

May 15, 2026

Via Regulations.gov

Ms. Katherine McCafferty
U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314

**RE: U.S. Army Corps of Engineers' Request for Input on Nationwide Permits, Docket
No. COE-2026-0001**

Dear Ms. McCafferty:

The Southern Environmental Law Center submits the following comments in response to the U.S. Army Corps of Engineers' request for input on its Clean Water Act Section 404 nationwide permit program.¹ The comments are submitted on behalf of:

Altamaha Coastkeeper	Lynnhaven River NOW (LRNow)
Altamaha Riverkeeper	MountainTrue
Amphibian Foundation	NC League of Conservation Voters
Black Warrior Riverkeeper	North Carolina Coastal Federation
Catawba Riverkeeper Foundation	Ocean Natural Farm
Chattooga Conservancy	Ogeechee Riverkeeper
Clean Water Expected in East Tennessee	Rockbridge Conservation
Congaree Riverkeeper	Savannah Riverkeeper
Conservation Law Foundation	Save Our Saluda
Defenders of Wildlife	Sierra Club North Carolina
Environmental Protection Network	Tennessee Citizens for Wilderness Planning
Flint Riverkeeper Inc.	Third Act Georgia
Georgia ForestWatch	Waterkeeper Alliance
Georgia Interfaith Power and Light	Waterkeepers Chesapeake
Harpeth Conservancy	Winyah Rivers Alliance
Lumber Riverkeeper	Young, Gifted & Green

As an initial matter, the Southern Environmental Law Center and dozens of other organizations submitted extensive comments on the Corps' 2026 reissuance of its nationwide permits. Those comments detail how aspects of the nationwide permit program harm water quality, wildlife, businesses, and communities, and identify numerous ways to improve the program. The Corps incorporated almost none of those recommendations in its recent reissuance

¹ See 91 Fed. Reg. 12,591 (Mar. 16, 2026).

of nationwide permits. Any effort to revise the nationwide permit program should begin with the recommendations in our prior letter, which we attach and incorporate herein.²

These comments begin with a brief background on the nationwide permit program to place in context the Corps' current request for input; we then respond to the six questions provided by the Corps.

I. Nationwide Permit Program Background

Congress enacted the Clean Water Act in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³ The Act established “the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985,”⁴ with “pollutant” defined broadly to include, as relevant here, “dredged spoil, . . . rock, [and] sand.”⁵ To further that goal, the Act prohibited the “discharge of any pollutant” but created an exception for discharges authorized through Clean Water Act Sections 402 and 404 permitting programs.⁶

Relevant here, Section 404 prohibits “the discharge of dredged or fill material into the navigable waters at specified disposal sites” without a permit.⁷ Congress assigned Section 404 permitting responsibility to the Army Corps of Engineers.

From the outset, the Corps resisted the scope of its permitting obligations and issued regulations limiting the reach of Section 404. Those regulations were struck down by court order in 1975,⁸ prompting the Corps to issue new regulations. Those regulations introduced a new method for limiting the Corps' permitting responsibilities—a “general permitting” scheme.⁹ General permits allowed the Corps to bypass more stringent individual permitting procedures but were limited to “those activities that are substantially similar in nature, that cause only minimal adverse environmental impact when performed separately, and that will have only a minimal adverse cumulative effect on the environment.”¹⁰ Congress ratified the use of general permits in 1977 amendments to the Clean Water Act.¹¹ That same year the Corps issued its first nationwide permits—a type of general permit that applies nationwide—for fifteen categories of activities.¹²

Since then, the nationwide permit program has expanded to encompass the vast majority of the Corps' Section 404 permitting responsibilities. In the early 1980s, President Reagan “encouraged the Corps to consider measures to expedite permit processing and expand the use of

² See Attachment 1.

³ 33 U.S.C. § 1251(a).

⁴ *Id.* § 1251(a)(1).

⁵ *Id.* § 1362(6).

⁶ *Id.* § 1311(a).

⁷ See *id.* §§ 1311, 1344.

⁸ See *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

⁹ See 40 Fed. Reg. 31,320, 31,335 (July 25, 1975).

¹⁰ *Id.*

¹¹ 91 Stat. at 1600-1601

¹² See Congressional Research Service, *The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments* (Jan. 12, 2017).

nationwide permits”¹³ which led to the promulgation of twenty-seven nationwide permits in 1982.¹⁴ The number of nationwide permits increased to thirty-six by 1991,¹⁵ over forty by 1998,¹⁶ fifty by 2007,¹⁷ and there are now fifty-seven.¹⁸ Today, the Corps estimates that nationwide permits authorize approximately 55,000 activities annually.¹⁹ For comparison, in 2024 the Corps authorized 981 activities under individual Section 404 permits.²⁰ Thus, to the extent the Corps is working to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” through Clean Water Act permitting, it is doing so almost solely through general permits which are predominantly nationwide permits.

Most activities authorized under nationwide permits require no advance notice to the Corps.²¹ In other words, each year tens of thousands of activities are completed under nationwide permits that the Corps is completely unaware of. Even where the Corps receives notice, it relies on permit terms and general conditions to minimize impacts while largely disclaiming responsibility for verifying compliance.²²

In part because the Corps is unaware of all activities authorized by nationwide permits, it lacks data “to conclude, with any confidence, . . . [whether] the issuance of [a nationwide permit] is likely to cause more than minimal cumulative adverse environmental effects to aquatic ecosystems.”²³ To be sure, the Corps requires compensatory mitigation for some nationwide permit activities. The 55,000 annual nationwide permit activities affect over 23,000 acres of jurisdictional waters,²⁴ but to compensate for those effects, permittees complete mitigation on only a little over 2,000 acres.²⁵ The 21,000-acre difference is likely due, at least in part, to the fact that the Corps *does not* require mitigation for so-called “temporary” effects. But even when mitigation is required, “it is difficult to assess whether compensatory mitigation projects have fully or partially offset the lost functions provided by the aquatic resources that are impacted by permitted activities.”²⁶

Unsurprisingly in the face of these statistics—and despite the Clean Water Act’s goal of “restoring or maintaining” the Nation’s waters—millions of acres of wetlands have been lost since the Act was promulgated.²⁷ Water quality continues to suffer in many of the wetlands,

¹³ Michael C. Blumm, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and A Call for Reform*, 60 U. Colo. L. Rev. 695, 710 (1989).

¹⁴ 47 Fed. Reg. 31,794, 31,831 (July 22, 1982).

¹⁵ 94 Fed. Reg. 65,874, 65,875 (Dec. 13, 1996).

¹⁶ See 63 Fed. Reg. 36,040 (July 1, 1998).

¹⁷ 72 Fed. Reg. 11,092, 11,181 (March 12, 2007).

¹⁸ See Army Corps, List of Nationwide Permits, <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

¹⁹ Army Corps, 2026 Nationwide Permits Regulatory Impact Analysis at 5 (“Regulatory Impact Analysis”).

²⁰ *Id.* at 10.

²¹ See Army Corps, Nationwide Permit Reissuance (Jan. 8, 2026), <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll9/id/3210>.

²² See, e.g., *Mobile Baykeeper, Inc. v. U.S. Army Corps of Eng’rs*, 2014 WL 5307850, at *13 (S.D. Ala. Oct. 16, 2014).

²³ 2026 Nationwide Permit 12 Decision Document at 38.

²⁴ Regulatory Impact Analysis at B-2.

²⁵ *Id.*

²⁶ 2026 Nationwide Permit 12 Decision Document at 110.

²⁷ *Id.* at 52.

rivers, and lakes that remain. As of 2017, more than 55% of the nation’s miles of rivers and streams were impaired. As were 70% of the acreage of lakes, ponds, and reservoirs, nearly 80% of the square miles of bays and estuaries, and more than 90% of ocean and near-coastal waters.²⁸

Against this backdrop of increased use of nationwide permits, lack of data confirming the environmental consequences of those permits, and degraded water quality, the Corps asks for recommendations to further increase the efficiency of its nationwide permit program or “eliminate unnecessary review” of certain activities altogether.²⁹

II. Responses to the Corps’ Questions

As explained above, most activities are already authorized under nationwide permits without ever informing the Corps. It is unclear what additional “efficiency” the Corps believes is necessary for this process. Big picture, many aspects of the nationwide permit program fail to “maintain or restore” the Nation’s waters as intended under the Clean Water Act. The Corps should limit the number of activities that qualify for nationwide permits—not increase them—and more strictly evaluate, condition, and monitor those activities that do qualify. We respond to the six specific questions provided by the Corps below.

1. What measures should the Corps consider that would eliminate unnecessary review over jurisdictional activities that do not require heightened scrutiny?

The Corps should not eliminate any currently required review processes under the nationwide permit program which already approves fifty-five times as many activities as individual permits, usually with no notice to the Corps, no mitigation requirements, and no verification of the success of any mitigation that is required. To the contrary, the easiest way to reduce any perceived “red tape” associated with the nationwide permit program specifically is to change or eliminate permit terms and conditions so that activities which risk more-than-minimal individual or cumulative effects are authorized under individual Section 404 permits as required by the Clean Water Act, rather than nationwide permits.³⁰ Stated differently, the best way to eliminate “heightened scrutiny” of activities under nationwide permits is to authorize activities that deserve that “heightened scrutiny” as individual Section 404 permits. To be sure, this would increase the regulatory burden of the individual Section 404 permit program but, at least in theory, that program should be better equipped and resourced to process permits for projects that risk more-than-minimal impacts. This change would also mitigate the ever-present litigation risk of the nationwide permit program, reducing the likelihood that Section 404 projects will have to stop because the Corps attempted to authorize them with a nationwide permit when they should have been authorized with an individual permit. In addition, the Corps should evaluate and consider:

- Eliminating or restricting the use of Nationwide Permits 3, 12, 27, 31, and 48 for numerous reasons including that these five permits are estimated to each impact more

²⁸ See EPA, *National Water Quality Inventory: Report to Congress* 8, 11, 14, 15 (Aug. 2017), <https://perma.cc/QZ8B-U7XU>.

²⁹ 91 Fed. Reg. at 12,592.

³⁰ The Corps should facilitate this change by allocating more resources to staff issuing individual Section 404 permits.

- than 1,000 acres of jurisdictional waters annually.³¹ That is not a “minimal” impact—individually or cumulatively. The Corps should also evaluate and consider eliminating or restricting Nationwide Permits 13 and 14 for the reasons identified in our 2026 comment letter (Attachment 1).
- Clarifying that “currently serviceable” as used Nationwide Permit 3 means the “structure or fill” to be repaired under that permit is useable to some degree in its current form. In other words, Nationwide Permit 3 may not be used to repair structures or fills which are not useable, and therefore need full reconstruction, *at the time the permit is issued*. The Corps has problematically interpreted “currently serviceable” to refer to the status of a structure or fill *prior* to the time a repair is needed. That interpretation cannot ensure impacts are less than minimal because it effectively authorizes full-scale reconstruction of any structure or fill so long as that structure or fill was serviceable at some point in the past. The Corps could make its review processes more efficient by narrowing the definition of “currently serviceable” to apply to the time period immediately preceding permit issuance, thereby eliminating the need to review projects under Nationwide Permit 3 that are full reconstruction projects rather than partial repairs.
 - Setting an overall acreage limit for nationwide permits that approve linear projects. For example, Nationwide Permit 12 authorizes projects with an unlimited amount of overall fill so long as each individual fill is less than ½-acre. The Corps should provide an overall acreage cap for nationwide permits that authorize linear projects and should consider setting that cap as low as 1.5 acres, which is approximately the median impacted acreage under individual Section 404 permits.³² This change would make nationwide permitting more efficient because the Corps could more quickly exclude projects that exceed the overall project cap.
 - Repealing General Condition 28 which authorizes stacking multiple nationwide permits to authorize a single project in specific circumstances.³³ The Corps has no analytical or regulatory basis for this general condition because its nationwide permit decision documents assess the impacts of those permits in silos. This leaves the full analytical burden to district staff to ensure projects that use more than one nationwide permit do not have more than minimal impacts. Pre-construction notifications may not provide the information necessary to make that finding and the Corps is incapable of making that finding for projects that do not require pre-construction notifications. It would be more efficient to simply eliminate this practice and general condition.
 - Promulgating categorical exclusions under the National Environmental Policy Act for activities with truly minimal impacts. For example, several nationwide permits (e.g., Nationwide Permits 1, 2, 9, 25) are predicted to impact less than five acres annually. The Corps could consider approving those and potentially other activities using a programmatic categorical exclusion.

³¹ Regulatory Impact Analysis at B-1–B-2.

³² *Id.* at 27.

³³ See 91 Fed. Reg. 768, 880 (Jan. 8, 2026).

2. What measures should the Corps consider that would improve or maintain efficiency in the review of pre-construction notifications or issuance of NWP verifications?

The Corps should make three changes to the pre-construction notification process. First, it should require permittees to submit a sworn statement with their pre-construction notification that their project complies with all general conditions. This would reduce the burden on the Corps who should also be required to ensure that permitted projects meet all general conditions. Second, the Corps should require district engineers to make pre-construction notifications publicly available within five business days of receipt. At the same time, the Corps should invite the public to provide information relevant to the project and its compliance with the nationwide permit and general conditions. This would help ensure the public is notified of nationwide permit projects and improve efficiency by making it more likely that the Corps has all necessary information before issuing a nationwide permit verification, rather than obtaining information later which could lead it to suspend, modify, or revoke its verification. Third, the Corps should clarify that General Condition 18 requires completion of the Endangered Species Act Section 7 consultation process before any activity may be approved using a nationwide permit. General Condition 18 expressly provides that “[n]o activity is authorized under any NWP which ‘may affect’ a listed species or critical habitat, unless [Endangered Species Act] section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed.”³⁴ But as explained in our comments on the 2026 reissuance of nationwide permits, the Corps has recently taken the position that initiating—rather than completing—Section 7 consultation satisfies this requirement.³⁵ As we further explained, this approach violates the Endangered Species Act. It also makes the permitting process less efficient because it leaves permittees and Corps staff in the dark about how to comply with General Condition 18. The Corps can eliminate this ambiguity by reaffirming that Section 7 consultation must be *complete* prior to use of a nationwide permit. The Corps should make this same clarification for General Condition 20 which similarly requires compliance with the National Historic Preservation Act before activities may be authorized under a nationwide permit.³⁶

3. What categories of activities that are similar in nature should the Corps consider for establishing new NWPs?

The Corps should consider expanding Nationwide Permit 53 to authorize the removal of dams in addition to “low-head dams.” The Corps declined to make this change when reissuing nationwide permits in 2026, concluding that removal of non-low-head dams “could result in a greater range of potential impacts to aquatic resources.”³⁷ While that may be true in some circumstances, the Corps provided no basis for this statement. If the Corps moves forward with changes to the nationwide permit program, it should meaningfully evaluate expansion of Nationwide Permit 53 to other types of dams.

³⁴ *Id.* at 877.

³⁵ *See* Attachment 1.

³⁶ *See* 91 Fed. Reg. at 878.

³⁷ *Id.* at 815.

4. What measures should the Corps consider to ensure that discharges of dredged or fill material into waters of the United States would cause no more than minimal adverse environmental affects both individually and cumulatively?

Our comments on the 2026 reissuance of nationwide permits made multiple recommendations to ensure nationwide permits do not exceed minimal-effect thresholds. As noted elsewhere, we incorporate those recommendations in full but here we specifically highlight three important changes the Corps should make. First, the Corps should consistently define “single and complete” project as the total permitted project. The Corps generally prohibits the use of a nationwide permit more than once for each “single and complete” project but, for linear projects only, defines “single and complete” project to be each individual waterbody crossing rather than the project as a whole.³⁸ In other words, if a Nationwide Permit 12 pipeline crosses 1,000 waterbodies, the Corps considers each of those individual crossings to be a “single and complete” project even though each individual crossing has no independent value. This makes no sense. The Corps should define “single and complete” project to be the “total project” for linear projects, as it does for non-linear projects.

Second, the Corps should require compensatory mitigation for permanent and temporary effects to jurisdictional waters. Currently, the Corps does not require compensatory mitigation for “temporary” impacts even though it acknowledges those impacts “cause short-term or partial losses of aquatic resource functions and services.”³⁹ The Corps should reverse this practice, and require compensatory mitigation for all nationwide permit effects to jurisdictional waters, to help ensure permitted activities cause no more than minimal impacts.

Third, the Corps should require permittees to monitor structures or fills approved with nationwide permits, including compliance with permit terms and conditions along with any required mitigation, and provide that information to the Corps annually. The Corps’ nationwide permit decisions assume that “district engineers will monitor the use of these NWP,” but, in our experience, monitoring is inconsistent and often does not happen.⁴⁰ The lack of monitoring data is apparent in the Corps’ decision documents which largely rely on high-level qualitative analysis and general estimations. The Corps could better ensure that discharges have no-more-than-minimal effects if it required permittees to collect and submit monitoring data.

5. What measures should the Corps consider to develop NWPs, terms, general conditions, or processes for the transportation and disposal of dredged material into ocean waters?

The Corps should not develop a nationwide permit for the transportation and disposal of dredged material into ocean waters. The disposal of dredged material under the Marine Protection, Research, and Sanctuaries Act can only be permitted after considering site-specific factors which makes that disposal inappropriate for nationwide permits.⁴¹

³⁸ *Id.* at 885.

³⁹ *See, e.g.*, 2026 Nationwide Permit 12 Decision Document at 92.

⁴⁰ 91 Fed. Reg. at 843.

⁴¹ *See* 33 U.S.C. §§ 1412(c)(3), 1413.

6. What measures should the Corps consider to improve existing regulations regarding general permits or the implementation of the nationwide permit program?

Again, our prior comments contain numerous recommendations for improving the nationwide permit program. To prevent abuses of the nationwide permit program, we request pursuant to 33 C.F.R. § 330.5(b)(1) that the Corps consider rescinding Nationwide Permits 12 and 13, and making the changes to Nationwide Permits 3, 17, 27, 29, and 54 requested in our comments.

III. Conclusion

From the perspective of permittees and the Corps, it is hard to imagine a more “efficient” permitting program than the Section 404 nationwide permit program. It is also hard to imagine a permitting program that cumulatively does so much harm to water quality. Now is not the time to try to make this permitting program even more efficient or relaxed. We remind the Corps that once a wetland, river, or stream is filled, there is no unfilling it. We recognize that the Section 404 program helps spur important economic growth in some circumstances but filling our water resources should be a last-ditch option. If the Corps makes any changes to its nationwide permits, it should make them more environmentally protective, not less.

Sincerely,



Patrick Hunter
Senior Attorney

Attachment 1

July 18, 2025

Via Regulations.gov

Ms. Katherine McCafferty
U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314

**RE: Comments on U.S. Army Corps of Engineers' Proposal to Reissue and Modify
Nationwide Permits, Docket No. COE-2025-0002**

Dear Ms. McCafferty:

The Southern Environmental Law Center submits these comments on the U.S. Army Corps of Engineers' proposal to reissue or modify permits ("NWPs") on behalf of itself and the following organizations:

Altamaha Riverkeeper, Inc.	Glynn Environmental Coalition
Amphibian Foundation	Highlanders for Responsible Development
Appalachian Voices	Lumber Riverkeeper
Birds Georgia	Lynnhaven River NOW
Black Warrior Riverkeeper	MountainTrue
Brunswick Environmental Action Team	Nature Forward
Center for a Sustainable Coast	NC Coastal Federation
Center for Biological Diversity	NC Conservation Network
Charleston Waterkeeper	NC League of Conservation Voters
Chattahoochee Riverkeeper	Northern Virginia Bird Alliance
Chattooga Conservancy	Ogeechee Riverkeeper
Chesapeake Bay Foundation	Public Citizen, Inc.
Choctawhatchee Riverkeeper	Rockbridge Conservation
Clean Fairfax	Savannah Riverkeeper
Coastal Carolina Riverwatch	Tennessee Citizens for Wilderness Planning
Columbia Riverkeeper	Tennessee Scenic River Association
Congaree Riverkeeper	Upstate Forever
Coosa River Basin Initiative	Virginia League of Conservation Voters
Coosa Riverkeeper	Waterkeeper Alliance
Defenders of Wildlife	Waterkeepers Chesapeake
Environmental Integrity Project	Wetlands Watch
Friends of Buckingham	Wild Virginia
Friends of Dyke Marsh	Winyah Rivers Alliance
Georgia ForestWatch	Yadkin Riverkeeper
Georgia Interfaith Power and Light	

The NWP, as proposed, would result in significant and widespread harm to our Nation’s waters and the communities and wildlife that depend on them. In the decision documents, the Corps does not sufficiently consider the scope or severity of this impact, nor does it comply with the requirements of the Clean Water Act, the National Environmental Policy Act (“NEPA”), the Endangered Species Act (“ESA”), or the Administrative Procedure Act (“APA”). Given the systemic and permit-specific flaws described below, we urge the Corps to withdraw the proposed NWP and undertake a more thorough review that complies with the agency’s statutory obligations and adheres to the Clean Water Act’s directive to “restore and maintain the . . . integrity of the Nation’s waters.”¹

I. Clean water and healthy wetlands are vital to southern communities, wildlife, and businesses.

A. The South has significant resources at stake.

Throughout the nation—and especially the South—communities, wildlife, and businesses rely on clean water and healthy wetlands. The six states in which SELC works—Virginia, North Carolina, South Carolina, Georgia, Alabama, and Tennessee—have a combined 12,517 miles of shoreline,² 324,965 miles of rivers,³ and myriad streams, lakes, and wetlands. The region is a biodiversity hotspot, containing some of the most species-rich amphibian, reptilian, and freshwater fish communities in North America.⁴ Freshwater biodiversity in the region is the highest in the nation. Alabama alone supports 38% of North America’s native freshwater fish species, 60% of native mussel species, 43% of snail species, and 52% of turtle species.⁵

The South’s waters also support abundant commercial and recreational fisheries, which serve as an important economic driver. Commercial fishers fish the estuaries and ocean waters of the region, generating more than \$300 million in income in 2022 in the six states where SELC

¹ 33 U.S.C. § 1251(a).

² Nat’l Oceanic & Atmospheric Admin. (“NOAA”) Off. for Coastal Mgmt., *Shoreline Mileage of the United States*, <https://perma.cc/ZH5Q-3XM3> (last visited Apr. 23, 2025).

³ See Nat’l Wild & Scenic Rivers Sys., *Georgia*, <https://perma.cc/79MF-6F3Y> (last visited Apr. 23, 2025); Nat’l Wild & Scenic Rivers Sys., *North Carolina*, <https://perma.cc/F874-V49X> (last visited Apr. 23, 2025); Nat’l Wild & Scenic Rivers Sys., *South Carolina*, <https://perma.cc/CQ8P-8WQM> (last visited Apr. 23, 2025); Nat’l Wild & Scenic Rivers Sys., *Alabama*, <https://perma.cc/M7UB-YS3P> (last visited Apr. 23, 2025); Nat’l Wild & Scenic Rivers Sys., *Tennessee*, <https://perma.cc/H3XM-4HS9> (last visited Apr. 23, 2025); Nat’l Wild & Scenic Rivers Sys., *Virginia*, <https://perma.cc/JL25-NRPW> (last visited Apr. 23, 2025).

⁴ Clinton N. Jenkins et al., *US Protected Lands Mismatch Biodiversity Priorities*, 112 Proc. Nat’l Acad. Scis. 5081, 5082 (2015), <https://perma.cc/G2TZ-DPE6>; Elizabeth Guinessey et al., *A Literature Review: The Chemical, Physical and Biological Significance of Geographically Isolated Wetlands and Non-Perennial Streams in the Southeast* 11, 12, 28 (2019), <https://perma.cc/J485-MURK> (“Literature Review”).

⁵ Charles Lydeard & Richard L. Mayden, *A Diverse and Endangered Aquatic Ecosystem of the Southeast United States*, 9 Conservation Biology 800, 802 (1995), <https://perma.cc/WF75-AANJ>; Literature Review at 28.

works.⁶ Recreational anglers catch trout in the region’s mountain streams, bass in its piedmont lakes and streams, and any number of saltwater fish in its extensive estuaries and oceans. In 2011, more than \$19 billion was spent on wildlife recreation in our six-state region, including \$5.7 billion on fishing, with more than 15.9 million people participating.⁷ Besides recreational fishing, healthy streams and wetlands support many other diverse recreational opportunities (and the businesses that cater to them), including birding, hiking, wildlife viewing, kayaking, canoeing, hunting, photography, camping, and scouting outings, among others.

Southern waters also support a thriving tourism industry. Each year, visitors from across the country vacation on southern beaches. In 2021 alone, tourism around the beaches of the South generated over \$11 billion in gross domestic product and supported more than 200,000 jobs.⁸ Seashore tourism depends on pristine beaches, estuaries, and sounds, filled with clean water. Visitors to the region also patronize the businesses comprising the South’s flourishing brewing industry— which contributed nearly \$9 billion to the economy and supported over 55,000 jobs in 2023⁹—as well as wineries and distilleries, all of which depend on clean water to thrive. Many other industries in the South and throughout the nation depend on reliable sources of clean water as well: agriculture (including livestock, crops, and shellfish farming), food processing and distribution, beverage bottling, pharmaceutical manufacturing, microelectronic manufacturing, and power generation.

Without robust clean water protections, our communities, wildlife, and businesses suffer. For example, harmful algal blooms that result when waters receive excess nutrients¹⁰ can lead to beach and fishery closures, often resulting in millions of dollars in losses to local tourism, seafood, and recreation industries.¹¹ By contrast, strong clean water protections are good for communities and businesses: in 2014, the *Ecological Economics Journal* estimated that the Clean

⁶ See National Marine Fisheries Service, *Fisheries Economics of the United States 2022* 9 tbl. 3 (2024), <https://perma.cc/J8FF-8EK3> (totaling income for Alabama, Georgia, North Carolina, South Carolina, and Virginia).

⁷ See U.S. Fish & Wildlife Serv., *2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* 95–97 (2014), <https://perma.cc/VD3Z-ETUF>; see also Literature Review at 22.

⁸ See Nat’l Ocean Econ. Program, *Ocean Economy Data*, https://www.oceaneconomics.org/ocean_econ/ocean_econ.html (last visited July 16, 2025) (totaling 2021 “Tourism & Recreation” gross domestic product and employment figures for Alabama, Georgia, North Carolina, South Carolina, and Virginia).

⁹ Brewers Ass’n, *Total Economic Impact 2023*, <https://perma.cc/F2PX-7MUF> (last visited Apr. 23, 2025) (totaling employment and economic impact figures for Alabama, Georgia, North Carolina, South Carolina, Tennessee, and Virginia).

¹⁰ EPA, *The Effects: Dead Zones and Harmful Algal Blooms* (Feb. 5, 2025), <https://perma.cc/DV2Q-77DR>.

¹¹ See NOAA Fisheries, *Hitting Us Where It Hurts: The Untold Story of Harmful Algal Blooms* (Sept. 25, 2024), <https://perma.cc/UZH6-D4SQ>.

Water Act has been responsible for adding as much as \$15.8 billion in economic benefits for Virginia alone.¹²

B. Our Nation’s waters need stronger protections.

Five decades after Congress announced its goal “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”¹³ the Clean Water Act’s mandate remains unfulfilled. Pollution, storms, droughts, algal blooms, and other stressors continue to threaten the nation’s waters. As of 2017, more than 55% of the nation’s miles of rivers and streams were impaired. As were 70% of the acreage of lakes, ponds, and reservoirs, nearly 80% of the square miles of bays and estuaries, and more than 90% of ocean and near-coastal waters.¹⁴ The nation’s wetlands are struggling, too. Between 2009 and 2019, the country lost 670,000 acres of vegetated wetlands, primarily in the South and Great Lakes region.¹⁵ Coastal watersheds, which make up 13% of the coterminous United States, accounted for 86% of those losses.¹⁶ Of those that remain, some 82% of wetlands by area are in fair or poor condition due to human-driven physical alteration and diminishing water quality.¹⁷

The impact on freshwater habitats is particularly concerning. The 2024 National Water Quality Inventory Report concludes that just 28% of our nation’s river and stream miles, 43% of our lakes, and 47% of our wetlands have healthy biological communities.¹⁸ Losses of this magnitude “reduce[] the prosperity, health, and safety of communities . . . through increased susceptibility of people and infrastructure to natural disasters like flood, drought, and wildfire, as well as decreased food security, reduction in clean water, increased harmful algal blooms, . . . greater vulnerability to sea level rise and storms, and reduced recreational opportunities.”¹⁹

In the South, the health of our rivers and streams is particularly concerning. Toxic contaminants that have been dumped into our waterways by industry, development, and agriculture are seeping into our drinking water sources and our homes.²⁰ For example, as of 2022, 96% of lakes and reservoirs in North Carolina by area did not support fish consumption

¹² See Jim Epstein, *Letter to the Editor, Clean Water Is Vital for Business in Virginia*, The Progress-Index (Oct. 16, 2014), <https://perma.cc/3ZDD-ZQH3>.

¹³ 33 U.S.C. § 1251(a).

¹⁴ See EPA, *National Water Quality Inventory: Report to Congress* 8, 11, 14, 15 (Aug. 2017), <https://perma.cc/QZ8B-U7XU>.

¹⁵ M.W. Lang et al., *Status and Trends of Wetlands in the Coterminous United States 2009 to 2019*, U.S. Department of the Interior, Fish and Wildlife Service 8–9, 17–18, 26 (2024), <https://perma.cc/7GSF-VW25> (“Status and Trends Report”).

¹⁶ *Id.* at 26.

¹⁷ EPA, *National Wetland Condition Assessment: The Third Collaborative Survey of Wetlands in the United States* (2024), <https://perma.cc/FFR9-4V8C> (last visited Apr. 23, 2025).

¹⁸ See EPA, *National Water Quality Inventory: Report to Congress* 21 (Oct. 29, 2024), <https://perma.cc/85F9-4F49> (last visited June 3, 2025).

¹⁹ Status and Trends Report, *supra* n. 15 at 9, 24.

²⁰ Editorial: *We Need More State Help with Water Quality*, Fayetteville Observer (Apr. 7, 2019).

because of PCB and dioxin contamination.²¹ And 80% of North Carolina’s coastal waters were impaired for aquatic life due to excessive levels of metals, acidity, and algae.²² In Virginia, more than 86% of lakes and 75% of estuaries are impaired.²³ Likewise, 67% of rivers and streams and 69% of lakes and reservoirs in Georgia are impaired,²⁴ in part due to high levels of algae, nitrogen, phosphorus, and PCBs.²⁵ Forty-six percent of those Georgia waterbodies do not support fish consumption.²⁶

These trends are likely to continue, particularly following the 2023 U.S. Supreme Court decision in *Sackett v. Environmental Protection Agency*. According to EPA estimates, the *Sackett* decision stripped Clean Water Act coverage from as much as 63% of the nation’s wetlands by acreage and up to 4.9 million miles of streams.²⁷

To further complicate these issues, climate change is predicted to significantly transform the nation’s streams, rivers, lakes, estuaries, and ocean in the near future. More frequent and intense extreme weather and climate-related events are expected to continue to damage infrastructure, ecosystems, and social systems that provide essential benefits to communities.

Changing rainfall patterns, increased storms, and sea level rise induced by climate change are already increasing flooding in many parts of the country.²⁸ Flood losses in the United States—currently estimated at \$32.1 billion on average—are projected to increase by over 25% in the next thirty years.²⁹ EPA has attributed the likelihood of larger and more frequent river floods in certain regions to changes in the size and frequency of storms, streamflow, snowmelt, and snowpack accumulation.³⁰

The Southeast is already acutely feeling the impact of increased flooding. The year 2021 brought the deadliest flash flooding ever to affect Middle Tennessee and one of the worst natural

²¹ EPA, *How’s My Waterway?, North Carolina*, <https://perma.cc/3D2P-KJP8> (last visited July 7, 2025).

²² *Id.*

²³ Va. Dep’t of Env’l Quality, *Final 2022 Integrated Report* 47 <https://www.deq.virginia.gov/our-programs/water/water-quality/assessments/integrated-report> (last visited July 7, 2025).

²⁴ Ga. Dep’t of Nat. Res., Env’l Prot. Div., *Water Quality in Georgia, 2022–2023 (2024 Integrated 305b/303d Report)* 3–45 tbl.3-7, <https://perma.cc/S4MJ-M3DA> (last visited July 7, 2025).

²⁵ EPA, *How’s My Waterway, Georgia*, <https://perma.cc/EE4Z-3YMS> (last visited July 7, 2025).

²⁶ *Id.*

²⁷ Allyson Chiu, *Biden Rule, Heeding Supreme Court, Could Strip Over Half of U.S. Wetlands’ Protections*, Wash. Post (Aug. 29, 2023), <https://perma.cc/TSQ3-NXBV>.

²⁸ See NOAA, *2021 State of High Tide Flooding and Annual Outlook* 6–10 (2021) (“State of High Tide Flooding”), <https://perma.cc/6GHT-AEUE>.

²⁹ Oliver E.J. Wing et al., *Inequitable Patterns of US Flood Risk in the Anthropocene*, *Nature Climate Change* 2 (2022).

³⁰ EPA, *Climate Change Indicators: River Flooding*, <https://perma.cc/JZ76-SRLJ> (last visited Apr. 23, 2025).

disasters in state history.³¹ Historically high rainfall—as much as 17 inches in one day in some places—led to flooding that killed at least 20 people and inflicted severe damage to communities across Middle Tennessee.³² In 2024, Hurricane Helene devastated the western North Carolina mountains,³³ and an unnamed storm in North Carolina’s coastal counties brought catastrophic flooding to communities.³⁴ Elsewhere in the South, the number of days marked by high tide flooding—sometimes called “sunny-day flooding,” resulting from rising sea levels—has increased by over 400% since 2000.³⁵ Experts expect these types of catastrophic flooding events to increase in frequency in the coming decades due to climate change.³⁶

North Carolina, South Carolina, and Georgia are already among the U.S. states historically most hard hit by tropical storm systems. In just the last nine years, North Carolina and other southern states have been hit with several devastating 500-year storms, including Hurricane Matthew, Hurricane Florence, Tropical Storm Michael, Potential Tropical Cyclone Eight, and Hurricane Helene. The damage from these storms is measured in billions of dollars, including an estimated \$78.7 billion from Hurricane Helene alone, with much of the damage caused by floodwaters.³⁷ These types of storms are projected to increase in frequency, power, and duration, making it more important than ever to preserve the nation’s water resources in order to mitigate the damage from climate change.

Coastal populations and ecosystems in the Southeast are also threatened by sea level rise, which will erode shorelines, inundate wetlands, and facilitate saltwater intrusion. These

³¹ Nat’l Weather Serv., *August 21, 2021 Flash Flooding* (Sept. 28, 2021), <https://perma.cc/4R2Z-G6RJ>.

³² Bob Henson, *Henri Drenches Northeast; Death Toll at 21 in Catastrophic Tennessee Flash Flood*, Yale Climate Connections (Aug. 23, 2021), <https://perma.cc/CY9N-8DTT>; see also Michael Levenson, *At Least 22 Dead and 50 Missing in Tennessee Floods, Officials Say*, N.Y. Times (Aug. 24, 2021), <https://perma.cc/65MG-K2Y9>.

³³ Governor Roy Cooper, *Hurricane Helene Recovery*, Office of State Budget & Mgmt., 5 (Dec. 13, 2024), <https://perma.cc/T7PJ-WGYR> (“The damage attributable to Helene is roughly three and a half times the \$16.7 billion impact of Hurricane Florence in 2018,” with damage and needs estimated at \$59.6 billion, and more than 100 deaths attributable to the storm).

³⁴ N.C. Dep’t of Env’tl. Quality, *More Resilient by Design: North Carolina’s Flood Resiliency Blueprint, Spring 2025 Update 6* (2025), <https://perma.cc/KAE8-5JRD> (noting that “[o]ver the past decade, North Carolina has experienced a sharp increase in major flood events, a trend that continued in 2024” and describing historic flooding after a tropical storm dumped 20 inches of rain on coastal counties).

³⁵ NOAA Off. for Coastal Mgmt., *High Tide Flooding* (Mar. 31, 2025), <https://perma.cc/3595-EYL3>; see also generally *State of High Tide Flooding*.

³⁶ See Vanderbilt Sch. of Eng’g, *Tennessee Flash Floods are an Example of Climate Change Impacts to Come* (Aug. 25, 2021), <https://perma.cc/2XV8-WADX>.

³⁷ NOAA Off. for Coastal Mgmt., *Hurricane Costs* (Mar. 31, 2025), <https://perma.cc/H47B-Y7DZ>. “Coastal wetlands are estimated to save about \$39.54 billion . . . annually in damage to U.S. Atlantic and Gulf of Mexico coastal communities. Conversely, researchers have linked the loss of wetlands in heavily developed areas to increased flooding damage after hurricanes.” Status and Trends Report, *supra* n. 15 at 6.

processes have caused global mean sea level to rise by 8 to 9 inches since 1800,³⁸ with “[s]ea levels off the southeastern U.S.” rising at “about triple the global average” over the past decade.³⁹ Using intermediate projections with emission rates similar to today, the interagency report led by NOAA anticipates 1.5 to 2 feet of sea level rise by 2050 along the South Atlantic coast⁴⁰—a rate that is predicted to accelerate globally over the rest of this century.⁴¹

As with other environmental burdens, the impact of flooding and climate change often fall disproportionately on lower-income communities and communities of color. Many such communities experience climate-change impacts most acutely because they lack the resources to mitigate and adapt to climate-related changes.⁴² For communities that rely on fish and other aquatic life for income, changing water temperatures and flows can drastically affect their livelihoods.⁴³ Lower-income communities and communities of color also tend to be particularly vulnerable to increased flooding: they are both more likely to live in flood-prone areas and less likely to have the resources to readily recover from the damage flooding causes.⁴⁴

Climate change will also lead to habitat degradation and loss in myriad ways, including higher temperatures, increased drought, sea level rise,⁴⁵ and increased storm frequency and intensity.⁴⁶ Development and urban sprawl in the Southeast will almost certainly hamper the ability of species to move in response to these threats.⁴⁷

³⁸ Nat’l Oceanic & Atmospheric Admin., *Climate Change: Global Sea Level* (2022), <https://perma.cc/M7BJ-YWGN>.

³⁹ Chelsea Harvey, *Southeastern U.S. Seas Are Rising at Triple the Global Average*,” *Sci. Am.* (Apr. 11, 2023), <https://perma.cc/2RZU-G6DW>.

⁴⁰ Projections are relative to sea level in the year 2000. William V. Sweet et al., *Global and Regional Sea Level Rise Scenarios for the United States*, NOAA (Jan. 2017), <https://perma.cc/V8H4-M5FG>.

⁴¹ See Status and Trends Report, *supra* n. 15 at 26.

⁴² Rachel Morello-Frosch et al., *The Climate Gap: Inequalities in How Climate Change Hurts Americans & How to Close the Gap* (2009), <https://perma.cc/EDX6-L76A>; Susan Cutter, *The Geography of Social Vulnerability: Race, Class, and Catastrophe*, in *Understanding Katrina: Perspectives from the Social Sciences*, Items (2006), <https://perma.cc/7JKE-QY5K>.

⁴³ Food & Agric. Org. of the United Nations, *Climate Change Adaptation and Mitigation in the Food and Agriculture Sector* (2008), <https://perma.cc/3J68-XU9L>.

⁴⁴ Dalbyul Lee & Juchul Jung, *The Growth of Low-Income Population in Floodplains: A Case Study of Austin, TX*, 18 *KSCE J. Civ. Eng’g* 683, 684 (2014); Jonathan M. Katz, *Who Suffers When Disasters Strike? The Poorest and Most Vulnerable*, *Wash. Post* (Sept. 1, 2017), <https://perma.cc/UGA9-CWH5>.

⁴⁵ For example, by 2030, between 16% and 60% of all current nesting beach habitat for sea turtles and shorebirds in the Southeast is projected to be more vulnerable to erosion due to sea level rise. Betsy von Holle et al., *Effects of future sea level rise on coastal habitat*, *J. Wildlife Mgmt.* (Feb. 3, 2019).

⁴⁶ See, e.g., *id.* at 4, 7, 9, 13.

⁴⁷ Lee Hannah, *Climate change, connectivity, and conservation success*, *Conservation Biology* (Dec. 2011).

Our natural water resources are among the best defenses against the effects of climate change. A single acre of wetlands can store up to one and a half million gallons of water;⁴⁸ when that acre of wetland is removed, those 1.5 million gallons flow unimpeded downstream, increasing the risk of flooding. In addition to guarding against flooding, wetlands filter upstream pollution and prevent pollution from entering our sensitive estuaries and marine environments. With a warming climate and pollution mobilized through increases in precipitation, wetlands play a critical role in removing sediment and excess nutrients⁴⁹—pollutants that have the potential to decimate valuable commercial and recreational fisheries. Millions of people in the South and across the country get their drinking water from surface waters kept clean by wetlands. Wetlands also recharge groundwater supplies,⁵⁰ which is important for the millions more who rely on wells as their source of drinking water.

Given the vital role of our water resources in addressing climate change, and the existing challenges posed by regulatory rollbacks, increased development pressure, and already stressed ecosystems, it is more important than ever to protect our wetlands, streams, and other waters from destruction.

II. The proposed NWP's violate the Clean Water Act.

Congress passed the Clean Water Act in 1972 to “restore and maintain the . . . integrity of the Nation’s waters”⁵¹ by preventing pollution, protecting aquatic ecosystems, and ensuring safe, clean water for all Americans. Section 404 of the Act requires permits for the discharge of dredged or fill material into waters of the United States.⁵² As part of the § 404 permitting program, the Clean Water Act allows the Secretary of the Army to issue general, nationwide permits for certain categories of activities that (1) “are similar in nature,” (2) “will cause only minimal adverse environmental effects,” and (3) “will have only minimal cumulative adverse effect on the environment.”⁵³ Like all permits, NWP's must comply with the Corps’ Section 404(b)(1) guidelines, which prohibit any discharge of dredged or fill material that would “cause or contribute to significant degradation of the waters of the United States.”⁵⁴

Before issuing a general permit, the Corps must prepare a written evaluation assessing each requirement. Here, the Corps proposes to meet this obligation by replicating dense and repetitive decision documents for each NWP that, in many cases, avoid any meaningful analysis. Indeed, despite the wide range of activities covered by the proposed NWP's, substantial portions

⁴⁸ *5 Reasons Why We Love Wetlands*, Nat. Oceanic and Atmospheric Admin. Fisheries (2020), <https://perma.cc/7QYF-5DPC>.

⁴⁹ EPA & U.S. Dep’t of the Army, *Technical Support Document for the Final “Revised Definition of ‘Waters of the United States’” Rule 110* (Dec. 2022), <https://perma.cc/K3XQ-WLJ3> (“2023 Rule Technical Support Document”).

⁵⁰ N.C. Dep’t of Env’t Quality, *North Carolina Coastal Habitat Protection Plan*, 2021 Amendment 87 (2021), <https://perma.cc/C4JV-R7FT>.

⁵¹ 33 U.S.C. § 1251(a).

⁵² 33 U.S.C. § 1344.

⁵³ 33 U.S.C. § 1344(e)(1); *see also* 40 C.F.R. § 230.7.

⁵⁴ 40 C.F.R. § 230.10.

of each decision document are essentially identical. This creates several problems that plague each of the analyses. We address these systemic failures in the general analysis below, and highlight permit-specific concerns in Sections V through XI.

A. The proposed NWP's unlawfully authorize activities that are not “similar in nature.”

To be “similar in nature,” activities must be “similar in nature *and* similar in their impact upon water quality and the aquatic environment.”⁵⁵ Many of the NWP's do not satisfy even this most basic criterion. Although Clean Water Act regulations direct the Corps to provide “a precise description of the activities to be permitted” and “explain[] why they are sufficiently similar in nature and in environmental impact to warrant regulation under a single General permit,”⁵⁶ the Corps makes no real effort to do so. Instead, it admits that the authorized activities may vary widely in their impact—so much so that the Corps cannot even predict what that impact might be. In a paragraph replicated in each decision document, the Corps concedes:

[A]ctivities eligible for NWP authorization may be constructed in a wide variety of environmental settings, and affect waters and wetlands of varying quality, from severely degraded (i.e., performing ecological functions and services to a low degree, or not performing one or more ecological functions and services) to performing some or all ecological functions and services to a moderate or high degree. NWP activities may result in permanent or temporary losses of aquatic ecosystems and the functions and services they provide, or partial or complete losses of aquatic ecosystems and the functions and services they provide. Therefore, it is difficult to predict all of the reasonably foreseeable direct and indirect impacts that may be caused by each activity authorized by an NWP.⁵⁷

If the potential impacts are so varied that the Corps cannot predict all the reasonably foreseeable impacts, it is not a proper use of an NWP.

The Corps further admits that, for at least some permits, the scope of activities itself is too varied to reliably assess permit use at a nationwide scale. It even identifies specific examples:

For example, the NWP that authorizes 25 cubic yard discharges of dredged or fill material into various types of waters of the United States may be used to fulfill a variety of project purposes, and the direct and indirect environmental effects caused by those discharges may vary as a result of the characteristics of that

⁵⁵ 40 C.F.R. § 230.7(a)(1) (emphasis added); *see also* *Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1257 (D. Wyo. 2005).

⁵⁶ 40 C.F.R. § 230.7(b)(2).

⁵⁷ NWP 12 Drft. Decision Doc. at 57. We cite this decision document throughout these comments as an example. Because the Corps' decision documents are nearly identical in many sections, these comments apply equally to each document.

activity and the environmental characteristics of the site and landscape or seascape setting in which the activity takes place.⁵⁸

Beyond the Corps' own example, the final rule is rife with examples of overly broad categories of activities. For example, NWP 39 authorizes discharges "for the construction or expansion of commercial and institutional building foundations and building pads or attendant features," which can include structures as varied as roads, parking lots, garages, yards, utility lines, stormwater management facilities, playgrounds, and playing fields.⁵⁹ The permit covers developments ranging from retail stores, industrial facilities, restaurants, business parks, shopping centers, schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship.⁶⁰ And these are just the listed examples. The permit makes clear that the list is not exhaustive. Such a list cannot possibly be described as "similar in nature."

Rather than explain how or why these activities are sufficiently similar in nature and impact to warrant regulation under an NWP, the Corps dismisses these differences with a boilerplate assurance that "[i]f a situation arises in which the discharge of dredged or fill material . . . is more appropriately reviewed under the individual permit process, provisions of the NWPs allow division and/or district engineers to take such action."⁶¹ This approach is not allowed under the statute or the regulations, which plainly require the evaluation of 404(e) criteria "before any General permit is issued."⁶²

B. The Corps' minimal-impact determination under the Clean Water Act and finding of no significant impact under NEPA are arbitrary, capricious, and unsupported by substantial evidence.

As noted above, the Corps may not issue an NWP under the Clean Water Act if the activities it governs will have more than minimal individual and cumulative environmental impacts.⁶³ Relatedly, under NEPA, the Corps must prepare an EIS if an NWP may "significantly affect[] the quality of the human environment."⁶⁴ Because the Clean Water Act minimal-impact analysis and the NEPA significance analysis largely intersect (as do the Corps' evaluation of these standards in its draft decision documents), we address them together in this section. Where NEPA requirements diverge from Clean Water Act requirements, we address the NEPA issues separately in Section III.

⁵⁸ *Id.* at 57.

⁵⁹ NWP 39 Drft. Decision Doc. at 1.

⁶⁰ *Id.*

⁶¹ NWP 12 Drft. Decision Doc. at 106.

⁶² 40 C.F.R. § 230.7(b).

⁶³ 33 U.S.C. § 1344(e)(1); *see also* 40 C.F.R. § 230.7.

⁶⁴ 42 U.S.C. § 4332(C).

i. The Corps’ nationwide analysis is fatally undermined by its inability to assess its chosen “current environmental setting.”

The Corps’ analysis falters at its first step—attempting to assess its analytical baseline. As explained by the Corps, the “current environmental setting is the baseline against which the environmental effects of [reissuing an NWP] are evaluated to determine whether the issuance of this NWP will have a significant impact on the quality of the human environment . . . [and whether it is] likely to result in no more than minimal individual and cumulative adverse environmental effects.”⁶⁵ Stated differently, the “current environmental setting” is the foundation of the Corps’ CWA and NEPA analyses—without an accurate “current environmental setting,” it cannot accurately evaluate effects. The Corps was therefore obliged to assess the “current environmental setting” at a scale that would allow it to complete analysis compliant with the CWA and NEPA. The Corps chose to use a “current environmental setting” that includes “terrestrial and aquatic ecosystems within the United States and its territories, as well as the built environment.”⁶⁶ Fair enough. But the Corps could not be clearer that it does not have data to assess the “current environmental setting.” As examples,

- It concedes that the “current environmental setting varies substantially in different areas of the country and in different waterbodies” but that “it is not possible to describe the environmental conditions for specific sites where [the NWP] may be used.”⁶⁷
- It admits that “[d]ue to the large geographic scale of the affected environment . . . as well as the many past and present human activities that have shaped the affected environment, the affected environment can only be practicably described in general terms.”⁶⁸
- The Corps has “no accurate estimates of the total number of river or stream miles in the conterminous United States.”⁶⁹
- The Corps does not know how the Supreme Court’s *Sackett* decision (discussed above) affects the current environmental setting.⁷⁰
- “There is little national-level information on the current ecological state of the Nation’s wetlands, streams, and other aquatic ecosystems, or the general degree to which they perform various ecological functions and services.”⁷¹
- The Corps cannot assess the degree to which impacted waters are currently performing ecological functions “because that information is not available at the geographic scale of this environmental assessment”—i.e., nationwide.⁷²
- The Corps only has a “paucity of quantitative data at a national scale,”⁷³ so its “assessment must be speculative.”⁷⁴

⁶⁵ NWP 12 Drft. Decision Doc. at 9.

⁶⁶ *Id.*

⁶⁷ *Id.* at 11, 12.

⁶⁸ *Id.* at 12.

⁶⁹ *Id.* at 20.

⁷⁰ *Id.* at 22.

⁷¹ *Id.* at 47.

⁷² *Id.* at 56.

⁷³ *Id.* at 59.

⁷⁴ *Id.* at 57.

- It excuses shortcomings in its analysis by pointing to the “wide variability in aquatic ecosystem structure and functions from site to site and from region to region, and the limited quantitative data available at a national scale.”⁷⁵
- While acknowledging that “[c]umulative effects analysis should take into account the complexity, uncertainty, and natural variation of ecosystems,” it simultaneously acknowledges that it does not understand those factors at a nationwide scale.⁷⁶
- Finally, it concedes that it has a “lack of data concerning: (1) the quantity of aquatic ecosystems across the country, (2) the degree to which those aquatic ecosystems perform various ecological function and services, (3) the numbers, types, and impacts of . . . actions across the country that may affect . . . aquatic ecosystems, (4) what types of interactions are likely to occur among the various anthropogenic disturbances to aquatic ecosystems, [and] (5) the degree to which those aquatic ecosystems are resilient to disturbances.”⁷⁷

These statements should all have been red flags that the Corps cannot complete its analysis at its chosen nationwide scale. If the Corps cannot assess its chosen “current environmental setting,” it cannot assess the effect of the NWP on that setting.

To be clear, this may not mean that the Corps cannot issue a general permit for the authorized activities, but it cannot choose a scope for that permit (here, nationwide) if it cannot complete analysis required under the Clean Water Act, NEPA, and ESA, consistent with that scope. For decades, the Corps has justified its dearth of analysis for its NWP program by arguing that its analysis *has* to be poor because of the permit’s nationwide scope. This gets the Corps’ legal obligations exactly backwards. Its desire to issue an NWP does not diminish its statutory obligations. To the contrary, if it cannot complete that analysis consistent with statutory requirements, it must choose a narrower permit scope/scale.

ii. The Corps admits it cannot assess the effects of the NWPs on a nationwide scale.

This same self-inflicted scale problem dooms the Corps’ effects analysis. Like problems with its baseline analysis, the Corps does not have data to support a nationwide effects analysis. To wit,

- “Whether the individual adverse environmental effects of an NWP activity are no more than minimal are dependent on activity-specific and site-specific factors” that are unknown to the Corps.⁷⁸
- The Corps does not know the “severity of potential impacts to aquatic ecosystems caused by activities authorized by [the NWPs]” without more data.⁷⁹

⁷⁵ *Id.* at 64.

⁷⁶ *Id.* at 80.

⁷⁷ *Id.* at 83.

⁷⁸ *Id.* at 63.

⁷⁹ *Id.* at 64.

- The Corps explains that the “complexity of aquatic ecosystems, the potential types of interactions among the various causes of disturbance that can occur, and other factors make it difficult to predict how aquatic ecosystems in a particular region will respond to the cumulative impacts of the activities authorized by [the NWP].”⁸⁰
- Elsewhere it explains that “there is uncertainty in how . . . aquatic ecosystems will respond to activities authorized by [the NWP].”⁸¹
- The Corps also notes that it is “difficult to predict whether or not the cumulative use of [the NWP] during the five year period it is in effect may, or may not, cause no more than minimal adverse cumulative effects.”⁸²
- Finally, in a strange flip of its statutory obligations, the Corps argues that its lack of data makes it “difficult to conclude, with any confidence, that the issuance of [the NWP] is likely to cause more than minimal cumulative adverse environmental effects” without speculating whether the same lack of data also makes it difficult to conclude “with any confidence” that issuance of the NWP will *not* cause more than minimal effects.⁸³

Ultimately, according to the Corps, “it is difficult to predict all of the reasonably foreseeable direct and indirect impacts that may be caused by each activity authorized by [the NWP]”⁸⁴ resulting in a self-described “speculative” analysis at best.”⁸⁵ That difficulty is self-imposed based on the Corp’s chosen permit scope. It does not justify the Corps’ violations of the CWA, NEPA, ESA, and APA.

iii. The limited data available to the Corps indicate that many of the NWP cross the relevant CWA and NEPA thresholds.

If anything, the limited data available to the Corps indicates that many of the NWP will cause more than minimal individual and cumulative effects in violation of the CWA and cause significant impacts requiring an EIS.

Specifically, the Corps discloses that the environmental baseline, against which the effects of each NWP will be assessed, is already significantly degraded. For example, the conterminous United States has lost more than half of its wetlands since colonization.⁸⁶ An additional 221,000 acres were lost from 2009-2019.⁸⁷ Of those remaining, less than half of surveyed wetlands were found to be in good condition.⁸⁸ Most rivers also fail to meet one or

⁸⁰ *Id.* at 74.

⁸¹ *Id.* at 77.

⁸² *Id.* at 78.

⁸³ *Id.* at 83.

⁸⁴ *Id.* at 57.

⁸⁵ *Id.*

⁸⁶ *Id.* at 14.

⁸⁷ *Id.* at 17.

⁸⁸ *Id.* at 36.

more health factors.⁸⁹ Ultimately, “[m]ost, if not all, aquatic and terrestrial ecosystems in the United States are degraded or impaired to some degree.”⁹⁰

This matters because the Corps must take this degraded condition into consideration when determining whether the NWP’s will have significant and more-than-minimal effects, including cumulative effects.⁹¹ On top of this degraded condition, many of the NWP’s will or may:

- Cause “changes to in-stream habitat and sediments in river[s] and stream bed[s].”⁹²
- “[A]ct as disturbances that might temporarily or permanently change the structure and functions of aquatic ecosystems.”⁹³
- “[R]esult in permanent or temporary losses of aquatic ecosystems and the functions and services they provide.”⁹⁴
- Affect “the ecological functions and services provided by waters and wetlands.”⁹⁵
- Contribute to a “decrease in aquatic ecosystem resilience.”⁹⁶
- Cause the “conversion of forested wetlands to scrub-shrub or emergent wetlands.”⁹⁷

The Corps acknowledges these impacts but uses three techniques to improperly diminish their importance. First, it arbitrarily compares them to the rest of human activity. Second, the Corps compounds this error by arbitrarily and capriciously relying on an undisclosed and unassessed combination of compensatory mitigation will help ensure that activities authorized by the NWP’s will result in no more than minimal “individual and cumulative” environmental effects. Third, the Corps arbitrarily exaggerates the protections offered by general permit conditions. As a result, the Corps’ CWA and NEPA findings are arbitrary, capricious, and unsupported by the record.

a. The Corps supports its CWA and NEPA findings by arbitrarily and capriciously comparing the NWP’s effects to the rest of human activity.

As noted above, the Corps’ failure to accurately assess the environmental baseline is fatal to its analysis. But the Corps has a separate environmental baseline problem. Its attempt to use that baseline as a sword—arguing the effects of the NWP’s must be less-than-minimal and insignificant when compared to human activity nationwide—also violates statutory requirements.

⁸⁹ *Id.* at 25.

⁹⁰ *Id.* at 23.

⁹¹ *See id.* at 55–56 (noting that effects must be evaluated against the “current environmental setting”); 72–84 (repeatedly explaining importance of factoring environmental baseline into cumulative effects analysis).

⁹² *Id.* at 27.

⁹³ *Id.* at 56.

⁹⁴ *Id.* at 57.

⁹⁵ *Id.* at 64.

⁹⁶ *Id.* at 77.

⁹⁷ *Id.* at 94.

As indicated above, the purpose of establishing an environmental baseline is to assess “what [harm] might result from the agency’s proposed actions in the present and future human and natural contexts.”⁹⁸ By accounting for both the present effects of past actions and the impacts of other current actions, an agency can determine what effects its actions will have.⁹⁹ Here, the Corps perverts this process by weighing the NWP’s impacts *against* the environmental baseline, rather than using that baseline to determine *what effects* the NWP will have.¹⁰⁰

The Corps sets the stage for this arbitrary and capricious comparison by noting—repeatedly—that “humans have altered aquatic and terrestrial environments in numerous, substantial ways for *thousands of years*.”¹⁰¹ As a result of this historical impairment, the Corps finds—rightly so—that “most” of the nation’s aquatic resources are already “degraded to some degree.”¹⁰²

But the Corps missteps by placing this “degraded” baseline on one end of a scale, and the supposed impacts of each NWP on the other, to find the latter is dwarfed by the former and therefore insignificant and minimal. Specifically, the Corps finds that:

Because the activities authorized by this NWP constitute *only a small proportion* of the categories of [past and present] human activities that directly and indirectly affect ocean waters, estuarine waters, lakes, wetlands, streams, and other aquatic resources, the activities authorized by this NWP over the next 5 years are *likely to result in only a minor incremental change* to the current environmental setting for ocean waters, estuarine waters, lakes, wetlands, streams, and other aquatic resources.¹⁰³

In effect, the Corps finds the “minor incremental change[s]” caused by activities authorized under NWPs are a drop in the bucket when weighed against thousands of years of human activity. We agree. But that is not the relevant legal question.

It is both obvious and profoundly unhelpful to observe that detrimental impacts caused by NWP–authorized activities are “minimal” when compared with “thousands of years” of aquatic-

⁹⁸ *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir. 2005) (analyzing baselines in the ESA context).

⁹⁹ *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016) (“Without establishing the baseline conditions which exist . . . before [a project] begins, there is simply no way to determine *what effect* the [project] will have on the environment.” (citation omitted) (emphasis added)).

¹⁰⁰ *See Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng’rs*, 417 F. Supp. 3d 1354, 1364 (W.D. Wash. 2019), *aff’d*, 843 Fed. Appx. 77 (9th Cir. 2021) (faulting the Corps for analyzing the effects of an NWP “as a percentage of the decades or centuries of degrading activities that came before”).

¹⁰¹ *See, e.g.*, NWP 12 Drft. Decision Doc. at 11.

¹⁰² *Id.* at 23.

¹⁰³ *Id.* at 83. For what it’s worth the Corps’ statement is simply copy and pasted from past versions of NWP 12. *See* 2017 NWP 12 Decision Doc. at 45.

ecosystem degradation and every other contemporary source of aquatic pollution. The Corps is well aware that this approach does not satisfy legal requirements. It used this same stratagem to downplay impacts when reissuing NWP's in 2017 (and in 2021) and was reprimanded by the Federal Court for the Western District of Washington. To quote the court, “[n]oting that a particular environmental resource is degraded is not an excuse or justification for further degradation.”¹⁰⁴ The Corps is required to analyze the individual and cumulative impacts of an NWP *given* the current environmental setting, not calculate these impacts “*as a percentage* of the decades or centuries of degrading activities that came before.”¹⁰⁵ Put differently, the point of a baseline is not to determine “the *proportional* share of responsibility the federal agency bears for the [harm to the aquatic resource], but what [harm] might result *from* the agency’s proposed actions in the present and future human and natural contexts.”¹⁰⁶

The longstanding degradation of the nation’s waters is the very reason the CWA was enacted in the first place—it may not serve as an excuse to evade its requirements. The Corps’ attempt to base its minimal-impact determination upon such an artificially biased comparison violates the CWA, NEPA, and the APA.

b. The Corps arbitrarily and capriciously relies on uncertain and unsupported mitigation measures that not even the Corps believes will work.

The Corps’ next strategy to downplay the effects of the NWP's is to point to mitigation and other measures. To be sure, the Corps may partially rely on mitigation measures and other “post-issuance” procedures “to cement its [nationwide] determination that the projects it has authorized will have only minimal environmental impacts.”¹⁰⁷ But the Corps must explain “*why* it believes mitigation imposed through the case-by-case review of NWP activities will work to mitigate the permit’s [adverse] impacts to a minimal level.”¹⁰⁸ This must “include documented information supporting” its findings, including its minimal-cumulative-impact determination.¹⁰⁹

¹⁰⁴ *Coal. to Protect Puget Sound Habitat*, 417 F. Supp. 3d at 1364.

¹⁰⁵ *Id.* (emphasis added).

¹⁰⁶ *Pac. Coast*, 426 F.3d at 1093 (emphasis added) (analyzing baselines in the ESA context).

¹⁰⁷ *Ohio Valley Envtl. Coal. v. Bulen*, 429 F.3d 493, 501 (4th Cir. 2005) (warning that it “would have substantial doubts about the Corps’ ability to issue an NWP that relied solely on post-issuance, case-by-case determinations of minimal impact, with no general pre-issuance determinations,” because in that case, “the Corps’ ‘determinations’ would consist of little more than its own promise to obey the law”).

¹⁰⁸ *Ohio Valley Envtl. Coal. v. Hurst*, 604 F. Supp. 2d 860, 892 (S.D.W. Va. 2009).

¹⁰⁹ 40 C.F.R. § 230.7(b)(1); 40 C.F.R. § 230.11(g). EPA guidelines define “cumulative effects” or “impacts” as “the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material.” 40 C.F.R. § 230.11(g)(1). The guidelines go on to note that though “the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.” *Id.*

Neglecting to reference such information, or failing to analyze or explain the “factual underpinnings” for the Corps’ determination, is arbitrary and capricious.¹¹⁰

The Corps has not carried that burden here. In language replicated in each NWP’s decision document, the Corps repeatedly notes “other mitigation measures . . . may be required,” but never describes what or when.¹¹¹ The Corps also provides some general discussion of mitigation measures that exist and could be required in theory but, again, makes no commitments or findings regarding how these potential measures may help reduce the NWP’s impacts below NEPA and CWA thresholds.¹¹² Against this summary of potential measures—but utter lack of analysis—the Corps concludes that “compliance with all applicable NWP general conditions as well as regional conditions [yet to be] imposed by division engineers and activity-specific conditions [yet to be] imposed by district engineers” will result in the NWP having “no more than minimal” impacts.¹¹³

This does not meet relevant statutory burdens. It fails NEPA’s hard look requirement, is insufficient to substantiate a FONSI, and does not provide “any explanation for *why* [the Corps] believes mitigation imposed through the case-by-case review of NWP activities will work to mitigate the permit’s cumulative impacts to a minimal level,” in violation of the CWA.¹¹⁴

The Corps’ general discussion of mitigation does not change this outcome. Merely listing and describing various post-issuance mitigation strategies that might be required in some contexts does not explain how the Corps “arrived at its *preissuance* minimal cumulative-impact finding[.]”¹¹⁵ The Corps must explain how these mitigation measures would succeed “*in the context of [the specific] NWP.*”¹¹⁶ Yet the Corps conducted no such analysis.

*Ohio Valley Environmental Coalition v. Hurst*¹¹⁷ is instructive. There, the Corps’ minimal impacts finding “relied on a review *process*” to identify necessary and appropriate mitigation measures “at a later time and on a case-by-case basis.”¹¹⁸ When it came to the “actual measures the district engineer should impose, however,” the Corps simply provided “a list of options with

¹¹⁰ See *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 413 (6th Cir. 2013) (holding that merely mentioning potential post-issuance mechanisms like mitigation “do[es] not explain how the Corps arrived at its *preissuance* minimal cumulative-impact findings”); see also *Hurst*, 604 F. Supp. 2d at 887 (holding that “the ‘mere listing’ of mitigation measures and processes, without any analysis, cannot support a cumulative impacts determination” in either the NEPA or CWA contexts); *Wyo. Outdoor Council*, 351 F. Supp. 2d at 1252 (holding the court cannot “defer to the Corps’ bald assertions that mitigation will be successful” in the NEPA and CWA contexts).

¹¹¹ See, e.g., NWP 12 Drft. Decision Doc. at 57.

¹¹² See *id.* at 107–17.

¹¹³ *Id.* at 117.

¹¹⁴ *Hurst*, 604 F. Supp. 2d at 892.

¹¹⁵ *Kentucky Riverkeeper*, 714 F.3d at 412; *Hurst*, 604 F. Supp. 2d at 887.

¹¹⁶ *Hurst*, 604 F. Supp. 2d at 890–9.

¹¹⁷ 604 F. Supp. 2d 860.

¹¹⁸ *Id.* at 889.

little guidance on how they should be selected or applied.”¹¹⁹ This “generic” discussion of mitigation did not explain how these measures would apply “in the context of” NWP 21 or “how they would ensure the mitigation of cumulative impacts at the sites of [NWP 21] activities.”¹²⁰ Though the Corps suggested several general conditions would adequately police its review process, the court found that “[s]uch loose instructions . . . do not evidence the guarantee of successful mitigation necessary to comply with the permit requirements.”¹²¹ Ultimately, because the Corps did not “show *how*” the listed measures would mitigate expected impacts or “explain *why* such mitigation plans are appropriate for the given circumstances,” the court determined that the Corps’ minimal-cumulative-impacts determination was arbitrary and capricious.¹²² The Corps faces a similar problem here.

Moreover, the Corps’ own statements contradict its claim that compensatory mitigation will help ensure no-more-than-minimal impacts. For example, the Corps confidently predicts that compensatory mitigation will “offset some or all of the losses of aquatic resource functions caused by the activities authorized by this NWP.”¹²³ Yet only a few pages earlier, the Corps discloses that because “few studies” have evaluated “aquatic resources impacted by permitted activities,” it is “difficult to assess whether compensatory mitigation projects have fully or partially offset the lost functions provided by the aquatic resources that are impacted by permitted activities.”¹²⁴

In a similar vein, the Corps optimistically notes that “restoration of wetlands and streams can increase the ecological functions and services provided by those aquatic resources” and “increase biodiversity.”¹²⁵ But it later admits that “restoration typically cannot return a degraded wetland or stream to a prior historic condition,” and any increases in biodiversity or ecosystem services “do not approach the amounts of biodiversity and ecosystem services performed by undisturbed reference sites.”¹²⁶ Likewise, the Corps maintains that “restoring or establishing wetland hydrology is of primary importance.”¹²⁷ But one page later, the Corps reports that it is “difficult to restore or establish natural wetland hydrology.”¹²⁸ For these and other reasons, the Corps repeatedly warns that “it is important to establish realistic goals and objectives” for mitigation.¹²⁹ But it is hard to square these sober assessments of mitigation’s shortcomings with the Corps’ bald assertions that “[m]itigation required by the district engineer *will* ensure that the adverse effects on the aquatic environment are no more than minimal.”¹³⁰

¹¹⁹ *Id.* at 892.

¹²⁰ *Id.* at 890–94 (emphasis added).

¹²¹ *Id.* at 893.

¹²² *Id.* at 889 n.1 (emphasis added).

¹²³ NWP 12 Drft. Dec. Doc. at 116.

¹²⁴ *Id.* at 109.

¹²⁵ *Id.* at 108.

¹²⁶ *Id.*

¹²⁷ *Id.* at 109.

¹²⁸ *Id.* at 110.

¹²⁹ *Id.* at 108.

¹³⁰ *See, e.g., id.* at 105 (emphasis added).

Finally, even if the Corps could rely on mitigation measures to support its minimal-impact finding—which, given the above shortcomings, it cannot—the NWP still authorize substantial unmitigated impacts that the Corps ignores. Numerous draft decision documents estimate that a large amount of wetlands and streams will be impacted and *not* mitigated. For example, of the thousands of times NWP 12 will be used each year, the Corps estimates only 5% will require compensatory mitigation to offset impacts.¹³¹ Indeed, according to the Corps’ own estimates, dozens of NWPs will have unmitigated impacts to aquatic resources, with twenty NWPs estimated to impact at least 500 unmitigated acres. Six of those are predicted to impact more than 5,000 unmitigated acres. The Corps makes no attempt to explain why those unmitigated impacts should be considered minimal.

In sum, the Corps entirely fails to document or explain why mitigation measures will work. And what generic mitigation measures it does list either would not work in the context of specific NWPs or are undercut by the Corps’ own statements admitting their inefficacy. Instead, the Corps “presumes, on this record, that whatever the impacts, it will be able to mitigate them successfully and further, that the procedures incorporated into the NWP authorization process are sufficient to ensure that success.”¹³² But an “analysis based on presumptions at every step cannot support any sort of conclusion.”¹³³

Therefore, the Corps’ CWA and NEPA determinations are arbitrary, capricious, and unsupported by substantial evidence.

c. The Corps arbitrarily and capriciously exaggerates the protections offered by general permit conditions to substantiate its CWA and NEPA findings.

Next, the Corps attempts to downplay the effects of the NWPs by pointing to general permit conditions. Like the strategies discussed above, this too fails. We note at the outset that the Corps’ reliance on general conditions is undermined by its longstanding position that it has no obligation to ensure permittees are abiding by general conditions. According to the Corps, listing the general conditions on paper is enough. This does not reflect reality.

In any event, general permit conditions can be “relevant to and supportive of a finding of minimal impacts.”¹³⁴ But the conditions must actually do what the Corps says they will; if they “do not necessarily prohibit substantial impacts,” relying on them to make a “minimal” impact finding is arbitrary and capricious.¹³⁵

Here, the Corps cites anticipated compliance with general conditions 1–7, 9, 19, 20, 22, 23, and 25 as a key factor in its NEPA and CWA analysis.¹³⁶ However, many of the Corps’

¹³¹ NWP 12 Drft. Decision Doc. at 107.

¹³² *Hurst*, 604 F. Supp. 2d at 895–96.

¹³³ *Id.* at 896.

¹³⁴ *Protect Puget Sound*, 417 F. Supp. 3d at 1365; *Hurst*, 604 F. Supp. 2d at 899.

¹³⁵ *Protect Puget Sound*, 417 F. Supp. 3d at 1365.

¹³⁶ *See* NWP 12 Drft. Decision Doc. at 91–100.

claims regarding these general conditions overstate—if not outright contradict—the terms of the general conditions themselves. For example:

- **General Condition 3:** The Corps promises that compliance with General Condition 3 (and 5) “*will ensure* that the authorized activity does not adversely affect important spawning areas or concentrated shellfish populations.”¹³⁷ The actual language of General Condition 3, however, is much less forceful. Though it prohibits the “physical destruction” of “important spawning area[s],” it only requires that “[a]ctivities in spawning areas during spawning seasons” be avoided to the “maximum extent practicable.”¹³⁸ Therefore, though General Condition 3 “precludes the most destructive of activities in spawning areas,” it “leaves unregulated many activities that could significantly impact those areas.”¹³⁹
- **General Condition 4:** The Corps asserts that NWP activities “*cannot* have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.”¹⁴⁰ But General Condition 4, like General Condition 3, only provides that “[a]ctivities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.”¹⁴¹ Thus, many activities that could “significantly impact” breeding areas for migratory birds are left “unregulated.”¹⁴²
- **General Condition 6:** The Corps claims that “[a]dverse effects to the chemical composition of the aquatic environment *will be controlled* by general condition 6.”¹⁴³ But General Condition 6 only provides that “[m]aterial used for construction or discharged” to be “free from toxic pollutants in toxic amounts.”¹⁴⁴ Therefore, General Condition 6 has no ability to police toxic chemicals released during spills, leaks, or frac-outs, and cannot guarantee minimal adverse effects to the “chemical composition of the aquatic environment,” writ large.
- **General Condition 10:** The Corps confidently predicts that “[c]ompliance with general condition 10 *will ensure* that authorized activities in 100-year floodplains will not cause more than minimal adverse effects on flood storage and conveyance.”¹⁴⁵ Yet the terms of General Condition 10 simply state that “[t]he activity must comply with applicable FEMA-approved state or local floodplain management requirements.”¹⁴⁶ Unless the

¹³⁷ *Id.* at 122 (emphasis added).

¹³⁸ Proposal to Reissue and Modify Nationwide Permits, 90 Fed. Reg. 26100, 26157 (June 18, 2025).

¹³⁹ *Protect Puget Sound*, 417 F. Supp. 3d at 1365.

¹⁴⁰ NWP 12 Drft. Decision Doc. at 97 (emphasis added).

¹⁴¹ 90 Fed. Reg. at 26157.

¹⁴² *Cf. Protect Puget Sound*, 417 F. Supp. 3d at 1365.

¹⁴³ NWP 12 Drft. Decision Doc. at 92 (emphasis added).

¹⁴⁴ 90 Fed. Reg. at 26157.

¹⁴⁵ NWP 12 Drft. Decision Doc. at 98 (emphasis added).

¹⁴⁶ 90 Fed. Reg. at 26157.

Corps has reviewed every applicable FEMA-approved state or local floodplain management plan—and it does not suggest it has—it is hard to see how it can say they “will ensure” no more than minimal environmental effects.

- **General Condition 12:** The Corps notes General Condition 12 “requires the permittee to stabilize exposed soils and other fills, which *will* reduce turbidity.”¹⁴⁷ But the full language of General Condition 12 only requires that “all exposed soil and other fills . . . be permanently stabilized at the earliest practicable date.”¹⁴⁸ Thus, exposed soil and fills could cause sediment loading and turbidity plumes until it is “practicable” to deal with it. Regardless, a requirement to “reduce” turbidity is not necessarily a requirement to reduce it below the minimum-impact threshold.
- **General Condition 18:** According to the Corps, General Condition 18 guarantees that the reissuance of the NWP’s will have “‘no effect’ to listed species or critical habitat, because no activity that ‘may affect’ listed species or critical habitat is authorized” unless Section 7 consultation has been completed. As explained below, this is not accurate.
- **General Condition 22:** The Corps finds that General Condition 22 will help safeguard special aquatic sites such as “designated critical resource waters and adjacent wetlands, which may include high value wetlands,”¹⁴⁹ and marine “sanctuaries and refuges.”¹⁵⁰ But general condition 22 only guards against discharges of dredged or fill material “for any activity *within, or directly affecting*, critical resource waters, including wetlands adjacent to such waters.”¹⁵¹ Therefore, General Condition 22 provides no protection against indirect or secondary impacts stemming from upstream NWP activities.

Finally, as explained in Sections VI and VII, despite these general conditions, NWP projects have historically caused more than minimal impacts on the ground. The Corps cannot claim that general conditions are a silver bullet when experience shows that they are not.

In sum, general conditions are an important tool for limiting the impacts of NWP’s as a whole. And the Corps can cite to them in appropriate circumstances when making a minimal-impact finding. But here the Corps has failed to “articulate a rational connection between the facts it found and the choice it made” in violation of the APA and CWA.

¹⁴⁷ NWP 12 Drft. Decision Doc. at 117 (emphasis added).

¹⁴⁸ 90 Fed. Reg. at 26157.

¹⁴⁹ NWP 12 Drft. Decision Doc. at 95.

¹⁵⁰ *Id.* at 120.

¹⁵¹ 90 Fed. Reg. at 26160.

iv. The Corps arbitrarily and capriciously defers its CWA minimal-cumulative-impact and NEPA significant-effects determinations to the regional and district level.

As noted above, the Corps may rely on post-issuance mechanisms “in part” to “cement” its minimal-cumulative-effects determination.¹⁵² But under the CWA and 404(b)(1) guidelines, the Corps still must produce a “*national* decision document that *actually evaluates* the [cumulative] impacts of the proposed activity in light of [the potential post-issuance] conditions.”¹⁵³ This evaluation “must be completed *before* any General permit is issued.”¹⁵⁴ Deferring the statutorily mandated cumulative-impact analysis to the regional or district level is arbitrary and capricious.¹⁵⁵

Similarly, deferring the significant-effects determination required by NEPA to the regional or district level is also arbitrary and capricious. The Corps may not issue a FONSI that is entirely based on future analysis and assumptions about what district engineers may or may not find or require later in time.

The Corps’ effects analysis in each NWP decision document begins by essentially conceding that a minimal-cumulative-impact or significant-effects determination is impossible at the national level. At the outset, the Corps notes that the cumulative effects it is supposed to be analyzing “may vary by aquatic ecosystem types and geographic regions.”¹⁵⁶ Some of these ecosystems “are at or near ecological thresholds . . . where additional disturbances,” such as NWP activities, “may cause those aquatic ecosystems to shift to an alternative state with substantially different structure and functions.”¹⁵⁷ However, because the Corps does not know where any given NWP may be used, and because the ecosystems where it may be used are “complex[]” and “dynamic[],” the Corps admits that it is “difficult to predict whether or not the cumulative use of th[e] NWP during the five year period it is in effect may, or may not, cause no more than minimal adverse cumulative effects.”¹⁵⁸ According to the Corps, the difficulty in predicting whether more-than-minimal cumulative effects will result is compounded by a “lack of data” and “data gaps,”¹⁵⁹ like those described above. Together, the uncertainty about where the NWPs may be used combined with the lack of data make “it difficult to conclude, *with any confidence*, that the issuance of th[e] NWP is [not] likely to cause more than minimal cumulative adverse environmental effects.”¹⁶⁰

¹⁵² See *Bulen*, 429 F.3d at 501.

¹⁵³ *Protect Puget Sound*, 417 F. Supp. 3d at 1366 (emphasis added).

¹⁵⁴ 40 C.F.R. § 230.7(b) (emphasis added).

¹⁵⁵ *Protect Puget Sound*, 417 F. Supp. 3d at 1366; *Hurst*, 604 F. Supp. 2d at 895, 901 (applying the same analysis in the NEPA and CWA contexts).

¹⁵⁶ *Id.* at 74.

¹⁵⁷ *Id.* at 77.

¹⁵⁸ *Id.* at 78.

¹⁵⁹ *Id.* at 83.

¹⁶⁰ *Id.*

The Corps' solution to this quandary? Defer the effects determinations it is required to make at the national level to the regional and district level.¹⁶¹ The Corps even provides some guidance for how this should occur at the regional and district level, noting that a "stressor-based approach" is probably "not appropriate"; instead, regional and district engineers should use an "effects-based approach" and consider "ecological thresholds" when deciding whether NWP activities are resulting "in more than minimal cumulative adverse environmental effects in a waterbody, watershed, or other geographic region"¹⁶² or having a "a reasonably foreseeable significant impact on the quality of the human environment."¹⁶³

But despite what the Corps seems to think, deferring these effects determinations to the regional or project level "cannot compensate for the absence of a *nationwide* cumulative impacts determination."¹⁶⁴ Indeed, courts have repeatedly found that, under the CWA, "the 'cumulative impacts' of a *general* permit cannot be evaluated in the context of a *single* project."¹⁶⁵ Similarly, determining the cumulative effects of a "cluster of activities permitted in a *region* . . . does not provide any information about the cumulative impacts of the *nationwide permit*."¹⁶⁶ Therefore, the Corps' repeated assurance that district or division engineers "will" ensure that (1) "activities with more than minimal cumulative adverse environmental effects are not being authorized by the NWP" and (2) that effects will not be significant under NEPA is meaningless.¹⁶⁷

What's more, this contradicts the role of the district engineer as outlined in the Corps own Proposed Rule. According to the language of the rule, "district engineers do not need to do comprehensive cumulative effects analyses for NWP verifications for a specific activity" precisely because the Corps supposedly conducted a nationwide cumulative effects analysis when it promulgated the permit.¹⁶⁸ Instead, district engineers need only prepare a "brief statement" regarding the activity's effects during permit verification.¹⁶⁹ This attempt to substitute nationwide impacts analysis for project-level considerations has already been found to be unlawful, yet the Corps insists on repeating its mistakes here.

Put simply, when "[f]aced with incredible diversity in both the environment and the activities permitted under [the] NWP[s]. . . , the Corps effectively threw up its hands and turned

¹⁶¹ *Id.* at 82 ("Because of differences between non-linear and linear responses by ecosystems to cumulative impacts, and other variables such as aquatic ecosystem resilience, the degree to which aquatic ecosystems have been affected by past human activities and natural disturbances, and gaps in understanding how aquatic ecosystems respond to multiple, interacting disturbances, a reactive approach by division and district engineers to address the potential cumulative adverse environmental effects caused by activities authorized by this NWP during the period it is in effect is warranted.").

¹⁶² *Id.* at 77–84.

¹⁶³ *Id.* at 83.

¹⁶⁴ *Hurst*, 604 F. Supp. 2d at 895 (emphasis added).

¹⁶⁵ *Wyo. Outdoor Council*, 351 F.Supp.2d at 1243 (emphasis added).

¹⁶⁶ *Hurst*, 604 F. Supp. 2d at 895 (some emphasis added).

¹⁶⁷ NWP 12 Drft. Decision Doc. at 58.

¹⁶⁸ 90 Fed. Reg. at 26105.

¹⁶⁹ *Id.*

the impact analyses over to the district engineers.”¹⁷⁰ This deferral is arbitrary and capricious and violates the CWA and NEPA.

v. The NWP’s allow more than minimal impacts to streams.

Numerous NWP’s are insufficiently protective of streams, either allowing unlimited impacts, allowing district engineers to waive impact limits, or placing limits on the amount of impact that can occur at one location but authorizing impacts at an unlimited number of locations. The NWP’s should have both area and linear impact limits that cannot be waived. Headwater streams, in particular, need more protection given their relative importance in providing habitat, hydrologic benefits, and water quality benefits to downstream waters.

As the Corps well knows:

The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.¹⁷¹

Although the NWP’s have never been sufficiently protective of stream networks and their associated riparian zones, the Corps included a 300 linear foot limit on many permits for decades before removing it with little explanation in 2021. The Corps first adopted the 300 linear foot limit in its reissuance of the NWP’s in 2000, for NWP’s 39, 40, 42, and 43, noting that the restriction was necessary to “substantially increase the protection of the Nation’s aquatic environment.”¹⁷²

In the 2007 reissuance of the NWP’s, the Corps reaffirmed the importance of the linear foot limit, explaining: “Even though the acreage limits of the NWP’s 29, 39, 40, 42, and 43 also apply to losses of stream bed, the linear foot limit is a useful tool for ensuring minimal adverse effects to these linear aquatic systems.”¹⁷³ As the Corps recognized, streams are linear systems, and therefore a limit on the length of stream bed losses, in addition to the acreage limit, is necessary.¹⁷⁴

In 2012, the Corps adopted the half-acre limit and the 300 linear foot limit on stream-bed losses for NWP 21, NWP 50, and for new NWP’s 51 and 52.¹⁷⁵ The Corps again made clear that

¹⁷⁰ Cf. *Protect Puget Sound*, 417 F. Supp. 3d at 1366.

¹⁷¹ U.S. EPA, *Connectivity of Streams & Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* ES-2 (Jan. 2015) (“Connectivity Report”); see also Comments of Richard Rheinhardt (Nov. 2020) (Attachment A).

¹⁷² See Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12818, 12818–19 (Mar. 9, 2000).

¹⁷³ Reissuance of Nationwide Permits, 72 Fed. Reg. 11092, 11097 (Mar. 12, 2007).

¹⁷⁴ *Id.*

¹⁷⁵ Reissuance of Nationwide Permits, 77 Fed. Reg. 10184 (Feb. 21, 2012).

the “300 linear foot limit is appropriate to ensure that losses of stream beds result in minimal adverse effects on the aquatic environment,” and it noted that “Division engineers may add regional conditions to an NWP to reduce the linear foot limit to an amount less than 300 linear feet.”¹⁷⁶ Similarly, the Corps stated with respect to newly adopted NWP 51, that both the “1/2-acre and 300 linear foot limits are necessary to ensure that this NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment.”¹⁷⁷

In the 2017 final NWPs,¹⁷⁸ the Corps rejected suggestions both to increase the linear foot limit (to 500 linear feet) and to eliminate the linear foot limit altogether and rely simply on the half-acre limit. The Corps reiterated that “both the ½-acre and 300 LF limits are necessary to ensure that the activities authorized by this NWP cause no more than minimal individual and cumulative adverse environmental effects.”¹⁷⁹

In 2021, the Corps removed the 300 linear foot limit without adequately explaining how a several-fold increase in impacts to streams could be considered minimal.¹⁸⁰ The Corps’ failure to ensure against stream loss violated the Clean Water Act then and continues to do so today. Using the Corps’ own estimate, the half-acre impact limit—without any linear foot restriction—allows the fill of nearly 3,500 linear feet of stream bed under first order streams. For activities that impact less than the full width of a stream, the half-acre limit could allow miles of stream to be destroyed with each use. These impacts cannot be considered minimal, particularly for permits like NWPs 29 and 39, which are expected to be used nearly 10,000 times combined over the authorized period.

C. The NWPs fail to consider other factors set forth in the Section 404(b)(1) Guidelines.

In addition to the considerations discussed above, the 404(b)(1) Guidelines impose additional obligations on the Corps. The Guidelines provide a laundry list of items the Corps must assess *before* issuing a permit, including:

- Whether the NWP “will cause or contribute to significant degradation of waters of the United States.”¹⁸¹

¹⁷⁶ 77 Fed. Reg. at 10189–90.

¹⁷⁷ 77 Fed. Reg. at 10237.

¹⁷⁸ Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1871 (Jan. 6, 2017).

¹⁷⁹ 82 Fed. Reg. at 1909 (referring to NWP 21 Surface Coal Mining Activities).

¹⁸⁰ An agency cannot ignore prior factual determinations without providing a “reasoned explanation” for its proposed departure from “facts and circumstances that underlay or were engendered by the prior policy.” See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

¹⁸¹ 40 C.F.R. § 230.10(c).

- Whether the NWP will jeopardize ESA-listed species or result in the destruction or adverse modification of critical habitat.¹⁸²
- The “potential short-term or long-term effects . . . on the physical, chemical, and biological components of the aquatic environment,” including effects on physical substrate, water circulation, fluctuation, salinity, suspended particulate, turbidity, contaminants, and aquatic ecosystems.¹⁸³
- The potential secondary and cumulative effects of the NWP.

Importantly, the Corps may not issue an NWP if it determines “*there [is not] sufficient information to make a reasonable judgment as to whether the [authorized activities] will comply with [the] Guidelines.*”¹⁸⁴ Here, the Corps concedes as much, as discussed above in Section II.B.ii. Although the Corps again attempts to evade this requirement by deferring its effects analysis to the regional or district level, the Guidelines explicitly prohibit this: “In the case of a General permit, [the required] findings shall be prepared *at the time of issuance of that permit rather than for each subsequent discharge under the authority of that permit.*”¹⁸⁵ Elsewhere, the Guidelines reiterate, “the evaluation [of potential individual and cumulative impacts] must be completed *before* any General permit is issued.”¹⁸⁶ The regulations could not be clearer.

To the extent the Corps attempts to analyze these factors at all at this stage, that analysis is wholly perfunctory and inadequate. Take, for example, cumulative impacts. At the most basic level, the Corps cannot assess cumulative effects without first considering and disclosing the direct and indirect effects of the NWPs. The agency’s cumulative-impact analysis fails for that reason alone.

More to the point, besides disclosing the predicted number of times that NWPs will be used over the next five years, there is no *analysis* of the cumulative effect of that use—even for those NWPs that the Corps has had rejected in court, such as NWP 12.

Comparing the draft decision documents for the proposed NWPs reveals just how flimsy—and canned—the Corps’ assessment of cumulative effects is. For example, we compared the text of NWP 3 with NWP 12. NWP 3 authorizes the “repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill.”¹⁸⁷ NWP 12 authorizes “the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities.”¹⁸⁸ The cumulative effects section of the EAs for NWP 3 and NWP 12 are *virtually identical* except for substituting the number of times each NWP is predicted to be used.¹⁸⁹ The

¹⁸² 40 C.F.R. § 230.10(b)(3).

¹⁸³ 40 C.F.R. § 230.11.

¹⁸⁴ 40 C.F.R. § 230.12(a)(3) (emphasis added).

¹⁸⁵ 40 C.F.R. § 230.12(b) (emphasis added).

¹⁸⁶ 40 C.F.R. § 230,7(b).

¹⁸⁷ NWP 3 Drft. Decision Doc. at 1.

¹⁸⁸ NWP 12 Drft. Decision Doc. at 1.

¹⁸⁹ Compare NWP 3 Drft. Decision Doc. at 64–78, 94–105 with NWP 12 Drft. Decision Doc. at 69–84, 106–17.

Corps cannot seriously assert that the cumulative effect of building new pipelines hundreds of miles in length is the same as conducting maintenance on existing fills. The cumulative effects analysis text is boilerplate, not the meaningful analysis required by the Clean Water Act.

Another particularly egregious failure is the Corps' refusal to consider climate change in any context. When issuing NWP's in 2017, the Corps explained that "[c]limate change represents one of the greatest challenges our country faces with profound and wide-ranging implications for the health and welfare of Americans, economic growth, the environment, and international security."¹⁹⁰ In 2021, it "recognize[d] the importance of climate change resiliency and both mitigation and adaptation efforts to address climate change."¹⁹¹ Accordingly, the "Corps discusse[d] climate change in the context of the NWP reissuance in each of the national decision documents for the 41 NWP's."¹⁹² This included disclosure of NWP's contributions to climate change (particularly NWP 12)¹⁹³ and ways NWP's could help communities adapt to climate change.¹⁹⁴ The Corps also discussed (albeit, briefly) how climate change contributed to cumulative effects with NWP's.¹⁹⁵

As far as we can tell, the current draft rule and decision documents do not mention climate change at all—as if climate change has been solved and is no longer something the Corps needs to consider in its permitting decisions. Of course, nothing could be further from the truth. The Corps' refusal to consider climate change is a political decision. Thankfully, the application of federal laws is not dependent on politics. The Corps will fail its statutory obligations if it continues to act as if climate change does not exist.

III. The proposed NWP's violate NEPA.

NEPA is "designed to prevent agencies from acting on incomplete information and to 'ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.'"¹⁹⁶ To this end, NEPA obligates the Corps to take a "hard look" at the environmental impacts of NWP issuance¹⁹⁷ and prepare an environmental impact statement if "*any significant environmental impacts might result*" from the issuance of the NWP's.¹⁹⁸

¹⁹⁰ 82 Fed. Reg. at 1878.

¹⁹¹ Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73522, 73527 (Dec. 27, 2021).

¹⁹² 86 Fed. Reg. at 73527.

¹⁹³ 82 Fed. Reg. at 1891.

¹⁹⁴ 82 Fed. Reg. at 1878–79.

¹⁹⁵ See, e.g., NWP 12 Drft. Decision Doc. at 62–66 (2021).

¹⁹⁶ *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1214 (11th Cir. 2002) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)) (internal quotation marks omitted).

¹⁹⁷ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

¹⁹⁸ *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (first emphasis in original); 42 U.S.C. § 4332(2)(C).

Because the Corps' obligations under NEPA and the Clean Water Act largely overlap, the NEPA shortcomings associated with the draft decision documents are largely addressed in Section II.B above. Below, we highlight NEPA-specific issues not raised above.

A. The Corps does not adequately evaluate alternatives.

NEPA requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.”¹⁹⁹ Despite recognizing that “the text of NEPA . . . requires consideration of a reasonable range of alternatives,”²⁰⁰ the agency makes no real effort to comply with NEPA's requirements.

As an initial matter, none of the alternatives provided offer alternatives to the proposed *discharge*, just alternatives to the permitting procedure. This ignores the purpose of the alternatives analysis, which is to understand and evaluate the alternatives to the regulated action—in this case, the discharge.

The Corps argues that general condition 23 and the pre-construction notice process allow the district engineer to require on-site alternatives to a specific project.²⁰¹ But describing a future process that could be invoked if the preferred alternative is selected is not an alternatives analysis. Nor does a post-decision alternatives analysis satisfy NEPA.²⁰²

To the extent an analysis of alternative *permitting schemes* was sufficient, the Corps' analysis still fails. Section 404(e) of the Clean Water Act provides for the issuance of general permits on a national, regional, or state level,²⁰³ yet the Corps does not consider whether state or regional permits would satisfy the purpose and need behind the NWPs. This failure is particularly inexcusable given the Corps' repeated concession that it cannot evaluate impacts on a nationwide scale given the diversity of conditions and that regional conditions are essential to the program.²⁰⁴

¹⁹⁹ 42 U.S.C. § 4332(2)(E).

²⁰⁰ *Id.* at 7.

²⁰¹ *Id.* at 8–9.

²⁰² *See, e.g., Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005) (“NEPA was passed by Congress to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action *before* the government launches any major federal action.” (emphasis added)).

²⁰³ 33 U.S.C. § 1344(e).

²⁰⁴ NWP 12 Drft. Decision Doc. at 57 (“After this NWP is issued, division engineers prepare supplemental documentation to address whether regional conditions, regional suspensions, or regional revocations of this NWP are necessary to help ensure that the activities authorized by this NWP within a particular geographic area . . . result in no more than minimal individual and cumulative adverse environmental effects.”); *see also id.* at 6 (“Regional conditions are imposed to protect important regional concerns and resources.”); 87 (noting that regional conditions provide “an enhanced ability to address differences in aquatic resource functions, services, and values among different regions across the nation”); 54 (“[I]t is necessary to account for

The Corps acknowledges the existence of regional or programmatic general permits, but does not conduct any analysis of these alternatives.²⁰⁵ Instead, despite repeatedly relying on engaged division engineers to implement the NWP, the Corps flippantly dismisses regional general permits as an impractical and inefficient method of review.²⁰⁶ In other words, division engineers are essential to evaluating the regional environmental impacts of NWPs, but requiring the same analysis for regional general permits is impractical and inefficient. This violates NEPA.

B. The Corps may not tier its NEPA analysis to a non-NEPA document.

As addressed above, rather than assess impacts at the national level, the Corps improperly defers its analysis to the district and regional level. This presents additional issues in the NEPA context, because the Corps is effectively trying to tier its NEPA analysis to a non-NEPA document. Tiering “refers to the coverage of general matters in broader environmental impact statements or environmental assessments . . . with subsequent narrower or more detailed statements or environmental analyses (such as an analysis of how one of those conceptual options could be implemented at a specific site)” at a later time.²⁰⁷ By their own admission, the draft decision documents provide “a general assessment of individual and cumulative effects”²⁰⁸ and “[a]fter [the NWPs are] issued, division engineers [will] prepare supplemental documentation.”²⁰⁹ This is tiering.

Unfortunately for the Corps, under the recently issued Interim Final NEPA Rule, tiering is allowed only for reviews of activities under Section 408.²¹⁰ Even if tiering were allowed in the NWP context, “tiering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA.”²¹¹ The Corps cannot, therefore, tier its NEPA analysis to non-NEPA documents produced by district engineers.

C. The Corps cannot rely on potential mitigation to offset effects under NEPA.

In addition to the reasons addressed in Section II.B.iii.b above, the Corps’ suggestion that “compensatory mitigation required by district engineers” will ensure insignificant impacts is flawed because compensatory mitigation is insufficient as a mechanism to reduce impacts for

individual and regional variations when evaluating wetlands and the functions and services they provide.”).

²⁰⁵ *Id.* at 7.

²⁰⁶ *Id.* at 85 (“[I]t would take a substantial amount of time to issue those regional general permit and programmatic general permits.”).

²⁰⁷ 33 C.F.R. § 333.61(q); *see also Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir. 2002) (tiering involves “avoiding detailed discussion by referring to another document containing the required discussion”).

²⁰⁸ NWP 12 Drft. Decision Doc. at 1.

²⁰⁹ *Id.* at 57.

²¹⁰ 33 C.F.R. § 333.31(a).

²¹¹ *Kern*, 284 F.3d at 1073.

NEPA purposes. Though what qualifies as compensatory mitigation can vary,²¹² in many instances, it simply entails purchasing “[c]redits from approved mitigation banks or in-lieu fee programs.”²¹³ Therefore, it may not include *any* activity in the specific location where environmental effects attributable to NWP are occurring.²¹⁴ While such mitigation measures may satisfy some of permittees’ obligations under the Clean Water Act,²¹⁵ money payouts do not necessarily make the effects of NWP activities less significant for *NEPA* purposes. Rephrased, contributing to an environmental improvement in one location does not reduce the significance of environmental impacts of authorized activity at another location. And even if it did, simply pointing to the potential for compensatory mitigation—without at least some specifics to suggest it will reduce impacts below the significance threshold—does not satisfy NEPA. A promise to mitigate some effects in some capacity at some point in the future does not alleviate the need for an EIS or provide a hard look.

D. Environmental Impact Statements are required.

Agencies must prepare an Environmental Impact Statement (“EIS”) for “major Federal actions significantly affecting the quality of the human environment.”²¹⁶ If the need for an EIS is unclear, an agency may first prepare an Environmental Assessment (“EA”). An EA results in a determination that either: (1) an EIS is necessary or (2) an EIS is unnecessary because there will be no significant effects, and the project may proceed with a Finding of No Significant Impact (“FONSI”). A FONSI must document “*why . . . the selected alternative will not have a significant effect on the quality of the human environment.*”²¹⁷

If the evidence before the agency is inadequate to conclude that a major federal action will *not* have a significant effect on the environment, the agency must prepare an EIS. In other words, preparation of an EIS is necessary not only when the agency finds that the activity will have significant effects but also if the agency’s EA is insufficient to conclusively show that the activity will *not* have significant effects.

The latter is the situation here. The record before the Corps falls far short of demonstrating that the NWPs generally—and NWPs 3, 12, 13, 14, 19, 21, 29, 39, 41, 42, 43, 44, 50, 51, and 52 specifically—will not have significant effects on the environment. In fact, the record is replete with examples of how these NWPs may affect the environment.²¹⁸ Some of those effects are significant on their own; the combination of those effects easily surpasses the

²¹² Compensatory mitigation for Clean Water Act purposes is “the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purpose of offsetting unavoidable adverse impacts.” 40 C.F.R. § 230.92.

²¹³ NWP 12 Drft. Decision Doc. at 45.

²¹⁴ *Id.*

²¹⁵ *See* 33 C.F.R. § 330.1(e)(3).

²¹⁶ 42 U.S.C. § 4332(C).

²¹⁷ 33 C.F.R. § 333.16.

²¹⁸ *See infra* § II.B.iii.

“may significantly affect” bar. Because the record does not support a FONSI, the Corps must prepare an EIS for at least NWPs 3, 12, 13, 14, 19, 21, 29, 39, 41, 42, 43, 44, 50, 51, and 52.

E. The Corps’ approach suppresses public participation.

Courts “have consistently held that public involvement lies at the center of NEPA’s procedural requirements.”²¹⁹ In practical terms, this means that an agency must provide the public with sufficient information to meaningfully comment on the proposed agency action.

The Corps’ decision document is far from sufficient in this respect. Even if the Corps could lawfully forego an EIS in favor of an EA/FONSI (and it cannot),²²⁰ the Corps shirks NEPA’s public participation requirements for much the same reason that it fails to take a hard look at the impacts of the NWPs: deferral. By deferring a large component of the requisite impacts analysis to the regional and verification stages, the Corps has not provided “sufficient environmental information . . . to permit members of the public to weigh in with their views and thus inform the agency decision-making process.”²²¹ Instead, the Corps offers conclusory statements about why it cannot say more. For example:

- “Due to the large geographic scale of the affected environment (i.e., the United States and its territories), as well as the many past and present human activities that have shaped the affected environment, the affected environment can only be practicably described in general terms. In addition, for this environmental assessment it is not possible to describe the environmental conditions for specific sites where this NWP may be used to authorize regulated activities because those sites will be identified after this NWP is issued and goes into effect.”²²²
- “Given the geographic scope in which this NWP can be used to authorize activities under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899 (i.e., the United States and its territories), the wide variability in aquatic ecosystem structure and functions from site to site and from region to region, and the limited quantitative data available at a national scale on functions and services provided by various types of aquatic ecosystems, the analysis of potential environmental consequences of the issuance of this NWP is a qualitative analysis. In addition, if this NWP is issued, it will be issued before many specific sites for proposed NWP activities are identified. Therefore, the impact analysis in this environmental assessment is a general, qualitative analysis and cannot consider site-specific characteristics associated with a particular NWP activity.”²²³

²¹⁹ *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng’rs*, 674 F. Supp. 2d 783, 809 (S.D.W.V. 2009); see also *id.* (collecting cases).

²²⁰ See *supra* § III.D.

²²¹ *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng’rs*, 524 F.3d 938, 953 (9th Cir. 2008).

²²² NWP 12 Drft. Decision Doc. at 12.

²²³ *Id.* at 64.

- “When an NWP is issued or reissued by the Corps, division engineers issue supplemental documents that evaluate potential impacts of the NWP at a regional level, and assess cumulative impacts caused by this NWP on a regional basis during the period this NWP is in effect.”²²⁴

This tiering to non-NEPA documents is not only unlawful because it fails to take a hard look at the impacts of the NWPs,²²⁵ but it also leaves the public in the dark until it is too late.

The Corps cannot dismiss this concern by pointing to the regulatory efficiencies that NWPs are supposed confer. Congress authorized the Corps to issue general § 404 permits for certain categories of activities, but not to the exclusion of the Corps’ obligations under NEPA.²²⁶ To the extent that the Corps cannot provide the public with adequate information at this stage because the range of potential impacts is large, that is a problem of the Corps’ own making and one that the Corps is obligated to fix. “To be sure, accounting in advance for the broad range of possible impacts resulting from the wide variety [activities] authorized under [the NWPs] is a daunting task. But compliance with NEPA is not excused simply because compliance is difficult.”²²⁷

Not only does the Corps’ approach contravene NEPA’s public-participation requirements, it also produces a result that disenfranchises interested parties. Parties mounting NEPA challenges in court sometimes face the prospect of forfeiture under the rule that “[p]ersons challenging an agency’s compliance with NEPA must structure their participation so that it . . . alerts the agency to the [parties’] position and contentions, in order to allow the agency to give the issue meaningful consideration.”²²⁸

But the Corps’ approach creates a catch-22. Because the Corps defers major aspects of the impacts analysis to subsequent non-NEPA review, interested parties may not be apprised of the information necessary to develop and advance their positions and contentions in the first place.²²⁹ To make matters worse, there will almost certainly be parties that become interested in NWPs and the Corps’ NEPA process when, for example, a pipeline using NWP 12 is proposed for their area, and by then it may be too late for them to engage with the agency through NEPA at all.

The requirement that parties exhaust administrative remedies prior to challenging final agency decisions bakes in the assumption that those parties will have sufficient notice of agency actions that may affect them. The Corps approach to approving, for example, large oil and gas pipelines under NWP 12, before those projects have even been proposed throws that approach out the door in violation of NEPA and the APA.

²²⁴ *Id.* at 87.

²²⁵ *See supra* § II.B.

²²⁶ *See* 33 U.S.C. § 1344(e).

²²⁷ *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1066 (10th Cir. 2015) (McHugh, J., concurring).

²²⁸ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (alterations in original) (internal quotation marks omitted).

²²⁹ *Cf. id.* at 764.

IV. The proposed NWP's violate the ESA.

The “plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.”²³⁰ “To that end, the Endangered Species Act requires federal agencies ‘to afford first priority to the declared national policy of saving endangered [or threatened] species’—even when this goal conflicts with agencies’ ‘primary missions.’”²³¹

To this end, Section 7(a)(2) of the ESA commands each federal agency to ensure “that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.”²³² To ensure compliance with this substantive mandate, the ESA and its implementing regulations impose specific procedural duties on federal agencies to consult with the Fish and Wildlife Service (“FWS”) or the National Marine Fisheries Service (“NMFS”) before undertaking any action that “may affect” a listed species or its designated critical habitat.²³³ Those procedures are generally referred to as the Section 7 consultation process.

Section 7 consultation takes two forms: informal and formal. If, through informal consultation, FWS or NMFS determine “that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.”²³⁴ Otherwise, the action must proceed to formal Section 7 consultation.²³⁵

Formal Section 7 consultation focuses on the “action area” which includes “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.”²³⁶ It also requires FWS or NMFS to “[e]valuate” four different categories of information for the action area: (1) the “current status” of the species; (2) the “environmental baseline”; (3) the “cumulative effects” of non-federal actions; and (4) the “effects of the [agency] action.”²³⁷

The “environmental baseline” is “the condition of the listed species . . . in the action area, without the consequences to the listed species . . . caused by the proposed action.”²³⁸ “Cumulative effects” include “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action

²³⁰ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

²³¹ *Appalachian Voices v. U.S. Dep’t of Interior*, 25 F.4th 259, 264 (4th Cir. 2022) (quoting *Tenn. Valley Auth.*, 437 U.S. at 185).

²³² 16 U.S.C. § 1536(a)(2).

²³³ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

²³⁴ 50 C.F.R. § 402.13(c).

²³⁵ 50 C.F.R. § 402.14(a).

²³⁶ 50 C.F.R. § 402.02.

²³⁷ 50 C.F.R. § 402.14(g)(2)–(3).

²³⁸ 50 C.F.R. § 402.02.

subject to consultation.”²³⁹ And the “effects of the action” are “all consequences to listed species or critical habitat that are caused by the proposed action,” including “consequences occurring outside the immediate area involved in the action.”²⁴⁰

Ultimately, FWS or NMFS must “[a]dd the effects of the action and cumulative effects to the environmental baseline and[,] in light of the status of the species and critical habitat, formulate the Service’s opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.”²⁴¹ “Jeopardize the continued existence of” means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”²⁴² As noted above, federal agencies like the Corps may not authorize an action that is “likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.”²⁴³

A. The Corps must consult regarding the aggregate effects of each NWP.

The Corps declines to consult over its NWP program based on the assertion that no activities that “may affect” listed species or critical habitat are “immediately” authorized by the NWPs.²⁴⁴ The Corps conducts thousands of Section 7 consultations for NWP activities *every year*,²⁴⁵ because actions covered by these NWPs impact listed species and their designated habitats. In these situations, where an agency is “approv[ing] a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation,” the agency must still conduct programmatic Section 7 consultation.²⁴⁶ Programmatic consultation is necessary, in part, because consultation over *one* NWP project does not account for the effect on a species in combination with *other* NWP projects authorized under a given permit. The Corps’ approach is insufficient because it allows the aggregate effect of its permits to slip through the cracks of siloed project-by-project consultations. The end result is the NWP program inflicts an unknown overall level of harm on protected species and their habitats—precisely the result the consultation requirements seek to avoid.

To be clear, the “action” the Corps must consult over here is the promulgation of the NWPs—not the subsequent authorization to use an NWP. Section 7 consultation is required for

²³⁹ 50 C.F.R. § 402.02.

²⁴⁰ 50 C.F.R. § 402.02.

²⁴¹ 50 C.F.R. § 402.14(g)(4).

²⁴² 50 C.F.R. § 402.02.

²⁴³ 16 U.S.C. § 1536(a)(2).

²⁴⁴ 90 Fed. Reg. at 26128.

²⁴⁵ 90 Fed. Reg. at 26129.

²⁴⁶ 50 C.F.R. § 402.02; *id.* § 402.14(i)(7) (explaining when an incidental take statement is necessary for biological opinions prepare for programmatic consultations).

any “action” that may affect species with action defined to include “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” specifically including “the promulgation of regulations.”²⁴⁷ Whether future project-specific consultations are required is unrelated to the legal question of whether the Corps’ NWP’s cross that threshold.²⁴⁸ By the Corps’ own admission, they do.²⁴⁹

As the Corps well knows, courts have consistently held that the agency has a duty to consult at the programmatic level. More than two decades ago, the U.S. District Court for the District of Columbia held in *National Wildlife Federation v. Brownlee* that the project-by-project approach does not comply with the ESA.²⁵⁰ In *Brownlee*, the Corps had failed to consult with FWS on four NWP’s.²⁵¹ Like here, the Corps argued that a general condition would ensure the protection of endangered species like the endangered Florida panther and that the agency could satisfy the ESA’s § 7(a)(2) requirement by consulting with FWS on individual projects authorized under the four NWP’s.²⁵²

The *Brownlee* court disagreed and cited ESA regulations that state “any request for formal consultation may encompass . . . a number of similar individual actions within a geographical area or a segment of a comprehensive plan [and that] [t]his does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.”²⁵³ As the *Brownlee* court explained, “overall consultation for the NWP’s is necessary to avoid piecemeal destruction of panther habitat through failure to make a cumulative analysis of the program as a whole.”²⁵⁴

In response to the *Brownlee* decision, the Corps commenced consultation for the 2007 NWP’s, but it did not complete consultation before the NWP’s were issued. For the 2012 NWP’s, the Corps continued consultation with both FWS and NMFS. NMFS eventually issued a jeopardy opinion.²⁵⁵ The Corps failed to conclude its consultation with the FWS.

In its jeopardy opinion, NMFS determined that the Corps had “failed to insure that activities that would be authorized by the [NWP’s] are not likely to jeopardize the continued existence of endangered or threatened species under the jurisdiction of NMFS.”²⁵⁶ The Corps, according to NMFS, did not have sufficient information “to know or reliably estimate the general

²⁴⁷ 50 C.F.R. § 402.02.

²⁴⁸ See *Nat’l Wildlife Fed’n v. Brownlee*, 402 F. Supp. 2d 1, 11 (D.D.C. 2005).

²⁴⁹ 90 Fed. Reg. at 26129 (acknowledging thousands of NWP consultations annually).

²⁵⁰ 402 F. Supp. 2d 1 (D.D.C. 2005).

²⁵¹ 402 F. Supp. 2d at 10.

²⁵² *Id.*

²⁵³ *Id.* (quoting 50 C.F.R. § 402.14(c)). The regulation is now codified at 50 C.F.R. § 402.14(c)(4) but has not substantively changed in relevant part. It does, however, now specifically include programmatic consultations in its scope.

²⁵⁴ *Id.*

²⁵⁵ See Nat’l Marine Fisheries Serv., *Endangered Species Consultation Biological Opinion on U.S. Army Corps of Engineers’ Nationwide Permit Program* (Feb. 2012) (Attachment B).

²⁵⁶ *Id.* at 221.

and particular effects of the activities that would be authorized,” to determine the effect of those activities on water quality or listed species, or to take action necessary to prevent direct or cumulative degradation of water quality and habitat.²⁵⁷

In 2017, the Corps ignored this jeopardy finding and the *Brownlee* decision and chose to forego consultation once more when reissuing its suite of NWP. Another federal court held that the Corps’ failure to consult on NWP 12 in particular violated the ESA, citing the same concerns as the *Brownlee* court.²⁵⁸

In the current proposed NWPs, the Corps yet again states that the action of authorizing or reauthorizing the NWPs does not involve any activity that would trigger consultation. For those activities that “may affect” a threatened or endangered species, consultation will purportedly be performed on the project level by the Corps districts.²⁵⁹ In those cases where there is no PCN requirement, the Corps has left it up to the applicant to determine, under General Condition 18, whether consultation is necessary.²⁶⁰

One of the primary problems with the Corps’ approach relates to the “action area” the Corps uses during project-specific Section 7 consultations. As the Corps has previously explained, “the action area” for the Corps’ NWPs “consists of the land and waters in the United

²⁵⁷ *Id.* at 223.

²⁵⁸ *N. Plains Res. Council v. U.S. Army Corps of Engineers*, 454 F. Supp. 3d 985, 994 (D. Mont. 2020). The Montana district court initially remanded NWP 12 to the Corps “for compliance with the ESA,” vacated the permit, and enjoined the Corps from authorizing any activities under it until Section 7 consultation was complete. *Id.* at 996. The court later narrowed the scope of both the vacatur and the injunction to dredge or fill activities associated with the construction of “new oil and gas pipelines,” but left its remand order unaltered. *N. Plains Res. Council v. U.S. Army Corps of Engineers*, No. CV 19-44-GF-BMM, 2020 WL 3638125, at *14 (D. Mont. May 11, 2020). The Supreme Court subsequently stayed the partial vacatur and injunction, “except as it applies to the Keystone XL pipeline,” but left the remand order and grant of summary judgment intact. *U.S. Army Corps of Engineers v. N. Plains Res. Council*, No. 19A1053, 2020 WL 3637662, at *1 (U.S. July 6, 2020).

²⁵⁹ 90 Fed. Reg. at 26128.

²⁶⁰ 90 Fed. Reg. at 26128. This additionally violates the ESA because the Corps cannot delegate its initial-effect determination to non-Federal permittees. *Cf. City of Tacoma, Washington v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006) (“[T]he ultimate responsibility for compliance with the ESA falls on the action agency.”). The ESA requires the “*Federal agency . . . [to] insure that any action authorized, funded, or carried out by such agency*” is not likely to jeopardize listed species or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2) (emphasis added). Consistent with this command, ESA implementing regulations require *the Corps* to determine, “at the earliest possible time,” whether “*its actions . . . may affect listed species or critical habitat.*” 50 C.F.R. § 402.14(a) (emphasis added). But General Condition 18 unlawfully turns the “ESA’s initial effect determination over to non-federal permittees, even though *the Corps* must make that initial determination.” *N. Plains*, 454 F. Supp. 3d at 994 (emphasis added).

States, its territories, and its possessions.”²⁶¹ But when engaging in project-specific NWP Section 7 consultations, the Corps uses a far narrower “action area” that is specific to the individual project. Through this process, the Corps *never* conducts an analysis using the actual NWP action area: “the land and waters in the United States, its territories, and its possessions.” This means that the Corps never fulfills the ESA requirement to assess jeopardy using the environmental baseline—which “includes the past and present impacts of all Federal, State, or private actions and other human activities *in the action area*, [and] the anticipated impacts of all proposed Federal projects *in the action area*”—or cumulative impacts—which are “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur *within the action area*.”²⁶² The end result is an inaccurate jeopardy assessment that violates the ESA.

This is not a hypothetical concern. For example, the Atlantic Coast Pipeline and Mountain Valley Pipeline—each with over 1,000 waterbody crossings—were both approved under NWP 12. Both pipelines would adversely affect the endangered Roanoke logperch, a freshwater fish.²⁶³ There are “approximately eight total populations of . . . logperch.”²⁶⁴ Mountain Valley Pipeline affected three populations; Atlantic Coast Pipeline would have affected a fourth.²⁶⁵ Yet despite the overall adverse effect of these NWP 12 projects on logperch, project-specific jeopardy analysis for each pipeline ignored the adverse effect of the other because each pipeline defined “action area” to exclude the other project. If these NWP 12 projects together would have jeopardized Roanoke logperch, no one would have known until it was too late. This is precisely why formal Section 7 consultation is necessary for NWPs.

²⁶¹ See U.S. Army Corps of Eng’rs, *Biological Assessment for the Proposed Issuance and Reissuance of the 2021 Nationwide Permits* 6 (Jan. 2, 2021), <https://perma.cc/H8N5-72KH>.

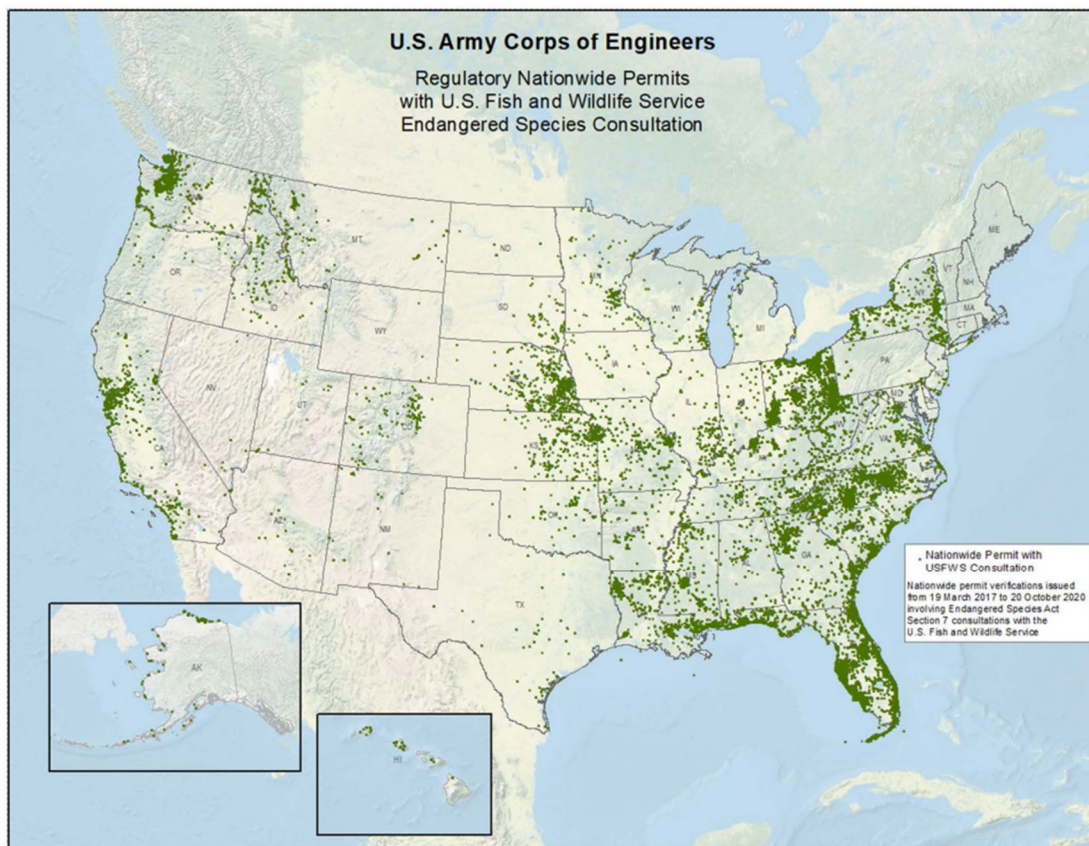
²⁶² 50 C.F.R. § 402.02.

²⁶³ See FWS, Biological Opinion for ACP 38–39 (Sept. 11, 2018), <https://perma.cc/DJ24-MMQ6> (“ACP BiOp”); FWS, Biological Opinion for MVP 23–24 (Nov. 21, 2017), <https://perma.cc/N27C-UNQE> (“MVP BiOp”).

²⁶⁴ *Id.* at 10.

²⁶⁵ Compare *id.* (listing populations) with ACP BiOp 18–19; MVP BiOp 14–16. The Atlantic Coast Pipeline project was cancelled by developers in July 2020.

The map below, produced by the Corps in its biological assessment for the 2021 NWP, also illustrates this point. As the map shows, there are significant clusters of projects approved with NWPs. It is very likely that multiple projects in an area adversely affect the same species. It is also almost certain that this overall effect is missed in the Corps' project-specific Section 7 consultation because of the way it defines project-specific action areas.



Locations of NWP activities by the Corps from March 19, 2017, to October 20, 2020, where ESA Section 7 consultations (formal, informal, and programmatic) were conducted with the U.S. FWS for those NWP activities

In summary, the Corps' refusal to complete programmatic Section 7 consultation violates the ESA, as recognized by the *Brownlee* court, which emphasized that ESA consultation over an action may not be postponed for the purpose of segmenting that action into smaller actions and consulting over the smaller actions.²⁶⁶ With the reauthorization of the NWPs, the Corps is attempting to improperly segment the impacts of the NWPs into all the individual impacts of the activities authorized under any particular permit. This is not allowed under the ESA.

²⁶⁶ See also *Lane County Audubon v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992) (holding management guideline governing timber sales was an agency action, and therefore postponing ESA consultation to individual sales was prohibited); *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (holding that the agency violated the ESA by refusing to consult on effects of oil and gas plan and that consultation at individual lease stage is insufficient).

B. The Corps cannot rely on General Condition 18 to satisfy the ESA.

The Corps overwhelmingly relies on General Condition 18 in an attempt to satisfy its ESA obligations. General Condition 18 states that “[n]o activity is authorized under any NWP which ‘may affect’ a listed species or critical habitat, unless ESA Section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed.”²⁶⁷ According to the Corps, this requires that “any proposed NWP activity that ‘may affect’ listed species or critical habitat will undergo an activity-specific ESA Section 7 consultation, [therefore] there is no requirement that the Corps undertake programmatic consultation for the NWP Program.”²⁶⁸ For the reasons explained above, this does not satisfy the ESA. It also cannot satisfy the ESA because the Corps’ assertions here are not true.

In 2025, the Corps verified the use of NWPs 3, 33, and 45 to reconstruct a railroad on the North Carolina-Tennessee state line damaged by Hurricane Helene. Because the reconstruction adversely affects endangered species, the Corps initiated formal Section 7 consultation with FWS, but the Corps did not complete consultation before verifying use of the NWPs. A group of river advocates challenged the Corps’ verifications on the grounds that the project did not comply with General Condition 18 because project-specific Section 7 consultation had not “been completed.” In response to the litigation, the Corps asserted that General Condition 18 does not actually require the completion of Section 7 consultation but only initiation of that process. The most the Corps could say in court was that it “ha[d] completed ‘informal consultation,’” with formal Section 7 consultation forthcoming (consultation still has not been completed now ten months after work began).²⁶⁹ The Corps specifically rejected “Plaintiffs’ argument . . . that no NWPs could be verified until formal ESA Section 7 consultation is complete.”²⁷⁰

The Corps cannot have it both ways—arguing that programmatic Section 7 consultation is unnecessary because General Condition 18 prohibits NWP projects from moving forward “unless ESA Section 7 consultation . . . *has been completed*” while arguing at the project level that General Condition 18 is no bar to projects moving forward *before* Section 7 consultation is complete. As the Hurricane Helene example shows, the Corps does not implement General Condition 18 as presented in this rulemaking. When pressed, either at the programmatic- or project-level, the Corps’ consistent response is that ESA compliance is not required. This cannot be squared with the “plain intent of Congress in enacting [the Endangered Species Act] . . . to halt and reverse the trend toward species extinction, whatever the cost.”²⁷¹

²⁶⁷ 90 Fed. Reg. at 26158.

²⁶⁸ 90 Fed. Reg. at 26130.

²⁶⁹ Fed. Agencies’ Opp’n to Pls’ Second Mot. for Prelim. Inj. at 17, *Am. Whitewater v. U.S. Army Corps of Engr’s*, No. 1:24-cv-00284-MR-WCM (W.D.N.C. Feb. 25, 2025) (Attachment C).

²⁷⁰ *Id.*

²⁷¹ *Tenn. Valley Auth.*, 437 U.S. at 184.

C. Use of emergency Section 7 consultation procedures further undermines the Corps' argument that programmatic consultation is not required.

To be sure, the Corps and FWS were exercising emergency consultation procedures²⁷² in connection with the Hurricane Helene example above. Exercise of emergency Section 7 consultation procedures should be rare. But now the Corps has been instructed to regularly use emergency Section 7 procedures for energy projects due to the presidentially declared “energy emergency.”²⁷³ This requirement has significant implications, particularly for NWP 12 which authorizes construction of energy pipelines. Emergency Section 7 consultation procedures purport to allow the Corps to take action—presumably including verification of NWPs—before completing Section 7 consultation.²⁷⁴ Regardless of whether an emergency actually exists (in connection with the “energy emergency,” it does not), the point is that invoking emergency procedures makes it less likely that consultation will be completed before project-specific activities move forward—which is exactly what happened with Hurricane Helene—underscoring the need for programmatic consultation. In other words, routine invocation of emergency procedures makes it even less likely that General Condition 18 will serve the function asserted by the Corps—to prevent individual projects from moving forward until they comply with Section 7. For this reason, too, the Corps cannot rely on that General Condition to reach a “no effect” determination at the programmatic stage. Instead, the Corps must complete consultation at the programmatic stage accounting for the use of “emergency procedures” for NWP energy projects.

D. Recent amendments to ESA implementing regulations have no bearing on the Corps' duty to consult.

Perhaps sensing the weight of authority against it, the Corps advances one new argument in its proposal. In short, it contends that “the 2015 and 2024 amendments to 50 C.F.R. part 402” support its claim that “the issuance or reissuance of the NWPs has ‘no effect’ on listed species or designated critical habitat.”²⁷⁵ But neither of these amendments has any impact on the Corps' duty to consult.

i. The 2015 amendments confirm programmatic Section 7 consultation is required.

The 2015 amendments the Corps references addressed when it is appropriate to provide an incidental take statement (“ITS”) along with a biological opinion during “programmatic Section 7 consultation.” Specifically, the amendments provided that an ITS is *not* required “at the programmatic level” for “framework programmatic actions,”²⁷⁶ even if formal Section 7

²⁷² See 50 C.F.R. § 402.05 (outlining emergency consultation procedures).

²⁷³ See Executive Order 14,156 (Jan. 20, 2025).

²⁷⁴ See 50 C.F.R. § 402.05.

²⁷⁵ 90 Fed. Reg. at 26129.

²⁷⁶ Framework programmatic action means:

[F]or purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or

consultation is.²⁷⁷ In its preamble to the rule, the Services identified the Corps' NWP regime as such a framework program.²⁷⁸ The Corps now suggests that this reference means that “the Corps’ NWP program [is] an example of a framework action at a national scale that can address *ESA Section 7 consultation requirements* at a later time as appropriate, as specific activities are authorized, funded, or carried out.”²⁷⁹

The language of the 2015 amendments, however, only allowed FWS and NMFS to avoid issuing an *ITS* for framework programmatic actions. It did not allow agencies to postpone “ESA Section 7 consultation requirements” writ large, as the Corps suggests.²⁸⁰ If anything, the language of the 2015 amendments support the position that consultation is necessary. Contrary to the Corps’ suggestion, FWS and NMFS took pains to point out that the 2015 amendment’s “altered view as to *incidental take* for framework programmatic actions . . . does not undermine the *duty to consult* under Section 7(a)(2) of the ESA.”²⁸¹

Indeed, the notion that “[f]ramework programmatic actions *will* trigger formal consultation *if the action may affect* listed species or their designated critical habitat” is the very premise of the 2015 rule.²⁸² If no consultation were needed at the programmatic level—as the Corps seems to imply—there would be no need for *either* a biological opinion *or* an *ITS*, and no need for a rule saying the latter is not required when the former is.²⁸³ The Services decided to leave the programmatic consultation requirement untouched, however, because the “analysis in a biological opinion allows for a broad-scale examination of a [framework programmatic action’s] potential impacts on a listed species and its designated critical habitat—an examination that is *not as readily conducted when the later, action-specific consultation occurs on a subsequent action developed under the program framework.*”²⁸⁴

In sum, no reading of the 2015 rule and its preamble supports the Corps’ argument.

carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

50 C.F.R. § 402.02.

²⁷⁷ Interagency Cooperation—Endangered Species Act of 1973, as Amended, 80 Fed. Reg. 26832, 26835–45 (May 11, 2015).

²⁷⁸ 80 Fed. Reg. at 26835.

²⁷⁹ 90 Fed. Reg. at 26128 (emphasis added).

²⁸⁰ See 50 C.F.R. § 402.14(7) (stating that for a “framework programmatic action, an incidental take statement is not required at the programmatic level”).

²⁸¹ 80 Fed. Reg. at 26833 (emphasis added).

²⁸² 80 Fed. Reg. at 26833 (emphasis added).

²⁸³ 80 Fed. Reg. at 26835 (noting the 2015 rule is “specific to framework programmatic actions that require section 7 consultation and adopt a framework for the development of future actions”).

²⁸⁴ 80 Fed. Reg. at 26836 (emphasis added).

ii. The 2024 amendments are irrelevant to the Corps' programmatic Section 7 consultation obligation.

The Corps takes one last stab at shoring up its “no effect” determination by invoking the 2024 amendments to the ESA implementing regulations. These amendments made two primary changes to 50 C.F.R. part 402: (i) “amending the definition of ‘effects of the action’,” and (ii) “amending the definition of environmental baseline.”²⁸⁵ Insofar as the Corps is suggesting that the 2024 amendments alter the “may affect” trigger for either programmatic or site-specific consultation, it is mistaken. In the preamble to the 2024 rule, the Services plainly stated that, with the exception of revisions regarding reasonable and prudent measures in an incidental take statement, these “revisions do not make any changes to existing practice of the services in implementing Section 7(a)(2) of the Act.”²⁸⁶

In summary, the Corps is required to complete programmatic Section 7 consultation when issuing draft NWP. None of the Corps' new arguments change this obligation. If anything, the Corps' practice under the current (2021) NWP, and the recent executive instruction to use emergency Section 7 consultation procedures at the project level, confirms that programmatic Section 7 consultation is necessary. The Corps has largely avoided this requirement by dragging out litigation over its failure to consult until it reissues NWP, which, it has so far successfully argued, moots the pending litigation. The public, environment, and wildlife deserve better than this gamesmanship. Finalizing this rulemaking without completing Section 7 consultation will once again leave the Corps in violation of the ESA.

V. NWP 3

NWP 3 suffers from the same deficiencies discussed above for all NWP. Here, we underscore a specific problem regarding the Corps' application of the permit in response to natural disasters.

NWP 3 covers the “repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill authorized.”²⁸⁷ This includes “the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events.”²⁸⁸ For years, the Corps has explained that the “currently serviceable” limitation is key to its “similar in nature” and minimal impacts findings required under the Clean Water Act.²⁸⁹ The current draft permit

²⁸⁵ 90 Fed. Reg. at 26129.

²⁸⁶ Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 89 Fed. Reg. 24268, 24269 (Apr. 5, 2024).

²⁸⁷ 90 Fed. Reg. at 26139. Note that the Corps is not proposing any changes to NWP 3 from its 2021 promulgation, *see* 85 Fed. Reg. 57,321.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 94 (“The activities authorized by this NWP are sufficiently similar in nature and environmental impact to warrant authorization by a general permit. . . The restrictions imposed by the terms and conditions of this NWP will result in the authorization of discharges of dredged or fill material into waters of the United States that have similar impacts on the aquatic

explains that the permitted activities are “similar in nature” because they must be “part of maintaining existing, currently serviceable, structures or fills.”²⁹⁰ In responding to comments in 2021 that NWP 3 will cause significant adverse impacts, the Corps reiterated that the “currently serviceable” limitation would “ensur[e] no more than minimal adverse environmental effects” would occur.²⁹¹ It also relied on the “currently serviceable” limitation to reject commenters’ suggestions to put additional guardrails on the permit, including requiring a preconstruction notification (“PCN”) for all authorized activities.²⁹²

As to what “currently serviceable” means, the Corps gives repeated assurance that anything requiring full reconstruction is not currently serviceable and therefore not eligible for authorization under NWP 3. The Corps explains, NWP 3 “does not authorize the repair, rehabilitation, or replacement of structures that are no longer currently serviceable.”²⁹³ A structure is no longer currently serviceable if it “is no longer capable of providing any degree of operability [such that it] would have to be reconstructed to perform its intended function.”²⁹⁴ Therefore, “[i]f a derelict or non-operational structure requires repair, rehabilitation, or replacement, [those activities] must be authorized by individual permits or regional permits.”²⁹⁵

Despite those previous assurances, the Corps has recently explained that the “currently serviceable” limitation does not apply when the Corps is authorizing activities in response to “storms, floods, fire or other discrete events.”²⁹⁶ In those instances, the Corps claims it can approve any structure or fill under NWP 3 so long as the work is needed due to a “discrete event.” This limitless authorization far exceeds the lawful scope of NWPs for two reasons.

First, as explained above, NWPs may only be issued for activities that are “similar in nature.”²⁹⁷ Allowing any type of work to proceed under NWP 3, so long as that work is needed because of “storms, floods, fire or other discrete events,” is not a definable category of work. Unsurprisingly then, the Corps has made no effort in its draft NWP 3 decision document to show

environment, namely the replacement of aquatic habitats, such as wetlands and open waters, with structures or fills that are part of maintaining existing, currently serviceable, structures or fills, as well as the removal of accumulated sediment from canals associated with intake and outfall structures.”); *see also* NWP 3 Dec. Doc., 107 (2021) (“The timeframe in which the structure or fill requires some degree of repair, rehabilitation, or replacement is not as relevant to ensuring no more than minimal adverse environmental effects than the constraints imposed by the ‘currently serviceable’ and ‘minor deviations’ provisions of this NWP.”).

²⁹⁰ *Id.*

²⁹¹ 86 Fed. Reg. at 73528.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *See* Fed. Agencies’ Opp’n to Pls’ Second Mot. for Prelim. Inj. at 9, *Am. Whitewater v. U.S. Army Corps of Eng’rs*, No. 1:24-cv-00284-MR-WCM (W.D.N.C. Feb. 2, 2025) (“NWP 3 authorizes the repair or replacement of structures destroyed or damaged by storms, floods, and other discrete events.”) (Attachment C).

²⁹⁷ 33 U.S.C. § 1344(e)(1).

that this category of work is sufficiently “similar in nature” to justify promulgation of an NWP. The only common thread for those activities is that they are necessitated by a “discrete event.” That is insufficient to identify a category of activities that “are similar in nature and similar in their impact upon water quality and the aquatic environment.”²⁹⁸

Second, the Corps cannot make its required “minimal impacts” findings under the Clean Water Act, or comply with NEPA’s hard look and EIS requirements, without somehow limiting the amount of work that can occur under NWP 3. Stated differently, the “currently serviceable” limitation helped ensure NWP 3 would not be used for activities that cause more-than-minimal impacts. Without that limit, the Corps seems to think it can use the permit for any amount of work necessary to respond to a storm, flood, fire, or other discrete event. That unlimited category of work cannot qualify for an NWP because it risks more than minimal impacts individually and cumulatively.

Notably, nowhere in its woefully inadequate impacts analysis does the Corps consider the impacts from reconstruction work necessitated by natural disasters.²⁹⁹ Even if it had mentioned these types of activities, the Corps fails to adequately demonstrate how authorized activities will only have minimal adverse effects or qualify for a FONSI.

We are seeing those impacts in real time with the railroad reconstruction project discussed above. Flooding caused by Hurricane Helene washed away approximately 7 miles of railroad tracks along the Nolichucky River. The Corps relied on NWPs 3, 33, and 45 to authorize miles of in-stream work and the refilling and stabilizing of the railbed embankment.³⁰⁰ The Corps does not dispute that the railroad is not “currently serviceable” but argues NWP 3 is available anyway since the reconstruction was necessitated by a flood.³⁰¹ The permitted reconstruction work caused significant impacts, including disastrous impacts to an endangered aquatic species, harm to whitewater rapids vital to recreation, and a host of water quality issues on top of those already inflicted by Hurricane Helene. Individually, the impacts from this one reconstruction project are more than minimal. Cumulatively, this and other NWP 3 projects—around 3,890 annually according to the Corps’ estimates—far exceed relevant thresholds.³⁰²

As noted above, to defend its verification of the railroad rebuild in court, the Corps asserted that NWP 3 empowers it to authorize *any* reconstruction project following a natural disaster.³⁰³ It likens miles of embankment reconstruction to the replacement of electric utility lines knocked down in a storm, the Corps’ 2021 promulgation’s example of allowable

²⁹⁸ 40 C.F.R. § 230.7(a)(1).

²⁹⁹ See NWP 3 Drft. Decision Doc.

³⁰⁰ Letter from Amanda Jones Fuemmeler, USACE, to Matthew L. Adkins, CSX Transportation Inc., NWP Verification Letter, SAW-2024-02064 (Jan. 3, 2025).

³⁰¹ Federal Agencies’ Opposition to Plaintiffs’ Second Motion for Preliminary Injunction at 14, *American Whitewater v. U.S. Army Corps of Eng’rs*, No. 1:24-cv-00284-MR-WCM (W.D.N.C. Feb. 2, 2025).

³⁰² NWP 3 Drft. Decision Doc. at 65.

³⁰³ Fed. Agencies’ Opp. to Pls’ Second Mot. for Prelim. Inj. at 9, *Am. Whitewater v. U.S. Army Corps of Eng’rs*, No. 1:24-cv-00284-MR-WCM (W.D.N.C. Feb. 2, 2025).

reconstruction following a discrete event.³⁰⁴ Comparing the replacement of utility poles to a reconstruction project of this magnitude goes to show the unworkability of “limiting” activities to reconstruction following natural disasters. The only similarity in rebuilding a railroad, utility line, dam, bridge, or any of the limitless types of “structures”³⁰⁵ or necessary fills is not in the nature of the rebuild activity but only how the structure was damaged in the first place. This has no bearing on the types of impacts felt by the surrounding waters.

Even if the Corps read NWP 3 to be limited to currently serviceable structures following natural disasters, NWP 3 would still be unlawful due to its extraordinarily lacking impact analysis. First, there is *zero* mention of emergency reconstruction activities. This alone invalidates the Corps’ *carte blanche* use of NWP 3 to authorize any emergency reconstruction.

The impact analysis for NWP 3 also suffers from many of the same defects generally discussed above. The Corps admits that NWP activities “may result in permanent” and “complete losses of aquatic ecosystems,” with the actual severity of the potential impacts depending on activity- and site-specific factors.³⁰⁶ In other words, the NWP allows such a disparate array of activities with incalculable impacts that the Corps cannot determine whether they are similar in nature.³⁰⁷ If the impacts are so dependent on such a wide array of factors, those activities must be authorized via individual permits.

This is particularly concerning given the lack of oversight for NWP 3. NWP 3 does not even require the district engineer to be notified before most of the authorized activities take place, meaning that *no* substantive impact analysis will ever occur. Most activities can proceed without ever notifying the district engineer.³⁰⁸ In practice this means that massive infrastructure repairs, like the railroad rebuild on the Nolichucky River, may occur without the Corps ever considering the impacts. The CWA’s NWP program cannot lawfully allow for such flagrant abuse.

VI. NWP 12

NWP 12 poses particularly egregious threats to the Nation’s aquatic resources. The discussion below highlights specific harm that would be caused by the proposed permit and specific shortcomings in the Corps’ Clean Water Act and NEPA analyses for the proposed permit. The proposed permit also suffers from the systemic flaws described in Sections II, III, and IV above.

³⁰⁴ *Id.* (citing 89 Fed. Reg. at 73530).

³⁰⁵ NWP 3 Drft. Decision Doc. at 60 (citing 33 C.F.R. § 322.2(b)) (The River and Harbors Act’s defines structure as “*without limitation*, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.” (emphasis added)).

³⁰⁶ NWP 3 Drft. Decision Doc. at 54, 60, 62.

³⁰⁷ 33 U.S.C. § 1344(e).

³⁰⁸ 33 C.F.R. 330.1(e)(1).

NWP 12 authorizes activities “required for the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities . . . provided the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.”³⁰⁹ For linear projects like pipelines, the Corps defines “single and complete project” as “that portion of the total linear project . . . that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization.”³¹⁰ The Corps does not define “separate and distant.” In practice, the Corps uses this definition to authorize pipelines with thousands of waterbody crossings under the fiction that each individual crossing is a “single and complete project” that can be permitted under NWP 12 so long as each individual crossing does not cause the loss of greater than ½ acre of jurisdictional waters. According to the Corps’ estimates, NWP 12 has been used to authorize over 224,000 waterbody crossings over the past eighteen years—that equates to over 1,000 waterbody crossings each month over that time period.³¹¹

A. Allowing linear projects to be piecemealed *ad infinitum* violates the Clean Water Act, NEPA, and the APA.

As noted above, NWPs can only be promulgated and used for “activities . . . [that] cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.”³¹² Under NEPA, the Corps has also determined that NWPs do not have a significant impact on the human environment.³¹³ To stay below these statutory thresholds, the Corps generally prohibits NWPs from being used more than once on a “single and complete project.”³¹⁴ This limitation prevents permittees from arbitrarily breaking up bigger projects into smaller ones in an attempt to shoehorn their projects into NWPs and evade individual permit review.³¹⁵ Whether these and other anti-piecemealing safeguards actually kick in, however, depends on the Corps’ arbitrary definitions of “linear” and “non-linear” projects.

A “single and complete” non-linear project is defined as “the *total* project proposed or accomplished by one owner/developer or partnership or other association of

³⁰⁹ NWP 12 Drft. Decision Doc. at 1.

³¹⁰ 90 Fed. Reg. at 26166.

³¹¹ See NWP Decision Documents from 2026, 2021, 2017, 2012, and 2007.

³¹² 33 U.S.C. § 1344(e)(1).

³¹³ 90 Fed. Reg. at 26106 (“[T]he national decision document completed for each NWP includes an environmental assessment and a finding of no significant impact.”); see 42 U.S.C. § 4332(C).

³¹⁴ See 33 C.F.R. § 330.6(c) (providing that “the same NWP cannot be used more than once for a single and complete project”); 90 Fed. Reg. at 26157 (General Condition 15) (also providing that the “same NWP cannot be used more than once for the same single and complete project”).

³¹⁵ Cf. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (holding an agency violates NEPA “when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration”).

owners/developers.”³¹⁶ To ensure that this definition is not twisted to allow “piecemeal[ing],” non-linear projects “must” also have “independent utility” to qualify as a single and complete project.³¹⁷ Phases of a non-linear project have independent utility if they “would be constructed even if the other phases were not built.”³¹⁸ Thus, non-linear projects may *only* be piecemealed or segmented when their constituent phases are essentially stand-alone projects.

Linear projects, on the other hand, can be piecemealed ad infinitum. The Corps defines a “single and complete” linear project³¹⁹ as

That portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at *separate and distant* locations, *each crossing is considered a single and complete project* for purposes of NWP authorization.³²⁰

In effect, this definition allows large-scale pipeline projects to use NWP 12 an unlimited number of times, so long as the half-acre threshold is not exceeded at any one “separate and distant” crossing.

No similar “independent utility” requirement polices this apparently limitless piecemealing. Previously, the Corps has explained that the “concept of independent utility does not apply” to linear projects “because the crossings of waters of the United States between the point of origin of a linear project and its terminal point *are necessary for the linear project to fulfill its purpose.*”³²¹ Phrased slightly differently, “because *each separate and distant crossing* of waters of the United States *is necessary* to transport people, goods, or services from the point of origin to the terminal point,” each of those crossings lacks independent utility.³²² In effect, the Corps is saying that it does not apply an independent-utility requirement to single-and-complete linear projects because segments of a linear project *cannot have* independent utility.

This approach makes no sense. If avoiding piecemealing is the goal—and the Corps maintains it is—the Corps should (1) forbid NWPs from being used more than once on the same project.³²³ It does—but *only for non-linear projects*. If it wants to carve out a minor exception for project portions that can stand alone—since those projects are theoretically not being

³¹⁶ 90 Fed. Reg. at 26166 (citing 33 C.F.R. § 330.2(i)) (emphasis added).

³¹⁷ *Id.*

³¹⁸ *Id.* at 26165.

³¹⁹ In this context, “linear project” means a “project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point.” *Id.* at 26166.

³²⁰ *Id.* (emphasis added).

³²¹ Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1976 (Jan. 6, 2017) (emphasis added).

³²² *Id.* at 1951 (emphasis added).

³²³ As discussed more below, for NWP 12 this might involve multiple, separate discharges so long as those discharges collectively did not exceed the half-acre threshold.

“piecemealed” anyway—it should (2) require independent utility. It does—*but only for non-linear projects*. When it comes to linear projects, it turns these principles on their head and designs a regime that (1) allows NWP 12 to be used an unlimited number of times on the same overall project; and (2) forbids consideration of independent utility, as a linear-project segment can never have independent utility, which interferes with (1). This divergent treatment of linear projects is arbitrary, capricious, violates the CWA, and leads to significant impacts contradicting the Corps’ NEPA findings.

It also has real-world consequences. The ad infinitum piecemealing of linear projects turns acreage thresholds intended to keep impacts to a minimum into a fiction. Pipeline developers are free to impact as many acres of jurisdictional waters as they wish, so long as they do not impact more than a half-acre at any one crossing. As a result, projects that collectively destroy dozens or hundreds of acres of wetlands and waters may receive less scrutiny than a project with a single impact on jurisdictional waters but that fills 0.51 acres in total. But the impairment of U.S. waters by a thousand half-acre cuts is still impairment.

When the Corps last issued NWPs, it presented a few arguments in support of its linear/non-linear project dichotomy.³²⁴ All boil down to the same point: the impacts of linear projects are “scattered throughout a large landscape,” while non-linear projects’ effects are usually concentrated in or near a “single waterbody.”³²⁵ “[B]ecause *all* of the authorized impacts will occur in or near that waterbody,” non-linear projects “may have a larger incremental contribution to the cumulative impacts” for those particular waterbodies.³²⁶

This is wrong. Just because “all” of the impacts for a non-linear project may be in the same watershed does not mean those impacts are “larger” than those stemming from long-distance pipeline cutting across that watershed. A residential development consisting of just one home, for example, will probably have lesser impacts than a 36-inch oil pipeline with a fifty-foot-wide permanent right-of-way. Conversely, just because a linear project may impact a “large number [of] different waterbodies” does not mean that “the incremental contribution of a linear project crossing of a waterbody to the cumulative impacts for that particular waterbody is *small*.”³²⁷ The Gulf Coast Pipeline, for example, required 2,227 water crossings spread across two states.³²⁸ But in Texas’ Pine Island Bayou alone, the pipeline crossed 41 different waterways resulting in the permanent clearing of 72 acres of forested wetlands—over 3 million square feet.³²⁹

³²⁴ See 82 Fed. Reg. at 1975.

³²⁵ *Id.*

³²⁶ *Id.* (emphasis added).

³²⁷ *Id.* (emphasis added).

³²⁸ Sierra Club et al., Comments on the U.S. Army Corps of Engineers’ Proposal to Reissue and Modify NWP 12, Dkt. No. COE-2015-0017 at 14 (Aug. 1, 2016).

³²⁹ *Id.* Insofar as the Corps is suggesting that these impacts are “incremental” because the “sum of the authorized impacts” must be divided by the large number of “various waterbodies crossed by that linear project,” it is mistaken. *Id.* Assessing impacts to a single watershed is not a matter of averages or long division. And even if it was, because NWP 12 effectively allows for

When reissuing its NWP in 2017, the Corps stubbornly maintained that the “separate and distant” requirement in its linear-project definition prevented situations like Pine Island Bayou and helped ensure that “cumulative adverse environmental effects are no more than minimal.”³³⁰ While the “separate and distant” requirement is not discussed in the draft 2025 NWP documents, we assume the Corps is continuing to rely on this requirement to reach its minimum effects determination.

As noted above, this permit reissuance term the Corps is again failing to define “separate and distant.” In the past, it has explained that it “cannot establish thresholds at a national level because ‘separate and distant’ depends on a variety of factors and is best determined on a case-by-case basis.”³³¹ But there is no requirement that district or regional engineers come up with a local standard, or apply “separate and distant” in a consistent manner on a case-by-case basis. Worse, the Corps is crystal clear that “[i]ndividual review of each activity authorized by [NWP 12] will not normally be performed”—making it unlikely district or regional engineers could apply a standard case by case even if they had one.³³² In practice, this undefined term is arbitrarily and inconsistently applied at best or not applied at all. A handful of examples prove the point:

- **Gulf Coast Pipeline:** this 485-mile-long pipeline “required the Corps to issue 2,227 permits for water crossings,” meaning that it crossed jurisdictional waters “almost *five* times in each mile, or about once every 1,150 feet.”³³³ Yet the Corps never made a “separate and distant” determination for any of the water crossings authorized by NWP 12.³³⁴
- **Keystone XL:** this 1,209-mile pipeline is slated to pass through one unnamed waterbody *six* times in the span of a mile in Montana; Narcelle Creek *eight* times within one mile in South Dakota; and crossed *thirteen* waterways in a single mile in Nebraska.³³⁵ But the

unlimited impacts, the size of the denominator—the number of crossings—does not guarantee the “small” and “incremental” effects the Corps seems to assume it will.

³³⁰ 82 Fed. Reg. at 1885.

³³¹ *Id.* at 1978; *see also* Final Rule for Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits, 56 Fed. Reg. 59110, 59113–14 (Nov. 22, 1991) (“We do not agree with the practicability of defining “‘distant locations.’”). These impossible-to-resolve factors include: “topography, local hydrology, the distribution of waters and wetlands in the landscape, geology, soils,” and other appropriate “landscape factors.” 82 Fed. Reg. at 1888.

³³² NWP 12 Drft. Decision Doc. at 5.

³³³ *Sierra Club v. Bostick*, 539 F. App’x 885, 898 (10th Cir. 2013) (Martinez, J., dissenting from denial of preliminary injunction) (emphasis added).

³³⁴ Sierra Club et al., Comments on the U.S. Army Corps of Engineers’ Proposal to Reissue and Modify NWP 12, Dkt. No. COE-2015-0017 at 14 (Aug. 1, 2016).

³³⁵ Complaint at 44, *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 454 F. Supp. 3d 985 (D. Mont. 2020), *appeal filed*, No. 20-35432 (9th Cir. May 20, 2020) (No. CV-19-44-GF-BMM).

Corps never made a “separate and distant” finding for any of the pipeline’s 688 crossings.³³⁶

- **Atlantic Coast Pipeline:** though this 604.4-mile pipeline was later cancelled, it received NWP 12 verification letters that would have allowed it to cross 1,669 waterbodies.³³⁷ These letters made no explicit “separate and distant” finding for these crossings.³³⁸ Yet in some places, the project would have had *twenty-nine* waterbody crossings per mile—an average of about one crossing every 180 feet.³³⁹
- **Mountain Valley Pipeline:** this project was recently reauthorized to cross 1,108 waterbodies across two states, including 407 perennial waterbodies that could support fisheries.³⁴⁰ For example, the Corps permitted crossings of the Little Kanawha River—a major waterbody over 120 feet wide that could provide habitat for the federally endangered snuffbox mussel—*five* times along a one-mile stretch.³⁴¹ However, verification letters for the NWP made only one summary “separate and distant” determination for the project’s 1,108 water crossings.³⁴²
- **WB XPress:** this 29.3-mile pipeline project received NWP 12 authorization to cross 94 waterbodies—an average of more than *three* crossings per mile.³⁴³ Newly laid pipeline crossed unnamed tributaries to Cub Run *five* times in 3/10 of a mile—an average of one crossing every 317 feet—while replacement lines crossed Seneca Creek and its unnamed tributaries *seven* times in one mile.³⁴⁴

The Corps cannot rely on a meaningless, undefined, and unenforced phrase to explain its disparate treatment of non-linear and linear projects. Insofar as the Corps is suggesting that its current practice comports with any reasonable construction of “separate and distant,” it is mistaken. How the Corps can say this phrase will help ensure minimal cumulative impacts under

³³⁶ *Id.* at 46–47.

³³⁷ *See, e.g.*, U.S. Army Corps of Eng’rs Norfolk District, Atlantic Coast Pipeline NWP 12 Verification Letter (Feb. 9, 2018).

³³⁸ *See id.*

³³⁹ Env’tl. Res. Mgmt., *Atlantic Coast Pipeline Wetland and Waterbody Survey Report 2* at 16–17 (2017).

³⁴⁰ FERC, *Mountain Valley Project and Equitrans Expansion Project Final Environmental Impact Statement* at ES-6 (2017), <https://perma.cc/MC95-X7DY>.

³⁴¹ *Id.* at App’x F1-25 to 26.

³⁴² *See, e.g.*, U.S. Army Corps of Eng’rs Huntington District, Mountain Valley Project Nationwide Permit No. 12 Verification (Dec. 22, 2017) (“Based on the provided information, it has been determined the discharge of dredged and/or fill material into waters of the U.S. at 591 separate and distant locations in conjunction with the utility line project meets the criteria for Nationwide Permit (NWP) #12.” (emphasis added)), <https://perma.cc/4MDV-7UP8>.

³⁴³ FERC, WB XPress Project Environmental Assessment at 94 (2017), <https://perma.cc/BL6S-H3ML>.

³⁴⁴ *Id.* at App’x E.

the CWA or lack of significant impacts under NEPA—*when it does not know what it means and does not appear to care how it is applied*—is similarly hard to fathom.³⁴⁵

The Corps could fix all of this by amending the definition of “single and complete project” to reflect what anyone with common sense would think it means: the *total* linear project.³⁴⁶ Or the Corps could require independent utility of all projects, with a small caveat for individual linear projects that are truly “separate and distant,” such as water crossings located in different watersheds or separated by several miles.

The current illogical regime, however, is arbitrary and capricious and violates the CWA, NEPA, and APA for several reasons: (i) it allows for the effectively unbounded piecemealing of linear pipeline projects; (ii) it inconsistently applies the concept of independent utility to non-linear but not linear projects without a reasoned basis; and (iii) it relies on a toothless and undefined standard as support for its inconsistent behavior.

B. The Corps’ minimal-impact determination and finding of no significant impact for NWP 12 are arbitrary, capricious, and unsupported by substantial evidence.

As addressed above, the Corps largely fails to analyze the direct, secondary, and cumulative impacts of NWP 12 or other NWPs. The limited data cited by the Corps, however, indicates that NWP 12 will cause more than minimal individual and cumulative effects in violation of the CWA, and cause significant impacts requiring an EIS. For example, the Corps acknowledges that NWP 12 will or may:

- Cause “changes to in-stream habitat and sediments in river[s] and stream bed[s].”³⁴⁷
- “[A]ct as disturbances that might temporarily or permanently change the structure and functions of aquatic ecosystems.”³⁴⁸
- “[R]esult in permanent or temporary losses of aquatic ecosystems and the functions and services they provide.”³⁴⁹
- Affect “the ecological functions and services provided by waters and wetlands.”³⁵⁰
- Contribute to a “decrease in aquatic ecosystem resilience.”³⁵¹
- Cause the “conversion of forested wetlands to scrub-shrub or emergent wetlands.”³⁵²

³⁴⁵ See *infra* §§ II and III (discussing other failings).

³⁴⁶ The Corps’ application of the “single and complete project” criteria to linear projects is so far afield that it is oxymoronic. How can a single “separate and distant” crossing that is part of a linear project be a “complete project” if that individual crossing has no independent utility?

³⁴⁷ NWP 12 Drft. Decision Doc. at 27.

³⁴⁸ *Id.* at 56.

³⁴⁹ *Id.* at 57.

³⁵⁰ *Id.* at 64.

³⁵¹ *Id.* at 77.

³⁵² *Id.* at 94.

- Be used 3,700 times annually resulting in temporary or permanent impacts to 1,500 acres of jurisdictional waters.³⁵³ Over NWP 12’s five-year term, it is predicted to impact 7,500 acres of jurisdictional waters.³⁵⁴

The Corps acknowledges these impacts, but uses the same approach discussed above—relying on post-issuance analysis, mitigation measures, and general conditions—to arbitrarily dismiss those impacts. These approaches fail for the same reasons addressed above, in addition to the following context-specific reasons.

First, several of the mitigation measures described by the Corps would seem to have marginal application to the NWP 12 setting. For example, dam removal seems irrelevant in the NWP 12 context.³⁵⁵ So too seagrass-bed restoration practices.³⁵⁶ But even assuming NWP 12 activities affect seagrass beds, it is difficult to understand how the Corps’ preferred restoration technique—controlling “stressors”—will work in the NWP 12 context.³⁵⁷ The Corps suggests that “reduc[ing] inputs of sediment,” ensuring “suitable salinity and water temperatures,” and guaranteeing the “absence of mechanical disturbances” may be effective.³⁵⁸ But elsewhere the Corps finds that NWP 12 activities may “increase water turbidity,” “adversely affect salinity gradients” and water temperature, and mechanically “replace the aquatic area with dry land.”³⁵⁹ The Corps does not explain how these facially deficient or irrelevant mitigation practices will work in the NWP 12 context.

What’s more, other statements in the draft Decision Document imply that activities inherently associated with NWP 12 dredge or fill operations—namely upland pipeline construction—will make mitigation even more difficult, if not impractical. For instance, the Corps notes that “[i]rreversible changes to landscapes, especially those that affect hydrology within contributing drainage areas or watersheds, cause wetland degradation and impede the ecological performance of wetland restoration efforts.”³⁶⁰ Similarly, stream-restoration activities are only effective when they “address the causes of stream degradation, which are often within the watershed and outside of the stream channel.”³⁶¹ Oil and gas pipeline construction, by its very nature, is an irreversible change to the landscape. And the forest clearing, earthmoving, and trench digging needed to construct pipelines in upland areas certainly “affect” wetland hydrology and contribute to sediment loads that further degrade streams within the watershed. Therefore, the Corps’ own statements suggest restoration-based mitigation efforts—which the Corps already warns are not always effective—may be doomed to failure before they are even begun.

³⁵³ *Id.* at 70.

³⁵⁴ *Id.* at 71.

³⁵⁵ *See id.* at 113 (discussing environmental benefits of dam removal as a mitigation strategy).

³⁵⁶ *Id.* at 115.

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 115–16.

³⁵⁹ *Id.* at 117–18.

³⁶⁰ *Id.* at 111.

³⁶¹ *Id.* at 112.

Second, the Corps must make clear that its reliance on General Condition 10 is not illusory in the NWP 12 context. NWP 12 would apply in part to interstate natural gas pipelines authorized under Section 7 of the Natural Gas Act,³⁶² which is understood to preempt some (but not all) state and local laws regulating such pipelines.³⁶³ Consequently, pipeline developers have sometimes argued that local floodplain ordinances are preempted under the Natural Gas Act and that pipelines are thus exempt from those requirements.³⁶⁴ The Corps must make clear that any preemption under the Natural Gas Act does not excuse pipeline developers from their obligation under General Condition 10 to comply with FEMA-approved state or local floodplain management requirements. Preemption is a legal determination with no effect on the environmental impacts of activities authorized by NWP 12, so, unless the Corps makes clear that General Condition 10 applies regardless of Natural Gas Act preemption, it will be arbitrary and capricious for the Corps to conclude that General Condition 10 can limit the adverse environmental effects of NWP 12 activities.

In the NWP 12 context, the Corps also attempts to downplay the effects of authorized activities by suggesting that those activities may be beneficial to the environment over the long term. According to the Corps, “[i]t is likely that all ecosystems are maintained to some degree by disturbances,” including anthropogenic disturbances.³⁶⁵ In fact, the Corps notes that “many disturbances are crucial and necessary for ecosystems to maintain their structure and functions and ensure their long-term sustainability.”³⁶⁶ For example, the Corps notes that while NWP 12 activities may result in “habitat fragmentation,” “most of the ecological responses [to this fragmentation] were positive.”³⁶⁷ Among other things, the Corps notes that such fragmentation may result in “increased habitat, diversity, increased functional connectivity, positive edge effects, enhanced stability of enhanced stability of [sic] predator-prey relationships, and landscape complementation.”³⁶⁸

To the extent that the Corps is suggesting that NWP 12 activities are “crucial and necessary” to maintain ecosystem structure and function, or that the habitat fragmentation attendant to pipeline construction is ecologically “positive,” it is sorely mistaken. As explained both above and below, NWP 12 activities wreak incredible ecological damage. And despite the Corps’ doublespeak, the conversion of one habitat to another *does* involve a loss of habitat—after all, the habitat that was converted to something else no longer exists. Because the Corps’ attempts to spin NWP 12 as a force for ecological good run headlong into scientific reality, the

³⁶² 15 U.S.C. § 717f.

³⁶³ See, e.g., *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 244 (D.C. Cir. 2013).

³⁶⁴ See, e.g., Complaint, *Atl. Coast Pipeline Co. v. Nelson Cnty. Bd. of Supervisors*, No. 3:18-cv-0115-NKM-JCH (Dec. 6, 2018) (ECF No. 1).

³⁶⁵ NWP 12 Drft. Decision Doc. at 45; see also *id.* at 55–56 (“Some ecosystems require management by people to maintain or enhance their structure and functions as well as their resilience to disturbances and other drivers of change.”).

³⁶⁶ *Id.* at 44; see also *id.* at 55 (“Disturbances to ecosystems are not always harmful, and disturbances may be an important component of the ecosystem’s dynamics that help maintain its structure and function, as well as the ecological services it provides.”).

³⁶⁷ *Id.* at 96.

³⁶⁸ *Id.*

Corps has failed to “articulate a rational connection between the facts it found and the choice it made” in violation of the APA and CWA, and has failed to take a “hard look” at the negative effects of habitat fragmentation under NEPA.

C. The Corps fails to fully account for NWP 12’s secondary impacts.

EPA’s 404(b)(1) guidelines require the Corps to analyze a general permit’s “potential individual and cumulative impacts” by—among other things—making a “documented” finding for each factual determination listed at 40 C.F.R. § 230.11.³⁶⁹ Thus, in addition to assessing the “cumulative impacts” of the general permit, the Corps must also make a documented determination of NWP 12’s “secondary effects on the aquatic ecosystem.”³⁷⁰

The guidelines define “secondary effects as “effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material.”³⁷¹ To clarify, the guidelines provide several examples of secondary effects, including “fluctuating water levels in an impoundment and downstream associated with the operation of a dam, septic tank leaching and surface runoff from residential or commercial developments on fill, and leachate and runoff from a sanitary landfill located in waters of the U.S.”³⁷² The guidelines also warn that “[a]ctivities to be conducted on fast land created by the discharge of dredged or fill material in waters of the United States may have secondary impacts within those waters which should be considered in evaluating the impact of creating those fast lands.”³⁷³ Evaluations like these cannot be pushed to the project level: “[i]nformation about secondary effects on aquatic ecosystems *shall be considered prior to the time final section 404 action is taken* by permitting authorities.”³⁷⁴

Here, however, the Corps repeatedly invokes the bounds of its own jurisdiction to avoid analyzing secondary and indirect effects. For example:

- **Spills and Leaks:** Though the Corps acknowledges “the oil, natural gas, or petrochemical substances carried by [NWP 12–authorized] pipelines may leak into surrounding areas,”³⁷⁵ it declines to fully discuss the potential impacts.³⁷⁶ For instance, while the Corps notes that “a variety” of pollutants may be “discharged through inadvertent releases, such as spills, and other accidents,” it finds it does “not have the authority to

³⁶⁹ 40 C.F.R. § 230.7(b)(1).

³⁷⁰ *Id.* § 230.11(h).

³⁷¹ *Id.* § 230.11(h)(1).

³⁷² *Id.* § 230.11(h)(2).

³⁷³ *Id.*

³⁷⁴ *Id.* (emphasis added).

³⁷⁵ NWP 12 Drft. Decision Doc. at 92.

³⁷⁶ At one point, the Corps acknowledges that “[l]eaks from oil or natural gas pipelines or their substations may alter conservation values in the vicinity of the oil or natural gas pipeline,” without specifying how. *Id.* at 91. At another point, the Corps notes that “[s]pills from oil pipelines may alter aesthetics in the vicinity of the pipeline,” without explaining what that means. *Id.* at 92.

regulate operations and maintenance activities” that do not involve dredge or fill activities.³⁷⁷ Instead, the Corps points to EPA, FERC, and DOT as examples of federal agencies that have the responsibility for addressing oil spills and natural gas leaks.³⁷⁸ But notably, the Corps has acknowledged that spills and leaks are a secondary effect of pipeline construction.³⁷⁹

- **Frac-outs:** While the Corps recognizes that frac-outs—the “inadvertent returns of drilling fluids” during horizontal directional drilling—“may contribute to cumulative adverse environmental effects” to the environment, it forgoes further analysis because they are “not discharges of dredged or fill material” regulated under Section 404.³⁸⁰
- **Development:** The Corps appreciates that the “installation of oil or natural gas pipelines may induce more development in the vicinity of the project” but declines to scrutinize how that development might impact the aquatic environment because “the primary responsibility for land use decisions is held by state, local, and tribal governments.”³⁸¹
- **Impacts from Upland Pipeline Construction:** While acknowledging that “activities in uplands have indirect effects on aquatic ecosystems,”³⁸² including upland pipeline construction, the Corps declines to discuss these effects because they are “outside of the Corps’ authority to regulate under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899.”³⁸³

Despite what the Corps implies, EPA’s definition of “secondary effects” places no jurisdictional limit on what effects must be considered. Instead the 404(b)(1) guidelines broadly require all effects “*associated with* a discharge of dredged or fill materials” to be analyzed.³⁸⁴ Insofar as the Corps believes that recent Supreme Court decisions, such as *Seven County Infrastructure Coalition v. Eagle County*,³⁸⁵ relieve it of the obligation to consider secondary effects, it is mistaken. *Seven County* involved the NEPA statute; not EPA’s 404(b)(1) guidelines.³⁸⁶

The Corps seems to grasp that it is required to analyze secondary effects—even those that it lacks jurisdiction to control—because it does not hesitate to analyze the *beneficial* secondary effects of NWP 12. Specifically, the Corps notes that oil and natural pipeline construction

³⁷⁷ *Id.* at 93–94.

³⁷⁸ *Id.* at 93.

³⁷⁹ See *Kunaknana v. U.S. Army Corps of Eng’rs*, No. 3:13-CV-00044-SLG, 2015 WL 3397150, at *14 (D. Alaska May 26, 2015) (“The Corps responds that oil spills from a pipeline are secondary effects under the Section 404(b)(1) Guidelines.”).

³⁸⁰ NWP 12 Drft. Decision Doc. at 93.

³⁸¹ *Id.* at 98 (noting the “Corps [sic] scope of review with respect to land use is limited to significant issues of overriding national importance, such as navigation and water quality”).

³⁸² *Id.* at 12.

³⁸³ *Id.* at 31, 43.

³⁸⁴ 40 C.F.R. § 230.11(h)(1) (emphasis added).

³⁸⁵ 145 S. Ct. 1497 (2025).

³⁸⁶ See 40 C.F.R. § 230.11.

activities “will generate jobs and revenue for local contractors as well as revenue to building supply companies that sell construction materials.”³⁸⁷ In addition, “[o]il or natural gas pipelines provide energy to residences and schools, as well as factories, offices, stores, and other places of business, to allow those facilities to operate.”³⁸⁸ Finally, pipelines “transport oil to processing plants where the oil can be transformed into a variety of products, such as plastics, that are used for a wide variety of purposes.”³⁸⁹ Though the Corps also lacks the “authority to regulate” job creation, energy production, and petrochemical synthesis, it does not claim a similar jurisdictional bar prevents it from discussing these beneficial secondary effects.

The plain language of the 404(b)(1) guidelines commands the Corps to account for all “associated” secondary effects. The Corps cannot arbitrarily invoke a jurisdictional bar to avoid analyzing *detrimental* secondary effects, only to remove the bar when it comes time to account for *beneficial* effects. The Corps’ consequent failure to fully analyze secondary effects, including oil spills or gas leaks, frac-outs, and upland development, among others, is therefore arbitrary and capricious and violates the CWA.³⁹⁰

D. The Corps’ changes to the pre-construction notice triggers are insufficient.

NWP 12, like all NWPs, is designed so that permittees generally “may proceed with activities authorized by NWPs without notifying the [Corps]” at all.³⁹¹ However, in certain situations, the prospective permittee must submit a pre-construction notice (“PCN”) to the appropriate Corps district engineer.³⁹² If a PCN is required, the prospective permittee generally may not commence the activity until either: (i) the district engineer verifies that the activity complies with the terms and conditions of the NWP; or (ii) the district engineer fails to respond within 45 days of receiving the notification.³⁹³

Assuming NWP 12 can be reissued in compliance with the CWA, NEPA, and ESA, the Corps’ should further adjust its PCN triggers. Currently, NWP 12 includes three PCN triggers: (1) if a Section 10 permit is required; (2) if more than 1/10-acre of waters will be lost; or (3) “the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline.”³⁹⁴

The Corps added this last notice requirement in 2021. In doing so, it failed to explain how it arrived at the 250-mile threshold, though it implied that pipelines over that length are “long-distance” projects. Instead of perpetuating the use of a necessarily arbitrary mileage threshold,

³⁸⁷ NWP 12 Drft. Decision Doc. at 91–92.

³⁸⁸ *Id.* at 92.

³⁸⁹ *Id.*

³⁹⁰ *Cf. Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512–13 (10th Cir. 1985) (holding that permitting the Corps “to ignore the indirect effects that result from its actions would . . . [allow] it to wear blinders that Congress has not chosen to impose”).

³⁹¹ 33 C.F.R. § 330.1(e).

³⁹² *Id.*

³⁹³ *Id.* §§ 330.1(e), 330.6(a).

³⁹⁴ NWP 12 Drft. Decision Doc. at 3.

the Corps should adopt a PCN for all *new* pipeline construction. This would ensure that the Corps carefully evaluates the impacts of projects with the potential to make the biggest net changes to the environmental baseline, as opposed to maintenance or replacement work in areas that have already been impacted by earlier construction, and for which impacts are more likely to be minimal in comparison.

Failing that, the Corps should design a PCN threshold based on the number of waterbody crossings, instead of the overall pipeline length. Depending on the landscape in which the pipeline is located, a 250-mile pipeline might cross a few dozen minor waterbodies or thousands of substantial rivers and streams. It would be highly arbitrary to require a PCN for a 250.1-mile pipeline through the desert, for example, but decline to require notification for a 249.9-mile pipeline through a temperate rainforest. Though a threshold based on waterbody crossings would also require selecting a somewhat arbitrary threshold, it would better account for the variation across landscapes.³⁹⁵ It also would push permittees to design pipelines that have fewer crossings than the threshold number, so as to avoid additional paperwork and scrutiny. If the Corps is concerned about imposing a national waterbody-crossing PCN number, it could require regional engineers to develop thresholds tailored to their specific region instead.

E. The Corps fails to take a hard look at the environmental effects of NWP 12.

To satisfy NEPA, the Corps must take a ‘hard look’ at [the] environmental consequences” of NWP 12.³⁹⁶ This “hard look” must include “some quantified or detailed information” supporting the conclusions of environmental analysis.³⁹⁷ An “agency has satisfied the ‘hard look’ requirement if it has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”³⁹⁸ The “hard look” requirement is violated if “the agency failed entirely to consider an important aspect of the problem.”³⁹⁹

As explained above, the Corps failed to take a “hard look” at numerous categories of effects, including relevant cumulative effects. The Corps also failed to take a “hard look” at several other categories of effects, including the following:

- **Past projects:** According to the Corps, division and district engineers “monitor the use of this NWP on a regional and activity-specific basis,”⁴⁰⁰ including “monitor[ing] . . .

³⁹⁵ If the threshold was 100 crossings, for example, this might allow permittees to build longer pipelines in areas with fewer waterbodies (like the high desert), while ensuring that shorter pipelines in more watered areas (like the Southern Appalachians) face additional scrutiny.

³⁹⁶ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

³⁹⁷ *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) (citations omitted).

³⁹⁸ *Black Warrior Riverkeeper v. U.S. Army Corps of Eng’rs*, 833 F.3d 1274, 1285 (11th Cir. 2016) (citation omitted).

³⁹⁹ *Sierra Club v. U.S. Army Corps of Eng’rs*, 295 F.3d 1209, 1216 (11th Cir. 2002).

⁴⁰⁰ NWP 12 Drft. Decision Doc. at 83.

authorized impacts.”⁴⁰¹ However, the Corps never says what these past monitoring reports reveal about the impacts of NWP 12, apart from using them to estimate the total annual acreage affected by NWP 12 activities. To satisfy NEPA’s hard-look requirement, the Corps must disclose its NWP 12 monitoring data. This data is not only the best available information regarding the effects of NWP 12 in the field, but also must be disclosed for the Corps to adequately assess the effects of its past actions.⁴⁰²

- **Inadvertent returns of drilling fluid:** The Corps discloses that “[d]uring construction of oil or natural gas pipelines [under NWP 12], where horizontal directional drilling is used to install or replace a portion of the pipeline, there is a possibility of inadvertent returns of drilling fluids that could adversely affect wetlands, streams, and other aquatic resources.”⁴⁰³ NWP 12 can also be used to “authorize[] activities that may be necessary to remediate inadvertent returns of drilling fluids, [and] to minimize the effects of those inadvertent returns on water supplies”⁴⁰⁴ But beyond disclosing the “possibility” of an “adverse effect” from inadvertent returns of drilling fluid, the Corps offers no analysis of the effect of those returns. This fails to satisfy NEPA’s hard-look mandate.
- **Forested wetlands:** According to the Corps, “construction of oil or natural gas pipeline rights-of-way through forested wetlands [under NWP 12] may result in the conversion of forested wetlands to scrub-shrub or emergent wetland.”⁴⁰⁵ This conversion is consequential because herbaceous wetlands “may have different habitat functions than the forested wetland” and the “conversion of wetlands to other types of wetlands may result in the loss of certain wetland functions, or the reduction in the level of wetland functions being performed by the converted wetland.”⁴⁰⁶ Stated differently, “[n]ot all wetlands perform the same function, nor do they provide functions to the same degree Therefore, it is necessary to account for . . . variation when evaluating wetlands and the functions and services they provide.”⁴⁰⁷ But this “accounting” is exactly what the Corps foregoes. Instead of conducting such an accounting, the Corps attempts to minimize the effects of forest-wetland conversion, noting that such a conversion can happen “without habitat loss” if, for example, the forested wetland is converted to an herbaceous wetland.⁴⁰⁸ This is not just wrong; it also misses the point—all wetlands do not “perform the same function, nor do they provide functions to the same degree.” By failing to adequately assess the impacts to forested wetlands, and instead pretending that the loss of forested wetland is not “habitat loss,” the Corps failed to take the hard look required by NEPA.

⁴⁰¹ *Id.* at 89.

⁴⁰² *See Rowlette*, 714 F.3d at 408 (discussing requirement for the Corps to consider past actions).

⁴⁰³ NWP 12 Drft. Decision Doc. at 91.

⁴⁰⁴ *Id.* at 99.

⁴⁰⁵ *Id.* at 94.

⁴⁰⁶ *Id.* at 94, 96.

⁴⁰⁷ *Id.* at 54.

⁴⁰⁸ *Id.* at 96.

- **Groundwater:** As confirmed by the Corps, “activities authorized by [NWP 12] may adversely affect . . . groundwater supplies.”⁴⁰⁹ More specifically, “[a]ctivities authorized by this NWP can [] affect the quality of water supplies by adding pollutants to . . . groundwater.”⁴¹⁰ Beyond that disclosure, the Corps includes no analysis of the effect of NWP 12 activities on groundwater. That falls well short of the hard-look standard.
- **Endangered or threatened species:** The Corps does not contest that use of NWP 12 will affect endangered, threatened and other species. However, it concludes that Section 7 consultation for the NWP 12 program is unnecessary because individual projects that “may affect listed species or critical habitat [are not] authorized by NWP [12] unless ESA Section 7 consultation . . . has been completed.”⁴¹¹ As explained elsewhere, this approach cannot be squared with the ESA. But whether a federal project affects endangered and threatened species is not relevant only to the ESA—it also implicates NEPA. Yet in the draft decision document, there is *zero* disclosure of the effect of NWP 12 on protected species. Instead, all species analyses are deferred to individual projects—projects that will not be subject to NEPA review. As a result, the Corps does not bother to examine NWP 12’s effects to listed species at this stage—*at all*. This not only violates NEPA’s hard-look requirement, but also violates the well-established prohibition against tiering a NEPA analysis to a non-NEPA document.⁴¹²

VII. NWP 13

Like NWPs 3 and 12, NWP 13 poses particular harm to the Nation’s aquatic resources. NWP 13 authorizes certain “[b]ank stabilization activities necessary for erosion control or prevention, such as vegetative stabilization, bioengineering, sills, rip rap, revetment, gabion baskets, stream barbs, and bulkheads, or combinations of bank stabilization techniques.”⁴¹³

The discussion below highlights specific harm that would be caused by the proposed permit and specific shortcomings in the Corps’ Clean Water Act analysis for the proposed permit. The proposed permit also suffers from the systemic flaws described in Sections II, III, and IV above.

⁴⁰⁹ *Id.* at 99.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 124.

⁴¹² *Kern*, 284 F.3d at 1073 (“[T]iering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA.”).

⁴¹³ NWP 13 Drft. Decision Doc. at 1.

A. The Corps has not shown in the Draft Decision Document that NWP 13 will cause no more than minimal impacts under the 404(b)(1) Guidelines.

i. Scientific research shows that shoreline armament is having significant adverse cumulative effects on shoreline ecosystems.

Fourteen percent of the Atlantic shoreline is armored.⁴¹⁴ A third of the southern California coastline is armored.⁴¹⁵ And armoring has been predicted to advance at a rate of 124 miles per year and to double by 2100.⁴¹⁶ It is also estimated that as much as 60 percent of the land below 1 meter sea level will be armored in the future.⁴¹⁷ Some studies have concluded that certain types of coastal wetlands may disappear from some regions over the next several decades due in part to shoreline armoring.⁴¹⁸ This is not surprising considering that we have lost over half of our saltmarsh already.⁴¹⁹

A comprehensive body of scientific research shows that armoring a shoreline greatly reduces the function and resilience of highly productive and valuable ecosystems.⁴²⁰ Shoreline armoring, specifically the use of bulkheads, can steepen and shorten shallow intertidal habitat over time, resulting in the loss of foraging habitat for shore birds and commercially and recreationally valuable fishes and crustaceans.⁴²¹

⁴¹⁴ Rachel Gittman, *The Living Shoreline Approach as an Alternative to Shoreline Hardening: Implications for the Ecology and Ecosystem Service Delivery of Salt Marshes*, dissertation, University of Chapel Hill Graduate School, 37, (2014), <https://perma.cc/RUM3-UBHA>.

⁴¹⁵ Molly Loughney Melius & Margaret R. Caldwell, *2015 California Coastal Armoring Report: Managing Coastal Armoring and Climate Change Adaptation in the 21st Century* 1 (2015).

⁴¹⁶ See Status and Trends Report, *supra* n. 15, at 40.

⁴¹⁷ Gittman, *supra* n. 414, at 41.

⁴¹⁸ See Status and Trends Report, *supra* n. 15, at 41.

⁴¹⁹ See *id.*

⁴²⁰ Carolyn Currin et al., *Shorelines Change in the New River Estuary, North Carolina: Rates and Consequences*, 31 J. of Coastal Res. 1069–77 (2015); J. E. Dugan et al., *8.02 Estuarine and Coastal Structures: Environmental Effects, a Focus on Shore and Nearshore Structures*, 8 Treatise on Estuarine & Coastal Sci. 17–41 (Eric Wolanski and Donald McLusky eds. 2011); James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 Md. L. Rev. 1279–1398 (1998); Thomas K. Rupert, *Eroding Long-Term Prospects for Florida's Beaches: Florida's Coastal Management Policy*, Sea Turtle Grant Program, 1–157 (2008); U.S. Army Corps of Eng'rs & Yellowstone River Conservation District Council, *Yellowstone River Cumulative Effects Analysis*, 1–433 (2015); Travis O. Brandon, *NWP 13, Shoreline Armoring, and the Important Role of the U.S. Army Corps of Engineers in Coastal Climate Change Adaptation*, 46 Env't L. 537, 539 (2016); Rachel K. Gittman et al., *Ecological Consequences of Shoreline Hardening: A Meta-Analysis*, Bioscience, 1–51 (2016).

⁴²¹ Megan N. Dethier et al., *Multiscale Impacts of Armoring on Salish Sea Shorelines: Evidence for Cumulative and Threshold Effects*, 175 Estuarine, Coastal, & Shelf Sci., 106–17 (2016); J.E. Dugan et al., *Ecological Effects of Coastal Armoring on Sandy Beaches*, 29 Marine Ecology,

Bulkheads also provide less physically complex habitat as compared with natural shorelines; thus they support fewer species.⁴²² A recently completed meta-analysis of the peer-reviewed literature found that the bulkheads in the study supported 23 percent lower biodiversity and 45 percent fewer organisms than the natural shorelines examined.⁴²³ Due to lack of structural complexity, bulkheads are less attractive to coastal fish communities.⁴²⁴ In contrast to bulkheads, natural habitats that include such features as saltmarsh, oyster reefs, and submerged aquatic vegetation have the structural complexity that serves to provide superior habitat and nursery grounds for aquatic species.⁴²⁵

Because bulkheads are constructed landward of tidal wetlands, these structures also increase seaward scour during storm events and will prevent upslope migration of tidal wetlands as sea levels rise, leading to their eventual loss (termed “coastal squeeze”).⁴²⁶ Salt marsh is the most rapidly declining type of wetland in the country.⁴²⁷ Bulkheads can increase rates of salt

160–70 (2008); Karl F. Nordstrom, *Living with Shore Protection Structures: A Review*, 150 *Estuarine Coastal & Shelf Sci.*, 11–23 (2014), <https://perma.cc/9GBX-ZFQT>.

⁴²² Rachel K. Gittman, *Living Shorelines Can Enhance the Nursery Role of Threatened Estuarine Habitats*, 26 *Ecological Applications*, 249–63 (2016); Steven B. Scyphers, *Natural Shorelines Promote the Stability of Fish Communities in an Urbanized Coastal System*, *Plos One* 10:e0118580, 1–12 (Maura G. Chapman ed. 2015); Sarah M. Heerhartz et al., *Shoreline Armoring in an Estuary Constrains Wrack-Associated Invertebrate Communities*, 39 *Estuaries & Coasts*, 171–88 (2016); Sarah M. Heerhartz et al., *Effects of Shoreline Armoring on Beach Wrack Subsidies to the Nearshore Ecotone in an Estuarine Fjord*, 37 *Estuaries & Coasts*, 1256–68 (2013); Amanda S. Lawless et al., *Effects of Shoreline Stabilization and Environmental Variables on Benthic Infaunal Communities in the Lynnhaven River System of Chesapeake Bay*, 457 *J. of Experimental Marine Biology & Ecology*, 41–50 (2014); Jeffrey C. Jorgensen et al., *Combined Effects of Climate Change and Bank Stabilization on Shallow Water Habitats of Chinook Salmon*, 27 *Conservation Biology*, 1201–11 (2013); R. D. Seitz et al., *Influence of Shallow-Water Habitats and Shoreline Development on Abundance, Biomass, and Diversity of Benthic Prey and Predators in Chesapeake Bay*, 326 *Marine Ecology Progress Series*, 11–27 (2006); Susan L. Sargeant et al., *Shoreline Armoring Research Program: Phase II-Conception Model Development for Bank Stabilization in Freshwater Systems*, Prepared for Wa. St. Dep’t of Transp., 1–53 (2004); Maura G. Chapman, *Paucity of Mobile Species on Constructed Seawalls: Effects of Urbanization on Biodiversity*, 264 *Marine Ecology Progress Series*, 21–29 (2003).

⁴²³ Gittman et al., *supra* n. 420.

⁴²⁴ David L. Strayer et al., *Biodiversity in Hudson River Shore Zones: Influence of Shoreline Type and Physical Structure*, 74 *Aquatic Sciences*, 597–610 (2012).

⁴²⁵ Scyphers, *supra* n. 422.

⁴²⁶ Catherine M. Bozek & David M. Burdick, *Impacts of Seawalls on Saltmarsh Plant Communities in the Great Bay Estuary, New Hampshire U.S.A.*, 13 *Wetlands Ecology & Mgmt.*, 553–68 (2005); Nigel Pontee, *Defining Coastal Squeeze: A Discussion*, 84 *Ocean & Coastal Mgmt.*, 204–07 (2013); Titus, *supra* n. 420.

⁴²⁷ Samantha A. Burdick, *Effects of Bulkheads on Salt Marsh Loss: A Multi-Decadal Assessment Using Remote Sensing*, 1 (Apr. 27, 2018) (unpublished Masters thesis) citing T.E. Dahl, *Status and trends of wetlands in the conterminous United States 2004–2009*, 108 (2011).

marsh loss by up to 300 percent,⁴²⁸ suggesting that as coastal development continues to increase, management policies and actions that influence the types of engineered shore structures used will greatly impact the habitat value and functioning (e.g., biodiversity,⁴²⁹ nutrient uptake,⁴³⁰ carbon sequestration,⁴³¹ and storm resilience⁴³²) of nearshore ecosystems.

⁴²⁸ *Id.* at 20.

⁴²⁹ Antonios D. Mazaris et al., *Evaluating the Impacts of Coastal Squeeze on Sea Turtle Nesting*, 52 *Ocean & Coastal Mgmt.*, 139–45 (2009); Christopher J. Patrick et al., *Effects of Shoreline Alteration and Other Stressors on Submerged Aquatic Vegetation in Subestuaries of Chesapeake Bay and the Mid-Atlantic Coastal Bay*, 37 *Estuaries & Coasts*, 1516–31 (2014); David L. Strayer et al., *supra* n. 424.

⁴³⁰ Theresa O’Meara et al., *Effects of Shoreline Hardening on Nitrogen Processing in Estuarine Marshes of the US Mid-Atlantic Coast*, 23 *Wetlands Ecology & Mgmt.*, 385–94 (2015); Karl F. Nordstrom et al., *Effects of Bulkheads on Estuarine Shores: An Example from Fire Island National Seashore, USA*, 56 *J. of Coastal Res.*, 188–92 (2009); J. L. Davis et al., *Artificial Armored Shorelines: Site for Open-Coast Species in a Southern California Bay*, 140 *Marine Biology*, 1249–62 (2002).

⁴³¹ J. L. Davis et al., *Living Shorelines: Coastal Resilience with a Blue Carbon Benefit*, 10 *Plos One* e0142595, 1–18 (2015).

⁴³² Katie K. Arkema et al., *Embedding Ecosystem Services in Coastal Planning Leads to Better Outcomes for People and Nature*, 112 *Proc. of the Nat’l Acad. of Scis. of the U.S. of Am.*, 7390–95 (2015); Katie K. Arkema et al., *Coastal Habitats Shield People and Property from Sea-Level Rise and Storms*, 3 *Nature Climate Change*, 913–18 (2013); Rachel K. Gittman et al., *Marshes With and Without Sills Protect Estuarine Shorelines from Erosion Better than Bulkheads During a Category 1 Hurricane*, 102 *Ocean & Coastal Mgmt.*, 94–102 (2014); Robert Costanza et al., *The Value of Coastal Wetlands for Hurricane Protection*, 37 *Ambio*, 241–48 (2008); Robert A. Dalrymple, *Shoring Up Coastal Engineering*, 71 *Civ. Eng’g*, 52–53 (2001).

Bulkheads also cause beach erosion. Wave action reflected off of bulkheads causes the sand in front of bulkhead to wash away.⁴³³ They also block sand that would otherwise migrate to the beach, as well as prevent beaches from migrating inland.⁴³⁴ Eventually, all that is left is the bulkhead itself.⁴³⁵ One study of the California coast concluded that “[a]rming California’s shoreline will ultimately result in the total loss of public beach seaward” of the armoring.⁴³⁶ For many of these reasons, South Carolina has severely restricted armoring along its coastline.⁴³⁷

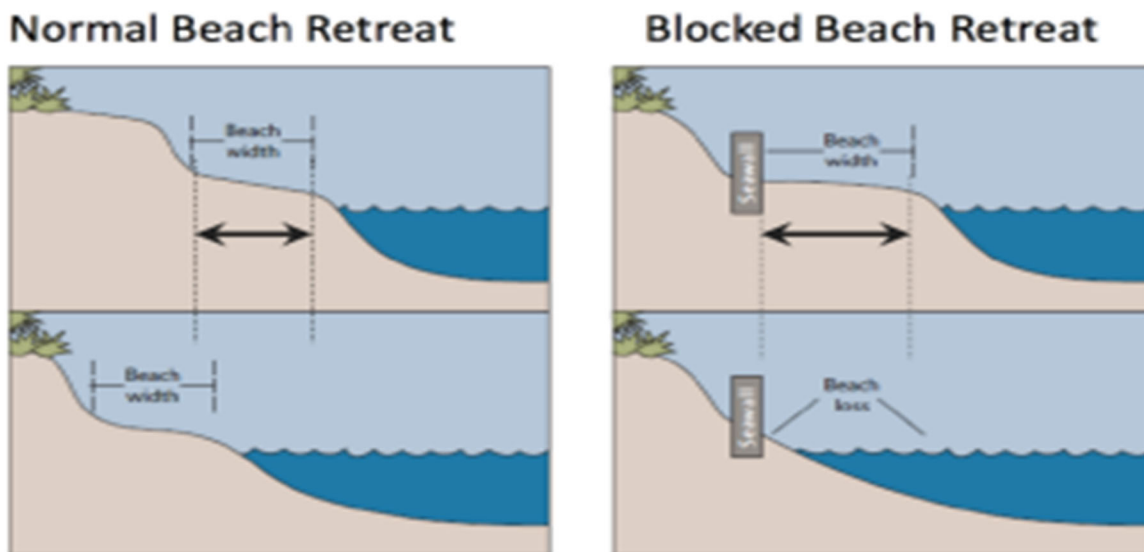


Diagram showing how armoring prevents beach migration and will lead to a total loss of beach over time.⁴³⁸

By creating a definitive barrier between water and land, bulkheads truncate ecosystems and reduce productivity.⁴³⁹ The bulkhead causes a loss of connectivity between landward and seaward habitats, disrupting inputs and exchange of material nutrients and prey resources.⁴⁴⁰ This lack of connectivity ultimately disrupts the food web, inducing negative impacts for both aquatic and terrestrial invertebrates and fauna.⁴⁴¹ A study conducted in 2008 found that armored beaches

⁴³³ Melius & Caldwell, *supra* n. 415, at 8–9.

⁴³⁴ *Id.*

⁴³⁵ *Id.* at 8–9.

⁴³⁶ *Id.* at 8.

⁴³⁷ Julian Hennig IV, *The South Carolina Beachfront Management Act and Debordieu Colony: A Case Study in South Carolina’s Beach Erosion Issues*, 74 S.C. L. Rev. 575, 593–94 (2023), <https://perma.cc/58CB-BEEL>.

⁴³⁸ Melius & Caldwell, *supra* n. 415, at 8 (citing Cal. Coastal Comm’n, Handouts for Senate Budget Subcommittee 2, Coastal Climate Adaptation, 12 (Mar. 20, 2014)).

⁴³⁹ Nordstrom, *supra* n. 421.

⁴⁴⁰ Heerhartz et al., *supra* n. 422, at 1256–68.

⁴⁴¹ *Id.*

had significantly fewer macroinvertebrates, shorebirds, gulls, and other birds than natural beaches.⁴⁴²

Reductions in biodiversity have extensive cumulative impacts on shoreline ecosystems. Due to the intricacy of estuarine ecosystems, bulkhead construction can set off chain reactions that significantly reduce ecosystem services at the site of the bulkhead and in adjacent systems.⁴⁴³ By degrading habitats of various species, shoreline armoring compromises the food web and ultimately creates less functional ecosystems.⁴⁴⁴ Additionally, recent studies indicate that seawalls and bulkheads create habitats conducive to the spread of invasive species.⁴⁴⁵

Many of the ecosystems adversely affected by shoreline armoring are home to endangered and threatened species, including turtles, birds, plants, and invertebrates. Intertidal

⁴⁴² Melius & Caldwell, *supra* n. 415, at 8–9.

⁴⁴³ Moisés A. Aguilera et al., *Spatial Variability in Community Composition on a Granite Breakwater Versus Natural Rocky Shores: Lack of Microhabitats Suppresses Intertidal Biodiversity*, 81 *Marine Pollution Bull.*, 257–68 (2014); C. Heatherington & M. J. Bishop, *Spatial Variation in the Structure of Mangrove Forests with Respect to Seawalls*, 63 *Marine Freshwater Res.*, 926–33 (2012); Richard G. Balouskus & Timothy E. Targett, *Egg Deposition by Atlantic Silverside, Menidia menidia: Substrate Utilization and Comparison of Natural and Altered Shoreline Type*, 35 *Estuaries & Coasts*, 1100–09 (2012); Gustavo M. Martins et al., *Influence of a Breakwater on Nearby Rocky Intertidal Community Structure*, 67 *Marine Env't Res.*, 237–45 (2009); Christopher R. Mattheus et al., *Impact of Land-Use Change and Hard Structures on the Evolution of Fringing Marsh Shorelines*, 88 *Estuarine, Coastal & Shelf Sci.*, 365–76 (2010); Daniel Martin et al., *Ecological Impact of Coastal Defense Structures on Sediment and Mobile Fauna: Evaluating and Forecasting Consequences of Unavoidable Modifications of Native Habitats*, 52 *Coastal Eng'g*, 1027–51 (2005).

⁴⁴⁴ Cornelia Harris et al., *The Ecology of Freshwater Wrack Along Natural and Engineered Hudson River Shorelines*, 722 *Hydrobiologia*, 233–45 (2014); Tsung-Han Lee & Mei-Hui Li, *Intertidal Assemblages on Artificial Structures and Natural Rocky Habitats on Taiwan's North Coast*, 61 *Raffles Bull. of Zoology*, 331–42 (2013); Sarah A. Morley et al., *Ecological Effects of Shoreline Armoring on Intertidal Habitats of a Puget Sound Urban Estuary*, 35 *Estuaries & Coasts*, 774–84 (2012); Melisa C. Wong et al., *Evaluating Estuarine Habitats Using Secondary Production as a Proxy for Food Web Support*, 440 *Marine Ecology Progress Series*, 11–25 (2011); W. Christopher Long et al., *Effects of Anthropogenic Shoreline Hardening and Invasion by *Phrasmites Australis* on Habitat Quality for Juvenile Blue Crabs*, 409 *J. of Experimental Marine Biology & Ecology*, 215–22 (2011); C. Wen et al., *Effects of Habitat Modification on Coastal Fish Assemblages*, 77 *J. of Fish Biology*, 1674–87 (2010); J. Moreira et al., *Seawalls Do Not Sustain Viable Populations of Limpets*, 322 *Marine Ecology Progress Series*, 179–88 (2006).

⁴⁴⁵ Nathan R. Galdi et al., *Artificial Substrates Enhance Non-Native Macroalga and N₂ Production*, 16 *Biological Invasions*, 1819–31 (2013); Guillermo Diaz-Agras et al., *Distribution and Population Structure of *Patella Vulgata* Linnaeus, 1758 (Gastropoda: Patellidae) on Intertidal Seawalls and Rocky Shores in the Ria de Ferrol*, 26 *Int'l J. of Marine Sci.*, 79–91 (2010); Tim M. Glasby et al., *Nonindigenous Biota on Artificial Structures: Could Habitat Creation Facilitate Biological Invasions?* 151 *Marine Biology*, 887–95 (2007).

flats and ponds provide crucial refuge for species such as the endangered Piping Plover.⁴⁴⁶ Piping Plovers commonly select nesting sites adjacent to these microhabitats as the higher seasonal prey abundance and protection from waves foster an ideal location for raising chicks.⁴⁴⁷ Man-made erosion structures such as seawalls and bulkheads, however, disrupt the natural ecosystem processes, degrading and inhibiting formation of such habitats.⁴⁴⁸ One study described the microhabitats as “essential to successful Piping Plover reproduction” and urged the conservation of natural habitat formation processes.⁴⁴⁹ Recent research suggests that “restricting the building or fortifying of seawalls” is the best way to allow Piping Plover habitats to recover in coming decades.⁴⁵⁰

The endangered Roseate Tern faces similar threats associated with shoreline armoring. A Fish & Wildlife Service study determined “Roseate Terns are highly sensitive to disturbances and will desert a whole colony if they feel threatened,” causing the human disruption of coastal armoring to pose serious threats to species survival.⁴⁵¹

Other ecosystem disruptions caused by coastal armoring create indirect threats to endangered populations. For example, shoreline stabilization can sufficiently alter or completely eliminate the intertidal sand beach habitat for horseshoe crab spawning.⁴⁵² While species like the Atlantic Horseshoe Crab are only near-threatened, they are critical to the survival of shorebirds such as the Roseate Tern and Red Knot.⁴⁵³ Another study found that shoreline stabilization efforts diminish Seabeach Amaranth plants, which also rely on dynamic shoreline environments.⁴⁵⁴

⁴⁴⁶ James D. Fraser et al., *Prenesting Use of Intertidal Habitats by Piping Plovers on South Monomoy Island*, Massachusetts, 69 *J. of Wildlife Mgmt.*, 1731–36 (2005).

⁴⁴⁷ *Id.*

⁴⁴⁸ Anne Hecht & Scott M. Melvin, *Population Trends of Atlantic Coast Piping Plovers, 1986–2006*, 31 *Waterbirds*, 64–72 (2009); Susan E. Cameron et al., *Compilation and Assessment of Piping Plover Wintering and Migratory Staging Area Data in North Carolina*, Symp. on Wintering Ecology & Conservation of Piping Plovers, 1–5 (2005).

⁴⁴⁹ David Rabon & Anne Hecht, *Beach Stabilization and Piping Plovers: Overview of Conservation Issues and Implications for ESA Section 7 Consultation*, Proc. of The Symp. On The Wintering Ecology & Conservation of Piping Plovers, 1 (2005).

⁴⁵⁰ Susan A. Sims et al., *Room to Move? Threatened Shorebird Habitat in the Path of Sea Level Rise—Dynamic Beaches, Multiple Users, and Mixed Ownership: A Case Study from Rhode Island, USA*, 17 *J. of Coastal Conservation*, 339–50 (2013).

⁴⁵¹ U.S. Fish and Wildlife Serv., *Roseate Tern: North American Subspecies (*Sterna dougalli dougalli*)*, 1–2 (2011).

⁴⁵² Lawrence J. Niles et al., *Status of the Red Knot (*Calidris canutus rufa*) in the Western Hemisphere*, *Studies in Avian Biology No. 36 in The Condor*, 1–185 (2008).

⁴⁵³ Nancy L. Jackson et al., *Influence of Configuration of Bulkheads on Use of Estuarine Beaches by Horseshoe Crabs and Foraging Shorebirds*, 74 *Env't Earth Scis.*, 5749–58 (2015).

⁴⁵⁴ Johnny Randall, *Bringing Back A Fugitive*, *Endangered Species Bull.* 27.3, 16–18 (2003).

Coastal armoring also disrupts sea turtle nesting and hatchling survival.⁴⁵⁵ A study of Florida's beaches found that fewer turtles emerged onto beaches in front of seawalls, determining that the armoring of shorelines poses a significant threat to sea turtle populations.⁴⁵⁶ Additionally, armoring structures increase clutch mortality and contribute to nesting habitat loss.⁴⁵⁷

The continued construction of bulkheads also creates a spiraling need for increased anthropogenic intervention. Studies indicate that coastal armoring structures increase erosion on either side of barriers due to disruption of sediment transport and/or wave refraction.⁴⁵⁸ Deflected wave energy from bulkheads creates a scouring effect, causing the loss of intertidal bottoms, loss of fringing marsh, and increased turbidity.⁴⁵⁹ Scouring worsens erosion and ultimately destroys marsh by undercutting the roots of marsh plants.⁴⁶⁰ Furthermore, bulkheads block marsh retreat as the sea level rises, destroying a natural form of erosion prevention.⁴⁶¹

The erosion surrounding bulkheads not only harms shoreline ecosystems, but it also jeopardizes the bulkheads themselves. Failure rates of coastal armoring from scour, undermining, outflanking, overtopping, and battering by storm waves are relatively high. Even large, well-engineered structures can experience overtopping by waves and catastrophic failure with risks not only to infrastructure but also to human safety.⁴⁶²

⁴⁵⁵ Daniel W. Wood & Karen A. Bjorndal, *Relation of Temperature, Moisture, Salinity, and Slope to Nest Site Selection in Loggerhead Sea Turtles*, 2000 *Copeia*, 119–28 (2000).

⁴⁵⁶ Andrea E. Mosier & Blair E. Witherington, *Documented Effects of Coastal Armoring Structures on Sea Turtle Nesting Behavior*, Proc. of the Twentieth Ann. Symp. on Sea Turtle Biology & Conservation, 304–06 (2002).

⁴⁵⁷ Carol E. Rizkalla & Anne Savage, *Impacts of Seawalls on Loggerhead Sea Turtle (Caretta caretta) Nesting and Hatching Success*, 27 *J. of Coastal Res.*, 166–73 (2010); B. Witherington et al., *Sea Turtle Responses to Barriers on Their Resting Beach*, 401 *J. of Experimental Marine Biology*, 1–6 (2011).

⁴⁵⁸ Dethier et al., *supra* n. 421 at 106–17; Mattheus et al., *supra* n. 443; U.S. Army Corps of Eng'rs & Yellowstone River Conservation District Council, *Yellowstone River Cumulative Effects Analysis*, 1–433 (2015).; Scott L. Douglass & Bradley H. Pickel, *Tide Doesn't Go Out Anymore—The Effect of Bulkheads on Urban Bay Shorelines*, 67 *Shore & Beach*, 19–25 (1999).

⁴⁵⁹ C.A. Currin, *Developing Alternative Shoreline Armoring Strategies: The Living Shoreline Approach in North Carolina*, Puget Sound Shorelines and The Impacts of Armoring - Proc. of a St. of the Sci. Workshop, 91–102 (2010).

⁴⁶⁰ *Id.*

⁴⁶¹ Bozek & Burdick, *supra* n. 426.

⁴⁶² Gittman et al., *supra* n. 432.

Bulkhead vulnerability creates an ongoing and costly need to monitor, repair, and maintain such structures.⁴⁶³ Additionally, as coastal erosion worsens due to bulkhead presence, more shorelines require stabilization, creating a dangerous cycle of increased shoreline armoring.

ii. In the Draft Decision Document, the Corps fails to provide a factual basis and documentation for its minimal cumulative effects determination in violation of CWA § 404(e), the 404(b)(1) Guidelines, and APA.

As discussed in Section II.C above, the 404(b)(1) Guidelines require the Corps to determine whether activities to be authorized by NWPs “will have only minimal cumulative adverse effects on water quality and the aquatic environment.”⁴⁶⁴ To predict the cumulative effects, the Corps has to include the number of individual discharge activities likely to be authorized under an NWP until the permit’s expiration.⁴⁶⁵ But this is only the first step. The Corps must then determine whether the cumulative impacts are minimal. In short, the 404(b)(1) Guidelines require far more than merely reciting numbers. The Corps must “set forth in writing an evaluation of the potential individual and cumulative impacts of the category of activities to be regulated.”⁴⁶⁶

The 404(b)(1) Guidelines provide a laundry list of items a complete cumulative impact analysis must contain before the Corps can determine whether the cumulative impacts are minimal.⁴⁶⁷ Although many of these factors are addressed above in a more general context, we enumerate and discuss the specific requirements as they relate to the Corps’ NWP 13 analysis below.

First, the Corps’ evaluation has to be based on the consideration of prohibitions in 40 C.F.R. § 230.7(10)(b), including considering whether NWP 13 will jeopardize ESA-listed species or result in the destruction or adverse modification of critical habitat.⁴⁶⁸ Like with the other NWPs, the Corps does not fulfill this requirement for NWP 13, much less discuss it, at the headquarters level. It simply kicks this can to its field offices. As the Draft Decision Document provides, “[r]eviews of pre-construction notifications, regional conditions, and local operating procedures for endangered species will ensure compliance with the Endangered Species Act.”⁴⁶⁹ It is only at the project level that endangered or threatened species consultations take place. The Corps does not discuss in the Draft Decision Document any specific endangered or threatened species that could be adversely impacted by NWP 13, such as piping plovers, roseate terns, red knots, or sea turtles.

⁴⁶³ Steven B. Scyphers et al., *Participatory Conservation of Coastal Habitats: The Importance of Understanding Homeowner Decision Making to Mitigate Cascading Shoreline Degradation*, 8 Conservation Letters, 1–8 (2015).

⁴⁶⁴ 40 C.F.R. § 230.7(a)(3).

⁴⁶⁵ *Id.* § 230.7(b)(3).

⁴⁶⁶ *Id.* § 230.7(b).

⁴⁶⁷ *See id.*

⁴⁶⁸ *Id.* § 230.10(b)(3).

⁴⁶⁹ NWP 13 Drft. Decision Doc. at 104.

Second, the Corps has to consider whether NWP 13 “will cause or contribute to significant degradation of waters of the United States.”⁴⁷⁰ Significant degradation includes, the “loss of fish and wildlife habitat . . . [and] loss of the capacity of a wetland to . . . reduce wave energy.”⁴⁷¹ The Corps’ review of “significant degradation” had to be based on “appropriate factual determinations, evaluations, and tests.”⁴⁷² The Draft Decision Document contains two paragraphs discussing significant degradation and simply states that mitigation and general conditions will ensure that NWP 13 will not lead to any significant degradation.⁴⁷³

Third, the Corps is required to “determine in writing the potential short-term and long-term effects” of NWP 13, including the consideration of various environmental effects.⁴⁷⁴ Among them, the Corps has to “[d]etermine the nature and degree of effect that the proposed discharge will have individually and cumulatively on water, current patterns, circulation including downstream flows . . . [and] alterations of bottom contours, or other significant changes in the hydrologic regime.”⁴⁷⁵ This factual determination must be supported by documented information.⁴⁷⁶ In the Draft Decision Document the Corps makes no attempt to assess the cumulative impacts of NWP 13 on water movement.⁴⁷⁷

Fourth, the Corps is required to consider “secondary effects” on the aquatic ecosystem.⁴⁷⁸ These are effects associated with a discharge of material “but do not result from the actual placement of the dredged or fill material.”⁴⁷⁹ Scouring and downstream erosion caused by bulkheads are secondary effects, for instance. Instead of discussing any of these potential effects in the Draft Decision Document, the Corps simply discusses at length the variability of the different projects that will be authorized under NWP 13 and how difficult it is to make an assessment about secondary effects.⁴⁸⁰

Finally, the Corps cannot issue NWP 13 until there is “sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Guidelines.”⁴⁸¹ This analysis must be “completed before any General permit is issued.”⁴⁸²

⁴⁷⁰ 40 C.F.R. § 230.10(c).

⁴⁷¹ *Id.* § 230.10(c)(3).

⁴⁷² *Id.*

⁴⁷³ NWP 13 Drft. Decision Doc. at 104.

⁴⁷⁴ 40 C.F.R. § 230.11.

⁴⁷⁵ *Id.* § 230.11(b).

⁴⁷⁶ *Id.*

⁴⁷⁷ NWP 13 Drft. Decision Doc. at 118.

⁴⁷⁸ 40 C.F.R. § 230.11(h).

⁴⁷⁹ *Id.*

⁴⁸⁰ NWP 13 Drft. Decision Doc. at 62–64.

⁴⁸¹ 40 C.F.R. § 230.12(a)(3)(iv).

⁴⁸² *Id.* § 230.12(b); *see also id.* § 230.6(d).

Although the Corps attempts to address cumulative impacts for NWP 13 in the Draft Decision Document, it does so in the same perfunctory and wholly inadequate manner discussed in Section II above. The Corps merely says:

Based on reported use of this NWP during the period of February 22, 2022 to February 21, 2024, the Corps estimates that this NWP will be used approximately 3,200 times per year on a national basis, resulting in impacts to approximately 210 acres of waters of the United States, including jurisdictional wetlands.

* * *

Based on these annual estimates, the Corps estimates that approximately 16,000 activities could be authorized until this NWP expires, resulting in impacts to approximately 1,050 acres of waters of the United States, including jurisdictional wetlands. Approximately 800 acres of compensatory mitigation would be required to offset those impacts.⁴⁸³

This analysis consists of nothing more than a conclusory listing of how many acres the projects would impact, and how many acres of mitigation would be required. It does not even explain whether the cumulative effects would be minimal or not. Furthermore, it uses the number of wetlands acres that will be impacted by NWP 13 as a gauge of the impacts to the environment when the impacts of shoreline armoring extend far beyond the impacts to wetlands. It would be helpful, for instance, if the Corps were to produce data on the miles of shoreline that have already been armored nationally and the miles of additional armoring that could be authorized under NWP 13 over the next five years.

The arbitrariness of the Corps' cumulative impact analysis is heightened by the fact that the various environmental impacts it must evaluate under the 404(b)(1) Guidelines are precisely those impacts associated with hardening shorelines, such as the loss of habitat and loss of a wetland's capacity to reduce wave energy.⁴⁸⁴ The Corps provides no reasoned explanation or scientific analysis on the cumulative impact of hardening shorelines—including the erosion caused by NWP 13 activities. In violation of its own regulations, the Corps did not have “sufficient information to make a reasonable judgment” on the cumulative effects of NWP 13.⁴⁸⁵

The CWA and APA require the Corps to explain its decision and establish a “rational connection” between the facts found and the conclusion.⁴⁸⁶ In the Draft Decision Document, the Corps does not provide a connection between its tally of projected authorizations and any decision by the Corps that the cumulative effects will be minimal.

Instead, the Corps unlawfully defers its cumulative impact determination and its 404(b)(1) Guidelines analysis to its field offices. But as discussed above, the Corps cannot

⁴⁸³ NWP 13 Drft. Decision Doc. at 106–07.

⁴⁸⁴ 40 C.F.R. § 230.10(c)(3).

⁴⁸⁵ *Id.* § 230.12(a)(3)(iv).

⁴⁸⁶ *See State Farm*, 463 U.S. at 43; 40 C.F.R. § 230.12(a)(3)(iv).

defer its analysis of NWP 13 to field offices where “[b]y their very nature, the ‘cumulative impacts’ of a general permit [under CWA Section 404] cannot be evaluated in the context of approval of a single project.”⁴⁸⁷ The Corps Headquarters is engaging in wishful thinking, not the required substantive analysis of NWP 13’s environmental effects.

Because in the Draft Decision Document the Corps arbitrarily relies on future analyses to be done and failed to ensure that NWP 13 will have minimal environmental effects at the time NWP 13 is released, it did not satisfy the CWA requirements for issuing NWP 13.

iii. The Corps’ reliance on compensatory mitigation to reduce the cumulative impacts of NWP 13 to a minimal level is arbitrary and unsupported.

The Corps’ determination that cumulative impacts of NWP 13 will be minimal rests largely on its belief that those effects will be mitigated to a minimal level through compensatory mitigation. This determination is arbitrary and capricious for the general reasons described in Section II.B.iii.c above, and the context-specific reasons discussed below.

In the Draft Decision Document for NWP 13, the Corps states that “[a]pproximately 800 acres of compensatory mitigation would be required to offset” the expected impacts of the activities authorized under NWP 13 over the next 5 years.⁴⁸⁸ But the Corps does not explain why only 800 acres of compensatory mitigation is sufficient to offset an estimated 1,050 acres of impacts.

Moreover, for the Corps’ reliance on mitigation to be reasonable, the Corps’ mitigation must “have been demonstrated to be effective in circumstances similar to those under consideration.”⁴⁸⁹ And the Corps must “assess the likelihood for ecological success” in determining compensatory mitigation.⁴⁹⁰ Although the Corps includes boilerplate language in each of the Draft Decision Document that mitigation is often (though not always) successful, it does not provide any data on whether, for example, there are sufficient salt water mitigation banks to offset adverse impacts to salt marsh ecosystems adversely affected by NWP 13 projects. Nor does the discussion include any mention of other types of mitigation such as salt marsh, beaches, and mudflats. For instance, one impact of a bulkhead constructed on a beach is that sand seaward of the bulkhead often erodes away reducing habitat. The Decision Document does not explain how that adverse effect could be mitigated and whether any mitigation attempted would be sustainable. In short, the Corps’ belief in compensatory mitigation is not based on any “documented information supporting each factual determination,” as the Corps’ own regulations require.⁴⁹¹

The discussion of seagrass mitigation is particularly telling because the Corps goes on at great length explaining how difficult it is to mitigate for the destruction of seagrass. For instance, the Draft Decision Document provides that “[r]ealistic expectations should be

⁴⁸⁷ *Wyo. Outdoor Council*, 351 F. Supp. 2d at 1243.

⁴⁸⁸ NWP 13 Drft. Decision Doc. at 107.

⁴⁸⁹ 40 C.F.R. § 230.75(d).

⁴⁹⁰ 33 C.F.R. § 332.3(a)(1).

⁴⁹¹ 40 C.F.R. § 230.7(b)(1).

established for seagrass restoration activities because of our limited understanding of seagrasses and the challenges of controlling conditions in open coastal waters.”⁴⁹² This assessment suggests that the restoration of seagrasses, which may well be associated with a project authorized under NWP 13, can be problematic.

In *Riverkeeper v. Rowlette*, the Corps argued that mitigation could be used to support its minimal effects determination for NWP 21 for mountaintop mining activities, stating “that compensatory mitigation will ensure cumulatively minimal adverse effects.”⁴⁹³ The Sixth Circuit rejected that argument because the Corps failed to provide any factual basis for its reliance on mitigation. As the Court noted, the Corps’ “mere listing of mitigation measures and processes, without any analysis, cannot support a cumulative impacts determination.”⁴⁹⁴ The Corps “must, at a minimum, provide *some* documented information supporting that finding.”⁴⁹⁵ As the Guidelines provide, “[i]n the case of activities covered by General permits . . . , the analysis and documentation required by the Guidelines will be performed at the time of General permit issuance . . . and will not be repeated when activities are conducted under a General permit”⁴⁹⁶

Here, as in *Riverkeeper*, the Corps has cited no factual basis for its claim that mitigation can ensure NWP 13’s minimal effects. As in *Hurst*, in which the Corps’ cumulative impact analysis of NWP 21 was challenged, the Corps has offered “nothing but the Corps’ unsupported belief that compensatory mitigation will successfully minimize cumulative impacts.”⁴⁹⁷ The Corps must detail in the Draft Decision Document the impacts associated with different NWP 13 activities, explain how those impacts would be mitigated, and determine whether the mitigation is likely to be successful. In violation of the 404(b)(1) Guidelines, there is no documented information in the Draft Decision Document supporting the Corps’ reliance on mitigation to specifically offset the impact of NWP 13.⁴⁹⁸

Furthermore, if the Corps is going to rely on mitigation to offset the adverse effects of NWP 13, it should reveal its track record. That is, it should provide data on how often mitigation is required to offset NWP 13 impacts and how successful that mitigation has been. The Draft Decision Document does provide that the Corps estimates that two percent of NWP 13 activities will rely on mitigation to reach minimal impacts.⁴⁹⁹ But this is not sufficient. It should also provide, for example, data on how often district engineers determine that mitigation cannot be used to reach a minimal impact analysis and that an applicant must obtain an individual permit.

⁴⁹² NWP 13 Drft. Decision Doc. at 114.

⁴⁹³ 714 F.3d 402, 411 (6th Cir. 2013).

⁴⁹⁴ *Id.* at 412 (quoting *Hurst*, 604 F. Supp. 2d at 887).

⁴⁹⁵ *Id.* at 413 (emphasis in original).

⁴⁹⁶ 40 C.F.R. 230.6(d).

⁴⁹⁷ 604 F. Supp. 2d at 894.

⁴⁹⁸ 40 C.F.R. § 230.11.

⁴⁹⁹ NWP 13 Drft. Decision Doc. at 106.

Theoretically, any adverse impact, regardless of its size, can be offset to below a minimal impact threshold. The Corps needs to explain in the Draft Decision Document how it determines that the impacts associated with a specific project would require *too* much mitigation and thus trigger the need for an individual permit. And the Corps must also explain how it makes cumulative minimal impacts analyses when it reviews projects on a project-by-project basis. The District Court for the Western District of Washington recently made this point in a case where it vacated NWP 56, which applies to aquaculture facilities.⁵⁰⁰ The court held that “[t]he Corps has failed to persuasively explain how a site-specific review-one aquaculture facility at a time—could afford a division or district engineer the perspective necessary to assess the cumulative effect of NWP 56.”

If the Corps does in fact consider other past and future activities involving a specific NWP when it makes its project-by-project determinations, it must provide a discussion in the Draft Decision Document supporting how those determinations are made. It is doubtful that Corps can make a convincing case along these lines for NWP 13 considering that it is not even made aware of most shore armament projects that are less than 500 feet long. This begs the question, how can district engineers make evaluations of cumulative impacts when they do not have records on the majority of NWP 13 activities?

Even if mitigation plans could reduce the impacts of individual projects to insignificance, the Corps cannot simply presume that the cumulative impacts of those projects, when added together, are also insignificant.⁵⁰¹ Court decisions and applicable regulations recognize the principle that multiple actions can be individually insignificant but cumulatively significant. As the 9th Circuit Court of Appeals explained in *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, “[s]ometimes the total impact from a set of actions may be greater than the sum of the parts. [T]he addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact.”⁵⁰²

The 404(b)(1) Guidelines also recognize this principle by stating that “[a]lthough the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.”⁵⁰³ The Corps’ reliance on mitigation thus violates this principle by assuming that the cumulative impacts from NWP 13 activities cannot be greater than the sum of the individual impacts of those activities. The Corps has failed to provide a rational basis for its reliance on mitigation to reduce cumulative effects in violation of the CWA and APA.

⁵⁰⁰ *Don’t Cage Our Oceans v. U.S. Army Corps of Eng’rs*, No. C22-1627-KKE, 2024 WL 4349548, at *9 (W.D. Wash. Sept. 30, 2024).

⁵⁰¹ *Cf. O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 234–35 (5th Cir. 2007) (discussing mitigation measures in the NEPA context).

⁵⁰² *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 994.

⁵⁰³ 40 C.F.R. § 230.11(g)(1).

B. The Corps must require nature-based approaches for all shore armoring to minimize the adverse effects of such structures where practicable.

As the Draft Decision Document provides, “[g]eneral condition 23 requires permittees to avoid and *minimize* discharges of dredged or fill material into waters of the United States to the maximum extent practicable on the project site.”⁵⁰⁴ In the following discussion in the Draft Decision Document, the Corps explains at length how nature-based approaches can reduce the adverse impacts of bulkheads and seawalls.

As the Corps states, “[t]he inclusion of ecological engineering and nature-based solutions can decrease adverse effects of hard bank stabilization structures on nearshore biodiversity, habitat value, and other ecosystem functions and services, especially in coastal areas.”⁵⁰⁵ The Corps then explains how seawalls and bulkheads can be constructed so they have textured surfaces that allow aquatic organisms to attach to them which creates microhabitats that attract fish.⁵⁰⁶ As the Corps continues, these positive effects can be increased if rock piles, tidal pools, bags of mollusks, and wood debris are placed in front of seawalls and bulkheads.⁵⁰⁷

Considering this discussion, it is clear that the Corps agrees that the use of nature-based approaches can reduce or minimize the adverse impacts of bulkheads and seawalls. Thus, under general condition 23, the Corps has no choice but to require permittees to install nature-based approaches where they are practicable. This, of course, would include bulkheads and seawalls that do not trigger the PCN threshold.

In the proposed Note 2, however, the Corps states that they will simply encourage permittees to use these nature-based approaches.⁵⁰⁸ Again, later in the draft decision document, the Corps goes on to state that “[m]odifications to this NWP to encourage project proponents to use soft bank stabilization approaches and/or nature-based solutions where appropriate could reduce the potential individual and cumulative adverse environmental effects that may be caused by bank stabilization activities.”⁵⁰⁹ Although such encouragement is helpful, the Corps cannot have it both ways. It cannot suggest valid ways to minimize the effects of seawalls and bulkheads and then leave it up to permittees to decide whether to include them in their projects. The Corps must make permittees comply with general condition 23 and minimize the adverse impacts of their projects. To do otherwise would be arbitrary and a violation of the APA.

⁵⁰⁴ NWP 13 Drft. Decision Doc. at 104 (emphasis added).

⁵⁰⁵ *Id.* at 64.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 3.

⁵⁰⁹ *Id.* at 90.

C. Affected communities are denied the opportunity for meaningful involvement in the permitting process because NWP 13 does not provide an opportunity for public comment on most armoring projects.

The Corps does not require a preconstruction notice for most armoring projects less than 500 feet in length. Applicants decide whether they meet the requirements of NWP 13, and no comment period is afforded to the public.⁵¹⁰ As explained earlier in this comment letter, studies have shown that NWP 13 has significant adverse impacts on the environment. Studies show that armoring is having a significant impact on lower-wealth communities and communities of color by increasing erosion and flooding.⁵¹¹ These studies show that economically advantaged property owners are more inclined to armor their shorelines.⁵¹² Without the ability to comment on armoring projects, affected communities are left to suffer the collateral damage of shoreline armoring projects. The public should be given the opportunity to comment on all shore armoring projects regardless of their size.⁵¹³

D. The Corps fails to consider how climate change exacerbates the adverse effects of shore armoring.

Sea level rise and other climate change impacts have not been adequately considered in the analysis of NWP 13. As a result, the Corps is excluding a significant array of individual and cumulative effects from their analysis. Without further analysis on sea level rise and climate change, the Corps cannot legally reauthorize NWP 13.

Although the Draft Decision Document is replete with references to sea level rise, there is no analysis of how sea level rise will exacerbate the adverse impacts of shore armoring. In the Draft Decision Document, the Corps focuses solely on how sea level rise will lead to more armoring. One example involving coastal areas of this one-sided analysis follows:

Bank stabilization activities can help reduce economic losses in coastal areas by protecting existing structures such as homes, businesses, and recreational facilities from increased risk of damage by erosion due to sea level rise and increased intensity of storm events caused by changing environmental conditions.⁵¹⁴

In this reference, the Corps completely ignores the fact that although armoring may decrease erosion, at least temporarily, where a bulkhead or seawall is constructed, erosion will likely

⁵¹⁰ Travis O. Brandon, *Too Little Too Late: Why the Environmental Justice Problems Caused by the Army Corps' Nationwide Permit Program Run Much Deeper than Permit*, 48 Vt. L. Rev. 40, 70 (2023–24).

⁵¹¹ *Id.* at 69; *see also id.* at 73 (citing Michelle A. Hummel et al., *Economic Evaluation of Sea-Level Rise Adaptation Strongly Influenced by Hydrodynamic Feedbacks*, 118 Proc. Nat'l Acad. of Sci., 1, 6 (July 12, 2021)).

⁵¹² *Id.* at 70 (citing Nicole E. Peterson et al., *Socioeconomic and Environmental Predictors of Estuarine Shoreline Hard Armoring*, Sci. Reps., at 1, 7 (Nov. 8, 2019)).

⁵¹³ *See id.*

⁵¹⁴ NWP 13 Drft. Decision Doc. at 89.

occur on adjacent coastal properties and that this erosion will likely be exacerbated by sea level rise.

In another section of the Draft Decision Document, the Corps points out that more armoring will be sought by property owners owning property along rivers and streams but does not explain that the armoring itself will cause increased erosion upstream and downstream of any such armoring. The Draft Decision Document provides as follows: “[a]s storms increase in frequency and intensity because of changing environmental conditions, the need for bank stabilization activities along river and stream banks may increase to protect land and infrastructure from erosion.”⁵¹⁵ Without any discussion of the climate change driven adverse effects of armoring, the Corps has not completed its analysis.

It is imperative that the Corps do so. Data from NOAA show that sea level has risen over a foot in the past century along the southeastern coastline and is continuing to rise.⁵¹⁶ Parts of Tidewater Virginia have experienced over two feet of sea level rise in a century.⁵¹⁷ The impacts can be significant. In Florida the number of miles of critically eroded beaches increased from 217 miles in 1989 to more than 400 miles in 2022.⁵¹⁸ Fourteen of 17 beaches studied along North Carolina’s Outer Banks are predicted to erode all the way back to the main road running the length of the barrier islands by 2080.⁵¹⁹ And the speed of the rising water has been accelerating since the 1990s—more than a third of the 8-inch rise in global sea levels took place in just the past 25 years.⁵²⁰

Along the contiguous United States coastline, NOAA recently predicted that over the next 30 years, sea level will rise as much as it did over the past century.⁵²¹ More frequent tidal flooding is one-way coastal communities are already feeling the effects of rising seas. As sea level increases, the tideline rises closer to the threshold at which water moves into the streets and cities begin to flood more often. For example, Charleston, SC averaged 2 or 3 days of tidal flooding per year in the 1950s and 1960s. More recently, tidal flooding has been setting record highs with 38 days of minor tidal flooding in 2015, followed by 50 days with tidal flooding in

⁵¹⁵ *Id.*

⁵¹⁶ Nat’l Oceanic & Atmospheric Admin., *Global and Regional Sea Level Rise Scenarios for the United States*, U.S. Department of Commerce (2017), <https://perma.cc/V8H4-M5FG>.

⁵¹⁷ See Nat’l Oceanic & Atmospheric Admin, *Sea Level Trends*, <https://perma.cc/Z6T2-YZ5Z>.

⁵¹⁸ J. Peterson et al., *Managing Threats to Beaches from Storms and Rising Seas*, 53 *Env’t L. Rptr.* 10355, 10355 (2023).

⁵¹⁹ *Id.* at 10356.

⁵²⁰ R.S. Nerem et al., *Climate Change Driven Accelerated Sea Level Rise Detected in the Altimeter Era*, *PNAS* (2018), <https://perma.cc/24Q9-FPRY>.

⁵²¹ Nat’l Oceanic & Atmospheric Admin., *Global and Regional Sea Level Rise Scenarios for the United States: Updated Mean Projections and Extreme Water Level Probabilities Along U.S. Coastlines*, U.S. Department of Commerce, xii (2022), <https://perma.cc/493R-6U4N>.

2016.⁵²² In 2019, Charleston experienced 89 tidal flooding events on 76 separate days.⁵²³ This amounts to water impeding movements through the area one out of every five days.

Recognizing the need for sea level rise to be incorporated into planning decisions, the Corps published three relative sea level rise scenario curves—Low, Intermediate, and High—for major tide gauges along the United States coast in 2013 (“USACE 2013 curves”).⁵²⁴ Based on those curves, the Corps issued Engineer Regulation 1100-2-8162 (“SLR Guidance”) which directed the Corps to use the USACE 2013 curves to evaluate the “direct and indirect physical effects of projected future sea level change across the project life cycle in managing, planning, engineering, designing, constructing, operating, and maintaining [Corps] projects. . . .”⁵²⁵ The 2013 SLR Guidance allowed for the Corps to incorporate other sea level rise curves into their analysis, in addition to the USACE 2013 curves, in order to properly evaluate how projects and project costs may be affected by sea level rise.⁵²⁶ These tools show that the Corps is no stranger to sea level rise analysis and has been incorporating it into its own planning since 2013.

The most advanced sea level rise scenarios and projections available for the United States estimate an average of almost 4 feet of relative sea level rise by 2100 over 2000 levels along the southeastern coastline.⁵²⁷ Along the entire contiguous U.S. coastline, NOAA predicts that sea levels will rise about 2–7 feet by 2100 and 3–13 feet by 2150 over the sea level in 2000.⁵²⁸ Along with the Western Gulf region, the Southeast is predicted to suffer the most pronounced sea level rise in the continental United States.⁵²⁹ And, not surprisingly, these predictions increase as the average global temperature increases.⁵³⁰ Research shows that both Greenland⁵³¹ and Antarctica’s⁵³² ice sheets are melting faster and in greater volume than expected and that the

⁵²² William V. Sweet & John J. Marra, *State of U.S. “Nuisance” Tidal Flooding*, Nat’l Oceanic & Atmospheric Admin Ctr. for Operational Oceanographic Products and Servs. and Nat’l Ctrs. for Env’t Info. (2016), <https://perma.cc/Q93S-72NL>.

⁵²³ See Post & Courier, *Charleston and the South Carolina Coast Flooded Record Times* (Jan. 3, 2020), <https://perma.cc/BU85-Y8QJ>.

⁵²⁴ The USACE 2013 curves were novel at their release because they were some of the first to assess localized sea level rise along the entire U.S. coast, however these curves are based on projections originally created by the National Research Council in 1987 and have been superseded by more recent research.

⁵²⁵ U.S. Army Corps of Engrs, *Incorporating Sea Level Change in Civil Works Programs*, Appendix B at 14 (June 2019), <https://perma.cc/8TQ2-Y36R>.

⁵²⁶ U.S. Army Corps of Engineers SLR Guidance (June 2019), Appendix B at 15.

⁵²⁷ See NOAA, *supra* n. 521, at 23.

⁵²⁸ See *id.* at xiii.

⁵²⁹ *Id.* at 16.

⁵³⁰ *Id.* at 62.

⁵³¹ J. Box et al., *Global Sea Level Contribution from Arctic Land Ice: 1971–2017*, 13 Env’t Rsch. Letters (2018), <https://perma.cc/KU9W-SPH2>; see also J. Schwartz, *Greenland’s Melting Ice Nears a ‘Tipping Point,’ Scientists Say*, N.Y. Times (Jan. 21, 2019), <https://perma.cc/JCS6-EYXW> (last visited July 7, 2025).

⁵³² E. Rignot et al., *Four Decades of Antarctic Ice Sheet Mass Balance from 1979–2017*, 116(4) Procs. of the Nat’l Acad. of Scis. (PNAS) 1095–1103 (2019), <https://perma.cc/BJ8Q-53GM>.

oceans are also warming more rapidly than predicted.⁵³³ Also, 2024 marked the globe's warmest year on record with an average temperature of 2.32 degrees F.⁵³⁴

There is a consensus among researchers that climate change will continue to make storms and the floods that follow more intense, as warmer air can hold more moisture and add more fuel to storm systems.⁵³⁵ Extreme rainfall has already become more frequent and more damaging throughout the Southeast.⁵³⁶ This trend will continue due to climate change even with future emissions reductions.⁵³⁷ In keeping with this trend, hurricanes have dropped more rain in recent years compared to the historic average, even accounting for changes in storm frequency over time.⁵³⁸ The Atlantic basin has already seen an increase in the number of Category 4 and 5 hurricanes since the 1980s.⁵³⁹ With Hurricane Matthew in 2016 and Florence in 2018, the Carolina coastal plain was dealt two so-called 1,000-year storms in only two years.⁵⁴⁰ Then in 2024 North Carolina was hit again by Hurricane Helene which let loose all-time highest rainfall totals in Asheville and the surrounding region.⁵⁴¹ As explained above, the accompanying floods devastated the area.⁵⁴²

Storm surge, the most damaging and deadly hurricane impact, has continually worsened in the Southeast since the 1920s according to tide gauge measurements.⁵⁴³ Higher seas create a higher launching point for storm surge, which makes historically less probable storm surges and

⁵³³ L. Cheng et al., *How Fast are the Oceans Warming?*, 363 *Sci.* 128–29 (2019), <https://perma.cc/7AZM-74HE> (last visited July 7, 2025).

⁵³⁴ Nat'l Oceanic & Atmospheric Admin., *2024 Was the World's Warmest Year on Record* (Jan. 10, 2025), <https://perma.cc/GW9H-G7XN>.

⁵³⁵ S.I. Seneviratne et al., *Weather and Climate Extreme Events in a Changing Climate*, in *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* 1513 (V.P. Masson-Delmotte et al. eds.), <https://perma.cc/VH5V-3DMW>.

⁵³⁶ U.S. Global Change Research Program, *Precipitation Change in the United States*, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* (2017).

⁵³⁷ U.S. Global Change Research Program, *Southeast Impacts, Risks, and Adaptation in the United States*, *Fourth National Climate Assessment, Volume II* (2018).

⁵³⁸ K.E. Kunkel et al., *Recent Increases in U.S. Heavy Precipitation Associated with Tropical Cyclones*, *Geophysical Resch. Letters*, 37 (2010).

⁵³⁹ P.J. Webser et al., *Changes in Tropical Cyclone Number Duration and Intensity in a Warming Environment*, 309 *Sci.* 1844–46 (2005).

⁵⁴⁰ See Michael S. Williamson et al., *First Hurricane Matthew then Florence: A town in constant recovery*, *Wash. Post* (Oct. 24, 2018), <https://www.washingtonpost.com/graphics/2018/national/amp-stories/hurricane-matthew-then-florence-lumberton-nc-in-constant-recovery/> (last visited July 7, 2025).

⁵⁴¹ Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv., *Hurricane Helene: Record-Breaking Rainfall and Historic Flooding*, <https://perma.cc/NJX9-QSZL>.

⁵⁴² *Id.*

⁵⁴³ According to gauge observational data (not modeling). See A. Grinsted et al., *Homogenous Record of Atlantic Hurricane Surge Threat Since 1923*, *PNAS*, 109(48), 19601–19605, (2012), <https://perma.cc/XX4Q-PUJ6>.

flooding more likely.⁵⁴⁴ In 2017, when the eye of Hurricane Irma was over 200 miles away, Charleston was hit with a 4.7 foot storm surge on top of high tide.⁵⁴⁵ Hurricane Milton packed a storm surge of over 10 feet in 2024 when it came ashore at Manasota Key, Florida.⁵⁴⁶

High tide flooding is also becoming increasingly problematic. While in the past severe storms typically caused coastal flooding, today due to sea level rise, common wind events can cause homes and businesses to flood, as well as overload stormwater and wastewater systems and stress wetlands and estuarine ecosystems.⁵⁴⁷ By 2050, NOAA predicts that major to moderate high tide flooding will occur as frequently as moderate to minor flooding does today putting coastal infrastructure, communities, and ecosystems at significant risk.⁵⁴⁸

Sea level rise and climate change pose a significant threat to coastal marsh and other coastal ecosystems, especially when considered in conjunction with shoreline armoring. Marshes in particular supply innumerable benefits to surrounding ecosystems and communities in the form of wildlife habitat, flood protection, fisheries nurseries, water purification, erosion mitigation, food supply, carbon storage, and recreational functions.⁵⁴⁹

Over 75% of the region's fishery species shelter in tidal wetlands at some point in their lifecycle.⁵⁵⁰ Properties located behind a marsh save around 16% in flood losses each year compared to properties where marshes have been lost.⁵⁵¹ Moreover, Georgia and South Carolina are home to hundreds of thousands of acres of marsh—one of the most biologically productive ecosystems in the world.⁵⁵²

The future of the marshes and the ecosystem services they provide are at risk as sea levels continue to rise. In the absence of man-made barriers, these marsh systems are able to migrate to higher ground with the tideline.⁵⁵³ Evidence of marsh migration can already be observed up and

⁵⁴⁴ Sea Level Rise.org, *North Carolina's Sea Level Is Rising, And It's Costing Over \$2 Billion*, <https://perma.cc/PLX3-ABGB>.

⁵⁴⁵ NOAA, Nat'l Weather Serv., *Tropical Storm Irma - September 10-11, 2017*, <https://perma.cc/HQX9-82WQ>.

⁵⁴⁶ J.L. Beven et al., *National Hurricane Center Tropical Cyclone Report: Hurricane Milton*, Mar. 31, 2025, <https://perma.cc/A8SW-K8G6>.

⁵⁴⁷ See NOAA, *supra* n. 521, at 2–3.

⁵⁴⁸ *Id.* at 60.

⁵⁴⁹ S.C. Dep't of Nat. Res., *Guide to the Salt Marshes and Tidal Creeks of the Southeastern United States* (2016), <https://perma.cc/F2MV-6E7P>.

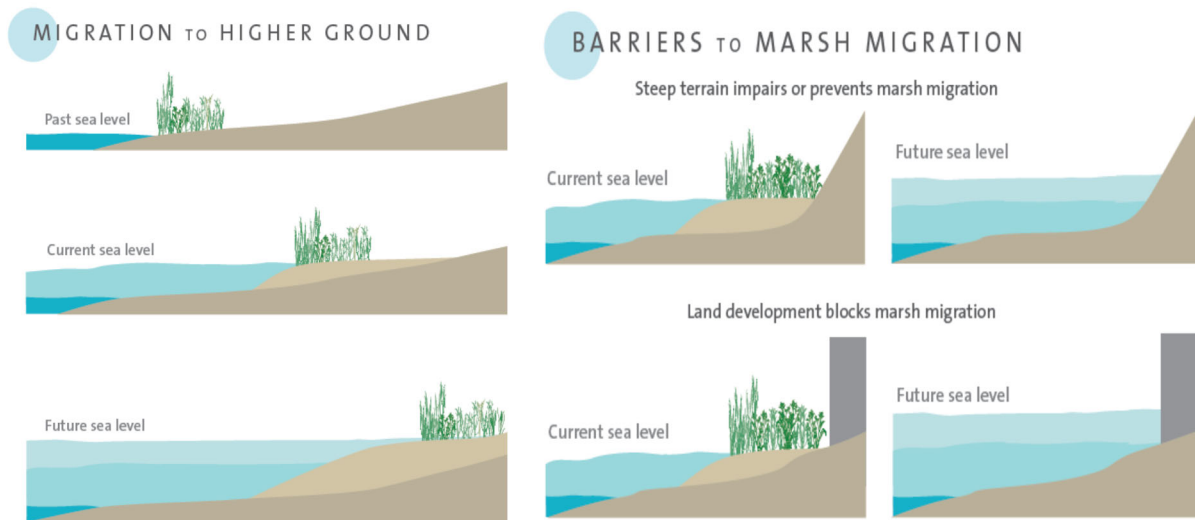
⁵⁵⁰ *Id.*

⁵⁵¹ S. Narayan et al., *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*, 7 *Sci. Reps.* 1 (2017), <https://perma.cc/U4WH-TEYG>.

⁵⁵² Clint McNeal, *Beyond the Beach: Playing in Georgia's Salt Marshes*, Explore Georgia, <https://perma.cc/7CZE-BE78>; S.C. Dep't of Nat. Res., *Marine—Salt Marsh Habitat, Life's Better Outdoors*, <https://perma.cc/W6YZ-FC7A>.

⁵⁵³ K. Warnell et al., *Fact Sheet: Assisted Marsh Migration*, NBS Roadmap Project, Nicholas Institute for Energy, Environment & Sustainability 1 (2023), <https://perma.cc/NW9Y-UAGW>.

down the coast along natural shorelines as marsh grass replaces trees.⁵⁵⁴ Armoring along the shoreline cuts off the marsh's evacuation route and can result in the loss of the marshland and its benefits.⁵⁵⁵



Visual representations show natural marsh migration over time and the barriers that prevent migration, resulting in loss of the habitat⁵⁵⁶

A recent study of the coast of South Carolina found that the state's shoreline is covered in over 90 miles of structures such as bulkheads, piers, and seawalls.⁵⁵⁷ Changes in wave action along the coast, connected to intensifying storms fueled by climate change, have already led to dramatic shifts in longshore sediment transport.⁵⁵⁸ While accelerating sea level rise will continue to increase erosion rates along the coast,⁵⁵⁹ the construction of more hardened structures on the shoreline harms the health of the natural system and hinders adaptation in the face of rising seas.⁵⁶⁰ Even isolated areas of shoreline stabilization have the potential to worsen the erosional

⁵⁵⁴ N.C. Sea Grant, *Unraveling Mysteries of Ghost Forests* (2017), <https://perma.cc/3CUW-9R4F>.

⁵⁵⁵ See Warnell, *supra* n. 553, at 1.

⁵⁵⁶ Northeast Regional Ocean Council, *Make Way for Marshes* 10–11, <https://online.anyflip.com/mptp/vflu/mobile/index.html#p=11>.

⁵⁵⁷ J. Beauvais, and J. Byers, *Racial Composition and Homeownership Influenced the Distribution of Coastal Armoring in South Carolina, USA*, 47 *Estuaries & Coasts* 1151, 1156 (2023), <https://perma.cc/UN5M-J32X>.

⁵⁵⁸ J.M. Johnson et al., *Recent Shifts in Coastline Change and Shoreline Stabilization Linked to Storm Climate Change*, 40(5) *Earth Surface Processes and Landforms* 569–85 (2014), <https://perma.cc/XL4M-XUU5>.

⁵⁵⁹ S.P. Leatherman et al., *Sea Level Rise Shown to Drive Coastal Erosion*, 81(6) *EOS* 55–57 (2000); R. Ranasinghe et al., *Climate Change Impact Assessment for Inlet-Interrupted Coastlines*, 3 *Nature Climate Change* 83–87 (2013).

⁵⁶⁰ J. L. Miselis and J. Lorenzo-Trueba, *Natural and Human-Induced Variability in Barrier-Island Response to Sea Level Rise*, 44 *Geophysical Research Letters* 11,922–31 (2017).

effects of sea level rise, as these structures can concentrate erosional forces in adjacent areas.⁵⁶¹ As storms increase in intensity, the scouring effect in front of bulkheads will increase.⁵⁶²

Sea level rise is currently and will continue to threaten many aspects of the coastal environment. Regardless of whether the exact future rate of sea level rise or the full effects of climate change are known with complete certainty, the Corps must consider its effects in decision making. As the D.C. District Court explained in *Chlorine Chemistry Council v. E.P.A.*, “All scientific conclusions are subject to some doubt; future, hypothetical findings always have the potential to resolve the doubt.”⁵⁶³ Nonetheless, administrative agencies are directed to make the best decisions that they can based on the “best available evidence *at the time* of the rulemaking.”⁵⁶⁴ Given the extensive body of research showing that sea level rise is occurring, the Corps must consider how the reauthorization of NWP 13 is affected by sea level rise, especially because the shorelines affected by NWP 13 will simultaneously be affected by sea level rise. Additionally, the Corps must consider the growing body of climate change research, particularly observations of more intense storms and storm impacts along the shoreline.

VIII. NWP 17

While we acknowledge that the Corps does not propose to modify NWP 17 and that it putatively only applies to relatively small hydropower projects, we remain concerned about the impacts of projects built under this permit.

As an initial matter, when issuing NWP 17 in 2021 the Corps explained that “[t]his NWP does not authorize the construction of new dams for hydropower projects.”⁵⁶⁵ We ask the Corps to reconfirm that NWP 17 cannot be used for new dam construction.

Regardless, as stated throughout, nationwide permits are intended for activities that (1) “are similar in nature,” (2) “will cause only minimal adverse environmental effects,” and (3) “will have only minimal cumulative adverse effect on the environment.”⁵⁶⁶ Yet the activities authorized under NWP 17 do not necessarily satisfy these criteria for two reasons. First, the permit provides no limit on the extent of permitted activities—the only limit is that the activities can occur at certain hydropower projects. This limitation on *where* the work occurs does not necessarily limit the *impact* of that work. Second, dredge and fill activities at a fairly wide variety of hydropower projects may qualify for NWP 17, some of which may have far more than “minimal adverse environmental effects” and will not be similar in nature to other projects, given that one way to qualify is to have been granted a licensing exemption by the Federal Energy Regulatory Commission (“FERC”). A fairly large structure that impedes a fairly large stream and

⁵⁶¹ Slott, J.M. et al., *Large-Scale Responses of Complex-Shaped Coastlines to Local Shoreline Stabilization and Climate Change*, J. of Geophysical Rsch.: Earth Surface, <https://perma.cc/46ZD-C6BM>.

⁵⁶² Bozek & Burdick, *supra* n. 426; Pontee, *supra* n. 426; Titus, *supra* n. 420.

⁵⁶³ *Chlorine Chemistry Council v. E.P.A.*, 206 F.3d 1286, 1291 (D.C. Cir. 2000).

⁵⁶⁴ *Id.*

⁵⁶⁵ NWP 17 Final Decision Doc. at 105 (2021).

⁵⁶⁶ 33 U.S.C. § 1344(e)(1); *see also* 40 C.F.R. § 230.7.

allows fairly large discharges may still qualify for a FERC exemption. An example is the Lockville Dam on the Deep River in North Carolina that stands 13 feet high and 900 feet wide, blocks a river with a daily mean instream flow of approximately 1250-1300 cubic feet per second or cfs (and recently neared 60,000 cfs as a result of a tropical storm), and channels a portion of the river into a 2,390-foot long canal alongside the mainstem of the river. The dam obstructs the flow of the Deep River, severely limits paddling and other recreational opportunities, segments habitat for several federally protected aquatic species, and discharges many cubic feet per second.⁵⁶⁷ This is the sort of disruption of a stream from dredge and fill activities that would not be permitted under NWP 27, which does not permit stream channelization and requires a “net increase in aquatic ecosystem functions,”⁵⁶⁸ and yet it presumably could be permitted under NWP 17 as written.

The Corps should consider modifying NWP 17 to make it more protective. The Draft Decision Document for NWP 17 recommends reissuing the permit without modification, offering the following rationale:

Changing the national terms and conditions of this NWP may change the incentives for project proponents to reduce their proposed impacts to jurisdictional waters and wetlands to qualify for NWP authorization Under the individual permit process, the project proponent may request authorization for activities that have greater impacts on jurisdictional waters and wetlands, and may result in larger losses of aquatic resource functions and services.⁵⁶⁹

This passage ignores the possibility of modifying the permit to make it *more* protective of wetlands, streams, and other waters of the United States and assumes without justification that individual permits would be less protective than the NWP. In fact, the Corps can and should modify NWP 17 by, limiting the amount of fill that can be authorized under the permit and/or taking other protective actions, such as requiring fish passage technology, bypasses, size restrictions, sediment flushing, fish-protective turbine spacing, and technologies to prevent violations of water quality standards for temperature, dissolved oxygen, nutrients, and other potential pollutants.⁵⁷⁰

IX. NWP 27

Although we support the use of NWPs for ecological restoration and acknowledge the benefits of many projects authorized under NWP 27, we have concerns about the Corps’ wholesale removal of PCN requirements for NWP 27 projects. In addition, while we commend the Corps’ inclusion of indigenous and local knowledge in the ecological reference changes, we are concerned that the “cultural ecosystems” language may be misapplied to allegedly restore

⁵⁶⁷ Alton Chewing, *The Removal of Lockville Dam and the Future of the Deep River*, Carolina Canoe Club (Jan. 2. 2025), <https://perma.cc/Y9WG-VY3F>.

⁵⁶⁸ NWP 27 Drft. Decision Doc. at 2.

⁵⁶⁹ NWP 17 Drft. Decision Doc. at 78.

⁵⁷⁰ *National Management Measures to Control Nonpoint Source Pollution from Hydromodification*, U.S. Env’t Prot. Ag., 4-2 – 4-4 (July 2007), <https://perma.cc/Z4EN-Y3FN>.

ecosystems to human altered or degraded states, particularly given the removal of PCN requirements. We also seek to better understand the difference in estimated uses between the proposed 2026 NWP and the 2021 NWP. In the draft decision document for the proposed 2026 NWP, the Corps estimates that NWP 27 impact approximately 13,100 acres of waters of the United States per year, or 65,500 acres over the five-year permit period. By comparison, in the 2021 decision document, the Corps estimated that NWP 27 would impact approximately 3,500 acres per year, or 14,000 acres total over the life of the permit. The Corps does not explain this nearly five-fold increase in estimated impacts.

X. NWP 29

Like NWP 3, 12, and 13, NWP 29 also poses particular harm to the Nation’s aquatic resources. The Corps has not shown in the Draft Decision Document that NWP 29 will cause no more than minimal impacts under the 404(b)(1) Guidelines, and that mitigation of the impacts allowed by the permit is appropriate and likely to succeed. The discussion below identifies harms that would be caused by the proposed permit and specific shortcomings in the Corps’ Clean Water Act analysis for the proposed permit. Because the Draft Decision Document for NWP 29 contains so much of the boilerplate language that is common to all the NWPs, the proposed NWP 29 also suffers from the systemic flaws described in Sections II, III, and IV above.

NWP 29 would allow the fill or destruction of up to ½-acre of non-tidal waters per residential development project, for activities such as constructing or expanding foundations, building pads, roads, garages, utility lines, septic fields, and golf courses. The permit conditions are insufficiently protective and the Draft Decision Document fails to address adequately the likely impacts. Residential development contributes significantly to the loss of wetlands in the United States. As explained above, the nation lost 670,000 acres of vegetated wetlands between 2009 and 2019, primarily in the South and Great Lakes region; this represented more than a 50% increase in net wetland loss as compared to the prior study period.⁵⁷¹ The Department of the Interior’s most recent Status and Trends of Wetlands in the Conterminous United States Report to Congress identified development as a major contributor to these losses. It identified urban, suburban, and rural development as a major driver of wetlands losses, accounting for more than 50% of wetland losses by the late 1990s.⁵⁷²

More specifically, an interagency workgroup concluded that “the largest loss of freshwater wetlands was to development,” and that “drainage and fill for development . . . was likely the main cause of wetland loss within coastal watersheds from 2009 to 2019.”⁵⁷³ Coastal watersheds accounted for a disproportionate 85% of wetlands losses in the period 2009 to 2019, and “[t]he U.S. federal Interagency Coastal Wetlands Workgroup found that in four coastal watersheds (i.e., Cape Fear, North Carolina; San Francisco Bay, California; Galveston Bay, Texas; and Tampa Bay, Florida) development accounted for between 39 to 98% (average of 70%) of total net wetland loss between 1996 and 2010.”⁵⁷⁴ These watersheds include some of the

⁵⁷¹ Status and Trends Report, *supra* n. 15, at 17–18.

⁵⁷² Status and Trends Report, *supra* n. 15, at 11, 22, 24, 28.

⁵⁷³ Status and Trends Report, *supra* n. 15, at 17, 28.

⁵⁷⁴ Status and Trends Report, *supra* n. 15, at 29.

fastest growing cities and counties in the United States, with rampant development.⁵⁷⁵ New residential developments in these fast-growing areas may involve thousands of homes built on clearcut land and may also incorporate high-traffic commercial areas, resulting in erosion, flooding, runoff of pollutants and sediment, and other water quality problems for neighboring communities.⁵⁷⁶ The Department explained that “replacement of wetlands with development” harms people in myriad ways, including that it “reduces wetland pollutant removal services, . . . increases pollutant inputs . . . , increases the amount of impervious surfaces in a watershed, . . . [and] places people and infrastructure in locations that are more vulnerable to natural disasters, such as storm surge along the coasts and flooding near streams.”⁵⁷⁷

Yet NWP 29 would allow the fill or destruction of up to ½-acre of non-tidal waters per project, for activities such as constructing or expanding foundations, building pads, roads, garages, utility lines, septic fields, and golf courses. Though the permit states that “[f]or residential subdivisions, the aggregate total loss of waters of United States . . . cannot exceed 1/2-acre,” the permit fails to define the term “subdivision” or impose any temporal limits on the use of the permit. It is therefore unclear whether individuals who have purchased individual homes within a subdivision, or who own lots in close proximity to other homeowners in communities that are not technically subdivisions within the meaning of applicable zoning ordinances, may each attempt to use NWP 29 to expand their home including by expanding the foundation or building pads, adding garages or outbuildings, expanding septic fields, etc., potentially resulting in much greater losses.

As discussed above, the Corps’ removal of the 300-linear foot limit from NWP 29 in 2021 is particularly problematic. The 300-linear foot limit had been a useful tool for ensuring minimal adverse effects to these linear aquatic systems. Yet by removing it from NWP 29, the half-acre impact limit—with no linear foot restriction—allows the fill of nearly 3,500 linear feet of stream bed under first order streams. For activities that impact less than the full width of a stream, the half-acre limit could allow miles of stream to be destroyed with each use. Such impacts, especially when replicated over multiple residential development projects in close proximity, cannot be considered minimal under any conception of that term.⁵⁷⁸ The Corps’

⁵⁷⁵ U.S. Census Bureau, *Population Growth Reported Across Cities and Towns in All U.S. Regions*, (May 15, 2025), <https://perma.cc/3XMP-UJZ4>; U.S. Census Bureau, *More Counties Saw Population Gains in 2023* (Mar. 14, 2024), <https://perma.cc/373W-4NXF>.

⁵⁷⁶ See, e.g., Katherin Feser, *These 5 Home Developments Will Bring Thousands of Homes to Fort Bend’s Suburbs in 2025*, *Houston Chronicle* (Jan. 5, 2025), <https://perma.cc/8298-S5RC> (describing massive residential developments planned for Houston/Galveston Bay area); Daniel Sheehan, *With Thousands of New Homes Along the Cape Fear River, Some Residents Consider Relocating*, *Wilmington Star News* (Feb. 19, 2025), <https://perma.cc/336V-6SKW>.

⁵⁷⁷ Status and Trends Report, *supra* n. 15, at 25.

⁵⁷⁸ An agency cannot ignore prior factual determinations without providing a “reasoned explanation” for its proposed departure from “facts and circumstances that underlay or were engendered by the prior policy.” See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

failure to ensure against stream loss by eliminating the 300-linear foot limit from NWP 29 violated the Clean Water Act in 2021 and continues to do so now.

Moreover, the Corps' reliance on compensatory mitigation to reduce the cumulative impacts of NWP 29 is arbitrary and unsupported. The mitigation provisions and other conditions are not adequate to minimize impacts and satisfy Clean Water Act requirements. As the Draft Decision Document provides, “[g]eneral condition 23 requires [mitigation for] *avoidance and minimization* of impacts to waters of the United States to the maximum extent practicable *at the project site*.”⁵⁷⁹ For the Corps' reliance on mitigation to be reasonable, the proposed mitigation must be “demonstrated to be effective in circumstances similar to those under consideration,”⁵⁸⁰ and the Corps must “assess the likelihood for ecological success.”⁵⁸¹ The discussions of mitigation in the Draft Decision Document for NWP 29 and in NWP 29 itself are both generic rather than being focused specific methods for mitigating the effects of residential construction, and they lack specific data or evidence to support a finding that the authorized mitigation will be successful. For instance, the Draft Decision Document acknowledges the difficulty of replacing streams through mitigation and the fact that some types of “stream restoration efforts, such as channel reconfiguration,” may even “cause substantial adverse impacts to riverine systems.”⁵⁸² The difficulty in mitigation stream impacts provides one more reason why NWP should reinstate the 300-linear foot limit to prevent inappropriate and unmitigatable amounts of stream loss.

In addition, residential developers often rely on stormwater ponds to mitigate the loss of wetlands, and the Draft Decision Document contemplates their use.⁵⁸³ Yet mitigation of wetlands lost to development by replacement with a stormwater pond is rarely adequate. As an interagency workgroup concluded,

When wetlands are replaced with development, stormwater ponds are often constructed to help prevent flooding, a service that was being provided by the original wetland. However, artificial ponds are inadequate substitutes for natural wetlands because they do not provide other important benefits to communities.⁵⁸⁴

Similarly, mitigation bank credits are inadequate to address the loss of wetlands and streams and the benefits they provide to communities that will be caused by the activities permitted by NWP 29. As discussed above in section I(C), purchasing mitigation credits from mitigation banks or in-lieu fee programs may not include *any* activity in the specific location where environmental effects of the residential development and resulting losses are occurring and therefore provide no actual compensatory mitigation to the community affected by the resulting flooding and water quality degradation.

⁵⁷⁹ NWP 29 Drft. Decision Doc. at 87 (emphasis added) *see also id.* at 85, 91, 93, 94, 96, 103, 108.

⁵⁸⁰ 40 C.F.R. § 230.75(d).

⁵⁸¹ 33 C.F.R. § 332.3(a)(1).

⁵⁸² NWP 29 Drft. Decision Doc. at 100–03.

⁵⁸³ NWP 29 Drft. Decision Doc. at 103.

⁵⁸⁴ Status and Trends Report, *supra* n. 15, at 6.

As with NWP 13, NWP 29 should do more to require nature-based solutions in order to avoid and minimize impacts of the authorized residential development. New construction—whether it is within or outside a flood prone area—increases the risk of flooding, stormwater impacts, and loss of wetlands, streams, and other waters of the United States.⁵⁸⁵ Nature-based solutions and construction methods can avoid and minimize such impacts, lessening the need for mitigation.⁵⁸⁶ The general conditions of NWP 29 should include a term requiring both nature-based construction methods and solutions to protect and manage ecosystems in the project area, as well as low-impact development techniques to reduce runoff and discharges into waters of the United States, to the maximum extent practicable, just as it requires other proactive methods to minimize the impact of a development project, such as soil erosion and sediment controls.

The Draft Decision Document for NWP 29 recommends reissuing the permit without modification offering the following rationale:

Changing the national terms and conditions of this NWP may change the incentives for project proponents to reduce their proposed impacts to jurisdictional waters and wetlands to qualify for NWP authorization Under the individual permit process, the project proponent may request authorization for activities that have greater impacts on jurisdictional waters and wetlands, and may result in larger losses of aquatic resource functions and services.⁵⁸⁷

This recommendation ignores the possibility of modifying the permit to make it *more* protective of wetlands, streams, and other waters of the United States and assumes without justification that individual permits would be less protective than the NWP. In fact, the Corps can and should modify the permit by, for instance, reducing the quantitative limit to something less than ½ acre, re-instating the 300-linear foot limitation, requiring the use of low-impact construction methods, and/or requiring the implementation of nature-based construction and solutions.

XI. NWP 54

We support the use of living shorelines and commend the Corps' reissuance of NWP 54. The proposal includes new language allowing a portion of a living shoreline to “consist of an unvegetated cobble, gravel, and/or sand beach (i.e. a pocket beach).” With respect to this

⁵⁸⁵ Kenneth E. Kunkel et al., *North Carolina Climate Science Report* 187, North Carolina Institute for Climate Studies (2020), <https://ncics.org/nccsr>; Christopher P. Konrad, *Effects of Urban Development on Floods*, U.S. Geological Survey Fact Sheet 076-03 (2003), <https://perma.cc/MW2G-4H8G>; Boyu Feng, Ying Zhang & Robin Bourke, *Urbanization Impacts on Flood Risks Based on Urban Growth Data and Coupled Flood Models*, 106 *Natural Hazards* 613–627 (2021).

⁵⁸⁶ Suzanne Kandel & Niki Frantzenskaki, *Nature-Based Solutions and Buildings: A Review of the Literature and an Agenda for Renaturing Our Cities One Building at a Time*, 5 *Nature-Based Solutions* (2024), <https://perma.cc/PS4P-W4EY>; Carla S.S. Ferreira et al., *Wetlands as Nature-Based Solutions For Water Management in Different Environments*, 33 *Current Op. in Env't Sci. & Health* (2023), <https://perma.cc/4EG4-AL95>.

⁵⁸⁷ NWP 29 Drft. Decision Doc. at 79–81.

proposed change, we note the importance of enforcing grain size regulation to avoid the improper use of larger rocks to achieve the benefits that living shorelines confer.


XII. Conclusion

Given recent regulatory rollbacks and already stressed ecosystems, it is more important than ever to protect our wetlands, streams, and other waters from destruction. We therefore urge the Corps to withdraw the proposed NWP and undertake a more thorough review that complies with the Clean Water Act, the Endangered Species Act, and NEPA.

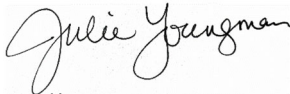
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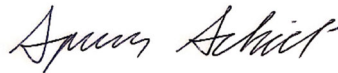
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