

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS,)

Plaintiff,)

v.)

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

Defendants)

No.: CV 00-379 (RJL)

NATIONAL STONE, SAND, AND GRAVEL)
ASSOCIATION, et al.,)

Plaintiffs,)

v.)

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

Defendants)

No.: CV 00-558 (RJL)

NATIONAL FEDERATION OF INDEPENDENT)
BUSINESSES and WAYNE NEWNAM,)

Plaintiffs,)

v.)

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

Defendants.)

No.: CV 01-404 (RJL)

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFF
NATIONAL ASSOCIATION OF HOME BUILDERS'
MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Six years after the U.S. Army Corps of Engineers (the "Corps") first announced its intention to revoke Nationwide Permit ("NWP") 26 and replace it with a new series of Replacement Permits, and two years after the Corps issued those new permits in March 2000, the Corps has once again revoked and reissued its flawed and illegal permits. In the latest iteration of the Replacement Permit Rule, the Corps has reissued all of its NWPs, including the NWPs at issue in this case: the Replacement Permits and NWP 29. Notwithstanding the efforts of Plaintiff National Association of Home Builders ("NAHB") and others through repeated administrative comments and this litigation to request and require the Corps to correct its illegal NWPs, the Corps has chosen to ignore the flaws in those NWPs and issue them in virtually identical form.

These NWPs bear little resemblance to the streamlined and efficient system Congress envisioned when it authorized the NWP program.¹ The problems with the NWPs are nonetheless straightforward. The Corps must not impose acreage limits, PCNs, or any other condition or restriction without a reasoned, rational, and non-arbitrary basis — in particular, the Corps must not rely on rote recitation of a "minimal effects" standard that it steadfastly refuses to define. The Corps must adopt a streamlined Nationwide Permit program in accordance with Congress's intent to permit projects having minimal effects on the environment to proceed with little red tape and to enable the Corps to concentrate its efforts on large projects with greater environmental impacts. The Corps must not sacrifice the statutory goal of an efficient permitting program to vague concerns for undefined environmental effects. The Corps must limit itself in

¹ As one of the Corps' district offices has complained, "NWP 39 and its kin have not proved very useful at all, due largely to their 'protective' conditions (as in 'protecting' them from being used)" Supp. AR, "Administrative Record Associated With Federal Register Notice Dated August 9, 2001," Doc. 95 (App. Tab 1).

reviewing those purported effects (and in imposing conditions to correct them) to those effects and correctives that are within its own statutory authority and jurisdiction. And the Corps must satisfy its statutory mandates to revise or revoke the NWP's only upon a finding that such actions are necessary, and only after considering the effects of its strangulation of the NWP program on small business entities.

Despite the pendency of this lawsuit and despite having its attention directed to these issues once again in the latest comment period, the Corps' latest rulemaking includes virtually no effort to correct the defects in the Replacement Permit Rule or NWP 29. The claims and the related arguments in NAHB's pending Motion for Summary Judgment and supporting Memoranda therefore apply with full force to the reissued NWP's, with only one minor exception. This Memorandum will summarize these claims and explain why they are largely unaffected by the latest rulemaking.

BACKGROUND

The six-year course of the Replacement Permit Rule has been fully set forth in the Plaintiffs' prior Memoranda. In brief, the Corps announced in 1996 that it intended to revoke NWP 26 and issue a series of new "replacement NWP's." 61 Fed. Reg. 65,874 (Dec. 13, 1996). On July 1, 1998, the Corps published a notice that proposed to reduce the acreage limit of NWP 29 and to replace NWP 26 with six new NWP's and six modified NWP's. *See Proposal to Issue and Modify Nationwide Permits*, 63 Fed. Reg. 36,040 (July 1, 1998). The modification to NWP 29 became final and effective on August 30, 1999. *See Final Notice of Modification of Nationwide Permit 29 for Single Family Housing*, 64 Fed. Reg. 47,175 (Aug. 30, 1999). On March 9, 2000, the Corps issued its final Replacement Permits. *See Final Notice of Issuance and Modification of Nationwide Permits*, 65 Fed. Reg. 12,818 (March 9, 2000).

NAHB sued, raising a number of challenges to the Replacement Permits and NWP 29. After the assembly and certification of the administrative record, the parties prepared and briefed Cross-Motions for Summary Judgment. These Cross-Motions were fully briefed and ripe for consideration on September 20, 2001.

In the meantime, the Corps prepared to reissue a number of NWPs that were not a part of the Replacement Permit Rule, which were scheduled to expire on February 11, 2002. *See Proposal to Reissue and Modify Nationwide Permits; Notice*, 66 Fed. Reg. 42,070 (Aug. 9, 2001). To align all of the NWPs on the same five-year review cycle, the Corps proposed to reissue all of the NWPs—including the recently-issued Replacement Permits and NWP 29, which were not scheduled to expire until June 2005. *Id.* During the ensuing comment period, NAHB submitted comments pointing out that the Corps' proposal to reissue the same NWPs would only perpetuate the deficiencies that had led to this suit, and asking the Corps to correct those deficiencies. *See* Supp. AR, "Comments Received by CECW-OR Based on 9 August 2001 Federal Register Notice," Doc. 333 (App. Tab 2).²

On January 15, 2002, the Corps published a Final Notice reissuing all of the NWPs, effective March 18, 2002. *See Issuance of Nationwide Permits; Notice*, 67 Fed. Reg. 2020 (Jan. 15, 2002). Notwithstanding NAHB's comments, the Corps' final NWP package failed to correct

² The Supplemental Record prepared by the Corps is not Bates stamped and does not collect the record documents in a single numbered list. Instead, the Certified Index contains several tables of numbered documents. This Memorandum will cite the Supplemental Record as "Supp. AR," and will identify specific documents with reference to the title of the table of the Certified Index on which each document is listed and the appropriate document number from that table. Citations to the original Administrative Record will use the appropriate Bates reference.

the defects in the NWP's that NAHB has challenged in this case. All of the reissued NWP's took effect on March 18, 2002.

ARGUMENT

I. NAHB's Complaint and Motion for Summary Judgment Raise Eight Main Challenges to the Replacement Permit Rulemaking.

NAHB's Complaint, Motion for Summary Judgment, and the supporting Memoranda before this Court raise eight main objections to the Replacement Permits and to NWP 29. In brief, these objections are as follows:

First. The Corps' revocation of NWP 26 and issuance of the Replacement Permits was based on a fundamental misapprehension of its jurisdiction. (Opening Brief (O.B.) 13-17, Reply Brief (R.B.) 15-19, Compl. Counts 1-2.) The Corps' primary justification for revoking and replacing NWP 26 was its concern for the level of individual and cumulative effects authorized by NWP 26, including discharges to headwaters and isolated waters. *See* 61 Fed. Reg. at 65,890-91. The Corps may evaluate only those effects of permitted activities that are within its jurisdiction, however. *See, e.g.,* 64 Fed. Reg. at 39,274. Because the Corps lacks jurisdiction over isolated waters, *see Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Corps' decision to revoke and replace NWP 26 was based on factors outside its jurisdiction and must be revisited.

Second. The Replacement Permits lack a reasoned basis because the Corps never defined "minimal effects" or otherwise explained the basis for its acreage and PCN thresholds and other requirements. (O.B. 17-23, R.B. 19-23, Compl. Count 2.) The fundamental promise of the Administrative Procedure Act is that an agency must engage in "reasoned decisionmaking," meaning it will "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *United States*

Telecom Ass'n v. FCC, 227 F.3d 450, 461 (D.C. Cir. 2000) (quoting *Motor Vehicle Mfrs. Ass'n, v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). Here, the Corps has established a 1/2 acre ceiling for most NWP's, a 1/10 acre trigger for preconstruction notification, and numerous other restrictions on the use of NWP's.³ But nowhere in the six-year administrative record of this action does the Corps deign to explain why it selected these particular acreage levels or to support any of the other choices made. Instead, the Corps has justified its conditions and restrictions simply by asserting that they are necessary to meet the "minimal effects" standard of § 404(e)⁴ — while at the same time refusing to define that critical term. This refusal to define what constitute "minimal effects" on the environment, and the Corps' repeated incantation of that same undefined standard to justify the many conditions and restrictions it has imposed on the NWP's, deprive the NWP's of any reasoned basis.

Third. The Replacement Permits are arbitrary and capricious because they (a) are based on bad data, (b) impose irrational conditions, and (c) treat similar situations differently. (O.B. 25-32, Compl. Count 2.) (a) The Corps arbitrarily discounted the workload impacts of the Replacement Permit Rule by relying on an analysis of a less restrictive proposal that was not adopted. See 65 Fed. Reg. at 12,824 (discussing the "IWR Report"). (b) The Replacement Permits arbitrarily included an irrational floodplain restriction that bars the use of NWP's in the floodplain below the headwaters and the floodway of the floodplain above the headwaters,

³ The acreage thresholds and preconstruction notification requirements are the prime example. Others are collected in a table at pages 22-23 of NAHB's Reply Brief.

⁴ Section 404(e) authorizes the Corps to "issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1).

despite the Corps' own admission that it did "not have evidence that documents the need for more stringent floodplain requirements." See O.B. at 30 (quoting AR.PRT1-0994, -0995 (App. Tab 3)). And, (c) the Replacement Permits and NWP 29 arbitrarily treated similar situations differently — such as public versus private transportation crossings and residences constructed by individuals versus constructed by builders. These actions are arbitrary and capricious.

Fourth. The Replacement Permits are contrary to law because the Corps ignores Congress's "streamlined permitting" mandate. (O.B. 41-44, R.B. 24-27, Compl. Counts 1-2.) When Congress enacted § 404(e) to authorize general permits, it intended to establish a streamlined permitting program that would "grant permission to conduct activities without . . . separate approval from the corps or a State each time that activity is to be conducted, or without any more than reasonable notice." 123 Cong. Rec. 26,771 (Aug. 4, 1977), reprinted in 4 Congressional Research Service, Legislative History of the Clean Water Act of 1977, at 1053-54 (hereinafter "LH") (statement of Sen. Nunn). Streamlining permits for minor projects would allow the Corps to handle its growing workload efficiently and to focus its efforts on larger projects with greater environmental effects. See 42 Fed. Reg. 24,756 (1977). The Replacement Permit package flouts this clear congressional intent by imposing so many procedural hoops on the new NWPs that they have been reduced to virtual copies of the individual permits. For example, just like individual permit applicants, NWP 39 applicants must submit a formal wetland delineation, a formal mitigation proposal, and an avoidance-and-minimization statement. 67 Fed. Reg. at 2085-86, 2091. The Corps' standardless pursuit of "minimal effects" has thwarted Congress's streamlining goal and is not in accordance with law.

Fifth. The Replacement Permits are contrary to law because the Corps lacks statutory authority (a) to review state water quality programs and (b) to require vegetated buffers unrelated

to the effects of the discharge being permitted. (O.B. 34-38, R.B. 27-33, Compl. Count 1.) (a) General Condition 9 authorizes the Corps to require water quality plans if it deems state water quality programs to be insufficient to protect downstream water quality. However, § 401 of the Clean Water Act empowers the States to create water quality certification programs, and authorizes only EPA to review those programs. The Corps has no authority to second-guess state water quality certifications in this manner. (b) General Conditions 9 and 19 and NWPs 29 and 39 require vegetated buffers on any site containing open waters, regardless of whether the discharge on that site will have any impact on those open waters or streams. Because the Corps cannot impose permit conditions that are unrelated to the discharge being permitted, this blanket requirement is beyond its jurisdiction.

Sixth. The Replacement Permits are contrary to law because the Corps never made findings, as required by § 404(e)(2), "that the activities authorized by [NWP 26] have an adverse impact on the environment or such activities are more appropriately authorized by individual permits." (O.B. 32-34, R.B. 33-35, Compl. Count 1.) Indeed, at the time it announced its intent to revoke NWP 26 and modify NWP 29 and numerous general conditions, the Corps stated that "the adverse effects of the NWP program have been minimal." 61 Fed. Reg. at 65,879. The Corps' actions are contrary to law.

Seventh. The Corps failed to comply with the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, which requires the Corps to consider the effects of its rulemakings on small business entities and prepare a regulatory flexibility analysis. (O.B. 38-41, R.B. 33-34, Compl. Count 4.)

Eighth. NAHB asserted in its Complaint and argued in its Opening Brief that § 404 cannot be interpreted consistently with the nondelegation doctrine to grant unbridled discretion to the Corps. (O.B. 23-25, Compl. Count 3.) Applying the framework set forth in the newly-

decided *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), NAHB acknowledged in its Reply Brief that § 404 itself does not appear to grant unbridled discretion — so long as the Corps adopts a streamlined permitting program for projects having a defined level of minimal effects. (R.B. 23-24 n.13.) To ensure that the Corps exercises its discretion within these statutory bounds, and does not merely operate through *ipse dixit*, the Corps must articulate the bases for its decisionmaking. The Corps has failed to do so here.

II. The New Rulemaking Cured None of the Defects That NAHB Has Identified in This Litigation and in Multiple Sets of Comments to the Corps, Including in Comments Submitted on the New Rulemaking Itself.

A. The Corps Justified Its Revocation of NWP 26 and Issuance of the Replacement Permits By Consideration of Effects on Areas Over Which the Corps Lacks Jurisdiction.

Nothing in the new rulemaking affects this claim. The new rule does not dispute that the Corps' justifications for revoking NWP 26 were based on a flawed interpretation of its jurisdiction. Nor does it attempt to justify the Corps' actions by examination of considerations within the Corps' jurisdiction, or even to acknowledge that the Corps' jurisdiction must be reconsidered after *SWANCC*. Instead, the preamble to the new rule simply repeats the Corps' litigating position that "[t]he NWPs do not establish jurisdiction that does not otherwise exist," 67 Fed. Reg. at 2026, and offers the generic explanation that the changes in the NWPs "are necessary to comply with section 404(e)." *Id.* at 2021, 2023.

These statements misapprehend NAHB's comments and arguments. NAHB's claim is that the Corps based its decision to replace NWP 26 on the perceived need to reduce the effects of permitted activities on areas outside the Corps' jurisdiction. Even the Corps must now acknowledge that its jurisdiction does not extend as far as it once thought. Based as it was on extrajurisdictional factors, the Corps' decision was arbitrary and illegal, and must be revisited.

B. The Replacement Permits Lack a Reasoned Basis Because the Corps Never Defined “Minimal Effects” or Otherwise Explained the Basis for its Acreage and PCN Thresholds and Other Requirements.

Far from addressing the defects that prompted this claim, the new rulemaking only perpetuates them. The Corps continues to refuse to define the term “minimal effects,” and continues to justify its conditions and restrictions on the theory that they are necessary to ensure that permitted activities have only “minimal effects.” *See* 67 Fed. Reg. at 2075 (“We maintain our position that the term ‘minimal effects,’ as used in the context of the NWP program, cannot be simply defined.”). That the term “minimal effects” is not “simple” to define does not excuse the Corps from its basic obligation to provide a reasoned basis for its decisionmaking.⁵ Moreover, the undefined concept of “minimal effects” continues to supply the central justification for the Corps’ decisionmaking. A word search of the 75-page Federal Register notice published January 15, 2002, shows that the Corps used the phrase “minimal adverse effect(s)” 157 times, “minimal impact(s)” 40 times, “minimal effects” 28 times and “minimal adverse environmental effects” 23 times, an average of 3.3 mentions per page. The Corps’ refusal to define this critical term robs the Replacement Permit Rule of a reasoned basis, contrary to the requirements of the Administrative Procedure Act.

C. The Replacement Permits Are Arbitrary and Capricious Because They Are Based on Bad Data, Impose Irrational Conditions, and Treat Similar Situations Differently.

The new rulemaking affects only one aspect of the third of these arguments, and does not affect the first two arguments at all. First, the new rule makes no attempt to cure the original

⁵ Nor does the prospect that the Corps “would have to publish a proposed definition for public notice and comment,” another justification the Corps now gives for refusing to define the rule. *See* 67 Fed. Reg. at 2075. The Corps cannot cite the procedural requirements of the Administrative Procedure Act as justification for its failure over the past six years to comply with that same Act.

rule's reliance on the IWR Report's conclusions regarding a different program. Indeed, the new rule does not mention the IWR Report at all — or a followup IWR Report ordered by Congress when it discovered that the original report did not study the package that was “actually issued.”⁶ Instead, as noted above, the Corps has arbitrarily ignored and continues to ignore evidence of the workload implications of its Replacement Permit Rule.

Second, the new rule retains the arbitrary restriction on the use of certain NWP's in the floodplain, which the Corps itself acknowledged would require “a very large number of projects” to undergo “the Corps standard individual permit process without any value added for the aquatic environment or the floodplain.” AR.PRT1-0994, -0995 (App. Tab 3). The Corps continues to cite no data in support of the restriction (because it has none), but rather states simply that it “believe[s] that General Condition 26 plays an important role in reinforcing the FEMA program.” 67 Fed. Reg. at 2073. The Corps' bald “belief” is not a reasoned basis for this restriction. Moreover, it continues to be contradicted by the Corps' own statements in the record — in particular, the Corps' conclusion, contained in its statement of compliance with Executive Order 11988 (Floodplain Management), that “the appropriate standard for Corps permits” is simply consistency with the standards and criteria of FEMA's National Flood Insurance Program (“NFIP”). Supp. AR, “Administrative Record Associated with Federal Register Notice Dated 15 January and 13 February 2002,” Doc. 23 (App. Tab 4).

⁶ After the Corps issued the Replacement Permits in March 2000, Congress ordered the Corps to prepare a new study on the package that was “actually issued.” Pub. L. No. 106-377, 114 Stat. 1441, 1441A-144 (Oct. 27, 2000). A March 2001 draft of the new IWR Report is included in the Supplemental Record. See Supp. AR, “Administrative Record Associated With Federal Register Notice Dates 9 August 2001,” Doc. 90 (App. Tab 5) (“March 2001 IWR Report”). The final report is not included in the record, although a transmittal letter indicates that it was completed in November 2001. See Supp. AR, “Outgoing Correspondence from CECW-OR,” Doc. 7 (App. Tab 6).

Notwithstanding this conclusion, the Corps has gone beyond the NFIP standards and imposed new restrictions on construction in the floodplain. This is arbitrary.

Third, the new rule has eliminated the distinction between public and private linear transportation crossings, essentially conceding that "the Corps was unjust in differentiating between private and public projects." 67 Fed. Reg. at 2036. That particular example in support of this claim has therefore been addressed. Nonetheless, the NWP's continue to allow only individuals to use NWP 29, even though the identity of the builder or resident of the home has nothing to do with the level of environmental effects caused by the construction of that home. *See* O.B. at 31; 67 Fed. Reg. at 2046. The new NWP's therefore continue to treat similar situations differently without rational justification.

D. The Replacement Permits Are Contrary to Law Because the Corps Ignores Congress's "Streamlined Permitting" Mandate.

The new rule makes only minor and cosmetic changes to the NWP's, none of which will reduce the administrative burden that the Replacement Permits have imposed on the Corps and the public. The NWP's still look nothing like the streamlined program Congress intended to create. For example, General Condition 13, which lays out the arduous notification procedures for these nominally general permits, still consumes over six columns in the Federal Register. *See* 67 Fed Reg at 2090-92. NWP 29 (the "small landowner" permit governing construction of a personal residence to be occupied by the permittee) still requires those small landowners to submit a formal wetland delineation conducted in accordance with the 100-page Wetland Delineation Manual. *See id.* at 2083, 2091. The Corps' one attempted palliative, a potential waiver of streambed limitations, is itself so laden with conditions that establishing compliance will force the applicant into yet another process. *See id.* at 2058-60.

The Corps itself acknowledges—as it must—that “certain activities that were previously authorized by NWP’s now require individual permits, and that it takes more time to authorize those activities.” 67 Fed. Reg. at 2022. Even under the Corps’ draft workload analysis, the Replacement Permit Rule will create 2500 additional standard permit applications annually, a 25% increase in the Corps’ standard permit workload. March 2001 IWR Report at vii. The Corps has argued that such workload impacts are “irrelevant.” Corps Mot. S.J. at 44 n.21. But *Congress* did not think workload impacts were irrelevant. Indeed, as the House Report accompanying the 1977 amendments explained, the whole point of the NWP program was that a “substantial increase in permit applications” would leave the Section 404 program “impossible of effective administration,” so that “[r]ather than managing a more limited program well, the Corps will be in the position of managing a too-large program poorly.” H.R. Rep. No. 95-139 (1977), reprinted in 4 LH, *supra*, at 1217. To prevent that undesirable outcome, Congress created this streamlined program. The Replacement Rule ignores that statutory purpose and is contrary to law.

E. The Corps Lacks Authority to Review State Water Quality Programs and to Require Vegetated Buffers Unrelated to the Effects of the Discharge Being Permitted.

The new Replacement Permit Rule continues to assert authority to review state water quality programs and to impose vegetated buffer requirements — each of which is beyond the Corps’ jurisdiction. First, even though it is the States that are authorized to determine whether permit discharges will comply with state water quality standards, and despite commenters’ warnings that General Condition 9 “infringe[s] upon the water quality authority of the State[s],” the new rule continues to require “comprehensive water quality planning” in at least “a few cases.” 67 Fed. Reg. at 2061. Although the new rule backpedals somewhat, asserting that it

was “never [the Corps’] intent” to “require detailed studies and design to develop water quality plans for every permit action,” and conceding that “comprehensive water quality planning” should not be “a requirement of Corps NWP,” *id.*, General Condition 9 continues to assert wholly discretionary authority to impose unbounded “water quality” conditions where the Corps believes state water quality certification is not good enough.⁷ This is still in effect a review of the state § 401 water quality programs, which the Corps lacks authority to do.

Second, with regard to vegetated buffers, the Corps continues to mandate vegetated buffers under NWPs 29 and 39 “if there are any open waters or streams within the project area,” regardless of whether a particular project will impact those open waters or streams. 67 Fed. Reg. at 2083, 2086. The new rule therefore continues to violate the requirement that “conditions must be related to the discharge itself.” *United States v. Mango*, 199 F.3d 85, 98 n.7 (2d Cir. 1999). Strangely, the Corps claims to acknowledge this general principle. See 67 Fed. Reg. at 2066 (“All mitigation, whether vegetated buffers or wetland mitigation, must be related to the impacts authorized.”). But the Corps propounds a vague and apparently unbounded notion of “relatedness” that removes any link between the effects of the discharge and the requirement of vegetated buffers. See *id.* (“The Corps views that relationship in the context of the overall aquatic environment on a watershed basis.”). It is not clear what the Corps means by this vague statement, but it is apparent that the Corps continues to claim authority to impose vegetated buffers whenever it believes such buffers might provide some free-floating benefit. See *id.* at 2069 (“We may require upland vegetated buffers as mitigation to the extent the vegetated upland buffers to open waters protect or enhance aquatic functions and habitat.”). The Corps has no

⁷ Like its predecessor, the January 15 Rule continues to leave open which States will receive this extra layer of water quality review and the nature of the review those States will receive.

jurisdiction to impose such requirements on a permittee without any link to the permittee's regulated conduct.

F. The Replacement Permits Are Contrary to Law Because the Corps Never Found That the Activities Authorized by NWP 26 Have an Adverse Impact on the Environment or Are More Appropriately Authorized by Individual Permits.

The Corps has never found, as required by § 404(e), that the activities authorized under NWP 26 had an adverse effect on the environment. Indeed, the Corps has never disavowed its original statement that the "adverse effects of the NWP program have been minimal," 61 Fed. Reg. at 65,879, and it makes no attempt in the latest rulemaking to back away from that conclusion. NAHB's § 404(e) claim remains.

G. The Corps Failed to Comply With the Regulatory Flexibility Act, Which Requires the Corps to Consider the Effects of Its Rulemakings on Small Business Entities and to Prepare a Regulatory Flexibility Analysis.

The Corps has never attempted to comply with the Regulatory Flexibility Act, insisting instead that the Act does not apply to the NWPs. Because the Corps has not changed its stance with this new rulemaking, the Corps continues to violate the Act.

H. Section 404 Cannot Be Interpreted to Grant Unbridled Discretion to the Corps. The Corps Must Articulate the Bases and Define the Principles Underlying its Decisionmaking.

The Corps continues to refuse to define the term "minimal effects" and continues to claim unfettered discretion to impose conditions and set restrictions at its whim. Whether couched as violations of the requirement that the Corps provide a "reasoned basis" for its decisions and refrain from arbitrary action, or in terms of the principles underlying the nondelegation doctrine, the Corps' actions continue to be improper.

CONCLUSION

For the foregoing reasons, NAHB respectfully renews its Motion for Summary Judgment.

Respectfully Submitted,

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