY 10801

Westchester County Department of Environmental Facilities, Attn: Anthony M. Landi, P.E., Commissioner, 270 North Avenue, New Rochelle, NY 10801

New York State Department of Environmental Conservation, Attn: Margaret Duke, Permits Administrator, Division of Environmental Permits – Region 3, 21 South Putt Corners Road, New Paltz, NY 12561-1696

New York State Department of Environmental Conservation, Division of Regulatory Services, 625 Broadway, Albany, NY 12233

New York State Department of Transportation, Region 8, Attn: Robert Dennison, Regional Director, Eleanor Roosevelt State Office Building, 4 Burnett Boulevard, Poughkeepsie, NY 12603

U.S. Army Corps of Engineers, Eastern Permits Section, New York District, Jacob K. Javits Federal Building, 26 Federal Plaza, Room 2109, New York, NY 10278-0090

Town of Greenwich, Attn: Diane W. Fox, Town Planner, Town Hall, 101 Field Point Road, Greenwich, CT 06836-2540

Marilyn Timpone Mohamed, ASLA, AICP, Frederick P. Clark Associates, Inc., 350 Theodore Fremd Avenue, Rye, New York 10580

Edward F. Beane, Esq., Village Attorney

Village of Rye Brook Advisory Council on Environmental Conservation

Westchester County Soil and Water Conservation District, Attn: Robert Doscher, District Manager, 148 Martine Avenue, Room 432, White Plains, NY, 10601

Westchester County Environmental Management Council, Attn: Nancy Seligson, 148 Martine Avenue,

White Plains, NY, 10601

Westchester County Department of Transportation, Attn: Patricia Chemka, Director of Planning, 100 East First Street, Mount Vernon, NY 10550

Blind Brook Union Free School District, Attn: Dr. Ronald Valenti, Superintendent, 840 King Street, Rye Brook, NY 10573

New York State Office of Parks, Recreation and Historic Preservation, Attn: Ruth L. Pierpont, Director, Field Service, Empire State Plaza, Agency Building 1, Albany, NY 12238

Aquarion Water Company a.k.a. New York and American Water Company, Attn: Jeff Farrell, Customer Service, 200 Monroe Turnpike, Monroe, CT 06468

Connecticut Department of Transportation, Bureau of Policy and Planning, Attn: H. James Boice, Bureau Chief, 2800 Berlin Turnpike, Newington, CT 06131

Mayor Steven Otis, City of Rye, 3rd Floor City Hall, 1051 Boston Post Road, Rye, NY 10580

Supervisor Robert A. Morabito, Town of Rye, 10 Pearl Street, Port Chester, NY 10573

Supervisor/Mayor Stephen Malfitano, Town/Village of Harrison, Municipal Building, 1 Heineman Place, Harrison, NY 10528

Victor G. Carosi, P.E., Village Engineer

Michael Izzo, Building Inspector

Dolph Rotfeld, P.E., Dolph Rotfeld Engineers PC, 200 White Plains Road, Tarrytown, New York 10591

Blind Brook Club

President, King Merritt HOA

President, King Street Area HOA

President, Northwest Greenwich Association

John M. Wagner, Esq., Rivkin Radler LLP, 926 Reckson Plaza, Uniondale, NY 11556-0926, Applicant's Attorney

K. F. (Rye Brook), LLC, 126 East 56 Street, New York, NY 10022, Applicant

Freudenthal & Elkowitz Consulting Group, Inc., 368 Veterans Memorial Highway, Commack, NY 11725, Applicant's Consultant

Village Clerk, Rye Brook Village Hall, 938 King Street, Rye Brook, NY 10573

This Findings Statement is also on file at the offices of the Lead Agency.

VC
BOT
MAYOR
ADMIN
ATTORN

FREDERICK P. CLARK ASSOCIATES, INC.
Planning/Development/Environment/Transportation
Rye, New York and Fairfield, Connecticut

350 Theodore Fremd Avenue
Rye, New York 10580

(914) 967-6540 • FAX (914) 967-6615

David H. Stolman, AICP, PP
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Joanne P. Meder, AICP
Daniel K. Wery, AICP

David J. Portman, FAICP

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JUN 6 2003
VILLAGE ADMINISTRATOR

MEMORANDUM

RECEIVED
JUN - 5 2003
VILLAGE OF RYE BROOK
BUILDING DEPT.

To: Warren S. Agatston, Chairman, and the Planning Board of the Village of Rye Brook

Date: June 4, 2003

Subject: **Hilton Garden Inn at Rye Brook –**
Review of Final Environmental Impact Statement (FEIS)

In response to comments by the Board and village consultants at the February 13, 2003 Planning Board meeting, the Applicant submitted a revised Final Environmental Impact Statement (FEIS), Volumes I and II, prepared by Freudenthal & Elkowitz Consulting Group, Inc. of Commack, New York, on April 24, 2003. The revisions include some reorganization and revision of the text, the addition of information relating to the wetlands and visual and tabular illustrations describing six proposed hotel alternatives and the impacts and mitigation associated with each alternative.

Project Description

The proposed action involves the construction of a 145-guest room hotel facility on a 15.44-acre site located at the southwest corner of the intersection of King Street and Anderson Hill Road. The proposed hotel would be three stories and include a restaurant and 156 parking spaces. Approximately 2.7 acres of the property is located within the Town of Greenwich, Connecticut. No activity or disturbance is proposed on this portion of the property.

The subject site includes a considerable amount of wetlands. The site plan proposes to locate nearly all of the site development in the upland areas in the northwest corner of the property. In order to achieve this design, the Applicant will seek variances from the requirements for a minimum 12-acre site area, a minimum 1000-foot street frontage and frontage on a street with a minimum width of 100 feet, building setbacks of 175 feet from

property lines, parking area setbacks of 100 feet, a maximum of 25% wetlands included in the area of the lot used to calculate minimum lot size.

Review Comments

1. *Reorganization and revision of the text.* The narrative, superceding items in the initial FEIS text and inserted at the beginning of Volume 1 was revised. Table 4, Comparison of Wetlands Impacts for Alternative Development Scenarios on page 48 has been updated to include the new alternatives proposed. The initial FEIS text remains in the document as Appendix A. This format is very difficult to follow. It is our opinion that a new FEIS text, incorporating all comments into one continuous, logical narrative should be developed to replace the present unwieldy arrangement.

2. *Site plan alternatives.* The applicant has provided an updated summary table, conceptual site plans, landscape plans, wetland mitigation plans, and preliminary elevations for each of six alternative layouts – 75 rooms, 100 rooms, 125 rooms in a three-story building, 125 rooms in a four-story building of a "modified construction method," 125 rooms in a three-story building of a "modified construction method" and 145 rooms in revised Appendix H. Appendix F contains conceptual color renderings of the proposed buildings and photographs of existing Garden Inns.

   All the alternatives propose to maintain the building and parking setbacks along the north and west property boundaries, encroaching into the wetlands to varying degrees. The 125-room four-story building alternative creates the smallest encroachment into wetlands and buffers. All six alternatives propose wetland mitigation areas greater than or equal to the areas of wetland impacted by the proposed designs.

   It is our opinion that additional information should be provided, accurately and sufficiently describing alternatives to the proposal, so that the impacts of each alternative may be compared to those of the proposal.

   According to SEQR regulations, Section 617.11(b), once the FEIS is accepted by the Board of Trustees, the Board in their capacity as the Lead Agency, has 30 days to approve or disapprove the project, in this case, the site plan. In the event that an alternative is favored over the proposal, there may not be enough time to produce and review the documents required for application for site plan approval.

The site plan drawings for the alternatives should be revised to include all required drawings specified in Section 209, Site Plan Review, of the Village Code.

3. *Visual Impacts.* Rendered elevations and or perspectives of proposed buildings and site elements, shown in the site context, should be provided for the proposal and alternatives to enable assessment of the visual impacts of the proposal and each of the alternatives. In our opinion, the generic representations submitted in Appendix F, are not site and building specific enough to accurately describe the buildings proposed.

4. *Sanitary Sewer, water and stormwater management design.* Comments from the Village engineering consultant, Dolph Rotfeld Engineering, P.C., state that the FEIS should not be accepted until acknowledgement of adequate sanitary sewer capacity is received from Westchester County, data regarding water pressure is provided and the stormwater management plan is revised to comply with the new NYSDEC stormwater management regulations known as Phase II. (See letter, dated May 23, 2003, to Victor Carosi, P.E., Village Engineer, attached.)

5. *Wetlands and wetland buffer disturbance.* The proposed 145-room development would result in the disturbance of approximately 1,050 square feet of wetland and approximately 1.67 acres of wetland buffer. The impacts associated with the alternatives range from 50,316 square feet of buffer for the 125-room, four-story building to 77,532 sq. ft. of buffer for the 100-room two-story building and 528 sq. ft. of wetland for the 125-room four-story building to 25,196 sq. ft. for the 145-room three-story building as indicated in the updated table in Appendix H. The most attractive alternative, in terms of wetland disturbance, is the 125-room four-story building.

   The wetlands delineation and functional assessment has been updated by the Applicant's consultants based on field investigation performed by representatives from Evans Associates Environmental Consulting, Inc., Frederick P. Clark Associates (FPCA), and the Village Engineer on April 16, 2003. As stated in the our memo, dated April 25, 2003, regarding our review of the 1997/1999 wetlands delineation and functional assessment requested by the Planning Board, it is our opinion that the delineation and functional assessment of wetlands present on the site are accurate and complete.

6. *Town of Greenwich Approvals.* The Applicant should provide a written determination from the Town of Greenwich, CT regarding application to the Inland Wetlands and Watercourses Agency in Greenwich to comply with the town wetland regulations. Although the Inland Wetlands and Watercourses Regulations are attached in Appendix P and referenced in the introductory narrative, the Town of Greenwich should review proposed plans for any development of property that is contiguous to/or within its town border as stated in a letter from the Town to the Village of Rye Brook Board of Trustees, dated September 26, 2000, appended to the FEIS in Appendix A (Section IV, Comments Received, of the initial FEIS).

Involve agency

We look forward to discussion with the Board.

Marilyn Timpone Mohamed, ASLA, AICP
Senior Associate/Planning/Environment

David H. Stolman, AICP, PP
President

Attachments

cc: Francis L. Filipowski, Mayor, and the Members of the Board of Trustees
Christopher Bradbury, Village Administrator
Nicholas Ward-Willis, Esq., Village Attorney
Victor Carosi, P.E., Village Engineer

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Appendix D

DEPARTMENT OF THE ARMY
NEW YORK DISTRICT, CORPS OF ENGINEERS
JACOB K. JAVITS FEDERAL BUILDING
NEW YORK, N.Y. 10278-0090

REPLY TO
Eastern Permits Section

SEP 2 1 2007

SUBJECT: Permit Application Number NAN-2007-831-EBU by KF Rye Brook

KF Rye Brook
c/o Evans Associates
205 Amity Road
Bethany, CT 06524

Dear Sir or Madam:

The New York District of the U.S. Army Corps of Engineers received your application for a Department of the Army (DA) permit dated July 6, 2007 for in-water construction activities located below the mean high tide line and/or discharge of fill material into waters of the United States.

By letter dated July 6, 2007, Nationwide Permit verification was requested in accordance with the terms and conditions of the nationwide permits prescribed as an Issuance of Nationwide Permits in the Federal Register dated March 12, 2007 (FR Vol. 72, No. 47). Once 45 days have passed from submission of a Pre-Construction Notification, the permittee may presume that their project qualifies for the Nationwide Permit provided that the permittee has carefully reviewed and meets the terms, conditions, and language of the Nationwide Permits. (See 33 CFR Section 325.2 (a) and 330.1 (e).)

You are reminded that a Department of the Army permit may be required for any additional work that does not qualify for a Nationwide Permit on this site. If you decide to implement any other project on this site in the future, please submit a timely and completed application for our review. Impacts to waters of the United States for this project may be reviewed cumulatively with any future requests or any other applications you may submit for work in waters of the United States on this site.

Please note that this does not eliminate the need to obtain any other Federal, State or local authorization required by law for the proposed work illustrated in the attached plans, including any required permit or Water Quality Certification from the New York State Department of Environmental Conservation (NYSDEC) or a Coastal Zone Management consistency certification from the New York State Department of State (NYSDOS).

Submit any inquiries to Ms. Denise Butts, Engineer Technician, at (917) 790-8513.

Sincerely,

Michael G. Vissichelli
Chief, Eastern Permits Section

Enclosures

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LLP

Harbor Management Plans. However, the New York State Department of State objects to the Corps consistency determination where the activities authorized by this NWP would occur within the above referenced CMP special management areas, and therefore in those cases, see Section II, F, below.

Nationwide Permit 26 – Reserved

Nationwide Permit 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities

1. **Permit-specific Regional Conditions:** None
2. **Water Quality Certification:** A water quality certificate is not required for this NWP.
3. **Coastal Zone Consistency Determination:** This NWP is consistent with the New York State Coastal Management Program where the activities would occur outside the following CMP special management areas: 1) The Long Island Sound Regional Coastal Management Program; 2) Local Waterfront Revitalization Programs; 3) Significant Coastal Fish and Wildlife Habitats; and 4) Harbor Management Plans. However, the New York State Department of State objects to the Corps consistency determination where the activities authorized by this NWP would occur within the above referenced CMP special management areas, and therefore in those cases, see Section II, F, below.

Nationwide Permit 28 - Modifications of Existing Marinas

1. **Permit-specific Regional Conditions:** None
2. **Water Quality Certification:** A water quality certificate is not required for this NWP.
3. **Coastal Zone Consistency Determination:** This NWP is consistent with the New York State Coastal Management Program where the activities would occur outside the following CMP special management areas: 1) The Long Island Sound Regional Coastal Management Program; 2) Local Waterfront Revitalization Programs; 3) Significant Coastal Fish and Wildlife Habitats; and 4) Harbor Management Plans. However, the New York State Department of State objects to the Corps consistency determination where the activities authorized by this NWP would occur within the above referenced CMP special management areas, and therefore in those cases, see Section II, F, below.

Nationwide Permit 29 - Residential Developments

1. **Permit-specific Regional Conditions:**

a. The proposed impacts to waters of the United States shall include those direct impacts associated with construction of the proposed project, as well as any indirect, or reasonably anticipated future impacts which may occur as a result of the project (e.g., filling waters of the United States to increase size of usable yard space, impacts to existing hydrologic regimes, etc.).

b. The waiver process to exceed 300 linear feet of stream impact as described in 72 FR 11092 is not permissible for this NWP.

c. This NWP is not applicable for activities located in the following areas:

1. The Great Swamp in Putnam and Dutchess Counties
2. Mianus River and directly adjacent wetlands
3. Harbor Herons System in Staten Island, New York. For additional information on the Harbor Herons System, please contact the Trust for Public Land at the following address:

The Trust for Public Land
Mid-Atlantic Regional Office

666 Broadway
New York, N.Y. 10012

d. This NWP is not applicable in the following waterbodies and wetlands directly adjacent to these waterbodies:

1. Hudson River
3. Mohawk River
4. Lake Champlain
5. Lake George
6. Schoharie Creek
7. Susquehanna River

2. **Water Quality Certification:** An individual water quality certificate is required for this NWP.
3. **Coastal Zone Consistency Determination:** This NWP is consistent with the New York State Coastal Management Program where the activities would occur outside the following CMP special management areas: 1) The Long Island Sound Regional Coastal Management Program; 2) Local Waterfront Revitalization Programs; 3) Significant Coastal Fish and Wildlife Habitats; and 4) Harbor Management Plans. However, the New York State Department of State objects to the Corps consistency determination where the activities authorized by this NWP would occur within the above referenced CMP special management areas, and therefore in those cases, see Section II, F, below.

Nationwide Permit 30 - Moist Soil Management for Wildlife

1. **Permit-specific Regional Conditions:** None
2. **Water Quality Certification:** No WQC special conditions.
3. **Coastal Zone Consistency Determination:** This NWP is consistent with the New York State Coastal Management Program where the activities would occur outside the following CMP special management areas: 1) The Long Island Sound Regional Coastal Management Program; 2) Local Waterfront Revitalization Programs; 3) Significant Coastal Fish and Wildlife Habitats; and 4) Harbor Management Plans. However, the New York State Department of State objects to the Corps consistency determination where the activities authorized by this NWP would occur within the above referenced CMP special management areas, and therefore in those cases, see Section II, F, below.

Nationwide Permit 31 - Maintenance of Existing Flood Control Facilities

1. **Permit-specific Regional Conditions:** None
2. **Water Quality Certification:** An individual water quality certificate is required for this NWP.
3. **Coastal Zone Consistency Determination:** This NWP is consistent with the New York State Coastal Management Program where the activities would occur outside the following CMP special management areas: 1) The Long Island Sound Regional Coastal Management Program; 2) Local Waterfront Revitalization Programs; 3) Significant Coastal Fish and Wildlife Habitats; and 4) Harbor Management Plans. However, the New York State Department of State objects to the Corps consistency determination where the activities authorized by this NWP would occur within the above referenced CMP special management areas, and therefore in those cases, see Section II, F, below.

Nationwide Permit 32 - Completed Enforcement Activities

1. **Permit-specific Regional Conditions:** None
2. **Water Quality Certification:** The New York State Department of Environmental Conservation (NYSDEC) has certified that activities authorized by this NWP and undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards:

significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The NWPs issued today are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, these NWPs do not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The phrase "policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

The NWPs issued today do not have tribal implications. They are generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, Executive Order 13175 does not apply to this proposal. Corps districts are conducting government-to-government consultation with Indian tribes to develop regional conditions that help protect tribal rights and trust resources, and to facilitate compliance with general condition 16, Tribal Rights.

Environmental Documentation

A decision document, which includes an environmental assessment and Finding of No Significant Impact (FONSI), has been prepared for each NWP. These decision documents are available at: *http://www.regulations.gov* (docket ID number COE–2006–0005). They are also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW., Washington, DC 20314–1000.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing the final NWPs and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The proposed NWPs are not a "major rule" as defined by 5 U.S.C. 804(2).

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The NWPs issued today are not expected to negatively impact any community, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211

The proposed NWPs are not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Authority

We are issuing new NWPs, modifying existing NWPs, and reissuing NWPs without change under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.).

Dated: March 1, 2007.

Don T. Riley,

Major General, U.S. Army, Director of Civil Works.

Nationwide Permits, Conditions, Further Information, and Definitions

A. Index of Nationwide Permits, Conditions, Further Information, and Definitions

Nationwide Permits

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3. Maintenance.
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.
5. Scientific Measurement Devices.
6. Survey Activities.
7. Outfall Structures and Associated Intake Structures.
8. Oil and Gas Structures on the Outer Continental Shelf.
9. Structures in Fleeting and Anchorage Areas.
10. Mooring Buoys.
11. Temporary Recreational Structures.
12. Utility Line Activities.
13. Bank Stabilization.
14. Linear Transportation Projects.
15. U.S. Coast Guard Approved Bridges.
16. Return Water From Upland Contained Disposal Areas.
17. Hydropower Projects.
18. Minor Discharges.
19. Minor Dredging
20. Oil Spill Cleanup.
21. Surface Coal Mining Operations.
22. Removal of Vessels.
23. Approved Categorical Exclusions.
24. Indian Tribe or State Administered Section 404 Programs.
25. Structural Discharges.
26. [Reserved].
27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities.
28. Modifications of Existing Marinas.
29. Residential Developments.
30. Moist Soil Management for Wildlife.
31. Maintenance of Existing Flood Control Facilities.
32. Completed Enforcement Actions.
33. Temporary Construction, Access, and Dewatering.
34. Cranberry Production Activities.
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36. Boat Ramps.
37. Emergency Watershed Protection and Rehabilitation.
38. Cleanup of Hazardous and Toxic Waste.
39. Commercial and Institutional Developments.
40. Agricultural Activities.

41. Reshaping Existing Drainage Ditches.
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43. Stormwater Management Facilities.
44. Mining Activities.
45. Repair of Uplands Damaged by Discrete Events.
46. Discharges in Ditches.
47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs.
48. Existing Commercial Shellfish Aquaculture Activities.
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20. Mitigation.
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23. Regional and Case-by-Case Conditions.
24. Use of Multiple Nationwide Permits.
25. Transfer of Nationwide Permit Verifications.
26. Compliance Certification.
27. Pre-Construction Notification.
28. Single and Complete Project.

Further Information

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B. Nationwide Permits

1. *Aids to Navigation.* The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66). (Section 10)

2. *Structures in Artificial Canals.* Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)

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

(b) This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of and within existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional riprap to protect the structure. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the district engineer under separate authorization. The placement of riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.

(c) This NWP also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, 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.

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

Notification: For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). Where maintenance dredging is proposed, the pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. (Sections 10 and 404)

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

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and

clam and oyster digging, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Sections 10 and 404)

5. *Scientific Measurement Devices.* Devices, whose purpose is to measure and record scientific data, such as staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. (Sections 10 and 404)

6. *Survey Activities.* Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, and historic resources surveys. For the purposes of this NWP, the term "exploratory trenching" means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 25 cubic yards. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under Section 402 of the Clean Water Act. (Sections 10 and 404)

7. *Outfall Structures and Associated Intake Structures.* Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or that are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (Section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

8. *Oil and Gas Structures on the Outer Continental Shelf.* Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Minerals Management Service. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). The district engineer will review such proposals to ensure compliance with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this NWP will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, nor will such structures be permitted in EPA or Corps designated dredged material disposal areas.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 10)

9. *Structures in Fleeting and Anchorage Areas.* Structures, buoys, floats and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where the U.S. Coast Guard has established such areas for that purpose. (Section 10)

10. *Mooring Buoys.* Non-commercial, single-boat, mooring buoys. (Section 10)

11. *Temporary Recreational Structures.* Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use, provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

12. *Utility Line Activities.* Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than ½ acre of waters of the United States.

Utility lines: This NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in pre-construction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The term "utility line" does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than ½ acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead utility line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than

a larger single pad) are used where feasible.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the total discharge from a single and complete project does not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP also authorizes temporary structures, fills, and work necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, 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.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 27.) (Sections 10 and 404)

Note 1: Where the proposed utility line is constructed or installed in navigable waters of the United States (i.e., section 10 waters), copies of the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

Note 2: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, accordance with the requirements for temporary fills.

Note 3: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

13. *Bank Stabilization.* Bank stabilization activities necessary for erosion prevention, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless this criterion is waived in writing by the district engineer;

(c) The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line, unless this criterion is waived in writing by the district engineer;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless this criterion is waived in writing by the district engineer;

(e) No material is of the type, or is placed in any location, or in any manner, to impair surface water flow into or out of any water of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and, (g) The activity is not a stream channelization activity.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges into special aquatic sites; (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot along the bank below the plane of the ordinary high water mark or the high tide line. (See general condition 27.) (Sections 10 and 404)

14. *Linear Transportation Projects.* Activities required for 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 ½-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than ⅓-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 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 27.) (Sections 10 and 404)

Note: 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).

15. *U.S. Coast Guard Approved Bridges.* Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit. (Section 404)

16. *Return Water From Upland Contained Disposal Areas.* Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs on the upland and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States. (Section 404)

17. *Hydropower Projects.* Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

18. *Minor Discharges.* Minor discharges of dredged or fill material into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than 1/10 acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 27.) (Sections 10 and 404)

19. *Minor Dredging.* Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). (Sections 10 and 404)

20. *Oil Spill Cleanup.* Activities required for the containment and cleanup of oil and hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR 112.3 and any existing state contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. (Sections 10 and 404)

21. *Surface Coal Mining Operations.* Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations provided the activities are already authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

22. *Removal of Vessels.* Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 27.) If condition 1 above is triggered, the permittee cannot commence the activity until informed by the district engineer that compliance with the "Historic Properties" general condition is completed. (Sections 10 and 404)

Note 1: If a removed vessel is disposed of in waters of the United States, a permit from the U.S. EPA may be required (see 40 CFR 229.3). If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

Note 2: Compliance with general condition 17, Endangered Species, and general condition 18, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the likelihood that submerged vessels may be historic properties.

23. *Approved Categorical Exclusions.* Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity is categorically excluded from environmental documentation, because it is included within a category of actions which neither individually nor

cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW–CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

Notification: Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. (Sections 10 and 404)

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW–CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are the: Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05–07, which is available at: *http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rglsindx.htm.* Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same Web site.

24. *Indian Tribe or State Administered Section 404 Programs.* Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)–(l) is permitted pursuant to Section 10 of the Rivers and Harbors Act of 1899. (Section 10)

Note 1: As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

Note 2: Those activities that do not involve an Indian Tribe or State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Pub. L. 94–587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.3(a)(2)).

25. *Structural Discharges.* Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways, or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a section 10 permit if located in navigable waters of the United States. (Section 404)

26. [Reserved]

27. *Aquatic Habitat Restoration, Establishment, and Enhancement Activities.* Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas and the restoration and enhancement of non-tidal streams and other non-tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or establish stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the OSM or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland that has not been abandoned or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal

or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity result in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

Reporting: For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSM or the applicable state agency. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification. The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27), except for the following activities:

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. FWS, NRCS, FSA, NMFS, NOS, or their designated state cooperating agencies;

(2) Voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(3) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSM or the applicable state agency.

However, the permittee must submit a copy of the appropriate documentation. (Sections 10 and 404)

Note: This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee programs. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

28. *Modifications of Existing Marinas.* Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. (Section 10)

29. *Residential Developments.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Subdivisions: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed 1/2 acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

30. *Moist Soil Management for Wildlife.* Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, including streams to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies. (Section 404).

Note: The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

31. *Maintenance of Existing Flood Control Facilities.* Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) were previously authorized by the Corps by individual permit, general permit, by 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the "maintenance baseline," as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged material must be placed in an upland site or an authorized disposal site in waters of the United States, and proper siltation controls must be used.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline

based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels, but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the impacts to the aquatic environment are minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner.

Mitigation: The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental impacts are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance activities within the maintenance baseline. In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require compensatory mitigation and/or best management practices as appropriate.

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 27). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the dredged material disposal site. (Sections 10 and 404)

32. *Completed Enforcement Actions.* Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of Section 404 of the Clean Water Act, provided that:

(a) The unauthorized activity affected no more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, Section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself. Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e). (Sections 10 and 404)

33. *Temporary Construction, Access, and Dewatering.* Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged

material may be allowed if the district engineer determines that it will not cause more than minimal adverse effects on aquatic resources. Following completion of construction, temporary fill must be entirely removed to upland areas, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions. (Sections 10 and 404)

34. *Cranberry Production Activities.* Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

Notification: The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 27.) (Section 404)

35. *Maintenance Dredging of Existing Basins.* Excavation and removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less, provided the dredged material is deposited at an upland site and proper siltation controls are used. (Section 10)

36. *Boat Ramps.* Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the 50 cubic yard limit is waived in writing by the district engineer;

(b) The boat ramp does not exceed 20 feet in width, unless this criterion is waived in writing by the district engineer;

(c) The base material is crushed stone, gravel or other suitable material;

(d) The excavation is limited to the area necessary for site preparation and all excavated material is removed to the upland; and,

(e) No material is placed in special aquatic sites, including wetlands.

The use of unsuitable material that is structurally unstable is not authorized. If dredging in navigable waters of the United States is necessary to provide access to the boat ramp, the dredging may be authorized by another NWP, a regional general permit, or an individual permit.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 27.) (Sections 10 and 404)

37. *Emergency Watershed Protection and Rehabilitation.* Work done by or funded by:

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13);

(c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the prospective permittee should wait until the district engineer issues an NWP verification before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification any comments received as a result of agency coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). (Sections 10 and 404)

38. *Cleanup of Hazardous and Toxic Waste.* Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

Note: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

39. *Commercial and Institutional Developments.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants,

business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses, new ski areas, or oil and gas wells is not authorized by this NWP.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

40. *Agricultural Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams, unless for drainage ditches constructed in intermittent and ephemeral streams, this 300 linear foot limit is waived in writing by the district engineer.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

Note: Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act Section 404(f)(1)(C) exemption because of the recapture provision at Section 404(f)(2).

41. *Reshaping Existing Drainage Ditches.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. The reshaping of the ditch cannot increase drainage capacity beyond the original as-built capacity nor can it expand the area drained by the ditch as originally constructed (i.e., the capacity of the ditch must be the same as originally constructed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality.

This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity, if more than 500 linear feet of drainage ditch will be reshaped. (See general condition 27.) (Section 404)

42. *Recreational Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (e.g., football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

43. *Stormwater Management Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction and maintenance of stormwater management facilities, including the excavation of stormwater ponds/facilities, detention basins, and retention basins; the installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

Notification: For the construction of new stormwater management facilities, or the expansion of existing stormwater management facilities, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility. (Section 404)

44. *Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities. The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into

non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

45. *Repair of Uplands Damaged by Discrete Events.* This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 27) within 12-months of the date of the damage. The pre-construction notification should include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. (Sections 10 and 404)

Note: Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.)

46. *Discharges in Ditches.* Discharges of dredged or fill material into non-tidal ditches that are: (1) Constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) are determined to be waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

47. *Pipeline Safety Program Designated Time Sensitive Inspections and Repairs.* Activities required for the inspection, repair, rehabilitation, or replacement of any currently serviceable structure or fill for pipelines that have been identified by the Pipeline and Hazardous Materials Safety Administration's Pipeline Safety Program (PHP) within the U.S. Department of Transportation as time-sensitive (see 49 CFR parts 192 and 195) and additional maintenance activities done in conjunction with the time-sensitive inspection and repair activities. All activities must meet the following criteria:

(a) 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 or access fills or dewatering of construction sites;

(b) Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect);

(c) Temporary fill 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 affected areas must be revegetated, as appropriate;

(d) In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench so that there is no change in preconstruction contours;

(e) To the maximum extent practicable, the restoration of open waters must be to the pre-construction course, condition, capacity, and location of the waterbody;

(f) Any exposed slopes and stream banks must be stabilized immediately upon completion of the project;

(g) Additional maintenance activities done in conjunction with the time-sensitive inspection or repair must not result in additional losses of waters of the United States; and,

(h) The permittee is a participant in the Pipeline Repair and Environmental Guidance System (PREGS).

Reporting: The permittee must submit a post construction report to the PHP within seven days after completing the work. The report must be submitted electronically to PHP via PREGS. The report must contain the following information: Project sites located in waters of the United States, temporary access routes, stream dewatering sites, temporary fills and temporary structures identified on a map of the pipeline corridor; photographs of the pre- and post-construction work areas located in waters of the United States; and a list of best management practices employed for each pipeline segment shown on the map. (Section 10 and 404)

Note: Division engineers may modify this NWP by adding regional conditions to protect the aquatic environment, as long as those regional conditions do not require pre-construction notification or other actions that would delay time sensitive inspections and repairs. Examples of appropriate regional conditions include best management practices.

48. *Existing Commercial Shellfish Aquaculture Activities.* This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures necessary for the continued operation of the existing commercial aquaculture activity. This NWP also authorizes discharges of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize new operations or the expansion of the project area for an existing commercial shellfish aquaculture activity. This NWP does not authorize the cultivation of new species (i.e., species not previously cultivated in the waterbody). This NWP

does not authorize attendant features such as docks, piers, boat ramps, stockpiles, staging areas, or the deposition of shell material back into waters of the United States as waste.

Reporting: For those activities that do not require pre-construction notification, the permittee must submit a report to the district engineer that includes the following information: (1) The size of the project area for the commercial shellfish aquaculture activity (in acres); (2) the location of the activity; (3) a brief description of the culture method and harvesting method(s); (4) the name(s) of the cultivated species; and (5) whether canopy predator nets are being used. This is a subset of the information that would be required for pre-construction notification. This report may be provided by letter or using an optional reporting form provided by the Corps. Only one report needs to be submitted during the period this NWP is valid, as long as there are no changes to the operation that require pre-construction notification. The report must be submitted to the district engineer within 90 days of the effective date of this NWP.

Notification: The permittee must submit a pre-construction notification to the district engineer if: (1) The project area is greater than 100 acres; or (2) there is any reconfiguration of the aquaculture activity, such as relocating existing operations into portions of the project area not previously used for aquaculture activities; or (3) there is a change in species being cultivated; or (4) there is a change in culture methods (e.g., from bottom culture to off-bottom culture); or (5) dredge harvesting, tilling, or harrowing is conducted in areas inhabited by submerged aquatic vegetation. (See general condition 27.) (Sections 10 and 404)

Note: The permittee should notify the applicable U.S. Coast Guard office regarding the project.

49. *Coal Remining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal, provided the activities are already authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI) Office of Surface Mining (OSM), or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977. Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts. The permittee must clearly demonstrate to the district engineer that the reclamation plan will result in a net increase in aquatic resource functions. As part of the project, the permittee may conduct coal mining activities in an adjacent area, provided the newly mined area is less than 40 percent of the area being remined plus any unmined area necessary for the reclamation of the remined area.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

50. *Underground Coal Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

Note: Coal preparation and processing activities outside of the mine site may be authorized by NWP 21.

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as appropriate, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP.

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

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

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

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

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

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

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

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

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

of public water supply intake structures or adjacent bank stabilization.

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

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

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

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

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

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

15. *Wild and Scenic Rivers.* No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

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

17. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project 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 may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. 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 project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until Section 7 consultation has been completed.

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

(e) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. FWS or the NMFS, both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide Web pages at *http://www.fws.gov/* and *http://www.noaa.gov/fisheries.html* respectively.

18. *Historic Properties.* (a) In cases where the district engineer determines that the activity may affect 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. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work 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 resources can be sought from the State

Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). 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 and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties which the activity may 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 or that consultation under Section 106 of the NHPA has been completed.

(d) 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. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h–2(k)) 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, explaining 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.

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

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, and 50 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, and 38, notification is required in accordance with general condition 27, 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.

20. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are 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) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10 acre and require pre-construction notification, unless the district engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement. 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 minimal adverse effects on the aquatic environment. Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, wetland restoration should be the first compensatory mitigation option considered.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream restoration, to ensure that the activity results in minimal adverse effects on the aquatic environment.

(e) 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 project 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 a project already meeting the established acreage limits also satisfies the minimal impact requirement associated with the NWPs.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, riparian areas may be the only compensatory mitigation required. 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. 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 compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland

compensatory mitigation for wetland losses.

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

(h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of 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 effects of the project to the minimal level.

21. *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.

22. *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.

23. *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.

24. *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 ⅓-acre.

25. *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)

26. *Compliance Certification.* Each permittee who received an NWP verification from the Corps must submit a signed certification regarding the completed work and any required mitigation. The certification form must be forwarded by the Corps with the NWP verification letter and will include:

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

(b) A statement that any required mitigation was completed in accordance with the permit conditions; and

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

27. *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, as a general rule, 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:

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

(2) If 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 17 that listed species or critical habitat might be affected or in the vicinity of the project, or to notify the Corps pursuant to general condition 18 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation (see 33 CFR 330.4(g)) is 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 cannot 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 project;

(3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. The description should be sufficiently detailed to allow the district engineer to

determine that the adverse effects of the project will be minimal and to determine the need for compensatory mitigation. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project and when provided result in a quicker decision.);

(4) The PCN must include a delineation of special aquatic sites and other waters of the United States 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 of the United States, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States. Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, where appropriate;

(5) 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. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(6) If any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, for non-Federal applicants the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work. Federal applicants must provide documentation demonstrating compliance with the Endangered Species Act; and

(7) For an activity that may affect a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, for non-Federal applicants the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property. Federal applicants must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act.

(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 a PCN and must include all of the information required in paragraphs (b)(1) through (7) of this general condition. A letter containing the required information may also be used.

(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 project's adverse environmental effects to a minimal level.

(2) For all NWP 48 activities requiring pre-construction notification and for other NWP activities requiring pre-construction notification to the district engineer that result in the loss of greater than ½-acre of waters of the United States, the district engineer will immediately provide (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy of the PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each 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.

(3) 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.

(4) Applicants are encouraged to provide the Corps multiple copies of pre-construction notifications to expedite agency coordination.

(5) For NWP 48 activities that require reporting, the district engineer will provide a copy of each report within 10 calendar days of receipt to the appropriate regional office of the NMFS.

(e) *District Engineer's Decision:* In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. 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 projects with smaller impacts. The district engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. 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 effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any conditions the district engineer deems necessary. The district engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the district engineer to be minimal, the district engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

If the district engineer determines that the adverse effects of the proposed work are more than minimal, then the district engineer will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan.

28. *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.

D. Further Information

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

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

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

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

5. NWPs do not authorize interference with any existing or proposed Federal project.

E. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration, establishment (creation), enhancement, or preservation of aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Discharge: The term "discharge" means any discharge of dredged or fill material and any activity that causes or results in such a discharge.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities eligible for exemptions under Section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of "open waters" include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(e)).

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: Re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands adjacent to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects waterbodies with their adjacent uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 20.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete project: The term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete project must have independent utility (see definition). For linear projects, a "single and complete project" is all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a wetland (i.e., water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(d).

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWPs, a waterbody is a jurisdictional

water of the United States that, during a year with normal patterns of precipitation, has water flowing or standing above ground to the extent that an ordinary high water mark (OHWM) or other indicators of jurisdiction can be determined, as well as any wetland area (see 33 CFR 328.3(b)). If a jurisdictional wetland is adjacent—meaning bordering, contiguous, or neighboring—to a jurisdictional waterbody displaying an OHWM or other indicators of jurisdiction, that waterbody and its adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of "waterbodies" include streams, rivers, lakes, ponds, and wetlands.

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Appendix E

POST CONSTRUCTION MONITORING AND MAINTENANCE OF STORMWATER BASIN AND WETLAND MITIGATION PLANTINGS

Kingswood
Anderson Hill Road
Village of Rye Brook, New York

June 2007

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Monitoring and Maintenance of Stormwater & Wetland Mitigation Plantings

The proposed action will create stormwater management basins for stormwater runoff peak rate attenuation and for water quality improvement purposes. As mitigation for proposed impacts to the on-site wetlands, it is also proposed to create new wetlands, and to enhance the existing on-site wetlands. These areas will be planted with a variety of native trees, shrubs, and groundcovers that have been chosen based on the hydrologic environments of the basins and wetland creation areas, as well as hardiness and sun exposure. The purpose of the plantings are to: (1) stabilize the side slopes of the stormwater management basins, lessening the risk of erosion of the graded surface; (2) provide a diverse habitat that will be attractive to wildlife, including songbirds, amphibians and reptiles, as well as some mammals; and, (3) provide some shade over the permanent pool of the basin which would be beneficial to amphibians and fish species. Plantings consist of native plant materials. The number of each genus and species to be planted and their proposed location may be referenced on drawings 13A through 13F, dated May 22, 2007, as prepared by Evans Associates and Barrett Bonacci & VanWeele, P.C.

Protocol for Commencement of Post Construction Basin Planting Monitoring Period

Following the installation of the basin and wetland mitigation plantings, the Environmental Monitor shall receive a list of the plant materials that have been installed by the contractor and shall inspect the installed plantings for compliance with the approved plans. The Environmental Monitor shall note any deficiencies in the installation of the plant materials so that these can be corrected at the earliest possible time. All plantings and seed mixture applications in conjunction with the mitigation and basins planting work shall be accomplished in accordance with the approved plans, and completed within the first growing season after grading is complete. Once all deficiencies have been corrected, the Environmental Monitor shall prepare an initial compliance report for review and approval from the Village. Upon receipt of approval of the initial compliance report from the Village, the monitoring period shall commence, as outlined below.

Monitoring Period

Compliance monitoring to fulfill requirements listed under Section 245-10 of the Village Code will occur on a quarterly basis for three full growing seasons following installation of the wetland mitigation and stormwater basin plantings. Thereafter, monitoring may continue on an as-needed basis, depending on the results of the initial monitoring.

Monitoring Criteria

Photographs of the mitigation areas shall be taken at least once per year during the growing season (July or August are preferred times) from established photo stations, permitting comparison from one inspection to the next. Monitoring will consist of an assessment of the following:

1. ***Stability of the substrates and physical structures of the wetland.*** Visual observation will determine the physical stability of the mitigation areas and stormwater basins. Areas of instability will be immediately repaired.

2. ***Stability of the vegetation communities.*** The final species composition in the mitigation areas and basins can be influenced by a variety of factors. Reinforcement plantings may be necessary to compensate for losses following the initial planting. Percent vegetative cover of the mitigation and basin areas shall be noted. A vegetative cover of at least 85% is to be achieved in all mitigation and basin areas by the end of the first growing season. This vegetative cover shall be comprised of native species (not invasive species), whether planted or resulting from natural colonization. If vegetative cover is less that 85%, replanting shall occur with native species which have survived and show good vigor within the planting areas.

3. ***Wetland hydrology correctness according to the design.*** Areas of wetland hydrology occurring in the bottom of the stormwater management basins and in the proposed wetland creation areas will be monitored for effectiveness. Measures to modify hydrology will be taken, if necessary.

4. ***Elimination of undesirable plant and animal species.*** Purple loosestrife *(Lythrum salicaria)*, common reed *(Phragmites australis)*, or any other invasive species shall be removed by hand when observed, or selectively treated with a general herbicide (Round-Up or Rodeo) by a qualified wetland professional during the appropriate season.

Monitoring Reports

Monitoring Data Forms (see attached) shall be filled out for each wetland mitigation area and stormwater basin within the project area during each quarterly inspection. Quarterly inspections shall be summarized in an annual report, including photographs, which shall be submitted to the appropriate regulatory agencies, including the Village of Rye Brook and the United States Army Corps of Engineers. Field changes to grading within the wetland or wetland buffer, replanting, or modifications to the hydrology within the wetland shall be reviewed by the appropriate regulatory agencies and described in the annual report.

WETLAND MITIGATION / STORMWATER BASIN MONITORING DATA FORM

Project: Kingswood
Area #:

Project Location: Anderson Hill Road
City, State: Rye Brook, NY **County:** Westchester

Field Investigators: **Date:**

Plot #: Entire Area

Herbs and Bryophytes

SPECIES	INDICATOR STATUS[1]	COVER CLASS[2]
1.		

Notes:

Recommendations:

[1] Indicator Status: Obligate Wetland=>99% occurrence in wetlands (OBL); Facultative Wetland=67-99% occurrence in wetlands (FACW), Facultative= 34-66% occurrence in wetlands (FAC), Facultative Upland=1-33% occurrence in wetlands (FACU), Obligate Upland=>99% occurrence in non wetlands (UPL)

[2] Cover classes (midpoints): T<1% (none); 1=1-5% (3.0); 2=6-15% (10.5); 3=16-25% (20.5); 4=26-50% (38.0); 5=51-75% (63.0); 6=76-95% (85.5); 7=96-100% (98.0).

WETLAND MITIGATION / STORMWATER BASIN MONITORING DATA FORM

Shrubs, Woody Vines, Saplings and Trees

SHRUB SPECIES	INDICATOR STATUS[1]	COVER CLASS[2]
1.		
2.		
3.		

WOODY VINE SPECIES	INDICATOR STATUS[1]	COVER CLASS[2]
1.		
2.		
3.		

SAPLING SPECIES	INDICATOR STATUS[1]	COVER CLASS[2]
1.		
2.		
3.		

TREE SPECIES	INDICATOR STATUS[1]	TOTAL TREES
1.		
2.		
3.		

Notes:

[1] Indicator Status: Obligate Wetland=>99% occurrence in wetlands (OBL); Facultative Wetland=67-99% occurrence in wetlands (FACW), Facultative= 34-66% occurrence in wetlands (FAC), Facultative Upland=1-33% occurrence in wetlands (FACU), Obligate Upland=>99% occurrence in non wetlands (UPL)

[2] Cover classes (midpoints): T<1% (none); 1=1-5% (3.0); 2=6-15% (10.5); 3=16-25% (20.5); 4=26-50% (38.0); 5=51-75% (63.0); 6=76-95% (85.5); 7=96-100% (98.0).

WETLAND MITIGATION / STORMWATER BASIN MONITORING DATA FORM

Plant Survival Calculations

Species Planted	# start	# yr. 1	# yr. 2	# yr. 3	# yr. 4	# yr. 5	% surv.	>75 %

Mitigation Area >85% Survival of 75% of Species? Y N

Actual % Species Survival =

WETLAND MITIGATION / STORMWATER BASIN MONITORING DATA FORM

Soils and Groundwater Conditions

(Basin)Berms and Side Bank Soils: **Saturated?:**

Water level in basin or surface water depth in wetland:

Outlet Control Structure functioning properly?:

If no standing water in basin, what is moisture condition of basin floor?:

Groundwater level in monitoring well (if applicable):

Evidence of recent siltation?: **If yes, source:.**

Notes:

Wildlife Observations

Species Observed	Nesting	Feeding	Migratory Use / Season	Cover/Resting

Notes: