Ecological Restoration Business Association

Growth Through Resilient Environmental Solutions

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July 18, 2025

Ms. Katherine McCafferty
U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314-1000

RE: COE-2025-0002; Proposal to Reissue and Modify Nationwide Permits

The Ecological Restoration Business Association (ERBA) appreciates the opportunity to provide comments to the U.S. Army Corps of Engineers (the Corps) regarding the Proposal to Reissue and Modify the Nationwide Permits (the Proposal). Nationwide permits (NWPs) are an essential tool for balancing national infrastructure development and environmental protections. Predictable, transparent and workable NWP conditions enable reliable construction planning across the country for major industry sectors in their everyday business operations.

ERBA is a national trade association representing businesses that invest billions of private capital into measurable conservation outcomes, typically as wetland or stream mitigation credits or offsets, which provide efficient solutions for compliance with the Clean Water Act (CWA). ERBA's members include mitigation bankers, In-Lieu Fee (ILF) program sponsors, and third-party sponsors for turnkey permittee-responsible mitigation (PRM). Collectively, ERBA members have worked with Corps Districts across the country to oversee permitting on thousands of mitigation banks, ILF and PRM projects that encompass hundreds of thousands of acres of high-quality watershed habitat and advance fulfillment of the CWA's objectives while providing compliance certainty for permittees. In particular, mitigation credits are proven to facilitate 50% faster permit processing times than when permit applicants resort to sponsoring their own PRM projects.[1]

ERBA member companies work closely with permittees and Corps District Engineers (DEs) to satisfy NWP conditions, predominantly by providing mitigation or other compliance solutions in response to impact limits and pre-construction notifications (PCNs). In some regional markets, an ERBA member company's

[1] Connor, Michael L. "Memorandum for Commanding General, U.S. Army Corps of Engineers Re: Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008 Compensatory Mitigation Rule." September 16, 2024 ("Sept 2024 ASA Memo").

services rendered as a result of NWP consultations with permittees can constitute up to eighty percent of the company's regional business demand. Beyond servicing permittees, ERBA members are also themselves permittees that avail NWP benefits, particularly NWP 27 on Aquatic Habitat Restoration, Establishment and Enhancement, for both restoration projects delivering regulatory compliance as well as large scale nature-based solutions delivered under direct contracts to support infrastructure or other federal and state government programs. ERBA members value speedy and reliable permitting for their own project approvals, implementation, and operations.

Based on these direct experiences, ERBA members support the Administration's and Corps' desire to maximize use of the more efficient 45-day NWP timeline versus the average 264-day timeline for an Individual Permit (IP). ERBA members' mitigation solutions offer an important tool within the NWP program to ensure that any increase in expedited NWP permit actions authorize "no more than minimal individual and cumulative adverse environment effects." From our experienced perspective, ERBA offers the following comments and recommendations: i) support for the NWP-27 changes and NWP-A proposal, with recommendations on edits to ensure clarity in implementation and applicability of these NWPs for mitigation projects; ii) considerations on General Condition (GC) 23 on mitigation, iii) a recommendation on reinstatement of a PCN for mechanized clearing of forested wetlands, and iv) a recommendation to leverage the NWP program to expedite approvals for certain qualifying mitigation projects.

I. Support for the Proposal's Changes to NWP-27 and establishment of a new NWP-A; Recommendation on Clarifying Language in both NWPs.

ERBA has long been an advocate and facilitator of discussions to promote more process-based restoration approaches under the CWA's Section 404 mitigation program and to streamline approvals for nature-based solutions.[2] Thus, we applaud and appreciate the Proposal's removal of prior restrictive language on conversion of aquatic types to now allow projects converting streams or natural wetlands to other aquatic types to still qualify for NWP-27. This change reflects the best available science on restoration and will support an increase in mitigation projects incorporating process-based restoration techniques now qualifying for NWP-27 to quickly permit and implement their project on the ground. While the intent of the change is clear from the Proposals' preamble, we are concerned that the Proposal's NWP-27 language is not explicit enough to ensure that Districts will interpret NWP-27 as allowing type conversion. To offer further clarity, we recommend adding a statement in the last paragraph of NWP-27 to the effect of: "The conversion of waters from one type to another is authorized as long as there is an overall no net loss of aquatic resource functions and services."

ERBA also supports the Proposal's modification of the "ecological reference" requirement to clarify that ecological references are based on natural ecosystems and their characteristics that exist or previously existed in the region. Our members have experienced situations where nature-based solutions and mitigation projects with net ecological uplift that meet the intent of NWP-27 have had to resort to an IP due to Districts' restrictive interpretation of ecological reference in the prior NWP-27. To address these situations, we recommend an additional clarifying statement to ensure that Corps' Districts do not apply an overly narrow reading and implementation of the ecological reference requirement when determining if a project qualifies for NWP-27. Specifically, in the second paragraph of the Proposal's NWP-27 we recommend adding a statement to the effect of "In cases where certain natural elements, such as rocks,

[2] *See* "Supporting Innovation in 404 Stream Mitigation for Improved Ecological Outcomes." September 2023, Meridian Institute. Available at the link here: https://merid.org/wp-content/uploads/2023/08/Supporting-Innovation-in-404-Stream-Mitigation-Problem-Statement-and-Recommendations.pdf.

boulders, or other analogous features, are not naturally present in the reference habitats, their use may still be permitted if they contribute to the overall ecological function, stability, and uplift of the restored habitat."

ERBA members increasingly work with departments of transportation and other permittees on cost effective and innovative approaches to improve connectivity for fish species and to improve floodplain resiliency. Removal of low-head dams and culverts was recognized in Regulatory Guidance Letter 18-01, issued during President Trump's first Administration, as an effective technique to generate mitigation credits and is sometimes a component of fish passage projects. Accordingly, ERBA is supportive of the Proposal's new NWP A on "Activities to Improve Passage of Fish and Other Aquatic Organisms" and appreciates the direct mention that the new NWP A "can be used to authorize regulated activities associated with compensatory mitigation projects." Again though, while the Preamble makes the intent clear, we are concerned that the language of NWP A is not explicit enough on coverage for existing water intake facilities and thus would benefit from a few small edits to add clarity. We recommend the following additional underlined language: "Examples of activities that may be authorized by this NWP include, but are not limited to: … the installation of fish screens to prevent fish and other aquatic organisms from being trapped or stranded in irrigation ditches and other <u>water conveyance</u> features <u>(including existing water supply intakes)</u>."

II. Considerations on General Condition (GC) 23 on Mitigation.

We understand that there are legislative proposals and comments from peer stakeholders recommending an increase in NWP acreage thresholds from the historic 1/2-acre of waters of the United States to potentially a 3-acre threshold for some NWPs.[3] The higher threshold would result in more permit actions processed under the faster NWP rather than the longer and more time intensive IP, which may be especially important in a reduced workforce environment. However, an adjustment to these thresholds after roughly 25 years may also make certain NWPs and their permitted actions vulnerable to litigation on claims that the NWPs now permit "more than minimal adverse environmental effects" when performed separately and cumulatively.

At a minimum, we recommend retaining, as the Proposal does, the existing GC 23 thresholds for mitigation of 1/10th of an acre for wetlands and 3/100ths of an acre for streams. A handful of commentors characterize the 2021 NWP reissuance's modification of the stream mitigation threshold as a new burdensome requirement ("sudden imposition") that should be reversed. This characterization is incorrect. We agree with a peer commentor's response that the stream threshold is "a modest benchmark that allows many minor projects to proceed without triggering mitigation" and "a measured and scientifically supported policy aimed at preventing incremental but cumulative degradation of aquatic ecosystems." Prior to the 2021 reissuance, for 20 years the NWPs included a 300 linear feet numeric limit for stream mitigation to ensure that NWP permitted activities result in no more than minimal separate and cumulative adverse environmental effects.[4] To assist with NWP reporting, metric consistency with the 1/10th acre wetland mitigation threshold, and to reflect recent research on the value of area-based metrics for stream restoration efforts, the 2021 NWP simply converted the long-standing 300 linear foot metric to an area-based 3/100th acre metric. Thus, this modification was not a new requirement and

[3] *See* Promoting Efficient Review for Modern Infrastructure Today (PERMIT) Act (H.R. 3898).

[4] View ERBA's full comments on this topic in Section I of our November 16, 2020 comment letter on the 2021 NWP Reissuance, available here.

should continue to be included within GC 23 as a key threshold for assessing stream mitigation needs under the NWP program.

We further recommend that the Corps consider eliminating the 1/10th-acre and 3/100th-acre thresholds in GC 23(c) and (d) to instead simply require mitigation for all losses of wetlands and streams that require a PCN, which requirement the DE may adjust on a case-by-case basis as appropriate.[5] Removal of the thresholds would eliminate a step in NWP impact calculations, easing implementation of permit assessments. A comprehensive and straightforward mitigation GC would also offset environmental concerns and support the defensibility of any upward threshold adjustments to certain NWPs. This change to GC 23 would allow the Corps to fully leverage mitigation as a tool that balances Congress' environmental and efficiency statutory directives in §404(e) of the CWA.

III. Recommendation to Reinstate the PCN/Mitigation for Conversion of Forested Wetlands.

The PCN process is a "critical tool," as previously characterized by the Corps, that facilitates tailored analysis by the DE of a permit applicant's proposed impacts in the specific watershed.[6] PCNs enable the Corps to establish NWPs for activities that might otherwise necessitate the use of an IP to meet the statutory requirement of §404(e). PCNs, by establishing touchpoints of review, also ensure that the NWPs are administered in accordance with §404(b)(1) Guidelines, which require avoidance, minimization, and then compensatory mitigation for impacts.[7]

A permit applicant is prompted by the PCN process to incorporate minimization, avoidance, and mitigation measures early on in their project design process to facilitate speedy approval once under a DE's PCN review. In the absence of a PCN process, this incentive for better environmental design is removed and permittees will pursue the least costly design option for construction and long-term maintenance. Based on ERBA members' decades of experience and the realities of permittees' analyses on construction costs, we know that permittees design project impacts up to the NWP numeric limit when there is no preemptive analysis trigger or DE oversight making it worthwhile to design otherwise. Cumulatively, this leads to an increase in adverse environmental effects authorized under the NWPs.

Considering the utility of PCNs and our expertise in wetlands' benefits, ERBA recommends reinstating a PCN for mechanized land clearing in a forested wetland for NWPs covering linear infrastructure projects (typically, utility line construction and maintenance). Such a PCN was successfully used by the Corps to monitor utility line impacts to wetlands for 24 years and the PCN's removal was a substantial change that should have only occurred in response to new legal or scientific justifications, which was not the case. At least anecdotally, there is evidence that the mechanized clearing and resulting permanent loss of forested wetlands and their functions surpasses the no more than minimal adverse environmental effects threshold, and thus exposes certain NWPs and permitted actions to litigation risks. Reinstatement of the PCN would offset this litigation risk.

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[5] Already the existing language in GC 23(c) and (d) allows the DE to modify the mitigation thresholds if "the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement."

[6] 85 Fed. Reg. 179, 57314-15.

[7] 40 CFR 230.10 (https://www.lrc.usace.army.mil/Portals/36/docs/regulatory/pdf/404B1guidelines.pdf); see also https://www.epa.gov/cwa-404/memorandum-agreemement-regarding-mitigation-under-cwa-section-404b1-guidelines-text.

As another or additional approach, ERBA also recommends and supports a revision to GC 23(i) to remove the DE's discretion on mitigation requirements for the permanent conversion of forested wetlands and instead consistently require mitigation for the permanent conversion and loss of forested wetlands' functions. ERBA's peer organization, the Environmental Policy Innovation Center (EPIC), analyzed regional conditions on forested wetland conversions and found that 15 Districts had already instituted regional conditions to mitigate and address the loss of forested wetlands' functions. The high number of regional conditions regarding forested wetland impacts warrants the Corps' reconsideration of whether the permanent conversion of forested wetlands should trigger enhanced review and mitigation requirements under GC 23. As further detailed by EPIC, the current implementation of GC 23(i) is allowing more than minimal adverse environmental effects and should be addressed through a revision to avoid litigation risks.[8]

IV. Recommendation to leverage the NWP program to expedite approvals for certain qualifying mitigation projects.

Readily available mitigation credits and projects will facilitate faster processing of NWPs and compliance with GC 23. This is a fact supported by the Corps' own data and permittee feedback on the urgent need to increase the supply of mitigation credits in the marketplace. Considering these efficiency benefits and President Trump's permit streamlining objectives, ERBA recommends leveraging the NWP reissuance to establish a new NWP that would prescreen mitigation project approvals and permitting to boost mitigation credit supplies. In turn, mitigation sponsors' ability to recoup their investments in mitigation projects faster under this new NWP will result in lower credit pricing and increased mitigation options for permittees.

As detailed in the enclosed concept note, we recommend establishment of a new NWP that would pre-authorize and permit certain straightforward mitigation projects that are "similar in nature."[9] We term this new NWP the "Stream & Wetland Investment on the Fast Track," or "SWIFT." The mitigation bank and ILF review process established in 2008 Compensatory Mitigation Rule is thorough and sound in concept, but in practice allows for discretionary delays due to internal interagency negotiations, scheduling issues, and requests for uncoordinated, iterative drafts of documents.[10] The SWIFT would act as an expedited pathway, supplementing the 2008 Compensatory Mitigation Rule, to bring more mitigation credits and options to market faster for speedy processing of other NWPs and IPs.

Thank You

Thank you for your consideration of our recommendations to further improve the utility and effectiveness of the NWP program. This letter was developed through close consultation and deliberation with ERBA's leadership and NWP Committee. Please do not hesitate to reach out to

[8] Relatedly and to better inform an assessment of NWP's environmental impacts, ERBA echoes EPIC's recommendation that the Corps publish its internal cumulative impacts tool to support increased data transparency and public understanding on the administration and effectiveness of the NWP program. Publishing this data, including the acreage of impacts on the cumulative impacts' dashboard, would also align with the May 2025 White House Council on Environmental Quality's "Permitting Technology Action Plan" and the "NEPA and Permitting Data and Technology Standard."

[9] 33 U.S.C. § 1344(e)(1).

[10] See the opening discussion of this ASA Memo for further details on the issue: Connor, Michael L. "Memorandum for Commanding General, U.S. Army Corps of Engineers Re: Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008 Compensatory Mitigation Rule." September 16, 2024 ("Sept 2024 ASA Memo").

sjohnson@ecologicalrestoration.org with any questions or comments. ERBA welcomes the opportunity for further discussion on the recommendations presented here.

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Enclosure – "*SWIFT Policy Concept for Consideration*"

Stream & Wetland Investment on the Fast Track (SWIFT):
Mitigation Bank, ILF Site, and PRM Pre-Approval using the Nationwide Permit Program

Policy Concept for Consideration

BACKGROUND & NEED

Following the directive of Section 5(d) in the Executive Order *Unleashing American Energy*, the Secretary of Defense and Administrator of EPA should eliminate delays in approvals of compensatory mitigation projects by establishing a general permit for common, standardized mitigation projects under the nationwide permit program. Currently, mitigation project approvals are taking longer than the regulatory timelines[11] established in the "2008 Rule".[12] These delays compound existing risks faced by mitigation sponsors and contribute to credit shortages needed for timely infrastructure implementation. Despite an industry desire to develop more banks, sponsors are often forced to run projects through a PRM model to meet their clients' needs, which slows infrastructure permitting. The Corps has an opportunity in the current nationwide permit ("NWP") reissuance to develop a ***new NWP specifically for pre-approval of common stream and wetland mitigation sites*** using restoration methods regularly approved by a district that adhere to a district's published templates, policies, and SOPs. ***The SWIFT NWP will provide fast-track pre-approval of straightforward mitigation bank instruments, ILF sites, and PRM mitigation plans and their corresponding dredge and fill activities that are currently permitted under NWP-27. This streamlined approval of mitigation will, in turn, improve infrastructure permitting timelines by increasing credit inventories and serving as a source of pre-approved PRM projects when necessary, expediting infrastructure permit approvals in areas without sufficient credit supplies.***

While the Corps has recently issued guidance to improve process efficiencies,[13] which should prove helpful, improvements will only be incremental. The proliferation of mitigation banks, ILF programs and ILF project sites limits the Corps' ability to improve timeline compliance under the current model and creates demand for more PRM projects. The Corps and EPA should focus on opportunities for transformative change that can greatly expedite mitigation project approvals, markedly increase credit supplies and thereby accelerate infrastructure permitting.

SWIFT: A NEW MITIGATION PROJECT APPROVAL MODEL

ERBA proposes the development of a new regulatory review model incorporated into the Corps' next NWP issuance. Modelled after the permittee-responsible mitigation project review process, with an added pre-application public notice, SWIFT is intended to expedite the approval of the most common stream and wetland mitigation banks and ILF sites. ***ERBA suggests USACE and EPA develop a new NWP dedicated to the SWIFT program to fast track the 2008 Rule approval process for third-party mitigation projects. SWIFT project sites should be straightforward, using district-approved templates, policies, procedures***

[11] Becca Madsen, 2024. "The Time it Takes for Restoration: 2024 Update." Environmental Policy Innovation Center and Ecological Restoration Business Association, Washington D.C. The report found the average regulatory review was 1.5 times longer than prescribed, and noncompliance was widespread throughout the organization, with 30 out of 38 Corps districts exceeding the standard.

[12] "Compensatory Mitigation for Losses of Aquatic Resources." 33 CFR Part 332.

[13] Connor, Michael L. "Memorandum for Commanding General, U.S. Army Corps of Engineers Re: Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008 Compensatory Mitigation Rule." September 16, 2024; and Moyer, Jennifer A. "Memorandum for Division Regulatory Program Managers and District Regulatory Chiefs Re: Principles of Delivery for Mitigation Bank Decisions." September 19, 2024.

and credit determination methods.[14] In addition to streamlining mitigation instrument/plan approvals, the SWIFT NWP would also authorize dredge and fill impacts related to the approved mitigation projects. The SWIFT process would preserve Corps authority and place sponsors in direct control of project timelines while still providing an opportunity for public comment and IRT review.

Step 1: Pre-Nationwide Permit Application SWIFT Prospectus Submitted

The sponsor submits a SWIFT bank or ILF-site prospectus. The standards for a SWIFT prospectus would be identical to a standard prospectus, with three exceptions. First, the sponsor would need to indicate they are proposing to use the SWIFT permit. Second, the sponsor would commit to using current district-level mitigation policies, procedures, templates and credit determination methods *without* material exceptions. Third, the sponsor should demonstrate the proposed project is reasonably representative of common mitigation projects with respect to proposed restoration methods, site constraints and ecological objectives.

Step 2: SWIFT Public Notice

The SWIFT prospectus is placed on public notice as specified in the 2008 Rule, and the Corps and the IRT visit the site to assess suitability. Following the conclusion of the public notice period, the Corps provides the sponsor with all relevant comments along with the district's acceptance or denial of the sponsor's SWIFT request. The SWIFT designation would only be denied in rare circumstances where material site-specific concerns are reasonably apparent regarding ecological suitability or the applicability of district-level templates, policies, standards and/or credit determination methods.

Step 3: Nationwide Permit Application with SWIFT Notification

The sponsor submits a SWIFT NWP application, complete with all necessary information for Corps processing. This would include (among other elements) fill quantities, baseline aquatic resource assessments as well as reasonable estimates of projected aquatic resource assessments at maturity (i.e., credit estimate).[15] Once complete, the Corps would provide the sponsor with their NWP that would include approval of the types and number of credits, subject to the usual credit release conditions and process (if the NWP application will be used as a bank), and any regional or case-specific conditions requiring the use of district-approved templates, policies, procedures and standards.[16] With the SWIFT NWP in hand, the sponsor could use the project as a PRM site when matched to a development permit or move forward as a mitigation bank or ILF site.

Step 4: SWIFT Project Establishment & Construction

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[14] More complicated projects requiring special considerations with respect to restoration methods, ecological settings, policy exceptions, and crediting should not be eligible for SWIFT. These projects would need to seek the usual approvals, including NWP-27 for any related dredge and fill impacts.

[15] The Corps will not deliberate with the sponsor on these reasonable estimates and projections through an iterative review process. Rather, so long as these estimates are within typical range of other straightforward mitigation proposals, the Corps will accept them, and the risk is on the sponsor to meet the performance standards or risk ineligibility for later credit releases. This project review approach implements the Corps' recent guidance (*Principles of Delivery*, September 19, 2024) directing performance-focused review of mitigation banks.

[16] A note on HQ-level and District-level templates: Following the Sept 2024 ASA Memo and *Principles of Delivery*, we understand that the Corps is developing national level templates on various aspects of mitigation banking that are ripe for standardization. To support and jumpstart the Corps' effort, ERBA has developed recommended templates on financial assurances and a forthcoming template on the mitigation banking instrument. These templates should be issued by HQ to the Districts as soon as possible to better facilitate use of the SWIFT.

Site construction within jurisdictional waters can proceed once the sponsor has secured the NWP and provided any necessary notifications to the district engineer. An as-built report would be prepared by the sponsor, complying with all relevant district standards, and submitted with other requisite documentation to support the mitigation bank or ILF site's establishment[17] and its initial credit release[18] following construction. Accompanying documentation should be strictly based on district templates. For mitigation bank proposals that qualify for SWIFT, at this stage the bank sponsor will submit their instrument in the form of the relevant district approved template and complete with all site-specific information identified in Step 3. From this point forward, the mitigation banking instrument or ILF-site plan would serve as the basis of governance for a SWIFT project.

SWIFT ROLL OUT ACROSS DISTRICTS

Some districts are well prepared for the SWIFT program, as they have all necessary templates, policies, procedures and credit determination methods readily available. Such districts also have IRTs well versed in mitigation project approvals and performance evaluations.

Other districts would require more time to develop requisite templates, policies, procedures and credit determination methods. The Corps and EPA should support these districts to ensure they can launch the SWIFT program as soon as possible. ERBA suggests the use of a cross-district effort where subject matter experts are assigned to less experienced districts to assist with the necessary policy and standard establishment.[19] In theory, personnel from more experienced districts would have more time (i.e., less review time required per mitigation project) to assist other districts.

Aside from cross-district assignments, IRTs in districts using SWIFT would be freed up to focus on more innovative mitigation projects utilizing alternative restoration methods (e.g., dam removal, beaver dam analogs, stage zero, etc.). As the IRTs review and approve these alternative approaches, they should look to standardize project requirements with an eye towards eventually approving similar projects through the SWIFT program.

[17] Example documentation: proof of site protection (e.g., recorded conservation easement), delivery of sufficient financial assurances, a final mitigation banking instrument ready for the Corps' execution and associated mitigation plan with all relevant site-specific information, details and specifications.

[18] Ideally, districts would also issue SWIFT-specific credit release schedules based on Regulatory Guidance Letter 19-01. The initial credit release would ideally be a significant proportion of the project's credit potential, perhaps a small majority.

[19] We understand that the Corps already has a framework in place for this more efficient staffing model, currently termed "Regulators without Borders."