



CITIZENS COMMITTEE TO COMPLETE THE REFUGE

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April 18, 2011

Comments Regarding Proposal to Reissue and Modify Nationwide Permits,
Federal Register Vol. 76, No. 32, Issued February 16, 2011,
Docket No. COE-2010-0025, ZRIN No. 0710-ZA05.

Dear Mr. Olson,

This responds to the Proposal to Reissue and Modify Nationwide Permits published in the Federal Register February 16, 2011, Vol. 76, No. 32. The Citizens Committee to Complete the Refuge would like to thank you for the opportunity to provide comment on the Corps nationwide permit proposal. 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 in the past to proposed reissuance and modifications of 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.

We have reviewed the February 16, 2011 Proposal to Reissue and Modify Nationwide Permits (NWP). Based upon our review we fully concur with all of the comments contained in the letter submitted by the National Wildlife Federation, April 18, 2011.

We are deeply disappointed the Corps continues promote a program that erodes the protection of waters of the U.S. It is evident in reviewing the proposed NWP program that the primary goal of the program is "...saving time and cost to the regulated public and the government..." (U.S. Army Corps of Engineers February 16, 2011 News Release

http://usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP_rl_16feb2011.pdf) We fully concur the nationwide permits will likely provide timely authorizations for applicants. However, the NWPs as proposed lack the necessary restrictions to ensure the program will have only minimal adverse impacts to water quality and the aquatic environment. And while "innovation and creativity" can be useful in "meeting the challenges of protecting America's wetlands and aquatic resources," it would be an abuse of discretionary authority to renew and modify the proposed NWP program.

Based upon our review it is clear:

- The Corps continues to be out of compliance with the 404 (b) (1) Guidelines for general permits as specified at 40 CFR 230.7 (a).
- Corps Headquarters continues demonstrate an overwhelming reliance on discretionary authority at the District and Division levels to reduce the adverse individual and cumulative effects to the aquatic environment to a minimal level
- The Corps continues to assert the presumption that compensatory mitigation effectively replaces lost functions and values without adequate documentation.
- The Corps continues to assert the NWP's have only minimal impacts both individually and cumulatively, but has failed to ever conduct a meaningful evaluation of the cumulative effects of the NWP's as required by the National Environmental Policy Act (NEPA).

We strongly object to the following:

- the discretionary authority to waive the 300-foot restriction on the placement of fill in intermittent and ephemeral streams for nationwide permits 21 (surface coal mining activities), 29 (residential developments), 39 (commercial and industrial developments), 40 (agricultural activities), and 42 (recreational facilities), 43 (stormwater management facilities), 44 (mining activities), 50 (underground coal mining), A (land-based renewable energy generation projects), B (water-based renewable energy generation pilot projects) and the proposal to allow discretionary authority to waive the 500-foot restriction on NWP 13 bank stabilization;
- the continued NWP authorization of fills supporting development of floodplains;
- the proposal to authorize land-based renewable energy generation facilities through NWP (NWP A)
- the proposal to authorize water-based renewable energy generation pilot projects (NWP B)
- to the proposed modifications of NWP 3 (maintenance), NWP 13 (bank stabilization), NWP 20 (response operations for oil and hazardous substances), NWP 31 (maintenance of existing flood control facilities), NWP 43 (stormwater management facilities), NWP 48 (commercial shellfish aquaculture activities),
- the reissuance of NWP 21 surface coal mining activities), NWP 49 (coal re-mining activities), and NWP 50 (underground coal mining activities).

The goals of the Clean Water Act are to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," the proposed nationwide permit program does not satisfy those goals, nor is it consistent with the requirements for general permits.

Non-compliance with the 404 (b)(1) Guideline requirements for general permits:

The Guidelines require (40 CFR 230.7 (a)) that a category of activities must have only minimal cumulative adverse effects on water quality and the aquatic environment. The Corps has failed to demonstrate the impacts of the proposed nationwide permit program; current and past nationwide permit programs have only minimal impacts to water quality or the aquatic environment. A draft programmatic environmental impact statement (PEIS) prepared in July 2001 for the nationwide permit program raised serious concerns of whether the Corps even has the capability to provide accurate accounts of the extent of impacts previous nationwide permits have had on specific waters of the U.S. (i.e. specific habitat

types – vernal pools, prairie potholes, eelgrass beds, ephemeral streams, etc.), the cumulative impacts of nationwide permit authorizations in specific watersheds, the amount of compensatory mitigation that was successfully completed, or whether the required compensatory mitigation adequately replaced lost functions and values. The absence of this and other pertinent information makes it impossible for the Corps to conclude the impacts of the proposed nationwide permits will have no more than minimal adverse impacts to water quality or the aquatic environment.

Undue Reliance upon Discretionary Authority and the need for geographic restrictions:

Corps Headquarters has persisted in its undue reliance upon the use of discretionary authority at the regional level to minimize the adverse effects to the aquatic environment through the imposition of regional conditions and through the preconstruction notification (PCN) process. This is a *nationwide* permit program - note the emphasis! It is the responsibility of Corps Headquarters to ensure that across the nation and for all the aquatic habitats that will be impacted the program will *as a whole* have only minimal individual and cumulative adverse effects to the aquatic environment. It is completely irresponsible for Corps Headquarters to propose nationwide permits that have broad geographic applicability – even though Corps Headquarters is fully aware that within different regions certain habitat types are extremely valuable and have suffered high historic losses. We are extremely concerned that imposition of regional conditions will not occur consistently across the nation or to the degree necessary to reduce the adverse effects of this program and to conserve and protect increasingly imperiled aquatic habitats.

In areas such as the arid west where it is known that historic losses of particular habitats are extremely high, regional conditioning as proposed could lead to inconsistencies in the way the program is applied. As an example, in California, vernal pool habitat is generally recognized as extremely valuable habitat. Because historic losses of this habitat are high, most vernal pool areas support several to many federally-listed endangered or threatened species. The Los Angeles District has recognized the importance and rarity of this habitat type and proposes to revoke the use of NWP in jurisdictional vernal pool habitat. The Sacramento District, which has also suffered high historic losses of vernal pool habitat in some counties, has proposed to revoke the use of certain NWPs within seasonal wetlands and vernal pools in the Mather Core Recovery Area. The Santa Rosa Plain is an area within the San Francisco District that has also suffered high losses of vernal pool habitat; however, the San Francisco District has proposed only to require pre-construction notification as a means of “minimizing” the adverse impacts of the program on vernal pool habitat within this region. This inconsistency between Corps districts leads to confusion for the regulated public and prevents compliance with the requirements of the Guidelines.

The same likely holds true in other parts of the country for prairie potholes, playa lakes, riparian wetlands, bottomland hardwoods, pine forested wetlands, bogs, fens, cypress and cypress tupelo swamps, streams that support anadromous fish populations, etc.

In order to qualify as a general permits the 404 (b)(1) Guidelines require (40 CFR 230.7 (a)) "the activities in such category will have only minimal cumulative adverse effects on the water quality and the aquatic environment." Corps Headquarters state:

Regional conditions may be imposed by the division engineers to take into account regional differences in aquatic resource functions and services across the country and to restrict or prohibit the use of NWP's to protect those resources.

The fact that regional conditions "may be developed by Division Engineers" does not adequately ensure only minimal adverse impacts will occur or that Division Engineers will impose adequate regional conditioning. Has Corps Headquarters assessed the regional conditions that have been implemented in the most recent set of NWP's to determine the incorporation of regional conditions has adequately protected the aquatic environment? If so, where is the documentation of this analysis?

Rather than allowing impacts to the aquatic environment in the broadest geographic range, we reiterate that Corps Headquarters must assume responsibility for its *nationwide* permit program and restrict the usage of NWP's within regionally important habitat types. For example, at the national level restrict the usage of these nationwide permits in the arid west in vernal pools, riparian wetlands, diked baylands and streams that support anadromous or salmonid fish populations. In the Midwest, it may be appropriate to restrict the usage in prairie potholes, potholes, playa lakes, kettles, bogs, fens; in the south perhaps it may be appropriate to restrict the usage in fens, bogs, cypress and cypress tupelo swamps, etc. This list is by no means complete - Corps Headquarters could obtain a better listing through coordination with Corps districts, the U.S. Fish and Wildlife Service, and the Environmental Protection Agency. A division engineer could still choose to further restrict the use of the nationwide permits in locally valuable waters of the U.S. not identified by Corps Headquarters. We believe this is a much more responsible approach of minimizing the adverse effects of the proposed nationwide program.

The Preconstruction Notification (PCN) process is supposed to allow the district engineer the opportunity to assert discretionary authority where necessary to minimize adverse effects to the aquatic environment. Reliance upon discretionary authority can only be effective if a thorough review of each nationwide permit submittal occurs. In reality, the nationwide permit program is institutionally viewed as a "streamlined" (rubber-stamp) permit process. In general, very little effort has been expended by overworked Corps staff towards meaningful review of nationwide permit submittals - if an activity fits into a given nationwide permit "box" - it is assumed the proposed activity has only minimal effects on the aquatic environment. According to the draft PEIS, in fiscal year 1998, 41,879 nationwide permits were issued. Nationwide permit authorizations were issued in an average of 18 days. Has this review time changed? We assume that figure of NWP's issues did not include the non-reporting nationwide permits. How many of the NWP actions from the current NWP program warranted and received site inspections? How many NWP's were issued per year for the current NWP program? What was the average time of review? [Note we repeatedly refer to the draft PEIS because a comprehensive review of NWP program in terms of impacts, permit review time, denial, etc. has not been made available to the public since that document was released.]

How often does the Corps waive its ability to apply special conditions where necessary because adequate levels of staffing are unavailable to review PCN's within the specified 45 days? We do not believe it is appropriate for Corps Headquarters to rely on the PCN process to reduce the adverse impacts to the aquatic environment to a minimal level if it cannot be reasonably implemented at the district level.

Discretionary authority to elevate a NWP request to an individual permit review was only asserted 68 times during fiscal year 1998. How many times has this happened for the current set of NWPs and what NWPs were involved?

Any inconsistencies in the degree to which discretionary authority is asserted through the imposition of regional conditions, special conditions for individual NWP authorizations, and elevation to individual permit review would result in program non-compliance with the Guidelines requirement that general permits authorize only those impacts that are individually and cumulatively minimal.

Presumption that compensatory mitigation is effective in minimizing adverse effects:

The Corps Draft Decision Document for NWP 29 states:

...If the district engineer determines that the adverse effects of a particular project are more than minimal *after considering mitigation* then discretionary authority will be asserted and the applicant will be notified that another form of DA authorization, such as a regional general permit or individual permit, is required (see 33 CFR 330.4 (3) and 330.5)

What does this mean? Is it the Corps' position that compensatory mitigation be used to “buy-down” adverse impacts to waters of the U.S. to minimize the adverse effects of NWP authorization? If so, this approach is not compliant with the 404 (b)(1) Guidelines (40 CFR 230) that require for non-water dependent projects a strict sequence of avoidance and minimization occurs prior to any consideration of compensatory mitigation. If the adverse effects of a proposed project are more than minimal without compensatory mitigation the project should be subject to a full and thorough alternatives analysis and a complete public interest review. Furthermore, the resource agencies and the public should be able to review and comment on the project and any proposed compensatory mitigation.

The Corps is relying heavily on compensatory mitigation to offset the losses of “waters of the U.S.” authorized by the proposed nationwide permit program. The compensatory mitigation plans we have reviewed in public notices for projects located within the California can be highly speculative in nature (relying on unproven technology), are often inappropriate for replacing the resources lost, and often do not adequately replace the functions and values of the “waters of the U.S.” that would be lost. We see no reason to believe that compensatory mitigation proposed for nationwide permits - in the absence of public scrutiny and with only limited agency review and comment (due to the imposition of strict time constraints only 10 days and with higher thresholds before agency review is required – e.g. impacts exceed 1,000 linear feet, etc.)- would be any better.

The draft PEIS stated in a random sample (sample size unknown) of permits issued in fiscal year 1998 indicated only 15% of the permits reviewed employed special conditions. 75% of these addressed mitigation requirements; the remainder addressed endangered species, cultural resources and other environmental issues. Most EPA regional offices indicated if concerns are raised regarding compensatory mitigation, the degree to which concerns are addressed is often dependent on the permit manager involved.

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 PEIS:

- lack of proper identification of impacted wetland functions and values;
- inadequate consideration given to hydrologic conditions, hydrogeomorphology, 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 0.1% of all permitted activities. Has information regarding the percentage of NWPs that are reviewed for compliance with required special conditions been provided for subsequent NWP programs? We have not been able to locate this information in the draft decision documents.

A review of compensatory mitigation success conducted on behalf of the California 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.

The Institute for Water Resources (IWR) estimated wetland compensatory mitigation success ranges from 30% to 90%. IWR 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 concludes, “...More quantified assessment appears less encouraging, however, indicated 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.

We do not agree that even the best planned compensatory mitigation will always successfully replace lost functions and values. However, in light of the fact that the Corps does, the Corps should require *detailed* (not conceptual) mitigation and monitoring plans be submitted with the PCN for the review and comment of the Corps and all appropriate resource agencies. Such a requirement is necessary for the Corps and resource/regulatory agencies to accurately assess whether the compensatory mitigation proposed will have a high probability of success. This would also eliminate the delays that inevitably result from lack of adequate information.

The Corps Q & A's for the proposal to reissue and modify the nationwide permits state, "The Corps is currently upgrading its internal databases to better track impacts and mitigation." This acknowledges two major concerns, one that the Corps cannot adequately assess the extent of impacts or the NWP program on the aquatic environment (at the watershed level and not merely the total "bean count" of activities permitted), and the second, that the Corps does not have the ability to assess the degree to which lost functions and values are actually mitigated. What percentage of nationwide permit authorizations requiring compensatory mitigation does the Corps monitor? The Q & A's state in response to the question "How do you measure mitigation?" "Mitigation should replace lost aquatic resource functions resulting from permitted activities, so the Corps determines mitigation requirements and other permit conditions accordingly. The mitigation may be measured on an acreage or linear foot basis or through the assessment of wetland or stream functions..."

There is a tremendous difference between merely measuring the linear footage or acreage of a mitigation site and assessing whether functions and values have actually been replaced. If significant monitoring does not occur (i.e. if Corps staff do not inspect a reasonable percentage of NWP compensatory mitigation sites), how can the Corps ensure compliance with the requirements for general permits and more importantly, how can Corps to assert the adverse effects of the nationwide permit program are effectively being reduced to a minimal level?

Inadequacy of Corps decision documents:

The Corps has not reviewed alternatives that would narrow the range of activities authorized by individual nationwide permits, narrow the range of habitats in which particular nationwide permits could be utilized, or limit the extent of impacts authorized by a given nationwide permit (i.e. linear feet, acreage, etc.) etc.

The draft decision documents are essentially in boiler plate form. Acreages of broad habitat types are provided, but no information is provided on how those habitats have been impacted by the authorization of specific nationwide permits. Insufficient specific data is provided for each of the proposed nationwide permits to determine the types of habitats impacted, the acreages of those habitats, the extent to which those impacts were mitigated, etc.

In the decision documents for the proposed nationwide permits the Corps refers to mitigation acreage that it estimates will be required to offset the adverse effects of the individual nationwide permits. However, there are so many variables in the nationwide permit program, for example, for many nationwide permits, the inclusion of discretionary authority to extend the impact limitations, or the discretionary authority to not require compensatory mitigation, that it is very difficult to view the numbers supplied in the decision documents with any confidence.

Other examples of uncertainty in the Corps data include the lack of differentiation between temporary and permanent impacts, the lack of information regarding location of impact (i.e. within the watershed), insufficient knowledge of wetland or ecosystem function impacted, etc. It is clear from the data entry flaws identified through the PEIS that it is extremely difficult for the Corps to ascertain the cumulative impacts of the nationwide permit program on waters of the U.S.

Cumulative Impact Analysis:

“Cumulative impact” is defined at 40 CFR 1508.7 as the:

...impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonable foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Cumulative impact analysis is critical to the determination of compliance with the 404 (b)(1) Guidelines and NEPA. The nationwide permit decision documents do not adequately comply with the NEPA requirement to assess “past, present, and reasonable foreseeable future actions” because the review of impacts is incomplete and cannot adequately address the variability introduced by the incorporation of discretionary authority. The numbers provided for the existing nationwide permits result from a reported use of the nationwide permits during the period of August 1, 2009 to July 31, 2010, rather than the total number of acres authorized and reported for each nationwide permit during previous nationwide permit programs.

Page 3-20 of the PEIS states, “Rigorous cumulative impact analysis appears problematic in district practice.” As indicated above, it is apparent most Corps districts lack the data necessary to perform such analyses. Furthermore, the review of eight Corps districts suggests there is currently no standardized methodology for assessing the cumulative impacts of the nationwide permit program. The PEIS indicates Corps Headquarters “has recently provided specific recommendations to field offices for considering cumulative effects.” (p. S-16) What does this mean specifically? Are all Corps districts now assessing cumulative effects on a watershed basis, if so at what scale? Where is the data and why wasn’t this data made available to the public during the review period for the proposed NWP and during the comment period for the proposed Regional Conditions?

As stated earlier, the NWP program relies heavily on the assertion of discretionary authority to reduce the adverse impacts to a minimal level both individually and cumulatively. While it is appropriate for each district to assess historic losses and apply regional and special conditioning, Corps Headquarters should provide standards for determining the threshold for “substantial historic losses.” Without this guidance, there is no assurance the NWP program will not contribute significantly to the continued loss of rare wetland ecosystems across the nation. What percentage loss of aquatic habitat within a watershed is considered “substantial?” What percentage of Corps districts have proposed regional conditions that completely revoke a NWP or NWPs in special aquatic sites? Do instances exist where several districts have revoked the use of NWPs in similar habitat types – if yes; should use of NWPs be restricted in these habitats across the country? Has a particular NWP been revoked in more than one Corps district? If such instances exist, isn’t this an indication that NWP be removed from the program?

Authorization of "Expansion" of Existing Developments, etc.

We continue to object to the authorization of "expansion" of existing projects into waters of the U.S. through the nationwide permit program (e.g. NWP 3, 12, 14, 29, 34, 39, 48 etc.). Authorizing the expansion of existing projects into waters of the U.S. discourages avoidance and minimization of adverse impacts and thus violates the 404 (b)(1) Guidelines. The Corps defines a "single and complete

project" 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 (see definition of independent utility)."

"Independent utility" is defined in the following manner, "a project is considered to have independent utility if it would be constructed absent the construction of other projects in the area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility." 33 CFR 330 (E) The Corps argues that expansion does not contradict the definition of "single and complete project" because the previously authorized impacts are added to the proposed impacts to determine if the expansion exceeds the acreage limit, and as long as the terms and limits of a NWP are not exceeded the adverse effects on the aquatic environment are minimal. "Single and complete" as the Corps defined the phrase has nothing to do with fill thresholds or the minimization of adverse effects, instead it is the identification of the entire project and all its attendant features. The incorporation of "expansion" of existing projects into the nationwide permit program encourages piece-mealing of impacts. The fact that the applicant did not previously exhaust the fill limits set by a particular NWP does not alter the fact that the impacts to waters of the U.S. are being piece-mealed. How will the Corps effectively ensure that the cumulative adverse effects of the revised project (old impacts and new impacts) are adequately considered in determining whether the adverse effects are minimal? We believe that the expansion of an existing project should be subject to individual permit review and thus demonstrate compliance with the Guidelines, submit to a full public interest review, and receive public review and comment.

Project specific waiver of 300 linear foot restriction in NWPs 13, 21, 29, 39, 40, 42 43, 44, 50, A and B:

The Corps is once again proposing to allow the district or division engineer discretionary authority to waive the 300 linear foot prohibition for the above listed NWPs. The Corps is also proposing to allow the district engineer to waive the 500 foot limit for NWP 13. We strenuously object to this proposal. Notification of other resource and regulatory agencies is not triggered unless the linear footage exceeds 1000 feet and in that instance the other agencies have only 10 days in which to respond.

In the arid west, where we do not have year round rainfall as in the east, many of our headwater streams do dry up in the summer months. These streams however, are critical to the survival of many aquatic dependent species that are federally listed as threatened or endangered, and state listed or state species of special concern. These streams also provide many other important functions such as flood detention and desynchronization.

In the San Francisco Bay area, development has filled the low lying lands and is now progressing up the hillsides where a common technique proposed by developers is the indiscriminant lopping off of hilltops to fill adjacent creekbeds. These proposals involve the movement of substantial amounts of soil, pose serious questions of slope stability, contribute to growth inducing sprawl, impact the habitats of aquatic species of concern, fragment habitat, etc. and warrant individual permit review with public and agency comment. Removal of the linear foot prohibition is inappropriate as it would place additional burden on Corps staff to refute the request of developers for nationwide permit authorization.

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.

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.

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.”

We urge the Corps to invoke clear and firm limits for fills in ephemeral, intermittent and perennial streams. Fills in excess of 300 feet should require individual permit authorization. Versions of NWP 26 were responsible for filling hundreds of miles of local streams. The results 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 has resulted in local extinctions of rare, threatened or endangered species of water-dependent organisms. We would like to know specifically how often the request for stream fills in excess of the 300 foot limit was denied because the district engineer determined the fills would result in more than minimal impacts.

The proposed modifications to the nationwide permits would place the burden of proof on Corps staff to approve or deny the request for authorization of stream fills over 300 linear feet. The proposed language requires the District Engineer to consider site specific factors, such as the environmental setting, the functions provided by the affected aquatic resources, the degree or magnitude that those resources perform the functions, the extent to which aquatic functions will be lost, importance to the region, and mitigation required if any. This sounds wonderful, but how realistic is it to state this will occur given the time-clock of 45-days? There is absolutely no assurance that this review will be substantive and that required documentation will be more than a mere checklist where Corps staff will check "yes" or "no."

The nationwide permit terms state the activity is for 300 feet “unless this criterion is waived in writing by the district engineer.” However, General Condition 27 Pre-Construction Notification imposes a 45-day review period upon Corps staff, and if the applicant does not receive written notice within 45 days of submitting a complete notification to the Corps, they may proceed with their project subject to

subsequent modification, suspension, or revocation by the Corps. As currently written, it appears the applicant can proceed with stream fills in excess of 300 linear feet if the Corps does not respond in writing to the contrary within 45 days of receipt of a complete notification package. Thus the burden is placed upon the Corps to rebut the presumption fills exceeding 300 linear feet are more than minimal, with no agency input or reduced resource agency input, within a limited period of time, and without the benefit public input.

No prohibition of fill placed in floodplains:

General Condition 10, Fills Within the 100-year Floodplain, merely requires projects to “comply with 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.

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 change 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.

Given the increasing concerns about the anticipated impacts of climate disruption on flood plains (increasing intensity of storms, flashiness of storm flows, etc.) it would be an abuse of discretionary authority to continue to authorize projects that could place homeowners, the public in harm's way without providing the public an opportunity to review and comment.

As stated earlier, the proposed NWP's do not comply with the 404(b)(1) Guidelines:

The 404 (b)(1) Guidelines require (40 CFR 230, Subpart A 230.7 (a)) that a category of activities must meet the following conditions to qualify as a "general permit":

- 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 the water quality and the aquatic environment.

Several of the nationwide permits still fail to meet condition 1. For example, NWP 42 would authorize the discharge of dredged or fill material into waters of the U.S. for the construction or expansion of recreational fields ranging from playing fields (football or baseball fields), to basketball or tennis courts, to golf courses. The impacts of a basketball court cannot be considered similar to the construction of a golf course and its attendant infrastructure. There is no way the Corps or the public can reasonably predict the adverse effects that will result from the proposed NWP.

Another example is NWP 3, the "maintenance" NWP. NWP 3 includes authorization of "new" work in addition to the "repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill..." Section (b) of the NWP authorizes the "placement of new or additional riprap to

protect the structure” and without any specific limitations on the extent of work that can be conducted. How is the incorporation of new riprap (with no specific limitations) similar in impacts to repair, rehabilitation or replacement?

The proposed NWP B covers both tidal and non-tidal waters of the U.S. This is a huge geographic range of habitats, resources, functions and values that may be affected differently through the use of this NWP. The proposed NWP fails to even provide examples of the types of projects that might be authorized under the proposed NWP – we don’t know whether the direct and indirect impacts will be similar or widely different in their effect on the aquatic environment – how will these structures impact freshwater streams or seasonal wetlands? Would impacts in tidal waters be similar or would the impacts to aquatic resources be significantly different? For example how are the impacts of wave generated energy pilot projects in tidal waters similar to hydro electric power generated in small streams? The range of possible impacts are infinite as the current NWP is written and the only limitation imposed is that the areal extent of impacts is ½ acre or 300 linear feet, and those restrictions can be waived at the district engineers discretion. NWP B further exacerbates the problem of non-compliance with general permit condition 1 by including not only the impacts of the water-based renewable energy project itself, but also attendant features such as “land-based distribution facilities, roads, parking lots, stormwater management facilities, utility lines, including utility lines to transfer the energy to land-based distribution facilities.” It is inconceivable that the NWP as proposed can meet any of the conditions for general permits.

It is unclear how a NWP such as NWP A will meet conditions 1, 2 and 3 of the general condition requirements. Activities such as solar and wind turbine farms can cover vast acreages of land. In California we are aware of several solar farm proposals that will impact in excess of 2,500 acres of land. Such land disturbing activities may meet the permit terms of less than ½ acre of direct impacts to waters of the U.S. but have the potential to significantly alter the hydrologic regime of an entire watershed through the introduction of impervious surfaces, roads, buildings, etc. resulting in degradation of water quality and the aquatic environment. It is contrary to the public interest to authorize such a significantly land altering activity through the NWP process.

The proposed modified and replacement nationwide permits fail to meet conditions 2 and 3 of the 404 (b)(1) Guidelines (40 CFR 230, Subpart A 230.7 a) that require the activities in such category will have only minimal adverse effects when performed separately; and the activities in such category will have only minimal cumulative adverse effects on the water quality and the aquatic environment.

Rather than proposing a nationwide program that has minimal adverse effects at the national level, the proposed nationwide permit program relies heavily on regional conditioning, the PCN process, and compensatory mitigation to reduce the adverse individual and cumulative effects to a minimal level. As stated earlier, there is no way to ensure that these three methods will be applied effectively or consistently across the nation. The effective attachment of regional conditions to minimize adverse impacts of the nationwide permit program presupposes Corps districts are capable of determining the existing cumulative adverse impacts to the aquatic environment in their districts. We would be surprised if more than a handful of Corps districts are able to provide this information.

Based upon our review of the proposed regional conditions within the three Corps districts in California, and our review of the regional conditions of various districts across the nation, it is clear the level effort

that has been expended to impose regional conditions to minimize adverse impacts to the aquatic environment (hence the effectiveness of regional conditioning) is highly variable. We believe it is fair to assume that effectiveness of the PCN requirement and compensatory mitigation in reducing the adverse impacts of the nationwide permit program will vary greatly from district to district as well.

Corps Headquarters is basing their determination of compliance with the Guidelines, upon actions that have not even occurred (e.g. requirement of yet to be determined regional conditions) and clearly in the instance of proposed nationwide permits A and B, where adequate data does not exist to determine the proposed impacts will be minimal in nature. In addition, Corps Headquarters has not provided a means by which they can in fact ensure the appropriate level of scrutiny will be applied to PCNs or compensatory mitigation plans.

To comply with the Guidelines a general permit must be based upon a consideration of Subpart A, Section 230.10 (b) (c) (relating to toxics, endangered species, marine sanctuaries, etc.) and comply with the conditions for the issuance of general permits of Subpart A, Section 230.7 (a), which are discussed above. To reach the determinations required under Subpart A Section 230.7(a), the Guidelines state that the “permitting authority shall *set forth in writing an evaluation of the potential individual and cumulative impacts of the category of activities to be regulated under the General Permit* (emphasis added).” Furthermore, “the evaluation *must be completed before any General Permit is issued, and the results must be published with the final permit* (emphasis added).” The activity specific information provided in the decision documents of the Corps for each individual nationwide permit are largely in boiler plate fashion, and the numbers provided as estimates of impacts are incomplete. Many of the NWP's authorize impacts to a broad geographic range of habitats everything from tidal waters to seasonal wetlands, perennial streams to headwaters, however, there no information is provided as to the impacts of individual NWP's on these aquatic resources. For example, are the majority of impacts of NWP 29 to headwaters or seasonal wetlands? One cannot determine from a review of the draft decision documents. Is NWP 13 used more frequently in tidal waters or freshwaters streams? Again even at the grossest level of analysis, Section 404 verses Section 10, the public cannot determine how the NWP's are being used.

Removal of the public and resource agencies from the review process:

The nationwide permit program precludes public notification and comment and significantly reduces the potential for review by resource agencies. By significantly increasing the geographic scope of the nationwide permit program to all non-tidal "waters of the U.S. (excluding in some instances non-tidal wetlands contiguous to tidal waters)," including "navigable waters" and wetlands adjacent to them, the Corps has drastically limited the ability of the public to comment on the majority of Corps actions.

We appreciate the opportunity to comment on the proposed modifications to the nationwide permit program published on February 16, 2011 and hope the Corps will provide an opportunity to comment on a final version of the replacement nationwide permits that includes the final Corps and state regional conditions.

The Corps is asking the public to once again take a giant leap of faith that adverse effects of the program will be minimal. The proposed modifications to the nationwide permit program as a whole violate the

intent of the Clean Water Act to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."

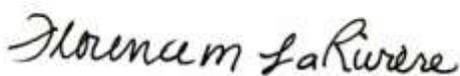
The proposal is inconsistent with the Administration's policy of no net loss of wetlands. Therefore, we urge the Corps to continue modifying the nationwide permit proposal by further reducing the proposed fill amounts, restricting the categories of activities that may be authorized by a given nationwide permit to activities that are similar in nature and those that will truly have only minimal adverse impacts to water quality and the aquatic environment, and requiring enforceable compensatory mitigation for all unavoidable impacts.

We urge the Corps to craft nationwide permits that will truly result in only minimal adverse impacts to water quality and the aquatic environment by prohibiting the use of nationwide permits in waters of the U.S. that have suffered high historic losses (e.g. vernal pools, riparian wetlands, etc.), and craft nationwide permit terms that will establish firm impact limits (no waivers through discretionary authority that would increase impacts).

In addition, prior to release of any nationwide permit program, the Corps must issue for the public's review decision documents that accurately report prior impacts of the nationwide permit program and credibly predict impacts that are expected to occur as a result of issuance of any forthcoming nationwide permit program. Finally, it is clear the nationwide permit program as it has been implemented has had significantly more than minimal adverse impacts and warrants preparation of an EIS and not a "findings of no significant impact" (FONSI).

We request that you inform us of any additional comment periods or decisions made regarding the implementation of the proposed NWP program.

Yours Sincerely,



Florence M. LaRiviere
Chairperson

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