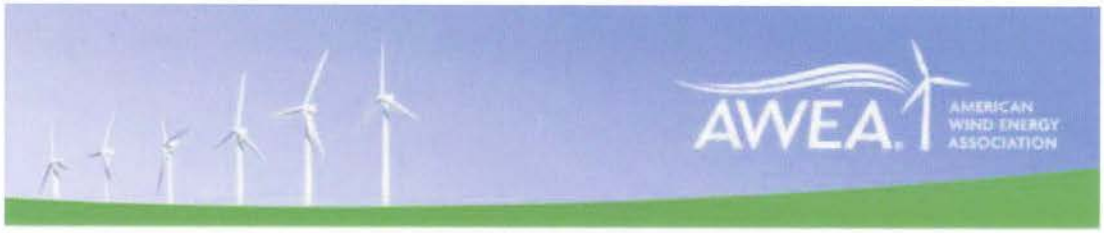

April 18, 2011

Mr. David Olsen
Mr. Dave Casey
U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street N.W.
Washington, D.C. 20314-1000
Docket Nos. COE-2010-0035; ZRIN 0710-ZA05

Re: Comments of the American Wind Energy Association on Proposal to Reissue and Modify Nationwide Permits

Submitted via Federal eRulemaking Portal: http://www.regulations.gov

Dear Messrs. Olsen and Casey:

On February 16, 2011, the U.S. Army Corps of Engineers ("Corps") published in the Federal Register its proposal to reissue 48 of its existing nationwide permits ("NWPs") and the issuance of two new NWPs, for land-based renewable energy generation facilities ("NWP A") and water-based renewable energy generation pilot projects ("NWP B").[1] The American Wind Industry Association ("AWEA") hereby submits comments on the Corps' proposal.[2]

AWEA is a national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind energy resources in the United States. AWEA's members include wind energy facility developers, owners and operators, construction contractors, turbine manufacturers, component suppliers, financiers, researchers, utilities, marketers, customers, and their advocates.

[1] 76 Fed. Reg. 9,174 (Feb. 16, 2011).
[2] AWEA has reviewed a draft of the Offshore Wind Development Coalition's comments to be submitted in this docket and generally supports them.

The wind energy industry currently employs 75,000 people in the U.S. and has been one of the few bright spots in an otherwise difficult economy. For instance, in 2010, the industry installed 5,116 megawatts, representing $11.1 billion in investment. Total cumulative installed capacity stands at 40,181 MWs, and average annual growth for the past five years was 35 percent. The industry has utility scale wind developments in 38 states and more than 400 manufacturing facilities in 42 states. The industry's potential as a jobs and economic engine is even much greater than these numbers would suggest. For example, a U.S. Department of Energy report, issued in July 2008 and entitled "20% Wind Energy by 2030: Increasing Wind Energy's Contribution to U.S. Electricity Supply" ("2030 Report"),[3] stated that a 20 percent wind penetration scenario was conceivable, and if that target were realized, the wind energy industry would support 500,000 jobs.

In addition to the above positive economic impacts of wind energy development, it is important to also note the environmental benefits of wind energy, which include the fact that it does not contribute air pollution and water pollution, deplete fresh water resources, or generate hazardous waste, and requires no mining, transportation, or refining of a feedstock or fuel. The 2030 Report, for instance, details the significant environmental benefits of increased wind penetration into the energy sector. Among other things, the report states that greater use of wind energy "presents an opportunity for reducing emissions today" and "can be widely deployed across the United States and around the world to begin reducing greenhouse gas emissions now." The report also quantifies the significant environmental and economic benefits that wind energy can play, including:

- Avoiding approximately 825 million metric tons of CO2 in the electric sector by 2030;

- Reducing cumulative emissions from the electric sector by 2030 by more than 7,600 million metric tons of CO2, and rising to over 15,000 million tons of C02 by 2050;

- Almost single-handedly keeping electric sector emissions from increasing despite dramatic increases expected in electricity demand;

- Displacing 50 percent of electricity generated from natural gas and 18 percent of that generated from coal, avoiding more than 80 GW of new coal capacity and mitigating electricity price increases by reducing demand for fossil fuels;

- Reducing natural gas consumption across all industries by 11 percent; and

[3] *Available at* http://www.nrel.gov/docs/fy08osti/41869.pdf.

- Reducing cumulative water consumption in the electric sector by 8 percent, or 4 trillion gallons, by 2030 with nearly 30% of the savings occurring in western states where water is particularly scarce.

Further the wind industry prides itself in designing generation projects that avoid, or if not possible that minimize to the greatest extent practicable, impacts to the waters of the U.S. Although impacts to the aquatic environment are ordinarily minor, wind energy developers often utilize NWPs for the construction of new wind energy facilities, and many of the issues discussed in the proposal will likely have a substantial impact on our members. AWEA appreciates the continued support of the Corps in the development of wind energy projects, and while the wind industry welcomes the Corps' efforts to improve the permitting process related to wind energy development, we have significant concerns over some of the proposed revisions to existing NWPs and the proposed NWPs for renewable energy generation. Specifically, several of the existing NWPs, general conditions, and definitions, proposed modifications thereto, and proposed new industry-specific NWPs A and B could affect the cost and timing of new wind energy facilities under development by AWEA members. Our comments focus mainly on the proposed NWPs A and B; existing NWP 12; general conditions ("GCs") 19, 20, 22 and 30; the definition of "Single and Complete Project"; and the discretionary authority of Corps District Project Managers.

It is our hope that the following comments are beneficial to the Corps in guiding its efforts to provide a permitting program that both allows for the rapid deployment of new wind energy facilities and continues to protect our nation's water resources.

I. Proposed NWPs

A. NWP A

Proposed NWP A applies to all activities related to the "construction, expansion, or modification of land-based renewable energy production facilities," including the construction of infrastructure and "[a]ttendant features" such as "roads, parking lots, utility lines, and storm water management facilities."[4] Under proposed NWP A, the discharge must not cause the permanent loss of greater than 1/2 acre of jurisdictional waters of the U.S., "including the loss of no more than 300 linear feet of stream bed."[5] The Corps' local District Engineer ("DE") is authorized to waive the 300 linear feet restriction for "intermittent and ephemeral stream beds" by making a written determination that the discharge will "result in minimal adverse effects."[6] Under

[4] 76 Fed Reg at 9,200.
[5] *Id.*
[6] *Id.*

proposed NWP A, permittees are required to submit a pre-construction notification ("PCN") to the local DE prior to commencing the activity.[7]

While AWEA acknowledges that an NWP for land-based renewable energy production facilities might help facilitate wind energy development under some circumstances, we believe the Corps should not adopt proposed NWP A unless it incorporates the following proposed changes and confirms our interpretation of the issues identified below.

1. Should Clarify that other NWPs Remain Open to Wind Developers

The proposed NWP A creates a "one size fits all" authorization for what is a diverse collection of "renewable energy production facilities." If NWP A is adopted, it is unclear whether the Corps would require permittees to seek coverage under NWP A for all components of a wind energy facility or whether other NWPs (*e.g.*, NWPs 12 and 14) would remain viable options for a project developer.[8] If a project qualifies independently for a certain NWP, it should not be required to use NWP A simply by virtue of its "renewable" nature. The potential impacts from a wind project to the waters of the United States will clearly differ significantly from those of a solar or geothermal project. In light of that reality, the wind industry believes the Corps should continue to allow wind developers, as well as other renewable energy developers, the option of using other applicable NWPs. In other words, the adoption of NWP A should not preclude the use of other applicable NWPs commonly used by the wind industry, or those that might otherwise be applicable to a particular construction activity.[9] Therefore, we seek clarification that wind energy facilities can continue to be authorized under the existing NWPs even if NWP A is adopted.

2. Should Clarify "Attendant Features" Does not Include Linear Elements

Although proposed NWP A covers "attendant features" including roads, it is not clear, given that wind energy facilities have both linear (*e.g.*, transmission lines and roads) and non-linear (*e.g.*, turbines and substations) project components, how the Corps will calculate the loss of non-tidal waters. To the extent NWP A treats all

---

[7] *Id.*

[8] AWEA's member's projects commonly utilize any of four different NWPs currently available because project features differ significantly among wind projects. For example, a renewable energy project that will result in less than 25 cubic yards of dredge or fill material should use NWP 18, and should not be required to use NWP A.

[9] We also question the prudence of relying on a single new NWP for renewable energy generation when that permit may never become available to project developers in states that refuse to issue a Clean Water Act section 401 Water Quality Certifications for the permit(s). This illustrates yet another reason the Corps should ensure that NWP A is not the sole available NWP to renewable energy projects.

components of the project (including those linear elements) as one "single and complete" project for the purposes of calculating acreage losses, there appears to be no benefit to seeking coverage under proposed NWP A (as opposed to the existing NWPs). Further, while developers typically seek coverage under the existing NWP 12 and 14 for project-related wetland impacts related to the installation of transmission lines and roads, in almost all instances other "attendant features," such as the turbines, pads, transformers, substations and related earthwork, are located outside of wetland and watercourse areas and, therefore, have no impact on these resources. Although the inclusion of "attendant features" within the scope of proposed NWP A might appear to be an efficient way to consolidate the permitting of a wind facility, the inclusion of roads and utility lines under NWP A could prevent many wind energy projects from qualifying for coverage under NWP A. Therefore, AWEA seeks confirmation as to whether the Corps plans to treat the permanent loss of jurisdictional waters attributed to linear attendant features as being added to those caused by "non-linear single and complete project" components for a single total loss calculation. In short, we seek clarification on how the loss will be calculated for the linear components of a wind energy facility.

3. A Loss Threshold Similar to Other NWPs Should be Included

NWP A, as proposed, is not as desirable as NWPs 12 and 14 because there is no loss threshold trigger for a PCN. Currently the loss trigger for filing a PCN under NWPs 12 and 14 is 1/10 acre (assuming other PCN filing requirements required by GCs are satisfied).[10] The result of this 1/10 acre threshold is that, to the extent practicable, developers seek to minimize their wetland impacts so they can remain under this threshold, thereby avoiding the time delays associated with the preparation of a PCN and extensive coordination with Corps. Further, the same threshold qualification for NWP A (impacts under 1/2 acre) are already considered individually and cumulatively to have minimal impacts and are covered under NWP 12 and 14. However, in order to take advantage of the non-reporting component of this permit, developers currently seek to minimize their impacts, thereby benefiting the project, the Corps and the resources themselves. As such, in many instances a project developer can proceed under NWP 12 or 14 without notifying the Corps, and this is not the case under NWP A as currently proposed. If the PCN requirement in NWP A remains in the final rule, it would run contrary to the Corps stated goal of incentivizing developers to reduce impacts to minimal amounts.[11] Furthermore, if the Corps interprets the 1/2 acre loss threshold as applying to the entire project rather than separately to each individual crossing as currently allowed by NWPs 12 and 14, the likely result will be that most wind energy projects will need to seek an individual permit, which in turn will result in not only

[10] In other words, if more than 1/10 acre is impacted, then a PCN is required.

[11] We also question whether the adoption of the mandatory PCN requirement would create an administrative burden that would cause unnecessary delays to project approvals. Based on AWEA members' experience nationwide, the Corps currently already lacks the staff resources to respond to the present volume of PCNs, much less the significant increase in volume this proposal would create.

increases in project costs and delays but an unnecessary administrative burden on the Corps. Consequently, we request that the Corps consider a PCN loss threshold similar to the loss threshold under NWPs 12 and 14 for NWP A.

4. Should Remove all References to the Regulation of Ephemeral Streams

It appears that permittees would be required to account for impacts to ephemeral streams when seeking coverage under NWP A. As noted above, proposed NWP A imposes a 1/2-acre limit, which includes "the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the [DE] waives the 300 linear foot limit."[12] Because the Corps' jurisdiction to regulate navigable waters under the Clean Water Act ("CWA") does not extend categorically to ephemeral streams, that language in proposed NWP A arguably amounts to an unlawful expansion of the Corps' CWA jurisdiction if it were applied to such waterways. Therefore, we request that the Corps remove all references to the regulation of ephemeral streams from NWP A.

B. NWP B

Proposed NWP B authorizes water-based wind and hydrokinetic pilot projects in navigable waters of the U.S. with no more than 10 individual generation units (*e.g.*, turbines) that do not cause the loss of greater than 1/2 acre of waters of the U.S., including the loss of no more than 300 linear feet of stream bed.[13] As under proposed NWP A, permittees under proposed NWP B are required to submit a PCN prior to commencing the activity.[14] In addition to the principal issues identified above with respect to proposed NWP A, we raise the following additional issues regarding proposed NWP B.

1. Should Clarify What the "Pilot Project" Limitation Means

The Corps' proposal would limit proposed NWP B to "Pilot Projects." The Corps, however, does not define Pilot Project. It is unclear whether the Corps is borrowing the phrase "Pilot Projects" from a Federal Energy Regulatory Commission ("FERC") staff white paper that uses that term.[15] FERC's white paper describes the process for granting five-year licenses under the Federal Power Act ("FPA") for small, removable, test-phase hydrokinetic projects. For project financing and other reasons, developers would likely develop commercial projects for a longer period than that. In short, the

---

[12] 76 Fed Reg at 9,200.
[13] 76 Fed Reg at 9,200.
[14] *Id.*
[15] Licensing Hydrokinetic Pilot Projects (April 18, 2008)

"pilot" project limitation needs to be clarified so that it is not administered in an unduly restrictive manner.

2. Should Clarify that the "Stream Bed" Limitation Does not Apply to Projects that Occur in Marine Waters

Some water-based renewable energy projects will occur in marine waters that do not have a "stream bed," as defined in the Corps' proposal. Some of these projects may be connected to the land-based grid by way of an energy transmission cable on or below the marine waters sea bed for more than 300 linear feet. We seek confirmation that the general limitation on NWP B to those projects that cause loss of no more than 300 linear feet of stream bed does not apply to water-based renewable energy projects located in marine waters that do not have a stream bed.

3. Should Clarify that other NWPs Remain Open to Wind Developers

For many of the same reasons discussed in the section regarding NWP A, we seek confirmation that wind energy facilities can continue to be authorized under other existing NWPs even if NWP B is adopted.

II. Existing Nationwide Permits

A. NWP 12

1. Should Clarify the Loss Calculation is Limited to Each Linear Crossing

NWP 12, Utility Line Activities, is often applied to the construction of wind energy facilities. NWP 12 covers "[a]ctivities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2 acre of waters of the United States."[16] Under NWP 12, this 1/2-acre limit applies separately to each "single and complete project."[17] For linear projects like utility lines and associated roads authorized under NWP 12, the "single and complete project" is "each crossing of a separate water of the United States."[18] As noted previously, NWP 12 has a PCN acreage-loss threshold of 1/10 acre.[19]

---

[16] 72 Fed Reg 11,092, 11,182 (Mar. 12, 2007).
[17] 72 Fed Reg at 11,106.
[18] 33 CFR 330.2(i).
[19] 72 Fed Reg at 11,183.

The Corps' proposal would change NWP 12 regarding how the calculation of loss of waters of the U.S. is made with respect to a "single and complete project" with multiple components. The access road component of NWP 12 currently provides:

> This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the total discharge from a single and complete project does not cause the loss of greater than 1/2-acre of non-tidal waters of the United States.[20]

The Corps proposes to replace the phrase "the total discharge from a" in the above quote to the following: "the activity, in combination with all other activities included in one."[21]

Although the Corps explains that this revision is merely to make the NWP 12 access road language consistent with other elements of the NWP, it could be interpreted as requiring that all impacts for a project under NWP 12 be combined in the loss calculations, as opposed to limiting the calculation to each linear crossing. In other words, this change could arguably call into question whether crossings of a single water body resulting in the loss of 1/2 acre or less will continue to be interpreted by the Corps to have only minimal adverse environmental affects, both separately and cumulatively. Accordingly, we seek confirmation that this proposed language does not require all impacts for a project be combined for loss calculations and will be interpreted consistently with the proposed definitions of "single and complete linear project" and "single and complete non-linear project." This would seem to run contrary to the Corps' goals to streamline permitting and create an incentive for developers to minimize impacts.

III. General Conditions

A. GC 19

GC 19 (formerly GC 17) is the primary means by which the Corps' NWP program complies with Section 7 of the ESA.[22] GC 19 prohibits the use of any NWP if the authorized activity "may affect" any species listed as threatened or endangered under the ESA or designated critical habitat for such species, unless a Section 7 consultation with the U.S. Fish and Wildlife Service ("USFWS") or the National Marine Fisheries Service ("NMFS") (collectively, "Services") has been completed.[23] GC 19 requires that

---

[20] *Id.*
[21] 76 Fed Reg at 9,181.
[22] 67 Fed Reg 2,020, 2,028 (Jan. 15, 2002).
[23] 76 Fed Reg at 9,201.

non-federal permittees notify the DE by submitting a PCN "if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat."[24] A PCN is not required by GC 19, however, if the project might only affect species that are not listed or habitat that has not been designated as "critical" under the ESA. AWEA has the following concerns with respect to GC 19.

1. Should Clarify the "Might be Affected" Threshold

The Corps uses the word "might" in order to clearly distinguish the formal determination by the Corps (may affect or no effect) from the requirement on the applicant to "notify the Corps where there is sufficient cause for concern to warrant a formal determination."[25] This threshold is intended to "provide a balance between efficient authorization of activities that have minimal adverse environmental impact, and environmental protection, including protection of listed species."[26] Although the requirement that a permittee notify the DE if a listed species might be affected or is in the vicinity provides a "relatively low bar for notification to the Corps of potential effects," it is not intended to "bog down the NWP process in cases where the applicant has performed due diligence and determined that there are no listed species or critical habitat in the vicinity of the project." Thus, as written, the "might be affected" threshold is unclear and leaves room for broad interpretation at the Project Manager level. Consequently, we seek clarification as to what the threshold is regarding the "might be affected" language with respect to the notification requirement.

2. Should Clarify How Far the "Vicinity" of the Project Extends

Like the "might be affected" threshold, the language requiring the permittee to notify the Corps if listed species or critical habitat is in the "vicinity" is ambiguous. Specifically, GC 19 does not specify how far from an activity in a water of the U.S. vicinity extends. Therefore, AWEA seeks clarification as to how far the vicinity of the project extends to enable proponents to determine if listed species are in the vicinity. Furthermore, the mere presence of critical habitat in the "vicinity" of a project is not relevant to the Corps', or a developer's, ESA obligations; the Corps should clarify that GC 19 only applies to impacts to critical habitat.

---

[24] *Id.*
[25] 72 Fed. Reg. at 11,159.
[26] *Id.*

3. Should Clarify what "Work" the Permittee is Prohibited from Undertaking

It is also unclear what "work" the permittee is prohibited from undertaking until a DE determines that a project will have "no effect" or until Section 7 consultation is complete. In particular, if a permittee did not submit a PCN and the Corps was independently aware that a project might affect listed species or designated critical habitat, the permittee could arguably be risking an exercise of the Corps' discretionary authority to require an individual permit if it moved forward with the activity without confirmation from the Corps that the project will have "no effect."[27] For example, if the activities performed by the applicant occur in areas outside the Corps jurisdiction, but those water-borne activities requiring Corps authorization are not being pursued until such time as clearance is granted, will all "work" activities be prohibited or only those under direct Corps' jurisdiction? Accordingly, AWEA seeks clarification as to what work the permittee is prohibited from undertaking while the Corps is considering whether the proposed activity will have an effect on listed species; such a prohibition should be directly tied to impacts to listed species or their critical habitat.

B. GC 20

GC 20 is the primary mechanism for the Corps' NWP program to comply with the National Historic Preservation Act ("NHPA"). Section 106 of the NHPA and the Advisory Council on Historic Preservation's ("ACHP") regulations set forth a procedural framework for "tak[ing] into account the effect" of federal "undertaking[s]" on any property listed on or eligible for listing on the National Register of Historic Places.[28] Any project, activity, or program funded by a federal agency or authorized by a federal permit, license, or approval constitutes an "undertaking" subject to Section 106.[29] AWEA raises the following concerns regarding GC 20.

1. Should Clarify What Constitutes the "Permit Area" under Section 106

Under Section 106, Appendix C defines the permit area as "those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures."[30] Given this ambiguous definition, we seek clarification as to what constitutes the boundaries of the "permit area" under Section 106.

---

[27] *See* 61 Fed Reg at 65,880 ("Consultation may occur under the NWP process or the district may assert its discretionary authority to require an individual permit for the action and initiate ESA consultation during the individual permit process.").
[28] 16 USC § 470f.
[29] 16 USC § 470w(7); 36 CFR § 800.16(y).
[30] 33 CFR Part 325, Appendix C.1.g(1).

2. Should Clarify that the Corps is not Obligated to Delay Issuance of a NWP until an Agreement is Obtained from a State

33 CFR 330.4(g) provides that "[n]o activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places, is authorized until the [DE] has complied with the provisions of 33 CFR part 325, appendix C." While Appendix C provides that parties may formalize their agreement regarding the treatment of historic properties if the consultation results in mutual agreement among the state historic preservation office, the ACHP, the applicant, and the DE (33 CFR Part 325, Appendix C.8.), certain Corps Districts have treated this step as a pre-condition to authorization under a NWP. In other words, although the regulatory language suggests that the Corps may issue the NWP before a memorandum of agreement is executed, Corps' districts have, in some cases, been reluctant to do so. Therefore, consistent with the fact that the Corps' NWP regulations provide that the Corps may issue the NWP before a memorandum of agreement is executed, we seek confirmation that the Corps is not obligated to delay issuance until the state historic preservation office signs a memorandum of agreement respecting historic property.

3. Should Reconsider Proposal to Reference Appendix C

In light of the criticism and potential ligation surrounding of the Corps' Appendix C regulations, we ask the Corps to reconsider its proposal to reference Appendix C. If not, litigation on this issue could make application of GC 20 to a project vulnerable to legal challenge.

C. GC 22

GC 22 (formerly GC 20) lists the particulars the DE must consider when determining "appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal."[31] GC 22 provides that this mitigation "will not be used to increase the acreage losses allowed by the acreage limits of the NWPs."[32]

Our primary concern with GC 22 is the lack of clear parameters on the scope of required mitigation. Permittees are often subject to the understanding of Corps District Project Managers for determining those parameters. As an industry with ordinarily minor impacts to the aquatic environment, unjustified mitigation conditions could be particularly unwarranted if these parameters regarding mitigation are interpreted too

[31] 72 Fed Reg at 11,193.
[32] *Id.*

stringently. Therefore, we request that the Corps provide clear guidance on the scope of required mitigation.

D. GC 30

The terms of particular NWPs require that a prospective permittee submit a PCN to the DE.[33] GC 30 (formerly GC 27) outlines the required content of a PCN.[34] GC 30 requires a description of the proposed project and impacts sufficient to allow the Corps to determine that the adverse effects of the project will be minimal and whether there is a need for compensatory mitigation.[35]

AWEA's chief concern regarding PCNs is the delay that permittees often experience when one is required. This contravenes the very intent of the NWP program, which is to streamline the permitting process and avoid the exhaustive environmental review that is required in the context of individual permits.[36] Therefore, we request that the Corps provide more specific requirements for processing NWPs when a PCN is required.

With respect to the content of a PCN, the primary issue that arises is the level of design detail a Corps District project manager might require, especially for wind projects where near-final design cannot be achieved until later in the development process. We think this issue could be addressed through the inclusion of more specific requirements in the actual GC. Accordingly, we request that the Corps better define the parameters regarding the discretion of Corps District Project Managers to require detailed designs early in the development process.

IV. Definition: "Single and Complete Project"

The Corps is proposing to modify the "single and complete project" definition by splitting it into two definitions: "single and complete linear project" and "single and complete non-linear project."[37] We are encouraged by the removal of reference to "independent utility" in the proposed definition of "single and complete linear project"[38] and think it should serve to ensure that Corps Districts consistently calculate permanent losses to jurisdictional waters correctly for linear projects. In other words, with this modification, each crossing of a distinct waterway clearly should be, treated as a single, permitted activity. Currently, Corps District Project Managers do not

---

[33] See, e.g., NWP 14 (requiring PCN for linear transportation facilities if more than 1/10 acre of jurisdictional waters will be lost).
[34] 72 Fed Reg at 11,194.
[35] *Id.*
[36] *See* 33 CFR 330.1(b) (NWPs "are designed to regulate with little, if any, delay or paperwork certain activities having minimal impact.").
[37] 76 Fed Reg at 9,186.
[38] 72 Fed Reg at 9,207.

consistently apply this loss calculation methodology due to confusion over how the definition of "single and complete projects" applies differently to linear, as opposed to non-linear, projects. Therefore, we urge the Corps to adopt the proposed changes to ensure that Corps District correctly calculate permanent losses to jurisdictional waters (*i.e.*, treating each crossing of a distinct waterway as a single, permitted activity).

V. Discretionary Authority

The Corps' NWP regulations grant the Corps broad discretion to modify, suspend, or revoke an NWP authorization for a specific activity. The regulations provide that the "[DE] may assert discretionary authority by modifying, suspending, or revoking NWP authorization for a specific activity whenever he determines sufficient concerns for the environment or any other factor of the public interest so requires."[39] The regulations go on to provide: "Whenever the DE determines that a proposed specific activity covered by an NWP would have more than minimal individual or cumulative adverse effects on the environment or otherwise may be contrary to the public interest, he must either modify the NWP authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the proposed activity is not authorized by NWP and provide instructions on how to seek authorizations under a regional general or individual permit."[40]

AWEA believes the extent of the Corps' discretionary authority to impose conditions is of concern, particularly when Corps Districts have requested PCNs even when such notification is not otherwise required under an applicable NWP. Because the Corps' ability to require an individual permit may be sufficient leverage to effectively force a permittee to submit a PCN (or agree to additional terms or conditions), defining more precisely when a Corps District project manager can exercise discretionary authority for the purposes of NWP authorizations would be consistent with preserving the utility of the NWP program. Therefore, we ask that the Corps consider defining more precisely when a Corps District Project Manager can exercise discretionary authority for the purposes of NWP authorizations.

VI. Conclusion

AWEA respectfully requests that the Corps consider our comments in formulating its final reissuance and modification of the NWPs. As the Corps' proposal raises complex issues for the wind industry, as well others, AWEA formally requests a public hearing on the matters discussed herein in order to further inform the Corps' consideration of these matters. Please do not hesitate to contact us if you should have any questions regarding our comments.

---

[39] 33 CFR § 330.4(c)(2).
[40] *Id.*

Sincerely,

John Anderson
Director of Siting Policy

Tom Vinson
Senior Director of Federal
Regulatory Affairs

Gene Grace
Senior Counsel

American Wind Energy Association
Suite 1000
1501 M St, NW
Washington DC 20005
Phone: (202) 383-2500
Fax: (202) 383-2505
E-mail: janderson@awea.org