



CITIZENS COMMITTEE TO COMPLETE THE REFUGE

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December 23, 2011

**Re: Public Notice (PN) 2011-00006, Nationwide Permit and San Francisco District's
Regional Condition Reissuance**

Dear Colonel DiCiro,

This responds to Public Notice: Proposed Regional Conditions for Nationwide Permits, dated November 28, 2011. We would like to thank you for the opportunity to provide comments. Based upon our review, we find many of our previously stated concerns remain. The proposed regional conditions are inadequate and propose modifications and additional regional conditions that must be implemented to minimize the adverse impacts of the nationwide permit (NWP) program on water quality and the aquatic environment within the boundaries of the San Francisco District (District). We do however commend the District for prohibiting the use of NWPs 29 (residential developments) and 39 (commercial/institutional developments) in diked baylands because according to the regulations proposed by Corps Headquarters the use of those NWPs is prohibited in non-tidal wetlands adjacent to tidal waters.

The Citizens Committee to Complete the Refuge, consisting of 2,000 members, has an ongoing history of interest in wetland protection, wetland restoration and wetland acquisition. As such, the Committee has taken an active interest in Clean Water Act regulations, policies, implementation and enforcement. We have established a record of providing information regarding possible CWA violations to both the Corps and EPA. We regularly respond to Corps public notices, and inform the public of important local CWA issues. We have responded to past proposals of reissuance and changes to the nationwide permit program. These actions demonstrate our ongoing commitment to wetland issues, toward protecting the public interest in wetlands, and in Section 404 of the CWA.

The Public Notice for the proposed regional conditions is inadequate. Corps regulations at 33 CFR §325.3 (a) *General state:*

The public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice must, therefore, include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.

As noted below, the requirement of any general permit is that the activities proposed “will have only *minimal cumulative* adverse effects on water quality and the aquatic environment.” [emphasis added] A finding of “minimal cumulative” adverse effects is the basic premise upon which the Corps authorizes the NWP. However, the Corps has yet to assess or disclose the cumulative effects of this program. Any information provided is largely in boiler plate language long *after* the public comment period has closed. Thus the public’s ability to substantively review and assess the impacts of the proposed NWPs on the aquatic environment have been thwarted. This is contrary to the guidance provided in by the Council on Environmental Quality in their 2007, “A Citizens Guide to NEPA,” which states at the outset, “Two major purposes of the environmental review process are better informed decisions and citizen involvement, both of which should lead to implementation of NEPA’s policies.

General Permits:

Nationwide Permits are “general permits,” (33 CFR 322.2 (f) and 33 CFR 323.s (n)) and are implemented with the goal of reducing the “administrative burdens on the Corps and the regulated public, by authorizing activities that have minimal adverse environmental effects.” The determination of “minimal adverse environmental effects” has *never* been based on a rigorous analysis of the cumulative effects of the program on the aquatic environment. In fact, in the early 2000’s Corps Headquarters, under pressure from the scientific and environmental communities initiated a Programmatic Environmental Impact Statement (PEIS) but failed to ever produce a final document. Instead Corps Headquarters continues their assertion the nationwide permit program will have only “minimal impacts” individually and cumulatively on the aquatic environment based upon an overwhelming reliance on the assertion of discretionary authority at the regional level by the District and Division Engineer. Included in this authority is the ability to revoke nationwide permits where historic losses of waters of the U.S. are high.

We have reviewed the regional conditions proposed by the San Francisco District. While we acknowledge the District’s initial attempts to minimize the deleterious effects of the nationwide permit program it is evident the proposed regional conditions remain insufficient to protect the aquatic environment. Also, the nationwide permit program is not compliant with the 404 (b)(1) guidelines and the National Environmental Policy Act (NEPA). In view of the significant losses of wetlands and streams that have already occurred within the San Francisco District implementation of the nationwide permit program as proposed is unacceptable.

The nationwide permits are a form of General Permit. The 404 (b)(1) Guidelines (40 CFR Part 230.7 (a)) establish the following requirements for General Permits:

- (1) The activities in such category are similar in nature and similar in their impact upon water quality and the aquatic environment;
- (2) The activities in such category will have only minimal adverse effects when performed separately; and
- (3) The activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment.

Thus, the nationwide permit program should authorize only those impacts to "waters of the U.S." that are truly "*minimal*" in nature both *individually and cumulatively*. In return, those projects that meet the terms and conditions of the nationwide permits receive either no review or expedited review from the Corps, and little if any, review by the resource agencies.

The Council of Environmental Quality (1999) begins their discussion of the concept of cumulative impacts with the following observation, “Evidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.” This statement is particularly pertinent to the impacts of the nationwide permit program on water quality and the aquatic environment. While each nationwide permit authorization individually may have only minimal impacts on the aquatic environment, the synergistic interactions of historic losses of habitat, continued authorization of new losses or modifications of the aquatic environment through federal and non-federal actions, and a growing number of stressors (e.g. pollutants, invasive species, increases in impervious surfaces, etc.) is resulting in continued degradation of the aquatic environment. As stated earlier, the Corps has yet to demonstrate that any substantive assessment of the cumulative impacts of the nationwide permit program has occurred at the national or regional level.

We are strongly opposed to the implementation of the nationwide permit program as proposed. Unfortunately, it is likely Corps Headquarters will reauthorize the nationwide permit program as proposed. It is imperative the San Francisco District provide strong regional conditions that will ensure within the District that the nationwide permit authorizations individually and *cumulatively* will not result in more than minimal adverse impacts. Since the San Francisco District does not have adequate information to assess the degree to which past authorizations (general, individual, etc.) have impacted district watersheds, or the degree to which any compensatory mitigation may have or have not replaced lost functions and values, it is imperative that strong and consistent limits be placed on the impacts that will be authorized through use of nationwide permits and that the nationwide permits are revoked in habitats that are known to have suffered significant losses or are difficult to recreate (not just physically but functionally as well).

The regional conditions proposed by the San Francisco District are inadequate and the adverse effects of the nationwide permit program will result in impacts to the environment that are individually and cumulatively more than minimal.

A. General Regional Conditions that apply to all NWPs in the Sacramento, San Francisco, and Los Angeles District:

1. Pre-construction notification (PCN) – This regional condition identifies the documentation required for any PCN - a process of Corps review triggered by any nationwide permit activity that has the potential for more than minimal impacts. The requirements should be amended to require the applicant not only provide evidence of avoidance and minimization, but also discuss the direct and indirect impacts of the proposed project, as well as the cumulative impacts of the project (in consideration of other fill placed in waters of the U.S. within the vicinity of their project).

2. PCN requirement for activities located within Essential Fish Habitat – please see comments below

3. Other NEPA lead – The proposed regional condition should clarify that for project locations that support endangered species, essential fish habitat, or historic properties, nationwide permit authorization must not be assumed by the project proponent until compliance with the Endangered Species Act (ESA) of 1973, the Magnuson-Stevens Fishery Conservation and Management Act (EFH – essential fish habitat), and/or the National Historic Preservation Act (NHPA) of 1966 has been determined and confirmation that the project is compliant is received in writing.

4. Fish passage – The language of this regional condition is confusing. We suggest the words, “...unless determined to be impracticable by the Corps...” be deleted. We urge the Corps to adopt the following changes due to the cumulative impacts of road crossings, bank stabilization projects, flood control vegetation removal, dams, etc. on the accessibility and viability of spawning grounds of federally listed fish species. Situations described under the original language would likely result in more than minimal impacts and should be reviewed through the individual permit process:

For all activities in waters of the U.S. that are suitable habitat for Federally listed fish species, all road crossings shall be designed to ensure that the passage and/or spawning fish is not hindered. In these areas, the permittee shall employ bridge designs that span the stream or river...~~unless determined to be impracticable by the Corps.~~ it can be **confirmed by the National Marine Fishery Service (NMFS) demonstrated** that the subject waters do not contribute to the recovery of federally listed species.

5. Compensatory Mitigation – We support the District’s regional condition that states “mitigation that is required by special condition to the permitted activity shall be completed before or concurrent with commencement of construction of the authorized activity...” but believe the words ~~“except when specifically determined to be impracticable by the Corps”~~ should be deleted.

Recent reports released by the National Research Council (NRC 2001) and the Government Office of Accounting (GAO 2001) indicate compensatory mitigation is ineffective in ensuring “no net loss” of wetland acreage and functions and values. Issues raised echo those identified in the Draft Nationwide Permits Programmatic Environmental Impact Statement (PEIS) prepared by the Institute for Water Resources (IWR):

- lack of proper identification of impacted wetland functions and values;
- inadequate consideration given to hydrologic conditions, geomorphology, ecologic landscape, etc.;
- type of compensatory mitigation is not specified (e.g. creation, restoration, etc.);
- database information is inadequate;
- little follow-up – i.e. compliance inspections are rare.
- long lag time between permit authorization (and fill in waters of the U.S.) and actual initiation of compensatory mitigation (if initiated at all)

Of the 89,857 permits issued in fiscal year 1998, it appears only 1321 permits were inspected for compliance. This figure represents a mere 1.5 % of all permitted activities.

A review of compensatory mitigation success conducted on behalf of the State Water Resources Control Board (Ambrose et al, 2007) revealed that while permittees for the most part comply with the compensatory mitigation requirements (one half to two thirds of the 143 files reviewed), and acreages of “wetlands” are produced, compensatory mitigation sites do not fully recapture lost functions and values of wetlands filled.

IWR estimated wetland compensatory mitigation success ranges from 30% to 90%. IWR has attempted to provide “Estimates of water resource abundance and the cumulative 100-year impact of nationwide permits assuming FY 1998 rates hold constant over the next century.” Based upon this analysis acreage impacts for the nationwide permit range from a negative impact (30% wetland mitigation success) of – 464,240 acres to a positive impact of 232,600 acres (90% wetlands mitigation success). The figure of 90% wetlands mitigation success is unfounded. In fact (p.4-14) the PEIS concluded, “...More quantified

assessment appears less encouraging, however, indicating a higher functional failure rate than the qualitative methods. Compensatory mitigation may not generate much more than 50% of the self-sustaining function expected program-wide, even for wetlands that have undergone substantial research.” Based upon the incredibly low rate of permit compliance inspections, the actual figure of successful wetlands mitigation may be lower still. Therefore, **we strongly urge the District to require mitigation be successfully completed before project construction to ensure functions and values are in fact replaced and to avoid temporal losses of functions and values.**

Prohibit the use of "in lieu fee" mitigation. Use of "in lieu fee" mitigation does not ensure "no net loss of wetlands," at best it may provide some protection for existing wetland areas. Given the restricted time in which Corps staff has to render decisions of approval or denial for the nationwide permits, we do not feel adequate analysis will occur regarding the appropriateness of "in lieu fee" mitigation for projects requesting NWP authorization. Use of this type of mitigation under the constraints of the nationwide permit program will not ensure a "no net loss of wetlands." Rather, the use of "in lieu fee" mitigation provides a disincentive to avoid or minimize adverse impacts to the aquatic environment. This type of mitigation, in the absence of meaningful resource agency and public review and comment, is not consistent with the goals of the Clean Water Act of "restoring and maintaining the chemical, physical and biological integrity of the Nation's waters." Furthermore, a recent General Accounting Office (GAO) study "Wetlands Protection – Assessment Needed to Determine Effectiveness of In-Lieu-Fee Mitigation", dated May 2001, states:

The extent to which the in-lieu-fee option has achieved its purpose of mitigating adverse impacts to wetlands is uncertain. While Corps officials in 11 of 17 districts with the in-lieu-fee options told us the number of wetland acres restored, enhanced, create, or preserved by in-lieu-fee organizations equaled or exceeded the number of wetland acres adversely affected, data submitted by over half those districts did not support these claims.

6. Waiver of 300 linear foot restriction for intermittent and ephemeral streams for NWPs 29, 39, 40, and 42, or to waive the 500 linear foot limitation for NWP 13 (bank stabilization) - The Corps proposes to require that applicants requesting a waiver of the linear foot restrictions provide additional information pertaining to existing conditions, direct and indirect impacts, and cumulative impacts in the watershed. This represents an improvement over previous PCN requirements, however, the emphasis of the information to be analyzed appears to continue to focus more on the discrete impacts of a particular project rather than on the substantive analysis of whether cumulative impacts within a watershed indicate the linear foot restriction should be enforced, or in fact the use of nationwide permits should be revoked.

It is unclear how the decision process would be applied in practice. What are the factors the Corps will rely upon to determine when to waive the 300 linear foot restriction? The burden is placed upon the Corps to demonstrate that fills exceeding 300 linear feet are more than minimal, with reduced resource agency input, within a limited period of time, and without the benefit public input. Also, there is absolutely no assurance the review will be substantive and that required documentation will be more than a mere checklist where Corps staff will check "yes" or "no."

Review of the District's 2007 NWP decision documents sheds little light on the cumulative impacts of the four NWPs on watersheds within the District boundaries. We are merely provided an estimate of the number of times NWPs, e.g. NWP 13 (bank stabilization) may be used per year and an estimate of the linear footage and acreage of impacts.

Levick et al (2008) note that ephemeral and intermittent streams comprise “over 81% of all streams in the arid and semi-arid southwest (Arizona, New Mexico, Nevada, Utah, Colorado and California)” according to the U.S. Geological Survey National Hydrography Dataset.

The authors affirm the importance of ephemeral and intermittent streams:

Ephemeral and intermittent streams *are the defining characteristics* of many watersheds in dry, arid and semi-arid regions, and *serve a critical role* in the protection and maintenance of water resources, human health, and the environment...

...highlighting *their importance* in maintaining water quality, overall watershed health, and provisioning of the essential human and biological requirements of clean water.

...Ephemeral and intermittent streams are *integral parts of a watershed, and their condition affects the health of the entire ecosystem*. Healthy ecosystems perform a diverse array of functions that provide goods and services to society. [emphasis added]

Regarding cumulative impacts the authors caution, “Individual ephemeral or intermittent stream segments *should not be examined in isolation*. Given their vast extent and the accumulation of impacts to them over large areas in the rapidly developing southwest, a landscape or watershed-scale approach should be employed that considers the cumulative effects on overall watershed function.” [emphasis added]

In the absence of meaningful data on the cumulative impacts of the Regulatory Program on stream courses (hence watersheds) within the District, there can be no provision for discretionary authority in this matter. Previous versions of NWP 26 alone were responsible for the filling of hundreds of miles of local stream courses. Not to mention the added negative impacts of using multiple nationwide permits (bank stabilization, road crossings, outfall structures, etc.) for projects. The resulting increase in the percentage of impervious surfaces in the upper reaches of watersheds has significant negative ramifications for downstream water quality. Filling of miles of these headwater areas is also responsible for local extinctions of rare, threatened or endangered species of water-dependent organisms.

The District should adhere to strict restrictions of authorizing no more than 300 linear feet of stream impacts for the NWPs listed above. Failing that, the District must **substantively** analyze the cumulative effects of the nationwide permit program on watersheds within its boundaries before considering waiving restrictions on the linear footage that can be authorized by NWPs.

General Regional Conditions that apply to all NWPs in the San Francisco District:

1. NWPs are not authorized in Diked Baylands/Historic Baylands:

The General Regional Conditions should clarify that in addition to NWPs 29 (Residential Developments) and 39 (Commercial and Institutional Developments), the use of NWP authorization is prohibited in diked baylands for NWPs 40 (Agricultural Activities), and 42 (Recreational Facilities). The NWP regulations clearly state for each of these NWPs, “This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.”

The PN defines San Francisco Bay diked baylands as:

...undeveloped areas currently *behind levees that are within the historic margin of the Bay*. Diked historic baylands are those areas on the Nichols and Write map below the 5-foot contour line, National Geodetic Vertical Datum (NGVD) (see Nichols, D.R. and N.A. Wright. 1971. Preliminary map of historic margins of marshland, San Francisco Bay, California. U.S. Geological Survey Open File Map). [emphasis added]

According to 33 CFR 328.3 (c) “The term adjacent means bordering, contiguous, or neighboring. Wetlands *separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands.*” [emphasis added]

By this definition, diked baylands and the non-tidal wetlands that occur within them are “adjacent” to San Francisco Bay, a “tidal” water. These lands have a topographic connection to San Francisco Bay because they lie within the historic tidal shorelines and bay margins. Ecological connections exist as well (e.g. use of wetlands on either side of levees by endangered species such as the salt marsh harvest mouse, nesting waterbirds, etc.) and are documented in the scientific literature (e.g. see Goals Project, 1999, Southern Pacific Shorebird Conservation Plan, 2003). Such ecological connections are also confirmed by the recommendations of the Draft Tidal Marsh Ecosystem Recovery Plan (2010) and the California Climate Adaptation Strategy (2009) that diked baylands (i.e. low-lying lands adjacent to the bay) may provide important escape habitat for tidal marsh species as sea level rises. Hydrological connections often exist through shallow subsurface connections, overtopping, piping, and normal seepage. Lastly and most importantly the San Francisco District has an overwhelming precedent of asserting jurisdiction over diked baylands based upon their adjacency to San Francisco Bay, a traditional navigable water (that is also tidal).

The San Francisco District has proposed under General Regional Condition 1 that activities described in NWP 40, and 42 and occurring within diked baylands may be authorized through the NWP Pre-construction notification process (PCN). *This proposed regional condition is not within the discretion of the District Engineer.* The Proposal to Reissue and Modify Nationwide Permits, published February 16, 2011, emphatically states, “Corps regional conditions can only be *more restrictive* than the original NWP terms and conditions.” [emphasis added] As we have indicated above, the terms of these particular NWPs state that their use is prohibited in “non-tidal wetlands adjacent to tidal waters.” Therefore, the San Francisco District must clarify, that while notification to the Corps is required for other NWP activities, individual permits are required for the activities described in NWPs 29, 39, 40, and 42 within diked baylands.

2. Prohibit the use of all nationwide permits in jurisdictional vernal pools. Vernal pools in California have suffered high historic losses. Successful compensatory mitigation (structural) for this habitat type is not always achieved. In addition, much is still unknown about the biological requirements of vernal pool plant and animal communities, making it difficult to determine if compensatory mitigation successfully restores lost functions and values. It cannot be assumed that the nationwide permit program would have minimal adverse effects for this habitat type. This request is not without precedent as the Los Angeles District has proposed a similar ban on the use of nationwide permits in jurisdictional vernal pools within its district boundaries.

The San Francisco District has identified the severity of vernal pool losses in the Santa Rosa Plain:

During the past 40 years, the Santa Rosa Plain has been transformed from an area which was a rural residential, agricultural area with large expanses of open space to a more urbanized and

intensely agricultural area with less open space. This change in land use has **resulted in a substantial loss of seasonal wetland habitat, especially vernal pools. This loss of seasonal wetlands has become so severe that several plant species which are adapted to live in vernal pools in the Santa Rosa Plain have been listed as federally protected endangered species by the US Fish and Wildlife Service.** These endangered plant species are: Sonoma sunshine (*Blennosperma bakeri*), Burke's goldfields (*Lasthenia burkei*), Sebastopol meadowfoam (*Limnanthes vinculans*), and Many-flowered navarretia (*Navarretia leucociphala* spp. *pliantha*). Also, the Sonoma County population segment of the California Tiger Salamander (*Ambystoma californiense*) is listed as federally endangered. (emphasis added)

Given the severity of the problem, we continue to urge the Corps to prohibit the loss of nationwide permits in the Santa Rosa Plain and in other jurisdictional vernal pools within the district.

3. Revoke the use of nationwide permits in endangered species habitat or critical habitat, essential fish habitat (EFH) and eelgrass beds. The San Francisco District has proposed the requirement of PCNs for all nationwide permits in areas that support EFH and eel grass beds, however this general condition is inadequate. The District must acknowledge that certain habitats are sufficiently rare and difficult to recreate (not just physically, but also in terms of replacement of lost functions and values) that the use of nationwide permits in those habitats (e.g. eelgrass beds and spawning streams for salmonids) will result in environmental harm. Authorization of nationwide permits in these habitats would be inconsistent with the requirement of minimal adverse impacts to water quality and the aquatic environment. For example salmonid spawning habitat has suffered high historic losses within California and within the boundaries of the San Francisco District, resulting in the federal listing of several salmonids.

According to the Subtidal Goals Project (2010), known occurrences eelgrass beds “comprise only 1% of the total estuarine area.” Though it represents a small percentage of the available estuarine habitat, eelgrass bed habitat is significant as “eelgrass transforms unstructured shallow-water areas into physically structured habitat that can support a wide variety of organisms,” and “have a higher abundance, biomass, and productivity of consumer organisms than do unstructured habitats.” This habitat is extremely sensitive to increases in turbidity caused by wind waves, boat wakes, dredging, and increased wave action generated by reflection of waves off of hardened shorelines. Eelgrass beds are also physically disturbed by dredging and wave action. Due to its limited distribution and sensitivity to disturbance the use of NWP should be revoked in eelgrass beds.

4. The use of NWPs for the placement of above grade fills must be revoked within the 100-year floodplain for NWPs 29 and 39. General Condition 10 perpetuates NWP authorization for above grade fills within the 100-year floodplain. The NWP language simply states, “The activity must comply with any applicable FEMA-approved state or local floodplain management requirements.” There doesn’t even appear to be a requirement for pre-construction notification (PCN) for above grade fills proposed within the 100-year floodplain.

The NWP process will not provide adequate scrutiny to ensure no more than minimal adverse impacts individually or cumulatively will occur. The NWP program has long been regarded as a “rubber stamp” process. Staff has little time to review the proposed project and the resource agencies have an even more limited time frame for review. This provides little assurance that the levels of scrutiny given these permit requests will be adequate.

It is unclear whether the 100-year floodplain has been mapped or updated for all areas within the District, therefore the Corps may not be able to rely upon FEMA, and state, or local floodplain management requirements to ensure public safety or to determine that adverse impacts to the aquatic environment will be minimized.

Waters of the U.S. located within the 100-year floodplain provide important functions and values such as flood storage, groundwater recharge, erosion control, water quality improvement, fish and wildlife habitat, endangered species habitat, etc. It is critical that land altering activities in floodplains be subject to thorough design considerations, alternatives analysis, cumulative impacts review, growth inducement considerations, and agency and public review and comment.

The 2009 California Climate Adaptation Strategy reports that “Currently, over 260,000 Californians live in areas designated as at-risk in a 100-year flood event (a one percent chance of occurring every year),” and that “What we currently define to be the 100-year flood today will occur much more frequently as sea level rises; therefore, the number of people exposed to risks from the 100-year floods will increase substantially as a result of sea-level rise in coming decades.” Furthermore,

Studies indicate that a 1.4 m (~5 feet) rise in the level of the San Francisco Bay by 2100 would place 33 percent more land at risk from flood-related inundation that is at risk today. Without accounting for future growth and land use change, the amount of developed land at risk in the Bay area could more than double from current levels by the end of the century. A majority of the structures at risk in that region are designated as residential property. The initial estimates of development in San Francisco Bay in 2100 indicate that over \$62 billion worth of building and contents could be at risk.

Brody et al (2007) studied the rising costs of flood damage in Florida and concluded:

Altering or removing a wetland in order to construct a parking lot, road, or building reduces the local wetland capacity to capture, store, and slowly release water runoff, exacerbating local flooding. Our study estimates that one wetland permit increased the average cost of each flood in Florida by \$989.62. Since each county had issued 407 such permits on average, they had on average increased the property damage each later flood would cause by \$402,465.29. This wetland permit effect equates to, on average, \$563,451 of flood damage per county per year, and an average of \$30,426,354 per year for all of Florida.

Currently, these costs are not born by the project proponent, but by the community:

...the economic burden resulting from altering a naturally occurring wetland should be borne by the individual permit applicant rather than the community at large. To fully internalize what is currently an externality, planning organizations ought to consider setting the acquisition costs of a wetland permit at an appropriate level (in our case at \$989.62). Increasing the cost of acquiring a permit, and perhaps charging to maintain it, will reduce the attractiveness of altering wetlands in the first place. The majority of permits issued by the ACOE, including letters of permission, nationwide, and general permits, have no fee. Individual permits cost only \$10 for individuals and \$100 for commercial projects (for a more detailed explanation of permit types, see Highfield & Brody, 2006). Only 14.7% of the federal permits we included in our study are individual permits.

NWP 29 and 39 authorizations should be revoked within the 100-year flood plain. Due to concerns regarding increased flood risk due to sea level rise, issues of public safety, the future economic burden resulting from the need to provide protection where sufficient flood control does not currently exist or from property damage resulting from flooding, etc. NWPs 29 and 39 should be revoked within the 100-year flood plain. Authorization of residential, commercial and institutional developments within the 100-year flood plain should not occur in the absence of meaningful public review and comment.

Additional regional conditions:

- 1. Prohibit the use of nationwide permits 12 (Utility Line Activities), 13 (Bank Stabilization), 14 (Linear Transportation Projects), 18 (Minor Discharges), 29 (Residential Developments), 39 (Commercial and Institutional Developments), 40 (Agricultural Activities), 41 (Reshaping Existing Drainage Ditches), 42 (Recreational Facilities), 43 (Stormwater Management Facilities), and 44 (Mining Activities) within wetlands adjacent to perennial streams and wetlands with woody vegetation adjacent to any stream course.** California has lost between 90 and 95% of its riparian habitat. Surrounding, and impinging development have degraded much of the remaining habitat. While most development proposals may not fill all riparian wetlands within a project site, fragmentation of the habitat occurs when fill is placed to allow golf course play or road crossings across this habitat. This fragmentation severely degrades the wildlife values of the riparian wetlands. Corps guidance clearly indicates that in habitats or geographic areas where historic losses are high the nationwide permits may be revoked.
- 2. Require that compensatory mitigation be provided for all unavoidable impacts to "waters of the U.S."** Compensatory mitigation must be reviewed and approved by the Corps and resource agencies in advance of nationwide permit issuance and must be submitted in the form of a detailed mitigation and monitoring plan with enforceable conditions. The Corps must commit to providing the resources necessary to conduct compliance inspections and to ensure any required compensatory mitigation is successfully completed by the project proponent.
- 3. Revoke the proposal that riparian mitigation may be the only compensatory mitigation required for projects in or near streams or other areas next to open waters.** There is great potential for misuse if this proposal is incorporated in the nationwide permit program. The lack of specific guidelines for what constitutes "riparian areas" could allow things such as landscaping (with "native species") adjacent to golf course tees, fairways, and greens to be considered as mitigation for impacts to waters of the U.S. The incorporation of the language proposed in the nationwide permit program is yet another indication the Corps nationwide permit program provides rubber stamp authorization in place of the careful review of functions and values lost, the relative occurrence of the aquatic habitat to be impacted (how common or uncommon is it), the degree of success that has been demonstrated in recreating the habitat to be impacted, and the appropriateness of the mitigation proposed to offset the adverse impacts of the proposed project. This language if not revoked will provide an easy out for developers rather than providing a disincentive to impact waters of the U.S.
- 4. To avoid piece-mealing of impacts to "waters of the U.S." and to be consistent with the requirements of avoidance and minimization as required by the Guidelines nationwide permits 12 (Utility Line Projects), 13 (Bank Stabilization), 14 (Linear Transportation Projects), 29 (Residential Developments), 39 (Commercial and Institutional Developments), 40 (Agricultural Activities), 41 (Reshaping Existing Drainage Ditches), 42 (Recreational Facilities), 43 (Stormwater Management Facilities), and 44 (Mining Activities) should not be used to expand previously permitted projects.** If the District does proceed with authorization of "expansion" projects mentioned in these nationwide permits, the total amount of

impact in waters of the U.S. including both previous and proposed impacts, should not exceed the amount currently authorized by the nationwide permit under which authorization will be granted and the applicant should be required to document the total amount of past and proposed impacts and Corps staff should be required to confirm the amount.

5. **Prohibit the use of riprap in areas adjacent to endangered species populations, refuges, special aquatic sites, and wetland areas that support woody vegetation.** Riprap provides shelter for non-native predators of endangered species, fragments riparian habitat, and can displace important aquatic plant communities, therefore placement of riprap in these areas is inconsistent with the minimal impacts criteria, especially given the proposal to allow discretionary waiver of compensatory mitigation.
6. **Provide information regarding the specific nationwide permit authorizations in the published quarterly report** such as nationwide permit(s) utilized, acreage and linear footage of impact, mitigation required - yes/no, type of activity authorized, type of water impacted and watershed location. We requested this information be provided during the last nationwide permit program renewal. This information is still not available on the District website; in fact no permit information is available online for 2008, 2009, or 2010. The information that is provided is sketchy at best. The district website only indicates the type of nationwide permit authorization received (if that), the county in which it was issued, and whether the authorization was based upon Section 10 or 404 authorities. The Corps is supposed to be tracking the water bodies in which it is authorizing the placement of dredged or fill materials, the amount of fill (acreage and linear feet), the extent to which compensatory mitigation (if required) has been successfully completed, etc. in order to assess cumulative impacts. The information provided on the Corps website raises serious questions about the extent to which this is being tracked.
7. **Publish pre-construction notifications (PCNs) on the District website for public information.**
8. **The San Francisco District should revoke nationwide permits 21 (Surface Coal Mining Operations), 34 (Cranberry Production Activities), 49 (Coal Remining Activities), and 50 (Underground Coal Mining) as these nationwide permits would not be utilized within the district.**

In addition to the regional conditions proposed by the San Francisco District, incorporate these regional conditions to ensure the adverse individual and cumulative effects of the nationwide permit program are reduced to a minimal level for this region.

NWP 3 (Maintenance) - REVOKE modifications (a) and (b) or at minimum:

- **Prohibit the addition of new riprap.** The District has not proposed to place any restriction on the amount (volume) of additional riprap “to protect the structure” authorized by this nationwide permit. The proposal to authorize the addition of up to 200 feet of new bank stabilization is inconsistent with the definition of “maintenance” and should be revoked. The language proposed by Corps Headquarters of not “extending further than 200 feet in any direction of the structure” seems to suggest the area of impact could be larger than an acre. For example, if the structure is a bridge crossing this wording could be interpreted to mean 200 feet to either side of the structure (along the bank or 400 feet) and 200 feet out from the bank. This would mean an area of 80,000 square feet or approximately 1.84 acres could be dredged. This is clearly not a minimal impact.

The interpretation of "maintenance" within the confines of NWP 3 has always referred to the replacement of currently serviceable structures. We do not believe it is appropriate to confuse the issue by incorporating new work into the terms of this NWP. Furthermore, scouring adjacent to a structure may indicate that it was improperly sized, located or installed. Further review of the structure should be required - simply throwing additional riprap at the problem does not seem an appropriate remedy. This is also counter to the intent of the nationwide permit program in that it encourages rather than minimizes impacts to "waters of the U.S." Lastly, the proposed modification does not consider the adverse impacts that will inevitably arise upstream or downstream of the added riprap.

- **Prohibit the amount of "removal of accumulated sediments and debris in the vicinity of the existing structures" to no more than 25 cubic yards and prohibit the use of this provision in eelgrass beds, wetlands, and jurisdictional riparian habitat.** The language of this NWP suggests that maintenance dredging could extend more than 200 feet – "This 200 linear 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 associate with outfall and intake structures." What does this mean? Is maintenance dredging to be limited to the immediate vicinity of the outfall or intake structure or is it more expansive? Clarification should be provided. NWP 19 (Minor Dredging) authorizes no more than 25 cubic yards of dredging implying dredging in excess of that amount would be "more than minimal." If more than 25 cubic yards of dredging is required, the structure has likely not been "maintained" as a "currently serviceable structure" and an individual permit authorization should be required.
- **Prohibit the removal of accumulated sediments in small impoundments as these areas locally support rare, threatened or endangered water-dependent organisms.** (e.g. California tiger salamander, Red-legged frog, etc.)
- **The District should require submittal of documentation post-construction and prior to the next high flow season to demonstrate the temporary fills have been removed from the stream channel and the channel bed has been returned to pre-construction elevations.**
- **We support the District's guidance that to the extent practicable disruption of the stream channel should be avoided.**

NWP 11 (Temporary Recreational Structures):

- **Alter proposed regional condition to prohibit use in riparian wetlands or special aquatic sites.** The District proposed requirement of notification is inadequate. Recreational structures that are "temporary" in nature do not need to be placed in areas of such high resource value.

NWP 12 (Utility Line Discharges):

Within the District, many utility lines are located in areas of high wildlife values (e.g. salt marsh harvest mouse and clapper rail habitat, riparian habitat, etc.). The proposed modifications of NWP 12 are sufficiently broad that significant adverse impacts to the human and aquatic environment will likely occur; therefore we are recommending that the types of activities and geographic location in which these facilities may be located be severely restricted.

- **Prohibit use in endangered species habitat and special aquatic sites.**
- **Prohibit side-casting of material into wetlands.**
- **Revoke the use of this nationwide permit to on construct or expand substation facilities.** We fully support the district's position that utility line substations generally do not require being sited in waters or wetlands. This being the case, such construction would not meet the requirement of avoidance.
- **Limit total impacts of this nationwide permit to 0.3 acres.**
- **Temporary impacts must be included in the calculation of impacts.** This nationwide permit states "waters of the United States temporarily affected by filling, flooding, excavation, or drainage, where the project area is restored to preconstruction contours and elevations, are not included in the calculation of permanent loss of waters of the United States." Temporary impacts to waters of the U.S. can have more than minimal adverse effects. For example, exotic invasives (e.g. *Lepidium latifolium*) with little wildlife value can colonize areas that have been recently disturbed and lower the habitat value by excluding native species. At minimum limit the total temporary impacts on the aquatic environment to 0.25 acres.
- **Require post-construction documentation be submitted demonstrating pre-construction contours have been restored and that the area has been successfully revegetated.**

NWP 13 (Bank Stabilization):

- **Revoke the use of this nationwide permit in special aquatic sites, instead of merely requiring notification. This NWP should not be authorized in areas supporting riparian habitat (individual permit review should be required).**
- **Limit bank stabilization in streams to 300 linear feet and no more than 1 cubic yard per running foot.** The District must acknowledge the adverse impact of bank stabilization projects on natural stream processes and on habitat values, and recognize that the bank stabilization in one reach of stream can lead to destabilization of the stream opposite of the project and upstream and downstream of the area of impact. In addition this limitation should be effective regardless of the type of bank stabilization proposed.

The 2007 District decision document anticipated this NWP would be utilized approximately 40 times per year resulting in the loss of approximately 1,200 linear feet of channel bank and approximately 1 acre of jurisdictional area. Based upon this estimate, the average permit authorization would be no more than 30 linear feet and 1, 089 square feet of area. Thus the proposed 500 linear foot restriction is excessive and should be reduced to a maximum of 300 linear feet. Furthermore, the District has failed to demonstrate that the use of the NWP for projects greater than 300 linear feet wouldn't result in more than minimal cumulative adverse impacts to the aquatic environment.

- **The Corps must require that the proposed site for disposal of excess material be identified by the project proponent.** Excess material should be disposed of at an upland site away from any wetlands or other waters of the U.S.

- **We support the district's proposal that the project proponent address the effect of the bank stabilization on the stability of the opposite side of the streambank and on adjacent properties upstream and downstream of the activity. The project proponent should be required to monitor these areas for at least two successive normal rainfall seasons to demonstrate the project is not adversely impacting surrounding areas through the deflection of flows.**

NWP 14 (Linear Transportation Projects):

- **Prohibit the construction of new linear transportation or spur projects.** The growth inducing potential for these types of projects clearly warrants a thorough alternative analysis and resource agency and public review and comment.
- **We fully support the district's prohibition of the use of this nationwide permit for the construction of new runways and taxiways.**
- **Reduce the impact threshold to 0.1 acres** This acreage should be more than adequate. According to the 2007 District decision document for this nationwide permit, NWP 14 was anticipated to be used 35 times per year resulting in the loss of 450 linear feet and/or 1 acre of waters of the U.S. That would equal an average of 0.02 acres per use. Note this is for reporting nationwide authorizations only.
- **Restrict the linear footage of total stream course fill to 100 feet.** This is more than adequate based upon the information provided in the District decision document. In fact, a 100 linear foot restriction may be excessive based upon the 2007 District decision document.

NWP 18 (Minor Discharges): Prohibit the use of this NWP in special aquatic sites. Please refer to the discussion on proposed overall regional conditions above. Oddly enough, the 2007 District decision document does not provide a volume estimate for the anticipated use of this NWP. Instead the District estimates the NWP will be used 6 times per year with a loss of 30 linear feet of waters of the U.S. Based upon the information provided by the District, the use of this NWP should be restricted to discharges no more than 1/10-acre (0.1 acres) and should not be utilized in special aquatic sites.

NWP 23 (Approved Categorical Exclusions) - REVOKE:

- **Failing revocation, the district should implement all the regional conditions it has proposed AND impose a ½ acre limit, 300 linear foot limit, and 25 cubic yard limit.**

This nationwide permit places no limit on the extent of impacts that can occur in waters of the U.S., and it relegates the responsibility of determining whether proposed activities will have a minimal impact on waters of the U.S. to other agencies. If proposed activities are truly minimal in nature, they should be authorized by nationwide permits designed for the specific suites of activities that are proposed.

NWP 27 (Wetland and Riparian Restoration and Creation Activities):

- **Prohibit the "relocation of aquatic habitat types on the project site."** There is tremendous potential for abuse of this nationwide permit by a developer who wishes to consolidate wetlands in one area of his property to allow development of the site.
- **Limit the use of this nationwide permit to 300 linear feet of stream or 0.5 acres of wetlands. Wetland enhancement projects must be limited to 5 acres to ensure adverse impacts will be minimal in nature. Enhancement projects larger than 5 acres should be subject to public review and comment.**
- **Prohibit the use of riprap and armoring under this nationwide permit.**
- **Require that the "wetland enhancement, restoration or creation agreement" is reviewed and approved by the Corps and other resource agencies.**
- **Restrict the use of this NWP to federal and state agencies or to projects approved or sponsored by federal or state agencies.**
- **Require that the "wetland enhancement, restoration or creation agreement" have enforceable conditions.**
- **Prohibit the use of this NWP for construction of mitigation banks.**

NWP 29 (Residential Developments) – REVOKE or at minimum:

- **We fully concur that use of this NWP in diked baylands should be prohibited. The regulations clearly state use of this NWP is prohibited in non-tidal wetlands adjacent to tidal waters. Refer to the restrictions proposed in the overall regional conditions above, i.e. prohibiting the use within the 100-year flood plain, special aquatic sites and endangered species habitat, strict 300 linear foot limit, etc.**
- **Prohibit the use of this nationwide permit for the construction of golf courses associated with residential developments.** Too many subdivisions with associated golf courses have been proposed in the past decade. Many of them were permitted under the previous nationwide permit 26 resulting in the filling of hundreds of miles of bay area streams. Such developments are being proposed in the headwaters of many of our streams and involve massive cut and fill, given the instability of bay area slopes it is highly unlikely the amount of contouring involved in such developments will result in only minimal impacts. In addition, such projects have tremendous potential for significant adverse impacts to the human environment, including growth inducement, introduction of pollutants, etc.
- **Require documentation of avoidance and minimization.**
- **Require on-site compensatory mitigation for any unavoidable impacts.**

NWP 31 (Maintenance of Existing Flood Control Facilities) REVOKE or at minimum:

- **Impose strict acreage, linear footage, and cubic yardage limits.** It is inconceivable that there should be no limits on the extent of impact authorized under this nationwide permit. Just because a flood control facility was previously authorized does not automatically result in minimal impacts when that facility is maintained. For example, dredging of a flood control channel can result in tremendous disturbance to surrounding habitat and result in degradation of water quality downstream of the dredging. The 2007 decision document estimates this NWP will rarely be used “0-1 times in the next five years” with an anticipated impact of 1/10 of an acre to waters of the U.S. Based upon this estimate, review of proposed activities by individual permit would not be a regulatory burden and based upon this assessment, the District should limit the use of this NWP to 1/10 of an acre.
- **Impose restrictions on the habitats in which this nationwide permit may be used.** Use of this nationwide permit should be prohibited in areas of tidal marsh, eelgrass beds, vernal pools, jurisdictional riparian habitat, and endangered or critical habitat.
- **Revocation of the proposal to require one-time mitigation.** This proposal completely ignores the length of time between maintenance cycles. Given a sufficient interval significant wildlife habitat can become established. Mitigation should be required to offset the temporal losses of this habitat particularly if the habitat impacted is locally rare, e.g. fringe tidal marsh habitat.

NWP 33 (Temporary Construction, Access, and Dewatering): In addition to the regional conditions proposed, the District should:

- **Prohibit the use of this nationwide permit in special aquatic sites, jurisdictional riparian habitat, or endangered species or critical habitat.**
- **Impose an acreage and linear foot limit. The impacts should be limited to ½ acre and no more than 300 linear feet of stream.**
- **Require post-construction documentation be submitted to the Corps that demonstrates pre-construction conditions have been restored.**
- **Implement the regional conditions proposed by the district.**

NWP 35 (Maintenance Dredging of Existing Basins):

- **Clarify use of this NWP is prohibited permit in endangered species or critical habitat.**
- **Prohibit the use of this permit in special aquatic sites.**
- **Implement the regional conditions proposed by the district.**

NWP 39 (Commercial and Institutional Developments) - REVOKE or at minimum:

- **Refer to the overall regional prohibitions and conditions proposed above.**

- **We fully concur that use of this NWP in diked baylands should be prohibited. The regulations clearly state use of this NWP is prohibited in non-tidal wetlands adjacent to tidal waters. Refer to the restrictions proposed in the overall regional conditions above, i.e. prohibiting the use within the 100-year flood plain, special aquatic sites and endangered species habitat, strict 300 linear foot limit, etc.**
- **Retain 300 linear foot prohibitions on fill in streams all streams (perennial, intermittent, and ephemeral).**
- **Reduce fill acreage to 1/3 acre.**
- **Require compensatory mitigation for any unavoidable impacts, to the standard listed above under the general conditions.**

NWP 40 (Agricultural Activities) - REVOKE or at minimum:

- **We are strongly opposed to the implementation of this nationwide permit.** Adequate exemptions currently exist to allow for normal agricultural activities to continue on agricultural lands. The adoption of National Resources Conservation Service (NRCS) wetland categorizations for the purposes of Section 404 of the Clean Water Act has led to the removal of extensive areas that otherwise meet wetland criteria (prior converted croplands) from regulatory review. The Corps and NRCS have withdrawn from their previous memorandum of understanding regarding agricultural lands. Now the Corps is proposing to rubber-stamp the filling or conversion of those remaining areas that are still identified as "waters of the U.S." on agricultural lands.
- We are extremely concerned that as written, this NWP allows for piece-mealing of impacts. As currently written, the total acreage of fill placed in waters of the U.S. could be substantially increased because the nationwide permit as written does not clearly state the proposed acreage limit applies to the entirety of a farm holding and not just to individual parcels within that holding. Measures must be provided similar to the subdivision clause for nationwide permits 29 and 39, to prevent abuse of the NWP. Impose a District condition that this NWP will be applied to the entirety of a farm holding, for all the tracts that are under one ownership. Or clarify that this "farm tract" is "...a unit of contiguous land under one ownership that is operated as a farm." The Corps should also incorporate the "single and complete project" criteria. The fill threshold cannot be exceeded for a "single and complete project" even if that project encompasses several farm tracts.
- **Please refer to the comments on proposed overall regional conditions stated above.**
- **Based upon the District's 2007 analysis of the average acreage of impacts per action, restrict the aggregate impact threshold to 0.1 acres and require notification for all impact amounts.**
- **Clarify the acreage limitation includes dewatering of jurisdictional areas or conversion of waters of the U.S. from one type to another, as a result of any proposed activities.** For example, if the proponent proposes to install drainage tiles, the acreage impacted would include not only the area in which the drainage tiles are installed, but also all areas that are dewatered as a result of the installation.

- **Clarify that the use of this NWP is prohibited in diked baylands.** The NWP regulations clearly state, "This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters."
- **Prohibit the use of this permit in areas that would alter the hydrology of adjacent wetlands.**
- **Prohibit fills or discharges into the channel of *any* stream (including ephemerals) that could impede high flows.**
- **Require a compensatory mitigation and monitoring plan complete with enforceable conditions that has been reviewed and approved the Corps and resource agencies.**
- **Require that the Corps make its own minimal effects determination consistent with the requirements of Section 404 of the Clean Water Act.**

NWP 41 (Reshaping Existing Drainage Ditches) - REVOKE:

The Corps has not demonstrated that there is sufficient need for this nationwide permit. The reshaping of "drainage ditches in waters of the U.S." requires thorough review to ensure that adverse impacts to "waters of the U.S." do not occur in the areas upstream or downstream of the impacts (e.g. increased headcutting, bank erosion, increased sediment deposition, etc.). This is not a review that can be conducted within the confines of the nationwide permit review process. In addition, the sidecasting of excavated drainage ditch soils may have significant adverse impacts on the hydrologic regime of adjacent wetlands.

- **Please see the comments above under overall regional conditions.**
- **At minimum the Corps must limit the linear footage of fill and impact to 100' in all streams, and the total acreage of fill and impact to 1/10 acre.** [based upon 2007 estimates of expected use]
- **Compensatory mitigation must be required for all impacts to waters of the U.S. Mitigation must be approved in advance of permit issuance and consistent with the general condition above.**

NWP 42 (Recreational Facilities) - REVOKE or at minimum:

- **The district had previously proposed to prohibit the use of this nationwide permit for the construction or expansion of golf courses.** We urge the district to reinstate this prohibition. Golf course proposals we have reviewed involve substantial recontouring of the landscape, massive engineering of fill material, and significant adverse impacts to water quality and the aquatic environment and the species that utilize the aquatic environment. The authorization of golf course projects would not meet the criteria of minimal impacts.
- **Refer to the comments above under overall regional conditions.**
- **Clarify that the use of this NWP is prohibited in diked baylands.** The NWP regulations clearly state, "This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters."
- **Limit the impact to "waters of the U.S." to 1/10 acre of fill.** [Based upon District's 2007 estimate of anticipated use]

- **Prohibit use of this NWP for construction of buildings, stables or parking lots.**
- **Prohibit the authorization of habitat conversion under this NWP.**
- **Prohibit the use of this NWP in any special aquatic site.**
- **Clarify that the use of this NWP is prohibited in areas that support federally listed species or critical habitat.**
- **Require compensatory mitigation at a minimum one-for-one replacement for any impacts to waters of the U.S Clarify the use of riparian buffers must be supportive of functions and values attributed to naturally occurring riparian habitat and not merely landscaping for recreational features.**

NWP 43 (Stormwater Management Facilities) - REVOKE or at minimum:

- **Refer to comments stated above under overall regional conditions.**
- **Reduce the fill threshold for the construction of new facilities to 0.1 acres. [Based upon District 2007 estimates of use.]**
- **Prohibit impacts in excess of 300 linear feet in streams.**
- **Clarify the use of this NWP is prohibited in areas that support federally listed species or critical habitat.**
- **Prohibit the use of this nationwide permit in streams that support anadromous fish.**
- **Prohibit the use in special aquatic sites and areas with riparian vegetation.**
- **Prohibit the construction of in-stream retention or detention basins and do not consider these areas as compensatory mitigation if regular maintenance will be required (e.g. dredging or removal of vegetation, etc.).**
- **Require that base-flows of the stream be maintained during periods of low flows to protect the downstream environment.**
- **Prohibit the construction of concrete or riprapped channels.**

NWP 44 (Mining Activities) - REVOKE:

- **In the 2007 NWPs the District revoked this nationwide permit.** The San Francisco District currently has an LOP (Letter of Permission) for gravel mining activities in two counties within the district. SFD should seriously analyze the cumulative effects of the permitted activities through the LOP. This analysis should include a categorization of the stream types impacted (ephemeral, intermittent, perennial) and the linear footage and acreage of impacts in each stream type and within each watershed. The Corps should also assess permit compliance and

mitigation compliance (including an analysis of successfully completed compensatory mitigation).

NWP 48 (Existing Commercial Shellfish Aquaculture Activities) – Revoke proposed changes that would authorize new activities and expansion of existing operations.

- **Prohibit this use of this NWP in special aquatic sites.**

NWP A (Land-Based Renewable Energy Generation Facilities) – REVOKE:

- **The proposed regional conditions are silent with respect to this NWP proposal. This NWP should be revoked due to the numerous public interest factors and impacts to waters of the U.S. that may result from such projects.**
- **The land-based renewable energy generation facilities within California cover massive tracts of land (3,500 acres for one of the projects proposed within the District). This NWP proposes restrictions of ½-acre of non-tidal including the loss of no more than 300-linear feet of stream channel impacts.** The alteration of vast tracts of land through the development of roads, buildings, above grade pads, etc. will certainly have watershed impacts that will in turn impact and alter hydrologic functions and values within the watershed (e.g. alteration of patterns and flashiness of flows, increase potential for erosion and thus degradation of water quality, adverse impacts to sustainability of aquatic species through fragmentation of habitat, etc.) In addition there is the likelihood of significant adverse impacts to public interest factors (e.g. water supply, aesthetics, recreation, conservation, etc.) **Authorization of projects that will alter massive tracts of lands and hence the dynamics of the watershed through NWP would be an abuse of discretion.**

NWP B (Water-based Renewable energy Generation Pilot Projects) – REVOKE:

- **The proposed regional conditions are silent with respect to this NWP proposal. This NWP should be revoked due to the numerous public interest factors and impacts to waters of the U.S. that may result from such projects. The analysis of this NWP provided in the draft regulations is wholly inadequate; therefore the use of this NWP within the San Francisco District should be revoked.**
- **The Corps has failed to demonstrate projects proposed for authorization under this NWP will have impacts that are similar in nature or that the impacts will be similar in their effects on the aquatic environment. In fact, the Corps has failed to describe what the potential impacts to the aquatic environment may be other than providing a description of the attendant features. Until the Corps can develop a substantive description of the types of impacts that are likely to occur and their anticipated impacts on the aquatic environment, the proposed NWP fails to meet the requirements of NEPA and the 404 (b)(1) Guidelines. Once this information is available, CCCR requests the opportunity to review and provide comment on regional conditions that may be necessary to reduce the impacts of the NWP to a minimal level.**

Absent revocation of NWPs indicated above, the San Francisco District must make every effort to develop regional conditions that will effectively reduce the adverse impacts to a minimal level. The proposed regional conditions do not meet that goal. We recommend that at minimum, the San Francisco District

adopt the regional conditions we have proposed. It is important to recognize that even with the incorporation of such conditions, close scrutiny of each nationwide permit request is necessary. We recognize the nationwide permit program places a substantial burden on Corps Districts by increasing the number of potentially complex permit applications that will have to be reviewed within a limited time period (45 days). However, the breadth of activities and geographic scope covered by the nationwide permit program, combined with the lack of adequate information regarding the cumulative effects of the Regulatory Program on "waters of the U.S.", places the responsibility of ensuring that no more than minimal adverse impacts are authorized, squarely on the shoulders of Corps staff and the District Engineer. The Corps cannot continue with a "rubber-stamp" approach to nationwide permit review. (Please note that we are using the word "prohibit" within the context of the nationwide permit review process. We fully realize that all activities listed below would be eligible for review under the individual permit process.)

Regional conditioning may be effective in reducing the impacts of general permits such as the nationwide permit program, but only if informed by an understanding of the types of activities that are permitted (through general permits, LOPs, individual permits, etc.) within the watersheds of the district and required compensatory mitigation is tracked to ensure unavoidable adverse impacts are being offset, and that functions and values are being restored. Finally and most importantly the San Francisco District should be analyzing the cumulative impacts of permits issued to determine if hydrologic functions of watersheds are remaining intact. We would argue that none of this is occurring to the degree necessary in any of the Corps districts across the country. We understand that this may be difficult to accomplish due to issues of understaffing, budget, etc. However, understanding the reasons why this is not occurring does not ensure the adverse impacts of the nationwide permit program are adequately minimized.

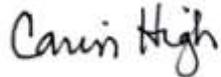
It is completely absurd that the Corps should state that the proposed modifications are a "reflection of the Corps' unequivocal commitment to its environmental mission and to wetlands protection." In general, the proposed nationwide permit program:

- maintains the significant increase in geographic scope that was introduced in the March 2000 nationwide permits and which still have not been demonstrated to have minimal adverse individual and cumulative impacts as required by the 404 (b)(1) Guidelines,
- maintains the significant increase in the number of Corps authorizations that can occur in the absence of public comment and with reduced agency review;
- relies too heavily on regional special conditioning to reduce impacts to a "minimal" nature;
- and presumes that compensatory mitigation will adequately offset the impacts authorized under the nationwide permit program.

The Corps to this day has not even attempted to substantively demonstrate that the increased scope of the nationwide permit program does not have significant adverse impacts on the human and aquatic environment. Corps districts have insufficient staff or incentive to adequately track potential cumulative adverse effects, review mitigation compliance, or review individual nationwide permit requests, yet Corps Headquarters has identified this data as fundamental to Corps' demonstration of compliance with the National Environmental Policy Act (NEPA) and Section 404 (e) of the Clean Water Act. Thus, implementation of the nationwide permit program is in violation of the requirements of NEPA and the Clean Water Act.

The nationwide permit program as proposed will have significant adverse impacts to waters of the U.S. within the State of California. The nationwide permit program as proposed violates the intent of the Clean Water Act to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." It does not ensure "no net loss of wetlands." It is not in the public interest. For these reasons we urge the San Francisco District to adopt the revocations and regional conditions contained in this letter.

Yours Sincerely,



Carin High
CCCR Vice-Chair

cc: South Pacific Division
EPA
USFWS
CDFG
SFRWQCB
WQCB

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