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August 1, 2016

Mr. David Olson
U.S. Army Corps of Engineers
ATTN: CECW-CO-R
441 G Street, N.W.
Washington, DC 20314-1000

Re: AGC's Comments on U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits; Docket No. COE-2015-0017

Dear Mr. Olson:

The Associated General Contractors of America (AGC)¹ appreciates the opportunity to provide comments on the proposal by the U.S. Army Corps of Engineers (Corps) to reissue and modify its nationwide permits (NWP), general conditions and definitions, with some modifications, as published in the *Federal Register* on June 1, 2016.² AGC members regularly undertake activities that are subject to the Clean Water Act (CWA) Section 404 regulations and these firms rely on the Corps' NWP authorizations to plan and conduct their construction activities in a timely and cost-efficient manner. AGC seeks to ensure that the construction industry can continue to contribute to the nation's quality of life.

The ability to obtain these federal permits required for construction activities in "Waters of the United States" is critical to the completion of the private and public infrastructure that forms the literal foundation of the nation's economy. Therefore, administration of the Section 404 regulatory program is important not only to AGC members but to the nation as a whole. While attentive and sensitive to the many risks of environmental degradation, AGC members must continue to support the physical infrastructure, on which all Americans are heavily dependent. Working without a permit is not a viable option. The penalties for failing to obtain a necessary CWA permit can be severe. Effective, Aug. 1, 2016, civil fines can reach \$51,570 per day per violation;³ criminal penalties for "negligent" violations can include \$50,000 per day, three

¹ AGC represents more than 26,000 firms engaged in building, heavy, civil, industrial, utility and other construction for both public and private property owners and developers. AGC members construct commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, and multi-family housing units; and they prepare sites and install the utilities necessary for housing development. AGC and its nationwide network of 92 chapters have sought to improve and advance the interests of the construction industry for nearly a century.

² 81 *Fed. Reg.* 35,186.

³ 81 *Fed. Reg.* 43,091, 43,095.

years' imprisonment, or both. As the "operators" of construction sites, both owners and their construction contractors risk such fines and penalties, as well as potential citizen suits, for any failure to comply with the CWA.

In the Corps' own words, "the purpose of the NWP program is to reduce regulatory delays and burdens on the public, to place greater reliance on state and local controls, and to free our limited resources for more effective regulation of other activities with greater potential to adversely impact the aquatic environment."⁴ For nearly four decades, the Corps has managed its workload by issuing general permits.⁵ Over time, the Corps has revised the nationwide permit program to include more, and increasingly stringent, conditions as prerequisites to authorization of general permits. The Corps argues that these additional restrictions and limitations are necessary to ensure authorization of only activities with "minimal impacts." The Corps makes available individual permits to address those activities with greater impacts. In practice, however, the general permits are now more like individual permits, in terms of the large amount of information and data required.

For the construction industry, it is important that the Corps maintain a streamlined permit program that avoids duplication with other federal and state regulatory agencies.⁶ To remain competitive, contractors must adapt quickly to changes due to fluctuating markets, contract revisions, and geological anomalies. The general permit provides the kind of flexibility required for construction jobsites that are temporary and ever changing. For these reasons, AGC members have a strong interest in preserving a workable general permit program for construction and development activities. AGC believes that any changes to the Corps' general permitting program should maintain an efficient and streamlined process for authorizing activities that propose minimal impacts.

AGC is pleased to offer the following comments in response to the Corps' June 1 proposal to reissue and modify its NWPs.

I. Acreage Limits and Pre-Construction Notification Thresholds

The Corps seeks comment on whether to increase or decrease the acreage limits and pre-construction notification (PCN) thresholds for several permits. AGC urges the Corps to consider increasing the permissible numeric limit, the PCN threshold, and refrain from imposing a linear-foot cap for NWPs that support public health and welfare and/or environmental protection, such

⁴ See 56 *Fed. Reg.* 14,598 at 14,605 (Apr. 10, 1991) (significant proposal to amend the NWP regulations and issue, reissue and modify NWPs).

⁵ NWPs are designed to provide an efficient and streamlined approach for authorizing activities with minimal impacts on "waters of the U.S." with little or no delay or paperwork. 33 C.F.R. § 330.1.

⁶ See 33 U.S.C. § 1344 (q) (requiring the Secretary of the Army to enter into agreements with the Departments of Agriculture, Commerce, Interior and Transportation and the heads of other appropriate agencies to minimize duplication, needless paperwork and delays in the issuance of permits).

as NWP 3 (Maintenance), NWP 12 (Utility Line Activities), NWP 13 (Bank Stabilization), NWP 14 (Linear Transportation Projects), NWP 35 (Maintenance Dredging Existing Basins), NWP 41 (Reshaping Drainage Ditches) and NWP 43 (Stormwater Management Facilities). These changes would further congressional intent and legal precedent for a streamlined permitting process for projects with minimal adverse environmental effects. The NWPs have strong protections through the District Engineer's prescribed decision process; the agency coordination requirement (if loss of waters greater than one-half acre); general, regional and sometimes "*special-project*" conditions; and a PCN requirement to ensure proper review.

Erosion of the General Permit Program Will Result in Project Delays, Higher Costs and Increased Uncertainty for All Activities that Require CWA Section 404 Approvals

The NWPs serve to prevent minimal impact projects from overburdening the individual permit process, causing costly and unnecessary delays. Even the Corps has published in the *Federal Register* that it "does not have the resources to review each activity that requires a Section 404...permit through the individual permit process..."⁷ When Congress enacted CWA Section 404(e), which grants the authority for nationwide permits, it was aware of the Corps' plan to use general permits as a management tool to lessen the impacts of potential overregulation of activities that have minor individual and cumulative environmental impact.

But since the nationwide permit program was promulgated in 1977, the Corps has gradually lowered the maximum acreage impact authorized under various NWPs, while, at the same time, increasing the preconstruction notification requirements and various other conditions and restrictions. Consequently, the nationwide permit program has evolved into a process that no longer resembles the streamlined permitting process Congress envisioned when it enacted Section 404(e).

AGC urges the Corps to make better use of its opportunity to further streamline the nationwide permit program and decrease delays resulting from the overly stringent permit restrictions. The undesirable alternative is to force contractors to apply for individual permits, resulting in unnecessary delays, regulatory uncertainty, and considerable cost to the industry. These restrictions and results are inconsistent with Congress' intent to enact a streamlined permitting process that authorizes activities with minimal effects without burdening contractors with needless costs and delays.

Indeed, an efficient nationwide permit program is critical to the Corps' fulfilling the statutory mandate under CWA Section 101(f)⁸ to utilize procedures which "encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays."

⁷ 64 *Fed. Reg.* 39,252, 39,268 (July 21, 1999) (Corps proposal to issue five new NWPs and modify six existing NWPs to replace NWP 26).

⁸ 33 U.S.C. § 1251(f).

The NWP's are an important mechanism to protect the nation's aquatic resources while providing a streamlined process for federal, state and local governments (acting as construction project owners) to respond to the increasingly important needs to update and repair our nation's critical infrastructure. Sustainability, resiliency, and ongoing maintenance must be an integral part of improving the nation's infrastructure. Today's transportation, water, and flood control systems must be able to withstand both current and future challenges. To this end, AGC urges the Corps, through this NWP reissuance process, to advance environmentally beneficial activities carried out by contractors, such as flood control protections, enhancing flood storage capacity, clearing of sediment basins and related maintenance of our existing stormwater management infrastructure, upgrading our drinking water and wastewater infrastructure, and creating wetland mitigation banks.

Finally, it is important to note that many developers design projects to qualify for an NWP by avoiding impacts to jurisdictional waters. As the Corps notes, NWP's "provide incentives to permit applicants to reduce impacts to jurisdictional waters and wetlands to meet the restrictive requirements of the NWP's and receive authorization more quickly than they would through the individual permit process."⁹ A prolonged or complex NWP process may dissuade project proponents from this practice. Moreover, an increase in time and cost will make it more difficult for smaller projects to be able to afford to comply with the program. This outcome is counter to the goals of the CWA.

II. "Waters of the United States" (WOTUS) Rule

In 2015, the U.S. Environmental Protection Agency (EPA) and the Corps jointly issued a rule redefining "Waters of the United States" (WOTUS).¹⁰ On Oct. 9, 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the rule pending further order of the court.¹¹ The Corps is soliciting comment on how the 2015 WOTUS rule might affect the applicability and efficiency of the proposed NWP's.

On Nov. 16, 2015, EPA Administrator Gina McCarthy and Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy issued a joint memorandum to their staff, *Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule; Improving Transparency and Strengthening Coordination*,¹² affirming "the agencies are fully complying with the [nationwide] stay" granted by the Sixth Circuit. To this end, currently, the Corps clearly states on its Regulatory Program and Permits Web page: "USACE is not implementing the Clean Water Rule, and is using the 1986 regulations and applicable guidance (those in effect prior to Aug. 28,

⁹ 81 *Fed. Reg.* at 35,188.

¹⁰ 80 *Fed. Reg.* 37,054 (June 29, 2015).

¹¹ *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015).

¹² <https://www.epa.gov/cleanwaterrule/inemoranda-regarding-implementation-clean-water-rule>.

2015) in making jurisdictional determinations or taking other actions based on the definition of “Waters of the United States.”¹³

AGC is an active member of the Washington, DC-based Waters Advocacy Coalition (WAC); that group has submitted detailed comments on the interplay between the 2015 WOTUS rule and the reissuance of the 2017 NWP. AGC seeks to incorporate by reference the points raised in WAC’s August 1, 2016, letter – and to further express below the issues and concerns specific to the commercial construction industry.

The scope of federal jurisdiction and its effect on the efficient administration of the nationwide permit program is of critical importance to AGC and its members. Collectively, AGC member firms build much if not most of the nation’s public and private infrastructure.¹⁴ Many of their highway, bridge, building and other construction projects unquestionably lie in WOTUS within the meaning of CWA, and therefore require federal permits. In the future, many other projects may or may not lie in such “waters,” depending on the precise contours of that term, which continues to be a source of much discussion and debate among regulators and the regulated community – but is now in the hands of the courts to decide.

Under the 2015 WOTUS rule, as currently written, virtually any public or private sector construction project that involves the creation of dry, flat areas for construction (where even an occasionally or seasonally wet area exists) or any mechanized earth moving activities (where even an occasionally or seasonally wet area exists) will likely require a Section 404 permit from the Corps. Through extensive revisions to the definitions of key terms such as “adjacent” and “tributary,” the 2015 WOTUS rule will “categorically” extend jurisdiction to myriad waters and features that have been evaluated on a case-by-case basis and currently may be deemed regulated WOTUS – such as isolated wetlands and ponds, streams and washes that flow infrequently and certain ditches and other man-made conveyances. Broader jurisdiction under the WOTUS rule would significantly increase the number of annual applicants for NWPs, straining Corps resources and would increase the burden on the Corps and applicants to develop mitigation plans.

An even more troubling scenario: If the Corps broadens the reach of its CWA jurisdiction, while simultaneously placing more onerous conditions and limitations on the NWPs which in turn limit their utility (see Section I above), the combination of these factors will:

¹³ <http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/>.

¹⁴ While AGC members rarely build single family homes, they are regularly engaged in the construction of all other improvements to real property, whether public or private. These improvements include the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

- Force more applicants to use individual rather than NWP (typically, it takes more than two years to obtain an individual permit but only 10 months to obtain an NWP¹⁵);
- Increase the Corps' workload and place more demands on limited resources;
- Increase demand for mitigation banking credits (see Section VI, discussion on GC 23-Mitigation);
- Delay the issuance of necessary authorizations; and
- Cost businesses substantially in terms of the lost time value of their investments and increased capital costs due to grave regulatory uncertainty.

There is no question that the scope of the definition of WOTUS—and, therefore, the status of the WOTUS rule—has implications for the nationwide permit program. While AGC supports the reissuance of the NWPs, it makes the following recommendations:

- Due to the nationwide stay of the WOTUS rule, the Corps should clarify that the WOTUS rule definitions will not apply to the final NWPs when they are issued. Critical definitions in the proposed NWPs refer to provisions in the stayed rule.¹⁶
- If the WOTUS rule is implemented or amended, AGC believes that the rule will have significant implications on the nationwide permit program, and the Corps should address those issues accordingly, through revised NWPs.
- Even with the rule stayed, AGC believes the acreage caps should be increased for the NWPs that support public benefits, as explained in Section I above. At a minimum, however, the Corps should maintain the current acreage limits, pre-construction notification thresholds and waiver provisions.

III. Waivers of Certain NWP Limits

The Corps is soliciting comment on several aspects and variations of the current waiver process, including changing the numeric limits that can be waived; imposing caps on certain waivers; and the possibility of removing/restricting authority of District Engineers to issue activity-specific waivers of certain NWP limits – among other things.

The District Engineer's authority to issue activity- (or project-) specific waivers is critical to accommodate the varying climates and conditions across the country – recognizing that aquatic resource functions and values vary considerably from place to place. AGC urges the Corps to retain this important tool. It allows Corps' District offices to efficiently authorize activities with

¹⁵ See *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality op.) (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RE-SOURCES J. 59, 74-76 (2002)) (“The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915 – not counting costs of mitigation or design changes.”).

¹⁶ For example, definitions, such as “waterbody,” “non-tidal wetland,” “ordinary high water mark,” and “tidal wetland” cite to the WOTUS Rule’s new regulations. See, e.g., 81 *Fed. Reg.* at 35,239 (citing 33 C.F.R. § 328.3(c)).

minimal adverse effects on the aquatic environment after making a written determination that the activity satisfies the NWP requirements, which provides a high level of review and resource protection.

IV. Regional Conditioning

Corps District and Division Engineers impose specific conditions if there are concerns for the aquatic environment in a particular District, watershed, or other geographic region. Another type of regional conditioning is done by states/tribes pursuant to their CWA Section 401 water quality certification process or, if in a coastal zone, the Coastal Zone Management Act consistency concurrence, whereby states ensure that their specific water-related concerns are addressed in federally-licensed activities. Regional conditions might include restricting or prohibiting the use of NWPs in specific types of waters, reducing the acreage thresholds in certain types of waters or specific regions, adding notification requirements for all permitted work in certain watershed, etc.

Division and District Engineers also have the authority to “tailor” the nationwide permit program, as finalized by Corps Headquarters, whereby they may choose to modify, suspend, or revoke NWPs within a region – or on an activity-specific basis – thus requiring project proponents to obtain individual project-specific permits.

AGC members have expressed concern that there is wide variation in interpretation of the nationwide permit program between certain District offices – and sometimes even between personnel within a given District. This lack of consistency (and sometime conflict) has led to delays in the permit review process and has added cost to the affected construction projects.

AGC recognizes that the purpose of regional conditioning is to consider local differences in aquatic resource functions and values to ensure that NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment. The alternative, of course, is applying for an individual permit. However, AGC would like to offer the following recommendations, in the interest of making regional conditioning more positive to the construction community:

- Provide comprehensive guidance that includes the complete package of federal NWPs, general conditions, as well as one central source for all regional conditions. Currently, contractors who perform work across the country are faced with the task of researching the often extensive list of extra conditions that have been imposed by each Corps District office. The scattered information is presented in different places, which results in greater complexity and less predictability for regulated entities. AGC recommends that the Corps Headquarters’ website serve as the central point from which the regulated community can easily and efficiently connect to the various District Web pages that should include any pertinent regional conditioning information.
- Establish a system to resolve any disagreements (regarding conditions to use of any of the NWPs) that may arise at the district level whereby such disputes may be elevated to the

appropriate Division Office, followed by Headquarters if necessary – with a goal of achieving conflict resolution.

- Develop “standard operating procedures” to guide Division and District staff as they undergo the regional conditioning process. For example: What is justification for “undoing” something USACE Headquarters has put in place to streamline the program or improve its efficiency?

In the November 2015 joint EPA-Corps memorandum¹⁷ referenced in Section II above, the federal agencies promise to “capitalize on the momentum... to improve transparency... coordination processes... public participation...” that underpin the CWA Section 404 permit program. The agencies also reiterated their commitment to reduce permit delays and to make the program more understandable, consistent, effective and accessible. A separate interagency memo from July 2015, Clean Water Rule Implementation Memorandum,¹⁸ reports that EPA and the Corps will convene a workgroup to evaluate existing permitting tools and procedures and develop streamlining recommendations for the agencies’ heads to consider. AGC’s recommendations would be in keeping with the Corps’ current goals and objectives.

The AGC-supported Construction Industry Compliance Assistance (CICA) Center at www.cicacenter.org may be a potential place to consolidate all of the NWP information for the regulated community. AGC recommends that the Corps look to the “Construction Stormwater State Resource Locator” online at <http://www.cicacenter.org/swrlnew.cfm> (scroll down to bottom of page) as a model format.

V. Overlap of Federal, State and Local Rules

AGC recommends that the Corps include a provision at the beginning of the NWP text clearly informing the regulated community that many of same activities covered by the Section 404 program also are regulated by state and local water/wetland regulatory programs throughout the nation. Currently, the only reference made to this very complex regulatory system – *which spans the federal, state and local levels* – is buried in the “Further Information” language following the NWP and General Condition text: “NWP’s do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.”

In the text of the various NWP’s, the Corps widely references the other federal laws, outside of the Clean Water Act, that have bearing on NWP-regulated activities, such as those to protect endangered species and historic properties (e.g., Surface Mining Control and Reclamation Act, Endangered Species Act, Migratory Bird Treaty Act, and the National Historic Preservation Act). However, within the text of the NWP’s, no reference is made to the many other state/local wetlands management and protection programs, which vary in the way wetlands are

¹⁷ <https://www.epa.gov/cleanwaterrule/memoranda-regarding-implementation-clean-water-rule>.

¹⁸ *Id.*

defined and the activities that may or may not take place within or near regulated WOTUS (e.g., the Calif. Drilling Mud regulations overlap with NWP 12; NJ Riparian Area Restoration regulations overlap with the newly proposed NWP B Living Shorelines). As discussed in Section IV directly above, AGC supports the Corps' goals to provide the regulated community with more tools to make the program more understandable, consistent, effective and accessible. AGC would welcome the opportunity to work with Corps Headquarters' staff to expand the Section 404 permitting and state-related information on the CICA Center at www.cicacenter.org, which would be a step towards helping the regulated community better navigate the duplication and apparent overlap of federal, state and local rules.

VI. Specific Comments on NWP Conditions & Provisions

GC 16 – Wild and Scenic Rivers

The Corps proposes to modify General Condition (GC) 16 to require PCN for any NWP activity that will occur in a “component” of the National Wild and Scenic River System or in a river designated as a “study river” for possible inclusion in the system. AGC members have expressed concern that the term “component” is too broad and, therefore, subject to wide interpretation. We recommend that the Corps designate distinct segments or specific waters of the NWRS that are subject to this PCN provision. Likewise, the phrase “potential to adversely affect” is vague and likely to be inconsistently interpreted and applied across the Corps Districts.

GC 18 – Endangered Species

GC 18 requires a non-federal permittee to submit a PCN to the District Engineer if any listed species or designated critical habitat “might” be affected¹⁹ or is in the vicinity of the project. The Corps proposes to modify the first paragraph of this GC to define the terms “direct effects” and “indirect effects” using definitions from the U.S. Fish and Wildlife Service’s (FWS) and National Marine Fisheries Service’s (NMFS) regulations and guidance to define these terms for GC 18, to assist with compliance. AGC supports this modification to define (and use) these terms as the wildlife consulting agencies define them. It will improve the consistency of the application of these terms.

The Corps stands by its prior position that the issuance of the NWPs does not necessitate consultation under Section 7 of the Endangered Species Act (ESA) because promulgation of the rule itself has “no effect” on listed species. AGC supports this conclusion that reissuance of NWPs neither jeopardizes endangered species nor adversely modifies critical habitat; no programmatic consultation is required under the ESA. The General Condition requirements for PCN already provide strong process controls for environmental review and species protection; PCNs are reviewed by Corps staff and evaluated for potential effects to listed species and critical habitat. Paragraph (c) of GC 18 also states that “non-federal permittees ... shall not begin work

¹⁹ Previously, the Corps established the “might affect” threshold codified at 33 C.F.R § 330.4(f)(2) because it is more stringent than a “may affect” threshold for purposes of complying with ESA Section 7 consultation regulations at 50 C.F.R. § 402.

on the activity until notified by the District Engineer that the requirements of the ESA have been satisfied and that the activity is authorized.”

GC 23 – Mitigation

Although minimal adverse effects are anticipated from the nationwide permit program, the Corps acknowledges that the use of NWP's may still affect the aquatic environment. Therefore, the permits include GC 23, detailing how District Engineers may require compensatory mitigation to offset the authorized impacts. Mitigation is intended to compensate for lost functions and values resulting from permitted activities. Compensatory mitigation can be accomplished through the restoration, creation, enhancement, and/or preservation of aquatic resources, either by the permittee's individual project, or the use of mitigation banks or other consolidated mitigation efforts, as further discussed below.²⁰

AGC members have noted that the policies and provisions that the Corps uses to determine how much compensatory mitigation and what type of compensatory mitigation are required have evolved over time, but have always left considerable discretion in the hands of the individuals that are reviewing the permit applications. AGC is concerned that proposed revisions to GC 23 would allow Corps' District staff to, in effect, stop applicants from using permittee responsible mitigation projects altogether. Specifically, the Corps seeks to add a sentence to GC 23 paragraph (f)(1) stating: “For the NWP's, the *preferred* mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits” (emphasis added). While this language is consistent with the “2008 Mitigation Rule”²¹ at 33 CFR 332.3(b)(2) and (3), the term “preferred” is not in text of the regulation itself. AGC recommends that the Corps define that term within the text of the reissued NWP's – or otherwise explain that the Corps authorizes the use of three mechanisms for providing compensation mitigation. As the 2008 Mitigation Rule appropriately states: “Flexibility in compensatory mitigation requirements is needed to account for regional variations in aquatic resources, as well as state and local laws and regulations.”²² It goes on to make the crucial point that “a preference hierarchy does not override a District Engineer's judgment as to what constitutes the most appropriate and practicable compensatory mitigation based on consideration of case-specific circumstances.”²³ AGC members have repeatedly stressed the importance of maintaining this flexibility and the three sources of compensatory mitigation for several reasons, as fully discussed below.

First, AGC members report that smaller-scale permittee-responsible mitigation is often less expensive and, therefore, in some circumstances, a necessary option to allow smaller-scale projects to move forward in an economically-efficient manner, or at all in some cases.

²⁰ Compensatory mitigation can include “requirements to offset authorized losses of jurisdictional waters and wetlands so that the net adverse environmental effects are no more than minimal.” 81 *Fed Reg.* at 35,188.

²¹ In 2008, the Corps and the U.S. Environmental Protection Agency (EPA) published compensatory mitigation rules (2008 Mitigation Rule). See 73 *Fed. Reg.* 19,594 (Apr. 10, 2008). While the Corps makes the final determination regarding the mitigation conditions included in the permit, EPA retains the authority to veto the permit if it concludes that the mitigation is not adequate.

²² 73 *Fed. Reg.* 19,594, 19,617.

²³ *Id.* at 19628.

Second, as the Corps has noted in the past, in some areas of the country, the number of economically viable mitigation banks is limited – and it may remain difficult to obtain the level of up-front financing necessary to start one because of the low rate of dredge and fill projects requiring compensatory mitigation.²⁴ The situation has not changed in the last eight years, according to an October 2015 report by the Corps and EPA, *The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources*.²⁵ It finds that, as of December 2014, there are still large portions of the country that are not covered by mitigation bank service areas and where applicants need to provide either permittee responsible on-site or off-site mitigation.²⁶

Third, if the 2015 WOTUS rule is implemented more wetlands and waters would be treated as jurisdictional and that would, in turn, mandate more plentiful and more robust mitigation plans (see also discussion in Section II above). Projects originally designed to avoid jurisdictional features may find newly designated WOTUS directly within the path or boundaries of the project. There would be an increased demand for banking credits in an already constrained market. Driving up the demand for credits will invariably drive up the cost, which may make mitigation banking impracticable for certain small projects. Also with regard to the 2015 WOTUS rule, AGC members have shared concerns about the lack of adequate amounts of banking credits within the watersheds where they predominately do business.²⁷ As a longer-term recommendation, AGC urges the Corps to work with EPA to amend their compensatory mitigation regulations to recognize the potential for situations where there is no approved wetland mitigation bank or in-lieu fee program serving the geographic area where the activity will occur – and, under that scenario, allow an other authorized activity to proceed under an NWP through the purchase of mitigation credits from whatever mitigation bank or in-lieu fee program is geographically closest to the permitted activity's site (when wetlands restoration, enhancement or creation cannot occur on-site or at a nearby off-site location).

Furthermore, pursuant to proposed GC 23, the District Engineer would now be required to consider additional factors when determining what mitigation will be “appropriate and practicable,” including “compensatory mitigation” for losses of streams or other open waters and mitigation at a minimum one-for-one ratio for wetlands.²⁸ The potential addition of

²⁴ See, e.g., 72 *Fed. Reg.* 11,092 (Mar. 12, 2007), corrected 72 *Fed. Reg.* 26,082 (May 8, 2007).

²⁵ <http://www.iwr.usace.army.mil/Media/News-Stories/Article/626925/iwr-releases-the-mitigation-rule-retrospective-a-review-of-the-2008-regulations/>.

²⁶ However, the report does note a substantial increase in bank availability including a 52 percent increase in wetland mitigation banks and a doubling of banks offering stream credits since 2008 (more than 1,400 mitigation banks and 45 in-lieu fee programs have been approved by the Corps nationwide, with many of them in the Southeast, Midwest, and Pacific coastal states).

²⁷ The 2008 Mitigation Rule establish a preference for selecting mitigation based on a watershed approach. See 33 C.F.R. § 332.3(b)(4). In situations where a watershed approach is not practicable, though, the regulations maintain a preference for on-site and in-kind mitigation over off-site and out-of-kind mitigation. *Id.* § 332.3(b)(5).

²⁸ 81 *Fed Reg.* 35,234.

jurisdictional waters under the 2015 WOTUS rule and the added complexity of the mitigation requirements would encumber the application process.

Finally, AGC members are keenly aware that since mitigation requirements are included as conditions in the permit, the Corps can bring enforcement actions against the permittee if the permittee does not comply with the mitigation requirements.²⁹

Clarification of How the District Engineer Determines What Constitutes “Minimal Adverse Effects” Is Needed, As Well As a Process for Challenging Such a Finding

Neither the CWA nor the Corps’ regulations define the key term “minimal effects.” Indeed, the Corps has explicitly declined to issue a minimal adverse environmental effects definition by regulation, explaining during the 2002 NWP reissuance process that “the criterion for evaluating whether adverse environmental effects are minimal is best left to District Engineers who are familiar with site specific factors that account for the variety of aquatic resources and functions.”³⁰

The Corps’ express refusal to define the fundamental term “minimal effects” appears to violate a basic principle of administrative law that has been well established by the courts: Agency action must be based on a consideration of relevant facts and rest on reasoned decision-making. AGC remains troubled that there is no way for the regulated community to consider or dispute the relevant facts concerning the impacts resulting from a regulable discharge and the Corps’ decision to restrict or allow the discharge. Under the Administrative Procedure Act (APA), agency actions must be set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³¹

NEW GC 31 – Activities Affecting Structures Built by the United States

This new condition would address compliance with Rivers and Harbors Act Section 408, which requires Corps approval before structures or works built by the United States are altered, occupied or used. It would require that all such projects are reviewed by the USACE Real Estate Department to determine if any of the proposed activities may affect a federal easement, right of way, property, levee, etc. Typically, the project manager evaluating the NWP can make this determination, but under this new condition, these actions would require a separate review and approval.

AGC is very concerned that this new Section 408 review will dramatically slow down the process of allowing construction work to proceed under an NWP. As a threshold matter, for the many NWPs that require the submittal of PCNs to the District Engineer before the permittee may begin work, the Corps will *not even being* to process the PCN until it is considered “complete” – which then triggers a 45-day review period. The Corps has proposed to add a requirement under

²⁹ See 33 U.S.C. § 1344(s).

³⁰ 67 Fed. Reg. 2,020, 2,075 (Jan.15, 2002).

³¹ 5 U.S.C. § 551 *et seq.*

GC 32 (see below) that the PCN include a statement confirming that the project proponent has submitted a written request for Section 408 permission, if the proposed work will alter or occupy structures or works built by the U.S. AGC objects to the imposition of a new condition that would delay the start of the 404 review process to an unspecified and unrestricted timeframe that is completely outside of the prospective permittees control.

Already we have heard from other stakeholders that the Corps' scope and process for reviewing Section 408 approvals is inconsistent across Divisions and Districts. What is more, the process seems largely duplicative of the Section 404 permitting program. This is inconsistent with Congress' directives for a dredge and fill permit program, requiring the Secretary of the Army to enter into agreements with the Departments of Agriculture, Commerce, Interior and Transportation and the heads of other appropriate agencies to minimize duplication, needless paperwork and delays in the issuance of permits.³²

GC 32 – Pre-Construction Notification (PCN)

Many NWP require the submittal of PCNs to the District Engineer before the prospective permittee may act pursuant to the permit, and when such notice is required, the applicant must provide a wetlands delineation, as well. As proposed, the procedures for PCN are set forth in General Condition 32. The Corps would eliminate the PCN requirement for certain NWPs and is soliciting comments on changing the PCN "thresholds" for those NWPs that require pre-construction notification. On these issues, please see AGC's comments in Section I above.

The Corps has also asked for input on modifying language to allow applicants to submit PCNs as electronic files. Generally, AGC offers its support for updates to the Corps' permit program that would allow permit applications and any associated documents to be submitted electronically, so long as the agency allow for paper-based submittal if needed.

In addition, the Corps has asked for comment on developing a standard form PCN that would be released in a separate notice and comment rulemaking. AGC will offer specific input after it reviews the proposed PCN form, but in theory, a standard document may be a positive step toward addressing some key areas of concern raised by AGC members, as described below.

AGC members have reported a great deal of variation between Corps Districts regarding the practices and procedures for deeming a NWP application complete. Per the Corps' regulations, the District Engineer generally has 45 days to notify the project applicant of approval to proceed or, instead, of the need to obtain an individual permit before the applicant may proceed. However, the Corps' duty to meet the 45-day clock does not begin until after the District has received a "complete application."

AGC members have expressed concern regarding the process and procedures used by certain Corps Districts to complete the PCN process. In the draft 2017 NWPs, GC 32 would maintain the current directive that the District Engineer must determine if the PCN is complete within 30

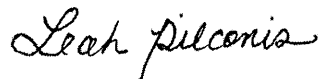
³² 33 U.S.C. § 1344 (q).

calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. In some cases, AGC members report that District Engineers will request additional information multiple times – with a new 30-day period commencing each time the DE receives a revised notification. AGC is concerned by this practice, which is unnecessarily drawing out the PCN-review process beyond its original scope and intent.

A fundamental issue may be this statement: “As a general rule, district engineers will request additional information necessary to make the PCN complete only once.” This implies that it is an acceptable practice for the District Engineer to go back to the applicant more than once. AGC points out that there is a stark difference between the DE continuing to request brand-new information and a situation where the DE makes multiple (or repeated) requests for the same initial list of information. AGC urges Corps Headquarters to provide the District offices with more guidance and direction on this process.

AGC appreciates the opportunity to offer its comments and recommendations on the Corps’ draft 2017 NWP’s. Please call or email if you have questions about any issues raised in these comments.

Respectfully,



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