IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS Plaintiff, v. UNITED STATES ARMY CORPS OF ENGINEERS, THOMAS E. WHITE, Secretary of the Army, and LT. GENERAL ROBERT B. FLOWERS, Chief of Engineers, United States Army Corps of Engineers, Defendants.	)	Case No. 1:00CV00379 and consolidated cases Judge Jackson

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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September 20, 2001

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REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants United States Army Corps of Engineers, the Honorable Thomas E. White, Secretary of the Army, and Lt. General Robert B. Flowers, Chief of Engineers, United States Army Corps of Engineers (collectively, the "Corps"), file this Reply Brief in Support of the Corps' cross-motion for summary judgment.[1]

INTRODUCTION

Plaintiffs discharged pollutants pursuant to the now-expired NWP 26 for years, and apparently developed a sense of entitlement to do so indefinitely. Ironically, after benefitting for years from various versions of NWP 26 that allowed them to conduct thousands of projects without notice to the Corps, Plaintiffs now argue that the Corps lacks sufficient information about the effects of their activities under that NWP to justify its replacement. Plaintiffs assert

[1] All three Plaintiffs in these consolidated cases – National Association of Home Builders ("NAHB"), National Stone Association et al. ("NSA"), and National Federation of Independent Businesses ("NFIB") – moved for summary judgment and filed oppositions to the Corps' cross-motion for summary judgment. The Corps files this single consolidated Reply.

that the appropriate remedy for this alleged lack of information is a Court order resurrecting the expired NWP 26 that obfuscated the effects of their development activities in the first place.

However, by operation of the statute, NWP 26 expired. Under section 404(e) of the Clean Water Act ("CWA"), the Corps may issue general permits in its place, provided that the permits contain requirements and standards which ensure that the activities authorized by those general permits have only minimal adverse effects on the environment. The Corps has issued a number of activity-specific general permits which authorize a broad range of activities with minimal effects to proceed without an individual permit. The terms and conditions the Corps has placed in those permits are directly related to the minimization of the impacts of authorized activities on the environment. The replacement general permits were issued by the Corps after a lengthy, careful process, in which the public was heavily involved. The resulting general permits allow substantial development activities without compromising water quality and defeating the public's right to effective implementation of the Act's ambitious but unequivocal goals to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Plaintiffs have not shown that the Corps' efforts to balance protection of the environment with legitimate landowner interests or the development of private property are irrational or clearly erroneous. Instead, they argue that the environmental effects allowed by the general permits are too minimal, and the permits are not sufficiently "streamlined." Their arguments find no support in the statute. The statute sets forth a minimal environmental effects standard, not a "streamlining" standard.

Moreover, Plaintiffs' arguments are premature and rest on speculation and conjecture; therefore, principles of finality, ripeness and exhaustion preclude this Court's review of the

Corps' general permit issuance. Plaintiffs do not, and cannot, assert that the replacement general permits result in the denial of a single project. Indeed, general permits provide only one form of authorization, they do not have the effect of denying a project. Failure of a project to meet the criteria for a general permit does not foreclose the project because other forms of authorization are available. This fact is ably demonstrated by Plaintiffs, who assert that in response to the general permits they will seek individual permits to conduct even larger, more valuable projects. Nevertheless, Plaintiffs assert that they suffer legal consequences from the general permits. Plaintiffs' complaint, however, is simply that in some situations they will have to engage in an individual permit process before going forward with their development projects. The general permits do not represent the consummation of the Agency's decisionmaking, and do not result in legally cognizable injury.

Further, even if Plaintiffs prevail, their requested relief in unavailable. Enamored with the expired NWP 26, Plaintiffs want the Court to take the extraordinary step of "reinstating" it. Plaintiffs request the Court to directly contravene the Congressional mandate limiting the life of a general permit to five years, as well as displace the Agency's experts in whose discretion Congress has placed the section 404 permitting program. Their request must be denied. Plaintiffs are not entitled to have this Court substitute expired permits for those issued by the Corps after extensive administrative proceedings and significant public input.

This Court should grant the Corps' cross-motion for summary judgment, deny Plaintiffs' motions, and dismiss the complaints with prejudice.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE COMPLAINT ON FINALITY, RIPENESS, AND EXHAUSTION GROUNDS

As discussed in the Corps' opening brief (U.S. Mem. at 22-29), principles of finality, ripeness and exhaustion preclude this Court's review of these general permits. In the permitting context, for purposes of judicial review the consummation of the Agency's decision making process comes when a person or entity is allowed or disallowed, as the case may be, to proceed with a project. Merely requiring some of Plaintiffs' members to participate in the individual permitting process does not amount to hardship of a kind that weighs in favor of a finding of finality. Plaintiffs' claims are neither ripe nor final. Moreover, the Corps has administrative procedures that disappointed parties must exhaust before they can seek judicial review. To the extent that any of Plaintiffs' members are ultimately denied a Corps permit to develop their property, they will have access to the courts at that time.

Plaintiffs attempt to evade these commonsense limitations on review by exaggerating the "injury" that the general permits supposedly inflict on them. NSA avows that unless set aside, the general permits will "substantially" injure its members. But NSA goes on to concede that the alleged injury is merely "the additional costs and delays of the individual permit process." NSA Opp. at 3. NSA asserts, without any citation or record support whatsoever, that "most" of its members' projects that formerly would have qualified for NWP 26 authorization cannot satisfy the current general permits and so will be "forced" into the individual permit process, which NSA characterizes as "extremely costly and time-consuming." NSA Opp. at 5.[2] NAHB

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[2] NSA claims that the Corps "admits" that the individual permit process is "extremely costly and time-consuming"(NSA Opp. at 5), citing 65 Fed. Reg. 12,818, 12,819 (Mar. 9, 2000). At that cite, the Corps actually stated only that its improvements to the general permits "will increase

similarly asserts that the general permits "impose extreme hardship on NAHB's aggrieved members" (NAHB Opp. at 6), but it, too, fails to support that contention. Like NSA, NAHB bases its hardship claim on the notion that even though many of its members will continue to qualify for general permits, some unquantified percentage of its members will have to participate in the "more onerous individual permit process." NAHB Opp. at 7.

As the Corps previously pointed out, many of Plaintiffs' members' activities will still qualify for the new NWPs or for other existing general permits in a particular State; under expired NWP 26, the average impact per project was 0.36 acres, a level of impact that under the Replacement Permits would still qualify for NWP treatment because it is less than the 0.50 acres of impact currently allowed. Thus, even assuming for argument's sake that it would be relevant if many of Plaintiffs' members will have to participate in the individual permitting process, Plaintiffs utterly fail to support that claim.

More to the point, however, the fact that some of Plaintiffs' members will have to participate in the individual permitting process in order to obtain a CWA section 404 permit does not amount to legally cognizable injury. For much the same reason, Plaintiffs' members' rights or obligations have yet to be determined. The general permits lack finality because they do not mark the consummation of the Corps' decisionmaking process for the members of the Plaintiffs' organizations. Not one of those members can say that it will be unable to construct a desired project due to the issuance of these general permits. Plaintiffs do not deny that most of their

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costs to applicants to some degree and will increase the funding needed by the Corps to maintain our current level of service to the public."

members will ultimately be allowed to proceed with projects. Nor do they deny that if any member's individual permit application is denied, that party will be able to have its day in court.

To the extent that Plaintiffs base their claim of hardship on the notion that projects that go through the individual permitting process may be somewhat delayed, such claims are overstated. The record shows that the average evaluation time for individual permits was 100 days in FY 1999, hardly a period of time that qualifies as extreme hardship. See 65 Fed. Reg. at 12,820. To the extent that Plaintiffs also complain that some of the conditions that accompany the general permits impose unnecessary burdens on those qualifying for the permits, if a prospective permittee cannot comply with all of the terms and conditions of the general permits, he or she can request another form of Department of the Army authorization, such as a regional general permit or a standard individual permit. Id. Finally, if the applicant receives an individual or regional general permit containing what it believes are unacceptable conditions, it can challenge those conditions administratively and in the courts.

Plaintiffs protest that deferring judicial review until their individual members suffer genuine legal consequences from a permit decision on specific projects is "inconsistent with our system's presumption of judicial review." NAHB Opp. at 3. To the contrary, the Corps' position that permitting decisions should be reviewed in the context of specific and concrete cases is entirely consistent with the doctrines of finality, ripeness, and exhaustion.

In support of its argument that the challenged general permits are neither final nor ripe for review, the Corps' opening brief (U.S. Mem. at 24) discussed Industrial Highway Corp. v. Danielson, 796 F. Supp. 121 (D.N.J. 1992), aff'd, 995 F.2d 217 (3d Cir. 1993), which dismissed for lack of finality a property owner's challenge to the Corps' decision that the owner needed to

go through the individual permit process rather than proceed under former NWP 26. NAHB claims (NAHB Opp. at 5) that Industrial Highway supports its argument that the general permits are reviewable now, but the language NAHB quotes merely points out that the plaintiff in that case was seeking authorization to proceed under an existing nationwide permit. Rather than standing for the principle that a general permit is reviewable, the case makes clear that having to participate in the individual permit process does not constitute judicially recognizable injury. The court determined that the Corps had "merely determined that Industrial must obtain an individual permit before it can discharge fill into its wetlands. Industrial is free to abandon its plans, or to comply with the individual permit application procedures." 796 F. Supp at 126. "Nothing in the CWA confers a vested right to discharge fill into waters of the United States without an individual permit," id. at 128, and therefore the Corps' decision to require an individual permit was not "the cause of any hardship to Industrial of a kind that weighs in favor of a finding of finality." Id.

NAHB argues that the Corps "itself acknowledges, in the individual permit context, that courts have the authority to review the grant, denial, or conditioning of a 404 permit." NAHB Opp. at 4. NAHB is correct that the Corps does not challenge the reviewability of final individual permit decisions, but that is because those decisions actually allow, or disallow, specific projects. Here, the alleged injury is premature because the ultimate rights of these developers to proceed is not determined by the Corps' failure to issue nationwide permits to their liking. The essence of the doctrines of finality, ripeness and exhaustion is that not every supposed "injury" is redressable in court. Injuries that consist merely of having to notify the Corps of desired projects and having to participate in the normal administrative process that

applies to individual permits simply do not amount to the type of harm that justifies immediate review.[3]

Plaintiffs cite Alaska Center for the Env't v. West, 31 F. Supp. 2d 714, 724 (D. Alaska 1998), a challenge by environmental organizations to certain Corps general permits, claiming that the decision supports Plaintiffs' claim that their challenge is ripe. NAHB Opp. at 5; NSA Opp. at 4. NSA states that the Corps "apparently did not argue that the general permits it had issued were not final or ripe for review in that case," and argues that from a "reviewability standpoint there is no basis to distinguish the general permits in Alaska Center from the nationwide permits challenged here." NSA Opp. at 4. Plaintiffs are correct that the Corps did not challenge the reviewability of the general permits at issue in Alaska Center, but they are wrong when they argue that the Corps is being inconsistent by opposing review here. The critical distinction lies in the type of injury alleged by the plaintiff. As the court in Alaska Center recognized, environmental organizations can demonstrate "concrete and not merely conjectural" harm flowing directly from the issuance of a general permit because "wetlands are being and will continue to be filled pursuant to" the permit. 31 F. Supp. 2d at 720. In contrast, Plaintiffs in this litigation will still have the opportunity to obtain authorization for their projects through the administrative permitting process. If review is deferred here, the essential goal of the Clean Water Act – restoration and maintenance of "the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), – is not compromised.

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[3] NAHB's Complaint (¶ 78) makes clear that its primary alleged injury is the "forcing" of "many minimal impact projects into the individual permit process."

In sum, Plaintiffs do not deny that most of its members' activities that do not qualify for the new general permits will subsequently be authorized through the individual permit process and that some members will even be able to construct larger and more valuable projects than they otherwise would have under a general permit. These facts undermine Plaintiffs' claims of hardship. Permitting issues should be addressed in the context of concrete challenges relating to specific properties, not in the abstract context presented here. The CWA does not entitle anyone to a "streamlined" permit process, especially one that would compromise the environmental concerns embodied in the statute's "minimal effects" language.

II. THE SUPREME COURT'S DECISION IN SOLID WASTE AGENCY NEITHER NECESSITATES A REMAND IN THIS CASE NOR UNDERMINES THE GENERAL PERMITS

Plaintiffs base two arguments on the Supreme Court's decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 121 S. Ct. 675 (2001) ("Solid Waste Agency"). First, NAHB argues that when the Corps issued the challenged permits it thought it had jurisdiction over isolated waters, but in Solid Waste Agency the Supreme Court held that the CWA's text does not allow the Corps to assert jurisdiction over such waters. NAHB Opp. at 15-16. NAHB contends that the Corps' permit actions were "wholly tainted by the Corps' fundamental misperception of its jurisdiction," NAHB Opp. at 15, and therefore the general permits must be vacated. Id.

Apparently lost on NAHB is that if this Court were to vacate the challenged general permits, the result would not be reinstatement of the expired NWP 26; it would be an absence of general permits, at least until the Corps issues new ones. See Part XII, infra. Also apparently lost on NAHB is the internal contradiction that, under NAHB's argument, NWP 26 suffered from

the same defect as the current general permits. Like the challenged general permits, NWP 26 pre-dates the Supreme Court's decision in Solid Waste Agency and, also like these general permits, was issued after the Corps (in NAHB's words) "weighed the effects of activities in isolated waters when determining what course to take." NAHB Opp. at 16. If NAHB is correct that a general permit is invalid if its "minimal effects" analysis took into account waters "outside" the Corps' "jurisdiction" (NAHB Opp. at 16), NWP 26 was likewise invalid and cannot be "reinstated" either by the Corps or by this Court.

Plaintiffs continue to overstate the holding and scope of Solid Waste Agency, in which the Supreme Court addressed CWA jurisdiction over nonnavigable, isolated, intrastate waters, based upon the use of those waters as habitat by migratory birds.[4] Contrary to Plaintiffs' suggestion (NSA Opp. at 14), Solid Waste Agency did not alter the long line of authority upholding CWA jurisdiction over waters that are hydrologically connected to traditional navigable waters. NSA relies on Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001), an erroneous decision that the Corps has already addressed in its opening brief (U.S. Mem. at 35). But even assuming for purposes of argument that Solid Waste Agency significantly reduced the scope of "waters of the U.S.," that would not advance Plaintiffs' position. The Corps has made clear that its section 404(e) analysis of cumulative adverse impacts was not dependent upon a nationwide mathematical calculation of the percentage of jurisdictional waters that will be

[4] See 121 S. Ct. at 684 ("We hold that 33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to petitioner's [property] pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. 41217 (1986), exceeds the authority granted to [the agencies] under § 404(a) of the CWA.").

covered by the NWPs.[5]

NAHB deems this argument "astonishing," NAHB Opp. at 18, apparently on the ground that the Corps was required to offer a mathematical rationale before it could "revoke" or "terminate" NWP 26. NAHB Opp. at 18. As previously noted, however, NWP 26 expired; it was neither revoked nor terminated. Moreover, NWP 26, contrary to the impression Plaintiffs seek to convey, was not itself based on verifiable mathematical calculations. As Plaintiffs concede, under NWP 26 many acres of wetlands were destroyed without the Corps even being notified. See, e.g., NAHB Opp. at 10. As the Corps explained, "an assessment of cumulative adverse effects that result from the use of the NWPs cannot be made at the national level, and . . . the only technically sound method to conduct this assessment is on a watershed basis, through the district offices." 65 Fed. Reg. at 12,827. Under this commonsense approach, Solid Waste Agency is simply irrelevant to the Corps' cumulative effects analysis.

According to Plaintiffs, whenever the judiciary issues a decision that arguably contracts (or, for that matter, expands) the scope of regulable waters, the Corps would be required to vacate its general permits.[6] The law requires no such action. As the Corps previously explained

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[5] As the Corps previously pointed out (U.S. Mem. at 33), even if Plaintiffs were correct that Solid Waste Agency reduced the acreage of protected "waters of the U.S.," that would only elevate in importance the waters that remain protected. The notion that the Corps would liberalize the destruction of those fewer remaining waters because of the holding in Solid Waste Agency is counter-intuitive.

[6] NAHB states, correctly though perhaps inadvertently, that if this matter were remanded "it is for the Secretary to decide in the first instance how he will now proceed." NAHB Opp. at 17. But Plaintiffs' requested relief, i.e., that this Court order the reinstatement of an expired permit in substitution for the allegedly defective new permits, would do the opposite by divesting the Secretary of the Army of the discretion exclusively accorded him by Congress under section 404(e).

(U.S. Mem. at 31-32), if Plaintiffs are correct that any post-decisional ruling – whether in Solid Waste Agency or any other subsequent litigation – undermines the continued viability of a prior Corps permit decision, the proper approach is not the immediate intervention of the courts, but rather the filing of an administrative petition with the Corps. 33 C.F.R. § 330.5(b)(1).

NSA takes a completely different tack from NAHB. Its brief reiterates its claim that the challenged general permits conflict with Solid Waste Agency because they "send a clear message to the regulated community" that the Corps regards "ephemeral streams" as "falling within the definition of 'waters of the U.S.' and that simple 'excavation' of these areas will require a section 404 permit." NSA Opp. at 10.

This argument makes little sense. As the Corps previously explained (U.S. Mem. at 33), a waterbody does not become a "water of the U.S." because of a general permit. A general permit specifies the permit criteria for waterbodies that are otherwise subject to CWA permit requirements. The Corps does not, and cannot, require a permit, general or individual, for waters that are not "waters of the U.S." Even if Plaintiffs' interpretation of Solid Waste Agency's jurisdictional holding were correct, it would mean that Plaintiffs would be able to discharge pollutants into those waters without any nationwide or individual permit. NSA's argument appears to be not that the Corps is actually asserting jurisdiction over non-regulated waters – it offers no evidence of that occurring. NSA's argument is that this Court should issue an advisory opinion to prevent NSA's members from becoming confused by a supposedly unclear "message" they might discern in the permits.

NSA's remaining arguments concerning "ephemeral streams" need not long detain the Court. NSA argues (Opp. at 14) that "by definition" an ephemeral water has "no connection" to

navigable waters, a contention that lacks any basis in fact. An "ephemeral stream" is, as NSA notes (Opp. at 14 n.7), a stream "that has flowing water in it only during, and for a short duration after, precipitation events in a typical year." Their beds are located "above the water table year-round." Id. Nothing in this definition indicates that such streams necessarily lack a connection to navigable waters. In actuality, some have such a connection and some do not.[7]

Further, as the Corps stated, "District engineers use their judgement on a case-by-case basis to determine whether an OHWM is present." 65 Fed. Reg. at 12,823. Because such questions are resolved on a site-specific basis, Plaintiffs' claims regarding the Corps' supposed over-regulation of ephemeral streams are not ripe.

Finally, to the extent that an NSA member is genuinely uncertain about whether the Corps views a particular ephemeral stream as regulated, that party can request a jurisdictional determination (defined at 33 C.F.R. § 331.2) from the Corps for that specific site and can challenge that determination if dissatisfied. 33 C.F.R. § 331. At this juncture Plaintiffs' alleged concerns about the scope of regulated waters following Solid Waste Agency are abstract and unripe.

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[7] See 65 Fed. Reg. at 12,881 ("We do not agree that it is necessary to explicitly state in the definition of this term that ephemeral streams are not waters of the United States because such a statement would be inaccurate. An ephemeral stream that meets the criteria at 33 CFR part 328 is a water of the United States."). Further, although this Court need not address the scope of "waters of the United States" under the CWA, that a stream runs only part of the year is not dispositive of its regulatory status. See Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533-34 (9th Cir. 2001) (intermittent nature of tributary makes no difference to whether it is protected under CWA because "[p]ollutants need not reach interstate [or navigable] bodies of water immediately or continuously in order to inflict serious environmental damage," a conclusion "not affected by the Supreme Court's recent limitation on the meaning of 'navigable waters' in Solid Waste Agency.").

III. THE REPLACEMENT PERMITS ADDRESSING EXCAVATION ACTIVITIES DO NOT EXCEED THE CORPS' AUTHORITY

Plaintiff NSA states that the general permits are an "underhanded" attempt to regulate incidental fallback resulting from excavation, in excess of the Corps' authority. NSA Opp. at 17-18. NSA's position essentially is that any mention of the word "excavation" is tantamount to an assertion of jurisdiction over all excavation activities.

In our opening brief, the Corps established that certain excavation activities result in discharges to waters of the United States, and that the Corps made clear throughout the preamble that the general permits address excavation only insofar as excavation results in a discharge to waters of the United States. U.S. Mem. at 36-37. NSA makes no attempt to rebut the fact that some excavation activities are properly regulated, nor does it rebut the clear preamble language stating that the general permits address only those activities that result in a discharge. NSA further fails to rebut the Corps' point that permits do not regulate, but simply authorize an otherwise regulated activity. The general permits clearly address only activities which result in a discharge. NSA's argument that the Corps has exceeded its authority by mere use of the word "excavation" is meritless.

IV. PLAINTIFFS ATTEMPT TO ELEVATE THE "STREAMLINING" OF SECTION 404 PERMITTING ABOVE THE CWA'S ENVIRONMENTAL GOALS

NAHB asserts that the Corps has violated section 404(e) by failing to adequately "streamline" the NWP process. NAHB Opp. at 24-27. NAHB argues that by issuing more environmentally protective NWPs, "[t]he Corps has read the mandate for 'general permits' out of the statute." NAHB Opp. at 25. However, as set forth in the United States' initial memorandum,

there is no such mandate. U.S. Mem. at 42-43. The Corps is authorized, but not required, to issue NWPs.

Moreover, the authorization to issue general permits is expressly limited to activities that the Corps determines will have only minimal adverse effects on the environment. The CWA does not authorize the Corps to discount the environmental implications of general permits in the interest of "streamlining." NAHB's assertion that it is the "unambiguously expressed intent of Congress" that the Corps do so finds no support in the statute. In fact, not only is such a standard not unambiguously expressed, it is not expressed <u>at</u> <u>all</u>. There is no "streamlining" standard set forth in the statute for the general permits to offend, and NAHB points to none. To the contrary, the statute sets forth in plain language a mandate that the Corps only issue general permits which it determines have only minimal adverse environmental effects, 33 U.S.C. § 1344(e), as well as an overall objective to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a).

NAHB attempts to equate Congress' passage of section 404(e) to ratification of the Corps' 1977 approach to general permitting. NAHB Opp. at 26. NAHB endorses this "inaugural version" of NWP 26, which it extols for its lack of any PCN and its dearth of environmentally protective conditions. <u>Id.</u> The "inaugural version" of NWP 26 permitted unlimited destruction of headwaters rivers, streams and wetlands, and permitted the destruction natural lakes up to 10 acres in size fed or drained by such streams -- all without notice to the Corps or the public. In the intervening quarter century of expertise gained by administering and observing the effects of the section 404 program, the Corps substantially improved the environmental protection provided by general permits.

The statutory language expressly contradicts any ratification, and supports the Corps increased protection of the environment. Rather than ratify the existing NWPs in 1977, Congress expressly provided in section 404(e)(2) for their expiration only five years later. Had Congress intended for the 1977 approach to general permits to continue indefinitely, it could have simply codified those NWPs. Instead, Congress created a statutory scheme that not only vested the Corps with exclusive authority to develop appropriate general permits based solely on a standard of minimal adverse environmental effects (and not a streamlining standard), but ensured that the Corps would regularly revisit those general permits at least every five years to ensure that they authorized only those projects that were appropriate under current conditions, as the Corps has done here.

Rather than disregard its environmental mandate as Plaintiffs suggest, the Corps instead established a general permit system which authorizes a broad range of activities to occur without an individual permit, while ensuring that the effects of those activities are minimal. The acreage limitations provide an example – the Corps found that the vast majority of activities authorized by NWP 26 were below or slightly above 0.50 acres, and the average project size under NWP 26 was 0.36 acres in 1995. U.S. Mem. at 39-40. Therefore, the Corps determined that a 0.50 acre limit would continue to authorize most activities, while appropriately directing larger activities into the individual permit process. This represents a reasonable balance between the primary concern of environmental protection and the competing interest of efficiency and should not be overturned by the Court.

V. THE CORPS' APPROACH TO THE MINIMAL EFFECTS STANDARD IS APPROPRIATE

Plaintiffs argue that the record does not support the replacement general permits, based predominantly upon the Corps' regionalized approach to the definition of "minimal adverse effects." Plaintiffs' arguments, however, must fail. The replacement general permits, and the conditions to those permits, are directly related to section 404(e)'s requirement to minimize adverse environmental effects, and the Corps' regionalized approach to defining minimal adverse effects is eminently reasonable.

Plaintiffs' arguments seem to be rooted in the faulty and self-serving premise that Plaintiffs are entitled to fill waters of the United States without an individual permit, unless the Corps proves otherwise. After years of operating under versions of expired NWP 26, Plaintiffs apparently have developed a sense of entitlement to fill waters of the U.S. which they feel the Corps must now overcome if it wishes to protect the environment. That is not the scheme set forth by section 404(e), or the CWA generally. The goal of the CWA is to eliminate discharges of harmful pollutants to waters of the United States. Therefore, a cornerstone of the Act is that discharges are illegal, unless authorized. Under section 404, individual permits are the standard approach, and general permits, where they are justified at all, are a narrow exception intended for activities with only minimal effects. The role of the Corps is not to rebut Plaintiffs' illusory presumption that they are forever entitled to the same permit terms that appeared in an expired NWP. Rather, the role of the Corps is to present a record reflecting that it has issued general permits that authorize activities similar in nature that have minimal adverse effects on the environment. This the Corps has done.

NWP 26 expired, and the Corps has issued new general permits, the terms and conditions of which are directly related to minimizing the environmental impacts of the general permits to meet the mandate of section 404(e) and the overall purpose of the Act. Plaintiffs do not rebut the relationship between the terms and conditions of the general permits and the minimization of impacts on the aquatic environment. Plaintiffs do not contend that they furnished scientific studies for the record which contradict the Corps' decisions, or that the Corps failed to consider such studies. Instead, they assail the Corps for producing inadequate evidence that Plaintiffs polluting activities are harmful, and argue that environmental effects permitted by the general permits are too minimal in the absence of an explanation of what "minimal effects" means under section 404(e).

It is ironic that after benefitting for years from various versions of NWP 26 that allowed them to conduct thousands of projects without notice to the Corps, Plaintiffs now argue that the Corps lacks sufficient information about the effects of their activities under that NWP to justify its replacement. It is even more ironic that Plaintiffs assert that the appropriate remedy for this alleged lack of information is a Court order resurrecting the expired NWP 26 that obfuscated the effects of their development activities in the first place. Plaintiffs are apparently not as interested in sound science as in perpetuating a system that insulates their activities from meaningful public review.

The Corps' regionalized approach to the minimal effects standard is reasonable. Neither the "inaugural version" of NWP 26, which NAHB touts, nor the NWP 26 that Plaintiffs seek to have "reinstated," nor any other NWP ever defined the term "minimal effects." And until now, Plaintiffs have never expressed dismay over the lack of a specific definition. Yet Plaintiffs now

take the position that if minimal effects is not defined on a nationwide basis, then nationwide permitting is illegal. NAHB Opp. at 19-21. However, if a definition of "minimal effects" is the lynchpin Plaintiffs claim it is, their desired remedy -- reinstatement of expired NWP 26 -- is as illegal as the Corps actions they attack. Clearly Plaintiffs do not consider a minimal effects definition to be as indispensable as they represent. Their newfound belief in the value of such a definition is pure opportunism.

The Corps' continued administration of the NWP program without a national definition of minimal effects continues to be appropriate, and in fact is even more so now. Unlike NWP 26, the replacement general permits are not bound to certain geographic areas, but instead are activity-specific. Because of the variety of areas and watersheds in which the activity-specific general permits may be used, the adverse impacts, separately and cumulatively, vary widely. Any single description of "minimal adverse effects," applied nationally, could not account for such variations. Any attempt at such a description would no doubt be met with a litany of examples from all sides demonstrating circumstances in which it is inappropriate. Therefore, the Corps reasonably issued general permits with acreage limitations and conditions which are protective of the environment and therefore consistent with the mandate of the CWA generally and section 404(e) in particular. To account for inevitable variations, district engineers may impose additional conditions, exercise discretionary authority to require an individual permit, or revoke the NWPs altogether where the NWPs are not sufficiently protective. In circumstances where the NWPs are overly protective, district engineers may issue more liberal general permits of their own. See, e.g., 61 Fed. Reg. 65,874, 65,894 (Dec. 13, 1996) ("If some ephemeral

drainage areas are truly low value the districts can develop and issue regional general permits to expand coverage.").

Plaintiffs do not challenge the Corps' conclusion that the functions and values of waters of the United States vary widely. Nor have Plaintiffs, in their hundreds of pages of comments, ever offered a proposed definition of minimal effects. Even Plaintiffs appear to acknowledge, at least tacitly, that attempting to reduce the concept of minimal effects to a single, national description is futile. Moreover, even if the Corps developed a national definition of minimal adverse effects, it would be of little import. In light of the division engineers' discretionary authority to account for regional functions and values by conditioning, revoking, suspending, or modifying NWPs, 33 C.F.R. § 330. 4(e)(1), or by issuing regional or statewide general permits, "minimal effects" is ultimately defined on a regional basis, regardless of whether the Corps defines the term nationally.[8]

Thus, the Corps has developed a system that accounts for the uncertainties inherent in a program of national scope, while at the same time allowing a large number of activities to bypass the individual permit process. The general permits are the result of careful balancing of competing policies, and should not be overturned. If Plaintiffs pinpoint areas in which the

[8] Because of division engineers' exercise of this discretionary authority, the terms under which Plaintiffs' members will ultimately be able to conduct their projects will vary from one watershed to the next, and are therefore not finally determined by the NWPs. For example, as set forth in the Corps initial memorandum, the general permits issued by Corps Headquarters and challenged here have been indefinitely suspended by division and district engineers in many States, including Pennsylvania, Maryland, Washington, D.C., New Hampshire, Vermont, Maine, Massachusetts, and Rhode Island. See Exhibits 1 and Ex. 2 to U.S. Mem. (Memoranda, dated April 18, 2001, from Brigadier General M. Steven Rhoades, U.S. Army Corps of Engineers, North Atlantic Division). Therefore, the NWPs do not constitute the consummation of the Corps decisionmaking, and Plaintiffs' claims are not ripe.

general permits are truly overprotective, they may suggest to the Corps at any time that regional permits be issued. 33 C.F.R. § 330.5.

VI. THE CORPS' ISSUANCE OF THE REPLACEMENT PERMITS COMPLIES WITH SECTION 404(e)(2) OF THE CWA

NAHB asserted in its opening brief that the Corps illegally revoked NWP 26 without determining, after opportunity for public hearing, that NWP 26 had an adverse effect on the environment pursuant to section 404(e)(2). In our opening brief, the Corps established that (1) NAHB waived this argument by failing to raise it during public comment; (2) NWP 26 was not revoked, but expired by operation of law, therefore section 404(e)(2) does not apply; and (3) even if NWP 26 was revoked, which it was not, the Corps complied with section 404(e)(2) by making the required determination after multiple public hearings. U.S. Mem. at 44-48. In response, NAHB addresses only the Corps' assertion that NAHB waived its section 404(e)(2) claim by not raising it during the comment period.

As set forth in the Corps opening memorandum, even if a section 404(e)(2) finding were required, the Corps made such a finding, stating at the outset of the development of the replacement general permits that the Corps "[d]etermined that a modified approach to NWP 26 and eventual replacement of NWP 26 is necessary in order to ensure that in the future no more than minimal adverse effects occur to the waters of the United States, both individually and cumulatively." 61 Fed. Reg. at 65,891. Further, the Corps set forth repeatedly that the new terms and conditions appearing for the first time in the replacement general permits were necessary to meet the minimal effects standard. NAHB asserts, however, that the Corps failed to make the finding, pursuant to section 404(e)(2), that NWP 26 had an adverse effect.

NAHB concedes that it did not comment that the Corps violated section 404(e)(2). NAHB Opp. at 34. NAHB argues that, nevertheless, it made substantive comments alleging that the record did not support the need for less permissive replacement general permits, and those comments also served as a procedural comment that the Corps did not follow the procedure for revocation of permits under section 404(e)(2). Id. at 34-35. Thus, on the one hand, NAHB asserts that there is a distinction between a specific finding under section 404(e)(2) that NAHB now asserts the Corps failed to make, and the Corps' statements that replacement of NWP 26 was necessary to ensure no more than minimal effects occur to the waters of the United States. Yet, on the other hand, NAHB seeks to distance itself from that distinction when it is applied to its own comments, arguing that its general comments that the replacement permits are unnecessary sufficed as a specific comment that the Corps failed to follow the procedure of section 404(e)(2). NAHB cannot have it both ways. Moreover, even if NAHB's argument were not waived, the Corps did not revoke NWP 26; it expired. No section 404(e)(2) finding was required. To the extent such a finding was required, the Corps made the finding.

VII. PLAINTIFFS LACK STANDING TO ASSERT TENTH AMENDMENT ARGUMENTS, BUT IN ANY EVENT THE GENERAL CONDITIONS THAT THE CORPS ADDED TO THE GENERAL PERMITS WERE AUTHORIZED UNDER THE CLEAN WATER ACT AND WERE REASONABLE IN ORDER TO PROTECT WATER QUALITY

Plaintiffs NSA and NAHB maintain that the general permits infringe on States' rights. See NSA Opp. at 24-26; NAHB Opp. at 27-32. NSA couches its argument in Tenth Amendment terms, whereas NAHB argues that the general permits impose water quality conditions that "conflict" with the CWA's grant of authority to the States. Id.

Turning first to NSA's arguments, although the Corps challenged NSA's standing to assert a Tenth Amendment claim (U.S. Mem. at 51), NSA responds in a footnote only that "it is by no means certain that private party suits are precluded." NSA Opp. at 26 n.16. Under applicable Supreme Court precedents, however, NSA cannot raise Tenth Amendment arguments on behalf of non-complaining States. U.S. Mem. at 51-52. The Supreme Court, in Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 143-44 (1939), held that a group of litigants counting no States or State officers among them lacked standing to raise a Tenth Amendment claim.

Given this unambiguous precedent, only States are allowed to press claims aimed at protecting States' sovereign powers under the Tenth Amendment. Here, various States submitted comments to the Corps fully supporting the general permits' approach to water quality management plans, floodplain protection and vegetative buffers (see U.S. Mem. at 52). Moreover, the State of New York has filed an amicus brief in this litigation supporting the Corps. No State has intervened or supported Plaintiffs' Tenth Amendment claim or any of Plaintiffs' other arguments.

NSA counters (NSA Opp. at 26 n.16) that the Supreme Court's rejection in Tennessee Electric Power of the private litigants' standing to assert Tenth Amendment claims is "dicta," but NSA's assertion is inaccurate. Tennessee Electric Power held that "the appellants, absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] Amendment." 306 U.S. at 144.

NSA discounts Tennessee Electric Power as "a 62-year-old Supreme Court case." But the district court in Gaubert v. Denton, No. 98-2947, 1999 WL 350103 at *5 (E.D. La. May 28, 1999), aff'd, 210 F.3d 368 (5th Cir. 2000), which dismissed a private party's Tenth Amendment

claim for lack of standing, stated "This Court finds that Tennessee Electric remains binding authority. Tennesse Electric has never been overruled." Id.

In the alternative, NSA argues – without citing any authority – that it has standing to advance Tenth Amendment claims because its membership includes (unspecified) "public and quasi-public bodies" that "could" be considered State entities for standing purposes. This argument, too, should be rejected. No States or State officers are parties to this litigation. In their absence, under binding Supreme Court authority, NSA lacks standing to present Tenth Amendment claims. NSA cannot be the States' self-appointed proxy.

Even assuming for argument's sake that NSA has standing to press arguments that the rights of States are somehow potentially undermined by the general permits, NSA's Tenth Amendment argument appears to be merely an extension of its claim that the general permits "attempt to regulate areas that are not 'waters of the United States.'" NSA Br. at 26. The Corps has addressed the flaws in that argument above, in Part II, and refers the Court to that discussion.

For its part NAHB, tellingly, does not mention the Tenth Amendment. It argues merely that the general permits impose water quality conditions that supposedly conflict with the CWA's "exclusive grant of authority to the States." NAHB Opp. at 27. NAHB focuses its attack on General Condition 9 (water quality), which requires permittees to submit water quality management plans including stormwater management and vegetative buffer components. It contends that this condition "upset[s] the careful federal/state structure" of the CWA. NAHB Opp. at 28.

As an initial matter, it is difficult to understand why NAHB finds General Condition 9 so objectionable. The condition merely provides that for certain general permits, where the State or

tribal section 401 certification[9] does not require or approve a water quality management plan, the permittee seeking to avail itself of certain general permits must include "design criteria and techniques that will ensure that the authorized work does not result in more than minimal degradation of water quality." 65 Fed. Reg. at 12,893. Under the general condition, permittees should include (1) stormwater management planning "that minimizes degradation of the downstream aquatic system, including water quality," and (2) the establishment and maintenance of vegetated buffers next to open waters, including streams.[10] These conditions are eminently reasonable on their face.

As for NAHB's States' rights argument, in the preamble to the general permits the Corps made clear that General Condition 9's terms are not intended to replace existing State or Tribal section 401 requirements:

> In regions with strong water quality programs, district engineers will defer to state, Tribal, and local requirements and will not require water quality management plans as special conditions of NWP authorizations. If the 401 agency or other state or local agency does not require adequate measures to protect downstream water quality, we have the authority to require measures, including the construction of stormwater management facilities or the establishment of vegetated buffers next to open waters, that will minimize adverse effects to water quality.

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[9] Section 401 water quality certifications are discussed in the Corps' opening memorandum, U.S. Mem. at 8, 49-50.

[10] NAHB misstates the requirement of General Condition 9. General Condition 9 does not, as NAHB asserts, require permittees to "submit substitute water quality management plans to the Corps." NAHB Reply Br. at 28. Such a plan is required only when not otherwise required by the State. In states with strong water quality programs, the district engineer will not require such plans, even where the state does not. 64 Fed. Reg. 39,252, 39,338 (July 21, 1999); 65 Fed. Reg. at 12,862.

65 Fed. Reg. at 12,862. This reasonable safeguard does not intrude on States' rights and, again, no State has asserted that it does.

Further, the structure of the CWA does not, as NAHB asserts, support the conclusion that the Corps lacks authority to protect water quality by making water quality the exclusion province of the States and EPA. NAHB Opp. at 27-28. On the contrary, the CWA gives the Corps not only the authority, but the responsibility, to participate in the protection of water quality. The very purpose of the CWA is to protect water quality, and Congress vested responsibility for one of the two major permitting programs with the Corps. The statute authorizes both the States and EPA to play a role in the Corps' permitting process, but it does not alleviate the Corps' responsibility, as the permit issuing authority, to protect water quality.

The role of section 401 is not to place all responsibility for water quality on the States. Rather, section 401 was intended to assure that any more stringent water quality requirements under State law also become conditions of any Federal permit. Monongahela Power Co. v. Marsh, 809 F.2d 41, 53, n.114 (D.C. Cir. 1987). As stated in Mobil Oil Corp. v. Kelley, 426 F. Supp. 230 (S.D. Ala. 1976), cited by NAHB:

> (t)he provision makes clear that any water quality requirements established under state law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit. The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override state water quality requirements.

Mobil Oil, 426 F. Supp. at 235 (quoting 1972 U.S.C.C.A.N. 3669, 3735). In fact, the States' 401 certification process is optional for the States. Section 401(a) provides that if a State fails or refuses to act on a request for 401 certification within a reasonable time, the State's opportunity

to do so is waived. 33 U.S.C. § 401(a). States therefore have the opportunity to provide a 401 certification, but "[a] state need not avail itself of this protection." Environmental Def. Fund, Inc. v. Alexander, 501 F. Supp. 742, 771 (N.D. Miss. 1980). It is unlikely that Congress intended the entire CWA purpose to restore and maintain water quality to rest on an optional state certification process. Any doubt as to Congress' purpose is eliminated by section 401(b) of the CWA, which specifically states that section 401 does not limit the authority of any department of agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. 33 U.S.C. § 1341(b).

EPA, for its part, is authorized to veto Corps permits if it determines that the discharge will have unacceptable adverse effects, but like the state certification process, this process is discretionary. 33 U.S.C. § 1344(c). Therefore, Congress intended that the Corps would, in the first instance, protect water quality in its administration of the section 404 program, subject to the States' and EPA's discretion to review the Corps' decisions and provide additional – not less – environmental protection.

The Corps' responsibility is plainly set forth in section 404(e), which imposes a specific obligation on the Corps to protect water quality. Congress endowed the Corps with discretion to issue general permits, but only if it determines that the permitted activities will cause only "minimal" adverse environmental effects when performed separately and will have only "minimal cumulative" adverse environmental effects when considered collectively. Also, in CWA section 404(e), 33 U.S.C. § 1344(e), Congress endowed the Corps with broad authority to "set forth the requirements and standards which shall apply to any activity authorized" by a nationwide permit. (Emphasis added).

NAHB points to no statutory language which limits the Corps' authority to impose water quality-related conditions. Instead, NAHB derides the Corps' interpretation, which finds clear support in the statute, as self-aggrandizing and unreasonable. NAHB Reply Br. at 29. However, it is NAHB that unreasonably interprets the statute. Where, as here, the Corps imposes conditions on general permits in order to protect downstream water quality, it not acting ultra vires, as NAHB claims. To the contrary, in issuing such general conditions the Corps is fulfilling its express statutory mandate, as the legislatively-appointed permit issuer under CWA section 404, to minimize the environmental effects of general permits. Under the law, it is the Corps, not the States or EPA, that bears that responsibility.

The cases cited by NAHB do not support its position. Those cases state that a State's certification pursuant to section 401 is not reviewable by federal agencies. Lake Erie Alliance v. Army Corps of Eng'rs, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981), aff'd, 707 F.2d 1392 (3d Cir. 1983); Mobil Oil Corp. v. Kelley, 426 F. Supp. 230, 235 (S.D. Ala. 1976). However, General Condition 9 does not constitute a review of 401 certifications. A State's determination to certify that a discharge complies with State standards is not reviewed or otherwise affected by General Condition 9. In addition, the cases do not state the broader premise advanced by NAHB that 401 certification precludes the Corps from conditioning NWPs to protect water quality.

NAHB's argument, stripped of its federalist gloss, amounts to the contention that in situations where the Corps believes that a general permit is inappropriate without adequate management plans and buffers because water quality will suffer, the Corps is powerless to act unless the State already requires such protective measures. Nothing in the CWA provides the States with exclusive authority to condition general permits for the purpose of protecting water

quality. Because the Corps has acted in accordance with the Constitution and the CWA, Plaintiffs' arguments must fail.

VIII. THE CONDITIONS REGARDING VEGETATED BUFFERS ARE REASONABLY RELATED TO THE DISCHARGE OF DREDGED AND FILL MATERIAL AND ARE WITHIN THE CORPS' AUTHORITY

NAHB asserts that vegetated buffers are required on a blanket basis by General Condition 19, NWP 29, and NWP 39 without regard to whether the discharge on a particular site has impacts that can be redressed by a buffer. NAHB Opp. at 32-33. The language of General Condition 19 and NWP 39, and the preamble to those provisions plainly contradict NAHB's position.

Vegetated buffers are a potential component of mitigation in General Condition 19.[11] General Condition 19 plainly sets forth that projects must be designed and constructed in the first instance to avoid and minimize adverse effects to waters of the U.S. to the maximum extent practicable. Then, additional mitigation is required "when necessary to ensure that the adverse effects to the aquatic environment are minimal." 65 Fed. Reg. at 12,896 (emphasis added). Vegetated buffers may be included as a component of the mitigation. Id. "The District Engineer will determine the appropriate width of the vegetated buffer and in which cases it will be required." Id. (emphasis added). General Condition 19 therefore makes clear that vegetated buffers are required only when the district engineer determines that they are necessary.

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[11] NAHB states that the Corps did not mention NWP 39. NAHB Br. at 32. The vegetated buffer language of NWP 39, at paragraph (j), states that "[t]he permittee will establish and maintain, to the maximum extent practicable, wetland or upland vegetated buffers . . . consistent with General Condition 19. 65 Fed. Reg. at 12,890 (emphasis added). The Corps' discussion of General Condition 19 applies equally to NWP 39.

The preamble is also replete with statements that the district engineer has the discretion to determine when vegetated buffers are necessary, and sets out circumstances under which vegetated buffers are not required at all.[12] With regard to NWP 39, the preamble states

> There is flexibility in the requirements of paragraph (j). If there are open waters or streams within the project area and it is impractical for the project proponent to establish and maintain vegetated buffers next to those waters, then those vegetated buffers are not required. . . . District engineers will determine, on a case-by-case basis, when it is practicable to establish and maintain vegetated buffers and the appropriate width of those vegetated buffers.

65 Fed Reg. at 12,850 (emphasis added).

Therefore, mitigation through vegetated buffers is required only when necessary to minimize impacts to open waters, and district engineers have the discretion to determine when it is appropriate to use vegetated buffers. The Corps further made clear how vegetated buffers

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[12] "Vegetated buffers are not required if the proposed work results in minimal adverse effects on the aquatic environment without compensatory mitigation." 65 Fed. Reg. at 12,836 (emphasis added). Vegetated buffers are not required for activities that do not require notification. . . ." Id. (emphasis added). "If it is impractical for the permittee to establish and maintain vegetated buffers next to open waters on the project site, then vegetated buffers are not required." Id. at 12,834 (emphasis added). "If it is impractical for the project proponent to establish and maintain vegetated buffers on the property because of prior subdivision approval, then the district engineer can determine that vegetated buffers are not required." Id. (emphasis added). "If it is impractical to establish and maintain vegetated buffers next to streams in urban areas because of the limited amount of available land, then vegetated buffers are not required." Id. at 12,837 (emphasis added). "District engineers will also assess, on a case-by-case basis, whether or not vegetated buffers are impractical or inappropriate." Id. at 12,835 (emphasis added). "We have added the phrase "to the maximum extent practicable" to the second sentence in paragraph (c) to clarify that vegetated buffers next to open waters can be required as compensatory mitigation only if such a requirement is practicable for the project proponent. District engineers will determine on a case-by-case basis whether vegetated buffers are necessary and the appropriate width of those vegetated buffers." Id. at 12,869-70. "District engineers will determine, on a case-by-case basis, whether or not vegetated buffers are required. Vegetated buffers are required only when it is practicable for the permittee to establish these areas and the vegetated buffer will be self-maintaining . . . ." Id. at 12,832.

redress the damage caused by Plaintiffs' activities. As the Corps stated,

> Discharges of dredged or fill material into waters of the United States, which the Corps regulates under section 404 of the Clean Water Act, result in the loss of aquatic resource functions and values. The establishment and maintenance of vegetated buffers next to streams and other open waters offsets losses of aquatic resource functions and values and reduces degradation of these aquatic resources.

65 Fed. Reg. at 12,834.[13]

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[13] The Corps detailed how vegetated buffers offset the loss of aquatic resource functions and values:

> Vegetated buffers, even if they are established on uplands next to streams and other open waters, would provide on-site aquatic habitat, water quality, and flood storage functions. Vegetated buffers next to streams and other open waters provide many of the same functions that wetlands provide. In fact, many vegetated buffers will be wetlands. Due to their proximity to open waters, vegetated buffers are more effective at protecting open waters than wetlands distant from those open waters. . . . In general, vegetated buffers next to streams and open waters provide the following functions: (1) Reduce adverse effects to water quality by removing nutrients and pollutants from surface runoff; (2) reduce concentrations of nutrients and pollutants in subsurface water that flows into streams and other open waters; (3) moderate storm flows to streams, which reduces downstream flooding and degradation of aquatic habitat; (4) stabilize soil (through plant roots), which reduces erosion in the vicinity of the open waterbody; (5) provide shade to the waterbody, which moderates water temperature changes and provides a more stable aquatic habitat for fish and other aquatic organisms; (6) provide detritus, which is a food source for many aquatic organisms; (7) provide large woody debris from riparian zones, which furnishes cover and habitat for aquatic organisms and may cause the formation of pools in the stream channel; (8) provide habitat to a wide variety of aquatic and terrestrial species; (9) trap sediments, thereby reducing degradation of the substrate that provides habitat for fish and other aquatic organisms (e.g., some fish species depend upon gravel stream beds for spawning habitats); and (10) provide corridors for movement and dispersal of many species of wildlife. In addition, vegetated buffers next to streams provide flood storage capacity and groundwater recharge functions.

65 Fed. Reg. at 12,833.

The vegetated buffer condition is tailored to be used where appropriate, in the discretion of the district engineer, to offset the impacts of Plaintiffs' activities. The condition makes good environmental sense, and is well within the Corps' authority.

IX. GENERAL CONDITION 26's RESTRICTIONS ON THE USE OF NWPs IN 100-YEAR FLOODPLAINS ARE NOT ARBITRARY AND CAPRICIOUS AND ARE FULLY CONSISTENT WITH THE CORPS' AUTHORITY

The record supports the Corps' decision to issue General Condition 26 limiting the use of some NWPs in some areas of the floodplain. In our opening brief, the Corps established that it issued General Condition 26 in order to ensure that the effects of permanent, above-grade fills on the flood-holding capacity of floodplains is adequately scrutinized. U.S. Mem. at 55-56. The Corps is required to consider floodplain, flood hazards, and safety in determining whether NWPs are in the public interest. 33 C.F.R. § 320.4(a). As set forth, the Corps did so, and determined that it is in the public interest to allow the use of NWPs 29, 39, 40, 42, 43, and 44 to discharge permanent, above-grade fills in 100-year floodplains only in the flood fringe above headwaters. This decision was based, in part, upon the comments of the Federal Emergency Management Agency ("FEMA"), 64 Fed. Reg. at 39,282, which administers the National Flood Insurance Program and has expertise regarding floodplain issues. FEMA provided comments to the Corps affirming that the proposed NWPs would have "serious implications for adversely affecting the natural resources and functions of floodplains and for potentially increasing flood damages. . . .." AR.PRT6-5191. Although FEMA recommended that the Corps not issue <u>any</u> NWPs in special flood hazard areas, of which FEMA has mapped over 100 million acres, AR.PRT6-5192, the Corps nevertheless restricted the use of only some NWPs, and only in certain areas. This decision resulted from the Corps' consideration of all comments, including FEMA's expertise

regarding flood hazards, safety, and flood plain values. The record supports the Corps' issuance of the flood plain condition.

NSA asserts that the public interest factors of flood hazards, safety, and flood plain values cannot support the Corps' development of general conditions to NWPs. NSA Opp. at 21. In support of its argument, NSA cites a footnote in United States v. Mango, 199 F.3d 85 (2d Cir. 1999). However, the proposition stated in Mango is that the public interest regulations do not allow the Corps to set conditions related to the entire activity involving the discharge, only the permitted discharge. Mango, 199 F.3d at 93 n.7. General Condition 26 does not run afoul of Mango. General Condition 26 does not address aspects of projects that are unrelated to the discharge. Rather, it addresses permanent, above-grade fills, which are the discharge.

NSA's arguments regarding the use of FEMA maps, NSA Opp. at 22, misconstrue the argument made by the Corps in our initial brief. As proposed, the General Condition required permittees to obtain from the appropriate local floodplain authority, through a licenced engineer, a determination of the location of the 100-year floodplain where FEMA maps do not exist. 64 Fed. Reg. at 39,369. Under the final General Condition 26, where no FEMA maps exist, the condition does not apply. 65 Fed. Reg. at 12,879. The Corps made the change after considering comments because it "eliminates the additional burdens on local governments or landowners that existed in the proposed condition." 65 Fed. Reg. at 12,878-79. This point is not "revisionist." NSA Opp. at 22. It is plainly stated in the preamble.

General Condition 26's requirement that PCNs include documentation that the permitted discharges comply with FEMA or FEMA-approved local floodplain construction requirements is within the Corps' authority. NSA relies on NRDC v. EPA, 859 F.2d 156 (D.C. Cir. 1988), to

argue otherwise, NSA Opp. at 23, but that case supports the Corps' exercise of authority. In that case, the court overturned EPA regulations that relied upon NEPA's requirement that EPA consider a broad range of environmental factors to impose conditions related to the entire facility, not just the discharge. 859 F.2d at 169-70. The court specifically stated, however, that "EPA can properly take . . . those actions authorized by the CWA -- allowing, prohibiting, or conditioning the pollutant discharge." Id. "[EPA] can deny a new-source permit on NEPA-related grounds or impose NEPA-inspired conditions on *discharges* that the agency determines to allow. Id. at 170. Unlike the EPA regulations at issue in NRDC v. EPA, which sought to impose conditions on new source facilities unrelated to the discharge itself, General Condition 26 requires that permittees provide documentation that the discharge complies with FEMA requirements. Flood hazards, safety, and flood plain values are factors the Corps is required to consider in issuing permits for discharges, and compliance with FEMA requirements for such discharges ensures that those factors taken into account. The Corps has conditioned the discharge itself, and acted well within its statutory authority.

X. THE REGULATORY FLEXIBILITY ACT DOES NOT APPLY TO THE CHALLENGED PERMITS

Plaintiffs NFIB and Newman (collectively "NFIB") devote the entirety of their 32-page brief to the argument that the challenged permits violate the Regulatory Flexibility Act ("RFA"). However, NFIB's entire argument is predicated on a single, faulty premise – that the issuance of the challenged permits constitutes a rulemaking.

The RFA, 5 U.S.C. §§ 601-612, as amended in 1996 by the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, tit. II, 110 Stat. 847, 857-74, ("SBREFA")

applies only to the rulemaking process. Under 5 U.S.C. § 603(a), an agency must perform an initial regulatory flexibility analysis ("IRFA") whenever it "is required by section 553 of this title [the rulemaking provisions of the APA], or any other law, to publish general notice of proposed rulemaking for any proposed rule." In addition, 5 U.S.C. § 604(a), which requires a final regulatory flexibility analysis ("FRFA"), only applies when an agency "promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking." The RFA defines a "rule" as "any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law." 5 U.S.C. § 601(2).

NFIB gives great weight to a statement made by the Corps in the challenged permits which described the notice and comment process under the CWA as almost identical to the APA notice and comment process. See NFIB Opp. at 5. Based upon this statement, NFIB contends that the Corps must have engaged in rulemaking under the APA. Id. However, this conclusion is contradicted by case law,[14] the CWA,[15] and the APA.[16]

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[14] The Supreme Court has expressly held that an agency has discretion to choose between proceeding by rulemaking or adjudication, see SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

[15] NFIB has not identified a single provision in the CWA that indicates that Congress intended the Corps' permits to be promulgated pursuant to rulemaking. In 33 U.S.C. § 1344(e), Congress stated that general (nationwide) permits should be "issued" (as opposed to "promulgated"). When Congress intended an agency to conduct rulemaking under the CWA, it made that clear. See, e.g., 33 U.S.C. §§ 1313(c)(4), 1316(b)(1)(B), 1317(a)(2), 1317(b)(1).

[16] Under the APA, some rulemaking proceedings do not even require a notice and comment period. See 5 U.S.C. § 553(b) (interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice are exempt from the notice and comment requirements of the APA).

A notice and comment process does not, in and of itself, transform an agency action into a rulemaking. The notice and comment requirement under the CWA for nationwide permits at 33 U.S.C. § 1344(e)(1) is no different than the equivalent requirement for individual permits at 33 U.S.C. § 1344(a). NFIB does not challenge the Corps' statements that the individual permitting process is not rulemaking subject to the RFA. Instead, NFIB essentially argues that because the Corps' process in issuing the nationwide permits "differs in scope from the simple permit decision making proceedings," it must therefore be undertaken through rulemaking. See NFIB Opp. at 29. However, this distinction lacks any relevance. As the Fifth Circuit has stated, "a nationwide permit is simply a type of general permit." Vieux Carre Property Owners v. Brown, 875 F.2d 453, 464 (5th Cir. 1989) (internal quotations omitted)[17]. It then follows that permit decision-making proceedings, whether undertaken through general or individual permits, are "clearly adjudication rather than rule making." National Wildlife Fed'n v. Marsh, 568 F. Supp. 985, 992 n.12 (D.D.C. 1983) (Parker, J.).

In addition, NFIB perfunctorily dismisses a case directly on-point, Abenaki Nation v. Hughes, 805 F. Supp. 234 (D. Vt. 1992), aff'd, 990 F.2d 729 (2d Cir. 1993), in favor of United States v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989). However, Plaintiff's reliance on Picciotto is misplaced. The Picciotto Court reversed the conviction of a woman who had demonstrated in a national park in violation of a regulation, because the United States Park Service had promulgated the regulation without the notice and comment required by the APA. In Piciotto,

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[17] The Fifth Circuit in Vieux Carre held that a nationwide permitting process triggers the historical impact evaluation procedures of the National Historic Preservation Act, 16 U.S.C. § 470f, which relates to the issuance of any license, not a rule making. See 875 F.2d 463-65.

the Park Service argued that its particular rules regarding demonstrators in national parks were exempt from the APA's notice and comment requirement because the Park Service had promulgated such an exemption in an earlier, global rule. However, in the instant case, the Corps makes no analogous argument. Indeed, the Corps fully complied with the notice and comment procedures required by section 404(e)(1) of the Clean Water Act, 33 U.S.C. § 1344(e)(1). Further, Picciotto played out against a background not present here: a criminal prosecution with a constitutional dimension.[18] As a result, Picciotto offers no support to Plaintiff's contention that the issuance of the challenged nationwide permits constitutes a rulemaking.

Even if NFIB were able to show that the issuance of the nationwide permits constituted a "rulemaking" for purposes of judicial review under the RFA,[19] it has failed to demonstrate how it is adversely affected or aggrieved. NFIB alleges it is harmed because, as a result of the challenged permits, its member organizations will be forced "to incur higher costs and construction delays that they are ill-equipped to absorb when they seek to undertake activities formerly permitted under NWP 26." NFIB Opp. at 17. While NFIB may have preferred the previous incarnation of NWP 26, that permit has expired, and no longer exists. 65 Fed. Reg at 12,818. Accordingly, NFIB's alleged aggrievement stems from the expiration of the old NWP 26, as opposed to the issuance of the challenged permits. Such allegations of aggrievement, however, are not enough to support judicial review of the challenged permits under the RFA.

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[18] "Before a person is threatened with jail for [violating a rule], the government must ensure that the rule itself is not in violation of the law." Piciotto, 875 F. 2d at 349.

[19] As discussed above at length, the nationwide permits do not constitute "final agency action" under the APA. Accordingly, they are not subject to review under the RFA either.

Because the issuance of the challenged permits is neither rulemaking nor final agency action and because NFIB is not aggrieved, the RFA, by its terms and under the case law is inapplicable. See American Moving & Storage Ass'n, Inc. v. United States Dep't of Defense, 91 F. Supp. 2d 132 (D.D.C. 2000) (holding that DOD revision to procurement policy through notice and comment proceeding was not subject to RFA because action did not constitute rulemaking).

XI. PLAINTIFFS FAIL TO ESTABLISH A NEPA CLAIM.

Plaintiffs, despite their conclusory statement that "[t]he Environmental Assessments ("EA") prepared for the individual NWPs do not justify proceeding ahead with the Replacement Permits prior to completion of the PEIS, " NSA Br. at 46, simply do not make an adequate showing to meet their evidentiary burden on the merits of their assertion that a Programmatic Environmental Impact Statement ("PEIS") was mandated by NEPA. Plaintiffs' broad conclusory statements about unspecified cumulative impacts and alternatives and citation of Kleppe v. Sierra Club, 427 U.S. 390 (1976) do not meet that burden.

In their opposition brief Plaintiffs attempt to bolster their argument that a PEIS was substantively mandated. But rather than focus on specific purported inadequacies of the EAs on these replacement permits, Plaintiffs instead rely on the comments of environmental groups whose environmental concerns differ fundamentally from that of Plaintiffs in these proceedings. It is fair to say that none of these cited commenting groups favor the relief Plaintiffs seek from these proceedings – judicial reinstatement of expired NWP 26. See e.g. NRDC/Sierra Club Reply. Mem. 3-4. Plaintiffs assert that the silence of some these environmental groups as Defendant-Interveners on the Programmatic EIS is "deafening." What is truly significant is the fact that only these Plaintiffs, in the face of all the other comments they cite, have elected to

challenge the Corps' exercise of discretion in proceeding with its program of replacement general permits while it continued to voluntarily prepare a PEIS.

Plaintiffs' real focus in its complaint and in its initial summary judgment submission has been on whether the Corps' decision to voluntarily perform a PEIS required that agency to complete the PEIS prior to issuing Replacement Permits and to leave NWP 26 in place in the interim. They continue to cite no case authority mandating that a decision to voluntarily perform an EIS requires that performance be completed at a particular juncture.

Plaintiffs' NEPA argument also does not respond meaningfully to the Corps' showing that the decision to allow NWP 26 to expire had already been made prior to the Corps' decision to perform a PEIS. Plaintiffs challenge a PEIS process which was proposed only after the decision to have NWP 26 expire had already been made.

Plaintiffs also continue to press for reinstatement of expired NWP 26. As established in the Corps initial memorandum, and as further set forth below in section XII, this remedy is unavailable. Nothing in Plaintiffs' submission alters that conclusion.

Finally, as noted in the Corps' initial memorandum, U.S. Mem. at 66, the Corps retains the discretion to revoke any NWP in advance of its stated term, 33 U.S.C. §1344(e)(2) and 33 CFR § 330.5, and can utilize the PEIS process presently at the public comment stage to inform the potential exercise of that discretion. Accordingly, completion of the PEIS and consideration of that analysis in the upcoming months hardly constitutes a "meaningless gesture" and instead makes Plaintiffs' continuing focus on past decisions essentially irrelevant.[20] NSA's approach of

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[20] The draft PEIS is available for public comment. 66 Fed. Reg. 39,299 (July 31, 2001).

analyzing purported inadequacies of that process in a vacuum based on suppositions gleaned from past comments, NSA Opp. at 9, makes little sense at this time.

XII. THE RELIEF THAT PLAINTIFFS SEEK IS UNAVAILABLE UNDER THE APA AND CONTRARY TO THE CLEAN WATER ACT

NSA contends that this Court has "equitable authority" to reinstate expired NWP 26, arguing that the relief Plaintiffs seek is "not so extraordinary" and that the Court's "equitable discretion" is "quite broad." NSA Opp. at 27, 29. Although Plaintiffs portray their requested relief as run-of-the-mill, they cite no case in which a court has reinstated an expired general permit. In fact, Plaintiffs' requested relief is extraordinary and exceeds this Court's discretion.

NSA constructs much of its argument concerning the Court's supposed equitable authority to reinstate expired NWP 26 on the false premise that NWP 26 "remains in force" (NSA Opp. at 26). Although NSA now characterizes as "blatantly misleading" the Corps' representation to this Court that NWP has "expired" (id.. at 27 n.17), NSA's opening brief expressly conceded that the Replacement Permits "eliminated NWP 26" (NSA Summ. J. Mem. at 1) and, even more to the point, that NWP 26 "expired" on June 7, 2000 (id. at 7 n.6).[21]

NSA would have this Court ignore that the Corps, in the first sentence of the challenged March 2000 general permits, unambiguously stated that NWP 26 would expire in three months:

> The Corps of Engineers (Corps) is issuing 5 new Nationwide Permits (NWPs) and modifying 6 existing NWPs to replace NWP 26 which expires on June 5, 2000.

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[21] NSA's co-plaintiff, NAHB, likewise conceded that the Corps "allowed NWP 26 to expire" in 2000. See NAHB Statement Of Material Facts As To Which There Is No Genuine Dispute, ¶ 32, at 7 (emphasis added).

Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg 12,818 (Mar. 9, 2000) (emphasis added).

NSA implicitly recognizes that this Court lacks authority, "equitable" or otherwise, to reinstate an expired permit, and therefore struggles to convince the Court that NWP 26 has not really expired. NSA resorts to arguing that NWP "remains alive" (NSA Opp. at 27) because the Corps, in an effort to minimize the disruption of ongoing projects, provided that activities authorized by NWP 26 prior to its expiration date will continue to be authorized by NWP 26 for 12 months, provided the permittee has commenced, or is under contract to commence, construction before NWP 26 expired.[22] The Corps' accommodation of projects already "in the pipeline" at the time of NWP 26's expiration hardly supports NSA's contention that NWP 26 has not expired with respect to other projects.

The Corps' opening memorandum discussed how Plaintiffs would have this Court displace the agency's experts and judicially authorize polluting activities at potentially thousands of sites. U.S. Mem. at 82-83. The Corps pointed out that were Plaintiffs' request for judicial reinstatement of NWP 26 granted, potentially thousands of dredge and fill activities would be allowed to go forward without site-by-site scrutiny, in many cases without the Corps even being notified, despite the fact that the Corps would not have made the necessary statutory findings that

[22] Specifically, the Corps' limited "grandfathering" provision provides that, unless discretionary authority has been exercised to modify, suspend, or revoke the NWP authorization, a permittee who receives an NWP 26 "authorization" prior to the expiration date will have up to 12 months to complete the authorized activity, provided the permittee commences construction, or is under contract to commence construction, before NWP 26 expired. The provision also allows a person who submitted a NWP 26 "preconstruction notice" ("PCN") by March 9, 2000 until February 11, 2003, to complete the work, provided the permittee receives an NWP 26 verification and has commenced construction or signed a construction contract prior to February 11, 2002.

such discharges are, individually and collectively, consistent with the strict limitations of CWA section 404(e). The record in this case reveals that over the decades, the Corps has become increasingly concerned with the environmental impacts of development activities under NWP 26[23] and finally determined to replace that permit when it expired with new and modified NWPs that "will substantially increase protection of the aquatic environment." 65 Fed. Reg. at 12,818. NSA derides the Corps' effort to more closely monitor and regulate the destruction of vital aquatic resources as a "sudden epiphany" (NSA Opp. at 28 n.18) and "a sudden concern with preventing 'pollution activities.'" Id. at 28. NAHB, in turn, laments that under expired NWP 26 many of its members in "the business of construction" frequently undertook projects "without any notice to the Corps," but "[t]his they can no longer do." NAHB Opp. at 10.[24] The goal of the Clean Water Act is not unlimited development, however; it is the protection of the Nation's waters. Congress charged the Corps with the duty and the exclusive authority to administer section 404(e) in a manner that assures that NWP-authorized activities will cause only "minimal" adverse environmental effects separately and only "minimal cumulative" adverse environmental

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[23] See 65 Fed. Reg. at 12,819:

> These revised NWPs continue a trend by the Corps of Engineers of enhancing the protection of the aquatic environment through the NWP program. In 1977 the predecessor to NWP 26 authorized unlimited fill in headwaters and isolated waters without any notification of the Corps. In 1984 the Corps established a maximum project specific impact limit of 10 acres and a notification of the Corps for any impact greater than 1 acre. In 1996, we reduced these project specific limits to 3 acres maximum and 1/3 acre for notification of the Corps.

[24] Many small projects continue to be exempt from pre-construction notice requirements, but under the new general permits, developers are required to notify the Corps before embarking on projects affecting more than 1/10 of an acre.

effects. The judiciary has neither the expertise nor the legislative authorization to issue – or in Plaintiffs' phrasing, to "reinstate" – general permits under section 404(e). If Plaintiffs want to return to an era when NWP 26 authorized the destruction of three acres of wetlands at a time and allowed thousands of projects to proceed with the Corps not even being notified, Plaintiffs should petition the Corps or ask Congress to re-write section 404(e). It should not ask this Court to usurp legislative or executive branch functions.

NSA's requested relief is extraordinary for another reason – the nature of the requested relief flies in the face of an express congressional directive. NSA concedes that the courts' "discretion to fashion relief" may be "displaced" by a "clear and valid legislative command." NSA Opp. at 29-30. But NSA ignores that Congress expressly limited the duration of nationwide permits to five years. Plaintiffs cannot properly ask this Court to displace that limitation, by reviving the expired NWP 26 and judicially extending its term beyond that expressly allowed under the Clean Water Act.

At one point in its Opposition, NSA correctly describes the only remedy that would be available were this Court to find that it has jurisdiction over the complaints and then go on to find the general permits unlawful. NSA states that the "appropriate relief under the APA, where administrative action has been found to be unlawful, is to require reconsideration by the agency under the applicable statute and regulations." NSA Opp. at 31. The Corps agrees. Judicial reinstatement of NWP 26, by contrast, would constitute unprecedented, extraordinary relief, and is unavailable.

For its part, NAHB largely adopts NSA's arguments that this Court has authority to reinstate an expired general permit. NAHB Opp. at 36. NAHB also asserts that "the Corps'

suggestion that this Court must somehow make 'findings' pursuant to § 404(e) is puzzling." NAHB Opp. at 36. NAHB contends that if it prevails on its Complaint, this Court need "only" order that NWP 26 remain "operative" during the Corps' "reconsideration" of its action. Id. NAHB deems this "straightforward equitable relief." Id.

However, NAHB's argument, not the Corps', is puzzling. CWA section 404(e) general permits are, by statute, valid for only five years and NWP 26 expired in 2000. Any return to the "status quo ante" to which NAHB refers would not be accomplished by "reinstatement" of expired NWP 26. It would be accomplished by remand to the Corps, which has exclusive authority to issue general permits.

Further, NWP 26 was issued under historical circumstances that no longer exist. The nation has fewer acres of wetlands than when NWP 26 was originally issued, and it has more people and more development. When the Corps last issued the now-expired NWP 26, it determined at that time that the anticipated environmental effects during the permit's five-year term would be "minimal," as required by the statute. The Corps did not find that the individual and cumulative effects of NWP 26 would continue to comply indefinitely with Congress's "minimal effects" mandate. Congress intentionally limited NWPs to five years to make certain that the environmental consequences of such permits would be continually re-assessed by the Corps in light of changing circumstances and trends.

In sum, courts lack the authority and expertise to make the statutorily-required environmental findings that are a prerequisite for NWP 26 to continue beyond its expiration. See Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983) (reviewing court must be "at its most deferential" when agency is "making predictions, within its area of special expertise, at the

frontiers of science"). Even if this Court were to set aside the challenged general permits, Plaintiffs are not entitled to the extraordinary relief they request. Were this Court to hold the general permits unlawful, the appropriate remedy would be remand to the Corps.

CONCLUSION

For the foregoing reasons, the Court should grant the Corps' motion for summary judgment and deny Plaintiffs' motions for summary judgment.

Respectfully submitted,

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September 20, 2001