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cc:  
Subject: Attachment to NRDC NEPA Comments

09/20/02 09:48 AM

NEPA Task Force

P.O. Box 221150

Salt Lake City, UT 84122

**Re: Comments Concerning NEPA Implementation**

The Natural Resources Defense Council (NRDC) submits the following attachment to our comments regarding the importance of the National Environmental Policy Act (NEPA) to promoting sound and accepted government decisions. This document concerns the Draft Environmental Impact Statement for the Nationwide Permit Program and, in part, discusses our concerns with the failure of this U.S. Corps of Engineers document to comply with NEPA. Please include this document in your records. Please contact me if you have any questions concerning this document.

Sincerely,

Robbin Marks,

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October 29, 2001

BY FEDEX  
AND EMAIL

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Dear Mr. Brumbaugh:

On behalf of our organizations and their members and supporters across the nation, the Natural Resources Defense Council, Earthjustice, National Wildlife Federation, and American Rivers file the following comments regarding the Draft Environmental Impact Statement for the Nationwide Permit Program. The Notice of Availability for the Draft Programmatic EIS ("PEIS") was published in the Federal Register at 66 Fed. Reg. 39499 (July 31, 2001) and the public comment period for this proposal was extended to today by notice published at 66 Fed. Reg. 47457 (September 12, 2001).

At the outset, we offer the observation that the draft PEIS is a document that appears to be at war with itself. The data, observation, and anecdotal evidence that it contains points overwhelmingly to the conclusion that the current program has significant impacts on the human environment and thus the Corps has a legal duty to complete an EIS for the program, and further, that the program has greater than minimal adverse effects, individually and cumulatively, and thus is in violation of §404 of the Clean Water Act. Nevertheless, in the face of the evidence at hand, the PEIS stubbornly and perversely holds fast to the Army Corps' dual longstanding, unsupported (and insupportable) contentions: that an EIS is not required for the NWP program (and in fact the program has "no significant impact" on the environment) and that the NWP program satisfies the requirements of the Clean Water Act.

The question of the NWP program's compliance with the Clean Water Act has been addressed in detail in our recent comments submitted on October 9, in response to the Corps' proposal to reissue and modify nationwide permits for activities involving discharge of dredged or fill material, published in the Federal Register at 66 Fed. Reg. 42070 (August 9, 2001). Because there is a great deal of overlap between issues surrounding the legality of the Corps' proposal to modify and reissue the NWPs, and the Corps' failure to satisfy the requirements of NEPA, we have attached a copy of our October 9 comments, and the attachments to those comments, to the comments we are submitting today. Our October 9 comments (and their attachments) are thus incorporated

by reference to the comments herein, and we ask that the entire package be included in the administrative record for the development of this PEIS.

Per the instruction of Mr. Robert Brumbaugh, we are emailing these comments, along with two sets of attachments (October 9 NRDC comments and October 5 Meyer letter) to the Corps. In addition, we were instructed by Mr. Brumbaugh that, because of the difficulty of hand delivery, particularly in the aftermath of the September 11 attacks on the Pentagon and World Trade Center, it would be better not to attempt hand delivery of the additional attachments that we are not able to email, but that we should send hard copies of those additional attachments today by FEDEX. Mr. Brumbaugh assured us that those attachments sent by FEDEX today would be included in the administrative record for the PEIS, as timely attachments to our comments submitted by email. Based upon these instructions, we are sending today by FEDEX a hard copy of these comments as well as all relevant attachments.

In the comments below, we outline the history of the development of this PEIS, as part of the series of proposals between June 1996 and the present to revise the NWP program; discuss our view that, contrary to the Corps' repeated assertions, an EIS for the NWP program and for individual NWPs is required; and outline in both general and specific terms the shortcomings and failures of the draft PEIS.

We know that many staff at all levels of the Army Corps desire to operate a permit program that complies with both NEPA and the Clean Water Act, and provides protection for wetlands, streams and other natural resources and habitats. We urge the Corps to rethink its current approach to the Nationwide Permit Program, abandon efforts to weaken the existing program and instead fulfill its overdue obligation to complete an EIS for the NWP program (and the individual nationwide permits) according to the requirements of NEPA.

## **I. HISTORY OF THE CURRENT PROPOSAL**

The Corps' current effort to develop a "voluntary" PEIS for the Nationwide Permit program is the outgrowth of a five year (and ongoing) process to determine the direction and content of the NWP program.

In June 1996, the Army Corps published a Proposal to Issue, Reissue and Modify Nationwide Permits in 61 Fed. Reg. 30780. Nationwide permits had previously been issued, reissued and modified in 1991.<sup>1</sup> Comments submitted to the Corps on September 3, 1996 by the Natural Resources Defense Council ("NRDC"), the National Wildlife Federation ("NWF"), and others asserted that, by failing to complete an EIS for individual NWPs as well as the overall NWP program, the Corps was violating the requirements of NEPA.

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<sup>1</sup> 56 Fed. Reg. 14598 (April 10, 1991); 56 Fed. Reg. 59110 (November 22, 1991). Nationwide permits are authorized for no longer than five years under the terms of §404(e) of the Clean Water Act, 33. USC §1344(e).

In December 1996 the Army Corps issued a Final Notice of Issuance, Re-Issuance, and Modification of Nationwide Permits (61 Fed. Reg. 65,874, December 13). In that notice, the Corps announced its intent to issue a modified version of NWP 26 that would expire in two years. The December 1996 notice signaled the Corps' intent to pursue additional changes to reform the NWP program.

In November 1997, NRDC and the League for Coastal Protection sent a notice letter to Togo D. West, then-Secretary of the Army, alleging the Corps' continued violation of the Clean Water Act, the Endangered Species Act and NEPA. The letter argued that the Corps was required to complete an EIS for individual NWP permits as well as the NWP program. A lawsuit concerning these allegations was filed in federal district court in February 1998. See Natural Resources Defense Council v. West, Civ. No. 98-0560 (N.D. Cal.)

On June 23, 1998 the Corps issued a Finding of No Significant Impact for the Nationwide Permit Program. ("1998 FONSI") As discussed in greater detail below, the 1998 FONSI found that "because the NWP program authorizes only those activities that have minimal adverse environmental effects, individually or cumulatively" (the statutory standard for compliance with the Clean Water Act), the NWP program "does not have a significant impact on the human environment and does not require the preparation of an EIS."

Nevertheless, one week later, in a notice published at 63 Fed. Reg. 36039 (July 1, 1998), as part of its next proposal to issue and modify nationwide permits, the Corps announced its intention to prepare a PEIS "for the entire NWP program." The Corps stated "the PEIS will provide the Corps with a comprehensive mechanism to review the effects of the NWP program on the environment, with full participation of other Federal agencies, States, Tribes, and the public. The corps will initiate the PEIS by mid-1999 and complete it by December 2000. The Corps plans to complete the PEIS prior to the next scheduled reissuance of the NWPs in December 2001." 63 Fed. Reg. at 36043.

Commenting upon the Corps' July 1 proposal to issue and modify nationwide permits, NRDC (August 31, 1998), NWF (September 9, 1998), Environmental Defense (August 3, 1998) and other organizations again asserted the legal duty of the Corps to complete an EIS for the Nationwide Permit program prior to issuance or modification of those permits.<sup>2</sup>

On March 22, 1999 the Corps published a Notice of Intent and request for comments regarding the proposed scope for the PEIS. (64 Fed. Reg. 13782). In this notice, the Corps stated: "The overall purpose of the PEIS is to review and evaluate the NWP program as a whole, to ensure that the NWP program authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. The PEIS will provide a programmatic comprehensive and structured review of the effects of the NWP program on the environment. The intent of the PEIS is to evaluate the procedures and process associated with the NWP program and not to examine impacts

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<sup>2</sup> NRDC had also submitted comments on July 30, 1998 opposing the reissuance of NWP 26 for 3.5 months, in part upon the failure of the Corps to comply with NEPA in proposing the reissuance.

associated with individual NWP authorizations.” This appears to have been an unwarranted effort on the part of the Corps to restrict the scope of the proposed EIS from that outlined in the July 1, 1998 proposal.

On July 21, 1999 the Corps published the next Proposal to Issue and Modify Nationwide Permits. 64 Fed. Reg. 39252. In comments to the Corps regarding this proposal, NWF and other organizations again asserted the legal duty of the Corps to complete an EIS for the Nationwide Permit program prior to issuance or modification of those permits. The Final Notice of Issuance and Modification of the Nationwide Permits, which established the NWP program as it exists today, was published March 9, 2000 ( 65 Fed. Reg. 12818).

On July 31, 2001, the Corps issued a notice of availability of the draft PEIS (66 Fed. Reg. 39499).<sup>3</sup> On August 9, 2001, the Corps published in the Federal Register a proposal to reissue and modify nationwide permits for activities involving discharge of dredged or fill material under §404 of the Clean Water Act. 66 Fed. Reg. 42070. Comments concerning the Corps’ proposal were submitted on October 9, 2001 by NRDC, NWF, Earthjustice, American Rivers and others. In those comments, the organizations again asserted that the Corps must complete an EIS before further issuance or modification of nationwide permits.

Under NEPA, the obligation to trigger an EIS is triggered by a "proposal" for action with significant environmental effects. § 102(2)(C), 42 U.S.C. § 4332(2)(C). “Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated.” 40 C.F.R. § 1508.23. Between June 1996 and the present, the Corps has published in the federal register at least four proposals for major federal action concerning revisions to the Nationwide Permit program, yet no EIS has been prepared by the Corps. Thus, another five-year cycle of nationwide permits is nearing completion, yet the Corps continues to refuse to take the steps necessary to comply with its legal obligations under NEPA.

While the draft PEIS contains some interesting information, it does not come close to satisfying the requirements for an EIS under NEPA and the implementing regulations adopted by CEQ. If the draft PEIS serves any useful function, it adds additional data and evidence to the already voluminous existing record strongly establishing that the existing Nationwide Permit program has environmental effects that are significant within the meaning of NEPA, and more than minimal within the meaning of § 404(e).

## **II. AN EIS ANALYZING THE INDIVIDUAL AND CUMULATIVE IMPACTS OF NWPs IS MANDATORY, NOT VOLUNTARY.**

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<sup>3</sup> The July 31, 2001 notice only referenced the narrower March 22, 1999 Federal Register notice concerning the Corps’ intent to prepare a PEIS, not the July 1, 1998 notice.

The Corps argues that an EIS is not required for NWP -- and thus that the PEIS need not comply with the NEPA requirements governing EISs. See, e.g., 1998 NWP FONSI ¶ 2; 66 Fed. Reg. 47457 (Sept. 12, 2001). The Corps' position is not merely that no programmatic EIS is required for NWP as a group, but also that no EIS is required at all for any NWP individually.

The Corps is wrong on both counts. An EIS is required, and that EIS must consider not merely the impacts of NWP individually, but also the cumulative impact of such permits.

#### **A. The Corps Must Prepare An EIS for NWP.**

NEPA requires preparation of an EIS in connection with any proposal for "major Federal actions significantly affecting the quality of the human environment." NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C). Issuance of authorizations such as general permits are clearly federal actions for purposes of NEPA, whether they be considered rules or permits. See, e.g., 40 C.F.R. § 1508.18(b)(1) and (4). Thus, the key to determining whether any such permit requires an EIS is whether it will "significantly" affect the human environment.<sup>4</sup>

Under applicable regulations, this significance determination must be made in an "environmental assessment" (EA). 40 C.F.R. § 1501.4.<sup>5</sup> General principles of administrative law and applicable regulations require the Corps to explain -- and support with substantial evidence -- any purported finding that impacts are insignificant. See Oct. 9 NRDC Comments at 3-4, 10-11 (citing caselaw); 40 C.F.R. § 1508.9(a)(1) (EA must "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact") (emphasis added).

No document prepared by the Corps -- not the EAs issued in connection with previous NWP, the 1998 FONSI, the August 9 NWP proposal, or the PEIS -- provides substantial evidence or a reasoned explanation for concluding that any NWP, much less all NWP, fall below NEPA's significant effects threshold. Indeed, far from taking the requisite "hard look" at the problem, see, e.g., Maryland-National Capital Planning Commn. v. USPS, 487 F.2d 1029, 1040 (D.C. Cir. 1973), all of these documents speak at a high level of generality that fails to even consider or analyze the relevant factors necessary to determine significance. Nowhere is there a consideration of the site-specific factors necessary to gauge the extent of environmental impacts -- for example, the impact on the environmental values of specific areas. See, e.g., pp.15-17, infra (PEIS's substantive discussion of NWP 21, which have impacted over 87 miles of streams, is limited to a single uninformative and generic paragraph that does not address the specifics). Other failings include:

<sup>4</sup> A federal action with significant environmental effects is necessarily "major," and requires an EIS. See, e.g., 40 C.F.R. § 1508.18 ("Major reinforces but does not have a meaning independent of significantly.") (citation omitted).

<sup>5</sup> The Corps has not claimed, and could not accurately claim, that NWP are covered by any "categorical exclusion" that would warrant dispensing with preparation of EAs. See 40 C.F.R. §§ 1501.4(a)(2), 1508.4.

**Failure to consider all impacts to "the human environment."** The Corps has improperly limited the scope of its impact analysis to impacts on waters of the U.S., or the "aquatic" environment. Oct. 9 NRDC Comments at 5-6. NEPA requires analysis of impacts, not solely to the "aquatic" environment, but to "the human environment." § 102(2)(C). "Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14 (emphasis added). Accord, id. §§ 1508.8 (defining "effects" to include all environmental effects "caused by the action," including *inter alia*, "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems"), 1508.7 (defining "cumulative impact" to encompass cumulative impact on "the environment").<sup>6</sup>

**Failure to consider all direct, indirect, and cumulative impacts.** Under NEPA, all environmental impacts must be considered, "whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8. The Corps has failed to properly consider even the direct and indirect impacts of any individual NWP, much less the cumulative impacts of the various NWPs together and with other environmentally damaging actions.

**Direct and indirect impacts.** Direct effects are those "which are caused by the action and occur at the same time and place," while indirect effects are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(a) and (b). Here, the Corps has not considered the full direct and indirect impact of each NWP nationally. In addition to other flaws (such as ignoring non-aquatic impacts), the Corps has subdivided the impacts evaluation and analysis, so that it will be performed by "district engineers on a watershed basis." 1998 NWP FONSI ¶ 4.<sup>7</sup> This approach at best produces a series of district-level evaluations, each of which evaluates the significance of some of the impacts of each permit, thus contravening the requirement to evaluate the significance of all impacts "caused by the action." 40 C.F.R. § 1508.8. Indeed, "[s]ignificance cannot be avoided by terming an action temporary or by breaking it down into small component parts," id. § 1508.27(b)(7) (emphasis added) -- yet that is just what the Corps' approach does.

**Cumulative impacts.** In gauging the significance of proposed action, the Corps must consider not only direct and indirect impacts, but "cumulative" impacts as well. Id. § 1508.8. "'Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably

<sup>6</sup> The Corps has not asserted that its approach is justified by the Corps' NEPA regulations, and any such argument would constitute a misinterpretation of those regulations. See Oct. 9 NRDC Comments at 15-17. In any event, the Corps' regulations lack authority to override NEPA and the CEQ regulations.

<sup>7</sup> The cited portion of the FONSI discusses cumulative impacts of NWPs. Under NEPA, the combined impact of all activities authorized by any given NWP constitutes direct and indirect impact to the extent such impacts are "caused by" the NWP authorization. 40 C.F.R. § 1508.8. However, regardless of whether such impacts are deemed to be direct, indirect, or cumulative, the point made in the text remains: subdividing impacts analysis and evaluation to the district engineer level produces significance determinations that fail to match the national reach of the NWPs.

foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." Id. § 1508.7. As in the case of direct and indirect impacts, the Corps has failed to analyze such impacts adequately. First, although the scope of the proposed action -- issuance of NWP -- is nationwide, the Corps has failed to analyze cumulative impacts of that nationwide action. Instead, the Corps has subdivided the impact analysis into a series of regional analyses, none of which considers the full extent of cumulative impacts of the nationwide permits at issue. 1998 NWP FONSI ¶ 4.

Second, the Corps has failed to analyze adequately the full range of actions with cumulative impacts. Applicable regulations caution that "[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7 (emphasis added). See also id. § 1508.27(b)(7) (in gauging significance, an agency must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.") (emphasis added).

Thus, for example, in gauging significance for each proposed NWP, the Corps must consider cumulative impacts of that NWP when added to other proposed NWPs (i.e., the NWPs proposed in the August 9 Federal Register notice) -- as well as other cumulative actions, whether by the Corps or by another "agency (Federal or non-Federal)." See 40 C.F.R. § 1508.7. Such other actions would include Corps civil works projects; Corps (or, in delegated states, state-issued) § 404 individual permits; non-NWP § 404(e) general permits; and other discharge permits (such as § 402 permits) issued by EPA or states.

In addition, such actions would include actions undertaken without permits (either illegally (in situations where a permit is required), or lawfully (in situations where no permit is required)). For example, the NPDES and § 404 program apply to discharges into U.S. waters from point sources. However, U.S. waters can be harmed by activities that regulators do not treat as regulable discharges -- such as nonpoint source runoff, § 404(f)(1) activities, addition of "pollution" rather than "pollutants," and "incidental fallback." Likewise, some waters treated as outside the scope of "waters of the U.S."<sup>8</sup> can be harmed by pollution or pollutants, with cumulative effects on resources that are waters of the U.S. (for example, an isolated water that may be used by the same species -- such as migratory birds -- that use U.S. waters).

Moreover, such actions would include actions affecting terrestrial resources, where impacts to such resources interact cumulatively with direct and indirect impacts of NWPs (as for example, where other actions damage terrestrial habitat of species that also use U.S. waters damaged by NWPs).

Consistent with applicable regulations, the Corps must consider not only those above-characterized actions that are contemporaneous with the above proposal, but also

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<sup>8</sup> See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 121 S. Ct. 675 (2001).

those that occurred previously, and those future actions that are "reasonably foreseeable." 40 C.F.R. § 1508.7 (cumulative impact is the impact on the environment resulting from the incremental impact of the action "when added to other past, present, and reasonably foreseeable future actions") (emphasis added). See also *id.* §§ 1508.8 (indirect impacts include "reasonably foreseeable" impacts caused by the action that are later in time or farther removed in distance). See, e.g., *Fritiofson v. Alexander*, 772 F.2d 1225, 1242-43 (5th Cir. 1985) (determination of significance must factor in all reasonably foreseeable impacts, even of actions that haven't yet been proposed).

Thus, for example, many areas are currently stressed because of past actions (such as wetlands whose extent has been vastly reduced by prior agricultural conversions or development activities, and streams that have been degraded by past channelization or mining). Likewise, many areas can be expected to suffer impact from future, reasonably foreseeable actions (such as future development, agricultural conversion, or increased pollution in areas where current and recent trends give reason to foresee such developments). The significance of NWP impacts must be gauged cumulatively with those past and future impacts.

The Corps has egregiously failed to consider these impacts, much less to make a reasoned determination, supported by substantial evidence, that they are insignificant.

**Failure to consider other factors relevant to a determination of significance.** In addition to the factors enumerated above and in our October 9 comments, the Corps has failed to consider other factors relevant to the evaluation of significance.

*Potential Impacts.* An EIS is required, not merely where significant impacts are certain or highly likely, but also where such impacts "may" occur. See, e.g., 40 C.F.R. § 1508.3 ("Affecting' means will or may have an effect on.") (emphasis added). The Corps has failed to factor this standard into its significance evaluation, and certainly has not determined -- or offered a reasoned basis or record support for determining -- that there is no reasonable potential for significant impact. Indeed, any such assertion would be absurd in light of the record documenting NWP impacts to thousands of acres of wetlands and other U.S. waters. Such impacts -- especially when considered in light of other indirect and cumulative impacts -- are more than sufficient grounds for concluding that significant impacts "may" result. See, e.g., 1998 FONSI ¶¶ 3(c) (conceding that even a one-third acre loss of high value aquatic resources "may" constitute more than a minimal adverse effect); 3(b) (recognizing that some NWPs "could" involve more than minimal adverse effects).

*Characteristics of area.* The determination of significance must evaluate "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). NWPs of course impact "wetlands," a factor weighing strongly in favor of significance. The Corps has failed to acknowledge this elementary conclusion, or to factor in other aspects of the § 1508.27(b)(3) list -- for example, it has failed to identify the extent to which areas directly or indirectly impacted

by NWP's are "ecologically critical," "park lands," or "wild and scenic rivers." There is ample reason to expect impacts to some or all such areas. The record, for example, amply documents the ecologically critical function that wetlands and other U.S. waters serve.

*Public health or safety.* Also to be evaluated is "[t]he degree to which the proposed action affects public health or safety." *Id.* § 1508.27(b)(2). Flooding and reduced water quality are well-recognized consequences of NWP-permitted actions such as wetland degradation and stream channelization. The Corps fails to adequately address these factors in its significance evaluation.

*Controversy.* The significance determination must likewise evaluate "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." *Id.* § 1508.27(b)(4). For years, environmental organizations, scientists, and others have vigorously urged the Corps to recognize the significance of NWP's impacts on wetlands, streams, and other environmental resources. Thus, the Corps' attempt to characterize NWP impacts as minimal is "highly controversial," to say the least. Yet the Corps has failed to recognize the relevance of this factor to its evaluation of significance.

*Endangered species, and scientific resources.* The factors relevant to significance include "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973." *Id.* § 1508.27(b)(9). Given the importance of wetlands and other U.S. waters to endangered and threatened species, NWP impacts are likely to adversely affect such species and their habitat. Moreover, the scientific value of such species, as well as the U.S. waters where they live, is high, thus implicating § 1508.27(b)(8)(agency must evaluate "[t]he degree to which the action .. may cause loss or destruction of significant scientific ... resources"). Once again, the Corps' significance evaluation does not account for these factors.

*Violation of law.* As previously shown, issuance of the proposed NWP's would violate CWA § 404(e). October 9 NRDC Comments at 2-10 and *passim*. Accordingly, the requirement that the Corps evaluate "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment" weighs strongly in favor of significance. This factor, too, was ignored by the Corps' significance evaluation.

**The Corps' rationale for asserting the insignificance of impacts is meritless.** Instead of evaluating significance in accordance with NEPA and applicable regulations, the Corps offered two rationales it claimed support a finding of insignificance. Both are meritless.

First, the Corps claimed that "the NWP program authorizes only those activities that have minimal adverse environmental effects, individually or cumulatively, which is a much lower threshold than the EIS threshold." 1998 FONSI ¶ 2. To the contrary, as

shown in detail in our October 9 comments, the Corps has not lawfully determined that any NWP, much less all of them together, authorizes only activities with minimal effects.

Second, the Corps argues that a finding of no significant impact is permissible because the Corps has authority to take action in the future to limit or revoke NWPs. 1998 FONSI ¶¶ To the contrary, before taking action that may have significant effects, an agency must first prepare an EIS. The agency cannot evade that duty simply by asserting that it has authority to take corrective action later. That is especially true here, where the corrective action is discretionary,<sup>9</sup> has not yet even been identified (and therefore its effectiveness in reducing significance of impacts cannot be evaluated), and will be taken regionally rather than nationally (so that evaluations of whether there are significant environmental impacts warranting corrective action will be made piecemeal, without considering the full extent of impacts nationwide). Simply pointing to such agency authority falls far short of satisfying the Corps' duty to "convincingly establish[]" that mitigation has sufficiently reduced impacts. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982).

In short, the Corps failed to make a reasoned, record-supported finding of no significant impact for any NWP -- much less all of them together. Under NEPA and applicable regulations, the conclusion is inescapable that many NWPs individually trigger NEPA's significance threshold, and that the cumulative impact of NWPs together more than suffices to do so.

#### **B. An EIS for NWPs Must Consider Cumulative Impacts of All NWPs.**

Having concluded that the EIS requirement is triggered by NWPs individually, it necessarily follows that the EIS must consider the cumulative impact of all NWPs.

First, under applicable regulations, the scope of the EIS must encompass all NWPs. For example, the various NWPs constitute "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(2) (emphasis added). For reasons already discussed, the NWPs presented in the August 9 notice -- all of which constitute "proposed actions" -- would have cumulatively significant impacts.

Likewise, the proposed NWPs represent "[s]imilar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." Id. § 1508.25(a)(3). The NWPs share "common timing": the Corps has proposed them in the same notice, and plans to finalize them contemporaneously as well. Likewise, they share "common geography": they are all nationwide in scope, and numerous individual watersheds around the nation will suffer activities under multiple NWPs. Given that the various NWPs are closely interrelated (indeed, the Corps has justified specific NWPs by reference to other NWPs), that all of

<sup>9</sup> See, e.g., 33 C.F.R. §§ 330.1(a), 330.2(g), 330.4(e), 330.5(c) and (d).

them invoke a single statutory provision (§ 404(e)), and that they will in many cases be used for the same project (so-called "stacking"), "the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement." Id.

Scoping an EIS involves more than just defining the actions to be covered -- it must also define the impacts to be covered as well. Even assuming arguendo that the actions considered in an NWP EIS could exclude other NWPs, the impact of such other NWPs would still need to be considered under the clear requirement that an EIS consider not just direct and indirect impacts, but cumulative impacts as well. See, e.g., id. § 1508.25(c)(3) (the scope of an EIS encompasses "cumulative" impacts); §§ 1502.14 and 1502.16 (EIS must consider "the environmental impacts" of the proposed action); 1508.8 ("effects" -- which is "synonymous" with "impacts" -- includes "direct, indirect, or cumulative" effects). Such cumulative impacts encompass "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." Id. § 1508.7. Given that actions taken by other federal agencies -- as well as nonfederal agencies and private parties -- must be considered in the evaluation of cumulative impact, the Corps can scarcely argue that its own actions can lawfully be excluded from cumulative impacts analysis.

### III. THE PEIS IS INADEQUATE TO MEET THE REQUIREMENTS OF NEPA

Unfortunately, the draft PEIS in its current form fails to satisfy several of the regulatory requirements for an EIS as outlined in the CEQ regulations. These failings of the draft PEIS are discussed below.

#### A. Reasons why the Draft PEIS fails to Comply with NEPA

##### 1. The PEIS does not address the current proposal being considered by the Corps.

On August 9, the Corps published in the Federal Register its most recent proposal to modify and reissue permits under the Nationwide Permit program. The August 9 proposal contains many changes that weaken the current version of the program, which was last revised in March 2000. The proposal published on August 9 was signed by Hans A. Van Winkle, Major General, U.S. Army, Director of Civil Works on July 23, 2001. The Notice of Availability for the PEIS was published in the Federal Register on July 31. Although the development of the Corps' proposed action and the PEIS were contemporaneous, the PEIS makes no mention of the Corps' proposal. This approach violates NEPA, which requires an EIS to address "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," "alternatives to the proposed action," and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." § 102(2)(C)(i), (ii) and (iii) (emphasis added). It also

violates applicable regulations, which require the EIS to "present the environmental impacts of the proposal," discuss "the environmental impacts of the alternatives including the proposed action," and to "[i]dentify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement." 40 C.F.R. §§ 1502.14, 1502.16, and 1502.14(e) (emphasis added). Here, the August 9 proposal plainly constitutes "the proposed action," "the proposal," and "the preferred alternative." Accordingly, the omission of that proposal from the PEIS violates NEPA and implementing regulations.

2. The Corps intends to finalize its current proposal prior to completion of the EIS.

When the Corps first announced in July 1998 its intention to complete an EIS for the Nationwide Permit program, the Corps stated that it planned "to complete the PEIS prior to the next scheduled reissuance of the NWP's in December 2001." 63 Fed. Reg. at 36043. The Corps has apparently changed its plans in this regard. In the September 12, 2001 notice extending the comment deadline for the PEIS (66 Fed. Reg. 47457) the Corps states that it "had hoped to complete the PEIS prior to reissuance of the NWP's that were proposed on August 9, 2001...However, with the extension of the comment period the Corp will not be able to complete the PEIS before the NWP's will need to be issued in order to ensure that the existing NWP's do not expire without new NWP's to take their place." Id.

The Corps claims it can proceed without completion of the PEIS, because the PEIS is allegedly "voluntary." 66 Fed. Reg. 47457. To the contrary, as shown in detail above, an EIS is mandatory. Therefore, under the requirements of NEPA and applicable regulations, an EIS must be completed before the Corps takes final action pursuant to the August 9 proposal. NEPA expressly requires preparation of an EIS in connection with any "proposal[]" for federal action with significant environmental effects. § 102(2)(C). To take final action before completing the EIS that must accompany proposed action violates the express terms of NEPA. Such an approach also violates applicable regulations, which provide that, where an agency proposal requires an EIS, no decision on the proposal can be made until thirty days after the EIS is finalized. 40 C.F.R. § 1506.10(b)(2). Accord, id. §§ 1505.1 (requiring inter alia that agency decisionmaking procedures "[d]esignat[e] the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them;" "[r]equiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings;" and "[r]equiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions") (emphasis added); §1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.") (emphasis added); 1502.2(g) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"); §1508.23 ("[p]reparation of an environmental impact statement on a proposal should be timed...so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal.").

The Corps ignores the above statutory and regulatory authorities, apparently assuming that 40 C.F.R. § 1506.1(c) is the only provision governing the relationship between the timing of the EIS and the timing of NWP issuance. However, § 1506.1(c) applies to the timing of a "program environmental impact statement." (Emphasis added.) It bears emphasis that the Corps has prepared no EIS -- not even an individual, non-programmatic EIS -- for any nationwide permit, although the EIS requirement plainly applies to at least many of those permits. Section 1506.1(c) offers no support whatsoever for proceeding with individual actions covered by an EIS requirement before completion of the corresponding EISs. Such a course is, as shown above, forbidden by NEPA and numerous regulatory provisions.

Moreover, the Corps' approach likewise violates § 1506.1(c) itself. The Corps' major reason for dismissing the relevance of § 1506.1(c) -- the assertion that a PEIS is "voluntary" -- has been shown above to be erroneous. Moreover, § 1506.1(c)

states:

While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action: (1) Is justified independently of the program; (2) Is itself accompanied by an adequate environmental impact statement; and (3) Will not prejudice the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

The Corps' August 9 proposal does not and cannot meet the criteria for an exception to the baseline prohibition of § 1506.1(c). First, the NWPs the Corps is on the verge of issuing have not been, and cannot be, justified independently of the NWP program -- to the contrary, they are the NWP program. Second, none of the NWPs will be accompanied by any EIS, much less a valid one. Third, the NWP issuance planned by the Corps will profoundly prejudice the ultimate decision on the program -- indeed, it will be that ultimate decision.

In short, the Corps must draft and finalize an adequate EIS before issuing NWPs, not after.

### 3. The Corps' analysis of the site-specific impacts of the proposed action is inadequate.

The Corps has failed to adequately identify specific areas subject to discharge of dredged or fill material under the Nationwide Permit program or even types of areas that are likely to be affected. Numerous types of wetlands, streams and other habitats are subject to discharges under the NWP program, but the PEIS relies on overly broad categories of waters (i.e. palustrine, lacustrine, riverine etc.) in analyzing the potential impacts of these discharges. As a result, dissimilar ecosystem types such as, bogs, fens, vernal pools,

coastal wetlands, lakes, ephemeral streams, bottomland hardwood wetlands, intermittent and perennial streams, mud flats, vegetated shallows, riffle and pool complexes and dozens of other particular types of waters of the United States are considered in an undifferentiated mass. No discussion of specific functions or values for these types of systems is presented.

As we discussed in our October 9 comments concerning the Corps' August 9 proposal to revise and modify the NWPs (attached and incorporated by reference), an interagency team, including Fish and Wildlife Service, National Marine Fisheries Service and Corps personnel has recommended that wetlands and other impacted ecosystems be defined and analyzed with much greater specificity. NRDC comments, p. 12. In order to complete an adequate EIS, the Corps must analyze past, present and reasonably foreseeable future impacts with much greater specificity than is accomplished in the PEIS.

4. The PEIS fails to adequately consider the cumulative impacts of the Nationwide Permit program.

In analyzing the effect of the Nationwide Permit program on the human environment, the Corps is required to consider the cumulative impact of past, present and reasonably foreseeable future actions including connected and cumulative actions. A cumulative impact is defined as:

“[T]he impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. §1508.7

Regulations implementing NEPA require that a federal agency consider “[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(2)

The Corps falls woefully short of this duty. In addition to the points discussed above and in our October 9 comments, the PEIS relies primarily on only one year's worth of permitting data (1998)<sup>10</sup> and contains no analysis of the impacts on the environment allowed by previous nationwide and other general permits. Although the Corps has been permitting discharges of dredged or fill material into waters of the United States with general permits for at least twenty years, no data specific to that period is considered in the PEIS. Instead, the PEIS is limited to broad estimates of historic loss for wetlands. Second, the Corps relies heavily on extrapolation from an examination of “program implementation” in only 8 of the 38 Corps Districts. Such a limited view of “present” impacts is inadequate to satisfy EIS requirements. Third, the PEIS includes no projections of reasonably foreseeable impacts from the issuance of future permits and their impacts.

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<sup>10</sup> The 1998 data set is incomplete, containing information for wetlands loss from only 35 of 38 Corps Districts. PEIS p. 4-15.

With such a limited analysis of what types of ecosystems have been, are being, or will be affected in the foreseeable future, the PEIS cannot be said to adequately considering cumulative impacts.

The PEIS contains almost no discussion on how the discharges it has permitted, is permitting and will likely permit, affects wildlife and flora, including those that are threatened and endangered. Given the enormously important role that wetlands (to name one ecosystem heavily impacted by the Nationwide Permit program) play in the nurturing and protection of threatened and endangered species, a thorough analysis of the NWP program's effects on wetlands and wetlands associated species must be part of an adequate EIS.

The PEIS also has little to say about the impacts or potential impacts upon humans from the NWP program. These include increased flooding, degradation of water quality (including drinking water) and loss of groundwater recharge capacity as well as loss of recreational, scientific and aesthetic opportunities.

An example of the type of analysis that the Corps must conduct in order to comply with the requirements of NEPA can be found in the October 5, 2001 letter from Dr. Judy L. Meyer and 39 other scientists to the Corps commenting upon the August 9 proposal to revise and modify the Nationwide Permits. The letter describes in considerable detail individual and cumulative impacts to headwater streams caused by the NWP program and other authorized permits. We have attached a copy of this letter with our comments for inclusion in the record and incorporate it by reference.

5. The Corps has failed to adequately analyze the impacts of individual nationwide permits, a necessary precursor to analyzing the cumulative impacts of the nationwide permits.

The Corps' failure to adequately consider the cumulative impacts of the Nationwide Permit program are further illustrated by their inadequate analysis of particular nationwide permits. The PEIS treatment of NWP 21 is an example of the failure of the Corps' approach.

The discussion of NWP 21 in the PEIS is completely inadequate. That permit is only mentioned on eleven pages (see pp. S-5, 2-6, 2-10, 2-17, 4-21, 4-22, 5-13, 5-23, C-28, C-29, C-41). The word "headwaters" is only mentioned eleven times (see pp. 4-21, 5-26, 2-2 (twice), 2-17, 2-21, 3-4, C-29, C-39 (twice), C-41). The only substantive discussion on NWP 21 is a single paragraph in Appendix C, p. C-41:

*NWP 21* Nationwide permit 21 authorizes discharges of dredged or fill material into waters of the United States for surface coal mining activities. It accounts for a very low percentage of nationwide permit verifications issued in FY 1998, a relatively high percentage of the total area impacted (9.5%), and the largest individual areas impacted. Both previously mined and unmined areas are

included. A bond is required for compensatory mitigation if one is not required by a Federal or state agency. A compensatory mitigation plan approved by the Office of Surface Mining or the state is required. There is no acreage limit. Notification to the district engineer is required for all activities. Each application reviewed by the Corps to determine if the activity, with any required compensatory mitigation, will result in minimal adverse effects on the aquatic environment.

Despite the brief recognition that NWP 21 results in “a relatively high percentage of the total area impacted (9.5%), and the largest individual areas impacted,” there is virtually no analysis of those impacts in the PEIS. A table in Appendix F indicates that NWP 21 authorizations in FY 2000 alone impacted over 87 miles of streams, but there is no analysis of stream impacts in prior years, or projected stream impacts in the future.

Available information, not referenced or considered in the PEIS, shows that NWP 21 authorizations are already having more than minimal environmental effects, both individually and cumulatively, and those adverse effects are increasing. In September 1998, the United States Fish and Wildlife Service (FWS) estimated that 354.8 miles of streams have been approved for filling and the placement of siltation structures in Eastern Kentucky coal fields through July 1995. “Permitted Stream Losses Due to Valley Filling in Kentucky, Pennsylvania, Virginia, and West Virginia: A Partial Inventory,” p. 5. FWS estimated the total number of stream miles filled in Kentucky, West Virginia, Pennsylvania and Virginia to be at least 897.2 miles. *Id.*, Abstract. FWS stated that this stream “degradation affects invertebrate abundance and diversity, nutrient cycling, energy sources for biotic communities, and other factors that are essential components of healthy stream systems.” *Id.* at 5.

In a February 2001 draft report, EPA found that “benthic macroinvertebrate communities at all the test sites [in watersheds with mountaintop mining/valley fill operations] were significantly impaired.” U.S. EPA, Science and Ecosystem Support Division, Ecological Assessment Branch, Athens, Georgia “Kentucky Mountaintop Mining Stream Characterization, Central Appalachian Ecoregion, Kentucky, May 1-4, 2000.” EPA stated that:

In summary, impacts of mountaintop mining and valley fill activities in eastern Kentucky were evident based on stream biological and habitat indicators. Mining related sites generally had higher conductivity, greater sediment deposition, smaller particle sizes, and a decrease in pollution sensitive macroinvertebrates with an associated decrease in taxa diversity compared to reference sites. Similar results have been reported for other studies conducted in mining areas. Such disruptions in the biological processes of first- and second-order streams can displace the development of a fully stable ecosystem farther downstream than normal. In turn, these streams and rivers may support fewer fish and other taxa which are recreationally or commercially important.

*Id.*, p. iii.

In a January 2001 executive summary of a status report on the programmatic EIS on mountaintop mining and valley fills in Appalachia, EPA found that 5,858 valley fills have been permitted from 1985 through 1999, that “studies conducted by EPA showed impairment of aquatic organisms below valley fills,” that “surface mining significantly alters terrestrial ecology,” and that “[t]he more headwater streams in a given watershed which are filled, the more difficult it will be to protect the aquatic ecosystem downstream.” EPA, Mountaintop Mining/Valley Fill Status Report, Executive Summary, January 16, 2001, pp. 3-4. The more detailed status report found that “watershed areas for fills in KY and WV have gradually increased” and that estimated stream impacts in the four-state Appalachian region are 563 miles, with 331 miles in Kentucky. EPA, MTM/VF Status Report, January 18, 2001, p. 8. “The entire valley fill inventory, if constructed as proposed, would cover 75,072 acres within 373,187 acres of watershed.” *Id.* The status report also found that, for West Virginia alone, current surface mining activities encompass about 120,000 acres of land, and new and proposed surface mining activities may potentially impact an additional 130,000 acres of land, 96% of which is forested. *Id.*, p. 29.

The Corps has failed to consider any of this information, even though it is one of the four agencies currently preparing the programmatic EIS on mountaintop removal mining. That EIS is designed to analyze information that is of direct relevance to the NWP program, including:

the cumulative environmental impacts of mountaintop mining; the efficacy of stream restoration; the viability of reclaimed streams compared to natural waters; the impact that filled valleys have on aquatic life, wildlife and nearby residents; biological and habitat analyses that should be done before mining begins; practicable alternatives for in-stream placement of excess overburden; measures to minimize stream filling to the maximum extent practicable; and the effectiveness of mitigation and reclamation measures.

64 Fed. Reg. 5800 (Feb. 9, 1999). The Corps admits in its August 9, 2001 notice that “we are gathering data to better understand the effects of valley fills on the aquatic environment.” 66 Fed. Reg. at 42076. However, the Corps has not described or used any of this information in the PEIS on the NWPs.

The Corps cannot ignore this existing information in the PEIS on the NWPs and segregate it for use only in the later PEIS on mountaintop removal mining. That PEIS is not expected to be completed for another year or more -- long after the Corps' announced issuance date for the NWPs proposed on August 9. In the meantime, the Corps has a duty under NEPA to use all reasonably available information. 40 C.F.R. § 1502.22(a).

This discussion of NWP 21 clearly establishes and illustrates a fundamental flaw that pervades the PEIS: the failure to present specific information -- rather than general bean-counting -- concerning environmental impacts.

6. The PEIS is largely limited to consideration of effects to the aquatic environment.

As noted above and in our October 9 comments, NEPA requires that an agency prepare an EIS for any action that will, or may, significantly effect the human environment. As stated in the CEQ regulations, the EIS “shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. §1502.1. Accord, §§ 1508.7, 1508.8, 1508.14.

Despite this straightforward mandate, the Corps insists on limiting the scope of its analysis primarily to impacts on the “aquatic environment” or “aquatic resources.”<sup>11</sup> S-1 (“The PEIS also analyzes impacts of alternatives to the nationwide permit program on the Nation’s aquatic ecosystems...”); S-14 – S-15 (“Summary of Impact Comparisons” limited to discussion of impacts to “aquatic resources”); 3-11 (§3.4.2 “Comparison of the Impacts of the Alternatives on Aquatic Resources”).

By narrowing the scope of its inquiry, the Corps has failed to consider the broader universe of potential effects that NEPA requires.

7. The consideration of alternatives is inadequate.

As noted above, the PEIS fails to consider as alternatives either the program as it currently exists or the Corps’ preferred alternative, the August 9 proposed revisions. In addition, the PEIS alternatives discussion is inadequate because it fails to consider all reasonable alternatives and discuss the reasons any alternatives were eliminated as required under 40 C.F.R. 1502.14(a). In response to the Corps’ request for comments on the scope of the PEIS, the Corps received several suggestions for alternatives to be considered in the PEIS. These include:

Restricting the maximum acreage filled under NWP’s to no more than one-quarter of an acre each time a permit is used, the current limit on NWP 29.

Placing an aggregate acreage cap on the use of nationwide permits within individual watersheds, to address the problem of cumulative impact.

Barring the use of nationwide permits in the habitat of threatened or endangered species.

Barring the use of nationwide permits in difficult-to-mitigate wetlands, such as forested wetlands.

Requiring some form of notification for all actions undertaken under an NWP regardless of acreage.

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<sup>11</sup> The Corps has also illegally narrowed the scope of its duty to protect the environment under the Clean Water Act. See October 9, comments attached at page 5-6.

Evaluating alternative acreage thresholds including 0.1, 0.25, 0.33 and 0.5 per acre for individual NWPs and the effects of the different thresholds on cumulative impacts on wetlands and aquatic resources and the goals of the Program.

In addition, the Corps should consider additional alternatives that were at issue during the previous periods of revision of the NWP program. These include:

Prohibiting or restricting use of the NWPs in the entire 100-year floodplain.

Prohibiting or restricting the use of NWPs in impaired waters.

None of these reasonable alternatives is considered in the PEIS, nor is the reason for their elimination adequately discussed. Rather than any specific explanation why the above alternatives, or any others, were eliminated from the PEIS, the Corps offers a sweeping dismissal of any need or ability to consider "Various Combinations of Nationwide Permit Alternatives." PEIS at 3-7. The Corps states:

The nationwide permit program evolved to its current level in direct response to concerns about protecting the resources while relieving the burden on the regulated community. There are currently 39 active nationwide permits with numerous national, regional and district specific conditions. If the various options were considered for each of the active nationwide permits, alone and in combination, this would result in millions of potential alternatives. Looking at sub-categories of nationwide permits would greatly reduce the number of potential alternatives. Various sub-categories of nationwide permits were considered but the number of potential combinations was still unmanageable. The conclusion from this evaluation was that nothing would be gained by sub-categorizing the nationwide permits because the purpose of this PEIS is to review the effectiveness of the overall nationwide permit program. Decisions resulting from this PEIS process will not preclude further specific or categorical changes to the nationwide permit program and may even foster such modifications.

PEIS at 3-7 to 3-8.

NEPA requires consideration of "all reasonable alternatives" to a proposed action. 40 C.F.R. §1502.14(a) Instead of complying with this mandate of NEPA, the Corps' alternatives analysis generally takes an "all or nothing" approach in considering the NWP program. Alternatives considered include: replacing the entire NWP program with Individual Standard Permits, replacing the entire NWP program with Letters of Permission, and replacing the entire NWP program with Regional General Permits. Only one of the alternatives considered, "A1" constitutes a more subtle variation on the version of the program identified in the PEIS as the "baseline." This approach is insufficient to meet NEPA's "all reasonable alternatives" standard.

8. The PEIS Violates NEPA Because Its Mitigation Analysis Is Fatally Flawed

### Mitigation Measures Must Be Discussed In Detail

An EIS must “contain a detailed discussion of possible mitigation measures.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351-52 (1989); 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1505.2, 1508.25(B). Mitigation must be discussed “in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Id.* at 352. This includes an analysis of “how effective the mitigation measures would be.” Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1381 (9<sup>th</sup> Cir. 1998); Northwest Indian Cemetery Protective Ass’n v. Peterson, 795 F.2d 688, 697 (9<sup>th</sup> Cir. 1986), *rev’d on other grounds sub nom. Lying v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988); Stein v. Barton, 740 F.Supp. at 753-54; *see* United States v. 27.09 Acres of Land, 760 F.Supp. 345, 352 (S.D.N.Y. 1991) (where agency’s decision not to prepare an EIS is “predicated on the implementation and effectiveness of extensive mitigation measures” the environmental assessment is “inadequate in its failure to consider the consequences of possible non-implementation or inadequacy of its anticipated mitigation measures”).

Only such a detailed analysis will allow the agency and other interested groups and individuals to “properly evaluate the severity of the adverse effects,” and the extent to which those adverse environmental effects can be avoided. Methow Valley Citizens Council, 490 U.S. at 351-52. Where, as here, “an agency’s decision to proceed with a project is based on unconsidered, irrational, or inadequately explained assumptions about the efficacy of mitigation measures, the decision must be set aside as ‘arbitrary and capricious.’” Stein v. Barton, 740 F. Supp. 743, 753-54 (D. Alaska 1990) (conclusion that mitigation “will prevent any significant reduction in fish habitat” was arbitrary in light of evidence in the record demonstrating mitigation failures). The Stein case exemplifies why the PEIS’ discussion of mitigation does not satisfy the requirements of NEPA.

In Stein, a Forest Service EIS concluded that effective and consistent application of mitigation measures “will prevent any significant reduction in fish habitat capability.” 740 F.Supp. at 753. Evidence in the record showed, however, that the mitigation efforts referred to by the Forest Service had been hampered in the past by poorly devised mitigation plans, poor on-the-ground implementation, and inadequate mechanisms for monitoring the mitigation measures’ efficacy in the field. As a result, the mitigation had not worked, and adverse fisheries impacts and extensive fish kills had occurred. Although the EIS in Stein acknowledged the past mitigation failures, it concluded, without providing any reasons, that the failures would not persist. The Forest Service argued in its briefs to the court that the stricter monitoring and enforcement provisions in the EIS and Record of Decision made past experience a poor indicator of whether mitigation would succeed. *Id.* at 754. The Stein court ruled that the cursory explanation of mitigation monitoring contained in the EIS was wholly insufficient to rebut the evidence of mitigation failure, and did not draw any type of rational connection between the Forest Service’s conclusions and the evidence directly contradicting those conclusions. *Id.*

As is discussed in detail below, the Corps' analysis of the environmental impacts of the nationwide permit program is likewise based on unconsidered, irrational, and inadequately explained assumptions about the efficacy of mitigation. Because the mitigation analysis is – by the Corps' own admission – central to the impacts analysis, the cumulative impacts analysis, and the Clean Water Act § 404(e)(1) minimal effects determination, the flawed analysis of mitigation taints the entire PEIS.

Mitigation Assumptions And Conclusions Must Be Supported By Substantial Evidence

It is well settled that assumptions and conclusions in the PEIS must be supported by substantial evidence. As the D.C. Circuit has ruled, § 706(2)(A) of the Administrative Procedure Act (which authorizes reviewing courts to "hold unlawful and set aside" agency action found to be "arbitrary" or "capricious")

*enabl[es] the courts to strike down, as arbitrary, agency action that is devoid of needed factual support. When the arbitrary or capricious standard is performing that function of assuring factual support, there is no **substantive** difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a nonarbitrary factual judgment supported only by evidence that is not substantial in the APA sense -- i.e., not enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn is one of fact for the jury.*

Assn. of Data Processing v. Board of Governors, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (emphasis in original, internal quotations and ellipsis omitted).

This standard requires the Corps to offer substantial credible evidence – not mere speculation – to support its factual conclusions. See, e.g., Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 866 (D.C. Cir. 2001) (remanded because agency had failed to “demonstrate[]” relevant point with “substantial evidence – not mere assertions”); Edison Electric Inst. v. USEPA, 2 F.3d 438, 446 (D.C. Cir. 1993) (agency's purported “justification on the record” rejected where it “consists of speculative factual assertions”); Chemical Mfrs. Assn. v. EPA, 28 F.3d 1259, 1266 (D.C. Cir. 1994) (same); United Distribution Cos. v. FERC, 88 F.3d 1105, 1187-88 (D.C. Cir. 1996) (“the law requires more than simple guesswork”); Air Transport Assn. v. FAA, 254 F.3d 271, 279 (D.C. Cir. 2001) (agency “failed to provide any record justification” for a key assertion, but instead “simply assumed it was so”); Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79, 93 (2d Cir. 1975) (agency must “go beyond mere assertions” and provide sufficient data and reasoning to support its conclusions).

Agency action based on unsupported assumptions is arbitrary and capricious, and is not entitled to deference, regardless of the alleged complexity of the underlying issue. See, e.g., Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1506-07 (D.C. Cir. 1986) (invalidating OSHA's refusal to establish a short term exposure limit standard for ethylene oxide, and holding, after a careful review of the record, that OSHA was not entitled to deference because: (1) that action was based on the “improper assumption not

supported by any evidence in the record” that employers would in fact reduce short term exposure limits in order to meet the long term ethylene oxide exposure limits; and (2) that by relying on this wholly unsupported assumption, OSHA had “entirely failed to consider an important aspect of the problem”).

It is equally well settled that the Corps must:

*examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” In reviewing that explanation [the Court] must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”*

Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted). Thus, the Corps must explain the basis for its decision in a manner that is rational and sufficiently detailed – and must link the evidence to the conclusions drawn from it. See, e.g., Transactive Corp. v. U.S., 91 F.3d 232, 236 (D.C. Cir. 1996) (“In order to ensure that an agency’s decision has not been arbitrary, we require the agency to have identified and explained the reasoned basis for its decision”); Dickson v. Secretary of Defense 68 F.3d 1396, 1407 (D.C. Cir. 1995) (“Because the Board only listed the facts and stated its conclusions, but did not connect them in any rational way, the Board’s decisions are arbitrary and capricious.”). The Corps’ PEIS falls far short of satisfying these standards.

#### The Flawed Mitigation Analysis Taints The Entire PEIS

As the PEIS makes clear, the mitigation analysis is the linchpin to its impacts analysis, its cumulative impacts analysis, and its Clean Water Act § 404(e)(1) minimal effects determination – a statutory prerequisite to the issuance of any general permit. For example, the PEIS states:

- “Compensatory mitigation is a **critical part** of the equation of achieving minimal impacts.” PEIS 3-21 (emphasis added). “Compensatory mitigation compliance with permit conditions is essential to ensure minimal adverse effects.” PEIS S-4.
- “The cumulative effectiveness of compensatory mitigation required by the Corps is critical in determining the long-term cumulative impact on aquatic ecosystem functions and the associated valued natural services.” PEIS S-7. “The cumulative impact of the permit process depends on the success of mitigation action, especially for wetlands.” PEIS 4-13. “[S]ubstantial impact results from legal filling of the Nation’s waters under the Corps permit program. Compensatory mitigation is the most important element remaining in the Corps permit process as a means for reducing or eliminating cumulative impacts from permitted fill.” PEIS 4-31.

As is discussed in detail below, this critical mitigation analysis is fatally flawed and does not comply with NEPA. Because the mitigation analysis does not comply with NEPA, it taints each of the other PEIS analyses driven by mitigation. The Corps’ flawed

consideration of mitigation places the environmental impacts of the nationwide permit program in a false light by painting a picture of program with minimal environmental impacts, when nothing could be further from the truth. The impacts of the nationwide permit program are far more serious than the PEIS suggests. As a result, the Corps' entire decision-making process is based on incorrect information, and cannot stand. See, e.g., Citizens for Mass Transit, Inc. v. Adams, 630 F.2d 309, 313 (5th Cir. 1980) (an EIS must permit a decisionmaker to fully consider and balance the environmental factors).

As importantly, the Corps' mitigation analysis cannot be used to justify the mandatory minimal effects determination. The Clean Water Act expressly prohibits the issuance of nationwide permits unless the Secretary of the Army determines, among other things, that the permits "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e), Clean Water Act § 404(e). This determination must be supported by substantial, credible evidence. As discussed below, the Corps' own statements in the PEIS, the testimony of top policymakers, and a host of scientific literature demonstrate that there simply is no basis for concluding that mitigation reduces environmental impacts of individual nationwide permits, let alone the entire program, to a "minimal" level. Accordingly, a § 404(e)(1) minimal effects determination that relies on mitigation to reduce impacts to minimal levels either individually or cumulatively cannot lawfully be made for either individual nationwide permits, or for the nationwide permit program as a whole.

#### The PEIS Does Not Contain A Detailed Discussion Of Possible Mitigation Measures

The PEIS violates NEPA because it does not discuss mitigation measures in detail. See Methow Valley Citizens Council, 490 U.S. at 351-52; 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1505.2, 1508.25(B). The PEIS does not discuss, propose, or analyze any specific mitigation measures or requirements for the nationwide permit program. For example, the PEIS does not discuss appropriate mitigation ratios, the need for increased monitoring, or the need to require detailed mitigation plans as a part of the nationwide permit process. As the National Academy of Sciences recently concluded, unclear performance expectations for mitigation and lack of compliance with permit conditions have contributed to the failure of the Clean Water Act § 404 mitigation program to meet the goal of no net loss of wetland functions and acreage. National Academy of Sciences, *Compensating for Wetland Losses Under the Clean Water Act*, (prepublication copy 2001) at 2, 4. While a detailed mitigation plan does not assure mitigation success, lack of a detailed plan does assure mitigation failure.

Instead of discussing detailed mitigation measures, the PEIS limits its analysis of mitigation to an evaluation of the overall lack of success of mitigation, to substantial mitigation-related knowledge gaps, and to a list of ideas for improving mitigation success – including taking the responsibility away from the Corps. See PEIS 3-19, 3-21 to 3-22. While NEPA clearly requires that such evaluations be made in the PEIS, they do not obviate the requirement to discuss specific mitigation measures in detail and to support those measures with analytical data. E.g., Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998), as amended on denial of reh'g, 1998 U.S. App. LEXIS 9521

(May 13, 1998) (the mere listing of mitigation measures without supporting analytical data does not satisfy NEPA).

As importantly, as is discussed below, even the limited analysis of the efficacy of mitigation fails to comply with NEPA, as it is rife with unsupported and contradictory conclusions.

#### The PEIS Ignores Substantial Evidence Demonstrating Lack Of Compliance With The No Net Loss Policy

The no net loss policy is a central tenet of the Corps' regulatory program. Indeed, the Corps is statutorily mandated to work towards the national interim goal of "no overall net loss of the Nation's remaining wetlands base, as defined by acreage and function," and the long-term goal "to increase the quality and quantity of the Nation's wetlands, as defined by acreage and function." 33 U.S.C. §2317(a)(1).

As part of its mitigation analysis, the PEIS places considerable emphasis on programmatic compliance with the no net loss policy. See PEIS 4-1 to 4-2. The PEIS, however, makes no mention of the recent National Academy of Sciences ("NAS") study that bears significantly on the Corps' success in meeting that goal. After conducting a thorough investigation of the effectiveness of mitigation, the NAS concluded that the "goal of no net loss of wetlands is **not** being met for wetland functions by the mitigation program" and that "[p]erformance expectations in Section 404 permits have often been unclear, and compliance has often not been assured nor attained." National Academy of Sciences, *Compensating for Wetland Losses Under the Clean Water Act*, (prepublication copy 2001) at 2, 4 (emphasis added). We request that this entire study be placed in the administrative record.

The failure of the Corps' regulatory program to comply with the no net loss policy is significant to the analysis of mitigation, impacts, and cumulative impacts of the nationwide permit program. To satisfy NEPA, the PEIS must carefully consider the implications of the NAS study on the nationwide permit program.

#### The PEIS Draws Insupportable Conclusions About The Efficacy Of Mitigation

The PEIS draws insupportable conclusions about the efficacy of mitigation. For example, the PEIS draws the following key conclusions that do not comport with reality:

- "Most studies indicate between 30 and 90% success" of mitigation success. PEIS 4-39. "In general, results of studies suggest that a range of compensatory-mitigation success commonly falling between 30% and 90% can be expected depending on conditions." PEIS 4-27. In its cumulative impacts analysis, the Corps assumed "estimates for wetlands ranging from 30% to 90% success at the present mitigation rates." PEIS 4-32. "[C]ompensatory mitigation will offset impacts." PEIS S-11, Table S.6 (Alternative A1).
- Studies show that "functional success is commonly 50 to 75%" for wetlands mitigation. PEIS 4-14.

The Corps' concession that mitigation is up to 70% ineffective is a telling one, that dramatically undercuts the Corps' claim that the environmental effects of the NWP program are minimal. As importantly, there is no credible basis to assume that mitigation achieves even this unsatisfactorily low degree of success. For the reasons described below, the Corps' estimates of mitigation success rate are entirely unfounded, and are not at all supported by substantial evidence. To the contrary, a host of scientific and governmental studies, and the testimony of Corps and EPA top policymakers make it clear that mitigation success is undeniably even poorer than the Corps' estimates, and that there is insufficient evidence to support any conclusion that mitigation reliably replaces lost wetland functions and values. As importantly, those estimates also are contradicted by a host of the Corps' own statements in the PEIS.

Significantly, the PEIS conclusion regarding mitigation success rates of up to 90% appears to be a complete fabrication. It is discussed nowhere in the PEIS or in Appendix C (to which the reader is referred for support for the 90% figure). Moreover, neither the PEIS nor Appendix C make any mention of, or reference to, any study – let alone the “most studies” referred to by the Corps – suggesting anything even remotely close to 90% mitigation success.<sup>12</sup> See PEIS C-33 to C-35. As a result, the PEIS conclusion regarding the upper (and as discussed below, the lower) range of wetlands mitigation success is undeniably arbitrary and capricious.

(1) Substantial Evidence Demonstrates An Overwhelming Lack Of Mitigation Success

A host of scientific literature and governmental reviews, the testimony of top policymakers, and the PEIS itself, all make it clear that mitigation success is undeniably poor. This substantial evidence directly contradicts the Corps' conclusion that “[m]ost studies indicate between 30 and 90% success” and that “compensatory mitigation will offset impacts.” PEIS 4-39; S-11. Indeed, the National Research Council has concluded that “there is indeed a considerable controversy over whether or not wetlands can actually be restored. The arguments are particularly important when wetland restoration is undertaken within the mitigation context, and the **promise** of full restoration of a degraded site **allows** a natural wetland to be destroyed.” National Research Council, *Restoration of Aquatic Ecosystems: Science, Technology, and Public Policy* (National Academy Press 1992) at 310-311 (emphasis in original).

A 1996 study published in *Ecological Applications* concludes that the:

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<sup>12</sup> As a result, the mitigation discussion also violates 40 C.F.R. § 1502.24, which requires the “explicit reference by footnote to the scientific and other sources relied upon for conclusions” in an EIS. The mitigation discussion also violates 40 C.F.R. § 1502.22, which requires that an EIS “make clear” when there is “incomplete or unavailable information” affecting its evaluation of reasonably foreseeable significant adverse impacts. This regulation goes on to provide the process that the Corps must follow when proceeding in the face of such uncertainty or lack of information. Because the Corps has no accurate evidence supporting a conclusion that mitigation is effective in fully replacing the functional values of the lost wetlands, it must comply with this regulation.

*“sober reality [is] that under present mitigation policies and practices losses are likely to be uncompensated for and that what we call mitigation has a high chance of failure.”*

Margaret S. Race and Mark S. Fonseca, *Fixing Compensatory Mitigation: What Will It Take?*, in *Ecological Applications* 6(1):94-101 at 97 (Ecological Society of America, eds., 1996). “Based on over a decade of survey results, the cumulative record of past mitigation projects remains undeniably poor overall, with disappointingly few examples of success.” *Id.* See also North Carolina State University, *Watershedss*, Water, Soil, and Hydro-Environmental Decision Support System, Successful Mitigation, (<http://h2osparc.wg.ncsu.edu/info/wetlands/mitsucc.html>) (last updated June 27, 2001) (mitigation projects have a “low rate of success”). Copies of these studies are attached.

A 1992 study prepared by the National Research Council surveyed the literature on wetlands restoration and found that problems with attempts to restore wetlands have been encountered across all regions and wetland types. Committee on Restoration of Aquatic Ecosystems: Science, Technology, and Public Policy, National Research Council, *Restoration of Aquatic Ecosystems* (1992) at 310-317. Relevant portions of this study are attached. We request that this entire study be placed in the administrative record.

Just this year, the National Academy of Sciences conducted a thorough investigation of the effectiveness of mitigation, and concluded that the “goal of no net loss of wetlands is **not** being met for wetland functions by the mitigation program” and that “[p]erformance expectations in Section 404 permits have often been unclear, and compliance has often not been assured nor attained.” National Academy of Sciences, *Compensating for Wetland Losses Under the Clean Water Act*, (prepublication copy 2001) at 2, 4 (emphasis added).

Top policymakers at both the Corps and EPA also have testified to Congress that the success of wetlands mitigation is questionable at best:

*Many mitigation projects have, in fact, failed due to one or more of the following reasons: poor siting and project design; inadequate monitoring programs; lack of adequate maintenance or remedial activities; and in some cases, failure of permittees to comply with the conditions of their permits.*

Complete Joint Statement of Michael L. Davis, Deputy Assistant Secretary of the Army for Civil Works and Robert H. Wayland III, Director, Office of Wetlands, Oceans and Watersheds Environmental Protection Agency, Before the Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment, United States House of Representatives, Wetlands Protection and Mitigation Banking, December 9, 1997. A copy of this testimony is attached.

Moreover, as dismal as the success of studied mitigation efforts have been, the PEIS suggests that the mitigation under the nationwide permit program is even less successful.

The PEIS concludes that data for FY 1998 evaluating permit condition compliance (as opposed to mitigation success) suggests that “the mitigation success of nationwide permits may be about 20% lower than for other permits . . . .” PEIS 5-26.

As importantly, the PEIS contains a host of statements and conclusions that either directly contradict, or reveal the wholesale arbitrariness of, the Corps’ conclusions that mitigation success is between 30% and 90%. For example, the PEIS undeniably concludes that the extent to which mitigation replaces lost wetlands and functions “**cannot now be ascertained**” and that it is likely that “mitigation success has **not** been high.” PEIS 3-21, 4-14 (emphasis added). The PEIS also concludes that “mitigation success is now relatively low when habitat is either created or restored.” PEIS 4-28. The Corps also acknowledges that “[h]igh uncertainty in the effectiveness of compensatory mitigation trends makes any assessment of cumulative impact of the Corps permit program highly speculative.” PEIS 4-40 (emphasis added). In addition, “[t]he present mitigation approach too often leaves too much to chance for it to be of much confident value in forecasting cumulative impacts.” PEIS 4-34. According to the PEIS, the lack of mitigation success is the result of a host of problems that include:

- Lack of compliance with mitigation requirements in permits (PEIS 3-21);
- Inability to verify that the intended ecological benefits will be realized even if permits are complied with (see, e.g., PEIS 3-21, C-33 to C-35);
- Lack of data to verify that the functions provided by mitigation match the functions impaired by permitted activities (PEIS 3-19 to 3-20);
- Long lag times in realization of mitigation benefits – due, for example, to slow growth of trees and other vegetation (see, e.g., PEIS C-32, C-34);
- Impossibility of mitigating some impacts at all (PEIS C-35 (“not all types of wetland loss can be mitigated”).

(2) Substantial Evidence Demonstrates That Functional Success Of Wetlands Mitigation Cannot Yet Be Determined

Substantial scientific evidence demonstrates that the Corps has absolutely no basis for concluding that “functional success is commonly 50 to 75%” for wetlands mitigation. PEIS 4-14. The PEIS also makes it clear that the Corps has no basis for making this conclusion.

“[T]here are few satisfactory methods for assessing replacement of the functions lost with the original wetland.” William J. Mitsch and Renee F. Wilson, *Improving the Success of Wetland Creation and Restoration with Know-How, Time and Self-Design*, in *Ecological Applications* 6(1):77-83 at 77 (Ecological Society of America, eds., 1996). As a result, “mitigation efforts cannot yet claim to have duplicated lost wetland functional values; nor has it been shown that restored wetlands maintain regional biodiversity or recreate

functional ecosystems.” Race and Fonseca, *Fixing Compensatory Mitigation: What Will It Take?* at 95 (summarizing findings of the National Research Council). Copies of these studies are attached.

As importantly, the amount of time needed to make a determination of functional success of wetlands mitigation is far greater than the length of time that monitoring is required for Corps permits (if it is required at all). According to the PEIS, mitigation monitoring might be carried out “to varying extent by the different Corps districts for periods typically up to 5 years.” PEIS 4-13. But this is far too short to make a reasonable determination of success or functional replacement.

“The very best” that can be hoped for after 5 years of monitoring a mitigation wetland “is a general idea of the wetland’s ecological trajectory and even less understanding of its function.” Mitsch and Wilson, *Improving the Success of Wetland Creation and Restoration with Know-How, Time and Self-Design*, at 79. Mitigation projects involving freshwater marshes should have at least 15 to 20 years of monitoring, rather than 5 years before judging their success. “Restoration and creation of forested wetlands . . . may require even more time.” *Id.* at 82. The National Research Council has explicitly concluded that “[t]he short time period within which forest[ed wetland] restoration attempts have been monitored **precludes an evaluation of their functional equivalency** with natural reference systems.” National Research Council, *Restoration of Aquatic Ecosystems: Science, Technology, and Public Policy* (National Academy Press 1992) at 311-312 (emphasis added). The PEIS also acknowledges that fully reestablishing lost wetland functions “may take a century or more for forested wetlands and more than a decade even for those herbaceous emergent wetlands that recover relatively rapidly once proper conditions are provided.” PEIS 4-32.

The PEIS acknowledges that scientific and other literature – literature that does not support the Corps’ conclusion – “generally suggests problems with compensatory mitigation in terms of both permit compliance and the ability to replace lost functions and values.” PEIS 3-21.

As importantly, the PEIS makes it clear that the Corps has absolutely no independent information upon which to base a conclusion that wetlands mitigation commonly results in functional success of 50 to 75%. Even the limited monitoring activity that **may be** undertaken for Corps permits “has only recently been established and a comprehensive analysis of mitigation success has yet to be completed and published for Corps projects.” PEIS 4-13.

Likewise, the Corps’ regulatory program does not have even the most basic measurements of wetland functions and values upon which to base an analysis of functional replacement, because the Corps does not bother to gather that data. PEIS 4-2, 4-20. Indeed, the PEIS states that “[t]here are no standard methods accepted and used by the Corps for assessing ecosystem function.” PEIS 4-20. The Corps also “does not attempt to estimate and record the values of impacted and mitigated ecosystem services . . . .” PEIS 4-25. The PEIS also makes clear that the Corps’ regulatory database does not

provide the information necessary support any conclusion that functional wetlands mitigation has been or will be successful:

*The database is especially deficient about impact on and compensatory mitigation for ecosystem functions. This deficiency limits interpretation of impact and compensatory mitigation effect on wetland function because there is no information about the locations of impact and mitigation with respect to the affected watershed or other ecoregional definition. In addition there is no estimation of the relative completeness of impact to wetland functions or compensatory mitigation, which is especially relevant when enhancement is used for compensatory mitigation. The functions of one acre of wetland often are impacted partially between no permanent impact and complete permanent impact, which are the only data options now recorded. Similarly, there is no information provided about the relative functional integrity of the ecosystem before impact and compensatory mitigation. There is no information provided about the valued functions associated with the area of impact or compensatory mitigation, nor is there information tracking mitigation based on consistent national guidelines focused on sustaining functions and values.*

PEIS 3-20. In short, there is no information whatsoever upon which to base a conclusion that functional mitigation within the Corps' regulatory program has achieved or will achieve success.

Instead of obtaining such information, the Corps relies on assumptions piled on assumptions in an effort to reach the conclusion it desires. Without any supporting evidence, the Corps assumes that functions will be replaced by in-kind replacement of ecological structure, and that values will be replaced by compensating for functional impact. PEIS 4-2, 4-20, 4-25. In direct contradiction of substantial evidence, the Corps "also assumes that the state of compensatory mitigation science actually enables replacement of in-kind functions." PEIS 4-20. In short, rather than rely on substantial evidence, the Corps relies on layer upon layer of unsubstantiated and incorrect assumptions. This does not satisfy the substantial evidence requirement.

As importantly, the reasoning behind these assumptions is meritless. First, the Corps asserts that "compensatory functions and values will ultimately follow restoration or creation as the mitigation site matures." PEIS C-32. *Id.* As discussed above, however, the Corps has no basis for assuming that mitigation is replacing the same functions and values – and in the same quantities – that are being lost to nationwide permit program activities. Moreover, mitigation can take a very long time (decades or longer), may not be complied with, or may not even be possible. Second, the Corps claims that "any variation in resulting compensatory functions and values from the impacted functions and values will 'average out' over the entire area of impact and compensatory mitigation." *Id.* The Corps itself concedes, however, that this assumption "requires random variation. Biased variation will have a cumulative effect resulting in net loss of some ecosystem functions and a net gain in others." *Id.* Without information about functions and values,

the Corps has no rational basis for concluding that mitigation projects on average replace them, rather than leaving some functions and values uncompensated.

In short, the Corps' conclusion regarding functional success of wetlands mitigation is completely arbitrary.

Unfortunately, this is not the first time that the Corps has drawn conclusions in the absence of necessary information to support claims of mitigation success. In its recent evaluation of in-lieu-fee mitigation, the General Accounting Office concluded that:

*While Corps officials in 11 of the 17 districts with the in-lieu-fee option told us that the number of wetland acres restored, enhanced, created, or preserved by in-lieu-fee organizations equaled or exceeded the number of wetland acres adversely affected, **data submitted by over half of those districts did not support those claims.** Also, while officials in 9 of the 17 districts said that the ecological functions and associated values (i.e., economic and social benefits) lost from the adversely affected wetlands were replaced at the same level or better through in-lieu-fee mitigation, **officials in over half of those districts acknowledged that they have not tried to assess whether mitigation efforts have been ecologically successful.***

General Accounting Office, *Wetlands Protection, Assessments Needed to Determine Effectiveness of In-Lieu-Fee Mitigation*, GAO-01-325 (May 2001) at 3 (emphasis added). We request that this study be placed in the administrative record.

The PEIS Does Not Articulate A Rational Connection Between The Evidence And The Conclusions Drawn

As discussed above, the PEIS must consider the relevant factors and articulate a "rational connection between the facts found and the choice made." Motor Vehicles Mfrs. Ass'n, 463 U.S. at 43 (citations omitted). Only if this rational connection is drawn can a court determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id.

The Corps does not articulate any connection – let alone a rational connection – between the facts set forth in the scientific literature, the testimony of top policymakers, and its own statements in the PEIS and its conclusions regarding mitigation success. Nor could the Corps do so, as the evidence overwhelmingly demonstrates that there is absolutely no basis for those conclusions.

9. The scope of the PEIS is insufficient to comply with the requirements of NEPA.

The Corps' avowed goal in preparing the PEIS is "to evaluate the nationwide permit program and determine if it is meeting the Corps['] objectives." PEIS, p. S-1. One of those objectives is to ensure that NWP's "cause only minimal individual and cumulative adverse environmental impacts to aquatic resources." Id. Yet to accomplish

this objective, the Corps limited its work to only two reviews: (1) interviews and file reviews in eight Corps district offices; and (2) analysis of the Corps' internal environmental impact database. Id. These reviews are far too narrow to adequately analyze whether, on a national basis, each type of NWP is having, or will have, minimal environmental effects.

First, the PEIS fails to consider the national or regional environmental impacts of each NWP. Instead, the Corps has stated its intention to defer that analysis to later Environmental Assessments on each NWP:

The Corps will again prepare EAs for each proposed reissuance of a NWP in this proposal to determine whether an Environmental Impact Statement (EIS) should be prepared. These EAs will consider the environmental effects of each NWP from a national perspective and each Corps District and Division Engineer will supplement the EAs to evaluate regional environmental effects.

66 Fed. Reg. at 42071. Thus, the Corps has omitted the national and regional impacts of each NWP from the PEIS and put that off until later.

This deferral violates NEPA and applicable regulations. A full discussion of impacts must be included in the EIS, made available for public comment, and finalized in a final EIS before a final decision is made on the pending agency proposed action, not after. See pp. 12-13, supra. See also 40 C.F.R. § 1503.1 (requiring agency to solicit comment on a draft EIS).

Second, the scope of the PEIS is inadequate because it fails to consider all available environmental information and impacts. The Corps limited its review to eight district offices. PEIS, p. B-2. That review focuses almost entirely on existing Corps procedures rather than the substantive environmental impacts of the Corps' permitting actions. In addition, that review uses an unrepresentative sample of district offices. For example, the Huntington District was not one of the eight districts analyzed. PEIS, p. B-2. This is a very significant omission. According to a table buried in Appendix F of the PEIS, the Corps' Huntington District issued 257 of the total 306 NWP 21 authorizations in FY 2000, with impacts to 449,896 linear feet of the total 460,575 linear feet of streams. Thus, this single District issued 84% of NWP 21 authorizations, and those authorizations impacted 85 of the 87 miles (97%) of streams that were impacted. Yet no analysis of the Huntington District's actions or procedures is contained in the PEIS. As a result, there is effectively no analysis of the cumulative impacts of NWP 21.

## **B. Additional comments**

### **a. Regional General Permits**

The Corps considers as one alternative in the PEIS elimination of the NWPs and their replacement with Regional General Permits (RGPs). PEIS at 3-5, 3-10. We note that

RGPs may also have significant effect on the human environment and each RGP would likely require completion of an EIS before being issued.

b. Letters of Permission

The PEIS also offers as one alternative the elimination of nationwide permits, and reliance upon Letters of Permission (LOPs). PEIS at 3-5, 3-10. We note that LOPs appear to be individual permits that are issued without providing for the requisite opportunity for public notice and comment. In this regard, LOPs appear to be illegal. The Corps should either explain why LOPs are not illegal, or discontinue their use for permitting discharges of dredged or fill material into waters of the United States.

c. Rules

The PEIS also suggests the Corps might authorize discharges of dredged or fill material by rule, rather than by individual or general permit. PEIS at 3-7. Such a rule would be unlawful. Section 301(a) of the CWA flatly prohibits discharges, except in accordance with enumerated exceptions. While individual and general permits constitute such exceptions, § 404(a) and (e), authorizations by rule do not. Accordingly, such authorizations violate the CWA.

## CONCLUSION

The Army Corps of Engineers has not prepared a valid Environmental Assessment, or made a valid Finding of No Significant Impact, for any of the nationwide permits or for the program as a whole. A valid EA and FONSI would conclude that an EIS is required for many (if not all) of the NWP's individually as well as for the entire NWP program. The draft PEIS does not constitute a valid draft EIS either for any individual NWP or for the overall NWP program. Moreover, the Corps' plan to issue final NWP's pursuant to the August 9 proposal, before an adequate final EIS has been prepared, violates NEPA and applicable regulations.

Sincerely,

Daniel L. Rosenberg  
Natural Resources Defense Council

Howard Fox  
Earthjustice

Melissa Samet  
American Rivers

Julie Sibbing  
National Wildlife Federation