

IN THE 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)

PLAINTIFFS' (NSSGA, et al.) SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
THEIR' MOTION FOR SUMMARY JUDGMENT

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

INTRODUCTION ..... 1

NATURE OF THE ACTION ..... 1

ARGUMENT ..... 2

    I. IT IS CLEAR FROM THE REISSUED NWP'S THAT THE CORPS CONTINUES TO IMPROPERLY ASSERT JURISDICTION OVER "EPHEMERAL STREAMS" AS REGULATED "WATERS OF THE US" ..... 2

    II. THE REISSUED PERMITS MAINTAIN THE SAME FUNDAMENTALLY FLAWED RESTRICTIONS FOUND IN THE REPLACEMENT PERMIT RULE ..... 6

        A. The Corps Continues to Maintain a Maximum Acreage Limit of 1/2 Acre Without Justifying that Such a National Limit is Necessary to Meet the "Minimal Effects" Standard. .... 6

        B. The Restriction on Discharges within 100-Year Floodplains Exceeds the Corps's Authority. The Minor Changes to these Restrictions Do Not Overcome Their Fundamental Flaws..... 7

        C. The Requirements that Permittees Submit Water Quality and Stormwater Management Plans and Preserve Vegetative Buffers Is Inconsistent with the CWA..... 9

    III. THE REISSUANCE OF THE NWP'S PRIOR TO COMPLETION OF THE PEIS VIOLATES NEPA. .... 10

        A. The Corps Has Failed to Justify Its Decision Not to Complete the PEIS Prior to Issuing the Permits..... 10

        B. The Corps Has Made No Attempt to Evaluate the Cumulative Impact of the NWP Program Prior to Issuing the 1998 FONSI, in Violation of NEPA. .... 12

CONCLUSION ..... 14

## INTRODUCTION

Plaintiffs, the National Stone, Sand and Gravel Association ("NSSGA"), the American Road and Transportation Builders Association ("ARTBA") and the Nationwide Public Projects Coalition ("NPPC") respectfully file this Supplemental Memorandum in Support of Plaintiffs' Motion for Summary Judgment. The purpose of this Supplemental Memorandum is to address the effects of the Corps January 15, 2002 reissued nationwide permits rule on the issues in this case that have been fully briefed by the parties in their cross motions for summary judgment.<sup>1</sup> Specifically, on January 15, 2002, the Corps reissued all existing Nationwide Permits effective March 18, 2002, with an expiration date of March 19, 2007 (the "Reissued NWP").<sup>2</sup> Despite minor changes, the reissued permits contain the same substantive and procedural defects found in the March 2000 Replacement Permit Rule.

## NATURE OF THE ACTION

The nature of this suit is unchanged from the time of its filing over two years ago. The injuries suffered by Plaintiffs as the result of the illegal conduct of the Defendants, (as described in Plaintiff's Supplemental Complaint for Declaratory and Injunctive Relief), continues unabated to this date.<sup>3</sup>

Briefly, Plaintiffs challenge final actions by the United States Army Corps of Engineers, et al. (collectively the "Corps") that make significant changes to the Nationwide Permit ("NWP") program administered by the Corps under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-

---

<sup>1</sup> Plaintiffs incorporate the contents of their Motion for Summary Judgment, the accompanying Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Memorandum") and subsequent Reply Memorandum as if set forth fully here.

<sup>2</sup> See Corps, Final Notice of Issuance of Nationwide Permits, 67 Fed. Reg. 2020 (Jan. 15, 2002) (the "Reissued NWP Rule"). A correction to the Reissued NWP rule was published on February 13, 2002. See 67 Fed. Reg. 6692.

<sup>3</sup> Please refer to the Supplemental Complaint and to Plaintiffs' briefs for a complete description of the facts and allegations at issue in this suit.

1387.<sup>4</sup> The essence of Plaintiffs' case is that the Corps replacement of NWP 26 with five new NWPs (particularly NWP 44 for Mining Activities and NWP 43 for Stormwater Management Facilities), the modification of six other NWPs, the addition of two new general permit conditions ("GCs"), and the modification of nine existing GCs (collectively the "Replacement Permit") are procedurally and substantively flawed and inconsistent with the Corps's authority under the CWA, the National Environmental Policy Act, ("NEPA") 42 U.S.C. §§ 4321 et seq. and the US Constitution. The changes to the Replacement Permits that were made by the Reissued NWP Rule are merely cosmetic and do not address the fundamental flaws of the NWP program already briefed before the Court.

### ARGUMENT

**I. IT IS CLEAR FROM THE REISSUED NWPs THAT THE CORPS CONTINUES TO IMPROPERLY ASSERT JURISDICTION OVER "EPHEMERAL STREAMS" AS REGULATED "WATERS OF THE US"**

The reissued NWP rule has the same jurisdictional defect as the March 2000 Replacement Permit rule with respect to the recent Supreme Court decision limiting the reach of CWA jurisdiction. Solid Waste Agency of Northern Cook County v. Corps (121 S. Ct. 675 (2001) (SWANCC)). The reissued NWP rule contains the same definition of "ephemeral waters" as the Replacement Permit Rule and continues to assert that such waters are regulated without requiring an assessment of whether such waters have a "significant nexus" to "navigable waters" as required under SWANCC. Thus, under both the Replacement Permit and Reissued NWP Rules, the dispositive criteria for asserting jurisdiction over such waters is the presence of an "Ordinary High Water Mark" (OHWM) under 33 CFR 328.3(a), a test that does not require the additional and necessary inquiry under SWANCC, i.e., whether a significant nexus to

---

<sup>4</sup> See Corps, Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (March 9, 2000) (hereinafter the "Replacement Permit Rule").

“navigable waters” exists. The net result is that, because the presence of an OHWM alone is sufficient to confer jurisdiction, any channel formed by a rain gutter or other impression in the soil caused by precipitation could become a water of the U.S. under the CWA regardless of any hydrologic connection to a traditionally navigable water.

The reissued NWP rule’s discussion of the “ephemeral stream” definition makes clear that it did not make any changes to the definition because it was “sufficient for the Corps regulatory program.” 67 Fed. Reg. at 2075/3. While the Corps states that it was “excluding ephemeral streams from the definition of ‘Loss of Waters of the US’ for the purposes of determining compliance with the NWP acreage and linear foot limitations... (the Corps) was not suggesting that ephemeral streams are not jurisdictional water under the Clean Water Act.” 67 Fed. Reg. at 2075/1. In a February 13, 2002 correction notice to the reissued NWPs, the Corps further states that the “loss of waters” exclusion was “not intended to exempt ephemeral waters or streams from calculations of impacted acreage’s to determine the Pre Construction Notice (PCN) or maximum acreage requirements in accordance with NWPs 39, 40, 42 and 43” 67 Fed. Reg. at 6695/1. Thus, despite the Corps’ confusing statements regarding “loss of water” calculations, one conclusion is indisputable - the reissued NWP rule does not change the Corps criteria that ephemeral waters are jurisdictional based solely on a finding of an OHWM by a particular Corps district engineer.

The practical effect of this “ephemeral waters” definition is particularly significant in the arid areas of the west and affects a wide range of Plaintiffs activities. These activities range from flood control maintenance and aggregate mining to merely filling “wet spots” in one’s back yard after rainwater has collected over a sufficient period of time to meet the OHWM test under 33 CFR 328.3(e). Indeed, a report issued by the Corps South Pacific Division in June 2001, after

the SWANCC decision, provides technical field guidance for determining if an OHWM mark exists in the arid Southwest.<sup>5</sup> Notably absent from that guidance is the requirement to also determine if a "significant hydrologic nexus" exists to navigable waters to determine jurisdiction. Rather, the guidance appears to presume such a nexus based on certain field data indicating surface flow.<sup>6</sup> This presumption is especially troublesome in states like Arizona where the Colorado River is considered to be the only traditionally navigable water.<sup>7</sup>

Further, the "ephemeral waters" test for asserting CWA jurisdiction is highly relevant to the NWP challenge before the court. Eligibility for NWP coverage under the Reissued NWP rule depends fundamentally on whether, and to what extent, a proposed activity may impact a "water of the US." For example, a necessary Storm Water Management (SWM) facility planned for a "dry wash" in Arizona or Colorado may not be eligible for NWP 43 (especially if the project's impacts exceed the ½ acre cap) if that dry wash is found to be jurisdictional based solely on a Corps finding an OHWM even though the wash is miles away from any traditionally navigable water. That facility may then have to undergo the expensive and time consuming Individual Permit Process under the CWA, despite the absence of any hydrologic connection to that navigable water. The net result is that important flood control benefits may not be provided in a timely fashion to protect lives and property.<sup>8</sup>

Indeed, given the clear impact of applying this definition, especially in arid western states, NSSGA's facial challenge to the Corps assertion of jurisdiction over ephemeral waters is

---

<sup>5</sup> See Final Summary Report: Guidelines for Jurisdictional Determination for Waters of the United States in the Arid Southwest, U.S. Army Corps of Engineers, South Pacific Division (June 2001). (Ex. 1)

<sup>6</sup> Id.

<sup>7</sup> See "A Guide to Watercourse Permitting in Arizona" available on the Corps website at <http://www.sp1.usace.army.mil/regulatory/water.html>. (Ex. 2, excerpt)

<sup>8</sup> The Reissued NWP Rule states that "even a project that impacts only an ephemeral stream could be required to obtain an individual permit if the District Engineer determines that individual or cumulative adverse effects were more than minimal." 67 Fed. Reg. at 2059/3.

entirely appropriate. See Nat'l Mining Ass'n v. Corps, 145 F. 3d 1399, 1407- 08 (D.C. Cir. 1998)(this Circuit has “on several occasions invalidated agency regulations challenged as facially inconsistent with governing statutes despite the presence of easily imaginable valid applications.”). Further, while the courts interpreting SWANCC have often reached differing conclusions as to what constitutes a “significant nexus” to “navigable waters” there is one common element -- in each case the courts have conducted a fact-specific analysis of whether a surface hydrologic connection exists between an allegedly isolated water or wetland and a navigable water or its tributary.<sup>9</sup> The absence of requiring a finding of such a jurisdictional element here, is facially inconsistent with that case law. Thus, the court should invalidate the Corps definition of “ephemeral waters” as jurisdictional based solely on a finding of an OHWM and remand to the Corps to apply the necessary jurisdictional element (establishing a hydrologic connection) before finding that CWA jurisdiction exists.

---

<sup>9</sup> United States v. Lamplight Equestrian Center, 2002 Westlaw 360652 (N.D.Ill. March 8, 2002) (quoting Brace v. United States, No. 98-897, \_\_ Fed. Cl. \_\_, 2002 WL 243761 at \*4, \*5 (Fed.Cl. Feb. 11, 2002) (“[I]t is clear that the Corps lacks jurisdiction if there is no nexus between wetlands and the interstate channel”); United States v. Newdunn Assocs., 2002 U.S. Dist. LEXIS 6985 (E.D. Va. Apr. 3, 2002) (Corps has burden of “factually proving a sufficient connection between the wetlands on the Property and navigable waters or waters of the United States”); Rice v. Harken Exploration Co., 250 F.3d 264 (5<sup>th</sup> Cir. 2001) (Jurisdiction fails because evidence does not show that site waters are “sufficiently linked” to surrounding waters); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9<sup>th</sup> Cir. 2001) (Manmade irrigation ditches must be shown to be connected (albeit intermittently) to natural stream for Corps jurisdiction to apply); United States v. Rapanos, 2002 WL 373332 (E.D. Mich) (Corps must show not only hydrological connection, but actual impact from the activities on site to surrounding waters).

**II. THE REISSUED PERMITS MAINTAIN THE SAME FUNDAMENTALLY FLAWED RESTRICTIONS FOUND IN THE REPLACEMENT PERMIT RULE**

**A. The Corps Continues to Maintain a Maximum Acreage Limit of 1/2 Acre Without Justifying that Such a National Limit is Necessary to Meet the "Minimal Effects" Standard.**

The Reissued NWP's Rule continues to apply a maximum 1/2 acre impact cap as necessary to meet the "minimal effects" standard of Section 404(e), despite record evidence to the contrary. In its 1998 Finding of No Significant Impact (FONSI) on the NWP program, the Corps stated clearly, "A five acre loss of some relatively low value waters of the United States may constitute a minimal adverse effect in some watersheds while a 1/3 acre loss of high value aquatic resources may be more than minimal in another geographic area." (AR PRT9-0144) (see Ex. 10 to NSSGA's Feb. 15, 2001, Motion for Summary Judgment) (emphasis added). The Corps continues to state that "the FONSI for the NWP program that was issued on June 23, 1998 is still valid." Vol. 67 Fed. Reg. at 2025/2. Indeed, the Reissued NWP rule provides no additional factual basis to support a national 1/2 acre cap or explain away the conclusions of the 1998 FONSI. Rather the rule merely restates the initial (unsupported) justification for the cap almost verbatim: "The terms and conditions of the NWP's are necessary to ensure that the NWP's authorize only those activities that result in no more than minimal adverse effects on the aquatic environment." 67 Fed. Reg. at 2023; 67 Fed. Reg. 2058 (NWP 44). It is the height of arbitrariness for the Corps to state, on the one hand, that wetland losses up to five acres in some watersheds may be minimal while on the other hand sticking by an inflexible 1/2 acre national cap.

Further, by reducing the maximum limit to such a small area, too small for any practical use, the Corps has effectively removed any incentive for the regulated community to design projects to fit under the limits of the NWP. This action is in direct frustration of the

Congressional intent to create a streamlined, efficient NWP program intended for widespread use. See Plaintiffs Memorandum, pp. 23-29.

**B. The Restriction on Discharges within 100-Year Floodplains Exceeds the Corps's Authority. The Minor Changes to these Restrictions Do Not Overcome Their Fundamental Flaws.**

The Reissued NWPs Rule does not appreciably alter the prohibition set forth in the Replacement Permit Rule of use of NWP 43 and 44 within 100-year floodplains. As explained at pp. 30-36 of Plaintiffs' Memorandum, the Corps promulgated a General Condition (GC 26) that is unduly burdensome and that will likely have a negative impact on flood control. Indeed, this concern was shared by some within the Corps, including the Chief of the Regulatory Branch of the Corps's Norfolk District, who commented "The floodplain condition provides no added value and should be eliminated . . . the Regulatory Program is not an effective tool for protecting floodplains and the attempt to use it in that way is simply burning up tax dollars performing unnecessary standard permit reviews." Email from R. Hume to P. Brown, Feb. 12, 2001.<sup>10</sup>

Despite minor changes in GC 26, the authority to define the scope of the permit remains impermissibly ceded to Federal Emergency Management Agency ("FEMA").<sup>11</sup> See 67 Fed. Reg. 2071-2074. Incredibly, the Reissued NWP Rule concedes that GC 26 "is somewhat duplicative" of the FEMA program, but believes it is necessary for its "role in reinforcing the FEMA program to minimize impacts to flood plains." 67 Fed. Reg. at 2073/2. However, nowhere in the CWA can the Corps point to authority for giving FEMA such a role in reinforcing the programs of other agencies.

---

<sup>10</sup> Document 95 in spreadsheet titled "Administrative Record Associated with Fed. Reg. notice dated 9 August 2001." (filed May 28, 2002) (Ex. 3)

<sup>11</sup> As the Corps notes in the NWP Reissuance Notice, if FEMA has not generated a map of the area, GC 26 does not apply. If FEMA has generated such a map, then that map controls, regardless of how long ago the "latest" version was made. See 67 Fed. Reg. 2071 (Jan. 15, 2002). These allegations are unchanged, and are set forth in at p. 32.

Further, the Corps' arbitrary application of the floodplain standard parallels its arbitrary imposition of the 1/2 acre cap. Specifically, the rule exempts certain NWP's from the prohibitions of GC 26(a) for discharges below headwaters (i.e., waters flowing at 5 cubic feet/second) or GC 26(b) for discharges within floodways. See 67 Fed. Reg. 2093-94 (exempting NWP's 12, 14 and 29<sup>12</sup> while retaining the restrictions as applied to NWP's 39, 40, 42, 43 and 44). There is no rational reason for distinguishing between the NWP's – if one NWP is exempt from these prohibitions, then all should be. As an explanation for its artificial distinction, the Corps states that the "permanent above grade fill authorized by [NWP's 12, 14, 29] are small and do not occur very often especially in the same watershed." 67 Fed. Reg. at 2074/1. The Corps states that "activities authorized by these NWP's that are in full compliance with FEMA approved requirements will have no more than minimal impacts to the flood plain." Id. Considering that the Corps again recognizes that aggregate mining activities can have positive impacts on flood storage capacity<sup>13</sup> and that GC 26(c) requires the activities to be consistent with FEMA requirements, it is difficult to discern why the Corps does not include NWP's 43 and 44 within the group of NWP's that are exempt from the prohibition.

Finally, the change to the General Condition 26 in the Reissued NWP's to remove the requirement that permittees document that the project meets FEMA or local floodplain management requirements is welcomed, but ultimately cosmetic. See 67 Fed. Reg. at 2072. While permittees no longer have to produce the paperwork demonstrating compliance, GC 26 states that the permittee must comply with such requirements. See 67 Fed. Reg. at 2094. This

---

<sup>12</sup> NWP's 12, 14, 29 apply to utility line construction, linear transportation projects and single family housing respectively.

<sup>13</sup> The Corps Decision Document for NWP 44 states in part that "Mining activities may increase the flood-holding capacity of the 100-year floodplain if areas within the 100-year floodplain are excavated to extract aggregates." (Ex. 4)

begs the question of how a permittee can demonstrate that it is complying with the requirements without producing some sort of proof – hence, the Corps’s change is a mirage.

**C. The Requirements that Permittees Submit Water Quality and Stormwater Management Plans and Preserve Vegetative Buffers Is Inconsistent with the CWA.**

The onerous and duplicative requirements that permittees submit water quality and stormwater management plans to the Corps remains in force in the Reissued GC 9. See 67 Fed. Reg. at 2089-90. The Corps’s statement that it was “never [the Corps’] intent” to “require detailed studies and design to develop water quality plans for every permit action,” 67 Fed. Reg. 2061/1, is hollow. Indeed, the Corps specifically reserves the right to require detailed studies and extensive design features in water quality plans. See id. The Corps does not, however, explain the standard under which it would usurp the CWA section 401 powers of the states.

Under GC 9, permittees operating in states or tribal areas that do not “require or approve” CWA Section 401 water quality management measures, must provide “water quality management [including stormwater management] measures that will ensure that the authorized work does not result in more than minimal degradation of water quality.” 67 Fed. Reg. at 2089. While the Reissued NWP Rule states that the requirement “is only applicable to projects that have the potential to affect water quality”, 67 Fed. Reg. at 2090, the implication is clear, and unchanged since the Replacement Permit Rule: the Corps reserves the right to overrule the exercise of the state’s delegated section 401 authority and will step in and impose water quality management measures wherever it sees fit. This exceeds the Corps’s authority under the CWA (see Plaintiffs’ Memorandum, pp. 36-38).<sup>14</sup>

---

<sup>14</sup> The requirement of vegetative buffers has remained consistent throughout the reissuance process as well. The allegations and argument set forth by Plaintiff’s earlier submissions remain fully in force. See Plaintiffs’ Memorandum, pp. 38-40.

### III. THE REISSUANCE OF THE NWP<sub>s</sub> PRIOR TO COMPLETION OF THE PEIS VIOLATES NEPA.

#### A. The Corps Has Failed to Justify Its Decision Not to Complete the PEIS Prior to Issuing the Permits.

The Corps, again, asserts that the Programmatic EIS (PEIS) currently in preparation is voluntary and that it was not obligated to delay action on reissuing the NWP<sub>s</sub> pending completion of that document. Vol. 67 Fed. Reg. 2025/1. This is in direct contradiction to governing NEPA law. As the D.C. Circuit recently held, "If any 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared before agency action is taken." Canyon Trust v. FAA, No. 01-1154, 2002 U.S. App. LEXIS 9835 at \*3 (D.C.Cir. May 24, 2002) (quoting Sierra Club v. Peterson, 230 U.S. App. D.C. 352, 717 F.2d 1409, 1415 (D.C. Cir. 1983)) (emphasis in original). Indeed, the Corps can't make NEPA "vanish" by calling its compliance "voluntary." See Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv., 75 F.3d 1429, 1436 (10<sup>th</sup> Cir. 1996), ("[m]erely because the Service says [NEPA does not apply] does not make it so").

By the Corps' own admission, the significance of impacts may be widely varied from region to region, and the Corps lacks data sufficient to evaluate cumulative impacts. See AR PRT9-0144. Thus, the PEIS is anything but voluntary, it is mandatory, and an essential element that must be completed before the Corps takes any irrevocable action. This is a "bedrock" principle of NEPA. Under the CEQ regulations, 40 CFR 1506.1(a), while work on a programmatic EIS is in progress, agencies may not undertake any major federal action covered by that program that may significantly affect the quality of the human environment unless it meets three narrow tests, none of which exist here.<sup>15</sup>

<sup>15</sup> The action must (1) be independently justified, (2) be accompanied by an adequate EIS and (3) will not prejudice the ultimate decisions on the program, determine subsequent development, or limit alternatives. Id.

Here, the PEIS on the NWP program has not been finalized. The Corps released the DPEIS on July 31, 2001, for public comment (Vol. 66 Fed. Reg. 39499), but proceeded with the reissued NWP rule in January 2002 before addressing comments and issuing a final PEIS and Record of Decision. Thus, the Corps reissued the 44 NWPs for five years before completing its comprehensive assessment of the entire NWP program in the PEIS. As argued in Plaintiffs' Memorandum and Reply Memorandum, the Corps has therefore passed the "critical stage of decision," – the point at which the PEIS would be of use to the Corps itself and to the public in evaluating and commenting upon the revised program. In short, the Corps is flying blind, with no meaningful data to guide their activities. See Plaintiffs' Memorandum, at p. 47. Consequently, the NEPA processes for both the programmatic evaluation and for the individual NWPs are empty.

The Corps' precipitous action flies in the face of numerous comments, again asserting that the Corps must complete the PEIS prior to altering the NWPs yet another time. EPA, the agency charged with NEPA oversight under Section 309 of the Clean Air Act stated that: "In the absence of a completed PEIS, the preamble's lack of environmental data or justification for changes in environmental thresholds is even more apparent."<sup>16</sup> The Fish and Wildlife Service recommended that "the Corps consider suspending its efforts to modify the NWP program until the data contained in the draft EIS is evaluated, and the Corps has a scientific basis for proposing modifications to the program."<sup>17</sup>

---

<sup>16</sup> Letter from R. Wayland to C. Hess, dated May 18, 2001. Document 80 in spreadsheet titled "Administrative Record Associated with Fed. Reg. notice dated 9 August 2001." (filed May 28, 2002). (Ex. 5) Mr. Wayland's comment was echoed by a subsequent letter from D. Regas, Acting Administrator of the EPA's Office of Water, labeled as Document 74 in spreadsheet titled "Administrative Record Associated with Fed. Reg. notice dated 9 August 2001." (filed May 28, 2002). (Ex. 6)

<sup>17</sup> Letter from B. Tuggle to J. Studt, dated July 2, 2001. Document 73 in spreadsheet titled "Administrative Record Associated with Fed. Reg. notice dated 9 August 2001." (filed May 28, 2002). (Ex. 7)

Indeed, ideologically diverse groups also attempted to draw the Corps's attention to the failure to adequately justify the revisions and comply with NEPA -- from the National Wildlife Federation<sup>18</sup> to the unified comments of the Real Estate Industry.<sup>19</sup> Disregarding these voices from within and without, the Corps has proceeded to enact the revised permits in violation of NEPA, as discussed above and in Plaintiffs' Memorandum, at pp. 44-49.<sup>20</sup>

**B. The Corps Has Made No Attempt to Evaluate the Cumulative Impact of the NWP Program Prior to Issuing the 1998 FONSI, in Violation of NEPA.**

In the Reissued NWPs Rule, the Corps reiterates its position that because the NWP's authorize only those activities that have no more than minimal adverse effects upon the environment, the program "does not reach the significance threshold required for the preparation of an EIS." 67 Fed. Reg. 2025 (Jan. 15, 2002). Notwithstanding the circularity of this logic, this is in direct contradiction of the language of the regulations accompanying NEPA. In these regulations, the word "significantly" is defined as actions "with individually insignificant but cumulatively significant impact on the environment." 40 C.F.R. § 1508.27(b)(7). The level of deference that the Corps deserves in its treatment of potential cumulative impacts is not nearly as great as it would have the court believe -- indeed the very point of NEPA is that the agency must go through the NEPA process rather than presupposing the outcome of its actions. See Canyon Trust v. FAA, No. 01-1154, 2002 U.S. App. LEXIS 9835 at \*6-\*7 (D.C.Cir. May 24, 2002).

<sup>18</sup> Combined comments found in package labeled Document 247 in spreadsheet titled "Comments received by CECW-OR based on 9 August 2001 Federal Register Notice." (filed May 28, 2002). (Ex. 8)

<sup>19</sup> Comment labeled Document 219 in spreadsheet titled "Comments received by CECW-OR based on 9 August 2001 Federal Register Notice." (filed May 28, 2002). (Ex. 9)

<sup>20</sup> Further, the Corps itself, having rested its refusal to comply with NEPA upon the assumption that the revised program will only cause a minimum impact on the environment, has bound its decision-making authority to this a priori determination. Because the Corps assumes that the revised NWPs have "minimal effects", the Corps will determine that the reissued permits have anything other than a minimum impact, because any other finding will be an admission that they have enacted the NWPs in violation of NEPA. See Plaintiffs' Memorandum at 48.

"NEPA is addressed to all federal agencies, and Congress did not entrust administration of NEPA to the [Corps] alone." Canyon Trust, 2002 U.S. App. LEXIS 9835 at \*7.

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. See 67 Fed. Reg. 2024-25. This Circuit has repeatedly and recently held that a review of cumulative impacts is fundamental to the "hard look" required by NEPA before an EA finding no significant impact may issue. In Canyon Trust, this Circuit held that failure by the FAA to evaluate the cumulative impacts of airplane noise was fatal to their NEPA analysis and the conclusion that there was no significant impact. "[T]he FAA's error in ignoring cumulative impact [in issuing their EAs] is not harmless, for the FAA has impermissibly taken a foreshortened view of the impacts which could result from [their] act." Canyon Trust, 2002 U.S. App. LEXIS 9835 at \*24.

By the Corps own admission, this is precisely what it has done in this instance. The Corps's programmatic analysis is not merely incomplete; it is nonexistent.

**CONCLUSION**

The Reissued NWP continues the Corps's promulgation of a NWP program that is inconsistent with the CWA, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of APA section 706.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: Lawrence R. Liebesman

Lawrence R. Liebesman

(D.C. Bar #193086)

Rafe Petersen

(D.C. Bar # 465542)

Stuart Turner

2099 Pennsylvania Avenue, N.W., Suite 100

Washington, DC 20006

(202) 955-3000

Attorneys for Plaintiffs

Dated June 19, 2002