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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. )

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Case No. 1:00CV00379 RJL  
and consolidated cases  
Judge Leon

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS-  
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS'  
MOTIONS FOR SUMMARY JUDGMENT**

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Defendants (collectively, the "Corps") file this Supplemental Memorandum in support of their cross-motion for summary judgment, in opposition to Plaintiffs' motions for summary judgment, and in response to Plaintiffs' Supplemental Memoranda filed June 19, 2002.<sup>1/</sup>

### **BACKGROUND**

In 1998, the Corps proposed to issue six new general permits (also known as "nationwide" permits or "NWPs") and to modify six existing NWPs and six existing General Conditions to the NWPs. 63 Fed. Reg. 36,040 (July 1, 1998). Included was a proposed modification of NWP 29 (Single Family Housing) precipitated by a court order requiring the Corps to consider the exclusion of high-value waters from NWP 29 and the use of lower acreage ceilings for that permit.<sup>2/</sup> The Corps received 10,000 comments on its July 1998 proposal and held more than a dozen public hearings throughout the country. After the Corps carefully evaluated the voluminous comments, it issued a new NWP 29 in August 1999, and a second proposal as to the other permits in July 1999. 64 Fed. Reg. 47,175 (Aug. 30, 1999); 64 Fed. Reg. 39,252 (July 21, 1999). The July 1999 proposal yielded an additional 1,700 comments, which the Corps assessed before issuing general permits replacing NWP

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<sup>1/</sup> Each Plaintiff in this case filed a supplemental memorandum – National Association of Home Builders ("NAHB") filed a 15-page brief; National Stone Association et al. ("NSA") filed a 14-page brief; and National Federation of Independent Businesses ("NFIB") filed a 4-page brief. Rather than filing three responses, the Corps files a \_\_\_ - page consolidated response.

<sup>2/</sup> See Alaska Ctr. for the Env't v. West, 31 F. Supp. 2d 714, 724 (D. Alaska 1998). In temporarily suspending NWP 29's use, that court noted that the "potential harm to the environment which will occur if a fill is placed in high-value waters is serious and likely irreversible," whereas the potential harm that might inure from requiring developers to temporarily participate in the individual (instead of the nationwide) permit process primarily involved somewhat increased permit processing time and "would not be so great." Id. at 723.

26 on March 9, 2000. Those general permits and conditions were challenged by Plaintiffs in this litigation.

While the parties' cross-motions for summary judgment were pending, the Corps proposed to issue new general permits and conditions. 66 Fed. Reg. 42,070 (Aug. 9, 2001). In response, the Corps received more than 2,100 comments even though the proposed changes from the existing permits were relatively minor. In January 2002, after evaluating the comments, the Corps issued new general permits and conditions, which became effective on March 18, 2002, and will, unless earlier revoked, expire five years later on March 17, 2007. See 67 Fed. Reg. 2020, 2021-22 (Jan. 15, 2002) (Issuance of Nationwide Permits). These permits are the subject of Plaintiffs' supplemental complaints and briefing.

The Corps' general permit proposal was assailed from both sides: by those who claimed the proposed permits were overly protective of the environment and too limited, and by those who deemed them insufficiently protective and unduly solicitous of developers and industry. See 67 Fed. Reg. at 2021-22.<sup>37</sup> In the Corps' considered view, however, the permits strike an appropriate balance, allowing the agency to efficiently authorize those activities – but *only* those activities – that will cause no more than “minimal” adverse environmental effects, individually and cumulatively, as allowed by law. See Clean Water Act (“CWA”) section 404(e)(1), 33 U.S.C. § 1344(e)(1).

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<sup>37</sup> See id. at 2021 (“Many commenters objected to the NWP proposal, stating that it will place citizens at risk from flooding, promote wetland and stream destruction, degrade water quality, and result in the loss of critical habitat.”); (“Several commenters asserted that the NWP program contradicts the clear intent of Congress to establish a streamlined general permit process for activities with minimal adverse effects on the aquatic environment.”).

It is evident from their Supplemental Memoranda that Plaintiffs do not contend that the current permits vary greatly from the previous version issued two years earlier. See NAHB Supp. Mem. at 1 (Corps has ignored alleged flaws in previous permits and issued latest permits “in virtually identical form”); NSA Supp. Mem. at 2 (Corps’ changes to previous permits are “merely cosmetic”); NFIB Supp. Mem. at 3 (current general permits maintain “the ½ acre impact limit and the 1/10 acre PCN threshold” and allegedly continue to violate “RFA/SBREFA”).

Although the Corps did make a number of changes to the previous version of the general permits, the Corps agrees with Plaintiffs that the permits issued in January 2002 did not mark a substantial change of direction for the NWP program. The changes did, however, “add additional requirements that will enhance protection of the aquatic environment, increase flexibility for the Corps’ field staff to target resources where most needed to protect the aquatic environment, reduce unnecessary burdens on the regulated public, and retain the key protections for the aquatic environment that were added last year (e.g., acreage limit of ½ acre of impact per project, the requirement for the Corps to be notified of any impacts over 1/10 acre, and important limits on impacts within mapped floodplains).” 67 Fed. Reg. at 2020.

Although one would be hard pressed to discern it from Plaintiffs’ supplemental briefing, most of the changes made to the previous permits redounded to Plaintiffs’ benefit.<sup>4</sup> For example, the current

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<sup>4</sup> See NAHB’s Oct. 9, 2001 letter to Corps, commenting on proposed permits, Tab 2 to NAHB Supp. Mem. at 7 (asserting that although the proposed permits “clarify some of the requirements, reduce some of the permit burdens, increase flexibility, and provide long-needed certainty for long-term projects,” they have done so only to a “limited extent” and NAHB “believe[s] the Corps has not gone far enough”).

permits require Corps regulatory offices to measure their success regarding the “no net loss” goal programmatically. Corps districts thus are not required to provide a one-for-one replacement for impacted acreage for individual projects; they must only meet or exceed that mitigation goal for their entire program. This allows districts to be more flexible in their decisionmaking while still protecting the aquatic ecosystem on a watershed basis. *Id.* at 2066.

The current permits make a distinction between intermittent and perennial (*i.e.*, more established, permanent) streams. To qualify for a nationwide permit for work that impacts a *perennial* stream, the applicant cannot fill more than 300 linear feet of that stream bed. However, district engineers, on a case-by-case basis, may now waive the 300-linear-foot limit for the loss of *intermittent* stream beds under NWP 39, 40, 42, and 43. *See* 67 Fed. Reg. at 2057-59. Although this change, too, inures to Plaintiffs’ benefit, NAHB criticizes it as a mere “palliative.” NAHB Supp. Mem. at 11.<sup>3</sup>

NSA’s approach is similar to NAHB’s, conceding that the current permits have resolved a number of issues in Plaintiffs’ favor but continuing to complain that the permits are still too protective of the environment. For example, NSA asserts that “the change to the General Condition 26 in the Reissued NWPs to remove the requirement that permittees document that the project meets FEMA or local floodplain management requirements is welcomed, but ultimately cosmetic.” NSA Supp. Mem. at 8.

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<sup>3</sup> NAHB does concede that the current general permits have resolved, to Plaintiffs’ benefit, one of NAHB’s previously expressed challenges, by eliminating the distinction between public and private linear transportation crossings. NAHB Supp. Mem. at 11. But, again, the various changes that have been made in Plaintiffs’ favor fail to satisfy them.

Thus, Plaintiffs' three supplemental memoranda largely reiterate the arguments they advanced during last year's summary judgment briefing. NAHB devotes much of its submission to a re-cataloguing of the "eight main objections" it advanced in last year's briefing. NAHB Supp. Mem. at 4-8. NSA's supplemental brief likewise re-plows old ground, while NFIB's supplemental brief merely states that, as concerns its Regulatory Flexibility Act/Small Business Regulatory Enforcement and Fairness Act claims, nothing has changed since 2001.

Plaintiffs' latest arguments continue, therefore, to suffer from the critical defects that beset their previous ones. They fail to recognize that the Corps' section 404(e) general permit program is, by congressional design, purely discretionary. Plaintiffs are not *entitled* to any general permits, and they certainly are not entitled to have this Court usurp Executive Branch functions by substituting expired permits for those issued by the expert agency charged by Congress with implementing the permit program. Plaintiffs' arguments also continue to be premature and to rest on speculation. Issuance of general permits does not mark the relevant consummation of the Corps' decisionmaking process for purposes of effective judicial review. No member of Plaintiffs' organizations can fairly say that it will be unable to construct a desired project due to the requirements of these nationwide permits. Plaintiffs' complaint – that, in some situations, some unspecified number of Plaintiffs' members may not qualify for a NWP but instead may have to participate in the individual permit process before proceeding with development – does not amount to legally cognizable injury.

Plaintiffs' non-procedural arguments mostly amount to their subjective belief that the environment can tolerate more damage and that they would draw the permits' "lines" in different places than did the Corps. Of course, an agency's interpretation of the statutes and regulations it administers

is entitled to substantial deference. But even if the Corps were not accorded deference, Plaintiffs have not shown the Corps' decisions to be irrational.

NAHB concedes that the "NWP program" "results in only minimal adverse environmental impacts." See NAHB's Oct. 9, 2001 letter to Corps, commenting on proposed permits, Tab 2 to NAHB Supp. Mem. at 12. That should be the end of the matter. Nothing in the CWA requires the Corps to issue general permits that authorize the maximum amount of environmental degradation that nature can tolerate, just inside the limits of the "minimal effects" line. If a project fails to qualify for a general permit, it will receive individualized attention under the Corps' well-established standard permit program. The law requires nothing more. Thus, even if this Court were to agree that the Corps *could* have authorized additional environmental harm while still satisfying the CWA's rigorous "minimal effects" standard, the Court may not substitute its judgment for the agency's in terms of where to draw the line.

Plaintiffs complain that in the years since general permits were first authorized, the permits have become somewhat more restrictive, and the Corps does not disagree. The Corps has required more parties seeking to use general permits to notify the agency prior to proceeding<sup>9</sup> and has lowered the acreage threshold for project impacts. However, given Congress's command – expressed in the statute – that general permits not cause effects that are more than "minimal," Plaintiffs cannot show that

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<sup>9</sup> Given that Congress charged the Corps with the task of not allowing the "cumulative" impacts from general permits to be more than minimal, it is difficult to see how the Corps' 1/10 acre notification provision could, under any calculation, be deemed irrational. If nothing else, that provision allows the Corps to assess whether its program is resulting in net loss of wetlands. Importantly, such notification also allows Corps district engineers to exercise discretionary authority to require certain projects to apply for an individual permit.

the Corps' efforts to balance environmental protection with legitimate development of private property are clearly erroneous.<sup>27</sup>

Plaintiffs also appear to persist in their extraordinary demand that this Court reinstate the expired NWP 26 if the Court grants Plaintiffs' requested remand. Plaintiffs argue that this Court should reinstate expired NWP 26 because the current permits fail to define "minimal" effects, fail to comply with NEPA and were based on calculations of environmental effects that improperly assumed that the Corps has jurisdiction over isolated waters. These attacks would apply to the expired NWP 26, as well. Plaintiffs do not explain why the Court should order reinstatement of an expired permit that fails Plaintiffs' own tests for legality. Nor do Plaintiffs explain how the Court can reinstate an expired permit in the face of Congress's express five-year limitation on general permits. See section 404(e)(2), 33 U.S.C. § 1344(e)(2). For these reasons, and all the other reasons discussed by the Corps in its previous briefs to the Court, even if Plaintiffs were to prevail on the merits and obtain a remand, this Court should not displace the agency's experts and judicially authorize dredging and filling activities at potentially thousands of sites.

For most issues, the Corps simply refers the Court to Defendants' prior summary judgment briefs, filed June 14 and September 20, 2001. This memorandum will address, briefly, only the

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<sup>27</sup> NSA contends that by reducing the amount of impacts allowed under the general permits, the Corps has "removed any incentive for the regulated community to design projects to fit under the limits of the NWP" NSA Supp. Mem. at 6. But the Corps, which has decades of experience administering the NWP program, stated that "most project proponents do not request NWP authorization to fill the maximum amount of wetlands under the NWP acreage limits." 67 Fed. Reg. at 2023. To the extent that NSA members have project requirements that legitimately require greater impacts on waters, they have a remedy – they can apply for an individual permit.

following issues: (1) whether any issues or arguments have been mooted by the Corps' issuance of the current general permits; (2) whether the Court continues to lack subject matter jurisdiction; (3) whether the Supreme Court's SWANCC decision and its progeny are still irrelevant to this litigation; (4) whether the CWA mandates "streamlined" permitting at the environment's expense; (5) whether restrictions on the use of certain NWP's in floodplains is arbitrary and capricious and beyond the Corps' authority; (6) whether the Corps has authority to condition NWP's to protect water quality; (7) whether the NWP's impose vegetated buffers only when they mitigate the impacts of the permitted activity; and (8) whether the issuance of the general permits violated NEPA and whether NSA lacks standing to assert that claim.

## DISCUSSION

### I. Several Of Plaintiffs' Claims Have Been Mooted By The New Permits.

In their previous summary judgment briefing, NSA argued that the Corps violated the APA's notice and comment requirements "by failing to provide adequate notice that the maximum authorized acreage would be reduced to 1/2 acre." NSA Summ. J. Mem. at 41-44. The Corps responded that Plaintiffs' argument was unavailing because throughout the process of developing the new NWP's that were issued in 2000, the Corps gave the public fair notice that the acreage limitations were under review. Corps Summ. J. Mem. at 74-77. The Corps explained that it received and considered extensive comments on this issue and that Plaintiffs were clearly on notice that the issue of acreage limitations was being considered. Id. In any event, the Corps explained, the 1/2 acre limitation was a

logical outgrowth of the July 1999 proposal. Id.<sup>8</sup>

Now, in the wake of the current round of general permits, Plaintiffs certainly have no basis to argue that they lacked express notice that the Corps was specifically contemplating imposing a ½ acre limitation on project impacts. See, e.g., NAHB's Oct. 9, 2001 letter to Corps, commenting on permits proposed for issuance in 2002, Tab 2 to NAHB Supp. Mem. at 20-22 (commenting in detail on Corps' proposal to allow an "aggregate impact of ½ acre, regardless of subdivision size," under NWP 39); "Unified Comments Of Real Estate Industry, Oct. 9, 2001, Tab 6 to NSA Supp. Mem. at 3 (commenting on proposal for "one-half acre cap" on NWPs).

At least one other issue raised by Plaintiffs in last year's briefing is similarly mooted by the 2002 general permits. As noted above, NAHB concedes that the current permits have resolved one of NAHB's previously expressed challenges,<sup>9</sup> by eliminating the distinction between public and private linear transportation crossings. NAHB Supp. Mem. at 11.

## **II. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Challenge To The New General Permits.**

As discussed in the Corps' previous briefs, 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 decisionmaking process comes when a person or entity is

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<sup>8</sup> For its part, the Corps previously argued that Plaintiffs were precluded from raising the challenge that the Corps did not make an express CWA section 404(e)(2) finding before the Court, because they failed to present this issue during the comment period. Corps Summ. J. Mem. at 45. Given NAHB's specific comments on this issue during the comment period pertaining to the current permits, the Corps withdraws that argument.

<sup>9</sup> See NAHB Summ. J. Mem. at 32.

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.<sup>109</sup> Moreover, the Corps has administrative procedures that disappointed parties must exhaust before they can seek judicial review. See 33 C.F.R. § 331.12. If any of Plaintiffs members are ultimately denied a Corps permit to develop their property, they will have access to the courts at that time.

Nothing in the current permits or in Plaintiffs' supplemental briefs points to a different conclusion concerning this Court's lack of jurisdiction. At bottom, Plaintiffs' claims of hardship continue to amount to complaints that parties seeking NWP's must submit more "paperwork" and that more projects will be participating in the standard, individual permitting process – a process that, in their opinion, results in increased environmental scrutiny and a somewhat longer permit processing time. However, "Nothing in the CWA confers a vested right to discharge fill into waters of the United States without an individual permit," and therefore "the Corps' decision to require an individual permit [is not] the cause of any hardship to [plaintiff] of a kind that weighs in favor of a finding of finality." Industrial Highway Corp. v. Danielson, 796 F. Supp. 121, 128 (D.N.J. 1992), aff'd, 995 F.2d 217 (3d Cir. 1993).<sup>110</sup>

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<sup>109</sup> If a prospective permittee does not qualify for a NWP, in addition to a individual permit he can request another form of Corps authorization – a regional general permit. 67 Fed. Reg. at 2053.

<sup>110</sup> As the Corps previously explained (Corps Summ. J. Mem. at 28), district engineers have long had, and exercised, the right to assert "discretionary authority" to override NWP's on a case-by-case basis to ensure that projects do not exceed the minimal effects threshold. Under the current permits, district engineers continue to possess that authority, as well as authority to add "special conditions" to NWP's (67 Fed. Reg. at 2022). If the engineer determines that the use of NWP's to authorize activities in a

As the Corps previously pointed out, many of Plaintiffs' members' activities will still qualify for the new NWP's or for other existing general permits in a particular State; for example, under the expired NWP 26, the average impact per project was 0.36 acres, a level of impact that would still qualify for NWP treatment because it is less than the 0.50 acres of impact currently allowed. Nothing in the current permits alters that situation. Plaintiffs cannot deny that most projects that qualified for the expired NWP 26 will still qualify under the NWP's and, if not, will be granted individual permit.<sup>12</sup>

The Supreme Court has held that a court should not review the merits of a claim until the court has determined that it has jurisdiction to do so. Steele Co. v. Citizens for a Better Env't, 523 U.S. 83, 93 (1998). Further, the party seeking to invoke federal jurisdiction, once challenged, has the burden of proving its existence. Georgiades v. Martin-Trigona, 729 F.2d 831, 833 n.4 (D.C. Cir. 1984). It would be wasteful of judicial resources for this Court to address the many issues raised in the summary

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particular watershed or area will cause more than minimal individual or cumulative effects, he can also modify, suspend, or revoke those NWP's in that area. In fact, following issuance of the current permits, a number of division and district engineers have suspended the new permits in various States. By way of example, the general permits issued by Corps Headquarters and challenged in this case have already been indefinitely suspended in Pennsylvania, Maryland, Washington, D.C., and the six New England States. See Ex. 1 and 2. The Chicago District revoked 23 general permits, including NWP's 29 and 39, and issued its own regional permit program. See Ex. 3. That document also shows that Illinois has denied CWA § 401 certification for a number of permits, as is its right. Given that denial, authorization for all discharges covered by such permit in Illinois is denied without prejudice until the State issues an individual water quality certification or waives its right to do so. 33 C.F.R. § 330.4(c)(3). Given the ongoing and localized nature of this process, Plaintiffs' claim that many of their members will be unable to construct projects due to these NWP's is purely speculative.

<sup>12</sup> The Draft IWR Study, which analyzed the more restrictive March 2000 permits, determined that 66% of the activities authorized under NWP 26 in 1998 would still qualify under the March 2000 NWP's, and 98% of the activities authorized under other NWP's in 1998 would still qualify under the March 2000 NWP's. Given that the new NWP's are less restrictive, those percentages are likely even higher today.

judgment briefing in this case until it has determined that it has jurisdiction over the Supplemental complaints. Accordingly, the Corps encourages the Court to consider setting a separate hearing to address jurisdictional issues.

### III. The Supreme Court's SWANCC Decision And Its Progeny Are Still Irrelevant To This Litigation.

Plaintiffs continue to base two arguments on Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) ("SWANCC"). First, NAHB argues that when the Corps issued the current permits it thought it had jurisdiction over isolated waters, but that SWANCC held that the CWA does not allow the Corps to assert jurisdiction over such waters. NAHB Supp. Mem. at 8. NAHB contends that the Corps' permit actions were based on "extrajurisdictional factors," id. at 8, and must be vacated.<sup>13</sup> But the fact that SWANCC did, to some undetermined extent, reduce the scope of "waters of the U.S.," does not advance NAHB's position. The Corps has made clear, again, that its analysis of cumulative adverse impacts did not depend on nationwide mathematical calculation of the jurisdictional waters covered by the NWP's. See 67 Fed. Reg. at 2024. As the Corps explained, an assessment of cumulative adverse effects that result from use of the NWP's cannot be made at the national level. The technically sound method to conduct this assessment is on a watershed basis, through Corps district offices. Id. The Corps' assessment of cumulative effects is not, and can not be, mathematically precise. Nor can a determination of the precise effect of SWANCC be mathematically calculated, as demonstrated by the case law NSA cites. NSA

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<sup>13</sup> As noted above, if NAHB is correct that a general permit is invalid if its "minimal effects" analysis took into account waters outside the Corps' jurisdiction, NWP 26 was likewise invalid and cannot be "reinstated" either by the Corps or by this Court.

Supp. Mem. at 5 and n.9. NSA itself asserts that those cases reach “differing conclusions” concerning what comprise waters of the United States and involve “fact specific analysis” of the jurisdictional issues. Id.<sup>14</sup>

NSA takes a different, but equally unavailing, tack.. NSA reiterates its prior claim that the challenged permits conflict with SWANCC because the permits indicate that the Corps regards at least some “ephemeral streams” as falling within the definition of waters of the United States. NSA Supp. Mem. at 3. NSA characterizes its argument as a “facial challenge to the Corps’ assertion of jurisdiction over ephemeral waters.” Id. at 4-5. NSA’s argument makes little sense. As the Corps previously explained (Corps Summ. J. Mem. at 33), a waterbody does not become a “water of the U.S.” *because* of a general permit. A general permit specifies 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 United States.” Were NSA’s interpretation of SWANCC correct, it would mean that Plaintiffs could discharge pollutants into those waters without *any* nationwide or individual permit.

NSA’s remaining arguments concerning ephemeral streams also lack merit. NSA argues (NSA Supp. Mem. at 4-5) that the Corps is legally required to make clear that if an ephemeral water has no connection to navigable waters, it is not regulated.. However, to the extent that any NSA member is 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 site and

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<sup>14</sup> The Corps does not agree with, but believes it unnecessary to address herein, NSA’s description of these cases and their holdings.

can challenge that determination if dissatisfied. 33 C.F.R. § 331. At this juncture, NSA's alleged concerns about the scope of CWA waters following SWANCC are being raised in the wrong forum and are premature.

#### **IV. The CWA Does Not Mandate "Streamlining" at the Expense of the Environment.**

Plaintiffs assert that the NWP's are illegal because they "ignore Congress's 'streamlined permitting' mandate." NAHB Suppl. Br. at 11. Plaintiffs cite no statutory language imposing such a mandate. Indeed, nowhere does section 404 suggest that there is a level of "streamlining" the Corps must meet in the 404 permitting program. Moreover, nothing in section 404 suggests that the Corps is authorized to elevate efficiency above section 404(e)'s specific, stated mandate that NWP's have no more than minimal adverse environmental impacts. Section 404(e) provides that "the Secretary may . . . issue general permits . . . if the Secretary determines that the activities . . . 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) (emphasis added). "May" does not mean "shall." Franks v. Prudential Health Care Plan, 164 F. Supp. 2d 865, 890 (W.D. Texas 2001). Far from mandating general permits, the statute merely authorizes them, and only under limited circumstances. Thus, the Corps is not required to issue general permits at all, let alone permits meeting some imaginary "streamlining" standard. The statute does not require "streamlining," and Plaintiffs have no right to demand it.

Further, "streamlining" is not the only source of efficiency in the section 404 permitting program. The efficiency of the section 404 permitting program is also a function of the Corps' budget. An 8% increase in the Corps 1998 permitting budget would enable the Corps to operate with the same

efficiency under the March 9, 2000 NWP's as it achieved in 1998. IWR Study at viii.<sup>15</sup> Thus, appropriate environmental protection and more efficient permitting are not mutually exclusive. If Congress grows dissatisfied with the efficiency of the section 404 program, it has the ability to provide a remedy. In the meantime, the Corps does not have the authority to ignore its statutorily-imposed environmental mandate based upon speculation regarding its future budget. Under the section 404(e)(1) of the CWA, efficiency cannot trump environmental protection, regardless of the resources Congress provides.

**V. The Restrictions on the Use of Certain NWP's in Floodplains are Reasonable and Within the Corps' Authority.**

Despite substantial changes to General Condition 26 addressing discharges in 100-Year floodplains, Plaintiffs continue to assert that General Condition 26 is "unduly burdensome" and exceeds the Corps' authority. NSA Supp. Mem. at 7-9. Plaintiffs' arguments regarding the Corps authority to impose the limitations of General Condition 26 are addressed in full in the Corps' prior briefs. Corp. Summ. J. Mem. at 55-59, Corp. Summ. J. Reply at 32-34. However, the changes to General Condition 26 in the latest round of NWP's are noteworthy.

The former General Condition 26 prohibited the use of NWP's 29, 39, 40, 42, 43, and 44 for projects below headwaters that result in permanent, above-grade fills. 65 Fed. Reg. at 12,897. Above headwaters, the former General Condition 26 prohibited the use of NWP's 29, 39, 40, 42, 43, and 44 for projects that result in permanent, above-grade fills in the floodway. *Id.* Notification was required

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<sup>15</sup> Moreover, the Draft IWR study does not account for the reductions in workload and costs attributable to the latest revisions to the NWP's.

for use of NWP 12 and 14 below headwaters, and for use of NWP 12, 13, 29, 39, 40, 42, 43, and 44 in the flood fringe above headwaters. Id. Finally, the former General Condition 26 required permittees to provide documentation that the discharges comply with FEMA or FEMA-approved local floodplain construction requirements. Id.

The new General Condition 26 is much simpler and less burdensome. First, the Corps deleted altogether the notification requirement. 67 Fed. Reg. at 2093-94. Second, the Corps deleted altogether the requirement to document that the project meets FEMA-approved requirements. Id. Third, several NWPs that were subject to the former General Condition 26, including NWP 29, are no longer covered under the new General Condition 26. Id.

Plaintiffs argue that the deletion of the requirement to document compliance with FEMA-approved construction requirements is “cosmetic.” NSA Supp. Mem. at 8. Plaintiffs’ assertion is strange given that they place such importance on “streamlining” and the amount of process and paperwork imposed by the NWPs. Far from “cosmetic” or a “mirage,” NSA Supp. Mem. at 8-9, the new General Condition 26 removes a substantial paperwork hurdle.

General Condition 26 simply conditions NWP authorization on the requirement that Plaintiffs comply with FEMA construction requirements. Plaintiffs must comply with those requirements anyway. Thus, the new General Condition 26 requires nothing new of them.

Plaintiffs argue that the new General Condition 26 is arbitrary and capricious because it removed the restrictions on the use of certain NWPs in the floodplain, but not all of them. NSA Br. at 8. Plaintiffs argue that there is no rational reason for distinguishing among the NWPs. However, the Corps explained the rationale – the permanent above grade fills authorized by NWP 12, 14 and 29

were removed from General Condition 26 because they are small, and do not occur very often, especially in the same watershed. 67 Fed. Reg. at 2073. Plaintiffs make no argument that this distinction drawn by the Corps is inaccurate or arbitrary.

**VI. The Corps Has the Authority to Condition NWP's to Protect Water Quality.**

Plaintiffs argue that General Condition 9, addressing water quality, exceeds the Corps' authority. This assertion is fully addressed in the Corps' prior briefs. Corps Summ. J. Mem. at 49-53; Corps Summ. J. Reply at 24-29. As set forth in those briefs, the Corps has not only the authority but the responsibility to ensure the protection of water quality under the section 404 program. Nonetheless, the Corps made notable changes to address the concerns raised by Plaintiffs. The Corps added language that clarifies that permittees may meet the requirement of this General Condition 9 by complying with state or local water quality practices. 67 Fed. Reg. at 2089. Moreover, the Corps explained in the Preamble that additional water quality planning will be a requirement in only a few cases. 67 Fed. Reg. at 2061. These changes confirm that the Corps will fulfill its responsibility to protect water quality, but will not supplant state and local water quality planning. Thus, General Condition 9 is within the Corps authority, and will not be a significant source of delay in the permit process.

**VII. The NWP's Impose Vegetated Buffers Only When They Mitigate the Impacts of the Permitted Activity.**

Plaintiffs cling to their meritless argument that NWP's 29 and 39 require vegetated buffers regardless of whether a particular project will impact open waters or streams. NAHB Suppl. Mem. at 13. That assertion is contrary to the language of the NWP's 29 and 39, and finds no support

whatsoever in the administrative record. First, NWP 29 requires “sufficient vegetated buffers . . . to preclude water quality degradation due to erosion and sedimentation.” 67 Fed. Reg. at 2083. Thus, the requirement of vegetated buffers is tied directly to a specific impact – water quality degradation due to erosion and sedimentation. If those impacts are not present, NWP 29 does not require vegetated buffers. Second, NWP 39 states, “if there are any open waters or streams within the project area, the permittee will establish and maintain, to the maximum extent practicable, wetland or upland vegetated buffers next to those open waters or streams consistent with General Condition 19.” 67 Fed. Reg. at 2086. Therefore, on its face, NWP 39 does not require vegetated buffers in all instances, because it contemplates that in some cases vegetated buffers may not be practicable. General Condition 19 states that “to be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. 67 Fed. Reg. at 2093. Further, under General Condition 19, buffers are discretionary, depending upon whether they are “appropriate and practicable.” 67 Fed. Reg. 2092. As the IWR Study puts it, “General Condition 19 gives District Engineers full discretion on when and to what extent to require vegetative buffers.” Draft IWR Study at 20 n. 11. Thus, in a given case, the Corps may determine that vegetated buffers are impracticable, and therefore not required, for a variety of reasons.

Moreover, the Corps confirms in the new NWPs that vegetated buffers are not required in every case, regardless of the impacts. The Corps explains that “all mitigation, whether vegetated buffers or wetlands mitigation, must be related to the impacts authorized,” 67 Fed. Reg. at 2066, and repeatedly states that the Corps will use its professional judgment to determine what mitigation is best for the aquatic ecosystem. 67 Fed. Reg. 2064-67. Thus, vegetated buffers are required by General

Condition 19 only when the Corps determines they are practicable, appropriate and related to the impacts authorized.

Plaintiffs claim that the Corps has exceeded its authority because the vegetated buffer condition is “vague” and may be imposed “whenever [the Corps] believes such buffers might provide some free-floating benefit.” NAHB Suppl. Mem. at 13. Plaintiffs’ confusion does not result from vagueness in the mitigation condition, but rather from the lack of ripeness of Plaintiffs’ arguments. The Corps vests the determination of whether vegetated buffers are appropriate with the District Engineer. Therefore, the decision to use vegetated buffers will be made on a project-by-project basis. Until vegetated buffers are applied in the context of a specific project, Plaintiffs’ challenge is premature.

#### **VIII. Plaintiff’s NEPA Claim Should Be Dismissed.**

NSA added a challenge to the 2002 NWP. NSA’s primary contention is that the Corps’ issuance of the NWP and the “elimination” of NWP 26 before the finalization of the ongoing processing of a voluntary Programmatic Environmental Impact Statement (“PEIS”) violates NEPA.<sup>16</sup> In addition, NSA contends that the Corps violated NEPA by failing to consider cumulative impacts, and by not including in the NEPA Decision documents prepared for the NWP the alternative that NWP26 would be maintained during the processing of the PEIS.<sup>17</sup>

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<sup>16</sup> See, NSA’s Complaint ¶¶ 84-86 and Pls.’ Mem. at pp. 10-13.

<sup>17</sup> See, NSA Supp. Mem. at 12-13 and Complaint ¶¶ 86-87.

NSA's NEPA challenge to the NWP<sup>18</sup> should be dismissed because NSA cannot establish constitutional and prudential standing. Alternatively, NSA's NEPA claims should be rejected because the Corps has complied with NEPA.

**A. NSA's NEPA CHALLENGE SHOULD BE DISMISSED FOR LACK OF STANDING**

**1. NSA Has the Burden of Establishing Constitutional and Prudential Standing.**

The threshold question in every federal court action is the court's power to hear the suit. Warth v. Seldin, 422 U.S. 490, 498 (1975). Article III of the Constitution limits the power of the federal court to the resolution of "cases" or "controversies." U.S. Const. Art. III, § 2, cl. 1; Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). A core component of a justiciable controversy under Article III, is that a litigant have standing to challenge the action sought to be adjudicated. Id. The party invoking federal jurisdiction bears the burden of establishing standing, and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . ." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (citations omitted). The elements of standing "are not mere pleading requirements but rather [are] an indispensable part of the plaintiff's case. . . ." Id.

The inquiry as to standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." Warth, 422 U.S. at 498 (citations omitted). To demonstrate constitutional standing, a plaintiff must show that: (1) the plaintiff has suffered an "injury in fact" that is concrete and particularized, (2) the injury is "fairly traceable" to the action of the defendant, and (3) it is likely that the injury would be redressed by a favorable decision. Lujan, 504 U.S. at 560-561. To

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<sup>18</sup> The 2000 NWP<sup>s</sup> were superseded by the 2002 NWP<sup>s</sup>. We are not addressing the now moot challenge to the NWP<sup>s</sup> but our arguments would have applied to the now moot challenge.

satisfy prudential standing requirements, a plaintiff must demonstrate that the “interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” Bennett v. Spear, 520 U.S. 154, 175 (1997). The same standard applies to for judicial review under the APA. Found. on Econ. Trends v. Lyng, 943 F.2d 79, 82-83 (D.C. Cir. 1991). See also California Forestry Ass’n v. Thomas, 936 F. Supp. 13, 20 (D. D.C. 1996).

## 2. NSA’s Allegations of Harm Fail to Establish Constitutional Standing.

To establish Article III standing, a plaintiff must establish “that it has suffered harm, or that one or more of its members are injured.” Warth, 422 U.S. at 515. The inquiry as to the existence of an actual or threatened injury “is necessarily case specific.” Wilson v. State Bar of Georgia, 132 F.3d 1422, 1428 (11<sup>th</sup> Cir. 1998) (citation omitted). The injury “must be concrete in both a qualitative and temporal sense.” Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). “[A] showing of *palpable* and *particularized* injury on the part of the plaintiff is a *sine qua non* of standing in federal court.” (Emphasis in original) (citations omitted) Found. on Econ. Trends v. Watkins, 794 F. Supp 395, 397 (D.D.C. 1992). The “injury complained of [must] be, if not actual, then at least imminent . . . .” Lujan, 504 U.S. at 564 n.2. “Although ‘imminence’ is . . . a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury. . . is certainly impending. . . .” Id. “Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact.” Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (internal quotations omitted); accord Lujan, 504 U.S. at 560 (Art. III requires allegation of injury that is “actual or imminent, not conjectural or hypothetical”) (internal quotations omitted).

NSA's allegations of injury all emanate from comparing the processing of permit requests through the expired NWP 26 with the processing of permits through the current NWPs or the standard individual permit system. See Complaint ¶¶ 24-29. NSA alleges that in cases that would have qualified under the expired NWP 26, its members will have to apply for individual permits or try to fulfill the requirements of the NWPs. Id. ¶¶ 25-26. In either case, NSA laments, the processing of future unspecified permit requests will be more costly and will take more time than under NWP 26. Id. ¶¶ 26-28. NSA alleges that the delays and costs "will also have a detrimental effect" on NSA's unspecified environmentally beneficial activities "such as flood control protection, clearing of sediment basins, providing drinking water, enhancing flood storage capacity, and creating wetland mitigation banks." Id. at ¶¶ 26. NSA's injury claims do not meet the standard for Constitutional standing.

"Nothing in the CWA confers a vested right to discharge fill into waters of the United States without an individual permit." Indust. Highway Corp., 796 F. Supp. at 128. Thus, the loss of any perceived benefit under NWP 26 or any other NWP cannot be said to constitute an "injury." Cf., id. Further, assuming, arguendo, that the impacts, economic or otherwise, of having to comply with permitting requirements could be considered to be "injuries" the allegations are too general to establish standing. None of NSA's conclusory allegations identify permit proceedings in which NSA's members are suffering any particularized injury that is "distinct and palpable," or "actual or threatened." Valley Forge, 454 U.S. at 472, 475.

NSA's allegations of procedural violations<sup>19</sup> are insufficient to fulfill the injury-in-fact requirement. In Lujan, the Supreme Court rejected the claim that standing can arise from an alleged procedural injury.

[T]he court [below] held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view.

Id. at 573. See also Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 664 (D.C. Cir. 1996) ("The mere violation of a procedural requirement. . . does not permit any and all persons to sue to enforce the requirement.). An individual can enforce a procedural right "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." Lujan, 504 U.S. 573 n.8. Here, Plaintiff has failed to establish such a concrete interest that could have been affected by the alleged procedural deficiencies.

NSA has failed to allege facts to establish the injury-in-fact requirement under Article III. In any event, the claimed injuries cannot establish the causation and redressability elements of Constitutional standing. "To prove causation, a plaintiff seeking the preparation of an EIS must demonstrate that the particularized injury that the plaintiff is suffering or is likely to suffer is fairly traceable to the agency action that implicated the need for an EIS." Florida Audubon Soc'y, 94 F.3d at 669. Thus, to establish causation, NSA would have to establish that its claimed injuries are "fairly traceable" to the Corps' issuance of the current NWP's and/or to the completion of the voluntary PEIS being prepared by the Corps. NSA has not and cannot so establish. All of the injuries claimed by NSA emanate from

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<sup>19</sup> NSA alleges that the Corps has violated NEPA by issuing the NWP's before completion of the PEIS (Complaint ¶¶ 83-86), by not considering cumulative impacts and by failing to include the maintenance of NWP 26 as an alternative (Complaint ¶ 86).

the fact that NWP 26 is no longer in existence. NWP 26 expired by its own terms in 2000, two years before the Corps' issuance of the current NWPs. Thus, the injuries allegedly caused by the expiration of NWP 26 are not "fairly traceable" to the NWPs. Similarly, the processing and/or completion of the PEIS has not had, and cannot have, any impact on NWP 26. NSA has failed to establish causality.

"Under the redressability test, it must be 'likely,' as opposed to merely 'speculative' that the injury claimed will be redressed by a favorable decision." (internal quotation marks and citations omitted) California Forestry, 936 F. Supp. at 18. In this case it is not only unlikely, it is a certainty that the alleged injuries cannot be redressed by the invalidation of the challenged NWPs or the issuance of the PEIS. Neither action would lead to the resuscitation of the defunct NWP 26. If the Court were to invalidate the NWPs, under the APA, it would have the authority to remand the issue to the Corps for further consideration. The Court would not have authority under the APA to order the Corps to reinstate or to issue a new NWP similar to NWP 26. Further, such an order would usurp the Corps' discretion under the CWA to issue NWPs (see 33 U.S.C. § 1344(e)(1)) and would contravene the statutory provisions that NWPs cannot be in effect for more than five years (33 U.S.C. 1344(e)(2)).

### **3. NSA's Allegations of Harm Are Insufficient to Establish Prudential Standing.**

The Supreme Court has defined the interests protected by NEPA § 102 as the "physical environment--the world around us, so to speak." Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983). "The theme of § 102 is sounded by the adjective 'environmental': NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment." Id. In order to have standing under NEPA, a plaintiff must allege an environmental harm. California Forestry, 936 F. Supp. at 21. "The purpose of the zone of interest inquiry is to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory

objectives.” Id. at 20-21 (internal quotations and citations omitted). In the absence of other demonstrable harm, a “plaintiff who asserts solely economic injury does not have standing under NEPA.” Id. at 21. See also Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1236 (D.C. Cir. 1996).

NSA’s primary injury claims that the processing of permits will be more costly and result in costly delays of its projects are, on their face, purely economic and, thus, do not fall within the NEPA’s zone of interest. The claims of injury to “environmentally beneficial activities of Plaintiff’s members” (Complaint ¶ 29) cannot fulfill the prudential requirements because the alleged general injuries are not to the waters of the United States which are the subject of the NWP’s. Finally, the challenged NWP’s were issued to ensure activities previously authorized by NWP 26 “are activity specific, with terms and conditions to ensure that these activities result in minimal adverse effects on the aquatic environment.” 65 Fed. Reg. 12,818 (March 9, 2000). The NWP’s “substantially increase the protection of the Nation’s aquatic environment.” Id. NSA’s objections to the NWP’s that provide more protection to the waters of the United States than NWP 26 indicates that the NSA’s interests are “more likely to frustrate than to further the [NEPA’s] objectives.” California Forestry, 936 F. Supp. at 21.

## **B. Defendants Have Fully Complied With NEPA**

### **1. Summary of NEPA Standards**

NEPA’s purpose is to focus the attention of the government and public on a proposed action so that the action’s consequences can be studied before the action is implemented and potential negative environmental impacts can be avoided. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989). NEPA requires a federal agency to prepare an EIS if the agency proposes to undertake a “major federal action[] significantly affecting the quality of the human environment.” 42

U.S.C. § 4332(2)(C). The federal “agencies have the initial and primary responsibility to determine the extent of the impact and whether it is significant enough to warrant preparation of an EIS.” This is accomplished through an Environmental Assessment (“EA”) which “provides a basis for a finding of no significant impact (“FONSI”).” Coalition of Sensible Transp. v. Dole, 826 F.2d 60, 66 (D.C. Cir.1987) (citing 40 C.F.R. § 1501.4(b), (c), & (e) (1986) (describing process); id § 1508.9 (defining EA); id. § 1508.13 (defining FONSI). “Thus under NEPA, an agency’s final action will be either an EIS or a FONSI.” California Dep’t. of Health Services v. Babbitt, 46 F. Supp. 2d 13, 21 (D.D.C. 1999)

NEPA imposes essentially procedural requirements on the federal agency, not substantive ones. “NEPA does not work by mandating that agencies achieve particular substantive environmental results.” Marsh, 490 U.S. at 371. NEPA claims are judicially reviewed under the APA’s searching, but narrow and deferential standard of review. See Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 882 (1990).<sup>20</sup>

## **2. Summary of NEPA Processing**

### **a. FONSI for the Nationwide Program, Purpose of Voluntary Programmatic Environmental Impact Statement, and Assessment of Cumulative Effects.**

On June 23, 1998, the Corps issued a FONSI for the NWP program<sup>21</sup> determining that “the NWP program does not have a significant impact on the human environment and does not require the preparation of an EIS, because the NWP program authorizes only those activities that have minimal adverse environmental effects, individually or cumulatively, which is a much lower threshold than the EIS threshold.” FONSI, p. 1, Ex. 4. The FONSI explained that the aforementioned factor, in

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<sup>20</sup> See also discussion of Standard of Review in Corps’ Summ. J. Mem at 19-21.

<sup>21</sup> A copy of the 1998 FONSI was included in the Administrative Record. (“AR”). See AR.PRT 7-0252. For easier reference a copy of FONSI is attached as Ex. 4.

conjunction with the fact that the NWP program has procedures to consider specified impacts and “in combination with the fact that the Corps must assess whether individual or cumulative adverse effects are more than minimal on a local watershed basis, ensures that no significant individual or cumulative adverse effects on the human environment will occur.” Id.

Nevertheless, the FONSI provides that the Corps will *voluntarily* prepare a PEIS to provide the Corps with a formal mechanism to review the effects of the NWP program on the environment, with full public involvement and comment, and identify any necessary changes to the procedures, substantive content, and implementation of the NWP program that may be appropriate. Id. at 2. The PEIS will assess the NWP program, including its individual or cumulative environmental effects, and alternative approaches to ensure that the NWPs authorize only activities that have minimal individual or cumulative adverse effects on the environment. FONSI at 2, Ex. 4. It is anticipated that the final PEIS will be issued by December 2002.<sup>22</sup> See Declaration of Leesa A. Beal, attached as Ex. 5.

The FONSI states that “[c]umulative adverse effects on the aquatic environment caused by activities authorized by NWPs must be monitored and evaluated by district engineers on a watershed basis[.]” which is “the only technically sound approach.” Id. at 5.

**b. The Corps Issued a NEPA Analysis for Each of the NWPs.**

The Corps has the practice of preparing an EA “and, where relevant a FONSI and/or a Section 404(b)(1) Guidelines compliance analysis for each NWP when they are issued or reissued.” Id. at 1-2. In accordance with this policy, the Corps prepared a Decision Document for each of the

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<sup>22</sup> Originally, the Corps anticipated that the PEIS would be completed by December 2001. 1998 FONSI at 2. However, the draft PEIS was made available for comments on July 31, 2001. See, Declaration of Leesa A. Beal, attached as Exhibit 5. The comment period terminated on October 29, 2001. Id. The Corps received numerous comments. Id. Presently, the draft final PEIS is under review by senior members of the Corps’ Regulatory Branch and it is anticipated that the final PEIS will be issued by December 2002. Id.

NWP permits which are part of the current NWPs. Each Decision Document includes a discussion of the environmental impacts as required by NEPA,<sup>23</sup> which includes “a general assessment of the foreseeable environmental effects of the individual activities authorized by the NWP, the anticipated cumulative effects of those activities, and the potential future losses of waters of the United States that are estimated to occur until the expiration date of the NWP.”<sup>24</sup> Every assessment includes a discussion of various NEPA related issues including, but not limited, to NEPA alternatives.<sup>25</sup>

### **3. Defendants Have Fully Complied with NEPA**

The Corps’ NEPA procedures for the NWP program have been comprehensive. Nevertheless, NSA contends that Defendants violated NEPA because the Corps failed to consider cumulative impacts, the NWPs were issued prior to the completion of the PEIS, and the EAs prepared as to the NWP’s did not include maintaining NWP 26 pending completion of the PEIS as an alternative. The Administrative Record for the challenged NWPs shows that NSA’s contentions have no merit.

#### **a. Plaintiff’s Contention that the Corps Has Failed to Consider Cumulative Impacts of the NWPs Should Be Rejected.**

The Council on Environmental Quality defines “cumulative impacts” as the impacts “on the environment which results from the incremental impact of the action when added to other past, present,

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<sup>23</sup> Copies of the Decision Documents prepared for the challenged 11 NWPs were included in the Administrative Record filed with the Court in May 2002. For copies of the Decision Documents prepared for the challenged NWPs Nos. 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44, see, AR, Documents Nos. 26, 30 35, 37, 49, and 62 through 66.

<sup>24</sup> See the first paragraph of Section 4(a), Individual and Cumulative Impacts, of the Decision Documents prepared for the challenged NWPs identified in footnote 13, infra.

<sup>25</sup> See Decision Documents, Section 4(b), for the challenged NWPs, identified in footnote 13.

and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7. Thus, “[a]ctions are cumulative if, when viewed with other proposed actions, they have cumulatively significant impacts. The statutory and regulatory scheme requires comprehensive analysis of the impact of connected or cumulative proposed actions in order to prevent agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” (Internal quotation marks and citations omitted) Nat’l Wildlife Fed’n v. FERC, 912 F.2d 1471, 1476 (D.C. Cir. 1990). “When actions will have cumulative or synergistic environmental impact upon a region and are pending concurrently before an agency, their environmental consequences must be considered together.” (Internal quotation marks and citations omitted). Friends of the Earth v. U.S. Army Corps of Eng’rs, 109 F. Supp. 2d 30, 41 (D. D.C. 2000). However, the “determination of the extent and effect” of the impacts of projects, “and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.” Kleppe v. Sierra Club, 427 U.S. 390, 414 (1976).

NSA contends that the Corps has failed to consider the cumulative impacts of the NWP program. NSA Supp. Mem. at 13. NSA’s contention should be rejected simply because it is too general, and does not identify any particular impact of the NWPs which is cumulative and has not been considered by the Corps. NSA has not presented any support for its claim other than the claim that the language in 67 Fed. Reg. 2024-25 indicates that the Corps “acknowledges that it has made no attempt to evaluate the cumulative impact of the NWP program and continued to rely on the June 23, 1998, FONSI.” NSA Supp. Mem. at 13. Plaintiff’s statement is wrong. A review of the cited pages indicates that, in response to a comment that the cumulative impacts of the NWPs should be reviewed

at a regional or national level, the Corps stated:

We believe that no assessment of individual and cumulative impacts can be made a national level, because the functions and values of aquatic resources vary considerably across the country. Assessment of cumulative impacts is more appropriately conducted by Corps districts on a watershed basis, because they have better understanding of local conditions and processes. However, the NWP program is designed programmatically to ensure no more than minimal adverse effects, individually and cumulatively. This is accomplished through acreage limits, the PCN process, regional conditioning, and the exercise of discretionary authority to require individual permits. Each district generally tracks losses of waters of the United States authorized by Department of the Army permits, including verified NWPs, as well as required compensatory mitigation achieved through aquatic resource restoration, creation, and enhancement. The regional conditioning process, including the preparation of supplemental Environmental Assessments by division engineers, also helps ensure that the NWPs authorize activities with no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

67 Fed. Reg. at 2024-25. The cumulative impacts discussions in the Decision Documents for each of the challenged NWPs is consonant with the Corps' systematic approach for assuring that the NWPs have minimal impact on the waters of the United States.<sup>26</sup>

**b. Plaintiff's Contention that NEPA Imposes on the Corps the Duty to Prepare a PEIS for the Nationwide NWPs Program Should Be Rejected.**

Although the Corps has issued a FONSI as to the NWP program "because the NWP program authorizes only those activities that have minimal adverse environmental effects, individually or cumulatively, which is a much lower threshold than the EIS threshold" (FONSI at 1, Ex. 4), the Corps decided to voluntarily prepare a PEIS (*id.* at 2). NSA does not dispute the substance of the Corps' reason for the FONSI which, thus, stands unchallenged. Nevertheless, NSA contends that the

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<sup>26</sup> Indeed the NAHB concurs with the Corps as to cumulative impact and has urged the Corps "to stand firm in defending its determination of minimal impacts for the NWP program and its compliance with NEPA." See NAHB's October 9, 2001 Comments on the Corps' proposal to reissue and modify NWPs at 14 (Ex. 1 to NAHB's Supp. Mem.)

voluntary PEIS being prepared by the Corps “is mandatory” and, thus, the issuance of the NWP before the completion of the PEIS violates NEPA.

In support of this contention, NSA does not even try to identify the elements which establish that the NWP program is a “major federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Instead, NSA relies on out-of-context quotes from selected letters from the EPA and the U.S. Fish and Wildlife Service (“FWS”) in which both express their preference that the Corps complete the PEIS before issuing the challenged NWPs. But what NSA fails to point out is that both EPA and FWS recognize the voluntary nature of the ongoing PEIS. Indeed, one of the two EPA letters cited by NSA states that “[w]hile I recognize that the Corps is undertaking this EIS on a voluntary basis . . . .” (emphasis added) See EPA’s June 29, 2001 letter at 2 (third paragraph), Ex. 5 to NSA Supp. Mem. The FWS’s letter implicitly recognizes the voluntary nature of the PEIS by its statement that “[w]e recommend that the Corps consider suspending its efforts to modify the NWP program until the data contained in the draft EIS is evaluated . . . .” FWS’s July 2, 2001 letter at 1 (second paragraph) Ex. 7 to NSA Supp. Mem. Had the position of FWS and EPA been that NEPA requires the Corps to prepare an EIS for the NWPs, as NSA would have this Court believe, both agencies would have made that fact clear. NSA’s claim that the NWPs cannot be issued until after the completion of the Corps’ voluntary PEIS should be rejected.<sup>27</sup>

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<sup>27</sup> We note that NSA’s contention that the issuance of the challenged NPWs requires an EIS is inconsistent with its claim that the Corps should reinstate NWP 26, which was issued based on an EA. If an EIS is required for the former, an EIS would be required for the latter. However, as shown above the NWP program does not have a significant impact on the environment and, thus, does not require an EIS.

**c. NSA's Contention that the Corps Has a Duty to Consider as an Alternative The Maintenance of NWP 26 Prior to Completing the PEIS Process Should Be Rejected.**

NEPA requires a federal agency to "study, develop, and describe appropriate alternatives" to a proposed action. 42 U.S.C. § 4332(2)(C), (E). The framing of alternatives is committed to the agency's discretion. North Slope Borough v. Andrus, 642 F.2d 589, 604 n.84 (D.C. Cir. 1980). An agency's choice of reasonable alternatives are to be evaluated "in light of the objectives of the federal action." City of Alexandria, Virginia v. Slater, 198 F.3d 862, 867 (D.C. Cir. 1999), cert denied, Alexandria Historical Restoration and Pres. Comm'n v. Fed. Highway Admin., 531 U.S. 820 (2000). The Corps' objective in issuing the challenged NWPs was to ensure that activities previously authorized by NWP 26 "are activity specific, with terms and conditions to ensure that these activities result in minimal adverse effects on the aquatic environment." 65 Fed. Reg. at 12,818. It need not be belabored that including NWP 26 as an alternative in the Decision Documents as to NWPs would not have been in accordance with "the objectives of the federal action." NSA's contention that the Corps should have included the continued implementation of NWP 26 as an alternative should be rejected.

**CONCLUSION**

For the foregoing reasons and those set forth in the United States previous briefs, the Court should grant the Corps' motion for summary judgment and deny Plaintiffs' motions for summary judgment.

Respectfully submitted,

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