

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF
HOME BUILDERS, *et al.*,

Plaintiffs,

vs.

UNITED STATES ARMY CORPS
OF ENGINEERS, *et al.*,

Defendants.

No: CV 00-379 (TPJ)

NATIONAL STONE ASSOCIATION, *et al.*,

Plaintiffs,

vs.

UNITED STATES ARMY CORPS
OF ENGINEERS, *et al.*,

Defendants.

No: CV 00-558 (TPJ)

NATIONAL FEDERATION OF
INDEPENDENT BUSINESSES and
WAYNE NEWMAN,

Plaintiffs,

vs.

UNITED STATES ARMY CORPS
OF ENGINEERS, *et al.*,

Defendants.

No: CV 00-1404 (TPJ)

**BRIEF OF AMICI CURIAE INTERNATIONAL COUNCIL OF SHOPPING CENTERS,
THE NATIONAL MULTI HOUSING COUNCIL, THE NATIONAL APARTMENT
ASSOCIATION, THE AMERICAN SENIORS HOUSING ASSOCIATION, AND THE
NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES IN
SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

This consolidated litigation involves numerous administrative challenges to a final action taken by the defendants, the United States Army Corps of Engineers, et al. (the "Corps"), introducing significant changes to the Nationwide Permit ("NWP") Program administered by the Corps pursuant to § 404(e) of the Clean Water Act ("CWA"), 33 U.S.C. § 1344(e). Plaintiffs¹ have asserted claims under the CWA, 33 U.S.C. §§ 1251 et seq., the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 et seq., the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., and the United States Constitution.

Because the Corps' action violates the CWA, the APA and the Constitution, amici² International Council of Shopping Centers ("ICSC"), National Multi Housing Council ("NMHC"), National Apartment Association ("NAA"), American Seniors Housing Association ("ASHA"), and the National Association of Industrial and Office Properties ("NAIOP") are filing this brief in support of Plaintiffs' Motions for Summary Judgment, and urge the Court to invalidate the challenged rule.

A. The Clean Water Act

Section 404 of the CWA, 33 U.S.C. § 1344, requires all persons who wish to discharge dredged or fill material into "navigable waters" to first obtain a permit from the Army Corps of Engineers. "Navigable waters" are defined in Section 502 of the CWA as "waters of the United States." 33 U.S.C. § 1362(7).

Section 404 of the Act establishes a two-tiered permitting system. Individual permits may be issued in situations requiring a case-by-case evaluation. See 33 U.S.C. § 1344(a). General

¹ Plaintiffs include the National Association of Home Builders, the National Stone Association, and the National Federation of Independent Businesses and Wayne Newman.

² A motion for leave to file a brief as *amicus curiae* has been filed concurrently with this brief.

permits, on the other hand, may be issued, after notice and an opportunity for comment, on a state, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material that are deemed to be similar in nature, causing only minimal adverse environmental effects when performed separately, and involving only minimal cumulative adverse effects on the environment. 33 U.S.C. § 1344(e)(1).

The Corps issued its first nationwide general permit (NWP) in 1975. See 40 Fed. Reg. 31,320, 31,322 (July 25, 1975). It authorized NWP 26, the permit that was replaced by the final rule at issue here, in 1982. See 42 Fed. Reg. 31,794 (July 22, 1982). Immediately prior to the issuance of the wetlands Replacement Permit Rule (the "Replacement Permit Rule" or the "Final Rule") on March 9, 2000, the Corps was using 39 different NWPs. Over time, the Corps has reduced the amount of acreage that may be filled using a NWP from ten acres to one-half acre and has added numerous restrictive terms and conditions to these general permits.

B. History of the Challenged Rule

On March 9, 2000, the Corps issued its wetlands Replacement Permit Rule, eliminating former Nationwide Permit 26 (NWP 26), and authorizing the use of new activity-based permits pursuant to new, more stringent standards and conditions. Replacement Permit Rule, 65 Fed. Reg. 12,818 (issued March 9, 2000) (AR PRT1-011 - 092). NWP 26 was a general permit, issued under § 404(e), which authorized discharges into headwaters and isolated waters with a loss of up to three acres of jurisdictional wetlands or 500 linear feet of streambed without the need to obtain an individual permit.

The Replacement Permit Rule establishes five new NWPs³; six modified NWPs⁴; two new NWP general conditions⁵; and nine modified NWP general conditions⁶. Under the Replacement Permit Rule, to qualify for a general permit, a discharge of dredged or fill material must affect one-half acre or less of wetlands, or less than 300 linear feet along a stream bed. The Replacement Permit Rule further requires pre-construction notification ("PCN") to the Corps' district engineer under substantially more circumstances (generally, when the impacted area exceeds one-tenth of an acre)(General Condition 13) and dramatically limits the use of multiple nationwide permits (General Condition 15). The Final Rule became effective on June 5, 2000, and NWP 26 expired the same day. Replacement Permit Rule, 65 Fed. Reg. at 12,818 (AR PRT1-012).

II. INTERESTS OF AMICI

The Replacement Permit Rule has a potentially devastating effect on the amici membership's activities. Under the rule, far fewer routine activities, such as the reshaping of existing drainage ditches, expansion of building pads and foundations, or construction of stormwater detention ponds, will qualify for a nationwide general permit. Accordingly, many more routine construction and renovation projects will be required to obtain individual permits through case-by-case evaluation by Corps district engineers, substantially increasing the amount of time and cost to obtain the necessary government approval. In addition, the Replacement

³ The new NWPs include, *inter alia*, NWP 39 (Residential, Commercial and Institutional Development), NWP 41 (Reshaping Existing Drainage Ditches), NWP 42 (Recreational Facilities) and NWP 43 (Storm Water Management Facilities).

⁴ The modified NWPs include, *inter alia*, NWP 3 (Maintenance), NWP 7 (Outfall Structures and Maintenance), NWP 12 (Utility Line Activity) and NWP 14 (Linear Transportation Crossings).

⁵ The new general conditions include General Condition 25, placing restrictions on discharges into Critical Resource Waters, and General Condition 26, placing restrictions on discharges within the 100 year floodplain.

⁶ The modified general conditions include, *inter alia*, General Condition 13, regarding Pre-Construction Notification; General Condition 15, regarding use of Multiple Nationwide Permits; and General Condition 19, regarding Mitigation.

Permit Rule drastically reduces the wetland acreage that can be disturbed using a nationwide permit, with potentially significant detrimental effects on construction and renovation project schedules and costs and hence on the national economy. Finally, the new General Conditions serve as a bar to most construction activities in floodplains and critical resource areas, activities that are crucial to the amici's construction and maintenance of safe, structurally sound, and economically feasible support facilities.

ICSC, NMHC/NAA/ASHA, and NAIOP submitted comments to the Corps explaining their concerns about the scope and requirements of the proposed Replacement Permit Rule. See AR PRT2-2724 - 2725; PRT2-6047 - 6051; PRT6-0439 - 0440; PRT6-0683 - 0684. As discussed herein, however, changes in the final version of the rule were made without the opportunity for meaningful comment, in violation of the APA's procedural requirements. The interests of the individual amici are set forth below.

A. International Council of Shopping Centers

ICSC is a trade association with over 40,000 members, including owners, developers, managers, retailers, lenders and others with a professional interest in the shopping center industry. Although ICSC's members appreciate the difficulties and disadvantages of placing shopping centers in areas that contain wetlands, the reality is that some developments must occur in areas of the country where avoiding wetlands is not a practical option. Thus, ICSC's members routinely engage in new projects that require dredge and fill permits under section 404. In addition, shopping centers are typically retrofitted and/or renovated every eight to ten years. Many of these pre-existing developments are located in areas now protected as wetlands under the CWA. Shopping center renovations – which are the industry's most prevalent use of nationwide permits – often involve activities that require a section 404 permit. For example,

retrofits and renovations routinely involve building enhanced stormwater management facilities, upgrading utilities, and improving ingress/egress facilities to control the flow of traffic. Changes to ingress/egress patterns, in turn, often involve the movement of drainage ditches.

The Replacement Permit Rule dramatically reduces the number of minor renovation projects that may qualify for NWP authorization, increasing the need for case-by-case analysis by district engineers of individual permits. As a result, it is likely that many shopping center owners will elect not to pursue construction plans rather than confronting the delay and uncertainty of the individual permitting process. Countless projects will be delayed or canceled entirely, with significant, nationwide economic ramifications. In addition, the quality of shopping centers will decline as fewer and fewer older shopping centers are renovated, causing detrimental effects on ICSC members, the economy, and the environment.

B. National Multi Housing Council/National Apartment Association/American Seniors Housing Association

NMHC, NAA and ASHA represent the nation's leading participants in the multifamily rental housing industry. The combined membership of these organizations is engaged in all aspects of the development and operation of apartments, including ownership, construction, finance, and management.

The Replacement Permit Rule has a significant impact on the thousands of apartment owners and managers whose activities impact wetlands and other aquatic environments. Among the affected activities are those involving the maintenance of existing facilities or drainage ditches and those involving construction in support of the main facilities, including parking lots and playgrounds. Many of these relatively minor construction and renovation projects, which would have been routinely authorized under NWP 26, now require PCNs and individualized analysis by the Corps. Applicants not meeting the requirements of the new NWPs will be forced

to seek coverage of their activities under the time-consuming and costly individual permit process set forth in section 404(a).

C. National Association of Industrial and Office Properties

The National Association of Industrial and Office Properties is a trade association with over 9,000 members who are developers, owners, investors, and related professionals in industrial, office and commercial real estate throughout North America. NAIOP promotes effective public policy, through its grassroots network, to create, protect, and enhance property values. NAIOP's members routinely require section 404 permits to authorize construction and renovation of building pads and foundations, changes in transportation patterns, and stormwater management facilities. The Replacement Permit Rule significantly curtails NAIOP members' ability to engage in these routine activities by placing unreasonable restrictions on the use of NWP's and imposing stringent new and modified General Conditions on projects that previously would have met the NWP 26 standard.

III. ARGUMENT

A. Summary of Argument

The Replacement Permit Rule⁷ exceeds the Corps' rulemaking authority under the CWA, is arbitrary and capricious, and violates the APA's notice and comment requirements. It also

⁷ The APA defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]" 5 U.S.C. § 551(4). "Rule making" is defined as "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). It is well established in this Circuit that the APA's definition of "rule" is extremely broad, encompassing "nearly every statement an agency may make." Ctr. for Auto Safety v. NHTSA, 710 F.2d 842, 846 (D.C. Cir. 1983) (citations omitted). This is so even when the agency does not explicitly term its action a "rulemaking." Id. ("It is the substance of what the [agency] has purported to do and has done which is decisive.").

There can be no doubt that the Replacement Permit Rule is a "rule" and that the Corps' action in promulgating it constitutes a "rulemaking" invoking the substantive provisions and requirements of the APA. The replacement of NWP 26 with a comprehensive and complex combination of new and modified NWP's, new and modified General Conditions and increased substantive permitting requirements is unquestionably an "agency statement of general or particular applicability and future effect" that is "designed to implement, interpret, or prescribe law or policy." The Replacement Permit Rule must, therefore, satisfy the APA to be enforceable.

raises significant concerns implicating the Tenth Amendment and the Commerce Clause. Accordingly, the Court should grant Plaintiffs' Motions for Summary Judgment, invalidate the Final Rule, reinstate NWP 26, and remand the Final Rule to the Corps for reconsideration based on appropriate legal principles.

B. The Replacement Permit Rule Exceeds the Corps' Statutory Authority Under the CWA

Although the Corps has some degree of authority to administer specified provisions of the CWA, its discretion is not unfettered. The APA requires the Court to reverse an agency action that it finds to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Although agencies are entitled to some degree of judicial deference to their interpretations of statutes they administer, an agency's discretion is not absolute. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). If Congress has specifically addressed the subject at issue, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' Only if the statute is ambiguous does a court defer to an agency's interpretation of the statute." Am. Mining Cong. v. United States Army Corps of Eng'rs, 951 F. Supp. 267, 271 (D.D.C. 1997) (quoting Chevron, 467 U.S. at 843), aff'd sub nom Nat'l Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998). As set forth below, the Replacement Permit Rule exceeds Congress' unambiguously expressed intent in enacting section 404(e).

1. The Corps has no jurisdiction over isolated waters and ephemeral streams

In an important case decided earlier this year, the U.S. Supreme Court clarified that certain non-navigable, isolated waterbodies do not constitute "waters of the United States." See Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 121 S. Ct. 675

(2001) (hereinafter, "SWANCC"). The Supreme Court struck down the Corps' "Migratory Bird Rule" and held that the Corps had exceeded its statutory authority because the CWA does not extend to certain non-navigable, isolated, intrastate waters as defined in 33 C.F.R. § 328.3(a)(3). See also United States v. Wilson, 133 F.3d 251, 257 (4th Cir. 1997) (holding that the Corps exceeded its jurisdiction under the CWA by seeking to regulate intrastate, non-navigable waterbodies "solely on the basis that the use, degradation, or destruction of such waters could affect interstate commerce.").

In this case, the Corps is again trying to extend its jurisdiction to isolated, non-navigable waters that do not constitute "waters of the United States" under SWANCC and Wilson. The Replacement Permit Rule expressly states the Corps' intention to regulate ephemeral streams, drainage ditches, isolated waters, and stormwater management facilities. Replacement Permit Rule, 65 Fed. Reg. at 12,823-824 (AR PRT1-017 - 018). This class of waters is clearly within the category of waters for which there is no federal interest. Much like the waters regulated under the Migratory Bird Rule struck down in SWANCC, these "waters" are not even close to "navigable" and have scant, if any, connection to interstate commerce. See Section III.E.2. *infra*. Ephemeral streams, for example, are by definition dry most of the year, meet no test of navigability and clearly fall outside the jurisdiction of the federal government. Accordingly, the Corps has exceeded its statutory authority under the CWA, and the Final Rule must be reversed.

2. The Final Rule violates Congressional intent to streamline the permitting process by enacting NWPs

Congress enacted the two-tiered permitting process under section 404 in order to exempt certain projects from the requirement of case-specific analysis. The purpose of the general permitting process was to alleviate the burden of the individual permitting process, and to streamline the permitting process as a whole for certain types of projects that have minimal

adverse effects upon the environment. The Corps recognized this principle in its July 1999 proposal to replace NWP 26. See Proposal to Issue and Modify Nationwide Permits, 64 Fed. Reg. 39,252, 39,260 (July 21, 1999) (AR PRT3-0010).

The Replacement Permit Rule frustrates this clear congressional mandate. The general permitting process is now virtually useless to the regulated community, given the stringent limitations, restrictions and conditions that have been imposed in the new and modified NWPs and General Conditions. Section 404's delegation of authority to the Corps to establish requirements and standards for activities authorized by a general permit does not authorize requirements and standards that are so onerous as to frustrate the basic premise of section 404, that projects with limited environmental impact be authorized to proceed without seeking case-by-case government approval. The PCN requirements of the Replacement Permit Rule further frustrate this basic tenet of the general permit program envisioned by Congress. Because the Replacement Permit Rule exceeds the Corps' jurisdiction and is contrary to the intent of Congress as expressed in the CWA, it is subject to reversal under the APA.

C. **The Replacement Permit Rule is Arbitrary and Capricious**

Under section 706(2)(A) of the APA, a reviewing court should set aside a challenged agency rule if the agency acted arbitrarily or capriciously in adopting its interpretation of the relevant statute. 5 U.S.C. § 706(2)(A); Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 678 (D.D.C. 1997). In determining whether a particular agency action is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law, the Court must conduct an in-depth review of whether the agency action "was based on consideration of the relevant factors and whether there has been a clear error of judgment." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted). An agency action is arbitrary

and capricious "if the agency relies upon improper factors, ignores important arguments or evidence, fails to articulate a reasoned basis for the rule, or produces an explanation that is 'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Natural Res. Def. Council, Inc. v. United States Env'tl. Prot. Agency, 822 F.2d 104, 111 (D.C. Cir. 1987) (quoting State Farm, 463 U.S. at 43).

In addition, "[a] rule without a stated reason is necessarily arbitrary and capricious." Small Refiner Lead Phase-Down Task Force v. United States Env'tl. Prot. Agency, 705 F.2d 506, 551 (D.C. Cir. 1983) (citations omitted). Thus, if the agency has failed to articulate a "rational connection between the facts found and the choice made," the Court may invalidate the action or remand for a more reasoned decision. State Farm, 463 U.S. at 43; Defenders of Wildlife, 958 F. Supp. at 679. See also Am. Petroleum Inst. v. Env'tl. Prot. Agency, 216 F.3d 50, 57 (D.C. Cir. 2000); Chem. Mfrs. Ass'n v. Env'tl. Prot. Agency, 217 F.3d 861, 865 (D.C. Cir. 2000).

1. **The Corps failed to articulate an intelligible principle defining "minimal adverse effects"**

Section 404(e) authorizes the Corps to issue general permits for any category of activities that are "similar in nature, 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)(1). Activities causing more than "minimal adverse effects" must go through the individual permitting process. Despite this clear congressional mandate distinguishing individual and general permits on the basis of their propensity to cause more than "minimal adverse environmental effects," the Corps obstinately refused to define that term in the Replacement Permit Rule. Specifically, the Corps stated:

We cannot provide a national definition of the term "minimal effects on the aquatic environment" because the determination of minimal adverse effects for the NWP's and other general permits must be made on a case-by-case basis, by considering site characteristics, the functions and values of waters of the United States, the quality of

those waters, regional differences in aquatic resource functions and values, and other factors.

Replacement Permit Rule, 65 Fed. Reg. at 12,884 (AR PRT1-077).

Without a definition of this crucial term, the Corps' repeated statements that portions of the Replacement Permit Rule are justified because they ensure that NWP-authorized activities will have only "minimal adverse effects" on the aquatic environment lack all substance. See, e.g., Replacement Permit Rule, 65 Fed. Reg. at 12,853 (AR PRT1-047). Because the Corps' conclusory explanations provide no "rational connection between the facts found and the choice made," the Replacement Permit Rule must be set aside. State Farm, 463 U.S. at 43.

The Corps' failure to define "minimal adverse effects," and its repeated reliance on "case-by-case" analysis by district engineers in determining which activities qualify for NWP status, has the further effect of creating an impermissible third category of permits. In addition to the individual permits authorized by section 404(a) and the general permits (now severely restricted) authorized by section 404(e), as a result of the Replacement Permit Rule, the Corps now purports to analyze general permits under a slightly abbreviated and hopelessly complex new version of the individual permit process. Under the new and modified NWPs and General Conditions, permittees must submit PCNs for any discharge of dredged or fill material that will affect more than one-tenth acre of broadly defined "waters of the United States." In nearly every circumstance, local district engineers may exercise discretion to require additional special conditions on a case-by-case basis. See, e.g., Replacement Permit Rule, 65 Fed. Reg. at 12,851 (AR PRT1-045). This intermediate-level permitting process, delegating to local district engineers the authority to police NWP status by subjective determination of "minimal adverse effects" on a case-by-case basis (and significantly increasing the Corps' own workload), cannot possibly be what Congress had in mind when it decided to streamline section 404's permitting

requirements. The Final Rule should therefore be set aside and remanded to the Corps for determination on a reasoned and lawful basis.

2. The Corps failed to articulate a rational basis for its reduction of the maximum permissible acreage to one-half acre

Under these principles, the Corps' decision to reduce the maximum per-project acreage impact to one-half acre was arbitrary, capricious, and contrary to the express provisions of the CWA. Congress authorized a dual permitting system so as to streamline the permitting process in those circumstances where there would be minimal or no adverse impacts upon the environment. The general permitting process embodied in former NWP 26 had the further advantage of encouraging applicants to tailor their projects to minimize impacts to meet the parameters of the NWP process. As a practical matter, few projects will qualify for the one-half acre limit, so applicants will have little incentive to minimize the impact of their projects since they will need to go through the costly and time-consuming process of obtaining an individual permit.

Furthermore, the administrative record does not support the Corps' arbitrary decision to reduce the acreage limit from three acres to one-half acre. The prior limit under NWP 26 was 3 acres. During the rulemaking proceeding, the Corps was still discussing limits of two or three acres, coupled with the use of regional conditioning. (AR PRT3-0114/3, AR PRT7-0031). The Corps acknowledged in its 1998 Finding of No Significant Impact for the Nationwide Permit - Program (the "1998 FONSI") that a loss of five acres of low value waters in some parts of the country might have minimal impacts, and that the way to deal with the potential loss of high value aquatic resources would be to use regional conditions. (AR PRT9-0144). In the Final Rule, the Corps again acknowledged that it would be preferable to develop NWPs that authorize

most activities that have minimal impact upon the environment, and to direct the district engineers to use regional conditions. Replacement Permit Rule, 65 Fed. Reg. at 12,838 (AR PRT1-032/1). Nevertheless, the Corps then arbitrarily reduced the maximum acreage limit to one-half acre in the Final Rule, without further explanation to justify its decision. *Id.* at 12,825 (AR PRT1-019/1).

The stringent limit on the maximum acreage that will qualify for a NWP has the further effect of eliminating any incentive for applicants to modify their projects so as to qualify for NWPs. The Corps recognized the potentially damaging effect its modifications would have on the regulated community's incentive to engage in smaller projects in its Preliminary Decision Document for proposed NWP "E" (AR PRT7-0485), and the regulated community's concern was reflected in comments received during the comment period (AR PRT2-0921; AR PRT2-0925; AR PRT2-1609; AR PRT2-1824). Indeed, the Corps explicitly recognized that applicants were likely to design their projects to conform to the NWPs "rather than propose mining activities that require an individual permit and may have greater adverse impacts." (AR PRT7-0485). Despite this recognition, the Corps failed to provide any rational basis for reducing the maximum acreage impact to one-half acre. Its unexpected and significant reduction of the maximum acreage impact was therefore arbitrary and capricious.

3. The restriction on discharges within the 100-year floodplain was arbitrary and capricious

The Corps' decision to place numerous restrictions on discharges within the 100-year floodplain was similarly flawed. The new General Condition 26 excludes from coverage under NWPs 29, 39, 40, 42, 43 and 44 any discharges that result in "permanent, above-grade fills within the 100-year floodplain" or "permanent, above-grade fills within the floodway of the 100-year floodplain of headwaters." Replacement Permit Rule, 65 Fed. Reg. at 12,897 (AR PRT1-

090/2). The condition also requires prospective permittees to notify the District Engineer before discharges resulting in "permanent, above-grade fills within the flood fringe of the 100-year floodplain" may be authorized by NWPs 12, 14, 29, 39, 40, 42, 43 and 44. Applicants must determine the location of the floodplain based on maps provided or endorsed by the Federal Emergency Management Agency ("FEMA").

There is simply no support in the record for restricting the use of general permits in the 100-year floodplain. First, the complex scheme distinguishing between "headwaters," "floodways" and "flood fringe" areas places an unwarranted burden on permittees to analyze whether any particular project falls within the 100-year floodplain, and if it does, whether it qualifies for NWP authorization as a "flood fringe" area. The requirement that permittees consult FEMA or FEMA-approved maps in determining whether the project falls within restricted areas engenders further uncertainty, given the inconsistent quality and accuracy of these maps. See Issues Related to the 100 Year Floodplain (AR PRT1-0996).

Second, the applicability of the restrictions is hopelessly broad. The Corps has recognized that a large percentage of the wetlands regulated under § 404 - approximately 55 million acres - fall within the 100-year floodplain. Proposal to Issue and Modify Nationwide Permits, 64 Fed. Reg. at 39,282 (AR PRT3-0032/2). Given the complexity of the floodplain restrictions, the increased applicability will greatly increase the costs of the permit process as applicants are forced to examine and evaluate the new regulations for projects that would routinely have been authorized under the former NWPs.

Third, the Corps' decision to impose significant restrictions on discharges in the 100-year floodplain was made despite every indication that the current scheme sufficiently protected wetlands in floodplain areas. Significantly, when FEMA suggested a blanket prohibition on the

use of NWP's in the floodplain, the Corps acknowledged that the current program "already provide[s] adequate protection to wetlands within 100-year floodplains through the PCN process, regional conditioning, and the ability to exercise discretionary authority." Top Issues (AR PRT1-1055). The Corps further recognized that, under the new rule, many projects previously authorized under the NWP's would be subject to the individual permit process, "without any value added for the aquatic environment or the floodplain. . . ." (AR PRT1-0994 - 0995). Yet the Corps proceeded to adopt the new restrictions, without setting forth any rational basis for its decision.

Finally, the increased restrictions will have the further effect of forcing more projects – however minor and insignificant – into the costly and time-consuming individual permit process. While the NWP program applies to projects which fill less than one-half acre, the restriction on fills in the 100-year floodplain has no such dimensional requirement. Thus, even if one square foot of an otherwise qualifying project would be placed in a floodplain, the project could not be constructed under the NWP. Replacement Permit Rule, 65 Fed. Reg. at 12,897 (AR PRT1-090). Such a result could not have been what Congress intended in creating a streamlined permitting process under section 404.

4. **The exclusion of critical resource waters was arbitrary and capricious.**

The new General Condition 25 significantly restricts discharges of dredged or fill materials for any activity within, or directly affecting, "critical resource waters," including wetlands adjacent to such waters. Critical resource waters include marine sanctuaries, critical habitats for federally-listed threatened and endangered species, National Estuarine Research Reserves, national wild and scenic rivers, coral reefs, state natural heritage sites, and outstanding national resource waters or other waters a state has designated as having environmental

significance. Specifically, General Condition 25 removes authorization under some 14 NWP's for dredge and fill activities in these areas; and requires pre-construction notification for discharges into critical resource waters authorized by 18 additional NWP's.

The Corps simply failed to provide a rational basis for its decision drastically to reduce the authorized activities in areas containing or directly affecting "critical resource waters." Even if there were some rationale for this exclusion, there is no explanation as to why, when an area has been designated as such a resource, the scope of the exclusion must reach to other areas vaguely defined as "directly affecting" or as including "adjacent wetlands" the agency chose not to designate as critical in the first place. The decision categorically to exclude such projects from the NWP program was therefore arbitrary and capricious and must be set aside.

5. **The requirements regarding vegetated buffers, water quality and storm water management plans were arbitrary and capricious.**

Although the new NWP 39 authorizes discharges of dredged or fill material in connection with the construction, expansion or renovation of building foundations and building pads, the Corps has imposed so many restrictions that NWP 39 is virtually useless to the regulated community. In addition to reducing the maximum acreage impact to one-half acre, requiring PCNs for projects impacting more than one-tenth acre, and prohibiting use of the permit for stream channelization downstream of the point where the annual average flow is one cubic foot per second, NWP 39 requires the prospective permittee to build 25 to 50-foot wide wetland or upland vegetated buffers adjacent to any open waters or streams within the project area. Replacement Permit Rule, 65 Fed. Reg. at 12,889-890, 12,893, 12,896 (AR PRT1-082 - 083, - 086, -089).

In addition, the modified General Condition 19 gives discretion to the District Engineer to require wider vegetated buffers in connection with the newly required compensatory mitigation for all wetlands impacts requiring PCNs. Id. at 12,895 - 896 (AR PRT1-088 - 089). The combined effect of these new rules is to impose still greater burdens, costs and uncertainty on the regulated community, and to allow the Corps to micromanage previously routine projects well in excess of the statutory limits contemplated in the CWA.

The modifications to General Condition 9 further require applicants seeking authorization under numerous NWP's to include water quality measures in areas where state water quality certification procedures do not require or approve a water quality management plan. Id. at 12,862 (AR PRT1-056). The applicability of this new and onerous general condition is broad, encompassing NWP's in several areas.⁸ Many projects that previously would have been routinely authorized under the NWP's now require painstaking review and analysis of water quality measures irrespective of the likelihood that "waters of the United States" will even be affected by the project.

Moreover, to the extent General Condition 9 now requires water quality measures not otherwise contemplated by state or local law, it impermissibly intrudes upon the states' primary right and responsibility to regulate local land and water use.

Finally, although the new NWP 43 authorizes discharges for the construction and maintenance of stormwater management facilities, the acreage limit is again merely one-half an acre, and a PCN is required for all activities. Replacement Permit Rule, 65 Fed. Reg. at 12,891-892 (AR PRT1-084 - 085). The effect of these restrictions, again, is to create a *de facto* case-by-

⁸ For example, General Condition 9 affects use of NWP's for utility line activities, linear transportation crossings, hydropower projects, minor discharges, completed enforcement actions, residential commercial and institutional activities, agricultural activities, recreational facilities, stormwater management facilities, and mining activities.

case permitting scheme, increasing significantly the cost, delay, and burden of activities that previously would have qualified for general permit authorization. Yet the Corps has failed to justify the sweeping changes brought about by the Replacement Permit Rule, in violation of the APA's strict prohibition on arbitrary and capricious rulemaking.

D. The Corps Violated the Notice and Comment Provisions of the APA When It Failed to Notify the Regulated Community of Its Intention to Reduce the Maximum Permissible Acreage From Three Acres to One-Half Acre

The APA requires agencies to publish a general notice of proposed rulemaking in the Federal Register, including the terms and substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b). The required notice gives regulated entities an opportunity to comment on the proposed rules and to raise concerns about their scope or applicability. See Assoc. of Battery Recyclers, Inc. v. U.S. Envtl. Prot. Agency, 208 F.3d 1047, 1058 (D.C. Cir. 2000). The agency's notice satisfies § 553(b) if it "provide[s] sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." Am. Water Works Ass'n v. Envtl. Prot. Agency, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (quoting Florida Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988)).

The Corps' decision to reduce the maximum acreage impact from three acres to one-half acre woefully failed to comply with § 553(b)'s notice requirement. As far as the regulated community was aware, the Corps was considering a 2-3 acre ceiling for impacts authorized under the new and newly modified NWP's. The Corps provided no clue that it was, in fact, seeking significantly to reduce the authorized acreage, with a drastic effect on the number of projects now required to seek individual permits. In sum, the Corps' silence in the face of its dramatic reduction of the permissible acreage impact failed to allow interested parties an opportunity to "comment meaningfully" on the proposed rule.

E. The Replacement Permit Rule Violates the Constitution

1. The Corps' unauthorized foray into *de facto* land use planning violates the 10th amendment's reservation of powers to the states

Just a few weeks ago, the Supreme Court restated the well-established constitutional principle that the states, not the federal government, enjoy "traditional and primary power over land and water use." SWANCC, 121 S.Ct. at 684. The Court has long recognized that under principles of Federalism and the Tenth Amendment, states and localities have broad authority to engage in land use planning. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Consistent with the Tenth Amendment's mandate that all powers not expressly given to the federal government be reserved for the states, Congress explicitly recognized the states' primary rights to regulate land and water resources in the CWA:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b) (1986 & Supp. 2000). See also 33 U.S.C. § 1370 (1986 & Supp. 2000) (explicitly preserving the states' rights to adopt or enforce standards or requirements relating to pollution control, and providing that "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States.").

The CWA states further Congress' intent that the states would "manage the construction grant program . . . and implement the permit programs under [§] 1344." 33 U.S.C. § 1251(b). Thus, Congress explicitly stated its intent that the states would enjoy primary responsibility for implementing the permit program set forth in section 404.

Despite these broad statements that the states would maintain jurisdiction over land and water resources, the CWA is a federal statute authorizing the federal government to assert jurisdiction to regulate "navigable waters" of the United States. Thus, Congress gave concurrent authority to the Corps to administer section 404's permit program. Because the federal government has limited powers, however, the context and purpose of the CWA as well as general principles of federalism impose strict limits on that authority. For this reason, the Supreme Court has held that Congressional intent to alter the traditional constitutional balance between the federal government and the states may not be implied, but instead must be "unmistakably clear in the language of the statute." Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (citations omitted). Congress must "make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." Id. at 461. See also SWANCC, 121 S.Ct at 684 ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.") (footnote omitted).

Under these principles, it is clear that the Corps' interpretation of section 404(e) of the CWA exceeds its statutory and constitutional powers. The Corps does not have statutory authority to regulate discharges in waters that do not constitute "waters of the United States", and many of the waterbodies that are covered by the Final Rule are isolated, non-navigable waterbodies. In addition, the Corps has not justified its actions that constitute national land use planning, such as prohibiting the use of any NWP in floodplains or requiring vegetated buffers.

2. The inclusion of isolated, non-navigable waters in the Corps' regulatory scheme impermissibly stretches the limits of the Commerce Clause

The Supreme Court recently explained in SWANCC that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear

indication that Congress intended that result." 121 S.Ct. at 683. Similarly, in United States v. Wilson, the Fourth Circuit concluded that the Corps' definition of "waters of the United States," which included intrastate and non-navigable bodies of water with no apparent connection to interstate commerce, would likely "exceed congressional authority under the Commerce Clause." 133 F.3d at 257. The court concluded that, because the CWA's delegation to the Corps of the responsibility to regulate "the waters of the United States" was not a sufficiently "clear indication" that Congress intended the Corps to regulate intrastate and non-navigable waters, the Corps had exceeded its jurisdiction. Id.

Similarly, here, the Court should strike down the Corps' efforts to regulate waterbodies that are so removed from any reasonable definition of "interstate commerce" that they "invok[e] the outer limits of Congress' power."

IV. CONCLUSION

For the foregoing reasons, amici International Council of Shopping Centers, National Multi Housing Council, National Apartment Association, American Seniors Housing Association, and National Association of Industrial and Office Properties respectfully urge the Court to grant Plaintiffs' Motions for Summary Judgment; invalidate the Replacement Permit Rule; reinstate NWP 26; and remand to the Corps for reconsideration in light of SWANCC and other controlling legal principles.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

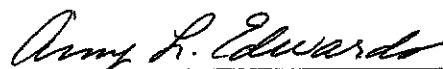
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