



November 16, 2020

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**RE: Docket ID No. COE-2020-0002  
Comments of the American Public Power Association on the U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits**

Dear Mr. Olson:

The American Public Power Association (APPA) appreciates the opportunity to submit the following comments in response to the U.S. Army Corps of Engineers' (Corps) Proposal to Reissue and Modify Nationwide Permits (the Proposal), published in the *Federal Register* on September 15, 2020.<sup>1</sup> APPA generally supports the Proposal, but we offer several recommendations below to improve and streamline Nationwide Permit (NWP) submittals under Section 404 of the Clean Water Act (CWA).

APPA is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. APPA represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. APPA advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

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<sup>1</sup> 85 Fed. Reg. 57,298 (Sept. 15, 2020).

The electric utility sector continues to make great strides in reducing carbon dioxide (CO<sub>2</sub>) emissions. This decrease in CO<sub>2</sub> emissions is due in part to public power utilities' investment in low and non-emitting generation technologies, such as solar, wind, hydro, nuclear, and natural gas, as well as the retirement of coal-fired generation. These investments require extensive transmission planning and integration. Against this backdrop, APPA's members will need to continue relying on NWP C to efficiently construct, maintain, and repair transmission and distribution lines and related facilities, to the extent their activities involve discharges subject to Section 404 permitting. APPA thus has a strong interest in the Corps' reissuance of existing NWP C, as well as its proposed creation of new NWP C for electric utility lines.

As explained in more detail below, APPA strongly supports the proposed new NWP C, which simplifies preconstruction notification (PCN) requirements (as compared to the current NWP 12) and maintains the longstanding definition of "single and complete" project, among other things. Moreover, APPA recommends that the Corps make additional changes to General Condition (GC) 32 to further simplify the PCN process. NWP further supports the Corps' proposals to: (i) eliminate the 300 linear foot threshold for several NWPs; (ii) revise NWP 3 (Maintenance) so that it once again authorizes discharges that were covered in prior versions of that permit; (iii) revise GC 18 to ensure consistency with the revised regulations implementing the Endangered Species Act (ESA); (iv) revise GC 23 to establish a 1/10-acre threshold for requiring compensatory mitigation for losses of stream bed that require PCN, so long as the Corps clarifies that compensatory mitigation is only required for permanent impacts to stream bed loss exceeding 1/10 acre; and (v) revise GC 25 to ensure consistency with the Corps' regulations governing CWA section 401 water quality certifications. Finally, APPA requests that the Corps clarify statements in the Proposal concerning the status of existing authorizations

under the 2017 NWP's and concerning the jurisdictional status of ditches and whether certain ditch-related activities are exempt under CWA section 404(f).

**I. The Corps Should Finalize the Proposed New NWP C.**

The Corps proposes to establish a new NWP C for electric utility line and telecommunications activities that “retain[s] the basic structure of the 2017 NWP 12.”<sup>2</sup> According to the Corps, a permit that is specific to electric utility line and telecommunications activities is better suited to address the particular circumstances of these types of utility lines, as distinguished from other utility lines such as oil and natural gas pipelines or water pipelines.<sup>3</sup> Tailoring the scope of NWP C (as well as the modified NWP 12 and the proposed new NWP D) comports with the statutory grant of authority to the Corps to issue NWP's for “categories of activities” that are “similar in nature” and that will have “minimal cumulative adverse effect on the environment.”<sup>4</sup> And as the Corps explains, this narrowed focus allows the Corps “to more effectively address potential differences in how the different types of utility lines are constructed, maintained, and removed, and to potentially add industry specific standards and best management practices to help ensure that each NWP authorizes only those activities that will result in no more than minimal individual and cumulative adverse environmental effects.”<sup>5</sup>

As a threshold matter, the Corps’ authority to establish new NWP's such as proposed new NWP's C and D is beyond question. Congress plainly authorized the Corps to “issue general permits on a . . . nationwide basis for any category of activities involving discharges of dredger or fill material” whenever the Corps determines that the statutory requirements in Section 404(e)

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<sup>2</sup> *Id.* at 57,322-23.

<sup>3</sup> *See id.* at 57,310.

<sup>4</sup> 33 U.S.C. § 1344(e)(1).

<sup>5</sup> 85 Fed. Reg. at 57,322.

are satisfied.<sup>6</sup> The Corps has broad discretion to decide what the appropriate scope is for any given category of activities that will be authorized by an NWP and whether changes to that scope are appropriate. Given this broad discretion, it is not surprising that the Corps has frequently issued new NWPs when reissuing existing NWPs.<sup>7</sup> Indeed, the Corps has previously created a new NWP to authorize activities previously covered by another NWP.<sup>8</sup> APPA supports the Corps' proposal to narrow the focus of NWP 12 to oil and gas pipelines and to issue a new NWP C to authorize discharges related to electric utility line and telecommunications activities that are currently within the scope of the 2017 version of NWP 12. The proposed new NWP C will meet CWA Section 404(e)'s "minimal adverse environmental effects" standard, while continuing to allow for timely and efficient authorization of relatively minimal discharges into jurisdictional waters, which is critical to APPA members' ongoing efforts to provide reliable and affordable electricity to the public. Importantly, the Corps recognizes that, as the "scale of electrical energy generation from renewable energy sources . . . increases, there will also be a need for additional electric transmission facilities to convey the electricity from the generation facilities to the end users."<sup>9</sup> Proposed NWP C will be important for authorizing activities associated with these new facilities.

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<sup>6</sup> 33 U.S.C. § 1344(e)(1).

<sup>7</sup> *E.g.*, 82 Fed. Reg. 1,860 (Jan. 7, 2017) (adding NWPs 53 (Removal of Low-Head Dams) and 54 (Living Shorelines)); 77 Fed. Reg. 10,184 (Feb. 12, 2012) (adding NWPs 51 (Land-Based Renewable Energy Generation Facilities) and 52 (Water-Based Renewable Energy Generation Pilot Projects)).

<sup>8</sup> *See* 72 Fed. Reg. 11,092, 11,113 (Mar. 12, 2007) (noting that "discharges associated with underground coal mining activities now require authorization under NWP 50 rather than NWP 21"); *id.* at 11,151 (addressing commenters' concerns about the "continued use of NWP 21 to authorize underground mining activities" and whether individual permits would be required by referencing new NWP 50).

<sup>9</sup> 85 Fed. Reg. at 57,346.

A. Proposed NWP C Appropriately Accounts for the Unique Aspects of Electric Utility Lines, While Continuing to Ensure Compliance with CWA Section 404(e).

The Corps proposes to define “electric utility line and telecommunication line” as “any cable line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication.”<sup>10</sup> In addition to authorizing discharges of dredged or fill material related to such lines and wires, proposed NWP C authorizes discharges related to construction of substations in non-tidal waters of the U.S.; foundations for overhead electric utility line and telecommunication line towers, poles, anchors; and access roads.<sup>11</sup>

The Corps’ proposal to establish a separate NWP for electric utility lines and telecommunication lines reflects the agency’s recognition of the unique characteristics of such lines (including relatively smaller impacts from construction) compared to other utility lines that are grouped together in the current NWP 12.<sup>12</sup> In addition to the discussion in the Proposal about the limited footprints of electric utility lines, it bears emphasis that electric utility lines are typically narrow and follow the contours of the land. Often, such lines are buried below or are located above waters they cross. And where possible, they can be sited to avoid or minimize impacts to jurisdictional waters.

APPA generally agrees with the Corps’ findings concerning the limited impacts from constructing electric utility lines. The Corps rightly explains that transmission line tower footings are normally between five and eight feet wide and are embedded into the soil surface and thus,

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<sup>10</sup> *Id.* at 57,347.

<sup>11</sup> *Id.*

<sup>12</sup> *See id.* at 57,322-23.

impacts are “fairly small” and limited to the “immediate vicinity of the structure.”<sup>13</sup> The Corps also correctly explains that electric transmission cables, which are usually small (*e.g.*, six inches in diameter), can be “installed in the ground through trenching and backfilling, and through horizontal directional drilling.”<sup>14</sup> Apart from these discussions in the Proposal, there are other aspects of electric utility line construction that further ensure compliance with the Section 404(e).

The Proposal seeks comments and suggestions for national standards or best management practices (BMPs) for electric utility line and telecommunications activities that would be appropriate to add to this NWP and that would be within the Corps’ legal authority to enforce as terms and conditions of a NWP authorization.<sup>15</sup> APPA notes that there are a wide range of minimization, avoidance, and management measures deployed to reduce impacts to aquatic environments, some are unique to the electric and telecommunication utility lines. However, it would be difficult to include many of these BMPs as national requirements for all uses of NWP C because their implementation, while frequent, is site-specific and may not be feasible or useful for minimizing impacts in all scenarios. APPA recommends that if the Corps includes specific BMPs in the final NWP C, it should indicate that the BMP should be implemented “where appropriate and practical” and recognize that implementation of certain BMPs may not be required in all circumstances.

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<sup>13</sup> *See id.* at 57,323.

<sup>14</sup> *Id.*

<sup>15</sup> *See id.* at 57,346.

The following is a list of various practices that APPA members implement<sup>16</sup> to help ensure that electric utility line construction and maintenance activities will have no more than minimal adverse environmental impacts:

- Avoiding surface waters when embedding structures (footings, poles, etc.), stockpiling materials, and setting up work areas.
- If avoidance of surface waters is not possible, installing structures to maintain conductor clearance in accordance with North American Electric Reliability Corporation (“NERC”) and other guidelines.
- Installing mats before placing or driving equipment over wetlands or streams.
- Constructing roads with pervious materials and limiting width and elevation, so long as access is safe.
- Relying on low water crossings and appropriately sized culverts.
- Designing site plans to address the prevention, containment, and cleanup of sediment or other materials caused by the inadvertent returns of drilling fluids when installing electric utility lines under streams or other waters via directional drilling.
- Sidecasting material onto uplands (where possible) or onto semi-permeable surfaces in vegetated wetlands.
- Performing frequent inspections of environmental and safety measures and construction activities.
- Properly training personnel to comply with permit terms and conditions.

For the reasons stated in the Proposal, and in light of the various practices available to avoid, minimize, and mitigate impacts, APPA agrees with the Corps’ determination that the proposed NWP C for electric and telecommunication utility lines will ensure compliance with the statutory minimal adverse environmental effect standard.

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<sup>16</sup> Decisions on which best management practices are appropriate and feasible are made on a site-specific basis; thus, the Corps should decline to impose national, one-size-fits-all standards in the final NWP C.

Importantly, proposed NWP C is informed by the Corps' extensive experience with electric utility lines and related activities, and there is strong record support for the permit. Electric utility lines have been included within the scope of the NWP program since the Corps issued its original set of NWPs in 1977, and the Corps has gradually added terms and conditions to NWP 12, such as acreage thresholds, which are more than sufficient to ensure compliance with CWA section 404(e)'s "minimal adverse environmental effects" standard. Over the past several decades, the Corps has amassed considerable knowledge and experience concerning the relatively minor and often temporary impacts of discharges of dredged or fill material in connection with activities related to electric utility lines and substations.

The Corps' experience with permitting electric utility lines is evident in the draft decision document for NWP C, which comprehensively discusses and analyzes potential impacts from discharges authorized by the permit.<sup>17</sup> The Corps explains why, in light of the permit terms and the various GCs, activities authorized by NWP C—which the Corps conservatively estimates will impact approximately 710 acres of jurisdictional waters per year—will result in no more than minimal adverse environmental impacts.<sup>18</sup> In reaching this conclusion, the Corps considered a broad range of impacts, such as to fish and wildlife, flood hazards, land use, and historic properties.<sup>19</sup> As the Corps explains, many of those will be temporary, and district engineers will have the ability to review activities on a case-by-case basis to ensure the authorized activity results in no more than minimal adverse environmental impacts.<sup>20</sup> These and other findings in

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<sup>17</sup> See Draft Decision Document for Nationwide Permit C, COE-2020-0002 ("NWP C Draft Decision Document")

<sup>18</sup> See *id.* at 34-38, 46, 65 & 72.

<sup>19</sup> See *id.* at Part 5.

<sup>20</sup> *Id.* at 52.



the Corps' draft decision document are consistent with APPA members' experiences with NWP 12 to date.

In closing, APPA agrees with the Corps' conclusions that electric and telecommunication utility lines are sufficiently unique to support the creation of proposed NWP C and that discharges of dredged and fill material authorized by NWP C will have no more than minimal adverse environmental effects.

B. APPA Supports the Proposal to Incorporate Certain Provisions from the Existing NWP 12 in New NWP C.

Under the Proposal, the Corps' longstanding definition of "single and complete linear project" would apply to Proposed NWP C.<sup>21</sup> Specifically, Note 2 to NWP C states that "[f]or electric utility line or telecommunications activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for the purpose of NWP authorization."<sup>22</sup> Furthermore, "single and complete project" is defined 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," and "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."<sup>23</sup>

APPA strongly supports this approach, which is consistent with the Corps' decades-long interpretation codified in 33 C.F.R. § 330.2(i): "For linear or linear projects, the 'single and complete project' (*i.e.*, single and complete crossing) will apply to each crossing of a separate

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<sup>21</sup> See 85 Fed. Reg. at 57,328, 57,383.

<sup>22</sup> *Id.* at 57,383.

<sup>23</sup> 82 Fed. Reg. at 2,007; *see also* 85 Fed. Reg. at 57,394.

water of the United States (*i.e.*, single waterbody) at that location; except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project.” As this regulatory provision illustrates, the Corps has long understood that discharges of dredged or fill material along a linear utility line, with crossings of separate and distant waters, will normally have minimal individual and cumulative impacts.

APPA further supports the provision in NWP C authorizing “temporary structures, fills, and work, including the use of temporary mats necessary to conduct the electric utility line activity,” which is in the existing NWP 12. In APPA members’ experience, the use of temporary matting for access is an effective best management practice for electric transmission and substation projects. The use of such matting reduces damages to wetlands and preserves underlying vegetation depending on the duration of the work. This, in turn, reduces the need for seeding and other restoration work, which can help minimize the introduction and spread of invasive or other non-desirable species.

Finally, APPA supports the Corps’ proposal to use the acreage limits from the 2017 NWP 12—specifically, the 1/2-acre cap and the 1/10-acre PCN threshold—in Proposed NWP C.<sup>24</sup> Over time, the Corps has placed more and more restrictions on NWPs such that the current permits are considerably more stringent than the original NWPs that the Corps issued in 1977. The existing acreage thresholds in NWP 12, which would apply to Proposed NWP C, were developed based on the Corps’ decades of experience with administering the NWP program and are well supported by the record. The Corps should maintain those acreage thresholds, which are more than adequate to ensure compliance with CWA section 404(e).

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<sup>24</sup> See 85 Fed. Reg. at 57,301, 57,383.

APPA members frequently plan their activities to satisfy the acreage thresholds of applicable NWP, rather than go through the process of applying for an individual Corps permit. Such reliance on NWP benefits APPA members, the Corps, and the environment. For starters, NWP coverage is critical to APPA members' ability to continue providing reliable, safe, and affordable electricity to homes, businesses, hospitals, and schools, among others. And as the Corps previously explained, "[g]eneral permits are an important tool for protecting the environment by providing incentives to minimize impacts to jurisdictional waters and wetlands to qualify for a streamlined authorization process."<sup>25</sup> It is important for the Corps to maintain existing acreage thresholds, such as those in the current NWP 12 (which should be carried over to the proposed new NWP C), as they would continue to provide an incentive for APPA members and other regulated entities to plan their activities to qualify for NWP coverage. If that incentive is eliminated, then project proponents may end up requesting individual permit coverage for activities with substantially greater environmental impacts.

For these reasons, APPA supports the Corps' proposal to include provisions regarding the longstanding "single and complete project" definition; the authorization of temporary structures, fills, and work; and the existing acreage thresholds from NWP 12 in the proposed new NWP C.

C. APPA Supports the Corps' Proposal to Simplify PCN Thresholds for NWP C.

The Corps proposes to reduce the number of PCN thresholds for NWP C (as well as NWPs 12 and D) to the following two circumstances: (i) if a permit is required under Rivers and Harbors Act section 10; or (ii) the discharge of dredged or fill material will result in the loss of more than 1/10 acre of waters of the U.S.<sup>26</sup> This proposed reduction is appropriate because many

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<sup>25</sup> 81 Fed. Reg. at 35,191.

<sup>26</sup> 85 Fed. Reg. at 57,347.

of the PCNs have become unnecessary in light of requirements that the Corps has steadily added to NWP 12 over the years (which will be carried over to Proposed NWP C), as the Corps acknowledges.<sup>27</sup> APPA supports these proposed changes, which will help simplify NWP C, eliminate unnecessary burdens on permittees, and ensure that PCN requirements are focused on activities that have the potential to result in more than minimal adverse environmental effects.<sup>28</sup>

Under the Proposal, PCNs are still required for activities that would result in the loss of 1/10 acre or greater to waters of the U.S., and APPA believes that the PCNs that the Corps has proposed to eliminate would be duplicative of the 1/10-acre threshold. Equally important, the terms of Proposed NWP C further ensure that the statutory minimal adverse environmental effects standard is satisfied. For instance, Proposed NWP C requires that temporary fills be restored to pre-construction elevations and that affected areas be revegetated.<sup>29</sup> More broadly, the general conditions applicable to NWPs—*e.g.*, GC 18 (PCN required if activities *might* affect listed species or designated critical habitat); GC 23 and 32 (where activities will cross the 1/10 acre threshold, permittees must explain how mitigation requirements will be met or why mitigation is not required because activities will be no more than minimal and Corps district engineers must scrutinize proposed mitigation)—will help ensure that Corps districts can identify any activities that will not satisfy the CWA Section 404(e) requirements.<sup>30</sup>

In short, the Corps' proposal to simplify the PCN thresholds is both sensible and defensible. The Corps should finalize these proposed changes.

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<sup>27</sup> *See id.* at 57,324.

<sup>28</sup> *See id.*

<sup>29</sup> *See id.* at 57,325.

<sup>30</sup> *See id.* at 57,386, 57,388.

## **II. APPA Urges the Corps to Further Streamline the PCN Process Through Adjustments to General Conditions 32.**

The current version of GC 32 states that, “[a]s a general rule, district engineers will request additional information necessary to make PCN complete only once.” Under GC 32, where a prospective permittee is required to submit a PCN, the permittee cannot begin the activity until they are notified in writing by the district engineer that the activity may proceed under the NWP or until 45 calendar days have passed without the prospective permittee receiving written notice from the district or division engineer.

The 45-day clock does not begin running until the district engineer receives a “complete PCN.” The district engineer has 30 days to determine whether the PCN is complete and may request additional information in order to render the PCN complete. If the district engineer believes the application is incomplete after having received additional information, the PCN process never begins. If, on the other hand, the PCN application is complete, the district engineer then has an additional 45 days to determine whether the applicant qualifies for the NWP authorization.

Not only does the current PCN process cause additional expenses to be incurred and substantial delays, it also burdens utility planning due to uncertainty. The PCN process was intended to have self-executing time limits, but in reality, this has not occurred because: (1) information requests have not been limited to the enumerated topics listed in section (b) of GC 32; and (2) as a result of those additional information requests, there is no schedule certainty as to when the 45-day time period will begin. Some Corps districts make numerous requests for information to “reset the clock” to provide them more time to review the project. This leads to significant delays in the PCN process. Therefore, APPA recommends that the Corps limit information requests to a single request for required information to provide certainty regarding

the length of time required to receive verification. Alternatively, the Corps could issue guidance to avoid delaying the PCN review through this request process.

**III. The Corps Should Finalize Its Proposed Removal of the 300 Linear Foot Limits for Losses of Stream Bed.**

The Corps proposes to remove the 300 linear foot limit for losses of stream bed from NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.<sup>31</sup> Relatedly, the Corps proposes to also: (i) remove the provisions in these NWPs that allow district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed when the applicant submits a PCN and requests a waiver; and (ii) remove the agency coordination process for seeking input from federal and state agencies on whether to grant requests to waive the 300 linear foot limit.<sup>32</sup> APPA supports these proposed changes to NWPs 21, 39, 43, 50, 51, and 52, in particular, and the Association agrees with the supporting rationale outlined in the Proposal.

The Corps presents the following reasons to support removal of the 300 linear foot limit and the related waiver provision: (1) the Corps relies on various tools in the NWP program to ensure that authorized discharges result only in no more than minimal individual and cumulative adverse environmental effects; (2) using acres or square feet instead of linear feet is a more accurate approach to quantifying losses of stream bed and are also better surrogates for losses of stream functions when a functional assessment method is either unavailable or impractical; (3) the proposed changes would provide consistency across the numeric limits used in NWPs for all categories of non-tidal waters of the United States (*i.e.*, wetlands, streams, ponds, etc.); and (4) the proposed changes further the objective of the NWP program to authorize with little, if any,

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<sup>31</sup> *Id.* at 57,311.

<sup>32</sup> *See id.*

delay or paperwork certain activities having minimal impacts by providing equivalent quantitative limits for non-tidal waters.<sup>33</sup>

Based on the Corps' lengthy and comprehensive discussion of each of the foregoing reasons in the Proposal,<sup>34</sup> APPA believes there is ample justification for removal of the 300 linear foot limit. The second rationale is particularly important because a reliance on linear feet does not consider variations in stream width through tributary networks or the scale of the stream reach being impacted.<sup>35</sup> By contrast, reliance on acreage limits most accurately represents the amount of stream bed that is lost (and consequently, the functions that are lost); thus, it is better to quantify stream impacts and stream compensatory mitigation credits using the acreage limits. Furthermore, it bears emphasis that all of the NWP's that currently include a 300 linear foot limit for losses of stream bed already require PCNs for all authorized activities, with the sole exception of NWP 51 (Land-Based Renewable Energy Generation Facilities).<sup>36</sup>

To state the obvious, if there are no linear foot limits, then there is no need for provisions concerning the ability to waive such limits. In any event, the Corps provides reasonable justifications for removing the provisions concerning district engineers' ability to waive the 300 linear foot limit and to seek input from other agencies on whether to grant such waivers. For example, because ephemeral streams are no longer jurisdictional under the Navigable Waters Protection Rule, there is no need to request waivers regarding losses of ephemeral stream beds because discharges into such streams no longer require a CWA section 404 permit. The elimination of the waiver and coordination process should, as the Corps notes, reduce

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<sup>33</sup> *Id.* at 57,313.

<sup>34</sup> *See id.* at 57,313-20.

<sup>35</sup> *See id.* at 57,316.

<sup>36</sup> *Id.* at 57,314.

administrative burdens from having to address waiver requests, thereby freeing up additional agency resources to review PCNs and other 404 permit applications, as well as to conduct other activities within the Corps' regulatory authority and mission.<sup>37</sup>

#### **IV. The Corps Should Finalize the Proposed Changes to NWP 3 (Maintenance).**

As the Corps explained when it finalized the 1982 version of NWP 3, discharges of fill material for repair and maintenance are normally exempt from regulation under CWA section 404(f)(1)(B).<sup>38</sup> But because of the “recapture” provision in section 404(f)(2), there are some circumstances where the exemption may not apply and thus, NWP 3 would be operable.<sup>39</sup>

The Corps now “propos[es] to modify paragraph (a) of this NWP to authorize the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require DA authorization at the time it was constructed.”<sup>40</sup> And as the Proposal explains, the 1982 and 1986 versions of NWP 3 included similar language, which the Corps deleted in 1991 without explanation.<sup>41</sup> APPA supports the proposed modification, which would restore the language that was inexplicably deleted in 1991 and also make NWP 3 consistent with NWP 31 (Maintenance of Existing Flood Control Facilities).<sup>42</sup> Under the proposed change, only minor deviations in the configuration of a currently serviceable structure or fill are authorized, which should ensure that any adverse environmental effects from repair, rehabilitation or replacement of such structures or fill will be minimal.

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<sup>37</sup> *See id.* at 57,311.

<sup>38</sup> 47 Fed. Reg. 31,794, 31,799 (July 22, 1982).

<sup>39</sup> *See id.*

<sup>40</sup> 85 Fed. Reg. at 57,321.

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*



The Corps has also proposed to modify paragraph (a) of NWP 3 to authorize the placement of new or additional riprap to protect structures requiring maintenance under the NWP, so long as the placement of riprap is the minimum necessary to protect or ensure the safety of the structure.<sup>43</sup> This provision appeared in the 2007 and 2012 versions of NWP 3, but was removed in 2017.<sup>44</sup> APPA supports this proposed modification to NWP 3. Although the Corps removed language from NWP 3 concerning the placement of riprap to protect structures in 2017, it also clarified that a “project proponent has the option of using NWP 13 or another NWP to authorize the placement of riprap to protect the existing structure, which in some circumstances does not require a PCN.”<sup>45</sup> Furthermore, the Corps states in the current Proposal that such placement also “could be authorized under the current text of [paragraph (a) of] NWP 3 as a minor deviation,” again without a PCN.<sup>46</sup> While these are both viable options, APPA supports the Corps’ proposal “to provide clarity and regulatory certainty to prospective permittees and other interested parties by adding an explicit provision to paragraph (a)” of NWP 3.<sup>47</sup> The Corps correctly recognizes that the placement of additional riprap to protect an existing structure or ensure safety “in most circumstances [will] result in no more than minimal adverse environmental effects because that riprap will protect the structure from erosive forces that can

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<sup>43</sup> See 85 Fed. Reg. at 57,322.

<sup>44</sup> See 82 Fed. Reg. 1,860, 1,984 (Jan. 6, 2017). The Proposal incorrectly states that this provision was removed from the 2012 version of NWP 3, citing an unrelated *Federal Register* notice from 2019. The provision appeared in the 2012 permit, before the Corps removed it in 2017.

<sup>45</sup> 82 Fed. Reg. at 1,881.

<sup>46</sup> 85 Fed. Reg. at 57,322.

<sup>47</sup> *Id.*

damage the structure and move pieces of the structure into the waterway where it can adversely affect the waterbody.”<sup>48</sup>

**V. The Corps Should Finalize the Proposed Changes to General Condition 18 to Ensure Alignment with the Revised ESA Implementing Regulations.**

The Corps proposes to revise paragraph (a) of GC 18 in light of recent changes to the U.S. Fish & Wildlife Service’s (FWS) and National Marine Fisheries Service’s (NMFS) regulations implementing Endangered Species Act (ESA) section 7.<sup>49</sup> The proposed revised paragraph (a) would cross reference the definition of “effects of the action” codified in 50 C.F.R. § 402.02, as well as the additional explanation in 50 C.F.R. § 402.17 about what constitutes “activities that are reasonably certain to occur” and “consequences caused by the proposed action.”<sup>50</sup>

As the Proposal explains, this revision is appropriate because the FWS/NMFS regulations no longer mention “direct effects” or “indirect effects” and thus, there is no need to include or define those terms in GC 18. Instead, Corps districts will apply the new definition of “effects of the action”—which incorporates “but for” and “reasonably certain to occur” standards for assessing whether a consequence to listed species or critical habitat is caused by the proposed action—in making effects determinations under the ESA.<sup>51</sup> For a consequence to be reasonably certain to occur, there must be “clear and substantial information” supporting such a finding.<sup>52</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *See* 85 Fed. Reg. at 57,350 (citing 84 Fed. Reg. 44,976).

<sup>50</sup> 85 Fed. Reg. at 57,386.

<sup>51</sup> *See id.* at 57,358.

<sup>52</sup> *See* 84 Fed. Reg. at 44,977.

APPA supports the proposed changes to GC 18, which accounts for recent revisions to the FWS/NMFS regulations implementing the ESA. It is important that Corps districts adhere to those revised regulations when evaluating PCNs under GC 18.

**VI. APPA Supports the Proposed Changes to GC 23 (Mitigation), but the Corps Should Clarify When Mitigation Is Required.**

The Corps proposes to modify GC 23 to establish a 1/10-acre threshold for requiring compensatory mitigation for losses of stream bed that require PCN, with an option for district engineers to waive this requirement where other forms of mitigation (*e.g.*, BMPs and other minimization measures) are more environmentally preferable.<sup>53</sup>

APPA generally supports the proposed decision to require compensatory mitigation for any impacts that result in 1/10 acre or more of stream bed loss but recommends further revisions for clarification. Specifically, APPA recommends that, consistent with the NWP definition of “loss of waters of the United States,” the Corps clarify that compensatory mitigation is only required for *permanent* impacts to stream bed loss exceeding 1/10 acre.<sup>54</sup> Temporary impacts are minor impacts to aquatic resources that occur for a short duration during authorized activities. Aquatic resources undergoing only temporary impacts are restored to pre-construction elevations, contours, conditions, and functionality. The Corps should confirm that it will not include temporary impacts in the calculation of whether a proposed activity reaches the proposed 1/10-acre threshold for requiring compensatory mitigation.

Moreover, it is important that, as proposed, the Corps maintains flexibility to determine that some other form of mitigation (*e.g.*, BMPs, minimization) is more appropriate or to waive

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<sup>53</sup> 85 Fed. Reg. at 57,351.

<sup>54</sup> *See id.* at 57,393 (“The loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation because of the regulated activity.”).

the mitigation requirement where the Corps determines that the adverse effects of the proposed activity are no more than minimal.<sup>55</sup> A flexible approach to mitigation is necessary and consistent with the Corps' longstanding recognition that "the functions and values of aquatic resources vary considerably across the country."<sup>56</sup> Although the 1/10-acre limit may be appropriate for wetland resources in one district or watershed, it may be far too restrictive in another district or watershed.<sup>57</sup> In some circumstances where the 1/10-acre threshold is crossed, it may not be necessary to require mitigation to achieve minimal individual and cumulative adverse environmental effects.<sup>58</sup>

Additionally, APPA recommends that the Corps clarify that mitigation shall only be required for impacts to jurisdictional wetlands in accordance with the Navigable Waters Protection Rule (NWPR). In light of the final rule, it should be made clear that mitigation is not required for impacts to ephemeral streams or drains or other non-regulated waters.

## **VII. APPA Supports the Proposed Clarification to GC 25 (Water Quality)**

The Corps proposes to modify GC 25 to articulate that, if a permittee is unable to comply with all the conditions of a section 401 water quality certification (WQC) for the issuance of an NWP, the permittee must obtain a discharge-specific WQC or waiver for the proposed discharge in order for the activity to be authorized by the NWP.<sup>59</sup> The district engineer or certifying

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<sup>55</sup> *Id.* at 57,388.

<sup>56</sup> 67 Fed. Reg. 2020, 2024 (Jan. 15, 2002).

<sup>57</sup> 81 Fed. Reg. at 35,234.

<sup>58</sup> *Id.*

<sup>59</sup> 85 Fed. Reg. at 57,352.

authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.<sup>60</sup>

The proposed modification is consistent with Corps' regulations, which allow a permittee to obtain a waiver of certification.<sup>61</sup> The preamble explains that "the inability to comply with all conditions of a WQC does not preclude the use of the NWP to authorize the regulated discharge into waters of the United States."<sup>62</sup> Requiring permittees to undergo individual review of activities that cannot comply with all the conditions of a 401 WQC ensures that authorization under NWP for such activities does not result in more than minimal adverse environmental effects. APPA supports the proposed clarification to GC 25, which is consistent with the CWA and the Corps' regulations.

#### **VIII. The Corps Should Clarify Certain Statements Concerning the Status of Existing Permits.**

In 2013, the Corps amended its NWP regulations to state that an NWP verification is "valid for a specific period of time (generally the expiration date of the NWP) unless the NWP authorization is modified, suspended, or revoked."<sup>63</sup> Prior to that amendment, verification letters were only valid for up to two years.<sup>64</sup> The 2013 amendments further state that NWP verifications "will remain valid for the specified period of time, if during that time period, the NWP authorization is reissued without modification or the activity complies with any subsequent

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<sup>60</sup> *Id.*

<sup>61</sup> 33 C.F.R. § 325.2(b)(1)(ii).

<sup>62</sup> 85 Fed. Reg. at 57,352.

<sup>63</sup> 33 C.F.R. § 330.6(a)(3)(ii).

<sup>64</sup> *See* 78 Fed. Reg. 5,726 (Jan. 28, 2013) (discussing 1991 version of 33 C.F.R. § 330.6(a)(3)(ii)).

modification of the NWP authorization.”<sup>65</sup> Although the phrase “for the specified period of time” suggests that authorizations expire on an NWP’s expiration date, the Corps made it clear that the 2013 amendment “does not affect § 330.6(b),” which “provides up to 12 months to complete an NWP activity after the NWP expires, as long as that activity has commenced or is under contract to commence by the date the NWP expires.”<sup>66</sup> Similarly, if “the NWP authorization expires, or is suspended or revoked, or is modified, such that the activity would no longer comply with the terms and conditions of an NWP,” permittees would also have an additional twelve months to complete activities so long as construction has commenced or are under contract to commence.<sup>67</sup> Accordingly, permittees should have until March 18, 2023 to complete activities authorized under the 2017 NWPs so long as they have commenced construction or are under contract to commence construction by March 18, 2022.

In the Proposal, the Corps requests comment on whether to “change the expiration date of the 2017 NWPs so that they expire the day before the 2020 NWPs go into effect.”<sup>68</sup> According to the Corps, if the expiration date changes, the amount of time that permittees have to complete activities under the terms and conditions of the 2017 NWPs would depend on whether the activity qualifies for authorization under the reissued or modified NWPs: (i) if the activity continues to qualify for NWP authorization, the original verification letter will be valid until March 18, 2022, unless the district engineer specified a different time; or (ii) if the activity no longer qualifies for NWP authorization, then the permittee will have twelve months to complete

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<sup>65</sup> *Id.*

<sup>66</sup> 78 Fed. Reg. at 5,730.

<sup>67</sup> *See id.*; *see also* 33 C.F.R. § 330.6(b).

<sup>68</sup> 85 Fed. Reg. at 57,305.

the authorized activity so long as the activity is under construction or under contract to commence construction.<sup>69</sup>

APPA is concerned that any revision of the expiration date of the 2017 NWP's threatens to upend expectations about the amount of time permittees will have to complete activities under the 2017 NWP's. Because the twelve-month "grandfathering" period in 33 C.F.R. § 330.6(b) relates back to "the date of an NWP's expiration, modification, or revocation," if the Corps changes the expiration date of the 2017 NWP's to an earlier date, permittees would no longer have until March 18, 2023 to complete authorized activities and would instead have to go through an additional PCN process to obtain an updated verification from the Corps (if their activities continue to qualify for NWP authorization) or would have to seek an individual permit (if their activities no longer qualify for NWP authorization). Such a change could be highly disruptive to APPA members who have planned activities in reliance on a March 18, 2023 completion date.

**IX. The Corps Should Clarify Statements Concerning the Jurisdictional Status of Ditches and the Ditch Exemptions under CWA Section 404(f).**

The Corps should clarify certain statements in the Proposal concerning ditches to ensure consistency with the NWPR. According to the Proposal, "some ditches will continue to be subject to Clean Water Act jurisdiction as tributaries, provided they are waters under 33 CFR 328.3(a)(1) or (2), or were constructed in adjacent wetlands that are waters under § 328.3(a)(4)."<sup>70</sup> But not all ditches that are constructed in adjacent wetlands are automatically jurisdictional under the NWPR. Instead, they must also either (i) satisfy the flow conditions of the new "tributary" definition; or (ii) develop wetlands in portions of the ditch that satisfy the

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<sup>69</sup> *See id.* at 57,306.

<sup>70</sup> *Id.* at 57,330.

new “adjacent wetlands” definition.<sup>71</sup> In accordance with the NWPR, the Corps should make it clear in the final NWP that not all ditches constructed in adjacent wetlands are jurisdictional.

Furthermore, the Corps should acknowledge that certain discharges related to activities involving ditches may qualify for exemptions from permitting under CWA section 404(f). Unlike NWP 3, 12, 14, 30, and 40, NWP 41 and 46 conspicuously do not even mention the 404(f) exemptions.<sup>72</sup> To ensure consistency between all of these permits, the Corps should revise NWP 41 and 46 by adding a Note that plainly states that certain discharges or activities “may qualify for an exemption under section 404(f) of the Clean Water Act” or that those NWP are only needed to authorize certain activities “that do not qualify for the Clean Water Act section 404(f) exemptions” for ditches.

The Corps should also consider explaining the relationship between NWP 41 and the recently issued “Ditch Exemptions Memo”<sup>73</sup> when it finalizes the Proposal. The Corps proposes to modify NWP 41 to add irrigation ditches to the permit, but the permit otherwise is largely identical to the 2017 version in that it authorizes the reshaping of existing ditches to modify the cross-sectional configuration (by regarding with gentler slopes) for the purpose of improving water quality, so long as the reshaping neither increases drainage capacity beyond the original as-built capacity nor expands the area drained by the ditch as originally constructed.<sup>74</sup> By

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<sup>71</sup> 85 Fed. Reg. at 22,286-87.

<sup>72</sup> See 33 U.S.C. § 1344(f).

<sup>73</sup> Joint Memorandum to the Field Between the U.S. Department of the Army, Corps of Engineers, and the U.S. Environmental Protection Agency Concerning Exempt Construction or Maintenance of Irrigation Ditches and Exempt Maintenance of Drainage Ditches under Section 404 of the Clean Water Act (July 2020), *available at* [https://www.epa.gov/sites/production/files/2020-07/documents/final\\_ditch\\_exemption\\_memo\\_july\\_2020\\_with\\_epa.pdf](https://www.epa.gov/sites/production/files/2020-07/documents/final_ditch_exemption_memo_july_2020_with_epa.pdf).

<sup>74</sup> See 85 Fed. Reg. at 57,330 & 57,378.



comparison, the “Ditch Exemptions Memo” states that a CWA section 404 permit is *not* required for “[m]inor changes to the cross-section of the ditch to conform with current engineering standards (*e.g.*, where more graduated side-slopes result in greater stability) qualify as maintenance, so long as those modifications of the ditch will not result in the drainage, degradation, or destruction of additional jurisdictional waters.”<sup>75</sup> Given the potential inconsistency between the Proposal and the Ditch Exemptions Memo, the Corps should clarify what types of modifications to the cross-sectional configuration of ditches require a permit (*e.g.*, NWP 41) versus when modifications would be exempt from permitting under CWA section 404(f)(1)(C).

**X. Conclusion**

APPA appreciates the opportunity to comment on the Corps’ Proposal and urges the Corps to adopt APPA’s recommendations in the final rule. Additionally, APPA is a member of the Utility Water Act Group and the Waters Advocacy Coalition. We are supportive of these organizations’ comments on the Proposal. If you have questions regarding the aforementioned comments please contact Ms. Carolyn Slaughter, at [cslaughter@publicpower.org](mailto:cslaughter@publicpower.org).

Sincerely,



Carolyn Slaughter

Director, Environmental Policy

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<sup>75</sup> Ditch Exemptions Memo at 4.