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Submitted Via Email: NWP2017@usace.army.mil

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

Re: Comments in Response to Department of the Army, Corps of Engineers, Proposal to Reissue and Modify Nationwide Permits, Docket COE-2015-0017, 81 Fed. Reg. 35186 (June 1, 2016)

Dear Mr. Olson:

The undersigned 72 organizations who are member of the Water Protection Network appreciate the opportunity to submit these comments on the Corps of Engineers' (Corps) proposal to reissue and modify the nationwide permits (NWP). Protecting and restoring the health of the nation's waters is critically important to our organizations and our millions of members and supporters. The recommendations outlined below would help achieve these goals by ensuring that activities authorized under the NWPs cause only minimal harm, as required by law.

General Comments

Our organizations strongly oppose any weakening of the terms and conditions in the NWPs, and strongly disagree with the suggestions (discussed at 81 Fed. Reg. 35190-91) that such changes might be appropriate in light of the 2015 revisions to the Definition of "Waters of the United States." Instead, our organizations urge the Corps to strengthen the NWPs to ensure that they in fact cause only minimal harm by:

1. Reducing, or at a minimum retaining, the existing acreage and linear foot limitations in the NWPs and imposing acreage and linear foot limits for the numerous NWPs that currently have no limits. NWPs that lack such limitations on their face allow unlimited impacts to waters of the United States in violation of Clean Water Act § 404(e). Our organizations strongly oppose raising and weakening the acreage and linear foot limits and/or PCN thresholds for high impact NWPs, including NWPs 12, 14, 18, 21, 29, 39, 42, 43, 44, 51, and 52. We also urge the Corps to reinforce the importance of the linear foot limitations on NWPs affecting stream beds, including the 300 linear foot limitations on NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.
2. Eliminating the ability of District Engineers to waive impact threshold levels. The Corps has provided no evidence to demonstrate that such waivers will not cause more than minimal adverse impacts.

3. Abandoning the use of compensatory mitigation to “buy-down” impacts to no more than minimal levels so that a NWP can be used. Mitigation requirements should also be strengthened and made consistent for all NWPs.
4. Eliminating the ability to use multiple NWPs to authorize individual segments of high impact linear projects, including pipelines and bank stabilization projects. This violates the Clean Water Act §404(e) minimal impact limitation; and the Clean Water Act, National Environmental Policy Act, Endangered Species Act and other legal requirements for rigorous, and public, environmental scrutiny and environmental safeguards to protect the nation’s waters.
5. Strengthening the pre-construction notification requirements to improve understanding and analysis of individual and cumulative impacts. Without detailed information in the PCN, decision makers have no ability to assess whether the impacts of a proposed project are in fact minimal and the public has no ability to assess the full extent of impacts from the NWP program.
6. Rigorously assessing the direct, indirect, and cumulative impacts of each NWP and the NWP program before issuing a final NWP package. Without this information, the Corps cannot ensure that the NWPs will cause only minimal individual and cumulative impacts as required by law.

Comments on Individual Permits and Permit Conditions

Proposed NWP A. Removal of Low-Head Dams: Our organizations support a new nationwide permit for the removal of low-head dams to restore natural river channels and river flows with additional safeguards to limit downstream impacts from release of sediments that are stored behind many low-head dams.

Dams alter flow, alter sediment and nutrient regimes, block migration of aquatic species, and harm water quality. These changes cause significant harm to people and wildlife. Dam removal reverses many of these adverse impacts and restores the process and function of the river ecosystem, including natural sediment transport. NWP A should help advance removal of low-head dams, including by reducing permitting costs, to restore river ecosystems, improve public safety, and/or improve outdoor recreation opportunities.

To ensure no more than minimal adverse individual and cumulative effects, NWP A should be revised to: (1) require an assessment of the quality, quantity, and type of sediments that may be stored behind the dam; (2) require development of a sediment management plan, if necessary; and (3) require that sediment assessment and management plan be coordinated through the 401 Water Quality Certificate review process. The PCN for this permit should require inclusion of information on the sediment analysis, sediment management plan, and 401 Water Quality Certification process. The PCN should also require information on the means of authorizing and ensuring any needed restoration of riparian wetlands lost when the water impounded behind the low-head dam is drawn-down or any active reestablishment of stream channel or streambank.

Proposed NWP B. Living Shorelines: Our organizations support NWP B. Utilizing vegetation or other natural elements alone or in combination with harder structures works in harmony with natural processes and provides benefits to the environment. Importantly, living shorelines will often qualify as

the least environmentally damaging practicable alternative to the type of shoreline hardening that would otherwise proceed under NWP 13.

As documented in detail in comments on these NWPs submitted by the Southern Environmental Law Center¹, a substantial body of scientific literature demonstrates the many benefits of living shorelines over structural armoring. These benefits include: being more effective at preventing erosion; being more resilient to storms and sea level rise; being more cost effective to install and maintain than shoreline armoring; supporting higher abundances and greater diversity of marine organisms, and providing more structurally complex refuges and foraging opportunities. By contrast, armoring shorelines causes significant environmental harm and greatly reduces the function and resilience of highly productive and valuable ecosystems.

Our organizations also recommend that the Corps include a condition on NWP B that explicitly states that applicants cannot use non-native oysters as part of their living shorelines because of the negative impacts such oysters can have on shoreline ecosystems. In addition, our organizations note that the term “groin” (which appears throughout the NWP B Draft Decision Document) and “breakwater” should *not* be included in NWP B as both types of structures cause significant adverse impacts. As discussed below, NWP 13 should be withdrawn as it authorizes activities that cause significant adverse impacts to the nation’s waters.

NWP 3. Maintenance: Our organizations urge the Corps to withdraw NWP 3 which is causing significant adverse impacts in violation of Clean Water Act §404(e). At a minimum, the Corps should impose strict impact limitations (both areal and linear) and restrict covered activities to those that are in fact similar in nature as required by law. Instead of doing this, the Corps is proposing changes that would expand the adverse impacts of this permit.

NWP 3 does not include any impact limitations (areal or linear), but instead allows unlimited impacts to waters of the United States. NWP 3 also authorizes a host of activities that are not all similar in nature, including any type of activity to repair, rehabilitate, or replace any previously authorized structure regardless of the structure type. This permit also authorizes sediment removal, debris removal, placement of new or additional riprap, construction of temporary structures, fills, and other work necessary to conduct the maintenance activities.

This permit violates the requirements of the Clean Water Act both on its face and in its impacts. According to the Decision Document, the Corps estimates that NWP 3 will authorize approximately 26,500 activities that will impact approximately 2,830 acres of waters of the United States, including jurisdictional wetlands. According to the Decision Document, only “250 acres of compensatory mitigation would be required to offset those impacts.” No information is provided on the projected linear impacts of this NWP.

NWP 12. Utility Line Activities: Our organizations urge the Corps to withdraw NWP 12 since it authorizes activities that are known to cause significant adverse impacts in direct violation of Clean

¹ July 22, 2016 Comments Submitted by the Southern Environmental Law Center on behalf of the National Wildlife Federation, the North Carolina Coastal Federation, Restore America’s Estuaries, the Coastal Conservation League, and One Hundred Miles on Department of the Army, Corps of Engineers, Proposal to Reissue and Modify Nationwide Permits, Docket COE-2015-0017, 81 Federal Register 35,186 (June 1, 2016).

Water Act §404(e). At a minimum, NWP 12 should be further limited to ensure only minimal adverse environmental effects, particularly with respect to oil and gas pipelines.

NWP 12 authorizes massive pipelines and associated infrastructure, including oil and gas pipelines known to have significant adverse cumulative impacts on aquatic resources. These impacts include damage from spills and other “inadvertent” discharges into waters of the United States of oil, gas, drilling muds, and other associated contaminants. These discharges are all too foreseeable and highly destructive of the chemical and biological integrity of the nation’s waters.

Our organizations oppose the proposed new note 2 for NWP 12 that would explicitly allow multiple segments of the same pipeline to qualify for authorization through the NWP program.² The proposed note 2 would explicitly allow the cobbling together of multiple NWPs to authorize high impact pipelines and associated infrastructure – and the harmful spills, leaks, and discharges that accompany them – in violation of the Clean Water Act §404(e) minimal impact limitation; and in violation of legal requirements for rigorous, and public, environmental scrutiny and environmental safeguards established by the Clean Water Act, National Environmental Policy Act, Endangered Species Act and other environmental laws.

Our organizations call on the Corps to eliminate NWP 12 and instead require individual permits for pipelines and associated infrastructure, including oil and gas pipelines. We emphasize that, at the very least, the thresholds and PCN requirements for NWP 12 should be strengthened, not weakened.

NWP 13. Bank Stabilization: Our organizations urge the Corps to withdraw NWP 13 since it authorizes activities that are known to cause significant adverse impacts in direct violation of Clean Water Act §404(e). At a minimum, NWP 13 should be further limited to ensure only minimal adverse environmental effects.

The Corps has not—and cannot—demonstrate that NWP 13 is causing only minimal harm. Despite requiring PCNs for some (but by no means all) of the NWP 13 activities, the Decision Document does not provide any actual numbers on the use or impacts of this NWP. The Decision Document instead provides only a general estimate that on its face demonstrates that the impacts are far more than minimal (*i.e.*, an estimated “16,000 activities could be authorized over a five year period” that would impact “approximately 400 acres of waters of the United States, including jurisdictional wetlands.”) The cumulative impacts of these activities are magnified by the fact that NWP 13 (like NWP 12) can be used to authorize multiple bank stabilization efforts in the same river or coastal reach.

NWP 13 ignores the comprehensive body of science that shows that river bank and coastal armoring greatly reduces the function and resiliency of highly productive and valuable ecosystems, destroys important habitat, increases flooding in other locations, and can exacerbate the very erosion issues that bank stabilization activities seek to address. These actions also ignore the fundamentally important dynamic nature of rivers and coastlines. In addition, reissuance of NWP 13 ignores the significant

² The proposed note 2 states, in part: “For utility line activities crossing a single waterbody more than one time a separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization.” NWP 12 currently allows use for multiple segments of the same pipeline through an inappropriate definition and interpretation of the term “single and complete linear project,” and this definition and practice should also be prohibited.

cumulative impacts of authorized activities, fails to account for the impacts of climate change, and fails to assess impacts on threatened and endangered species. As noted above, the cumulative impacts are greatly exacerbated by failing to limit the number of times the bank stabilization permit may be used on a particular stream or reach of stream. These issues have been extensively highlighted by conservation organizations during previous reissuances of NWP 13.³

Our organizations call on the Corps to eliminate NWP 13 authorizations and require individual permits for bank stabilization activities. If NWP 13 is not retired altogether, as it should be, then NWP 13 should be modified to require that any applicant for a structural bank stabilization method must demonstrate that their proposed method would cause less damage than a nature-based approach such as a living shoreline, and that that their proposed method would be the least environmentally damaging practicable alternative. If NWP 13 is not retired, we support including “vegetative stabilization” in the first paragraph.

NWP 31. Maintenance of Existing Flood Control Facilities: Our organizations urge the Corps to withdraw NWP 31 which is causing significant adverse impacts in violation of Clean Water Act §404(e). At a minimum, the Corps should impose strict impact limitations (both areal and linear) and restrict covered activities to those that are in fact similar in nature as required by law.

NWP 31 does not include impact limitations (areal or linear). Instead it allows unlimited impacts to waters of the United States, including both wetlands and streams. NWP 31 also explicitly limits mitigation to one time only, despite the fact that maintenance efforts could be carried out on multiple occasions causing adverse impacts each time.

In its Decision Document, the Corps estimates that this NWP could be used to authorize approximately 225 activities impacting 500 acres of waters of the United States, including jurisdictional wetlands. According to the Decision Document, only “10 acres of compensatory mitigation would be required to offset those impacts.” No information is provided on the projected linear impacts. These impacts are significant on their face.

The impacts of NWP 31 are exacerbated by the fact that it also authorizes removal of vegetation from levees. Significant research points to the multiple benefits of vegetation on levees. Levee vegetation removal would be best addressed by a regional approach that reflects regional differences in soils, plant species, and climate, is based on science, and is permitted through individual permits with public notice and comment and state and federal interagency consultation.

General Condition 10. Fills Within 100-Year Floodplains: Our organizations urge the Corps to reinstate its earlier prohibitions on the use of high impact NWPs for development in the 100 year floodplain.⁴ Fills for new development in the 100-year floodplain should be carefully reviewed and restricted through the individual permit process.

³ Letter from 65 organizations to David Olson RE: Docket # COE-2010-0035; ZRIN 0710-ZA05, dated April 18, 2011.

⁴ Both the 2000 and 2002 NWPs prohibited the use of a number of high impact NWPs in the 100-year floodplain, including NWP 39 (residential, commercial, and institutional developments), NWP 40 (agricultural activities), NWP 42 (recreational facilities), NWP 43 (stormwater management facilities), and NWP 44 (mining activities).

Healthy floodplains provide critical protections for people and wildlife, and are increasingly important in the face of the increased storms and floods resulting from climate change. As demonstrated by the ever-increasing costs borne by federal disaster assistance programs, FEMA's NFIP flood insurance standards are not sufficient to minimize flood hazard and floodplain impacts.

Reinstating the prohibition on the use of high impact NWP is fundamental to complying with Executive Order 11988 (Floodplain Management), Executive Order 13653 (Preparing the United States for the Impacts of Climate Change), and the 2014 *USACE Climate Preparedness and Resilience Policy Statement*. Reinstating this prohibition is also fundamental to ensure coordinated federal, state, and local efforts to reduce U.S. flood losses. The public notice and comment, and interagency consultation, procedures required under individual permit review, ensures that federal, state, and local floodplain managers are aware of, and have the ability to propose limitations, to floodplain fills to reduce flood losses.

General Condition 16. Wild and Scenic Rivers: Our organizations support the proposed change that would require pre-construction notification for any NWP activity that will occur in a component of a designated Wild and Scenic River or in a river officially designated as a "study river" for possible inclusion in the Wild and Scenic River system.

General Condition 23. Mitigation: Our organizations urge the Corps to eliminate (not expand, as proposed) the reliance on post-permit mitigation (*i.e.*, mitigation buy-downs) to justify a finding that an activity has less than minimal impacts. Such reliance violates the plain language of the Clean Water Act, which requires that NWP can be issued only for activities with minimal adverse effects.

Moreover, the Corps has provided no scientific or other factual evidence upon which it could conclude that compensatory mitigation will in fact render activities' impacts minimal, and no such evidence exists. To the contrary, science shows that compensatory mitigation often fails which means that the simple existence of proposed mitigation cannot reduce the impacts of an activity to minimal levels.

Our organizations strongly oppose the addition of new provisions in General Condition 23 that would further clarify that mitigation can be used to buy-down impacts to no more than minimal so that a NWP can be used. Instead, our organizations call on the Corps to eliminate all language allowing the use of mitigation buy-downs in General Condition 23 and elsewhere. General Condition 23 (and each NWP as appropriate) should also be revised to: (1) require that applicants take all steps practicable to avoid and minimize adverse impacts, as required by law; (2) eliminate the ability of the District Engineer to allow riparian area compensatory mitigation in lieu of compensatory wetland mitigation for wetland losses; and (3) make mitigation requirements consistent for all NWP. Our organizations support the proposed language requiring use of native species to restore riparian and other areas.

Conclusion

Our organizations urge the Corps to adopt the recommendations in these comments, and stand ready to work with the Corps to fix the mistaken approach to permitting activities that would be authorized

through the NWP package as proposed. Please do not hesitate to contact Melissa Samet at 415-762-8264 or any of the undersigned with regard to these comments.

Sincerely,

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