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December 14, 2012

The Honorable Eric C. Schwaab
Assistant Secretary for Conservation and Management (Acting)
United States Department of Commerce
Herbert Clark Hoover Building
14th Street and Constitution Avenue, NW, Room 6255
Washington, DC 20230

Re: National Marine Fisheries Service Biological Opinion on U.S. Army Corps of Engineers' Nationwide Permit Program 2012-2017

Dear Assistant Secretary Schwaab:

We submit this letter on behalf of the organizations listed below, which represent a large cross-section of the Nation's energy, infrastructure, housing, mining, and agriculture sectors. These sectors rely on nationwide permits (NWP) issued under the Clean Water Act (CWA) for their operations, maintenance work, and new construction. We are writing to identify numerous and substantial deficiencies and inaccuracies in the National Marine Fisheries Service (NMFS) Biological Opinion (BiOp) on the U.S. Army Corps of Engineers' (Corps) Nationwide Permit Program (February 2012). The BiOp is undermined by a serious misunderstanding of the NWP program, fails to make required factual determinations, rests on unsubstantiated conclusions, and does not comport with the requirements of section 7 of the Endangered Species Act (ESA) or the applicable regulations.

We understand that the Corps has reinitiated ESA section 7 consultation in response to concerns with the BiOp, and we hope that any new BiOp that NMFS may issue as a result of further consultation would account for the concerns set forth in this letter, including: an accurate description of the Corps' NWP program, including the scope, stages, timing, authority, limits, terms, conditions, and restrictions of actions by the Corps at the Headquarters, Division, and District levels; and specific facts and evidence with respect to any asserted effects on specific species as a result of specific NWPs as they exist today in particular geographic areas.

The following is a summary of some of our major concerns with the February 2012 BiOp:

I. The BiOp Misunderstands the NWP Program.

Section 7(a)(2) of the ESA requires a federal agency to consult with NMFS and the U.S. Fish and Wildlife Service (FWS) (jointly, the Services) on any prospective agency action to ensure



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that any proposed action “authorized by a federal agency” is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). Here, the BiOp mistakenly treats the overall NWP program as an “action” subject to ESA section 7 consultation, failing to differentiate between existing aspects of the NWP program (*e.g.*, the regulations at 33 C.F.R. Part 330) and the specific action properly under consideration in the BiOp, *i.e.*, the 2012 reissuance of specific NWPs by the Chief of Engineers. Rather than analyzing specifically whether the reissuance of the NWPs for 2012 – 2017 by the Chief of Engineers is likely to jeopardize listed species or destroy or adversely modify their critical habitat, the BiOp provides an overbroad analysis on the direct, indirect, and cumulative effects of all activities authorized by NWPs since 1977.

At least equally important, the BiOp fails to recognize that the reissuance by the Chief of Engineers “authorizes” only those activities that have “no effect” on threatened or endangered species or their critical habitat. In accordance with the February 2012 NWP rule, any project-specific actions that “may effect” listed species or destroy critical habitat is subject to project-specific review, including section 7 consultation, and cannot be authorized until after completion of this project-specific review. The BiOp demonstrates a failure to understand this framework or how the NWP program works, and instead incorrectly treats the numerous actions authorized now by the Chief of Engineers or in the future by District Engineers as a single agency “action” subject to consultation. This fundamental misunderstanding of the NWP program undermines the entire BiOp.

A. Overview of the Corps’ NWP Program

The CWA regulates discharges of pollutants into navigable water. 33 U.S.C. § 1311(a). CWA section 404 authorizes the Secretary of the Army, through the Corps, to permit discharges of dredged or fill material into waters of the United States. *Id.* § 1344. Within the Corps’ limited scope of authority to permit the discharge of dredged or fill material, CWA section 404(e) allows the Corps to authorize an even more limited category of discharges on a nationwide basis that have no more than minimal individual or cumulative environmental effects. *Id.* § 1344(e). Congress enacted CWA section 404(e) to allow the Corps to focus its limited resources on activities with greater impacts, and to provide a streamlined permit process for categories of activities with only minimal impacts. Because NWPs may not be issued for a period of more than five years under section 404(e), the Corps undertakes notice-and-comment rulemaking every five years to reissue certain NWPs and, in some cases, establish new NWPs.

The Corps has established regulatory provisions at 33 C.F.R. Part 330 that provide a protective framework for the NWP program. Pursuant to Part 330, the Chief of Engineers is responsible for issuing the NWPs and establishing NWP general conditions at the Headquarters level. 33 C.F.R.



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§ 330.1(b). Certain NWP, by their terms, require the prospective permittee to submit a pre-construction notification (PCN) to the District Engineer that complies with the requirements set out in General Condition (GC) 31 (Pre-Construction Notification) for the submission of PCNs.¹ The District Engineer will review the specific project identified in a PCN to determine whether the activity will result in more than minimal adverse environmental impacts. 77 Fed. Reg. 10,184, 10,286-87 (Feb. 21, 2012). Moreover, regardless of whether a particular NWP, by its terms, requires a PCN to be filed, GC 18 (Endangered Species) requires any applicant who intends to rely on an NWP to first file a PCN if a listed species or critical habitat “might be affected” or “is in the vicinity of the project,” and await notification from the Corps that ESA compliance has been assured and that the project may proceed. *Id.* at 10,283. In addition, Corps Divisions and District Engineers are responsible for establishing more restrictive regional conditions, where necessary, within Corps Districts and States. 33 C.F.R. §§ 330.1(d); 330.4(e). Finally, Corps District Engineers are responsible for reviewing specific projects whenever a PCN has been filed and imposing additional conditions and consultation requirements, where appropriate, or requiring individual permits if the District Engineer finds that the proposed activity would have more than minimal environmental impacts. *Id.* § 330.4(e), (f). Thus, to qualify for NWP authorization, a prospective permittee must comply with the NWP general conditions imposed by Corps Headquarters as well as any regional or case-specific conditions or consultation requirements imposed by the Division Engineer or District Engineer. 77 Fed. Reg. at 10,282.

On February 21, 2012, after providing notice and accepting public comments, the Corps reissued 48 existing NWPs and issued 2 new NWPs (2012 NWP Reissuance), along with 28 existing general conditions and three new general conditions. 77 Fed. Reg. 10,184. The Chief of Engineers prepared a National Environmental Policy Act (NEPA) analysis of the 2012 reissuance of the NWPs, which evaluated projected impacts of each NWP and estimated cumulative effects on a national scale. The Chief of Engineers’ 2012 reissuance of the NWPs imposed express limitations on activities authorized by the NWPs, including GC 18 (Endangered Species), which applies independently to all NWPs regardless of whether the NWP itself requires the filing of a PCN. GC 18 expressly prohibits authorization under any NWP of any activity that is likely to jeopardize the continued existence of a threatened or endangered species or adversely modify the critical habitat of such species. *Id.* at 10,283. Under GC 18, “[n]o activity is authorized under any NWP which ‘may affect’ a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed,” and the applicant “shall not begin work . . . until Section 7 consultation has been completed.” *Id.*

¹ The General Conditions apply to all uses of all NWPs.



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Because NWP's do not authorize any activity that "may affect" a listed species or critical habitat absent a project-specific ESA section 7 consultation, and because any activity that "may affect" a listed species must undergo a project-specific consultation and verification at the District Engineer level, the Chief of Engineers' NWP reissuance has "no effect" on listed species or critical habitat. To ensure protection against project-specific "actions" which "may affect" listed species and critical habitat, GC 18 requires submission of a PCN to the District Engineer if any listed species "might be affected" or "is in the vicinity of the project" and prohibits work until notified by the Corps that "the requirements of the ESA have been satisfied and the activity is authorized." *Id.* GC 18 notes that information on the location of listed species and their critical habitat can be obtained from the Services directly, or from their websites. *Id.* at 10,284. The PCN must include the name(s) of the listed species that might be affected by the proposed work or that utilizes the designated critical habitat that might be affected by the proposed work, *id.* at 10,283, and consultation on any listed species or critical habitat which "may be affected" must take place consistent with 50 C.F.R. §§ 402.13, 402.14 (2012), including analysis of cumulative effects. 50 C.F.R. § 402.14(g).

B. The BiOp's Analysis of GC 18 Demonstrates a Misunderstanding of GC 18.

The BiOp does not account for the legal restrictions on the Chief of Engineers' "action" in the 2012 NWP Reissuance. Under the ESA, consultation is exclusively focused on actions "authorized" by the Corps. 16 U.S.C. § 1536(a)(2). As discussed above, under GC 18, no activity is authorized under any NWP which is likely to jeopardize the continued existence of a listed species or destroy critical habitat, and the "[a]uthorization of an activity by a NWP does not authorize the 'take' of a threatened or endangered species." 77 Fed. Reg. at 10,283. In addition, no activity is authorized under any NWP which "may affect" a listed species or critical habitat unless section 7 consultation has been completed for that activity. *Id.* Thus, at the Chief of Engineers level, the only "authorized" actions under the NWP program are those with no effect on listed species or critical habitat. Additional regional or project-specific actions may eventually be authorized, but only after either a no effect finding or consultation with the Services and avoidance of jeopardy and destruction or adverse modification of critical habitat.²

² Under the ESA and applicable regulations, it is appropriate to time consultation to occur at the point that an activity is authorized which "may affect" listed species. *See* 50 C.F.R. § 402.14(a) (formal consultation required when action agency determines action "may affect" listed species or critical habitat); U.S. FWS & NMFS, Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act (hereinafter, Section 7 Consultation Handbook) at 4-4 (1998) ("If a 'may affect' situation exists, formal consultation must be initiated promptly.").

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The BiOp fails to focus on what is authorized under the 2012 NWP Reissuance; instead it focuses on what is unauthorized. Based on speculation, the BiOp hypothesizes possible problems with unauthorized activities and uses those hypotheses as a basis for claiming that the NWP program fails to insure that the NWPs are not likely to result in jeopardy to listed species or their critical habitat. *See, e.g.*, BiOp at 191, 219. The BiOp provides no evidence, however, of significant levels of unauthorized conduct or noncompliance with GC 18 leading to jeopardy or destruction or adverse modification of critical habitat. Moreover, the BiOp ignores that governing legal principles establish that the Corps and NMFS should presume that permittees will comply with the applicable terms and conditions of the NWPs.³ Thus, for these reasons alone, the BiOp's misapprehensions about GC 18 undermine its conclusions.

The BiOp acknowledges that GC 18 is a useful step, but then levels unfounded criticism of this general condition. BiOp at 191. First, the BiOp alleges that the NWP conditions "make the prospective permittee solely responsible for compliance with the requirements of the ESA." *Id.* This is untrue. GC 18 requires an applicant to notify the Corps if a listed species or critical habitat is "in the vicinity of" the permitted work, or "might be affected" by the permitted work. 77 Fed. Reg. at 10,283. This type of determination, like a determination whether a wetland may be present thus requiring NWP authorization, is readily and appropriately made by a prospective permittee. Indeed, NWP applicants are advised to check with NMFS and FWS regarding listed species or critical habitat and the procedures established in 50 C.F.R. Part 402.⁴ But compliance with ESA section 7 is ensured by the Corps through the process set forth in GC 18.⁵

³ *See United States v. Norton*, 97 U.S. 164, 168 (1877) ("It is a presumption of law that officials and citizens obey the law and do their duty."); *Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 5 n.7 (D.D.C. 2005) (citing *Norton* and noting that courts must presume, barring evidence to the contrary, that permittees will comply with Corps permit conditions); *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 481 n.1 (D.C. Cir. 2009) (rejecting argument that program at issue "could result in further exploration and seismic testing by third parties" because program itself did not authorize such activities and nothing in the record suggested such activities "have been or will be conducted without being separately authorized.").

⁴ *Id.* at 10,284 ("Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide web pages at <http://www.fws.gov/> or <http://www.fes.gov/ipac> and <http://www.noaa.gov/fisheries.html> respectively.").

⁵ It is the Corps that is responsible for insuring activities authorized under NWPs are in compliance with ESA requirements. In addition to its review under GC 18, the Corps conducts a review under GC 31 to ensure that every PCN provides complete information, including

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Second, the BiOp states that there is a lack of guidance from the Corps that specifies how to satisfy GC 18. BiOp at 191-92. Many Corps Districts have, in fact, provided guidance on listed species and critical habitat. For example, the Corps Jacksonville District and the FWS South Florida Field Office issued the Standard Local Operating Procedures for Endangered Species (SLOPES) for Section 404 Permits for the Florida Panther (April 18, 2000), which delineates “panther consultation areas” for proposed projects requiring a CWA section 404 permit that have the potential to affect the Florida panther. Moreover, the BiOp has not shown at all how an absence of such specific guidance is likely to result in jeopardy to specific listed species or destruction or adverse modification of their critical habitat.

Third, the BiOp asserts that the Corps does not routinely perform compliance inspections. BiOp at 193. Again, there is no evidence showing that the level of compliance inspections performed by Corps Districts is likely to result in jeopardy for particular listed species or destruction or adverse modification of critical habitat. Furthermore, the study that the BiOp cites to support this argument does not deal with GC 18, but with the Corps’ failure to monitor mitigation conditions. As discussed more fully below, the issues with mitigation compliance inspections have been addressed by the Corps’ 2008 Mitigation Rule.

Fourth, the BiOp singles out NWP 4 (fish and wildlife harvesting, enhancement, and attraction devices) and speculates, without providing any specific evidence, that NMFS’ prior experience suggests that the activities authorized by NWP 4 will have significant, adverse impacts on listed species despite the NWP general conditions. *See id.* at 193.⁶ However, regardless of the impacts of NWP 4 on certain species, it is unwarranted and unsubstantiated speculation to infer that each of the remaining 49 NWPs which govern quite different types of activities will have similar effects on listed species of concern to NMFS, especially since none of the other NWPs authorize actions which may trap or entangle marine species. Thus, any effects attributable to NWP 4 are not a basis for establishing jeopardy or destruction/adverse modification with respect to the other 49 NWPs.

information addressing whether “any listed species or designated critical habitat might be affected or is in the vicinity of the project.” *Id.* at 10,286-87. Even where a PCN is not required, the Corps monitors and enforces the requirements of the NWP program, including compliance with the ESA requirements.

⁶ The BiOp does not provide specific evidence that this single NWP is likely to result in jeopardy or destruction or adverse modification of critical habitat, nor does the BiOp establish that this single NWP will have any effects on various species under NMFS’ jurisdiction (*e.g.*, whales).



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Fifth, the BiOp cites “cumulative impacts” as a reason why GC 18 is not likely to prevent endangered or threatened species from being adversely affected by activities authorized by NWP. *Id.* at 194. However, the BiOp’s reliance on cumulative impacts in this context ignores the cumulative effects definition applicable under the ESA (discussed more fully below) and the BiOp’s own finding that there is no evidence that cumulative effects to listed species are reasonably certain to occur. *See id.* at 219. Also, as discussed above, the Corps does evaluate cumulative impacts to listed species and critical habitat which may be affected through the PCN and consultation process under GC 18 and 31. 50 C.F.R. §§ 402.13, 402.14.

Finally, the BiOp claims that the Corps Operations and Maintenance Business Information Link (OMBIL) Regulatory Module database is inadequate because it “cannot contain information about activities that do not require [a PCN].” BiOp at 197. Again, the BiOp demonstrates a misunderstanding of the NWPs. GC 18 specifically requires a PCN for any project that might affect or which is in the vicinity of listed species or critical habitat. Thus, the premise for the BiOp’s assertion that the database “cannot contain” information on potential species impacts is unfounded.

C. The BiOp Confuses PCNs Required by an NWP’s Terms with PCNs Required by GC 18, and Its Claims Regarding the Effectiveness of PCNs are Unsupported.

The BiOp confuses PCNs that are required by the terms of specific NWPs with PCNs required by General Conditions, which apply to all NWPs. In particular, the BiOp demonstrates confusion as to the requirement under GC 18 to submit a PCN whenever a listed species or critical habitat “might be affected” or “is in the vicinity of the project.” It fails to recognize that GC 18’s requirements apply whether or not PCN is required by the terms of a specific NWP relied upon by a permittee. *See* BiOp at 197. The fact that not all NWPs require PCN is irrelevant to determining the effectiveness of GC 18, because even if the NWP at issue does not require the applicant to submit a PCN, if any activity “might affect” or “is in the vicinity of” a listed species, the applicant has an obligation to file a PCN under GC 18. 77 Fed. Reg. at 10,283. For example, NWP 3(a) (maintenance) does not require PCN, but if the proposed maintenance activities “might affect” a listed species or critical habitat, the applicant will be required to file a PCN with the Corps under GC 18. In addition, the BiOp speculates that because the Corps’ database is missing project size data for 28 percent of NWPs, the Corps does not review significant percentages of PCNs to insure that they are complete and the information contained therein is correct. BiOp at 197. However, this conclusion is without basis. The fact that all of the records are not in the database does not mean the data were not provided when needed (*e.g.*, when a PCN was required) or that the data were not reviewed by the District Engineer; it simply means that certain data was not input into the database.

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The BiOp also claims that the Corps' review of PCNs for specific activities appears to overlook cumulative impacts. BiOp at 198. Again, the BiOp provides no factual basis for this speculation and ignores the fact that the Corps performs analysis of cumulative effects to species for ESA activities at the project-specific level under GC 18 and applicable ESA regulations and performs cumulative effects analysis for NWP PCN activities under GC 31. 77 Fed. Reg. at 10,283, 10,287.

II. The BiOp Overstates Impacts of the 2012 Reissuance of NWPs and Underestimates the Mitigation That Occurs Under the NWPs.

According to the Section 7 Consultation Handbook, a formal biological opinion "consists of a description of the proposed action, status of the species/critical habitat, the environmental baseline, effects of the action, cumulative effects, the Services' conclusion of jeopardy/no jeopardy and/or adverse modification/no adverse modification, and reasonable and prudent alternatives, as appropriate." Section 7 Consultation Handbook at 4-15. The "Effects of the Action" section must include "an analysis of the direct and indirect effects of the proposed action on the species/and or critical habitat." *Id.* at 4-23. This BiOp, however, overstates the perceived impact of the proposed action—the 2012 NWP Reissuance—while failing to provide actual and credible evidence of the effects of the proposed action on specific species or their critical habitat. Nor does it provide any evidence that these effects are likely to lead to jeopardy for listed species or destruction or adverse modification of critical habitat.

A. The BiOp Substantially Overstates the Impacts of the 2012 Reissuance of NWPs and Fails to Examine These Impacts in the Context of the Nation's Wetland and Stream Resources.

As a preliminary matter, a significant amount of the "data" relied on in the BiOp to estimate impacts was provided by interest groups (*e.g.*, Environmental Working Group (EWG), Public Employees for Environmental Responsibility (PEER), the Audubon Society). *See* BiOp at 51, 157. The BiOp does not make any attempt to determine whether there is any bias in the assumptions underlying or the derivation or presentation of this data. Under these circumstances and given that the Corps maintains its own data on the NWP program and has substantial field experience with the operation of the NWP program, the BiOp does not provide a reasoned explanation for why the Corps must accept the work of these groups as the "best available data" on the impacts of the NWP program.

Significantly, in its analysis of impacts to species or critical habitat, the "Environmental Baseline" section of the BiOp does not account for, much less detail, the wide array of threats to species beyond loss of wetlands or streams, such as habitat degradation caused by upland



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development or other land uses. Rather, the BiOp ignores the wide range of stressors that are beyond the authority of the Corps' NWP program, and generally attributes any adverse impacts to species to activities authorized under the NWP program. *See, e.g., id.* at 215. The BiOp provides no specific evidentiary support for the notion that the loss of wetlands or streams attributable to the NWP program is the main cause of any adverse effects on any specific species or critical habitat and fails to provide the complete context for evaluating the role of NWPs. Indeed, the BiOp's Environmental Baseline section fails to describe specific past and ongoing effects on specific species in the action area. The Environmental Baseline section begins by noting that, "[b]y regulation" a biological opinion must "include the past and present *impacts* of all state, Federal or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impacts of State or private actions which are contemporaneous with the consultation in process." BiOp at 139 (citing 50 C.F.R. § 402.02). The BiOp acknowledges that determining whether a specific action is likely to cause jeopardy or adverse modification requires an assessment of the effects of that action within the context of the environmental baseline. *Id.*; *see* Section 7 Consultation Handbook at 4-31. Yet the BiOp admits that the "Environmental Baseline does not assess the consequences of the USACE's proposed action for specific sites or listed resources that occur at those sites," and instead only "summarizes the status and trends of the aquatic ecosystems in the United States" and "conclude[s] with a summary of the consequences of those trends for endangered and threatened species and critical habitat that has been designated for them." *Id.* Accordingly, the BiOp does not describe, much less assess, the specific incremental impacts of the 2012 NWP Reissuance on specific species within the action area. Thus, the BiOp fails to provide the most fundamental analysis—the effects of the 2012 NWP Reissuance in relation to other past and present effects within the action area. By failing to engage in this critical analysis, the BiOp leaves a host of unanswered questions. Does NMFS assert that the 2012 NWP Reissuance is likely to jeopardize the continued existence of every listed species under its jurisdiction and in all locations? If so, the BiOp fails to provide that analysis. If not, the BiOp fails to specify which listed species under NMFS' jurisdiction are likely to be jeopardized, and in which geographic areas and by what specific causes.

This failure to segregate out NWP impacts from other CWA program impacts or impacts from unregulated activities not only pervades the BiOp's analysis but also is found in the studies relied upon in the BiOp. *See, e.g., id.* at 180-81. For example, the BiOp relies on the Highfield study of Corps permits issued in the Galveston District from 1986 to 2000 to estimate cumulative impacts of Corps permits on flow regimes in the study area. *Id.* at 181-82. The BiOp acknowledges that this data depicts "cumulative impacts that resulted from activities authorized by the USACE in combination with a variety of other activities that are not regulated by the USACE or the Clean Water Act," but proceeds to rely on this information to draw conclusions



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about the effects of NWP on mean annual stream flows without differentiating other activities, such as the filling of upland areas, that are likely contributing to the increasing mean annual flows and any resulting adverse impacts. *Id.* at 181.

The BiOp also substantially overstates the impacts of the 2012 NWP Reissuance. In the BiOp's estimates of acreage impacted by NWPs, it incorrectly combines all impacts that will result from NWPs and treats them as adverse impacts, including positive impacts (*e.g.*, impacts from NWP 27 restoration and other mitigation activities) and temporary impacts (*i.e.*, where there will be no long term effect on the aquatic system or species). *See id.* at 158-63. For example, the BiOp calculates that there were 40,529 total acres of impacts from three years of data for NWPs, but 30,726 of those acres of impacts are from NWP 27 (aquatic habitat restoration, establishment, and enhancement activities). *Id.* at 160. However, by its terms, NWP 27 can only apply to restoration and enhancement activities where "those activities result in net increases in aquatic resources and functions," 77 Fed. Reg. at 10,275, and thus, the NWP 27 activities should be considered as offsetting the amount of impacts from other NWPs rather than adding to the total.⁷ In addition, of the BiOp's calculated total impacts from NWPs, 1,598 of those acres are from NWP 12 (utility line activities). BiOp at 160. However, many activities authorized by NWP 12, such as excavation and backfill necessary to construct underground utility lines, have only temporary impacts, and NWP 12 requires that such temporary fills must be "removed in their entirety and the affected areas returned to pre-construction elevations" and "revegetated, as appropriate." 77 Fed. Reg. at 10,272. The BiOp relies on the calculation of total acres of NWP impacts (ignoring that the figure includes the positive impacts from NWP 27 and temporary impacts from NWP 12 and other NWPs) to project NWP impacts for the next 5 years, concluding that the NWPs will impact approximately 32,801 to 38,373 acres of wetlands and deepwater habitats over the next five years. BiOp at 161. These figures include positive impacts and temporary impacts and are therefore substantially overstated.

Importantly, the BiOp's analysis of overall NWP impacts also fails to put in context the size of the wetlands or stream resources throughout the entire nation and thus substantially overestimates the impacts of the 2012 NWP Reissuance. *See, e.g.*, BiOp at 200, 214. There are an estimated 110.1 million acres of wetlands in the United States. *Id.* at 145. Therefore, even if the NWP program would have substantial adverse impacts to 32,801-38,373 acres of wetlands over the next five years as the BiOp claims, which it will not, only approximately .03 percent of the nation's wetlands would be impacted. Based on this low percentage of impacts to wetlands

⁷ The BiOp notes that the data on NWP 27 from 2010 could be an outlier and provides an adjusted mean acre/activity calculation that does not include the 2010 NWP 27 figure. However, the adjusted calculations continue to rely on impacts from NWP 27 from 1999 and 2007. BiOp at 159-60.



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throughout the nation that would be caused by the 2012 NWP reissuance, the BiOp fails in its unsubstantiated claim that the impacted acreage is “sufficiently large to make cumulative impacts certain.” *See id.* at 214. Moreover, as discussed subsequently, the BiOp’s unsubstantiated claim fails to understand and completely ignores the positive impacts to wetlands and stream resources attributable to the compensatory mitigation required by GC 23 and the 2008 Mitigation Rule.

In sum, the BiOp’s analysis of effects is flawed because it relies on unreliable data, does not take account of positive and temporary impacts, does not examine impacts that are specific to the 2012 NWP Reissuance, and fails to put the impacts in context of the nation’s wetland and stream resources. As a result, the BiOp substantially overstates the adverse impacts of the NWP 2012 Reissuance.

B. The BiOp’s Cumulative Effects Analysis Is Not Based on the ESA Definition and Overestimates the Impacts of the 2012 NWP Reissuance.

The BiOp incorrectly utilizes the NEPA, rather than ESA, definition of cumulative effects. An analysis of the cumulative effects of the NWP program under NEPA is the responsibility of the Corps, not NMFS, and the Corps has properly performed this analysis for each of the NWPs subject to the 2012 reissuance. Under the ESA, the cumulative effects to be examined by NMFS are “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 subject to consultation.” 50 C.F.R. § 402.02. Under applicable regulations and the Section 7 Consultation Handbook, past and ongoing effects in the action area are part of the environmental baseline analysis, not the cumulative effects analysis.⁸ The handbook notes that “the concept of cumulative effects is frequently misunderstood” and explains that the cumulative effects “include effects of future State, tribal, local, and private actions, not involving a Federal action, that are reasonably certain to occur within the action area under consideration.” Section 7 Consultation Handbook at 4-31 (emphasis in original).

Despite this clear definition of “cumulative effects” under the applicable regulations and guidance, the BiOp nevertheless tries to aggregate past effects of the NWP program, which are supposed to be part of the environmental baseline, with the current and future effects of the NWP program. *See, e.g.*, BiOp at 162, 178. Moreover, under 50 C.F.R. § 402.02, the ESA cumulative effects analysis is not supposed to evaluate other federal activities, such as individual permits,

⁸ *Id.* § 402.02; Section 7 Consultation Handbook at 4-22 (Environmental baseline section is “an analysis of past and ongoing human and natural factors leading to the current status of the species” and “does not include the effects of the action under review in the consultation.”).



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letters of permission, and regional general permits, but this BiOp and the reasonably prudent alternative (RPA) both treat these impacts from other section 404 activities as cumulative effects of the 2012 NWP reissuance. *See, e.g.*, BiOp at 180-82, 229. Thus, the BiOp's cumulative effects analysis, which looks at effects since the NWP program was established in 1977 and effects of other federal actions, is inconsistent with the Service's regulations and overestimates the effects of the 2012 NWP reissuance.

When the BiOp does use the proper ESA definition of cumulative impacts to analyze the 2012 NWP reissuance, the BiOp does not find any. BiOp at 219. The BiOp explains that NMFS "searched for information on future State, tribal, local, or private actions that [are] reasonably certain to occur in the action area," but found "no evidence" of future state or private actions in the action area that are reasonably likely to occur. *Id.* The BiOp also concluded that "at the spatial and temporal scale of this programmatic action, NMFS is not aware of any actions of this kind that are likely to occur in the action area during the foreseeable future." *Id.* Although the BiOp acknowledges that there is no evidence of ESA cumulative effects, it nevertheless seeks to impose numerous conditions in the RPA that would identify effects which are beyond the ESA definition. BiOp at 227-28.

Furthermore, the BiOp fails to account for the Corps' comprehensive treatment of cumulative effects under the CWA and NEPA. As discussed above, the Corps reviews the cumulative effects of NWPs at the national, regional, and project-specific levels.⁹ In reissuing the NWPs, Corps Headquarters performs a cumulative effects analysis at the national level and imposes general conditions with additional terms applicable to NWPs, such as GC 18 for threatened and endangered species. 33 C.F.R. § 330.1(b). At the regional level, the Division Engineer reviews cumulative impacts and imposes regional conditions, where necessary. *Id.* §§ 330.1(d); 330.4(e). On a project-specific level, under GC 18, the District Engineer will review cumulative effects for any activity which "may affect" listed species or critical habitat and complete section 7 consultation before a project-specific activity can proceed. 77 Fed. Reg. at 10,283. The District Engineer also reviews cumulative effects for those NWPs that require PCN and can require activity-specific conditions, mitigation measures, or an individual permit. 33 C.F.R. § 330.1(e); *see also* Order, at 6, *Sierra Club v. Bostick*, No. 5:12-cv-00742-R (W.D. Okla. Aug. 5, 2012).

The BiOp seems to disregard the Corps' comprehensive, multi-layered approach to cumulative effects and concludes that the Corps Headquarters review of NWPs is inadequate and that the

⁹ For more discussion of the three stages of Corps review of cumulative impacts for NWPs, see United States Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, at 4-6, *Sierra Club v. Bostick*, No. 5:12-cv-00742-R (W.D. Okla. Aug. 1, 2012).



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general conditions are not effective. BiOp at 191. However, the BiOp fails to identify specific instances where an NWP activity led to jeopardy of listed species or destruction or adverse modification of critical habitat in spite of the Corps' project-specific review under GC 18 and PCN requirements. Rather, the BiOp ignores that the Corps will always look at the cumulative effects on species, where necessary. By the terms of numerous NWPs, the Corps requires PCNs in numerous cases pursuant to which the District Engineer examines whether cumulative effects are "more than minimal." 77 Fed. Reg. at 10,287. And, through GC 18, the Corps requires PCN in all cases where listed species or critical habitat "might be affected" or are "in the vicinity of the project," and whenever an NWP activity "may affect" a listed species or critical habitat, consultation between the Corps and the Services is required, including an examination of cumulative effects on any listed species. *Id.* at 10,283.

C. The BiOp Fails to Understand That the Corps' 2008 Mitigation Rule Applies to NWPs and Significantly Underestimates the Mitigation That Occurs Under the NWPs.

The BiOp also fails to understand that the Corps' 2008 Mitigation Rule applies to NWPs. 73 Fed. Reg. 19,594, 19,607-08 (Apr. 10, 2008) (rule "applies to compensatory mitigation required by all DA permits, including individual and general permits"). The BiOp explains that GC 23 (mitigation) is the "counterpart to the mitigation rule for Nationwide Permits" and explains the differences between the two, demonstrating that the BiOp has not taken into account that GC 23 specifically requires that "[c]ompensatory mitigation projects . . . must comply with the applicable provisions of 33 C.F.R. part 332," which is the 2008 Mitigation Rule. BiOp at 202-03; 77 Fed. Reg. at 10,285.

In large part, the BiOp utilizes old studies that do not account for the recent changes brought about by the 2008 Mitigation Rule, which was intended to address the issues raised in the studies. BiOp at 205, 207-09, 218. The BiOp alleges that compliance rates are low for compensatory mitigation, BiOp at 205, 218, but fails to recognize that the 2008 Mitigation Rule, which applies to NWPs, requires five years of monitoring and periodic reports to the Corps. 33 C.F.R. § 332.6. The BiOp "assume[s]" that the mitigation required by the Corps will be only partially successful because it claims that only a small percentage of compensatory mitigation projects replace the hydrologic, chemical, and ecological functions of the wetlands they are designed to replace. BiOp at 218. The BiOp fails to recognize, however, that the Corps has accounted for potential lack of success of compensatory mitigation by requiring higher mitigation ratios. 33 C.F.R. § 332.3(f)(2) (District Engineer must require mitigation ratio greater than 1:1 where necessary to account for likelihood of success). Similarly, the BiOp claims that GC 23 does not establish functional replacement as a goal of wetland mitigation, BiOp at 218,



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but fails to recognize that the Mitigation Rule requires full functional replacement where functional assessment methodologies are available. 33 C.F.R. § 332.3(f)(1).

Finally, as discussed above, the BiOp fails to recognize that many of the impacts authorized by NWP's have only temporary impacts (*e.g.*, temporary fills for utility line activity under NWP 12) and require restoration of contours and vegetation, which constitutes mitigation. 77 Fed. Reg. at 10,272. Thus, the estimates of acreage impacts utilized in the BiOp substantially overstate the impacts to the environment and underestimate the mitigation that occurs under the NWP's pursuant to GC 23 and the 2008 Mitigation Rule.

III. The RPA Is Not Binding on the Corps Because the BiOp Fails to Make the Required Jeopardy Finding and Provides No Factual Basis for a Jeopardy Finding, and the RPA Does Not Comply with Applicable Regulations.

A. The BiOp Fails to Make a Finding that Jeopardy or Adverse Modification is "Likely."

The ESA, the Services' joint regulations, and the Section 7 Consultation Handbook all make clear that a BiOp must make a determination whether jeopardy and adverse modification are "likely." The ESA specifies that the Service must provide "a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat" and whether "jeopardy or adverse modification is found." 16 U.S.C. § 1536(b)(3)(A). Similarly, the Services' regulations require that a BiOp "state[] the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.02; *see also id.* §§ 402.14(g)(4); 402.14(h)(3).

Likewise, the Section 7 Consultation Handbook provides that a biological opinion should consist of "a description of the proposed action, status of the species/critical habitat, the environmental baseline, effects of the action, cumulative effects, *the Services' conclusion of jeopardy/no jeopardy and/or adverse modification/no adverse modification*, and reasonable and prudent alternatives, as appropriate." Section 7 Consultation Handbook at 4-15 (emphasis added). The handbook also explains that the BiOp's conclusion section must state the Service's opinion regarding "whether the aggregate effects of the factors analyzed under 'environmental baseline,' 'effects of the action,' and 'cumulative effects' in the action area—when viewed against the status of the species or critical habitat as listed or designated—are **likely to jeopardize the continued existence of the species or result in destruction or adverse modification of critical habitat.**" *Id.* at 4-33 (emphasis in original). The handbook even provides a standardized statement for the BiOp's conclusion section, in which the Service is directed to state whether "it



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is the Service's biological opinion that the (action), as proposed, (is/is not) likely to jeopardize the continued existence of the (species), and (is/is not) likely to destroy or adversely modify designated critical habitat." *Id.* (emphasis in original).

However, the BiOp simply concludes that the Corps has "failed to insure" that the activities authorized by the 2012 NWP Reissuance are not likely to cause jeopardy to listed species or adverse modification to critical habitat, but does not provide a determination whether jeopardy or adverse modification is "likely." BiOp at 221-22. The BiOp's conclusion that the Corps has "failed to insure" that the 2012 NWP Reissuance will not cause jeopardy ignores the framework set up by the statute, regulations, and handbook governing section 7 consultation. If NMFS had the authority to issue a jeopardy opinion without a demonstration that jeopardy is likely, and instead based on a broad concern that an agency's administrative mechanisms are not sufficient to "insure" against jeopardy or adverse modification, this limitless notion could be applied to countless federal agency actions and render compliance with section 7 a wholly subjective, impracticable, and likely impossible exercise. Similarly, if the BiOp's conclusion that the 2012 NWP Reissuance "failed to insure" no jeopardy could be mainly premised on the theory that permittees might violate the explicit prohibitions of the NWPs, such logic could be extended to almost any federal action and create a situation where no federal actions could satisfy the requirements of section 7. Under the ESA and applicable regulations, NMFS' authority does not extend so far. Rather, NMFS may issue a jeopardy biological opinion only where it establishes through the application of scientific evidence and principles and rational analysis that the action is "likely" to jeopardize listed species or result in destruction or adverse modification of critical habitat. Thus, the BiOp does not comply with the requirements of the ESA, applicable regulations, or the Section 7 Consultation Handbook because it fails to make the requisite affirmative determination whether jeopardy or adverse modification is "likely."

B. The BiOp Does Not Provide a Factual Basis for an Affirmative Jeopardy or Adverse Modification Finding.

Rather than find that jeopardy or adverse modification is "likely" to result from the 2012 NWP reissuance, or specify an evidentiary basis for such a finding, the BiOp simply states NMFS' opinion that the overall NWP program is not structured to sufficiently monitor or prevent adverse effects to listed species or designated critical habitat. BiOp at 197, 219.

The BiOp describes specific NWPs and, in general terms, describes potential effects relating to those NWPs. Yet, the BiOp describes specific effects on listed species caused by NWP-authorized activities for only one NWP: NWP 4 (fish and wildlife harvesting, enhancement, and attraction devices). BiOp at 193. The BiOp states that NWP 4 authorizes placement of fish and harvesting devices, including pound nets, and that sea turtles have been captured and killed when



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they have become entangled in the lead lines of these nets. *Id.* The BiOp states that the NWP will authorize the placement of an unknown number of pound nets, crab pots, lobster pots, and similar devices, and that the cumulative effects of these activities on listed species are unknown because NWP 4 does not contain a PCN requirement. *Id.* The BiOp does not, however, conclude that reissuance of NWP 4 is likely to cause jeopardy or adverse modification to any listed species under NMFS' jurisdiction, nor does it provide a factual basis for such a conclusion. More critically, NWP 4 is not a basis for concluding that any of the other 49 NWPs cause adverse effects to listed species or critical habitat under NMFS' jurisdiction, much less that they are likely to result in "jeopardy" of one or more specific listed species or "destruction or adverse modification" of a specific listed species' critical habitat. Thus, even if the BiOp had made the proper finding, it nevertheless provides no specific evidence to substantiate that any of the other NWPs are likely to result in jeopardy or adverse modification of critical habitat for any specific listed species.

C. The RPA Reflects a Lack of Understanding of the Corps' NWP Program and Does Not Comply with Regulatory Requirements.

Compliance with an RPA is required under the statute and regulations only where the Service determines that the federal action would otherwise cause jeopardy or adverse modification. As the statute plainly states, "The Secretary shall suggest [] reasonable and prudent alternatives," but only "[i]f jeopardy or adverse modification is found." 16 U.S.C. § 1536(b)(3)(A).¹⁰ Because the BiOp did not make a jeopardy or adverse modification finding, the RPA is not authorized. Furthermore, the RPA exceeds NMFS' authority because it extends far beyond the federal action at issue—2012 NWP Reissuance—and seeks to suspend or revoke regional and State program general permits and to require extensive data gathering, inspections, and reporting on all GPs, individual permits, and letters of permission. BiOp at 229-30. Moreover, although the BiOp is directed at 21 NWPs "that are likely to involve the kinds of activities that directly or indirectly affect" listed species or critical habitat under NMFS' jurisdiction, the RPA seeks suspension of all NWPs. *Id.* at 158, 229. Finally, the BiOp is directed at the 19 Corps Districts "that overlap with the distribution of endangered or threatened species under NMFS' jurisdiction or critical habitat that has been designated for those species," yet the RPA apparently seeks suspension of the NWPs throughout the country. BiOp at 162, 229.

¹⁰ See also 50 C.F.R. § 402.14(h) (A biological opinion should include "[t]he Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or adverse modification of critical habitat (a 'jeopardy biological opinion') A 'jeopardy' biological opinion shall include reasonable and prudent alternatives, if any.").



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The Services' joint regulations define a reasonable and prudent alternative as one which "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction" and is "economically and technologically feasible." 50 C.F.R. § 402.02. As a result of the BiOp's misunderstanding of the Corps' NWP program, it provides an RPA that contains several elements that are beyond the authority of the Corps and/or are not economically or technologically feasible. For example, the RPA directs the Corps to engage in formal section 7 consultation with NMFS regarding any "take" of endangered or threatened species under NMFS' jurisdiction that is likely to occur incidental to activities that would be authorized by NWPs. BiOp at 227. However, the NWPs issued and reissued by the Chief of Engineers do not authorize any "take" of a listed species. If such a take occurs, the activity is not authorized by a NWP, unless a project-specific biological opinion with an incidental take statement has been issued after consulting with NMFS.

As another example, the RPA directs the Corps to provide NMFS Regional Offices with a semi-annual report that provides the Corps District's assessment of the cumulative impacts on watersheds and sub-watersheds by estimating total impervious surface area, change in mean peak flows, or both. BiOp at 228. This element of the RPA goes beyond the Corps' legal authority because the suggested assessment would include cumulative impacts caused by activities that are not regulated by the Corps, such as upland development and changes in upland land use, such as deforestation. Moreover, this element of the RPA is not economically or technologically feasible because it would require the Corps to establish and operate an entire network of stream gages in rivers and streams where there are no stream gages maintained by the U.S. Geological Survey or other agencies. Similarly, the RPA directs the Corps to suspend or revoke GPs or NWPs for watersheds where the individual or cumulative impacts of activities authorized by Corps activities result in increasing the area of total impervious surface by more than one percent. BiOp at 229-30. However, the Corps does not have legal authority to address increases in impervious surfaces on a watershed basis, because many increases in impervious surfaces are caused by activities in uplands, not due to discharges of dredged or fill material into waters of the United States attributable to the 2012 NWP Reissuance. Moreover, the proportion of impervious surface in a watershed is not a reliable or effective indicator of the contribution to cumulative impacts caused by activities authorized by the 2012 NWP Reissuance. Finally, as discussed above, this element of the RPA exceeds NMFS' authority because it extends far beyond the federal action at issue—2012 NWP Reissuance—and seeks to suspend or revoke regional and State program general permits.

The BiOp misunderstands the Corps' NWP program and fails to differentiate between activities authorized under the NWP program, activities authorized under other parts of the section 404 program, and activities beyond the Corps' regulatory control. As a result, the RPA is unsupported and does not comply with the applicable regulations.



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IV. Conclusion

In sum, the BiOp suffers from a serious misunderstanding of the Corps' NWP program, fails to make a jeopardy/adverse modification finding or provide evidence that would support a jeopardy/adverse modification finding, and does not comply with the ESA, the applicable regulations, or the Section 7 Consultation Handbook. The examples provided herein are an illustrative, rather than exhaustive, list of the problems contained in the current BiOp and do not address the full range of the BiOp's misunderstandings of the Corps NWP program.

We hope that NMFS will work to address the concerns set forth in this letter. If you would like to discuss this matter further, please contact Deidre Duncan at (202) 955-1919 or Andrew Turner at (202) 955-1658. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Deidre G. Duncan".

Deidre G. Duncan

American Farm Bureau Federation
American Gas Association
American Petroleum Institute
American Public Gas Association
American Road and Transportation Builders Association
Association of Oil Pipe Lines
Edison Electric Institute
Interstate Natural Gas Association of America
National Association of Home Builders
National Association of Realtors
National Mining Association
Utility Water Act Group

cc: James R. Hannon, U.S. Army Corps of Engineers, Chief, Operations and Regulatory
Community of Practice