Citizens Committee to Complete the Refuge

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Mr. David Olson
U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street, NW
Washington, D.C. 20314-1000

16 November 2020

Re: Comments in Response to Department of the Army, Corps of Engineers (Corps), Proposal to Reissue and Modify Nationwide Permits, Docket COE-2020-0002, 85 Fed. Reg. 57298 (September 15, 2020)

Dear Mr. Olson:

This responds to the Proposal to Reissue and Modify Nationwide Permits (NWP) published in the Federal Register September 15, 2020, Docket COE-2020-0002, 85 Federal Register 57298. 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 (CCCR), consisting of 2,000 members, has an ongoing history of interest in wetland protection, wetland restoration and wetland acquisition. As such, CCCR has taken an active interest in Clean Water Act (CWA) 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 and the 2001 Programmatic Environment Impact Statement that was never finalized. These actions demonstrate our ongoing commitment to wetland issues, protecting the public interest in wetlands, and in Section 404 of the CWA.

Based upon our review of the proposed NWP program and the preliminary decision documents provided, it is evident the proposed NWPs cannot and do not satisfy the requirements of General Permits as outlined in 40 CFR §230.7 (a) *Conditions for the issuance of General permits*, nor has the Corps fulfilled its requirement to adequately evaluate the environmental consequences of the proposed NWP program on waters of the U.S. as outlined in 40 CFR §230.7 (b) *Evaluation process.* We urge the Corps to withdraw the proposal to Reissue and Modify Nationwide Permits in its entirety. We also urge the Corps be more transparent in future nationwide permit proposals regarding the impacts of the nationwide permit program on water quality and the aquatic environment and to provide the public with more detailed data regarding the actual usage of nationwide permits under the nationwide permit program.

The Corps Process for the Modification and Re-Issuance of NWPs Thwarts the Public's Ability to Provide Substantive Comments:

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. [emphasis added]

The same standard should apply to notices provided in the Federal Register. The preliminary decision documents for the proposed NWP program provided by Corps Headquarters fail to provide actual data regarding the number of NWP verifications and PCN NWP authorizations issued for the each of the proposed NWPs, nor do the preliminary decision documents include any data regarding the actual acreage/linear feet of compensatory mitigation that have been required, actually implemented, or have met final success criteria. Some of this information is provided in a separate document, "*Regulatory Impact Analysis for the Proposed 2020 Nationwide Permits"* prepared by the U.S. Army Corps of Engineers, dated July 30, 2020. That document provides estimated reported and non-reported use of the 2017 NWPs, estimated mean annual activities authorized, estimated mean annual acreage impacted, and mean annual acreage of compensatory mitigation. The estimates are based on aggregated data from across all thirty-eight districts. No information is provided regarding the types of waters that have actually been impacted, or the acreage of impact within the different types of waters, the linear feet of streams impacted, where within the nation these impacts have occurred, etc.

It is unconscionable that a Clean Water Act general permit program, that is required to demonstrate that impacts are individually and cumulatively minimal in nature – a program that relies so heavily on the discretion of District and Division Engineers to impose regional conditions as necessary to ensure impacts are minimal – fails to provide pertinent information to the public. Review of the decision documents provided by Corps Headquarters is of little value since the information provided is aggregated from across the nation.

33 CFR 325.3 (b) states:

> *Public notice for general permits.* District engineers will publish a public notice for all proposed regional general permits and for significant modifications to, or reissuance of, existing regional permits within their area of jurisdiction. Public notices for statewide regional permits may be issued jointly by the affected Corps districts. The notice will include all applicable information necessary to provide a clear understanding of the proposal. In addition, the notice will state the availability of information at the district office which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance of general permits. District engineers will publish a public notice for nationwide permits in accordance with 33 CFR 330.4. [emphasis added]

This has not been the case for PNs soliciting comments for NWP regional conditions. In fact, in perusing a number of the District/Division regional condition PNs, the language that repeatedly appears states:

> "Draft decision documents for each of the proposed NWPs, which include environmental documentation prepared for the purposes of the National Environmental Policy Act, have been written by Corps Headquarters. The decision documents will address compliance of the NWPs with the requirements for issuance under the Corps' general permit authority. These draft decision documents,

as well as the proposed NWPs, are available for viewing at *www.regulations.gov*, docket number COE-2020-0002. Final decision documents will be prepared for the NWPs that are issued." [emphasis added]

What is incredibly frustrating is the fact that the Corps reports it has NWP impact data available within its automated information system:

> In the Corps Regulatory Program's automated information system (ORM), the Corps collects data on all individual permit applications, all NWP PCNs, all voluntary requests for NWP verifications where the NWP or general conditions do not require PCNs, and all verifications of activities authorized by regional general permits. For all written authorizations issued by the Corps, the collected data include authorized impacts and required compensatory mitigation, as well as information on all consultations conducted under section 7 of the ESA. Every year, the Corps evaluates approximately 35,000 NWP PCNs and requests for NWP verifications for activities that do not require PCNs, and provides written verifications for those activities when district engineers determine those activities result in no more than minimal adverse environmental effects.

Why hasn't this information been provided in the preliminary decision documents for each of the proposed NWPs? Why hasn't this information been provided by Corps districts when releasing their PNs of proposed NWP regional conditions?

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" effects is the basic premise upon which the Corps authorizes the NWPs. However, the Corps has yet to provide an assessment of the cumulative effects of this program in a manner that would permit substantive public review and comment. This is contrary to the guidance provided by the Council on Environmental Quality[1] in their 2007, "A Citizens Guide to NEPA," [which still appears on the U.S. Environmental Protection Agency's (EPA) website] 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."

To enable the public to meaningfully participate in the public review and comment process at the regional level, Corps Districts and Divisions should be required to provide, at minimum, the following information:

- The number of times the District/Division has provided written confirmation of authorization under each of the NWPs, the linear feet/acreage of impacts/the types of waters impacted/whether or not compensatory mitigation was required.
- An estimate of the number of times each of the non-reporting NWPs has been used, along with estimates of impacts in linear feet/acres and the types of waters impacted.
- The number of pre-construction notifications (PCN) that have been received for each of the NWPs requiring PCNs within the District/Division, the linear feet/acres of impacts for each of the NWPS, the types of waters impacted and whether or not compensatory mitigation was required.
- The number of times an NWP has been denied and the applicant informed they must apply for an individual permit authorization. If an NWP request for confirmation has been denied, what NWPs were involved? Why was NWP authorization denied?

[1] Council on Environmental Quality. 2007. A Citizen's Guide to NEPA: Having Your Voice Heard. https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf

- For NWPs with acreage or linear feet restrictions, how often did a permit applicant request that the size restriction be waived and if so, what was the requested increase in impact size?
- Were there counties within the District/Division that had higher requests for confirmation of NWP authorization? If so which counties and were there specific NWPs that were higher?
- Estimates of how many times each of the NWPs will be used within the next five years, and the extent of impacts (i.e. linear feet, acres of impacts, types of habitat that will be impacted, etc.).

These are but a few examples of the type of information that should and must be provided to the public and resource and regulatory agencies prior to or concurrent with issuing a PN that solicits comments on proposed regional conditions for the Nationwide Permit Program. How can the public be expected to provide substantive comments without this information? In the past, Districts published information on their websites regarding the number of individual permit authorizations and NWP verifications and PCN NWPs issued and the acreages or linear feet of impacts, along with a general description of the type of water of the U.S. that was impacted. Why was this practice discontinued? Districts should either reinstate this practice or publish draft decision documents that provide the information outlined in the bullets above.

The NWP program fails to satisfy the requirements of 40 CFR 230.7 (a)(1):

The 404 (b)(1) Guidelines 40 CFR 230.7 (a)(1) concerning General Permits, require that:

> The *activities* in such category are *similar in nature* and *similar in their impact upon water quality and the aquatic environment*. [emphasis added]

As a whole the nationwide permits continue to fail to meet condition 1. While the activities covered under a particular NWP may have a similar purpose, the individual activities authorized may have vastly different impacts, or magnitude of impacts on water quality and the aquatic environment.

As an example, the range of activities covered for the revised NWP 12, Oil or Natural Gas Pipelines Line Activities includes in-ground installation of oil or natural gas pipelines, the construction, maintenance, or expansion of substation facilities, foundations for above-ground oil or natural gas pipelines, and construction of access roads that can be constructed at grade or above existing contours and elevations. All of the mentioned activities are similar in that they are related to the construction of oil or natural gas pipeline infrastructure, but the activities do not have similar impacts on water quality or the aquatic environment. Please explain how a buried oil or natural gas pipeline, with preconstruction contours restored is similar in its impacts to water quality and the aquatic environment, to the construction or expansion of a substation, or above ground foundations, or above grade access roads? The impacts of this particular NWP set of activities, could be temporary in nature (if the terms and conditions of the NWP are fully met), or could result in permanent impacts that could potentially fragment habitat, alter the movements of aquatic dependent species, and potentially degrade water quality through the introduction of pollutants from constructed facilities and access roads.

NWP 29 provides authorization for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. Under the auspices of this NWP, impacts to waters of the U.S. associated with the construction of roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreational facilities (playgrounds, playing fields, and golf courses associated with the residential development), could all be authorized under this NWP. This NWP could be utilized in any non-tidal water of the U.S. so the waters impacted could range from seasonal to perennial wetlands, intermittent or perennial streams, or areas of ponding. It is inconceivable how this wide range of activities (e.g. impacts of a single residence vs. a residential subdivision and all its attendant features), in an

equally wide range of waters of the U.S., would have similar impacts on water quality or the aquatic environment.

NWP 39 authorizes the construction or expansion of commercial and institutional building foundations, building pads, and attendant features including: roads, parking lots, garages, yards, utility lines, storm water management facilities, waste water treatment facilities, and recreation facilities such as playgrounds and playing fields. Examples provided for institutional developments run the gamut from schools to fire stations and from public office buildings to hospitals. For commercial buildings, examples range from industrial facilities to shopping centers. This NWP, as with NWPs 12 and 39, provides authorization for widely disparate activities. And like NWP 29, this NWP can be used in any non-tidal waters of the U.S. including wetlands.

The most egregious example of non-compliance with 40 CFR §230.7 (a) is without question NWP 3, the "maintenance" permit. In addition to the "repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill," this NWP authorizes the removal of previously authorized structures or fills, removal of material from a stream channel, removal of accumulated sediments and debris in the vicinity of existing structures, the placement of *new or additional* riprap to protect the authorized structure (with no specific limitations on the amount that can be added), and temporary structures, fills and work necessary to conduct the maintenance. While all of these activities may be related to maintenance of currently serviceable structures, they most certainly are not similar in the impacts they might have on water quality or the aquatic environment.

The Corps has failed to demonstrate compliance with the requirements of 40 CFR 230.7 (a)(3):

The Corps has failed to demonstrate compliance with 40 CFR 230.7 (a)(3) which requires, "The activities in such category will have *only minimal cumulative adverse effects on water quality and the aquatic environment*." [emphasis added]

Cumulative impact analysis is critical to the determination of compliance with the 404 (b)(1) Guidelines. As discussed above, the preliminary decision documents for each of the NWPs are for the most part boiler plate discussions of the types of regulated waters of the U.S. The acreages of broad habitat types are provided, and generalized discussions of wetland losses are provided, but the preliminary decision documents fail to provide any information on how those habitats have been impacted by authorizations provided through specific nationwide permits. Insufficient specific data is provided for each of the current nationwide permits to determine the types of aquatic habitats that have been impacted, the actual acreages (or for streams, linear feet) of those habitats that have been filled, the extent to which mitigation for those impacts was required, the extent to which required mitigation was successfully completed, etc.

Other examples of uncertainty in the Corps data provided in the preliminary decision documents 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.

In the preliminary decision documents for the proposed nationwide permits and in the regulatory impact analysis for the 2020 NWPs, the Corps refers to mitigation acreage that it estimates will be required, or has been required, to offset the adverse effects of individual nationwide permits, but there is no indication that the Corps has actually assessed the degree to which required compensatory mitigation is implemented and whether the required compensatory mitigation has been successfully completed. Without this crucial follow through it is impossible for the Corps to credibly state that the NWP program has minimal impacts on the aquatic environment.

Failure to demonstrate that reliance on discretionary authority ensures impacts on the aquatic environment are minimal:

The Corps has steadfastly refused to provide a comprehensive analysis of the impacts of the NWP program on waters of the U.S., while maintaining the impacts of the NWPs are minimal in nature. The argument provided is that there is discretionary authority by Division and District Engineers to revoke individual NWPs where necessary to protect important regional aquatic resources or to add regional conditions to ensure impacts will be minimal in nature. Has Corps Headquarters provided 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 completely revoked an NWP or NWPs in special aquatic sites? Do instances exist where several districts have revoked the use of NWPs in similar habitat types? If the answer is yes, then why isn't the use of NWPs simply restricted in these habitats? Has a particular NWP been revoked in more than one Corps district? If such instances exist, isn't this an indication that this NWP should be removed from the program?

The only effort by the Corps to provide an analysis of the cumulative impacts was nearly two decades ago when it published a programmatic environmental impact statement (PEIS) on the NWP program in 2001. The preparation of the PEIS was precipitated by legal action brought by environmental groups after the Corps' repeated failure to provide a meaningful analysis of the impacts of the program on waters of the U.S. Though the Corps had indicated a final PEIS would be issued in 2002, that document was never published "because the Corps determined that it was not necessary to complete the PEIS."[2] While the draft PEIS was heavily flawed, it did affirm that the Corps had not and could not affirm that the NWPs comply with 40 CFR 230.7(a)(3).

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 suggested there is currently no standardized methodology for assessing the cumulative impacts of the nationwide permit program. The PEIS indicated Corps Headquarters "has recently provided specific recommendations to field offices for considering cumulative effects." (p. S-16) What was the result of the recommendations? Are all Corps districts now assessing cumulative effects on a watershed basis, if so at what scale? Where is the data and why hasn't this data made available to the public during the review period for the proposed NWPs and during the comment period for the proposed Regional Conditions?

Discretionary authority to elevate an 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.

[2] Copeland, Claudia. 2012. The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments. Prepared for Members and Committees of Congress. Congressional Research Service 7-5700.

Buying-down impacts of NWP program – inappropriate reliance on compensatory mitigation to ensure impacts are minimal:

The proposed NWP program repeatedly mentions consideration of compensatory mitigation in the determination of whether the impacts of a proposed project will be minimal:

> The district engineer *will consider any proposed compensatory mitigation or other mitigation measures* the applicant has included in the proposal *in determining whether the net adverse environmental effects of the proposed activity are no more than minimal*.

This approach does not comply with the 404 (b)(1) Guidelines (40 CFR 230) that require, for non-water dependent projects, that a strict sequence of avoidance and minimization occurs prior to any consideration of compensatory mitigation. If the impacts of an individual project are not minimal without the inclusion of compensatory mitigation, the project should be subject to the individual permit process, and the public should be able to review and comment on the project and any proposed compensatory mitigation. Furthermore, categories of activities (i.e. NWPs) that include a requirement for compensatory mitigation to buy-down adverse impacts to a minimal level should not qualify as a general permit.

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 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) - would be any better. Furthermore, it is unclear from the information provided in the Corps preliminary decision documents, the degree to which NWP required compensatory mitigation is even tracked – do compliance inspections of NWP compensatory mitigation occur? Failing that, are mitigation and monitoring reports required and reviewed? Does the Corps know the degree to which NWP required compensatory mitigation is even implemented, and if implemented, successfully reaches final success criteria?

Numerous studies, beginning with the National Research Council's 1992 "Restoration of Aquatic Ecosystems," 2001 "Compensating for Wetland Losses Under the Clean Water Act" and the SWRCB's study by Ambrose et. al. 2006, recognize the failure of compensatory mitigation wetlands in fully replicating the functions of natural wetlands.

Kihslinger[3], reviewed recent literature regarding wetlands compensatory mitigation compliance and success and concluded:

> Although wetland mitigation accounts for a significant annual investment in habitat restoration and protection, *it has not, to date, proven to be a reliable conservation tool*. Despite the nationwide "no net loss" goal, *the federal compensatory mitigation program may currently lead to a net loss in wetlands acres and function*. On the high end, Turner and colleagues (2001) estimated that the §404 program may lead to an 80% loss in acres and functions. [emphasis added]

[3] Kihslinger, Rebecca. 2008. Success of Wetland Mitigation Projects. National Wetlands Newsletter Vol. 30, No. 2: 14-16

Her review of the existing literature revealed:

> Studies of the ecological performance of compensatory mitigation have shown that compensatory wetland projects fail to replace lost wetland acres and functions even more often than they fail in their administrative performance. In fact, permit compliance has been shown to be a poor indicator of whether or not mitigation projects are adequately replacing the appropriate habitat types and ecological functions of wetlands.
>
> ...In addition to not meeting acreage requirements, mitigation wetlands often do not replace the functions and types of wetlands destroyed due to permitted impacts. *Turner and colleagues (2001) found that an average of only 21% of mitigation sites met various tests of ecological equivalency to lost wetlands*. Two recent studies compared mitigation sites to *impact sites.* One found that only 17% of the sites evaluated successfully replaced lost functions (Mink and Ladd 2003). The other study determined that 29% of the sites were successful in this regard (Ambrose and Lee 2004). The former study also found that 50% of the mitigation sites evaluated were actually non-jurisdictional riparian and upland habitat. Four studies comparing mitigation sites to *reference wetlands* found that fewer than 50% of the sites evaluated were considered ecologically successful (Ambrose et al. 2006 - 19%; Johnson et al. 2002 - 46%; MDEQ 2001 - 22%; Sudol and Ambrose 2002 - 16%). Ambrose and colleagues' statewide study of 143 permit files in California found that 27% of the constructed mitigation did not even meet the jurisdictional definition of a wetland (Ambrose et al. 2006). [emphasis added]

As mentioned above, a critical concern with compensatory mitigation of all types (including the use of mitigation banks), is the loss of local wetland functions and values and a reduction in the biodiversity of wetland types. Clare et al.[4] observed:

> The idea that a constructed wetland that visually resembles a natural wetland is adequate compensation ignores that wetlands grow and develop according to a myriad of highly variable inputs over time, including stochastic weather, random arrival events of species, competition, surface and groundwater interactions, and many others. The fluctuations and interactions of wetland ecosystems are more akin to human metabolism than they are to an automotive engine, with dynamic interacting components such as wetland soils, hydrologic regimes, riparian zones, and water chemistry that are linked to their surroundings. Constructed wetlands must grow, mature, and evolve, often requiring decades to centuries to stabilize and broadly resemble naturally occurring wetlands. Such time frames are rarely considered in the price of compensation.
>
> Despite the complexity of wetland ecosystems, optimistic and naive land developers, economists, engineers, and policy makers often argue for compensation over avoidance, confident in the notion that constructed wetlands can adequately replace the values and functions of a natural wetland. *The lack of focus on wetland avoidance allows for engineered compensatory wetlands to receive more political and economic value than their natural counterparts, as they provide decision-makers the options, flexibility, and negotiation room beyond a hard and fast requirement to relocate the proposed development to a nonwetland site*. The premise of compensatory offset wetland policies is that habitat loss can be mitigated through the creation or restoration of habitat that is equivalent to that which was lost. The challenges associated with measuring, let alone reproducing, the full suite of ecological,

[4] Clare, Shari, Naomi Krogman, Lee Fotte, Nathan Lemphers. 2011. Where is the avoidance in the implementation of wetland law and policy? Wetlands Ecological Manage 19: 165-182

social, and economic values and functions of a natural wetland makes the reliance on this policy approach untenable in all cases*, and highlights the need to give greater consideration to avoidance in the mitigation sequence.* [emphasis added]

Comments regarding the proposed 2020 NWPs:

The 300 linear foot restriction for NWPs must be retained for impacts to streams:

The Corps is proposing to remove the 300 linear foot restriction and instead replace the limitations with a ½-acre size limit for NWPs 21 (Surface Coal Mining Activities), 29 (Residential Developments), 39 (Commercial and Institutional Facilities), 40 (Agricultural Activities), 42 (Recreational Facilities), 43 (Stormwater Management Facilities), 44 (Mining Activities), 50 (Underground Coal Mining Activities), 51 (Land-Based Renewable Energy Generation), and 52 (Water-Based Renewable Energy Generation Pilot Projects).

We are strongly opposed to this proposed change and urge the Corps to retain the 300 linear foot limit for the above listed NWPs.

Ample scientific evidence documents the importance of headwater streams and the influence they exert on downstream reaches and higher order streams. An EPA analysis of the importance of ephemeral and intermittent streams in the arid and semi-arid American Southwest[5] stated that ephemeral and intermittent streams "make up approximately 59% of all streams in the United States (excluding Alaska), and over 81% 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." [We recognize that recent changes to the definition of waters of the U.S. have removed ephemeral streams from Clean Water Act regulation and protection.]

The authors also recognized the importance of ephemeral and intermittent stream channels, "Given their large extent, these streams are important sources of sediment, water, nutrients, seeds, and organic matter for downstream systems and provide habitat for many species (Gomi et al., 2002) and their inclusion is important in watershed-based assessments (Gandolfi and Bischetti, 1997; Miller et al., 1999b)." Furthermore, adverse impacts to intermittent streams have negative consequences for downstream channels (i.e. navigable waters):

> Because the small, uppermost channels of a drainage network are important in determining the amount of sediment transported downstream during storm events, their removal will increase sedimentation rates in downstream channels (Meyer and Wallace, 2000). This increased sediment load can have negative effects on channel stability, fish, invertebrates, and overall stream productivity. However, when small or headwater streams are replaced with paved or lined floodways during land development, sediment production may decrease, causing an increase in downstream erosion as sediment starved waters move through the watershed.

[5] Levick, L., J. Fonseca, D. Goodrich, M. Hernandez, D. Semmens, J. Stromberg, R. Leidy, M. Scianni, D. P. Guertin, M. Tluczek, and W. Kepner. 2008. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest. U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046, 116 pp.

The 2015 EPA synthesis report[6] concluded that:

> The scientific literature unequivocally demonstrates that streams, individually or cumulatively, *exert a strong influence on the integrity of downstream waters*. All tributary streams, including perennial, *intermittent,* and ephemeral streams, *are physically, chemically, and biologically connected to downstream rivers* via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Streams are the dominant source of water in most rivers, and the majority of tributaries are perennial, intermittent, or ephemeral headwater streams. Headwater streams also convey water into local storage compartments such as ponds, shallow aquifers, or stream banks, and into regional and alluvial aquifers; these local storage compartments are important sources of water for maintaining baseflow in rivers. [emphasis added]

Colvin et al[7] also describe the crucial ecological functions provided by headwaters (Defined as "Headwaters include wetlands outside of floodplains, small stream tributaries with permanent flow, tributaries with intermittent flow (e.g., periodic or seasonal flows supported by groundwater or precipitation), or tributaries or areas of the landscape with ephemeral flows (e.g., short-term flows that occur as a direct result of a rainfall event) (USEPA 2013; USGS 2013"):

> Headwaters perform ecological functions (i.e., biological, geochemical, and physical processes that occur within an ecosystem) that are critical for ecosystem services *throughout their drainage basins*. Headwaters deliver water, sediments, and organic material to downstream waters; contribute to nutrient cycling and water quality; enhance flood protection and mitigation; and provide recreational opportunities (Gomi et al. 2002; Richardson and Danehy 2007; Hill et al. 2014; Cohen et al. 2016). Headwater ecosystems provide both habitat and food resources for fish and other aquatic and riparian organisms; in turn, fish in headwaters affect food-web dynamics and contribute to the functioning of headwater ecosystems (Hill et al. 2014; Richardson and Danehy 2007; Sullivan 2012). Ecosystem functions in headwaters also maintain aquatic and riparian biodiversity and the sustainability of fish stocks not only in headwater reaches, *but also in larger downstream habitats*. These and other functions of headwater streams make them economically vital, with recent estimates at US$15.7 trillion per year in ecosystem services for the conterminous USA and Hawai'i (Nadeau and Rains 2007). For wetlands outside of floodplains, ecosystem service estimates are $673 billion per year for the conterminous USA (Lane and D'Amico 2016). [emphasis added]

Headwater ecosystems, wetlands and other waters provide habitat for many endemic and threated species, and can provide invaluable refugial habitat for rare or federally listed species, e.g. in California, the federally listed California red-legged frog and California tiger salamander take advantage of habitats that do not support perennial waters as these habitats do not support predatory species such as the bull frog or predatory fish species that are likely to prey on larval stages of the listed species.

As was acknowledged in the preamble for the proposed NWP program:

> "According to Downing et al. (2012), the mean width of a first order headwater stream is 6.3 feet. The mean width of a third order stream is 25 feet, and the mean width of a fifth order stream is 240 feet. An eighth order stream has a mean width of 1,688 feet and a tenth order stream has a mean width of 3,392 feet."

[6] USEPA (US Environmental Protection Agency). ES-2

[7] Ibid.

Downing et al. (2012)[8] were actually attempting to calculate the width of the "world's streams and rivers" and calculated the global mean width of a 1st order stream to be 1.9 m or 6.2 feet. Is this figure similar for streams in the U.S.? If we accept this assumption and extrapolate this out, utilizing a ½ acre limitation means that each time one of the above listed NWPs is utilized up to 3,513 LF of a 1st order stream with a stream width of 6.2 feet could be filled, 2,562 LF of 2nd order streams with a width of 8.5 feet could be filled, and 885 LF of a 3rd order stream with a width of 24.6 feet could be filled. Clearly, the removal of the 300 LF restriction from the above listed NWPs could result in extensive, significant and adverse cumulative impacts by potentially authorizing a loss of up to 3,513 LF (an 1171% increase) of 1st order stream length per NWP authorization.

Eliminating the 300 LF restriction previously imposed on the above listed NWPs will most assuredly result in more than minimal adverse impacts to the aquatic environment. Degradation of upstream reaches of a navigable water could result in profound adverse impacts to downstream states in terms of degradation of water quality, adverse impacts to drinking water supplies, increased flooding, etc.

We urge the Corps to maintain clear and firm linear foot limits for fills in Clean Water Act regulated 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, resulting in an increase in the percentage of impervious surfaces in the upper reaches of watersheds which has significant negative ramifications for downstream water quality and flood desynchronization. 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 how many miles of streams have been filled under the 2017 NWP program. We would also like to know how many times the 300-foot or 500-foot limitations (NWP 13 Bank Stabilization) have been waived, the average and maximum lengths of fills authorized under the discretionary use of waivers, how many miles of streambed have been filled through the use of waivers, and how often the request for a waiver was denied because a district engineer determined the fills would result in more than minimal impacts? This information should be in the Corps database as currently fills above 300 LF require written determinations that a waiver of the 300 LF restriction will result in minimal impacts.

Retain control of the NWP process and require that preconstruction notifications (PCN) continue to require submittal of PCNs from federal agencies:

One change proposed by the 2020 NWP program is to make statutory changes that "authorize Federal agencies to select and use NWPs without additional review by the Corps, and to allow other "Federal agencies to move forward on NWP projects without submitting PCNs to the Corps." Is this legally permissible under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act? Even if it is, we strenuously object to this proposed change. The U.S. Army Corps of Engineers Regulatory Program, for better or worse, has been tasked with administering the permit process for the Clean Water Act and the intent of the Clean Water Act is "maintaining the chemical, physical and biology integrity of the Nation's waters."

Throughout the preamble to the proposed 2020 NWP program, the Corps has emphasized the importance of the PCN process in enabling the Corps to ensure impacts to water quality and the aquatic environment are no more than minimal. Note the quotes from the preamble describing the importance of PCN review by the Corps, the description of the PCN process as a "critical tool" and the importance of discretionary authority of the district and division engineer in determining whether proposed activities qualify for NWP verification or require authorization through the individual permit review process:

[8] J.A. Downing, J.J. Cole, C.M. Duarte, J.J. Middelburg, J.M. Melack, Y.T. Prairie, P. Kortelainen, R.G. Striegl, W.H. McDowell & L.J. Tranvik (2012) Global abundance and size distribution of streams and rivers, Inland Waters, 2:4, 229-236, DOI: 10.5268/IW-2.4.502

- The purpose of requiring PCNs is to "...give the Corps the opportunity to evaluate certain proposed NWP activities on a case-by-case basis to ensure that they will cause no more than minimal adverse environmental effects, individually and cumulatively."
- "The case-by-case review of PCNs often results in district engineers adding activity-specific conditions to NWP authorizations to ensure that the adverse environmental effects are no more than minimal. These can include permit conditions such as time-of-year restrictions and use of best management practices or compensatory mitigation requirements to offset authorized losses of jurisdictional waters and wetlands so that the net adverse environmental effects are no more than minimal."
- "The PCN process is a critical tool, because it provides flexibility for district engineers to take into account the activity-specific impacts of the proposed activity and the effects those activities will have on the specific waters and wetlands affected by the NWP activity. It also allows the district engineer to take into account to what degree the waters and wetlands perform functions, such as hydrologic, biogeochemical cycling, and habitat functions, and to what degree those functions will be lost as a result of the regulated activity."
- "Review of a PCN may also result in the district engineer asserting discretionary authority to require an individual permit from the Corps for the proposed activity, if he or she determines, based on the information provided in the PCN and other available information, that adverse environmental effects will be more than minimal, or otherwise determines that ''sufficient concerns for the environment or any other factor of the public interest so requires'' consistent with 33 CFR 330.4(e)(2))."
- "During their reviews of PCNs, district engineers assess cumulative adverse environmental effects at an appropriate regional scale. The district engineer uses his or her discretion to determine the appropriate regional scale for evaluating cumulative effects. The appropriate regional scale for evaluating cumulative effects may be a waterbody, watershed, county, state, or a Corps district."
- "As the NWP program has expanded over the past 38 years, the PCN process has provided a mechanism where district engineers are given the opportunity to review certain proposed NWP activities before they take place, to determine whether the proposed activities will result in no more than minimal individual and cumulative adverse environmental effects."

These quotes provide a compelling case that the NWP program places a heavy reliance on Corps review of requests for NWP verification and the PCN process to ensure that impacts are truly minimal in nature and, when necessary, on the imposition of special conditions and compensatory mitigation. In some cases, Corps review can result in the requirement that an activity proceed through an individual permit process.

Other Federal agencies do not have the necessary Section 404 and Section 10 perspective within which to make decisions regarding the cumulative impacts of any given NWP authorization, or to make the determination of whether an activity exceeds the terms and conditions of an NWP and requires individual permit authorization. Adverse impacts to the aquatic environment will occur if NWPs are being used inappropriately by other Federal agencies.

If this proposed change were to be implemented, how would it be possible for the Corps to assert that impacts of the NWP program are truly minimal in nature? As stated above, the "the PCN process has provided a mechanism where district engineers are given the opportunity to review certain proposed NWP activities before they take place, to determine whether the proposed activities will result in no more than minimal individual and cumulative adverse environmental effects." If this proposed change were to be implemented, Corps staff could instead be faced with the prospects of undoing environmental harm, spending countless hours requiring removal of projects that do not meet the terms and conditions of the NWP program, or worse merely authorizing projects through an after-the-fact permit, rather than working at the beginning of the process, during the review of an NWP PCN, to ensure project impacts had been minimized.

Another reason this proposed change should not be implemented is in the following quote:

> "While some of the NWP activities conducted by federal permittees may include compensatory mitigation to offset losses of waters and wetlands, that compensatory mitigation would not be incorporated into the NWP authorization through legally-binding permit conditions in accordance with 33 CFR 332.3(k) because the Corps would not be reviewing and approving the compensatory mitigation plan for these non-PCN activities.

This means, if the federal permittee should fail to implement compensatory mitigation for the loss of waters and wetlands, there would be no recourse to enforce the requirement to mitigate for losses that have occurred.

Finally, if the proposed change were to be implemented, there would be even less likelihood that the Corps would ever provide meaningful analysis of the individual and cumulative impacts of the NWP program as there would be no requirement to report the use of NWPs by other federal agencies to the Corps.

The PCN requirements should not be weakened. In addition, the Corps should abandon the proposal that automatically allows projects to proceed if the district engineer does not respond to a PCN within 45 days. Written notification from the District Engineer that the proposed project is qualifies for NWP authorization should be required. The length of time provided to notified regulatory agencies and resource agencies should be expanded to 45 days.

Comments on proposed NWP General Conditions:

General Condition 10 – The Corps must amend General Condition 10 by imposing strict restrictions on the use of NWPs to construct above grade development and infrastructure within the 100-year flood plain.

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 nationwide, therefore the Corps may not be able to rely upon FEMA, and state, or local floodplain management requirements to ensure public safety.

NWPs 29 and 39 should be revoked within the 100-year flood plain, the PCN process does not provide adequate time for sufficient review of the substantive issues that must be addressed when permitting the construction of residences or commercial and institutional buildings within the 100-year floodplain. 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, due to concerns regarding increased flood risk due to climate change/sea level rise, issues of public safety, the likely future economic burden that will result from the need to provide protection where sufficient flood control does not currently exist, and the societal cost of property damage that results from flooding, etc.

From an ecological perspective, 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.

Within California, the 2009 California Climate Adaptation Strategy[9] reported 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." [emphasis added] 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)[10] 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."

Just earlier this year, the New York Times ran an article with the headline, "*Trump Administration Presses Cities to Evict Homeowners from Flood Zones."*[11] The article states, "The federal government is giving local officials nationwide a painful choice: Agree to use eminent domain to force people out of flood-prone homes, or forfeit a shot at federal money they need to combat climate change." The article goes on to state that the "choice is part of an effort by the army Corps of Engineers to protect people from disasters..." One questions

[9] California Natural Resources Agency. 2009. 2009 California Climate Adaptation Strategy: A Report to the Governor of the State of California in Response to Executive Order S-13-2006 (CA Climate Adaptation Strategy) 200 pp.

[10] Brody, S.D., S. Zahran, P. Maghelal, H. Grover, and W.E. Highfield. 2007. The Rising Costs of Floods: Examining the Impact of Planning and Development Decisions on Property Damage in Florida. Journal of the American Planning Association, Vol. 73, No. 3. pp. 330-345

[11] Flavelle, Christopher. "*Trump Administration Presses Cities to Evict Homeowners from Flood Zones."* 3-11-20. *The New York Times*. https://www.nytimes.com/2020/03/11/climate/government-land-eviction-floods.html Accessed 11-2-20

why on the one hand the Corps would consider utilizing an expedited permit process to authorize construction of homes and businesses in flood prone areas, while on the other it is encouraging the use of eminent domain to move homeowners away from the dangers of flood prone areas. It would be irresponsible to provide expedited permit authorization for any residential or commercial/institutional construction planned within the 100-year flood plain – such development should not occur without careful scrutiny or without providing the opportunity for review and comment by regulatory and resource agencies and the public.

Given the increasing concerns about the anticipated impacts of climate disruption on flood plains (increasing intensity of storms, flashiness of storm flows, etc.) is would be an abuse of discretionary authority to continue to authorize projects that could place homeowners and the public in harm's way. The public, who will likely have to bear the financial burdens of protecting ill-advised development within the 100-year floodplain, should have an opportunity to review and comment on such project proposals.

General Condition 12 – Soil erosion and sediment control.

General Condition 12 states, "Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow or during low tides." This statement should clarify that work should not occur during low tides when and where migratory waterbirds are utilizing tidal flats.

General Condition 18 – Endangered Species -

The language of General Condition 18 should be altered to include the entire definition of "Effects of the action" rather than requiring applicants chase down the Endangered Species Act regulations, this information should be provided within the text of the general condition.

> "Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17)."

Paragraph (c) of the general condition places the responsibility for identification of the potential presence of listed species or critical habitat on the permittee and requires the submittal of a PCN. While there is no way for the Corps to know whether permittees utilizing non-reporting NWPs are in fact verifying that their project is not in an area of listed species or critical habitat, we certainly hope that on all requests for NWP verification or for NWPs requiring PCNs that Corps staff are screening proposed projects for potential impacts to listed species and critical habitat even if listed species and critical habitat have not been identified in the NWP/PCN submittal.

General Condition 19 – Migratory Birds and Bald and Golden Eagles –

The language from the 2017 NWPs should be retained:

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

In addition, the entire discussion in the 2020 NWP preamble should be revised to reflect the fact that the referenced December 22, 2017 Solicitor's Opinion M-37050, was overturned on August 11, 2020, by a federal district court.

General Condition 23 – Mitigation

[Please see concerns regarding compensatory mitigation discussed above.]
We strenuously object to the proposal to change the trigger for requiring compensatory mitigation for impacts to streams, and to losses of streambed that exceed 1/10 of an acre. The Corps is proposing to add a greater than 1/10-acre threshold for triggering compensatory mitigation for stream impacts, similar to the 1/10-acre threshold that exists for wetland impacts. As was discussed above, analyzing and mitigating impacts to streams utilizing acreage rather than linear feet restrictions and thresholds will have significant adverse impacts on headwater streams and consequently on water quality and the aquatic environment. Under the 2020 proposed mitigation general condition that adopts a greater than 1/10-acre threshold, a project could impact more than 870 feet of a 5-foot wide stream without triggering the need for compensatory mitigation.

According to Figure 5.1 "Authorized impacts to jurisdictional waters and wetlands, including rivers and streams, in acreage range categories, by nationwide permit (NWP) and standard individual permit (SIP), during FY 2018,"[12] 25,018 NWPs had impacts that were less than 1/10 acre. Of course, there is no way to determine how many of these NWPs impacted streams, since that information was not provided. But if we say, for the sake of argument, that 10,000 of this NWPs were for impacts to streams, that could mean in one year, 1,647.7 miles of 5-foot wide creeks could be impacted with no requirement for compensatory mitigation. [870' x 10,000 projects ÷ 5280 ft/mi] This points to two conclusions – 1) the Corps needs to be more transparent and provide data that "includes sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment" and 2) the proposal that the threshold that triggers the need for compensatory mitigation for impacts to streams be "for all losses of streambed that exceed 1/10 acre" will have significant adverse impacts to water quality and the aquatic environment.

Compensatory mitigation should be required for losses of linear feet of stream at a minimum 1:1 ratio.

General Condition 28 (Use of Multiple NWPs)

We support the clarifying language proposed by the Corps. Specifically we support the language below that modifies the general condition for treatment of projects operating under multiple NWPs to address maximum impact limits:

> "In cases where only one NWP has a maximum acreage limit, that limit will apply for all authorized activities. In cases where each of the NWPs used has a different acreage limit, each acreage limitation must be met. This will prevent permittees from using NWPs with higher acreage limits to increase the acreage loss of waters of the United States for NWPs with lower specified acreage limits."

Comments on specific NWPs:

NWP 3 – Maintenance

As stated earlier in this letter, the NWP does not comply with the requirements of 40 CFR §230.7 (a)(1). The ever-growing list of activities covered by this NWP are neither similar in nature, nor similar in their impact on water quality and the aquatic environment. In addition to repair, rehabilitation, or replacement of any previously authorized and currently serviceable structures or fills, this NWP authorizes the *removal* of

[12] U.S. Army Corps of Engineers. July 30, 2020. "*Regulatory Impact Analysis for the Proposed 2020 Nationwide Permits.* 69pp.

previously authorized structures or fills, removal of material from a stream channel, removal of accumulated sediments and debris in the vicinity of existing structures, the 2020 NWP 3 would authorize the placement of *new or additional* riprap to protect the authorized structure (with no specific limitations on the amount that can be added), and temporary structures, fills and work necessary to conduct the maintenance. No strict limitations are placed on the areal extent or linear feet of impacts, excepting the removal of sediment that has accumulated in the vicinity of the permitted structure, to restore the waterway (cannot exceed 200 feet in any direction of the structure). This limitation however, does not apply to maintenance dredging "to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures." New riprap can be placed to protect existing structures and the only limitation is that it must be the "minimum necessary to protect the structure or to ensure the safety of the structure."

If new or additional riprap or fill is required to protect an authorized and currently serviceable structure, or if maintenance dredging is required to "restore the waterway" or to remove accumulated sediments, it strongly suggests the impacts of the structure were more than minimal, and that the original design of the structure (location, installation, original protective measures, etc.) was flawed. Rather than authorizing additional impacts to waters of the U.S. under the auspices of a general permit, an individual permit should be required. More detailed review of the problems should be conducted to ensure design flaws are corrected, and that any adverse impacts of the structure/fill (beyond its original footprint) to adjacent waters of the U.S. are rectified.

The preliminary decision document anticipates that for the duration of the 2020 NWPs approximately 9,075 acres of waters of the U.S., including wetlands may be impacted, and that only 225 acres of compensatory mitigation is anticipated to be required. There is no indication how many of the 9,075 acres reflect temporary impacts vs. permanent impacts. No information is provided regarding a breakdown of how often the different components of this NWP were utilized, how many waivers were issued, the linear feet of waterways that were impacted, the range of volumes of fill placed or excavated, the types of waters of the U.S. that were impacted, temporary vs. permanent impacts, etc. It is impossible to determine from the information provided that the impacts of this NWP are minimal in nature. NWP 3 should be withdrawn.

NWP 12 – Oil or Natural Gas Pipeline Activities, Proposed NWP C (Electric Utility Line and Telecommunications Activities) and Proposed NWP D (Utility Line Activities for Water and Other Substances)

These NWPs does not comply with the requirements of 40 CFR §230.7 (a)(1). The list of activities covered by each of these NWPs are neither similar in nature, nor similar in their impact on water quality and the aquatic environment. In addition to the construction, maintenance, repair, and removal of utility lines and associated facilities, these NWPs include authorization for the construction, maintenance of substation facilities (associated with a power line or utility line in non-tidal waters of the U.S. not adjacent to tidal waters), foundations for overhead utility line towers, poles, and anchors, construction of access roads (associated with utility lines, etc. and not in non-tidal waters adjacent to tidal waters) that can be at grade or above grade. The NWP also authorizes temporary structures, fills, and stockpiling of fills.

These NWPs should not be used for utility lines that cross multiple county or state borders. There should be a restriction on the number of times a utility line for a single and complete project can cross any given stream.

There are considerable public concerns regarding the potential damage that results from spills of oil, gas, or drilling muds and more recently, significant concerns related to fire hazards associated with electrical lines. Given the potential for harm to the environment and the public, and the great controversy that surrounds

these types of utility lines, we question whether it is appropriate to authorize these activities by general permit.

The preliminary decision document for the revised NWP 12 estimates that approximately 47,750 activities could be authorized over the five-year period of the 2020 NWP program, resulting in impacts to approximately 3,160 acres of waters of the U.S., including jurisdictional wetlands." And that "approximately 225 acres of compensatory mitigation would be required to offset those impacts." The preliminary decision document for NWP C estimates that approximately 8,650 activities could be authorized over the five-year period of the 2020 NWP program, resulting in impacts to approximately 3,550 acres of waters of the U.S., including jurisdictional wetlands." And that "approximately 500 acres of compensatory mitigation would be required to offset those impacts." The preliminary decision document for NWP D provides the exact same estimates of activities authorized, impacts and compensatory mitigation as NWP C. It is unclear from review of the preliminary decision documents why the level of activities that could be authorized under the revised NWP 12 is so much greater than NWPs C and D, yet NWP 12 has a lower estimated acreage of impacts.

The combined totals for these three NWPs for the five-year period of the 2020 NWPs, are estimated to be 65,050 authorized activities, that impact approximately 10,260 acres of waters of the U.S., including jurisdictional wetlands and that approximately 1,225 acres of compensatory mitigation would be required for impacts to waters of the U.S. including wetlands.

The preliminary decision documents do not distinguish between temporary and permanent impacts to waters of the U.S. but even temporary impacts result in temporal losses of functions and values. And "temporary impacts" can result in permanent impacts if preconstruction elevations or vegetation are not adequately restored. Therefore, the imbalance between impacts and compensatory mitigation "estimates" (i.e. no assurance compensatory mitigation will be required, assumption compensatory mitigation is successful, etc.) is substantial and represents highly significant, adverse impacts to waters of the U.S. These NWPs should be withdrawn.

NWP 13 – Bank Stabilization –

There are many scientific, documented accounts of the adverse impacts of hard, engineered bank stabilization techniques on the aquatic environment (riprap, gabions, shoreline armoring, etc.) from exacerbation of erosion adjacent to or upstream or downstream from an area of bank stabilization. As an example, shoreline armoring along the California Coast can lead to beach loss, that in turn can "eliminate intertidal (i.e., the area between the low and high tide lines) and supratidal (i.e., the zone of the beach immediately above the high tide line) sandy beach habitat, thereby impacting shorebirds and coastal flora and fauna."[13]

A U.S. Fish and Wildlife Service report from June 2004[14] reported:

> …the lower Sacramento River exhibits fragmentation and disconnection from ecological processes. Much of the degradation results from river meandering and erosion being halted by rock riprap bank protection. Over half (more in certain reaches) of the river's banks within the lower 194 miles have been riprapped, mainly from 4 decades of work by the Corps of Engineers' Sacramento River Bank Protection Project (SRBPP).

[13] Melius, Molly Loughney and Margaret R. Caldwell. 2015. 2015 California Coastal Armoring Report: Armoring and Climate Change Adaptation in the 21st Century. Stanford Law School Environment and Natural Resources Law & Policy Program

[14] Impacts of Riprapping to Aquatic Organisms and River Functioning, Lower Sacramento River, California. 2nd Edition. As Revised June 2004. U.S. Fish and Wildlife Service, Sacramento, CA

The document identifies many of the negative impacts of riprapping the banks with quarry rock which affect the river's natural functions and processes:

- reduction in recruitment of spawning gravel for salmonids
- disrupts the accretion of point bars and other depositions where riparian vegetation can establish itself
- reduces habitat renewal, diversity, complexity and heterogeneity

The list is lengthy and these are but a few of the negative impacts that have been observed in areas where rock riprap has been installed along the river's banks.

Bank stabilization methods that employ hard engineered bank stabilization techniques can have significant adverse impacts if employed on shorelines adjacent to tidal marshes by removing the ability of marshes to migrate upslope as sea level rises.

The preliminary decision document for this NWP estimates this NWP could be used to authorize 19,000 activities impacting at least 1,150 acres of waters of the U.S. including wetlands during the life of the 2020 NWP program and that approximately 50 acres of compensatory mitigation would be required. No information is provided regarding the linear feet of impacts that are predicted. No information is provided regarding the number, acreage, and miles of impacts that have resulted from previous authorizations under this NWP. The NWP can be used in tidal and non-tidal waters of the U.S. including wetlands. Discretionary authority can be used to authorize more than 500 linear feet of impact, to authorize more than an average of one cubic yard per running foot, and to authorize impacts in special aquatic sites. There appears to be no upper limit for the use of discretionary authority, nor is there any limitation on the acreage of impacts.

As very aptly summarized by Travis O. Brandon[15]:

> "...the 2017 reissuance of NWP 13 puts miles of shoreline at risk of destruction at a time when sea level rise is accelerating.[13] NWP 13 was reissued despite fierce opposition from a number of environmental groups, federal agencies, and local governments who argued that the Corps ignored the growing body of scientific research regarding the negative effects of coastal armoring on shorelines, bays, and estuaries and disregarded concerns about the long-term impacts of armoring in an era of sea level rise.[14] Because of those substantial and well-documented negative environmental effects, NWP 13 is in violation of section 404 of the CWA, which only authorizes the Corps to issue general permits when the permitted activities result in "minimal adverse environmental effects" either individually or cumulatively.[15]"

The Corps should withdraw NWP 13.

NWP 19 – Minor Dredging

The 2020 NWP program proposes increasing the limit of the volume of material that can be dredged from "below the plane of the ordinary high-water mark or the mean high-water mark from navigable waters of the U.S." from 25 cubic yards to 50 cubic yards. Additionally, the proposed 2020 NWP program is soliciting "public comment on whether a different cubic yard limit, such as 30 or 100 cubic yards, would be more appropriate for this NWP." None of the information provided in the draft decision document or the "Regulatory Impact

[15] Brandon, Travis O. 2019. *"A Wall Impervious to Facts: Seawalls, Living Shorelines, and the U.S. Army Corps of Engineers' Continuing Authorization of Hard Coastal Armoring in the Face of Sea Level Rise."* Tulane Law Review Vol. 93: 557-597

Analysis" document is useful in demonstrating the need for an increase in volume of material that can be dredged from a navigable water at any of the figures mentioned - 30, 50 or 100 cubic yards. The draft decision document and the impact analysis document estimate that approximately 2,050 activities could be authorized during the five-year period of the 2020 NWPs "resulting in impacts to approximately 30 acres of waters of the United States, including jurisdictional wetlands." [emphasis added] Information that would have been more useful would have been the number of times an individual permit was required because a proposed project exceeded the 25 cubic yard limitation and the average amount of material beyond the 25 cubic yard limitation that was requested. The Corps has not provided sufficient data to demonstrate increasing the 25 cubic yard limitation is warranted, therefore we recommend the 25 cubic yard limit for minor dredging activities be retained.

NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities.

To prevent abuse of use of this NWP the Corps should add restrictions that reword the portion of the text referring to changes in wetland plant community to ensure that conversion from seasonal wetlands to more permanent wetlands is not permitted if those seasonal wetlands support federally listed species or species of concern.

We strongly object to the note that states this NWP can be utilized to authorize mitigation banks and in-lieu fee projects.

As the Corps is well aware, projects authorized under nationwide permit benefit from expedited or no review, as long as the activities proposed in waters of the U.S. and navigable waters, meet the terms and conditions of the nationwide permit. There is no opportunity for the public to provide comments to individual nationwide permit authorizations, only to the overall program.

It might be possible, that any fills associated with the creation of a mitigation bank are individually minimal; however, while mitigation banks allow project proponents to purchase mitigation credits for wetland fill impacts that are supposed to be individually minimal, when viewed cumulatively they may have significant adverse impacts to the aquatic environment. Wetland mitigation banks do not ensure replacement of wetlands functions and values at the local level, e.g. flood desynchronization, endangered species habitat, etc., nor do mitigation banks ensure no net loss of wetlands; therefore, the creation of a mitigation bank cannot meet the requirements of a general permit, as the cumulative impacts cannot be considered minimal. In addition, significant impacts to the aquatic environment also occur when mitigation banks fail. If a mitigation bank fails, there a not only a loss in wetlands functions and values at the mitigation bank site, but any mitigation credits granted for wetland fill impacts would be of no value, resulting in losses of functions and values throughout the service area.

For the reasons elaborated, it is inappropriate to suggest mitigation banks may be authorized through the use of this NWP. The public must have an opportunity to review and provide comment on any wetland mitigation bank or in-lieu fee program.

We are deeply concerned by the proposed "reversion" language. While, the Corps has excluded prior converted croplands from regulation, and while it is true these areas might no longer "pond" water, many areas still meet the Corps criteria of wetlands and retain wetlands functions and values. We are therefore concerned that the reversion language in this NWP provides an additional loophole for landowners to convert areas that previously functioned as wetlands but were labeled prior converted croplands, even if in a degraded state, to uplands. The language should be revised to emphasize the requirement to provide

documentation of the prior physical condition even if labeled prior converted wetlands, before proceeding with a reversion activity.

NWP 29 – Residential developments. NWP 39 – Commercial and Industrial Developments

We have discussed above that these NWPs do not comply with the requirements of a general permit therefore they should be withdrawn. The breadth of activities covered by each NWP cannot be considered similar in nature or similar in their impacts on water quality or on the aquatic environment. If the Corps reissues these NWPs, then at minimum their use within the 100-year floodplain should be prohibited as discussed above, and they should not be authorized in special aquatic sites, identified critical habitat or recovery units. The use of discretionary authority to waive imposed limits should be revoked and the restriction that no more than 300 linear feet of stream may be impacted should be retained.

NWP 31 – Maintenance of Existing Flood Control Facilities –

We have substantive concerns regarding NWP 31 as worded. Unlike the majority of NWPs proposed, this NWP has no limitations on the areal extent that can be impacted or the linear feet of impact. There is no restriction on the type of habitat that may be impacted by the activities of this NWP. The only restriction imposed is the "maintenance baseline."

In the preliminary decision document provided by the Corps estimates that during the 2020 NWP program cycle, this NWP may be used to authorize 225 activities and impact 1,050 acres of waters of the U.S., including jurisdictional wetlands, and that only 210 acres of compensatory mitigation would be required to offset those impacts. The preliminary decision document is silent regarding the estimated linear feet of impact.

The estimated impacts for the duration of the 2020 NWPs represent a doubling of the estimated impacts from the 2017 NWP program, which is a significant increase in the usage of this NWP and it raises concerns regarding the assumption that the impacts of this NWP are individually and cumulatively minimal.

The language of the NWP specifically limits mitigation of impacts to one time – one time only, despite the fact that many of these flood control facilities have destroyed pre-existing functions and values, e.g. removal of riparian or wetland habitat, to the detriment of wildlife, water quality, etc. and continue to do so each time the NWP is utilized (i.e. more than once for a flood control facility). Many of these facilities support listed anadromous fish and other special status species and the maintenance activities can have significant adverse impacts on their supporting habitat. Maintenance dredging disturbs soils, exposing the channels to non-native invasive species, thereby facilitating the spread of invasive species. We urge the Corps to withdraw this NWP as proposed. If not, the Corps must impose strict areal and linear foot limitations on the extent of impacts that are authorized under the NWP. We also urge the Corps to require compensatory mitigation for lost habitat values, impacts to anadromous fish, and special status species each time the NWP is utilized.

NWP – 48 – Commercial Shellfish Mariculture Activities –

This NWP should be withdrawn until it can be incontrovertibly demonstrated that the impacts of shellfish mariculture on the aquatic environment are truly minimal in natural, or until the Corps has included sufficient protections within the terms and conditions of this NWP to ensure impacts will be minimal. It is insupportable that no limitations have been placed on the use of this NWP - absolutely none [aside from the General Conditions of the NWPS]. The cumulative impacts on intertidal and subtidal habitats of estuaries could be substantial. Instead of strengthening the terms and conditions of this NWP, the Corps is proposing to remove the few limitations that had been imposed in the 2017 NWPs:

> "We are proposing to remove the 1/2-acre limit for impacts to submerged aquatic vegetation in project areas that that have not been used for commercial shellfish aquaculture activities during the past 100 years. Since we are proposing to remove that limit, we are also proposing to remove the definition of ''new commercial shellfish aquaculture operation'' that we adopted in 2017 In addition, we are also proposing to remove both PCN thresholds for this NWP, as well as the paragraph that identifies the additional information that permittees must submit with NWP 48 PCNs."

The rationale provided for removing the ½ acre limit is:

> "We are proposing to remove the 1/2-acre limit because the impacts of commercial shellfish mariculture activities on submerged aquatic vegetation are often temporary, and these activities do not convert aquatic habitat to non-aquatic habitat or upland (i.e., they do not result in permanent losses of aquatic resources)."

Yet even the Corps acknowledges in its 2020 NWP preamble that differences of opinion exist regarding the impacts of shellfish mariculture on submerged aquatic vegetation (SAV):

> The severity of the impacts, both negative and positive, can vary as a result of scale and location of the shellfish mariculture operation, the species being cultivated, the equipment and techniques used by the grower, and the hydrodynamic and physical characteristics of the mariculture site (NRC 2010)."

Everett et al. [16] reported that:

> "Both stake and rack methods of oyster culture resulted in significant decreases in the abundance of SAV compared to undisturbed reference areas. SAV cover in both stake and rack treatments was less than 25% of that in reference plots after 1 yr of culture, and was absent from rack treatments after 17 mo of culture."

The concluding remarks of the authors point to the substantive concern that the adverse impacts of shellfish mariculture projects may be significantly greater than minimal:

> "As large areas of coastal habitat become devoted to intensive mariculture, it is increasingly critical to understand the range of modifications associated with these practices. Given the importance of SAV in the structure and function of coastal and estuarine communities, and the ongoing decline in the abundance of SAV in many estuaries around the world (e.g. Peres & Picard 1975, Cambridge & McComb 1984, Orth & Moore 1984, Giesen et al. 1990, Larkum & West 1990), a fuller understanding of the effects of mariculture is critical for development of sound management practices (Pillay 1992) driven by empirically based predictive models."

Recent work by Orth et al.[17] provides long-term aerial surveillance of the impacts of activities such as shellfish mariculture on SAVs. The authors found through long-term surveillance two issues that are of particular importance to consideration of NWP 48:

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[16] Everett, Richard A., et al. "Effect of Oyster Mariculture on Submerged Aquatic Vegetation: An Experimental Test in a Pacific Northwest Estuary." *Marine Ecology Progress Series*, vol. 125, no. 1/3, 1995, pp. 205–217. *JSTOR*, www.jstor.org/stable/24854671. Accessed 16 Nov. 2020.

[17] Orth, R.J., W.C. Dennison, C. Gurbisz, M. Hannam, J. Keisman, J.B. Landry, J.S. Lefcheck, K.A. Moore, R.R. Murphy, C.J. Patrick, J. Testa, D.E. Weller, D.J. Wilcox, and R.A. Batiuk. 2019. Long-term annual aerial surveys of submersed aquatic vegetation (SAV) support science, management, and restoration. *Estuaries and Coasts.* https://doi.org/10.1007/s12237-019-00651-w.

> In Virginia, aquaculture operations have been rapidly increasing (Fig. 8b, Orth et al. 2017a) and conflicts between placement of these structures and existing SAV have been increasing as well. In 2017, 18% of the 5,733 active shellfish leases in Virginia were located in areas considered SAV habitat. In that same year, 27% of the 108 new lease applications were then located in areas that either had or could potentially support SAV."

Fortunately, in Virginia and Maryland the states moved to adopt "aquaculture-specific regulations to protect existing SAV:"

> "... [Maryland] prohibits new leases in areas where SAV has been mapped by the aerial survey within 5 years of the application, and prohibits placing shellfish, bags, nets, or structures on existing SAV without prior approval. Virginia prohibits new leases in areas with existing SAV and uses a 5- to 10-year composite map from the bay-wide SAV monitoring program to determine SAV presence. Both states protect recovering SAV in areas where leases were formerly granted." [emphasis added]

These programs through these regulations acknowledge the tremendous effort and finances that have been required to restore SAV to Chesapeake Bay and recognize the environmental value of SAV protective measures. Their regulations implement actions even stronger and more protective than those the Corps proposes to remove from the terms and conditions of NWP 48. But such monitoring efforts and regulations do not exist for all coastal states.

Shellfish mariculture projects can be extremely controversial, as has been demonstrated in Northern California and the Pacific Northwest. One has only to view photos of geoduck mariculture projects in the Puget Sound and the mapping of shellfish mariculture operations to understand concerns that the use of this NWP has substantial and adverse cumulative impacts.[18]

The preliminary decision document for this NWP estimates that during the life of the 2020 NWP program, this NWP will authorize approximately 1,680 activities, resulting in impacts to approximately 40,800 acres pf waters of the U.S. including wetlands and other special aquatic sites, and that no compensatory mitigation will be required to offset those impacts.

It is bewildering that the Corps can assert the impacts of this particular NWP are minimal individually and cumulatively.

We urge the Corps to suspend use of this NWP.

NWP 51 – Land-Based Renewable Energy Generation Facilities – This NWP must be modified.

The 300 linear foot restriction must be retained for this NWP.

While we support renewable energy in theory, its development in California and in the San Francisco Bay Area has not been without significant controversy. Of particular concern, is that there are no geographic restrictions on where the NWP permit may be used. The Altamont Wind Energy Area in eastern Alameda and Contra Costa County of the San Francisco Bay Area has become known as the killing fields for Golden Eagles. Many more Golden Eagles are killed by collisions with wind turbines than can be supported by local recruitment. This means the adverse impacts of the wind energy farm extend far beyond the footprint of the

[18] http://coalitiontoprotectpugetsoundhabitat.org/. Coalition to Protect Puget Sound.

actual wind turbines. The wind energy companies have never obtained "take" permits for the slaughter of these eagles.

A massive solar farm in San Benito County, is located in one of three identified recovery units for San Joaquin Valley listed species. Another massive solar farm is proposed within one of the other recovery units. Federally listed aquatic dependent (and upland) species are known to occur within the footprint of the proposed solar farms.

Projects such as these should not be authorized by NWP, the impacts at both the individual and cumulative levels will be significant. The impacts should be avoided, or at the very least will require extraordinary compensatory mitigation, well beyond the capabilities of an NWP program.

For these reasons, the NWP should be modified to restrict the use of this NWP in identified critical habitat, recovery units, or areas known to be of importance to migratory birds, Bald and Golden Eagles.

NWP 54 – Living Shorelines.

CCCR generally supports the use of nature-based solutions and softer engineering techniques over riprap and armoring. We understand that a living shoreline may provide habitat and in places like the San Francisco Bay Area, there may be places where a living shoreline approach may be useful in dealing with sea level rise and the need to provide escape habitat for tidal marsh species. However, the Clean Water Act requires that impacts to waters of the U.S. should first be avoided. We are concerned that the concepts of avoidance or minimization will not be given adequate consideration due to the availability of a technique that may be considered more "natural."

We are also concerned, just as we are with NWP 27, that there is potential for abuse. We recommend that the applicant should be required to demonstrate why bank stabilization is necessary and why avoidance (managed retreat) is not possible. The NWP must require the applicant to provide assurances that the structure is sound (i.e. there is sound engineering behind the proposed design), and that it will not result in adverse impacts to existing and adjacent waters of the U.S., or become a hazard. The NWP should be conditioned to ensure introductions of non-native invasive species will not occur. The NWP should make clear that the living shoreline cannot be used to provide compensatory mitigation for another project. If fill material is used, it must meet water quality standards, and must be capable of supporting target vegetation. The NWP must have strict limitations on the areal extent of its use. Discretionary authority must not be used to waive a limit of 30 feet from the high-water mark or 500 feet in length along the bank.

NWP A (Seaweed Mariculture Activities) and NWP B (Finfish Mariculture) –

NPW A and NWP B should be withdrawn as the impacts of these proposed activities are more than minimal and are inappropriate for expedited permit review.

These NWPs would provide Section 10 Rivers and Harbors Act authorization for "structures in an anchorage area established by the U.S. Coast Guard. The only requirements of these NWPs are that a PCN is required for all activities and the activities must comply with 33 CFR 322.5 (l)(2):

> (2) District engineers may grant permits for the erection of structures within an area designated as an anchorage area, but the number of structures will be limited by spacing, as follows: The center of a structure to be erected shall be not less than two (2) nautical miles from the center of any existing structure. In a drilling or production complex, associated structures shall be as close together as

practicable having due consideration for the safety factors involved. A complex of associated structures, when connected by walkways, shall be considered one structure for the purpose of spacing. A vessel fixed in place by moorings and used in conjunction with the associated structures of a drilling or production complex, shall be considered an attendant vessel and its extent shall include its moorings. When a drilling or production complex includes an attendant vessel and the complex extends more than five hundred (500) yards from the center or the complex, a structure to be erected shall be not closer than two (2) nautical miles from the near outer limit of the complex. An underwater completion installation in and anchorage area shall be considered a structure and shall be marked with a lighted buoy as approved by the United States Coast Guard.

The NWPs propose no limitations on the size of these proposed operations.

Finfish mariculture is a highly controversial topic with concerns including habitat and water quality degradation, problems of escaped fish breeding with wild counterparts, the introduction of hormones and antibiotics to the environment, the spread of disease to wild populations of finfish, and attraction of wild predators such as sharks, whales, seals, sea turtles to their entanglement and death.

Kemper et al.[19] document the following reports of finfish mariculture impacts:

> "Two mass mortalities of pilchards along the southern coast of Australia during the mid-1990s may have been caused by a herpes virus that possibly came from imported pilchards used as food in the tuna feedlots at Port Lincoln (Gaughan *et al*. 2000). Harmful algal blooms have also been implicated in the death of many tonnes of caged tuna during 1996 (Hallegraeff 1997) and eutrophication of coastal waters is considered a major problem for many of Australia's estuaries and enclosed coastal waters (Zann 1995)."

California for example has struggled with the question of whether mariculture is an appropriate activity in the state's offshore waters for well over a decade. According to the California Department of Fish and Wildlife website[20]:

> In 2006, the State enacted Senate Bill 201 (SB201) which requires the Department, in consultation with the Aquaculture Development Committee, to "prepare programmatic environmental impact reports for existing and potential commercial aquaculture operations in both coastal and inland areas of the state [if certain conditions are met] …." This Programmatic Environmental Impact Report (PEIR) is being prepared pursuant to the California Environmental Quality Act (CEQA) and its implementing regulations, with additional analysis of factors required by SB201 to provide a framework for managing potential future coastal marine finfish aquaculture projects.
>
> The purpose of the PEIR is to develop and evaluate a Management Framework for the State Coastal Marine Aquaculture Program (Program) for current and future culturing of shellfish and algae and future finfish aquaculture on state water bottom leases issued by the California Fish and Game Commission (Commission), and to inform decision makers and the general public about the potential environmental impacts of existing and future marine aquaculture projects which would be considered under the Program.

[19] Kemper, C.M., Pemberton, D., Cawthorn, M., Heinrich, S., Mann, J., Wursig, B., Shaughnessy, P., Gales, R., 2003. Aquaculture and marine mammals: co-existence or conflict? In: Gales, N., Hindell, M., Kirkwood, R. (Eds.), Marine Mammals: Fisheries, Tourism and Management Issues. CSIRO Publishing, pp. 208–224.

[20] California Department of Fish and Wildlife. Aquaculture – PEIR.

> This report will be prepared as a programmatic level document. A PEIR is a type of tiered CEQA document that is intended to be broad in nature. Not all impacts from all future projects will be able to be determined or analyzed in this document. The intent of the PEIR is to analyze reasonably expected or determined impacts from the proposed Program with additional environmental impact analyses to be done when specific aquaculture projects are proposed in the future.
>
> The PEIR will programmatically evaluate the various types of marine aquaculture facilities which currently exist or may be reasonably anticipated in the future, and that would have generally similar types of environmental impacts which could be mitigated in similar ways. The PEIR process is intended to provide the Department of Fish and Wildlife (Department) with the environmental information required to evaluate the proposed Program; to identify methods for reducing adverse environmental impacts; and to ensure that a range of alternatives is considered prior to the approval of the Program. As individual new projects are brought before the Commission for leases in the future, this guidance can support the preparation of project-specific CEQA evaluations that will provide detailed guidance to the individual aquaculturist. [emphasis added]

To the best of our knowledge, over a decade later, the proposed PEIR has yet to be released. Just in February of this year, the California Ocean Protection Council (OPC) released its "*Strategic Plan to Protect California's Coast and Ocean 2020-2025."*[21] Included in the plan is Objective 4.2 "Promote Sustainable Aquaculture." The goal is to:

> "With the California Department of Fish and Wildlife and others, develop a statewide aquaculture action plan focused on marine algae and shellfish and land-based/recirculating tank operations of marine algae, shellfish, and finfish by 2023. The plan should identify areas of opportunity and avoidance to minimize impacts to habitat, biodiversity, and wild fisheries and should include minimum project criteria, including best practices for eliminating detrimental environmental impacts." [emphasis added]

Action items include funding scientific studies to advance understanding of the impacts of, and opportunities for, aquaculture in state marine waters." And to "Support the development and piloting of innovative tools and approaches to inform sustainable aquaculture management in California."

The language provided above indicates states like California are still in the early stages of investigating the environmental feasibility of permitting finfish aquaculture projects, and at this point are not considering the possibility of finfish mariculture projects.

Clearly finfish mariculture projects require careful consideration of a myriad of issues identified above, it is not possible to determine that finfish mariculture projects are minimal in their individual and cumulative impacts.

Environmental concerns exist for seaweed mariculture as well. Weitzman et al.[22] have reviewed existing literature for the effects of seaweed mariculture and divided the impacts into several categories – benthic and water quality effects and habitat modification. Their literature review indicates seaweed farms can result in "decreases in the density and cover of seagrass beds and coral reefs" through shading or competition for nutrients, and "lowered abundance and biomass of benthic fauna." Seaweed mariculture can improve dissolved oxygen levels, but can also result in "excessive nutrient depletion." Due to changes in local

[21] California Ocean Protection Council. "*Strategic Plan to Protect California's Coast and Ocean 2020-2025."California Ocean Protection Council.* https://www.opc.ca.gov/.../2020-2025.../OPC-2020-2025-Strategic-Plan- FINAL-20200228.pdf Accessed 11-2-20.

[22] Weitzman, Jenny & Steeves, Laura & Bradford, Jessica & Filgueira, Ramón. (2019). Far-Field and Near-Field Effects of Marine Aquaculture. 10.1016/B978-0-12-805052-1.00011-5.

hydrodynamics seaweed mariculture operations can have positive or negative habitat impacts. The negative impacts result when the operations result in degradation of coral reefs or seagrass beds.

Clearly the activities proposed under NWP A and NWP B are inappropriate for expedited permit review. These are large complex issues that require careful consideration of all aspects of the projects, something that cannot occur within the 45-day timeframe of a PCN NWP.

Conclusion:

The language of the “Proposal to Reissue and Modify Nationwide Permits” is riddled with comments that the objective of the Nationwide Permit Program is to “regulate with little, if any delay or paperwork” for “certain activities having minimal impacts” and that regional conditions “should not be an impediment to fulfilling this objective,” or that the purpose of the NWPs is to “reduce the regulatory burden of the regulated public.” These comments set the tone for many of the proposed changes to the Nationwide Permit Program, in that many of these changes focus squarely on reducing the regulatory burden for permittees without providing terms and conditions to ensure that each nationwide permit utilized only authorizes impacts to waters of the U.S. will be minimal both individually and cumulatively.

We recognize the NWP 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 NWP Program, combined with the lack of adequate information regarding the cumulative effects of the NWP 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 the Corps. The Corps cannot continue with a "rubber-stamp" approach to NWP review. (Please note that we are using the word "prohibit" within the context of the NWP 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 NWP program, but only if informed by an understanding of the types of activities that have been and are likely to be permitted within the watersheds of the district. Required compensatory mitigation must be tracked to ensure unavoidable adverse impacts are being offset, and that functions and values are being restored. Finally, and most importantly, the Corps Districts should be analyzing the cumulative impacts of permits issued to determine if hydrologic and ecological functions of watersheds are remaining intact, and that analysis must be made available to the public. The Corps has failed to provide evidence that this analysis 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. but the Corps must demonstrate that the cumulative impacts of the NWP program are adequately minimized.

In general, the proposed NWP program:

- still has not demonstrated the NWPs 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 heavily on regional special conditioning to reduce impacts to a "minimal" nature, yet includes language that “Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to “regulate with little, if any, delay or paperwork certain activities having minimal impacts.”

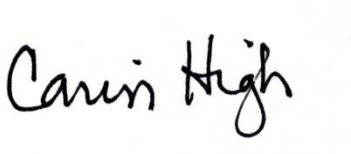
- And presumes that proposed compensatory mitigation will adequately offset the impacts authorized under the NWP program, without providing assurance that the compensatory mitigation will be implemented and successfully completed.

The Corps to this day has failed to demonstrate that the increased scope of the NWP program does not have significant adverse impacts on the human and aquatic environment. Corps districts have insufficient staff to adequately track potential cumulative adverse effects, review mitigation compliance, or review individual NWP 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 NWP program is in violation of the requirements of NEPA and the Clean Water Act.

The NWP program as proposed will have significant adverse impacts to waters of the U.S. within the State of California. The NWP 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. We strongly urge the Corps to withdraw the 2020 proposal to modify and reissue the NWPs. Instead the Corps return to the five-year NWP cycle, consider comments received, and revise the terms and conditions of the proposed NWPs and the NWP general conditions to ensure water quality and the aquatic environment are adequately protected.

Thank you for the opportunity to provide comments. We would appreciate notification of receipt of our comment letter, and request that we be notified of any future opportunities for public comment.

Sincerely,



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