Citizens Committee to Complete the Refuge

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Sent via electronic mail only
Lieutenant Colonel John Cunningham, Commander
US Army Corps of Engineers
San Francisco District
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San Francisco, CA 94102
Email: naomi.a.schowalter@usace.army.mil
Attn: Naomi Schowalter

November 3, 2020

Re: Public Notice (PN) Nationwide Permit Reissuance and San Francisco District's Nationwide Permit Program Regional Conditions

Dear Commander Cunningham,

This responds to the above Public Notice and "Regional Issues Concerning the Proposed NWPs, Including Regional Conditioning." We thank you for the opportunity to provide comments. The process for proposing regional conditions that will ensure significant adverse individual and cumulative impacts on the aquatic environment do not occur, is inappropriately hampered by the failure of Corps districts to provide basic information necessary to inform substantive comments. However, based upon our review of the PN, we find the regional conditions proposed by the San Francisco District to be inadequate. The 2020 nationwide permit program as will result in more than minimal impacts to water quality and the aquatic environment within the boundaries of the San Francisco District. The regional conditions must be modified.

The Citizens Committee to Complete the Refuge (CCCR) has an ongoing history of interest in wetlands protection, wetlands restoration and wetlands acquisition. Our senior members were part of a group of citizens who became alarmed at the degradation of the Bay and its wetlands. We joined together, and with the support of Congressman Don Edwards, requested that Congress establish the Nation's first national wildlife refuge in an urban setting. The process took seven long years and in 1972 legislation was passed to form the San Francisco Bay National Wildlife Refuge (Refuge). We turned to Mr. Edwards again, and in 1988 (the first year he submitted it), his legislation to double the size of the Refuge was signed into law. The Refuge now bears his name in honor of his efforts.

Our membership 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 regulations, policies, implementation and enforcement. We have established a record of providing information regarding possible CWA violations to both the Corps and EPA. We regularly respond to Corps public notices, and inform the public of important local CWA issues. We have responded to past proposals of reissuance and changes to the nationwide permit program. These actions demonstrate our ongoing

commitment to wetland issues, toward protecting the public interest in wetlands, and in Section 404 of the CWA.

The Public Notice for the proposed regional conditions is inadequate:

The San Francisco District has repeatedly failed to provide, prior to or concurrent with the release of the NWP regional conditions PN, the information necessary to assess impacts of the NWP program on waters of the U.S. within the geographic boundaries of the San Francisco District, and to assess whether the NWPs and their regional conditions have truly minimized the individual and cumulative impacts of the NWP program. Information that has been withheld from the public includes in part:

- The number of times the District 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 San Francisco District, 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?
- 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 San Francisco District 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? The NWPs are expedited permits that do not provide any opportunity for public review and comment other than during the NWP reissuance process and solicitation of comments for regional conditions. The San Francisco District used to publish information on a quarterly basis regarding the number of individual permit authorizations and NWP confirmations 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. The San Francisco District has discontinued this practice so there is no way for the public at large to understand the extent to which NWPs are used within the San Francisco District or the magnitude of impacts to waters of the U.S. To the best of our knowledge the last time regionally specific information on the use of NWPs was provided was in 2007. The links on the District website for the 2020 decision documents are for nationwide summaries that are provided by Corps Headquarters.

It is absolutely unconscionable that a Clean Water Act general permit program, that must demonstrate that impacts are individually and cumulatively minimal in nature, and that relies so heavily on the discretion of

District and Division Engineers to impose regional conditions as necessary, provides the public so little information. As an example, neither the San Francisco District nor the South Pacific Division have the 2017 Nationwide Permit Program decision documents for this region available for review on their respective websites, so it is not possible at the regional level, to understand the projected impacts of the current NWP program on waters of the U.S. or the reported impacts of previous NWP programs. No information is provided at all on the usage of NWPs within the region. There are no estimates of the number of times the NWPs listed above have been used in the past within the San Francisco District, or the linear feet of streams impacted or the acreages of wetlands and other waters impacted. Even perusing the decision documents provided by Corps Headquarters is of little value. Using NWP 29 alone as an example, Corps Headquarters projected that for the period 2017-2022, NWP 29 could authorize 3,500 activities nationwide, impacting approximately 475 acres of waters of the U.S., including jurisdictional wetlands. Based upon this information alone it is impossible to ascertain potential impacts to streams, wetlands and other waters of the U.S. nationwide, and certainly provides no insights for impacts within the San Francisco District.

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]

This has never been the case for PNs soliciting comments for 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" adverse effects is the basic premise upon which the Corps authorizes the NWPs. However, the Corps has yet to assess or disclose the cumulative effects of this program in a manner that would permit substantive public review and comment. Any information provided is largely in boiler plate language long after the public comment period has closed. Thus, the public's ability to substantively review and assess the impacts of the proposed nationwide permits (NWPs) on the aquatic environment has been thwarted. This is contrary to the guidance provided by the Council on Environmental Quality[1] in their 2007, "A Citizens Guide to NEPA," which states at the outset, "Two major purposes of the environmental review process are better informed decisions and citizen involvement, both of which should lead to implementation of NEPA's policies.

General Permits:

Nationwide Permits are "general permits," (33 CFR 322.2 (f) and 33 CFR 323.s (n)) and are implemented with the goal of reducing the "administrative burdens on the Corps and the regulated public, by authorizing activities that have minimal adverse environmental effects."

The 404 (b)(1) Guidelines (40 CFR Part 230.7 (a)) establish the following requirements for General Permits:

[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

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

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

The determination of "minimal adverse environmental effects" has *never* been based on a rigorous analysis of the cumulative effects of the program on the aquatic environment. In fact, in the early 2000's Corps Headquarters, under pressure from the scientific and environmental communities initiated a Programmatic Environmental Impact Statement (PEIS) but failed to ever produce a final document.

While recent, drastic and harmful changes have recently been made to the National Environmental Policy Act (NEPA), language from the Council of Environmental Quality (1997)[2] regarding the concept of cumulative impacts is still pertinent when considering the impacts of the NWPs: "Evidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time." [emphasis added] This statement is particularly pertinent to the impacts of the nationwide permit program on water quality and the aquatic environment. Never has there been greater cause for concern about devastating environmental effects than now, as we face a major rollback in the extent of Clean Water Act protections for waters of the U.S. In California alone, it is estimated that of the 519, 545 miles of streams mapped on the National Hydrography Dataset 67% are mapped as ephemeral streams no longer protected by the Clean Water Act under the 2020 Waters of the U.S. or WOTUS rule, and 22% of the streams are mapped as intermittent streams[3], and it is still unclear how many thousands of acres of wetlands will no longer be protected by the Clean Water Act. In addition, exploitation of natural resources continues unabated and with increasing rates, and climate change is increasingly disrupting hydrological regimes and ecosystems on a global scale. It is therefore, of critical importance that the San Francisco District adopt regional conditions that truly minimize the adverse impacts of authorized projects on the aquatic environment.

While each individual NWP activity authorized may have only minimal individual impacts on the aquatic environment, the synergistic interactions of historic losses of habitat, the continued losses or modifications of the aquatic environment through federal and non-federal actions, and a growing number of stressors (e.g. climate change, pollutants, invasive species, increases in impervious surfaces, etc.) is resulting in the continued degradation of the aquatic environment. As stated earlier, the Corps has yet to demonstrate that any substantive assessment of the cumulative impacts of the NWP program has occurred at the national or regional level.

[2] Council on Environmental Quality. 1997. Considering Cumulative Effects Under the National Environmental Policy Act. https://ceq.doe.gov/docs/ceq-publications/ccenepa/sec1.pdf

[3] Trout Unlimited State Maps Waters of the US. 2017. https://www.tu.org/wp-content/uploads/2019/05/TU_StateMaps_Waters-of-the-US.pdf

The application of discretionary authority in inconsistent amongst the three Regulatory Divisions within California:

Corps Headquarters continues their assertion the NWP program will have only "minimal impacts" individually and cumulatively on the aquatic environment is based upon an overwhelming reliance on the assertion of discretionary authority at the regional level by the District and Division Engineer. Included in this authority is the ability to revoke NWPs where historic losses of waters of the U.S. are high.

Of great concern is the fact that of the three regulatory districts within California, the San Francisco District is the only district that has not revoked the use of any of the NWPs. The San Francisco District has stated it is "revoking the use of NWPs 29 and 39 within San Francisco Bay diked baylands." While we appreciate and support this clarification, the language of NWPs 29 and 39 clearly state, "This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters," something we pointed out in our comments regarding the regional conditions for the 2012 NWPs. Thus, the terms and conditions of these two NWPs should automatically result in the prohibition of their usage in diked baylands without the need for revocation. So, despite tremendous development pressure within the San Francisco Bay Area and areas adjacent, and despite the historic losses of wetlands within the region, no NWP has been revoked within the geographic boundaries of the San Francisco District.

This is in marked contrast to the regional conditions proposed by the Sacramento and Los Angeles Districts. The Sacramento District has proposed revoking:

1. NWPs 4, 5, 7, 12 - 15, 17 - 19, 21 - 23, 25, 29 - 34, 36, and 39 - 51 are revoked for activities in peatlands containing histosols, including bogs and fens.
2. NWPs 4, 5, 7, 12 - 15, 17 - 19, 21 - 23, 25, 29 - 34, 36, and 39 - 51 are revoked for discharges of dredged and/or fill material below the ordinary high water mark of the Great Salt Lake containing bioherms (microbialites).

The Los Angeles District has proposed revoking the use of NWPs as follows:

- Individual Permits (Standard Individual Permit or 404 Letter of Permission) shall be required in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County for bank stabilization projects, and in Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures.

In addition to these revocations, the Los Angeles District has imposed further limitations on the acreage of impacts authorized by some of the NWPs.

- Within the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California (USGS Hydrologic Unit Code (HUC) accounting units: Lower Colorado -150301; Northern Mojave-180902; Southern Mojave-181001; and Salton Sea-181002), Nationwide Permits (NWP) 3, 7, 12-15, 17-19, 21, 23, 25, 29, 35, 36, 39-46, 48-54, C, D and E, cannot be used to authorize structures, work, and/or the discharge of dredged or fill material that would result in the loss* of wetlands, mudflats, vegetated shallows or riffle and pool complexes as defined at 40 CFR Part 230.40-45, in excess of 0.1 acre. [emphasis added]
- Within the Murrieta Creek and Temecula Creek watersheds in Riverside County NWPs 29, 39, 42 and 43, and NWP 14 combined with any of those NWPs, cannot authorize a loss* of waters of the United States greater than 0.25 acre.

We are strongly opposed to the implementation of the NWP program as proposed. Unfortunately, it is likely Corps Headquarters will reauthorize the NWP program with few if any positive modifications. It is therefore, imperative the San Francisco District provide strong regional conditions that will ensure within the District that the NWP authorizations individually and *cumulatively* do not result in more than minimal adverse impacts.

Since the San Francisco District has not provided any information to assess the degree to which past authorizations (general, individual, etc.) have impacted district watersheds, or the degree to which any compensatory mitigation may or may not have replaced lost functions and values, it is crucial that strong and consistent limits be placed on impacts that will be authorized through the continued use of NWPs, and that the NWPs are revoked in habitats that are known to have suffered significant losses or are difficult to recreate (not just physically but functionally as well). The San Francisco District has failed to do this.

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

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

The Corps is proposing to remove the 300 linear foot restriction and only replace linear feet limits 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 San Francisco District 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[4] 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."

The authors also noted that for 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 ephemeral and 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

[4] 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.

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.

The 2015 EPA synthesis report[5] 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[6] 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 an can provide invaluable refugial habitat for rare or federally listed species, e.g. in California, the federally listed

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

[6] Ibid.

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 stated earlier, under the 2020 WOTUS rule, at least 67% of California's streams will no longer receive Clean Water Act protection as they are considered ephemeral streams – that translates to roughly 348,034 miles of streams that will no longer be protected. Strict reliance on the use of acreage (1/2 acre) without consideration of the length of stream courses that will be filled is likely to have significant adverse impacts on the aquatic environment within the San Francisco District. As was discussed 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."

Extrapolating this out, utilizing a ½ acre limitation means that each time one of the above listed NWPs are utilized, 3,470 LF of a 1st order stream with a stream width of 6.3 feet could be filled, 2,540 LF of 2nd order streams with a width of 8.6 feet could be filled, and 880 LF of a 3rd order stream with a width of 24.8 feet could be filled. Clearly, the removal of the 300 LF restriction from the above listed NWPs could result in significant and adverse cumulative impacts by potentially authorizing a loss of up to 3,470 LF of 1st order stream length per NWP authorization.

Eliminating the 300 LF restriction previously imposed on the above listed NWPs will 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 strongly urge the San Francisco District to impose a regional condition that retains the 300 LF restriction for the above listed NWPs.

Retain control of the NWP process and require PCNs to be submitted by other 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." If statutory changes are made, it seems there would not be any discretionary authority for the San Francisco District to retain control of the NWP process and to require PNCs to be submitted by other federal agencies. However, we would like to go on record that we strenuously object to this proposed change for the following reasons:

- Missions of other Federal agencies (with the exception of the Environmental Protection Agency) do not prioritize "maintaining the chemical, physical, and biological integrity of the Nation's waters."
- 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."
- Other Federal agencies do not have the context 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.
- "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.
- State transportation agencies that have been delegated as NEPA compliance leads would be considered federal agencies for the purpose of issuing their own NWPs, therefore in California, Caltrans could be considered a federal agency under the proposed Rule.
- 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.

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

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

The General Regional Conditions should clarify that in addition to NWPs 29 (Residential Developments) and 39 (Commercial and Institutional Developments), the use of **NWP authorization is prohibited in diked baylands for NWP 12 (Oil or Natural Gas Pipeline Activities – Substations, Access Roads), NWP 40 (Agricultural Activities), NWP 41(Reshaping Existing Drainage Ditches), NWP 42 (Recreational Facilities), NWP 43 (Stormwater Management Facilities), NWP 44 (Mining Activities) and NWP 51 (Land-Based Renewable Energy Generation Facilities)**. The NWP regulations clearly state for each of these NWPs, "This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters."

The PN defines San Francisco Bay diked baylands as:

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

According to 33 CFR 328.3 (c):

> Adjacent wetlands. The term adjacent wetlands means wetlands that:
> (i) Abut, meaning to touch at least at one point or side of, a water identified in paragraph (a)(1), (2), or (3) of this section;
> (ii) Are inundated by flooding from a water identified in paragraph (a)(1), (2), or (3) of this section in a typical year;
> (iii) Are physically separated from a water identified in paragraph (a)(1), (2), or (3) of this section only by a natural berm, bank, dune, or similar natural feature; or
> (iv) Are physically separated from a water identified in paragraph (a)(1), (2), or (3) of this section only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water identified in paragraph (a)(1), (2), or (3) of this section in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

By this definition, diked baylands and the non-tidal wetlands that occur within them are "adjacent" to San Francisco Bay, a water "subject to the ebb and flow of the tide." These lands have a topographic connection to San Francisco Bay because they lie within the historic tidal shorelines and bay margins. Ecological connections exist as well (e.g. use of wetlands on either side of levees by endangered species such as the salt marsh harvest mouse, nesting waterbirds, etc.) and are documented in the scientific literature (e.g. see 2015 *Baylands Ecosystem Habitat Goals Science Update* (BEHGU)[7], Southern Pacific Shorebird Conservation Plan, 2003[8]). Such ecological connections are also confirmed by the recommendations of the Recovery Plan for Tidal Marsh Ecosystems (2013)[9], the California Climate Adaptation Strategy (2009) and the San Francisco Bay Shoreline Adaptation Atlas[10] that diked baylands (i.e. low-lying lands adjacent to the bay) may provide important escape habitat for tidal marsh species as sea level rises. Hydrological connections often exist through culverts and flood gates, shallow subsurface connections, overtopping, piping, and normal seepage. Lastly, and most importantly, the San Francisco District has an overwhelming precedent of asserting

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[7] Goals Project. 2015. *The Baylands and Climate Change: What We Can Do. Baylands Ecosystem Habitat Goals Science Update 2015* prepared by the San Francisco Bay Area Wetlands Ecosystem Goals Project. California State Coastal Conservancy, Oakland, CA.

[8] Hickey, C., W.D. Shuford, G.W. Page, and S. Warnock. 2003. Version 1.1. The Southern Pacific Shorebird Conservation Plan: A Strategy for supporting California's Central Valley and coastal shorebird populations. PRBO Conservation Science, Stinson Beach, CA.

[9] U.S. Fish and Wildlife Service. 2013. Recovery Plan for Tidal Marsh Ecosystems of Northern and Central California. Sacramento, California. xviii + 605 pp.

[10] SFEI and SPUR. 2019. *San Francisco Bay Shoreline Adaptation Atlas: Working with Nature to Plan for Sea Level Rise Using Operational Landscape Units*. Publication #915, San Francisco Estuary Institute, Richmond, CA. Version 1.0 (April 2019)

jurisdiction over diked baylands based upon their adjacency to San Francisco Bay, a traditional navigable water (subject to the ebb and flow of the tide).

The San Francisco District has proposed under General Regional Condition 1 that activities occurring within diked baylands may be authorized through the NWP Pre-construction notification process (PCN). **This proposed regional condition is not within the discretion of the District Engineer for the NWPs listed above.** The Proposal to Reissue and Modify Nationwide Permits, published September 15, 2020, emphatically states, "Corps regional conditions can only be *more restrictive* than the NWP terms and conditions established by Corps Headquarters when it issues or reissues an NWP." [emphasis added] As we have indicated above, the terms of these particular NWPs state that their use is prohibited in "non-tidal wetlands adjacent to tidal waters." **Therefore, the San Francisco District must clarify, that while notification to the Corps is required for other NWP activities, individual permits are required for the activities described in NWPs 29, 39, 40, 41, 42, 43, 44, 51 and certain activities under NWP 12 within diked baylands.**

2. Prohibit the use of all NWPs in jurisdictional vernal pools. It is unclear how the degree to which the 2020 WOTUS revisions to the definitions of regulated waters under the Clean Water Act will affect Clean Water Act protection of vernal pools within the San Francisco District. To date the San Francisco District has not provided any guidance clarifying the extent of impacts to vernal pool habitat. Clearly some vernal pools will no longer receive protection as explained in a February 2020 presentation by the Sacramento District of the Corps. Vernal pools in California have suffered high historic losses, the Environmental Protection Agency (EPA) once estimated that up 90% of vernal pools have been lost in California. Now, this extremely rare habitat is even more imperiled by the implementation of 2020 Waters of the U.S. (WOTUS) rule.

Successful compensatory mitigation (structural) for this habitat type is not always achieved. In addition, much is still unknown about the biological requirements of vernal pool plant and animal communities, making it difficult to determine if compensatory mitigation successfully restores lost functions and values. It cannot be assumed that the NWP program would have minimal adverse effects for this habitat type.

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

> During the past 40 years, the Santa Rosa Plain has been transformed from an area which was a rural residential, agricultural area with large expanses of open space to a more urbanized and intensely agricultural area with less open space. This change in land use has **resulted in a substantial loss of seasonal wetland habitat, especially vernal pools. This loss of seasonal wetlands has become so severe that several plant species which are adapted to live in vernal pools in the Santa Rosa Plain have been listed as federally protected endangered species by the US Fish and Wildlife Service**. These endangered plant species are: Sonoma sunshine (*Blennosperma bakeri*), Burke's goldfields (*Lasthenia burkei*), Sebastopol meadowfoam (*Limnanthes vinculans*), and Many-flowered navarretia (*Navarretia leucociphala spp. plieantha*). Also, the Sonoma County population segment of the California Tiger Salamander (*Ambystoma californiense*) is listed as federally endangered. (emphasis added)

The fact that the San Francisco District has not restricted the use of NWPs in vernal pools within the Santa Rosa Plain points to the inconsistencies that can arise through the heavy reliance on the use of discretionary authority to ensure impacts of the NWP program are minimal. Given the severity of the losses of vernal pool habitat in the Santa Rosa Plain, we continue to urge the Corps to prohibit the use of NWPs in the Santa Rosa Plain and in other jurisdictional vernal pools within the district.

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

According to the Subtidal Goals Project (2010)[11], known occurrences of eelgrass beds "comprise only 1% of the total estuarine area." Though it represents a small percentage of the available estuarine habitat, eelgrass bed habitat is significant as "eelgrass transforms unstructured shallow-water areas into physically structured habitat that can support a wide variety of organisms," and "have a higher abundance, biomass, and productivity of consumer organisms than do unstructured habitats." This habitat is extremely sensitive to increases in turbidity caused by wind waves, boat wakes, dredging, and increased wave action generated by reflection of waves off of hardened shorelines. Eelgrass beds are also physically disturbed by dredging and wave action. Due to its limited distribution and sensitivity to disturbance, the use of NWPs should be revoked in eelgrass beds. Similarly, due to the continued consumption of undeveloped lands within the nine Bay Area counties, undeveloped lands within recovery units and critical habitat for federally listed species is becoming increasingly rare. The recovery unit lands and critical habitat that remain are subject to increasing levels of degradation through habitat fragmentation, human disturbance and shifts in community structure driven by climate change. The use of NWPs should be revoked in these areas but especially, NWPs 29, 39 and 42.

The following should be added as general conditions within the San Francisco District:

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

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

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

Waters of the U.S. located within the 100-year floodplain provide important functions and values such as flood storage, groundwater recharge, erosion control, water quality improvement, fish and wildlife habitat,

[11] Subtidal Goals Project. San Francisco Bay Subtidal Habitat Goals Report. Conservation Planning for the Submerged Areas of the Bay. California State Coastal Conservancy and Ocean Protection Council, NOAA National Marine Fisheries Service and Restoration Center, San Francisco Bay Conservation and Development Commission, San Francisco Estuary Partnership.

endangered species habitat, etc. It is critical that land altering activities in floodplains be subject to thorough design considerations, alternatives analysis, cumulative impacts review, growth inducement considerations, and agency and public review and comment.

The 2009 California Climate Adaptation Strategy[12] reports that "Currently, over 260,000 Californians live in areas designated as at-risk in a 100-year flood event (a one percent change of occurring every year)," and that "What we currently define to be the 100-year flood today will occur much more frequently as sea level rises; therefore, the number of people exposed to risks from the 100-year floods will increase substantially as a result of sea-level rise in coming decades." Furthermore,

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

Brody et al. (2007)[13] 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.

The use of NWPs 29 and 39 must be revoked within the 100-year flood plain. Due to concerns regarding increased flood risk due to sea level rise, issues of public safety, the future economic burden resulting from the need to provide protection where sufficient flood control does not currently exist or from property

[12] 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.

[13] 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

damage resulting from flooding, etc. NWPs 29 and 39 should be revoked within the 100-year flood plain. Authorization of residential, commercial and institutional developments, or stormwater management facilities within the 100-year flood plain should not occur in the absence of meaningful public review and comment.

Just earlier this year, the New York Times ran an article with the headline, "*Trump Administration Presses Cities to Evict Homeowners from Flood Zones."*[14] 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 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 it is encouraging the use of eminent domain to move homeowners away from the dangers of flood prone areas on the other. 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.

Prohibit the use of NWPs 12 (Oil or Natural Gas Pipeline Activities – substations, access roads), 13 (Bank Stabilization), 14 (Linear Transportation Projects), 18 (Minor Discharges), 29 (Residential Developments), 39 (Commercial and Institutional Developments), 40 (Agricultural Activities), 41 (Reshaping Existing Drainage Ditches), 42 (Recreational Facilities), 43 (Stormwater Management Facilities), and 44 (Mining Activities) within wetlands adjacent to perennial streams and wetlands with woody vegetation adjacent to any stream course. California has lost between 90 and 95% of its riparian habitat. Surrounding, and impinging development have degraded much of the remaining habitat. While most development proposals may not fill all riparian wetlands within a project site, fragmentation of the habitat occurs when fill is placed to allow golf course play or road crossings across this habitat. This fragmentation severely degrades the wildlife values of the riparian wetlands. Corps guidance clearly indicates that in habitats or geographic areas where historic losses are high, the NWPs may be revoked.

General Condition 23 - Compensatory mitigation should be required for unavoidable impacts to "waters of the U.S."

The use of compensatory mitigation to buy down the adverse impacts of a project does not comply with the 404 (b)(1) Guidelines (40 CFR 230) that requires, 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.

Numerous studies, beginning with the National Research Council's 1992 "Restoration of Aquatic Ecosystems,"[15] 2001 "Compensating for Wetland Losses Under the Clean Water Act"[16] and the State Water

[14] 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

[15] National Research Council. *Restoration of Aquatic Ecosystems: Science, Technology, and Public Policy*. Washington, DC: The National Academies Press, 1992. doi:10.17226/1807.

[16] National Research Council (NRC). 2001. Compensating for Wetland Losses Under the Clean Water Act. National Academy Press, Washington D.C.

Resources Control Board's (SWRCB's) study by Ambrose et al.[17], recognize the failure of compensatory mitigation wetlands in fully replicating the functions of natural wetlands.

Issues raised echo those identified in the Draft NWPs Programmatic Environmental Impact Statement (PEIS) prepared by the Institute for Water Resources (IWR)[18]:

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

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

A review of compensatory mitigation success conducted on behalf of the State Water Resources Control Board (Ambrose et al., 2007)[19] revealed that while permittees for the most part comply with the compensatory mitigation requirements (one half to two thirds of the 143 files reviewed), and acreages of "wetlands" are produced, compensatory mitigation sites do not fully recapture lost functions and values of wetlands filled.

IWR estimated wetland compensatory mitigation success ranges from 30% to 90%. IWR has attempted to provide "Estimates of water resource abundance and the cumulative 100-year impact of NWPs assuming FY 1998 rates hold constant over the next century." Based upon this analysis, acreage impacts for the NWP range from a negative impact (30% wetland mitigation success) of –464,240 acres to a positive impact of 232,600 acres (90% wetlands mitigation success). The figure of 90% wetlands mitigation success is unfounded. In fact (p.4-14) the PEIS concluded, "…More quantified assessment appears less encouraging, however, indicating a higher functional failure rate than the qualitative methods. Compensatory mitigation may not generate much more than 50% of the self-sustaining function expected program-wide, even for wetlands that have undergone substantial research." Based upon the incredibly low rate of permit compliance inspections, the actual figure of successful wetlands mitigation may be lower still. Therefore, **we strongly urge the District to require mitigation be successfully completed before project construction to ensure functions and values are in fact replaced and to avoid temporal losses of functions and values**.

Kihslinger[20], 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*

[17] Ambrose, R.F., J.C. Callaway, S.F. Lee. 2007. An Evaluation of Compensatory Mitigation Projects Permitted Under Clean Water Act Section 401 by the California State Water Resources Control Board, 1991-2002. Prepared for the State of California Environmental Protection Agency, California State Water Resources Control Board.

[18] Army Corps of Engineers. July 2001. Draft Nationwide Permits Programmatic Environmental Statement. Prepared by the Institute for Water Resources, Alexandria, Virginia

[19] Ibid

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

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]

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]

Based upon the information presented above, the fact that compensatory mitigation is required does not ensure that functions and values of waters of the U.S. will, in fact, be replaced. Therefore, it is imperative that compensatory mitigation be reviewed and approved by the Corps and resource agencies in advance of NWP verification and must be submitted in the form of a detailed mitigation and monitoring plan with enforceable conditions. And equally important the Corps must commit to providing the resources necessary to conduct compliance inspections and to ensure any required compensatory mitigation is successfully completed by the project proponent.

Revoke the proposal to remove the 300 linear foot limit for losses of stream bed. As currently proposed, mitigation is only required for projects that impact more than 1/10th an acre of waters. And there is a proposal to remove the 300 LF restriction for fills in streams for certain NWPs. This means that projects that impact hundreds of linear feet of creek channels would not require mitigation if the surface area of impacts was less than 1/10th of an acre. Looking back at the analysis provided in the preamble to the NWPs, a 1st order stream has an average width of 6.3 feet. Using this average width and the usage of the 1/10-acre limit means that approximately 691' of 1st order stream length could be filled and not mitigated. This cannot result in minimal cumulative impacts to the environment and for some watersheds may result in a more than minimal individual impact.

Revoke the proposal to "allow the district engineer to waive the requirement to provide compensatory mitigation for losses of greater than 1⁄10-acre of stream bed when he or she determines that other forms of mitigation, such as best management practices and other minimization measures, are more environmentally preferable forms of mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects." Avoidance and minimization of adverse environmental effects should be considered when determining whether or not a specific activity can be

verified under the NWPs, and best management practices can help reduce adverse impacts but cannot replace functions and values lost by the placement of fill in waters of the U.S. – that can only be accomplished through compensatory mitigation; therefore, it is not in the public interest to allow waiver of the requirement to provide compensatory mitigation for losses of streambed or wetlands.

Revoke the proposal that riparian mitigation may be the only compensatory mitigation required for projects in or near streams or other areas next to open waters. The lack of specific guidelines for what constitutes "riparian areas" could allow things such as landscaping (with "native species") adjacent to golf course tees, fairways, and greens to be considered as mitigation for impacts to waters of the U.S. The incorporation of the language proposed in the NWP program is yet another indication the Corps NWP program provides rubber stamp authorization in place of the careful review of functions and values lost, the relative occurrence of the aquatic habitat to be impacted (how common or uncommon is it), the degree of success that has been demonstrated in recreating the habitat to be impacted, and the appropriateness of the mitigation proposed to offset the adverse impacts of the proposed project. This language if not revoked will provide an easy out for developers rather than providing a disincentive to impact waters of the U.S.

General condition 32 – Pre-Construction Notification (PCN):

Revoke changes to the NWPs that propose removal of the PCN requirement for certain NWPs and for the removal of PCN reporting for Federal agencies for the reasons discussed above.

A regional condition should be included to require the applicant provide evidence of avoidance and minimization and a discussion of the cumulative impacts of the project (in consideration of other fill placed in waters of the U.S. within the vicinity of their project).

A substantive criticism of the NWP program is the reliance on the use of compensatory mitigation to buy down the adverse impacts of a project to a minimal level. The 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.[21] 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

[21] 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

> 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, 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]

It is imperative that even for the NWP program, an applicant demonstrate compliance with the requirements of sequencing.

To avoid piece-mealing of impacts to "waters of the U.S." and to be consistent with the requirements of avoidance and minimization as required by the Guidelines NWPs 3 (Maintenance), 12 (Oil and Natural Gas Pipeline Projects), 13 (Bank Stabilization), 14 (Linear Transportation Projects), 42 (Recreational Facilities), and 48 (Commercial Shellfish Aquaculture Activities) should not be used to expand previously permitted projects. If the District does proceed with authorization of "expansion" projects mentioned in these NWPs, the total amount of impact in waters of the U.S. including both previous and proposed impacts, should not exceed the amount currently authorized by the NWP under which authorization will be granted. The applicant should be required to document the total amount of past and proposed impacts and Corps staff should be required to confirm the amount of waters of the U.S. impacted.

Prohibit the use of riprap in areas adjacent to endangered species populations, refuges, special aquatic sites, and wetland areas that support woody vegetation. Riprap provides shelter for non-native predators of endangered species, fragments riparian habitat, and can displace important aquatic plant communities, therefore placement of riprap in these areas is inconsistent with the minimal impacts criteria, especially given the proposal to allow discretionary waiver of compensatory mitigation.

Require the applicant delineate the limits of the authorized activity prior to initiation of construction:

We urge the San Francisco District to adopt a general condition proposed by the Sacramento District in their 2017 regional conditions:

> Unless determined to be not practicable or necessary by the Corps, the permittee shall clearly identify the limits of the authorized activity in the field with highly visible markers (e.g. construction fencing, flagging, silt barriers, etc.) prior to commencement of construction activities within waters of the U.S. The permittee shall maintain such identification properly until construction is completed and the soils have been stabilized. The permittee is prohibited from any activity (e.g. equipment usage or materials storage) that impacts waters of the U.S. outside of the permit limits (as shown on the permit drawings).

General condition regarding temporary access and construction activities resulting in temporary fill in waters of the U.S.:

We urge the San Francisco District to incorporate a general condition proposed by the Sacramento District in their 2017 regional conditions regarding the use of temporary fills:

> a. For temporary fills within waters of the U.S. supporting fisheries, spawning quality gravel shall be used, where appropriate, as determined by the Corps, after consultation with appropriate Federal and state fish and wildlife agencies;

b. Prior to placing temporary fill in waters of the U.S., place a horizontal marker (e.g. fabric, certified weed free straw, etc.) to delineate the existing bottom elevation of the waters temporarily filled during construction; and
c. Remove all temporary fill and restore the area to pre-project contours and conditions within 30 days following completion of construction activities in waters of the U.S.

Provide information regarding the specific NWP authorizations in the published quarterly report such as NWP(s) utilized, acreage and linear footage of impact, mitigation required - yes/no, type of activity authorized, type of water impacted and watershed location. This information should be made available on the District website. There is no transparency with respect to the NWP program, and this is contrary to the public interest. Corps Districts and Divisions are supposed to be tracking individual and cumulative impacts of the NWP program, therefore, the Corps should have information and should provide on their website: the water bodies in which it is authorizing the placement of dredged or fill materials, the amount of fill (acreage and linear feet), the extent to which compensatory mitigation (if required) has been successfully completed, etc. in order to assess cumulative impacts. The lack of information and transparency that surrounds the NWP program raises serious questions about the extent to which this critical information is being tracked and the degree to which it is being analyzed.

Publish pre-construction notifications (PCNs) on the District website for public information.
We understand that preconstruction notifications are not subject to public comment, but if the Corps is not going to provide information summarizing the use of NWPs and their cumulative impacts to waters of the U.S., the public at least can note the types of activities that are being reviewed through the PCN process.

The San Francisco District should revoke NWPs 21 (Surface Coal Mining Operations), 34 (Cranberry Production Activities), 49 (Coal Remining Activities), and 50 (Underground Coal Mining) as these NWPs would not be utilized within the district.

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

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

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

- **Prohibit the amount of "removal of accumulated sediments and debris in the vicinity of the existing structures" to no more than 25 cubic yards and prohibit the use of this provision in eelgrass beds, other special aquatic sites, and jurisdictional riparian habitat.**

- **The District should require submittal of documentation post-construction and prior to the next high flow season to demonstrate the temporary fills have been removed from the stream channel and the channel bed has been returned to pre-construction elevations.**

NWP 11 (Temporary Recreational Structures):

- **Adopt a regional condition to prohibit use in riparian wetlands, vegetated shallows, or special aquatic sites.** Recreational structures that are "temporary" in nature do not need to be placed in areas of high resource value.

NWP 12 (Oil and Natural Gas Pipeline Discharges):

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

- **As discussed above, clarify that the use of this NWP for construction of substations or access roads is prohibited within diked Baylands.**
- **Prohibit use in identified recovery units, critical habitat and special aquatic sites.**
- **Adopt the condition proposed by the Sacramento District in their 2017 regional conditions regarding separation of topsoil:**

  > For utility line trenches, during construction, the permittee shall remove and stockpile, separately, the top 6 – 12 inches of topsoil. Following installation of the utility line(s), the permittee shall replace the stockpiled topsoil on top and seed the area with native vegetation.

- **Prohibit side-casting of material into wetlands as this could negatively alter the hydrologic regime of the wetlands by altering ground topography.**
- **The language of the NWP seems to state at the very end that this NWP does not authorize expansion of existing substation facilities – please clarify whether this understanding is accurate.**
- **Limit total impacts of this NWP to 0.3 acres.**
- **Require post-construction documentation be submitted demonstrating pre-construction contours have been restored and that the area has been successfully revegetated.** At minimum require submittal of plans for revegetation of the disturbed area, monitoring and removal of non-natives and especially non-native invasive species, and require submittal of documentation to demonstrate the disturbed areas have been restored to pre-disturbance conditions or better.

NWP 13 (Bank Stabilization):

- **Revoke the use of this NWP in special aquatic sites, instead of merely requiring notification. This NWP should not be authorized in areas supporting wetlands or riparian habitat (individual permit review should be required).**

- **Limit bank stabilization in streams to 300 linear feet and no more than 1 cubic yard per running foot.** The District must acknowledge the adverse impact of bank stabilization projects on natural stream processes and on habitat values, and recognize that the bank stabilization in one reach of stream can lead to destabilization of the stream opposite of the project and upstream and downstream of the area

of impact. In addition, this limitation should be effective regardless of the type of bank stabilization proposed.

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

- **The Corps must require that the proposed site for disposal of excess material be identified by the project proponent.** Excess material should be disposed of at an upland site away from any wetlands or other waters of the U.S.
- **The project proponent should be required to address the effect of the bank stabilization on the stability of the opposite side of the streambank and on adjacent properties upstream and downstream of the activity. The project proponent should be required to monitor these areas for at least two successive normal rainfall seasons to demonstrate the project is not adversely impacting surrounding areas through the deflection of flows.**
- **For any bank stabilization considered under the auspices of this NWP, we support the stated preference for bioengineering techniques, but believe all bank stabilization projects should require a PCN.**

NWP 14 (Linear Transportation Projects):

- **Prohibit the construction of new linear transportation or spur projects.** The growth inducing potential for these types of projects clearly warrants a thorough alternative analysis and resource agency and public review and comment.
- **Prohibit the use of this NWP for use in identified critical habitats, recovery units, or special aquatic sites.** We have discussed earlier in this document why the use of NWPs in these habitats is inappropriate.
- **Reduce the impact threshold to 0.1 acres.** This acreage should be more than adequate. According to the 2007 District decision document [the last decision document available for public review] for this NWP, NWP 14 was anticipated to be used 35 times per year resulting in the loss of 450 linear feet and/or 1 acre of waters of the U.S. That would equal an average of 0.02 acres per use. Note this is for reporting nationwide authorizations only.
- **Restrict the linear footage of total stream course fill to 100 feet.** This is more than adequate based upon the information provided in the District decision document. In fact, a 100 linear foot restriction may be excessive based upon the 2007 District decision document.
- **A regional condition should be added** for NWP 14 that incorporations the language of Sacramento District's 2017 NWP regional conditions:

> "Culverted crossings that do not utilize a bottomless arch culvert with a natural stream bed may be utilized for waters that do not contain suitable habitat for Federally-listed fish and wildlife species, if it can be demonstrated and is specifically determined by the Corps, that such crossing will result in no more than minor impacts to fish and wildlife or expected high flows."

NWP 18 (Minor Discharges): Prohibit the use of this NWP in special aquatic sites. Please refer to the discussion on proposed overall regional conditions above.

NWP 19 (Minor Dredging): Retain the previous limitation of 25 cubic yards.

NWP 23 (Approved Categorical Exclusions) - REVOKE:

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

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

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

- **Incorporate the regional condition of requiring preconstruction notifications (PCN), as proposed in the 2017 Sacramento District NWP regional conditions, under the following circumstances:**

    a. The restoration, establishment or enhancement activity would result in a discharge of dredged and/or fill material into perennial waters, wetlands, mudflats, vegetated shallows, riffle and pool complexes, sanctuaries and refuges or coral reefs; or

    b. The restoration, establishment or enhancement activity would result in a discharge of dredged and/or fill material into greater than 0.10 acre or 100 linear feet of intermittent or ephemeral waters of the U.S.

- **Incorporate the requirement that the following documentation be provided with a PCN submittal as proposed in the 2017 Sacramento District NWP regional conditions:**

    The PCN shall include sufficient justification to determine that the proposed activity would result in a net increase in aquatic resource functions and services. Functions and services to be considered in the justification include, but are not limited to: short- or long-term surface water storage, subsurface water storage, moderation of groundwater flow or discharge, dissipation of energy, cycling of nutrients, removal of elements and compounds, retention of particulates, export of organic carbon, and maintenance of plant and animal communities.

The PCN submittal should also provide documentation to demonstrate that the proposed activities will not adversely impact existing wetlands functions, values, or areal extent.

- **Prohibit the use of this NWP for the creation of mitigation banks.**

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 NWP 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 NWP. There is no opportunity for the public to provide comments to individual NWP authorizations, only to the overall program. With respect to mitigation banks, a public notice is released informing the public that a mitigation bank is being considered, but these PNs are generally released before the extent of impacts to waters of the U.S. are known, the details of the appropriateness of a particular site to

successfully create or restore functions and values are known, and the details of meeting success criteria and monitoring have been provided, thus before any substantive information can be provided.

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 proposed wetland mitigation bank or in-lieu fee program.

- **We strongly object to the "reversion" language of the proposed NWP program. This should be revoked within the boundaries of the District. At the very least, preconstruction notification should be required and, in any instance, where "reversion" of wetlands occurs, the applicant should be required to provide documentation of the prior condition of the lands before reversion activities are commenced.** We are deeply concerned the proposed "reversion" language could facilitate further losses of functional wetlands. While the Corps has excluded prior converted croplands from regulation, and while it is true these areas might no longer "pond" water, many prior converted croplands still meet the Corps criteria of wetlands and retain wetlands functions and values (i.e. hydrologically they are saturated to the surface for the requisite period of time, but since they do not pond water, they have arbitrarily been exempted from wetlands regulation). We are therefore concerned that the reversion language in this NWP provides an additional loophole for landowners to convert areas still functioning as wetlands to uplands.

We urge the Corps to add the following language regarding "reversions" to regional conditions for NWP 27:

> The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit, *this requirement also pertains to prior converted croplands*.
>
> Before conducting any reversion activity, the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition, *this requirement also pertains prior converted croplands*.

- **Prohibit the "relocation of aquatic habitat types on the project site."** There is tremendous potential for abuse of this NWP by a developer who wishes to consolidate wetlands in one area of his property, under the auspices of "restoration," to allow development of the site.
- **Limit the use of this NWP to 300 linear feet of stream or 0.5 acres of wetlands.**
- **Prohibit the use of riprap and armoring under this NWP.**
- **Require that the "wetland enhancement, restoration or creation agreement" is reviewed and approved by the Corps and other resource and regulatory agencies.**

- **Restrict the use of this NWP to federal and state agencies or to projects approved or sponsored by federal or state agencies.**
- **Require that the "wetland enhancement, restoration or creation agreement" have enforceable conditions.**

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

- **Prohibit the use of this NWP in special aquatic sites, identified recovery units and critical habitat, and within the 100-year floodplain.**
- **Prohibit the use of this NWP for the construction of golf courses associated with residential developments.** Too many subdivisions with associated golf courses have been proposed in the past decade. Many of them were permitted under the previous NWP 26 resulting in the filling of hundreds of miles of Bay Area streams. Such developments are being proposed in the headwaters of many of our streams and involve massive cut and fill, given the instability of Bay Area slopes it is highly unlikely the amount of contouring involved in such developments will result in only minimal impacts. In addition, such projects have tremendous potential for significant adverse impacts to the human environment, including growth inducement, introduction of pollutants, etc. Lastly, given the restrictions that have been proposed on outdoor water usage in response to recurring periods of drought, the construction of golf courses should be subject to an individual permit process to provide the opportunity for public comment.
- **Emphasize the requirement that documentation of avoidance and minimization must be provided.**
- **Require on-site compensatory mitigation for any unavoidable impacts.**

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

- **Failing revocation, the District must impose strict acreage, linear footage, and cubic yardage limits.** It is inconceivable that there should be no limits on the extent of impact authorized under this NWP. Just because a flood control facility was previously authorized does not automatically result in minimal impacts when that facility is maintained. For example, dredging of a flood control channel can result in tremendous disturbance to surrounding habitat and result in degradation of water quality downstream of the dredging. The 2007 decision document estimates this NWP will rarely be used "0-1 times in the next five years" with an anticipated impact of 1/10 of an acre to waters of the U.S. Based upon this estimate, review of proposed activities by individual permit would not be a regulatory burden and based upon this assessment, the District should limit the use of this NWP to 1/10 of an acre.
- **Impose restrictions on the habitats in which this NWP may be used.** Use of this NWP should be prohibited in areas of tidal marsh, eelgrass beds, special aquatic sites, essential fish habitat, critical habitat, or recovery units.

- **Revocation of the proposal to require one-time mitigation.** This proposal completely ignores the length of time between maintenance cycles. Given a sufficient interval significant wildlife habitat can become established. Many of these facilities support listed anadromous fish and other special status species. Maintenance dredging also disturbs soils, exposing the channels to non-native invasive species, thereby facilitating the spread of invasive species.

We urge the Corps to require compensatory mitigation for lost habitat values, impacts to anadromous fish, and special status species. Mitigation should be required to offset the temporal losses of this habitat particularly if the habitat impacted is locally rare, e.g. fringe tidal marsh habitat.

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

- **Prohibit the use of this NWP in special aquatic sites, jurisdictional riparian habitat, or essential fish habitat, critical habitat or recovery units.**
- **Impose an acreage and linear foot limit. The impacts should be limited to ½ acre and no more than 300 linear feet of stream.**
- **Require post-construction documentation be submitted to the Corps that demonstrates pre-construction conditions have been restored, including revegetation and removal of any invasive or non-native species.**
- **Incorporate the conditions described above under general conditions for temporary fills.**

NWP 35 (Maintenance Dredging of Existing Basins):

- **Clarify use of this NWP is prohibited in habitats occupied by endangered species, essential fish habitat, critical habitat, or recovery units.**
- **Prohibit the use of this permit in special aquatic sites.**

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

- **Refer to the overall regional prohibitions and conditions proposed above.**
- **Refer to the restrictions proposed in the overall regional conditions above, i.e. prohibiting the use within the 100-year flood plain, special aquatic sites and endangered species habitat, strict 300 linear foot limit, etc.**
- **Retain 300 linear foot prohibitions on fill in streams all streams (perennial, intermittent, and ephemeral).**
- **Reduce fill acreage to 1/3 acre.**
- **Require compensatory mitigation for any unavoidable impacts, to the standard listed above under the general conditions.**

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

- **We are strongly opposed to the implementation of this NWP.** Adequate exemptions currently exist to allow for normal agricultural activities to continue on agricultural lands. The adoption of National Resources Conservation Service (NRCS) wetland categorizations for the purposes of Section 404 of the Clean Water Act has led to the removal of extensive areas that otherwise meet wetland criteria (prior converted croplands) from regulatory review. The Corps and NRCS have withdrawn from their previous memorandum of understanding regarding agricultural lands. Now the Corps is proposing to rubber-stamp the filling or conversion of those remaining areas that are still identified as "waters of the U.S." on agricultural lands.

- **Please refer to the comments on proposed overall regional conditions stated above.**
- **Based upon the District's 2007 analysis of the average acreage of impacts per action, restrict the aggregate impact threshold to 0.1 acres and require notification for all impact amounts.**
- **Clarify the acreage limitation includes dewatering of jurisdictional areas or conversion of waters of the U.S. from one type to another, as a result of any proposed activities.** For example, if the proponent proposes to install drainage tiles, the acreage impacted would include not only the area in which the drainage tiles are installed, but also all areas that are dewatered as a result of the installation.
  - **Clarify that the use of this NWP is prohibited in diked baylands.** The NWP regulations clearly state, "This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters."
  - **Prohibit the use of this permit in areas that would alter the hydrology of adjacent wetlands.**

- **Prohibit fills or discharges into the channel of *any* stream (including ephemerals) that could impede high flows.**
- **Require a compensatory mitigation and monitoring plan complete with enforceable conditions that has been reviewed and approved the Corps and resource agencies.**
- **Require that the Corps make its own minimal effects determination consistent with the requirements of Section 404 of the Clean Water Act.**

NWP 41 (Reshaping Existing Drainage Ditches) - REVOKE:

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

- **Clarify that the use of this NWP is prohibited in diked baylands.** The NWP regulations clearly state, "This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters."
- **Please see the comments above under overall regional conditions.**
- **At minimum the Corps must limit the linear footage of fill and impact to 100' in all streams, and the total acreage of fill and impact to 1/10 acre.** [based upon 2007 estimates of expected use]
- **Compensatory mitigation must be required for all impacts to waters of the U.S. Mitigation must be approved in advance of permit issuance and consistent with the general condition above.**

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

- **The district had previously proposed to prohibit the use of this NWP for the construction or expansion of golf courses.** We urge the district to reinstate this prohibition. Golf course proposals we have reviewed involve substantial recontouring of the landscape, massive engineering of fill material, and significant adverse impacts to water quality and the aquatic environment and the species that utilize the aquatic environment. Golf courses require inordinate amounts of water that are not appropriate given the recurrent conditions of drought in California. The authorization of golf course projects would not meet the criteria of minimal impacts.
- **Refer to the comments above under overall regional conditions.Clarify that the use of this NWP is prohibited in diked baylands.** The NWP regulations clearly state, "This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters."
- **Limit the impact to "waters of the U.S." to 1/10 acre of fill.** [Based upon District's 2007 estimate of anticipated use]
- **Prohibit use of this NWP for construction of buildings, stables or parking lots.**
- **Prohibit the authorization of habitat conversion under this NWP.**
- **Prohibit the use of this NWP in any special aquatic site.**
- **Clarify that the use of this NWP is prohibited in areas that support federally listed species or critical habitat.**
- **Require compensatory mitigation at a minimum one-for-one replacement for any impacts to waters of the U.S Clarify the use of riparian buffers must be supportive of functions and values attributed to naturally occurring riparian habitat and not merely landscaping for recreational features.**

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

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

NWP 44 (Mining Activities) - REVOKE:

- **In the 2007 NWPs the District revoked this NWP.** The San Francisco District currently has an LOP (Letter of Permission) for gravel mining activities in two counties within the district. SFD should seriously analyze the cumulative effects of the permitted activities through the LOP. This analysis should include a categorization of the stream types impacted (ephemeral, intermittent, perennial) and the linear footage and acreage of impacts in each stream type and within each watershed. The Corps should also assess permit compliance and mitigation compliance (including an analysis of successfully completed compensatory mitigation).
- **Clarify that the use of this NWP is prohibited in diked baylands.** The NWP regulations clearly state, "This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters."

NWP 46 (Discharges in Ditches):

- Impose restrictions on the use of this NWP to ½ acre and 300 linear feet. As written, this NWP could authorize up to one acre of fill. There is no NWP that authorizes that amount of fill and there has been no documentation provided by the Corps to convincingly demonstrate that this NWP won't result in more than minimal impacts to water quality or the aquatic environment.

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

- **Prohibit this use of this NWP in special aquatic sites.**
- **Retain the ½ acre limit for impacts to submerged aquatic vegetation in project areas that have not been used for commercial shellfish aquaculture activities during the past 100 years.** We have discussed the scarcity of eelgrass habitat within the San Francisco Bay region and the critical importance of protecting remaining eelgrass beds.
- **PCH thresholds should be retained within the San Francisco District due to the controversy of such projects, concerns of significant impacts to submerged aquatic vegetation and the ongoing work of the state of California to develop detailed guidance for such projects and a statewide aquaculture action plan.**
- **Prohibit the expansion of existing facilities or the construction of new facilities.**

NWP 51 (Land-Based Renewable Energy Generation Facilities) – REVOKE:

- **This NWP should be revoked due to the numerous public interest factors and impacts to waters of the U.S. that may result from such projects.**
- **Clarify that the use of this NWP is prohibited in diked baylands.** The NWP regulations clearly state, "This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters."
- **Prohibit the use of this NWP in special aquatic sites, critical habitat, and recovery units. In addition, this NWP should be prohibited in areas of known importance to migratory birds and raptors.**
- **The land-based renewable energy generation facilities within California cover massive tracts of land (3,500 acres for one of the projects proposed within the District). This NWP proposes restrictions of ½-acre of non-tidal and should retain the requirement restricts impacts to no more than 300-linear feet of stream channel.** The alteration of vast tracts of land through the development of roads, buildings, above grade pads, etc. will certainly have watershed impacts that will in turn impact and alter hydrologic functions and values within the watershed (e.g. alteration of patterns and flashiness of flows, increase potential for erosion and thus degradation of water quality, adverse impacts to sustainability of aquatic species through fragmentation of habitat, etc.) In addition, there is the likelihood of significant adverse impacts to public interest factors (e.g. water supply, aesthetics, recreation, conservation, etc.) **Authorization of projects that will alter massive tracts of lands and hence the dynamics of the watershed through NWP would be an abuse of discretion.**

NWP 52 (Water-based Renewable energy Generation Pilot Projects) – REVOKE:

- **This NWP should be revoked due to the numerous public interest factors and impacts to waters of the U.S. that may result from such projects. The use of this NWP within the San Francisco District should be revoked.**

- **The Corps has failed to demonstrate projects proposed for authorization under this NWP will have impacts that are similar in nature or that the impacts will be similar in their effects on the aquatic environment. In fact, the Corps has failed to describe what the potential impacts to the aquatic environment may be other than providing a description of the attendant features. Until the Corps can develop a substantive description of the types of impacts that are likely to occur and their anticipated impacts on the aquatic environment, the proposed NWP fails to meet the requirements of NEPA and the 404 (b)(1) Guidelines. Once this information is available, CCCR requests the opportunity to review and provide comment on regional conditions that may be necessary to reduce the impacts of the NWP to a minimal level.**

NWP A (seaweed mariculture): REVOKE:

- **Revoke the use of this NWP for the reasons elaborated below in the discussion regarding NWP B.**

NWP B (Finfish Mariculture) – REVOKE

- **Revoke the use of this NWP within the geographic boundaries of the San Francisco District.**

Finfish mariculture is a highly controversial topic with concerns including habitat and water quality degradation, problems of escaped fish breeding with wild counterparts, concerns regarding 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.

California has been struggling 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[22]:

> 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.
>
> 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.

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."*[23] 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."

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

[23] 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.

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 California state agencies 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. And that due to the many environmental complexities and potential far-reaching harm that could result, it is not possible to determine that finfish mariculture projects are minimal in their individual and cumulative impacts. It is certainly impossible to render a thoughtful, well-considered decision within the time constraints imposed by the nationwide permit process and given the controversy surrounding such projects, it is not in the public interest to authorize such projects without proper agency and public review and comment. The use of this proposed NWP should be revoked within the San Francisco District and should actually be revoked within the South Pacific Division.

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.

Absent revocation of NWPs indicated above the San Francisco District must make every effort to develop regional conditions that will effectively reduce the adverse impacts to a minimal level. The proposed regional conditions do not meet that goal. We recommend that at minimum, the San Francisco District adopt the regional conditions we have proposed. It is important to recognize that even with the incorporation of such conditions, individual NWP requests cannot be rubber-stamped.

To our knowledge the South Pacific Division has not proposed General Regional Conditions that apply to all NWPs in the Sacramento, San Francisco and Los Angeles District as was done for the 2017 NWPs. Why has this not occurred and will Division wide General Regional Conditions be provided?

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 Regulatory Program on waters of the U.S., places the responsibility of ensuring that no more than minimal adverse impacts are authorized, squarely on the shoulders of Corps staff and the District Engineer. The Corps cannot continue with a "rubber-stamp" approach to 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 are permitted (through general permits, LOPs, individual permits, etc.) within the watersheds of the district and required compensatory mitigation is tracked to ensure unavoidable adverse impacts are being offset, and that functions and values

are being restored. Finally, and most importantly, the San Francisco District should be analyzing the cumulative impacts of permits issued to determine if hydrologic functions of watersheds are remaining intact. We would argue that none of this is occurring to the degree necessary in any of the Corps districts across the country. We understand that this may be difficult to accomplish due to issues of understaffing, budget, etc. However, understanding the reasons why this is not occurring does not ensure the adverse impacts of the NWP program are adequately minimized.

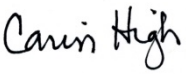
In general, the proposed NWP program:

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

The Corps to this day has not even attempted to substantively 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 or incentive 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. For these reasons we urge the San Francisco District to adopt the revocations and regional conditions contained in this letter.

Sincerely,



Carin High
CCCR Co-Chair

cc: South Pacific Division
EPA, Jason Brush
USFWS, Ryan Olah, Kim Squires
CDFG, Craig Weightman
SFRWQCB, Keith Lichten
SWRCB, Jean Bandura