

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION;  
OGEECHEE RIVERKEEPER; and  
SAVANNAH RIVERKEEPER,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS;  
LT. GENERAL THOMAS P. BOSTICK,  
U.S. Army Corps of Engineers;  
COLONEL THOMAS J. TICKNER, U.S.  
Army Corps of Engineers, Savannah  
District,

Defendants.

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Case No. 1:14-cv-01701-JDB

**SECOND AMENDED  
COMPLAINT**

Plaintiffs National Wildlife Federation, Ogeechee Riverkeeper, and Savannah Riverkeeper (the Conservation Groups) file this second amended complaint.

**INTRODUCTION**

1. The Conservation Groups are challenging the U.S. Army Corps of Engineers Headquarters' (Corps) improper issuance of a general permit for bank stabilization projects under section 404(e) of the Clean Water Act, 33 U.S.C. § 1344(e), and section 10 of the Rivers and Harbors Appropriation Act, 33 U.S.C. § 403. On March 19, 2012, the Corps issued Nationwide Permit 13 (NWP 13), a general permit authorizing bulkheads, sea walls, and other structures built in waters of the United States. Although these structures are intended to prevent land erosion, they cause significant environmental damage.

2. In issuing NWP 13, the Corps failed to adequately evaluate the environmental impact of approximately 17,500 projects to be authorized under the permit in violation of the Clean Water Act (CWA), Rivers and Harbors Appropriation Act (RHA), National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and Administrative Procedure Act (APA). This action is a facial challenge to the Corps' issuance of NWP 13 and is an as-applied challenge to a bulkhead improperly authorized by the Corps' Savannah District office in Savannah, Georgia.

3. The CWA allows the Corps to issue general permits for similar activities if they "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). In contrast to individual permits, NWP 13 authorizes the construction of a bank stabilization structure up to 500 feet in length without notifying the Corps prior to construction, without an environmental review of the project, and without public notice and comment.

4. Bank stabilization projects built along streams, rivers, lakes, and coastal waters have significant cumulative effects. Scientific evidence shows that the "hardening" of natural shorelines causes, among other things, further erosion, the degradation of stream bottoms, and the loss of important shoreline habitat. These environmental effects were brought to the Corps' attention prior to issuing NWP 13.

5. The Corps concedes that NWP 13 causes environmental impacts but contends that the permit will have only a minimal adverse effect on the environment. The Corps' conclusion is arbitrary and without a factual basis. The Corps' issuance of NWP 13 has facilitated the hardening of miles of shoreline without ensuring that NWP 13 projects cause only minimal

adverse and cumulative environmental effects. The Corps' minimal adverse environmental effects determination is invalid and violates the APA, CWA, and NEPA.

6. In issuing NWP 13, the Corps arbitrarily and unlawfully relied on future analyses by Corps district offices to make its minimal effects determination. This deferral of environmental analyses violates the CWA and NEPA. And the Corps' reliance on district offices to fulfill its CWA and NEPA obligations is entirely inadequate and speculative, as demonstrated by the Corps' Savannah District's authorizations under NWP 13.

7. The Savannah District has failed to evaluate the cumulative impact of NWP 13 projects authorized on the Georgia Coast. Thus, the Conservation Groups have challenged the Savannah District's authorization of a bulkhead on Bull River in Chatham County, Georgia. The Savannah District's failure to evaluate the environmental impact of this bulkhead highlights the Corps' arbitrariness in relying on district offices to conduct cumulative impact analyses and its continuing failure to ensure that NWP 13 will cause minimal adverse environmental effects.

8. The Corps' issuance of NWP 13 also violates the ESA. In issuing NWP 13, the Corps has failed to complete consultation with the United States Fish and Wildlife (FWS) on the effects of the permit on ESA-listed species within FWS's jurisdiction, such as sea turtles and shorebirds, and designated critical habitat. The Corps' authorization of NWP 13 has allowed permit applicants to continue to construct bulkheads and other structures that adversely affect listed species and their designated critical habitat. Therefore, the Corps has violated section 7(a)(2) of the ESA by failing to insure that the permit is not likely to jeopardize the continued existence of these species or destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2).

9. In violation of federal law, the Corps has failed to adequately assess the environmental impact of NWP 13, and its minimal adverse environmental effects determination

is arbitrary and invalid. The Conservation Groups ask the Court to (1) declare that the Corps has violated the CWA, RHA, NEPA, ESA, and APA in issuing NWP 13, (2) vacate NWP 13 and enjoin the Corps from further authorizing construction of projects under NWP 13, and (3) award to the Conservation Groups their costs and expenses, including reasonable attorneys' and expert witness fees.

### **JURISDICTION AND VENUE**

10. Jurisdiction of this court is invoked under 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (federal officer action); 28 U.S.C. §§ 2201 and 2202 (declaratory judgment); 5 U.S.C. §§ 701–706 (APA); 42 U.S.C. §§ 4321 *et seq.* (NEPA); and 16 U.S.C. §§ 1531 *et seq.* (ESA). The Conservation Groups provided the Corps with sixty days written notice of the ESA violations alleged in this amended complaint in a notice letter dated October 15, 2014, as required by 16 U.S.C. § 1540(g)(2)(C).

11. Venue is appropriate in this judicial district under 28 U.S.C. § 1391(e) because the Corps resides in this judicial district and its permitting decision—issuance of NWP 13—was made in this judicial district. Thus, a substantial part of the events giving rise to these claims occurred in this district. Also, Plaintiff National Wildlife Federation (NWF) resides in this judicial district.

### **PARTIES**

12. Plaintiff NWF is the nation's largest conservation advocacy and education organization. Founded in 1936, NWF is a non-profit corporation organized and existing under the laws of the District of Columbia. NWF's National Advocacy Center is located in Washington, D.C. NWF's mission is to inspire Americans to protect wildlife for our children's future. NWF has 49 affiliates in U.S. states and territories, including an organization in Georgia.

NWF and its over 4 million members and supporters are dedicated to protecting important resources like rivers, streams, and wetlands from the impacts of development such as NWP 13 projects and from major risks to wildlife and habitat. NWF has been working to conserve threatened, endangered, and imperiled species since its founding. NWF is also committed to addressing the causes of climate change, which imperil wildlife and wildlife habitat.

13. Plaintiff Ogeechee Riverkeeper (ORK) is a non-profit organization headquartered in Savannah, Georgia. ORK is dedicated to the preservation, protection, and defense of the Ogeechee River watershed and actively supports effective implementation of environmental laws, including the Clean Water Act. ORK's objectives are to protect the River, its tributaries, wetlands, coastal marshlands, barrier islands, and surrounding environment from degradation and to preserve their essential functions with respect to water quality, including preserving the natural hydrology and ecology of the region, retaining flood and stormwater, pollutant filtering, and providing habitat for aquatic flora and fauna. ORK is committed to protecting the endangered and threatened species in its watershed.

14. Plaintiff Savannah Riverkeeper (SRK) is a non-profit organization headquartered in Augusta, Georgia. SRK is dedicated to protecting the water quality of the Savannah River and the integrity of its watershed and promoting an enlightened stewardship of this unique heritage. SRK's efforts to protect the basin include protecting the River, its wetlands and tributaries, the coastal marshlands and barrier islands, and the species that inhabit these environs, including the endangered and threatened species in the basin. SRK strives to be an effective and sustainable organization solely focused on making the Savannah River basin a healthy and productive watershed ensuring the natural, economic, and recreational viability of the basin as a whole now and for generations to come.

15. The Conservation Groups and their members have aesthetic, scientific, recreational, business, and property interests in the wetlands, marshlands, rivers, streams, and other water bodies affected by NWP 13 projects, as well as the areas and habitat in the vicinity of those waters. The Groups enjoy and seek to protect the wildlife and plant species dependent on these waters, including endangered and threatened species. The Groups' members use, enjoy, and depend on the water bodies affected by NWP 13 projects for outdoor recreation, including nature study, photography, bird watching, fishing, canoeing, solitude, and a variety of other activities. The members regularly enjoy and observe endangered and threatened species on the Nation's coastlines, including the Georgia Coast, that are negatively impacted by NWP 13 projects. The Groups' members are adversely affected by projects authorized under NWP 13 and the environmental damage they cause.

16. The Conservation Groups' members have been and will continue to be harmed by the Corps' actions at issue in this case. Under NWP 13, large areas of vegetative shoreline are transformed into vertical-walled bulkheads. The natural characteristics and biological functions of the shorelines are lost. NWP 13 structures also negatively impact coastal habitat for species such as sea turtles and shorebirds. The members regularly use, enjoy, and benefit from healthy coastal ecosystems and enjoy the presence of diverse coastal wildlife and marine life that are harmed by the development and armoring of coastlines. The members can see NWP 13 projects when they use the waters and areas affected by the projects. The members' enjoyment of these areas is negatively impacted by their concern for the projects' environmental impact.

17. The Groups' members are concerned with NWP 13's environmental effects such as erosion, impairing water quality, and destroying important habitat. The members are concerned with the impact of NWP 13 projects on endangered and threatened species on the

Nation's coasts—including the Georgia Coast that serves as habitat for the piping plover, red knot, wood stork, and five species of sea turtles. The members' concern over the environmental damage caused by NWP 13 projects lessens their enjoyment of the affected waters and surrounding natural areas.

18. Attached as Exhibit 1A is a photograph included for illustrative purposes. It depicts a 130-foot bulkhead constructed under NWP 13—No. SAS-2013-00195—in Glynn County, Georgia.

19. The Corps' failure to adequately consider and inform the public of the environmental impact of NWP 13 projects adversely affects the interests of the Groups' members. Projects are being authorized under NWP 13 without an environmental assessment, both individually and cumulatively, by the Corps and without public notice and comment. As a result, the Conservation Groups and their members are prevented from commenting on these projects.

20. The Groups' members use and enjoyment of the waters along the Georgia Coast is harmed by the Corps' failure to comply with federal law and to adequately review the environmental impact of NWP 13 projects. The Corps' continued failure to comply with federal laws concerning the protection of coastal ecosystems and the species they support has harmed and will continue to harm the interests of the Conservation Groups' members in enjoying these species and their coastal habitat.

21. The Conservation Groups' injuries have been caused by the unlawful actions of the Corps and would be remedied by a court order granting the relief requested. The interests the Groups seek to protect by filing this suit are germane to their organizational purposes of protecting and restoring the water resources and environment and ensuring effective

implementation of environmental laws. The Groups represent the interests of their members and have filed suit to vindicate these interests. The Groups have standing for the claims made in this amended complaint.

22. The Conservation Groups have exhausted their administrative remedies or have no administrative remedies for the claims set forth in this amended complaint. The actions the Groups challenge are final actions subject to judicial review under the APA, and an actual, justiciable controversy exists between the Groups and the Corps.

23. Defendant U.S. Army Corps of Engineers is an agency within the United States Department of Defense. The Corps is charged with regulating any dredging and filling of the waters of the United States under section 404 of the CWA and the placement of structures in navigable waters of the United States under section 10 of the RHA. The Corps issued NWP 13 that is being challenged in this case.

24. Defendant Lieutenant General Thomas P. Bostick is the Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers. He is charged with the supervision and management of all Corps decisions and actions, including the issuance of NWP 13 that is being challenged in this case.

25. Defendant Colonel Thomas J. Tickner is the Commander of the Savannah District of the Corps and is the official responsible for actions taken by the Corps' Savannah District office. The Savannah District is responsible for issuing CWA and RHA individual permits and for authorizing activities under NWP 13 on the Georgia Coast.



## STATUTORY AND REGULATORY BACKGROUND

### A. The Clean Water Act

26. Congress enacted the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this goal, the CWA prohibits the discharge of any pollutant, including dredged or fill material, into navigable waters unless authorized by a CWA permit. *See id.* § 1311(a).

27. All discharges of dredged or fill material into waters of the United States, including wetlands, must be authorized under a section 404 permit unless exempted by section 404(f)(1). The Corps oversees the section 404 permit process and is authorized to issue two types of permits: individual permits and general permits. 33 U.S.C. § 1344(a)–(e). The Corps issues individual permits on a case-by-case basis. *Id.* § 1344(a). These permits are issued after an extensive review including site-specific documentation and analysis, public notice, public interest review, and a formal determination. 33 C.F.R. §§ 322.3, 323, and 325.

28. In contrast to individual permits, the Corps may allow similar activities to go forward with minimal Corps involvement by using general permits, including nationwide permits (NWP). NWPs are limited to “minor activities that are usually not controversial and would result in little or no public or resource agency comment if they were reviewed through the standard permit process.” 67 Fed. Reg. 2020, 2022 (Jan. 15, 2002). NWPs may be issued on a state, regional, or national basis “for any category of activities involving discharges of dredged or fill material if the [Corps] determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” 33 U.S.C. § 1344(e)(1). Thus,

before issuing an NWP, the Corps must find that the permit will have minimal effects on the environment, when considered both individually and cumulatively. *Id.*; 40 C.F.R. § 230.7(a).

29. An NWP “is issued by Corps Headquarters.” 77 Fed. Reg. 10,184, 10,212 (Feb. 21, 2012). The Corps “evaluate[s] cumulative effects at the national level” and presents its analysis “in the Headquarters decision documents.” *Id.* at 10,207.

30. Before issuing an NWP, the Corps must comply with rules developed by the EPA under section 404(b) of the CWA, known as the “404(b)(1) Guidelines.” 33 U.S.C. § 1344(b). The 404(b)(1) Guidelines require the Corps to determine whether activities to be authorized by an NWP “will have only minimal cumulative adverse effects on water quality and the aquatic environment.” 40 C.F.R. § 230.7(a)(3). The Corps must also consider “secondary effects” on the aquatic ecosystem. *Id.* § 230.11(h). These impacts are effects associated with a discharge of dredged or fill material but do not result from the actual placement of the material. *Id.*

31. The Corps must “collect information and solicit information from other sources about the cumulative impacts on the aquatic ecosystem [and] [t]his information shall be documented and considered during the decision making process concerning the evaluation of . . . the issuance of a General permit.” *Id.* § 230.11(g)(2). The Corps must also “set forth in writing an evaluation of the potential individual and cumulative impacts of the category of activities to be regulated.” *Id.* § 230.7(b). This analysis and documentation must be “completed before any General Permit is issued . . .” *Id.*; *see also id.* § 230.6(d). The Corps may not issue a permit unless there is “sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Guidelines.” *Id.* § 230.12(a)(3)(iv).

32. The Guidelines require the Corps to consider many factors before issuing an NWP, such as the “changing [of] the direction or velocity of flow and circulation” and “shoreline

and substrate erosion and deposition rates” caused by the NWP activities. 40 C.F.R. § 230.23(b). Also, the Corps must consider the “loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem.” *Id.* § 230.32(b). No activity may be authorized under an NWP which is “likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation . . . .” 77 Fed. Reg. at 10,283; *see also* 40 C.F.R. § 230.30.

33. The Corps must also consider the potential impacts on special aquatic sites, such as wetlands, mudflats, and vegetated shallows, including impact on the “value of vegetative shallows as nesting, spawning, nursery, cover, and forage areas, as well as their value in protecting shorelines from erosion and wave actions.” 40 C.F.R. § 230.41–43.

34. Activities authorized under an NWP may not be permitted that “will cause or contribute to significant degradation of waters of the United States.” *Id.* § 230.10(c). Significant degradation includes, among other things, the “loss of fish and wildlife habitat . . . .” *Id.* § 230.10(c)(3). The Corps must also “[d]etermine the nature and degree of effect that the proposed discharge will have individually and cumulatively on water, current patterns, circulation including downstream flows . . . [and] alterations of bottom contours, or other significant changes in the hydrologic regime.” *Id.* § 230.11(b). This factual determination must be supported by documented information. *Id.*

35. In addition to complying with the 404(b)(1) Guidelines, the Corps must conduct a “Public Interest Review,” evaluating the “probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.” 33 C.F.R. § 320.4(a)(1). No permit can be “granted which involves the alteration of wetlands identified as important . . . unless the

district engineer concludes . . . that the benefits of the proposed alteration outweigh the damage to the wetlands resource.” *Id.* § 320.4(b)(4). The Corps must also consider the “practicability of using reasonable alternative . . . methods to accomplish the objective of the proposed structure or work.” *Id.* § 320.4(a)(2)(ii). And the Corps “must give full consideration to all comments received prior to reaching a final decision” and must document “how substantive comments were considered.” *Id.* § 330.5(b)(3)–(4).

36. Any activity authorized under an NWP must avoid and minimize adverse effects, including implementing mitigation to minimize the adverse effects. *Id.* § 230.75(d). The Corps’ mitigation must “have been demonstrated to be effective in circumstances similar to those under consideration.” *Id.* The Corps must “assess the likelihood for ecological success” in determining compensatory mitigation. 33 C.F.R. § 332.3(a)(1).

**B. The Rivers and Harbors Appropriation Act**

37. The RHA requires a permit from the Corps for the placement of structures in navigable waters of the United States. *See* 33 U.S.C. § 403. Under its permitting program, the Corps may issue either an individual permit or a general permit for an activity proposed under the RHA. *See* 33 C.F.R. § 325.2(a), (e). The Corps issued NWP 13 under its RHA permitting authority in addition to the CWA.

38. Under the RHA, the Corps must comply with the same Public Interest Review requirement applied to CWA permits, described above. *See* 33 C.F.R. § 320.4.

**C. The National Environmental Policy Act**

39. Congress enacted NEPA to “promote efforts which will prevent or eliminate damages to the environment . . . .” 42 U.S.C. § 4321. To achieve this goal, NEPA requires federal agencies to fully consider and disclose the environmental consequences of an agency

action before proceeding with that action. *Id.* § 4332(2)(C); 40 C.F.R. §§ 1501.2, 1502.5.

Agencies' evaluations of environmental consequences must be based on scientific information that is both "[a]ccurate" and of "high quality." 40 C.F.R. § 1500.1(b). Agencies must notify the public of proposed projects and allow the public the opportunity to comment on the environmental impacts of their actions. *Id.* § 1506.6.

40. The cornerstone of NEPA is an environmental impact statement (EIS) that is required for all "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C). NEPA regulations state that "'significantly' as used in NEPA requires considerations of both context and intensity." 40 C.F.R. § 1508.27. In considering the "intensity," or the "severity of impact" of a project, agencies must consider a number of factors, including the degree to which the impacts are highly controversial; the cumulatively significant nature of the impacts; and the degree to which the action may adversely affect endangered species and their habitat. *See id.* § 1508.27(b). Any "one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005).

41. Where it is not readily discernible how significant the environmental effects of a proposed action will be, federal agencies may prepare an environmental assessment (EA) to establish the project's level of impact. 40 C.F.R. §§ 1501.4(b), 1508.9(a)(1). NEPA regulations provide that EAs "shall include brief discussions of the . . . environmental impacts of the proposed action and alternatives" including "cumulative impact." *Id.* §§ 1508.7–.8, 1508.9(b). Cumulative impact means "the impact on the environment which results from the incremental impact of the [proposed] action when added to other past, present, and reasonably foreseeable future actions." *Id.* § 1508.7.

42. If an EA concludes there are no potentially significant impacts to the environment, the agency must provide a detailed statement of reasons why project impacts are not significant and issue a “finding of no significant impact” (FONSI). *Id.* § 1508.13. The agency must make a convincing case for a finding of no significant impact on the environment. *See Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66–67 (D.C. Cir. 1987). It cannot rely on mere “conclusory assertions that an activity will have only an insignificant impact on the environment.” *Ocean Advocates*, 402 F.3d at 864. Where potential impacts are recognized, “some quantified or detailed information is required . . . [and] [w]ithout such information, neither the courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide.” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.2d 1372, 1379 (9th Cir. 1998).

43. NEPA’s implementing regulations also require agencies to disclose and analyze measures to mitigate the impacts of proposed actions. 40 C.F.R. §§ 1502.14(f), 1502.16(h). An agency’s analysis of mitigation measures must be “reasonably complete” in order to properly evaluate the severity of the adverse effects of a proposed action prior to the agency’s making a final decision. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

44. The Corps may be required to comply with NEPA before it issues NWP or individual section 404 permits, but it does not prepare any NEPA documentation before it authorizes projects under NWPs. 33 C.F.R. §§ 325.2(a)(4), 330.1(e), 330.5(b)(3).

#### **D. Endangered Species Act**

45. Recognizing that the Nation’s “species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,” 16 U.S.C. § 1531(a)(3), Congress enacted the ESA in 1973 with the express purpose of

providing both a “means whereby the ecosystems upon which endangered and threatened species depend may be conserved” and “a program for the conservation of such endangered species . . . .” *Id.* § 1531(b). The Supreme Court has recognized that the ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

46. Principal responsibilities for implementing the requirements of the ESA have been delegated to two expert agencies, the FWS, an agency within the Department of the Interior, and National Marine Fisheries Service (NMFS), an agency within the Department of Commerce. FWS is responsible for implementing the ESA for terrestrial species and a limited number of marine species, and NMFS is responsible for implementing the ESA for most other marine species. *See* 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01.

47. Before a species receives any protection under the ESA, the Service must list the species as either “threatened” or “endangered.” 16 U.S.C. §§ 1533(a), (c). A “threatened species” is one that is “likely to become an endangered species within the foreseeable future through all or a significant portion of its range.” *Id.* § 1532(20). An “endangered species” is one that is “in danger of extinction throughout all or a significant portion of its range . . . .” *Id.* § 1532(6).

48. Concurrent with listing the species, the Service is to designate the habitat that is critical for the species’ conservation or recovery. 16 U.S.C. §§ 1533(a)(3)(A)(i), 1532(5)(A).

49. Section 7(a)(2) of the ESA and its implementing regulations require each federal agency, in consultation with FWS and NMFS, to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

50. “Action” is broadly defined to include actions that may directly or indirectly cause modifications to the land, water, or air, and actions that are intended to conserve listed species or their habitat. *See* 50 C.F.R. § 402.02. The Corps’ issuance of NWP’s under the CWA is an “action” under the ESA. *See Id.* § 402.02.

51. To fulfill the ESA’s substantive mandate, section 7(a)(2) and its implementing regulations require that federal agencies engage in “consultation” with one or both of the expert agencies, FWS and NMFS, depending on what species might be affected by the action. 16 U.S.C. § 1536(a)(2).

52. If the action agency, or the expert agency, determines that its proposed action may affect any listed species or critical habitat, the action agency must engage in formal consultation with FWS or NMFS. 50 C.F.R. §§ 402.13, 402.14. “Any possible effect [to listed species or critical habitat], whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement . . . .” 51 Fed. Reg. 19,926, 19,949 (June 3, 1986).

53. In the formal consultation process, the action agency must provide FWS and NMFS with “the best scientific and commercial data available . . . for an adequate review of the effects” the action may have on listed species. 50 C.F.R. § 402.14(d). FWS and NMFS in turn must review the information received and all other relevant information, evaluate the status of the listed species, and issue a “biological opinion” detailing “how the agency action affects the species” and whether the action is likely jeopardize a listed species or destroy or adversely modify its designated habitat. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

54. In assessing the impact of an agency’s actions on a species, the Service is required to “[e]valuate the effects of the action and cumulative effects on the listed species or critical habitat.” *Id.* at § 402.14(g)(3). The effects to be considered include both the “direct and indirect



effects” of the action and all other activities that “are interrelated or interdependent with that action . . . .” *Id.* at § 402.02.

55. Thus, formal consultation under section 7 of the ESA culminates with the preparation of a written biological opinion by FWS and/or NMFS that (a) examines whether the proposed action is likely to jeopardize continued existence of threatened or endangered species or result in the destruction or adverse modification of their critical habitat and (b) sets forth any necessary measures for avoiding, minimizing, and mitigating any adverse impacts. *See generally* 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. FWS and/or NMFS “shall suggest those reasonable and prudent alternatives which [it] believes” would not result in jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3).

56. An action agency’s duty to insure against jeopardy or adverse modification is ongoing and continues after the completion of section 7 consultation. *See, e.g., Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1300 (8th Cir. 1989).

**E. Administrative Procedure Act**

57. The APA confers a right of judicial review on any person adversely affected by agency action. *See* 5 U.S.C. § 702. Under the APA, a reviewing court “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

58. An agency violates the APA when it fails to “examine relevant data and articulate a satisfactory explanation for its action . . . .” *Motor Vehicle Manufacturers Assoc. v. State Farm*, 463 U.S. 29, 43 (1983). An explanation for the agency’s action is not satisfactory if the “explanation for its decision . . . runs counter to the evidence before the agency . . . .” *Id.*

## STATEMENT OF FACTS

### A. The Corps' issuance of Nationwide Permit 13.

59. On February 21, 2012, the Corps issued and reissued 52 nationwide permits, including NWP 13 (the Final Rule). 77 Fed. Reg. 10,184 (Feb. 21, 2012). NWP 13 became effective on March 19, 2012. The Corps also issued a Decision Document and Environmental Assessment for NWP 13 on February 13, 2012 (the Decision Document). The Corps concludes in the Decision Document that NWP 13 will not have a significant impact on the environment and the preparation of an EIS is not required under NEPA. *See id.* at 44.

60. The Final Rule contains a set of general conditions and definitions that apply to all NWPs. *See* 77 Fed. Reg. at 10,282. Any reference to NWP 13 in this complaint includes both NWP 13 itself and the general conditions.

61. NWP 13 authorizes bank stabilization activities necessary to prevent erosion of uplands, provided that each activity meets the permit's criteria. Decision Document at 1. These activities include construction of bulkheads, sea walls, riprap, and other hard structures built along coastal shore areas, rivers, lakes, and other waters of the United States. The effect of these structures is commonly referred to as the "hardening" or "armoring" of shorelines because they often replace a naturally vegetative bank with a wooden, metal, or concrete structure.

62. Upon information and belief, NWP 13 has been used to authorize hundreds of miles of shorelines in waters across the Nation and along the coasts.

63. The Corps estimates that, between 2012 and 2017, approximately 17,500 projects will be authorized under NWP 13 filling approximately 275 acres of waters of the United States. Decision Document at 35–36. An estimated 600 acres of compensatory mitigation will be required. *Id.* at 36.

64. Under NWP 13, applicants submit a pre-construction notification (PCN) to the Corps' district offices prior to construction only if the project exceeds 500 feet in length, the project affects special aquatic sites, or the discharge of fill material exceeds the permit's cubic-yard maximum. *Id.* at 2.

65. The Corps states that “[i]ndividual review of each activity authorized by [NWP 13] will not normally be performed . . . .” *Id.*

66. Thus, most NWP 13 projects are built without prior individual review and approval by the Corps' district offices.

67. Unless a PCN is submitted to the Corps, an individual project's environmental effects are not evaluated by the district office prior to the project's construction.

68. When a project requires submission of a PCN, the district engineer must review the project and determine whether the activity satisfies the general conditions of the NWP. 77 Fed. Reg. at 10287.

69. Projects authorized under NWP 13 are not publicly noticed for review and comment.

**B. The Corps' assessment of NWP 13's environmental impact.**

70. Although bank stabilization projects are intended to solve erosion problems on a site-specific basis, studies show that they cause significant environmental problems. Instead of absorbing wave energy like a natural bank, stabilization structures increase shoreline and bank resistance to erosive forces. Thus, a bulkhead, for example, simply redirects wave energy either downward, causing scouring of the habitat in front of the structure, or redirects it downstream to another area.

71. NWP 13 projects replace vegetative buffers with hardened, unnatural structures. The destruction of natural banks impairs the water body's ability to filter pollutants, nutrients, and sediment and affects the health of the ecosystem.

72. Also, these projects cause the loss of shallow-water habitat because of changes in water depth, velocity, temperature, and sediment load.

73. The Corps received substantial opposition to NWP 13 highlighting the negative environmental effects of bank stabilization projects. Comments from federal and state agencies, the Conservation Groups, and others highlighted scientific evidence demonstrating the significant impact of hardening shorelines. But the Corps determined that the activities authorized under NWP 13 would cause minimal adverse effects on the aquatic ecosystem and would not have a significant impact on the environment. *See* Decision Document at 44.

74. The Corps made this determination without a factual basis or adequate explanation. As the Mobile Baykeeper in Alabama remarked in its comments on NWP 13, the Corps offers "no credible demonstration that projects to be permitted under NWP 13 will have only minimal impacts." Mobile Baykeeper Comments on NWP 13 at 1 (April 18, 2011).

**1. The Corps ignored the environmental impact of projects previously authorized under NWP 13.**

75. The Corps issued a FONSI that purported to take a "hard look" at the cumulative impact of NWP 13 across the country. But the Corps did not consider the "nationwide" cumulative impacts of NWP 13. *See* Decision Document at 26. It claimed that it is impossible to assess the cumulative impacts at that scale "because such data are not available at the national scale." *Id.*

76. Before issuing NWP 13, the Corps did not consider the cumulative impact of the permit on a regional or statewide scale. *See generally* Decision Document.

77. Instead, it assigned district engineers the task of assessing cumulative impacts on a project-specific basis. *Id.* at 26.

78. The Corps' Decision Document contained two sections titled cumulative effects. The first, section 4.3, evaluated cumulative effects under NEPA. It defined the scope of those effects "in terms of the estimated number of time[s] this NWP would be used until it expires." *Id.* at 26. It referenced section 6.2.2 as containing that estimate. *Id.* Section 6.2.2., in turn, evaluated cumulative effects under the CWA and limited its scope of analysis to the future "five year period until this NWP expires." *Id.* at 36. Its cumulative impacts analysis consisted primarily of the estimated number of times that NWP 13 would be used on a national basis. The Corps predicts that there will be 17,500 activities authorized under NWP 13 between 2012 and 2017 and that those activities would impact 275 acres of waters of the United States. *Id.*

79. The Corps did not determine the linear impact of NWP 13 projects in the Decision Document. *See id.*

80. The Corps did not account for the continuing impact of bulkheads and other hardened structures authorized in the past despite that "the effects of armoring shorelines are complex, involving both physical and biological science and requiring consideration of cumulative impacts of small-scale activities over large scales of space and time." Mississippi River Collaborative Comments on NWPs at 10 (April 18, 2011) (citation omitted).

**2. The Corps failed to ensure that the impact of erosion caused by NWP 13 would be minimal.**

81. Bank stabilization projects cause significant erosion in front of structures, downstream, and throughout the watershed by redirecting wave and flow energy. As the Conservation Groups explained to the Corps, "[s]ea walls and bulkheads do not decrease erosion, they simply displace it." ORK and SRK Comments on NWP 13 at 16 (April 18, 2011).

82. The Corps' Buffalo District informed the Corps that "bank stabilization may decrease erosion in the immediate project area, [but] it often serves to exacerbate erosion upstream and or downstream . . ." Buffalo District Comments on NWP at 1 (March 2010). The Buffalo District warned that "cumulatively" NWP 13 activities have "the potential to create an adverse impact to these systems and increase[e] the need for more bank stabilization." *Id.*

83. Because of the erosion problems caused by bank stabilization structures, the Department of the Interior (DOI) urged the Corps to prohibit NWP 13 authorizations for any "vertically-installed stabilization structures . . . within the coastal zone." DOI Comments on NWP at 7 (May 11, 2011). According to DOI, these structures "do not qualify as a minimal effect activity" because the reflection of wave action "inhibits the growth/survival of submerged aquatic vegetation." *Id.*

84. Attached as Exhibit 1B is a photograph included for illustrative purposes. It depicts a vertical-walled bulkhead on the Georgia Coast.

85. The U.S. Environmental Protection Agency (EPA) also expressed "strong concerns" on the erosion caused by NWP 13 projects, stating it is "well-documented that the use of hard structures can affect wave energy and direction, affect sediment and other materials transport, and cause accelerated erosion and/or scouring." EPA Comments on NWP at 5 (October 22, 2010).

86. These concerns were expressed by state agencies as well. For instance, the Washington State Department of Natural Resources (WDNR) stated that the Corps fails to establish "a way to effectively address the cumulative impacts associated with bank stabilization projects." WDNR Comment Letter at 5 (April 10, 2011). According to WDNR, the "sensitivity of Washington's shorelines has been widely documented and suggests that the cumulative

impacts of multiple hardened shorelines further impacts the biological and ecological functions of freshwater systems and Puget Sound.” *Id.*

87. Commenters also urged the Corps to consider the cumulative *linear* impact of armoring shorelines in addition to assessing the acreage impact. Although the acreage impact of a bulkhead may be small, NWP 13 bulkheads can be constructed close to two football fields in length without the Corps’ prior approval.

88. In its February 2012 Biological Opinion on the Nationwide Permits (2012 BiOp), NMFS urged the Corps to assess the linear impact of NWP 13 projects. Assessing the linear impact, according to NMFS, would be a “better measure of their effect on river systems and streams.” 2012 BiOp at 171. Because bank stabilization projects “generally follow stream alignments . . . it would be more important to know the linear distance impacted by these activities than acreage.” *Id.*

89. Bank stabilization projects armor the shorelines of waterways and constrict what would be meandering waterways into a single channel.

90. In its Decision Document, the Corps concedes that “bank stabilization may cause indirect effects in other areas of the waterbody.” *Id.* at 10. But the Corps concludes that “[t]hose indirect effects should be evaluated during the review of a pre-construction notification if it is required.” *Id.*

91. The cumulative impact of a project authorized under NWP 13 that does not require a PCN will not be evaluated by the Corps prior to construction of the project.

**3. The Corps failed to adequately assess NWP 13's impact on shoreline habitat and on aquatic life and wildlife.**

92. Bank stabilization projects destroy riparian vegetation that is an important source of energy and nutrients to aquatic organisms, and they cause the loss of shallow-water habitat because of changes in water depth, velocity, temperature, and sediment load.

93. Attached as Exhibit 1C is a photograph included for illustrative purposes. It depicts a vegetative bank and an adjacent vertical-walled bulkhead.

94. FWS concludes that traditional “hard” bank stabilization structures generally are not “environmentally acceptable from a fish and wildlife standpoint.” *See* Conservation Groups Comments at 78 (citation omitted). “Bank stabilization stops natural processes that form and maintain functioning riverine habitat along stream corridors.” DOI Comment Letter at 7.

95. State wildlife agencies expressed concerns to the Corps on the loss of habitat caused by NWP 13 projects. For instance, Texas Parks and Wildlife Department (TPWD) informed the Corps that the vague restriction on the amount of fill “needed for erosion protection” of NWP 13 “potentially allows this nationwide permit to have cumulative impacts on habitat important to fish and wildlife.” TPWD Comments on NWPs at 5 (April 15, 2011). Thus, TPWD recommended that any projects within special aquatic sites—including wetlands, marsh, and mudflats—be required to obtain an individual permit from the Corps. *See id.*

96. Comments on NWP 13 also highlight the negative impact of bank stabilization activities on endangered species. In its 2012 BiOp, NMFS determined that the Corps “has failed to insure that activities that would be authorized by the [NWPs, including NWP 13,] are not likely to jeopardize the continued existence of endangered or threatened species under the jurisdiction of NMFS.” 2012 BiOp at 221.



97. In their comments, the Conservation Groups explained the harm of coastal armoring on endangered sea turtles and their nesting habitat. Conservation Groups Comments at 78–79. The accelerated erosion that results from armoring decreases the extent and suitability of sea turtle nesting sites. *Id.* at 79. Notably, both FWS and NMFS have found that “beachfront armoring . . . greatly impacts nesting opportunities and hatching success.” *Id.* (citation omitted).

98. The Corps concedes that “[b]ank stabilization activities in the vicinity of streams may alter habitat features by increasing surface water flow velocities, which can increase erosion and reduce the amount of habitat for aquatic organisms and destroy spawning areas.” Decision Document at 41. The Corps also states that “this NWP will result in adverse effects on other wildlife associated with aquatic ecosystems . . . through the destruction of aquatic habitat, including breeding and nesting areas, escape cover, travel corridors, and preferred food sources. *Id.* at 42. But according to the Corps, “[c]ompensatory mitigation . . . may be required for activities authorized by this NWP, which will help offset losses of aquatic habitat for wildlife.” *Id.*

99. The Corps sets forth no guidance or performance standards to ensure sufficient compensatory mitigation is required by district engineers for NWP 13 activities.

100. Also, the Corps provides no discussion in the Decision Document on the cumulative impact of NWP 13 activities on ESA-listed species and critical habitat. *See* Decision Document at 39–41.

#### **4. The Corps did not consider the effects of sea level rise.**

101. The Conservation Groups, NMFS, and others urged the Corps to assess the combined impact of NWP 13 and sea level rise. Bulkheads, sea walls, and other structures are built in response to rising sea levels and can worsen the impact of sea level rise. *See*

Conservation Groups Comments at 73–75.

102. The degree of impact from sea level change on coastal ecosystems—such as increased wave energy, sediment instability, and beach erosion—largely depends on the ability of the coast to relocate inland. Coastlines fixed by hard structures prohibit wetlands, marshlands, various aquatic ecosystems, and beaches from migrating inland in response to sea level rise. Also, the increased wave energy hastens erosion in front of such structures.

103. The combined effect of sea level rise and NWP 13 projects may harm aquatic and terrestrial vegetation and animals in the Nation’s coastal zones. Negative effects include the loss of nesting beach habitat for sea turtles and the loss of seabird habitat.

104. NMFS informed the Corps that many of the Corps “permit decisions involve[s] infrastructure that will be in place for decades, and failure to consider its actions in terms of future [sea level] conditions could jeopardize life and property impacts as well as ecosystem resilience.” NMFS e-mail to the Corps, January 17, 2012. NMFS pointed out that the Corps had already “issued national engineering guidance for considering sea level rise in Corps project planning . . . .” *Id.*

105. But the Corps did not evaluate in the Decision Document the cumulative impact of sea level rise and NWP 13.

106. The Corps did not evaluate the cumulative impact of sea level rise and NWP 13 on ESA-listed species and critical habitat. *See id.* at 5.

107. The Corps states in the Decision Document that “there is a considerable amount of uncertainty surrounding climate change, and any associated sea level rise that may occur as a result of climate change.” *Id.* The Corps then states that it does not agree that “the structures and fills authorized by NWP 13 will accelerate erosion in areas affected by changing sea level rise

caused by climate change.” *Id.*

108. The Corps cites to no study or report in the Decision Document to support its statement that it does not agree that “the structures and fills authorized by NWP 13 will accelerate erosion in areas affected by changing sea level rise caused by climate change.” *Id.*

109. The Corps documents no factual basis supporting the conclusion that the structures and fills authorized by NWP 13 will not accelerate erosion in areas affected by changing sea level rise caused by climate change. *See id.*

**C. The Corps’ failure to comply with the ESA.**

110. In soliciting comments on the proposed NWP program in 2011, the Corps recognized that under this Court’s decision, *National Wildlife Federation v. Brownlee*, 402 F. Supp. 2d 1 (D.D.C. 2005), it must consult with FWS on the effects of the NWP program. 76 Fed. Reg. 9174, 9176 (Feb. 16, 2011). In response to *Brownlee*, in March 2007, the Corps initiated section 7(a)(2) programmatic consultation with FWS and NMFS for the NWP program. *Id.* That consultation was never completed. *Id.* NMFS produced a draft biological opinion but no final opinion before the Corps reissued the NWP program in 2007. *Id.*

111. Notably, FWS did not prepare a draft or biological opinion for the NWP program reissued in 2007. *See* Corps ESA Section 7(d) Determination, March 19, 2012, at 3.

112. The Corps reinitiated programmatic formal consultation for the NWP program with FWS and NMFS in 2010. *See id.* Separate formal consultations were conducted with both agencies. *Id.*

113. NMFS completed consultation on the 2012 NWP program and issued a final biological opinion, the 2012 BiOp. In this BiOp, NMFS determined that the Corps had failed to insure against jeopardy or destruction or adverse modification of critical habitat. According to

NMFS, the Corps “failed to insure that activities that would be authorized by the [NWP] are not likely to jeopardize the continued existence of endangered or threatened species under the jurisdiction of NMFS.”<sup>1</sup> 2012 BiOp at 221. The Corps, according to NMFS, did not have sufficient information “to know or reliably estimate the general and particular effects of the activities that would be authorized,” to determine the effect of those activities on water quality or listed species, or to take action necessary to prevent direct or cumulative degradation of water quality and habitat. *Id.* at 223.

114. In contrast, the Corps did not complete consultation with FWS on the effects of the 2012 NWP program on ESA-listed species and designated critical habitat. *See* Section 7(d) Determination at 3.

115. The Corps did not complete consultation with FWS on the 2012 NWP 13’s effects on ESA-listed species and designated critical habitat. *See id.*

116. FWS did not prepare a draft or final biological opinion for the NWP program reissued by the Corps in 2012. *See id.*

117. In fact, FWS has not issued a final biological opinion for the NWP program in at least 15 years. *See id.*

118. The Conservation Groups urged the Corps to conduct consultation on the impact of NWP 13 on ESA-listed species and critical habitat. The Groups explained that shoreline armoring from NWP 13 projects destroys important nesting habitat for sea turtles and piping plovers. *See e.g.*, Conservation Groups Comment Letter at 74.

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<sup>1</sup> On November 24, 2014, NMFS issued a new programmatic biological opinion for the NWP program (2014 BiOp). NMFS concludes that if the Corps implements the measures set forth in the 2014 BiOp, the Corps can avoid the likelihood of jeopardizing the continued existence of listed species or the destruction or adverse modification of critical habitat under NMFS’s jurisdiction. *See* 2014 BiOp at 337.

119. Along the Georgia Coast, for example, five species of threatened and endangered sea turtles occur in the coastal waters, including loggerhead sea turtles, leatherback sea turtles, green sea turtles, Kemp's ridley sea turtles, and Hawksbill sea turtles.

120. The harms of coastal armoring on sea turtles and their nesting habitat are well-documented. Specifically, the accelerated erosion and reduced accretion that results from sea walls and other beach armoring decreases the extent and suitability of sea turtle nesting sites. FWS and NMFS have found that "beachfront armoring ... greatly impacts nesting opportunities and hatching success."<sup>2</sup>

121. The Georgia Coast contains designated critical habitat for the endangered loggerhead turtle. *See* 79 Fed. Reg. 39,756 (July 10, 2014). In designating this critical habitat, FWS discussed the negative impact of coastal armoring. Although bulkheads, sea walls, and other structures "may provide short-term protection to beachfront property," shoreline armoring "causes changes in, and additional loss of, or impact to the remaining sea turtle habitat." *Id.* at 39776.

122. Also, the Georgia Coast contains designated critical habitat for the threatened piping plover. *See* 66 Fed. Reg. 36,038 (July 10, 2001). FWS cites the direct and indirect impacts of shoreline stabilization projects as factors affecting the loss of habitat for piping plovers. *See id.* at 36,039.

123. But in its Decision Document, the Corps, without any concurrence from FWS, arbitrarily concludes that NWP 13 "does not authorize activities that jeopardize the existence of

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<sup>2</sup> NMFS and FWS Five-Year Review of Loggerhead Sea Turtle (*Caretta caretta*) at 25 (August 2007), available at [http://www.nmfs.noaa.gov/pr/pdfs/species/loggerhead\\_5yearreview.pdf](http://www.nmfs.noaa.gov/pr/pdfs/species/loggerhead_5yearreview.pdf) (last visited December 18, 2014).

any listed threatened or endangered species or result in the destruction or adverse modification of critical habitat.” Decision Document at 34.

124. Also, in a determination issued under section 7(d) of the ESA, the Corps, again without the concurrence of FWS, arbitrarily concludes that the NWP’s “do not affect listed species or their critical habitat.” Section 7(d) Determination at 5.

**D. The Corps’ NWP 13 Authorizations on Coastal Georgia.**

125. The Georgia Coast is one of the most valuable ecological zones in the Nation and is an ecosystem vulnerable to the significant impact of armoring coastal waters under NWP 13. The Coast contains five diverse river systems, estuarine waters, and one-third of the remaining salt marsh on the East Coast.

126. Georgia’s coastal waters are heavily armored by bank stabilization projects. A 2010 study funded by the EPA and the state of Georgia determined that at least 131 miles of shoreline in six coastal counties is armored by bulkheads and other structures.<sup>3</sup>

127. In making its minimal effects determination for NWP 13, the Corps relied on future environmental assessments to be conducted by district offices, including the Savannah District office that administers NWP 13 on the Georgia Coast.<sup>4</sup> However, records obtained from the Savannah District show that it has failed to conduct adequate environmental evaluations—both individually and cumulatively—of projects it has authorized under NWP 13.

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<sup>3</sup> GIS and Field-Based Documentation of Armored Estuarine Shorelines in Georgia, Georgia Department of Natural Resources, 2009–2010, attached as Exhibit 2.

<sup>4</sup> The Savannah District considers the Georgia Coast to include 11 counties—Effingham, Chatham, Bryan, Liberty, Long, McIntosh, Wayne, Glynn, Brantley, Camden, and Charlton. *See* Programmatic General Permit 0083 for Single-Family Docks, at <http://www.sas.usace.army.mil/Portals/61/docs/regulatory/PGP0083.pdf> (last visited October 7, 2014). Reference to the Georgia Coast in this Complaint includes those 11 counties.

128. Approximately 30 projects have been authorized under NWP 13 in the 11 counties on the Georgia Coast since the permit's reissuance in 2012.

129. Upon information and belief, the Savannah District has not prepared a cumulative impact analysis of the projects authorized under NWP 13 in the 11 counties on the Georgia Coast since the permit's reissuance in 2012.

130. Upon information and belief, the Savannah District has not required mitigation for any of the projects authorized under NWP 13 in the 11 counties on the Georgia Coast since the permit's reissuance in 2012.

131. On March 24, 2014, the Corps authorized under NWP 13 the construction of a 177-foot vertical bulkhead proposed by Mr. Thomas Smith on the Bull River in Chatham County, Georgia (the Bull River Bulkhead). The Corps' authorization and decision document for the project is attached as Exhibit 3.

132. The project involves the construction of a cement wall and associated fill in coastal marshland along the Bull River. NMFS submitted comments to the Corps recommending denial of the project because the bulkhead is proposed to be placed in an area designated as federal Essential Fish Habitat (EFH). Decision Document for Bull River Bulkhead at 2.

133. Without factual support or written analysis, the Corps states that the project "will result in minimal individual and cumulative adverse effects on the environment." *Id.* at 5.

#### **CLAIMS FOR RELIEF**

**Claim One: The Corps violated the CWA, the CWA's regulations, and the APA by arbitrarily determining that NWP 13 causes only minimal adverse environmental effects and minimal cumulative effects.**

134. The allegations of paragraphs 1 through 133 are incorporated by reference.

135. Under the CWA, the Corps cannot issue an NWP unless it “determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment.” 33 U.S.C. § 1344(e)(1). In violation of the CWA and the APA, the Corps arbitrarily determined that NWP 13 would cause minimal adverse and cumulative effects on the environment. *Id.*

136. Before issuing NWP 13, the Corps must “collect information and solicit information from other sources about the cumulative impacts on the aquatic ecosystem [and] [t]his information shall be documented and considered during the decision making process concerning the evaluation of . . . the issuance of the General Permit.” 40 C.F.R. § 230.11(g)(2). And it must give “full consideration and appropriate weight . . . to all comments [on the permit], including those of federal, state, and local agencies, and other experts on matters within their expertise.” 33 C.F.R. § 320.4(a)(3).

137. The Corps must “set forth in writing an evaluation of the potential individual and cumulative impacts of the category of activities to be regulated.” *Id.* § 230.7(b). This evaluation requires the Corps to consider the secondary impacts on the aquatic ecosystem. *Id.* § 230.11(h). This analysis and documentation must be “completed before any General Permit is issued . . . .” *Id.* § 230.7(b). The Corps is prohibited from issuing any permit unless there is “sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the [404(b)(1)] Guidelines.” *Id.* § 230.12(a)(3)(iv).

138. In its Decision Document, the Corps fails to document an adequate factual basis or explanation supporting its determination of minimal adverse and cumulative effects. *See* 33



U.S.C. § 1344(e)(1). In violation of the CWA, the Corps failed to demonstrate that NWP 13 would cause only minimal cumulative adverse effects on the environment.

139. The Corps received information, studies, and comments showing that NWP 13 causes more than minimal environmental impacts. But the Corps failed to evaluate and document the impacts of past activities authorized under NWP 13 and the adverse effects of the permit, including the cumulative effects of erosion, habitat loss, sea level rise, and other impacts caused by projects authorized under NWP 13. *See* 40 C.F.R. § 230.7; *see id.* § 230.11.

140. The Corps also failed to consider the linear impact of NWP 13 projects and failed to support its determination that NWP 13's maximum length of 500 feet ensured minimal environmental impact.

141. The Corps' failure to adequately assess the environmental impacts of NWP 13 violates the CWA's 404(b)(1) Guidelines. Further, the Corps issuance of NWP 13 was not "based on an evaluation of the probable impact[s]" of the "proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1). Thus, the Corps' public interest review was inadequate and arbitrary in violation of the CWA. *Id.*

142. Also, the Corps unlawfully relies on unproven and speculative mitigation measures and on future analyses by district engineers to satisfy its obligation to consider, and render minimal, the impacts of NWP 13 projects. *See* 40 C.F.R. § 230.7(b); 33 C.F.R. 320.4(r)(2). The Corps violated its regulation prohibiting the reliance on mitigation techniques unless they "have been demonstrated to be effective in circumstances similar to those under consideration . . . ." 40 C.F.R. § 230.75(d).

143. Thus, the Corps' determination that NWP 13 would have minimal adverse effects on the environment is invalid, arbitrary and capricious, and in violation of the CWA and APA.

**Claim Two: The Corps' public interest review was inadequate and arbitrary in violation of the RHA and the APA.**

144. Paragraphs 1 through 143 are incorporated by reference.

145. Under the RHA, the Corps must comply with the Corps' public interest review requirement. The decision must be "based on an evaluation of the probable impact" of the "proposed activity and its intended use on the public interest." 33 C.F.R § 320.4(a)(1). In evaluating NWP 13, the Corps must consider "the extent and permanence of the beneficial and/or detrimental effects" of NWP 13 activities. *Id.* § 320.4(a)(2)(iii).

146. In issuing NWP 13, the Corps failed to adequately consider the environmental impact of NWP 13 projects and the impact of NWP 13 on the public interest. Thus, the Corps' public interest review was inadequate and arbitrary in violation of the RHA and the APA.

**Claim Three: The Corps violated NEPA and the APA by failing to prepare an EIS or adequately justifying its finding of no significant impact.**

147. Paragraphs 1 through 146 are incorporated by reference.

148. The issuance of NWP 13 is a major federal action that will significantly affect the quality of the environment. *See* 42 U.S.C. § 4332.

149. NEPA and its implementing regulations require the Corps to take a "hard look" at the direct, indirect, and cumulative environmental impacts of a proposed action using accurate and high-quality information. 40 C.F.R. § 1500.1(b).

150. In its Decision Document, the Corps concludes that NWP 13 will not result in significant environmental impacts. The Corps makes generalized statements that environmental impacts may occur but fails to evaluate the effect or significance of these impacts. The Corps ignored the significant environmental impacts of NWP 13 despite receiving substantial opposition from federal and state agencies and others highlighting those impacts. The Corps'

failure to address concerns over the environmental effects of NWP 13 violates NEPA. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1216 (11th Cir. 2002).

151. The Corps did not take a hard look at the cumulative impact of projects authorized under NWP 13, including erosion, habitat loss, and the collective impact of sea level rise and NWP 13 projects. Further, the Corps failed to assess NWP 13's impact on threatened and endangered species. The issuance of NWP 13 may adversely affect threatened and endangered species and designated critical habitat, thus rendering these impacts significant for NEPA purposes. *See* 40 C.F.R. § 1508.27(b)(9).

152. Also, the Corps unlawfully delegates its cumulative analysis to district engineers, and the Corps' NEPA determination of insignificance of environmental effect is based on compensatory mitigation to be purportedly required by district engineers. In violation of NEPA, the effectiveness of these mitigation measures is unknown and speculative. *Robertson*, 490 U.S. at 352.

153. Despite failing to adequately consider the environmental effects of NWP 13, the Corps issued a finding of no significant impact. But in violation of NEPA, the Corps failed to make a convincing case for the FONSI. *See Coalition on Sensible Transp.*, 826 F.2d at 66–67.

154. Based on the Corps' finding of no significant impact, the Corps did not prepare an EIS for NWP 13. The Corps' failure to take hard look at the impact of NWP 13 in its environmental assessment violates NEPA and the APA. The Corps' FONSI and its decision to forgo preparing an EIS are arbitrary and capricious and in violation of NEPA and the APA.

**Claim Four: The Corps violated the ESA in failing to complete consultation and to insure no jeopardy.**

155. Paragraphs 1 through 154 are incorporated by reference.

156. The Corps' issuance of a NWP constitutes an agency action within the meaning of the ESA. *See* 50 C.F.R. § 402.02.

157. Section 7(a)(2) of the ESA requires the Corps to ensure that any action it authorizes or carries out "is not likely to jeopardize the continued existence" of a listed species or "result in the destruction or adverse modification" of their designated "critical habitat." 16 U.S.C. § 1536(a)(2).

158. The Corps, as part of its duties under section 7(a)(2) of the ESA, must engage in formal consultation with the FWS (or NMFS) whenever its actions "may affect" a listed species or critical habitat, unless an exception applies. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

159. The Corps determined that NWP 13 "may affect" listed species and critical habitat and was required to consult with FWS under the ESA.

160. Despite that NWP 13 activities "may affect" listed species under FWS jurisdiction, the Corps failed to conduct and complete consultation with FWS, in violation of section 7(a)(2) of the ESA. *See* 16 U.S.C. § 1536(a)(2).

161. The Corps issued NWP 13 without adequately assessing the impact of the permit on ESA-listed species and their critical habitat based on the "best scientific and commercial data available." 16 U.S.C. §§ 1536(a)(2); 50 C.F.R. § 402.14(g).

162. Thus, in issuing NWP 13 the Corps failed to insure that there will be no jeopardy to an endangered or threatened species or destruction of or adverse modification to habitat resulting from the permit, as required by section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2).

**Claim Five: The Corps' issuance of NWP 13 is arbitrary  
and capricious and in violation of the APA.**

163. Paragraphs 1 through 162 are incorporated by reference.

164. Under the CWA, the Corps may issue NWP 13 only if it determines the permit will result in minimal adverse environmental effects. The Corps' determination of minimal adverse effects and its FONSI are inadequate, arbitrary, and in violation of the APA.

165. Before the Corps' issuance of NWP 13, federal and state agencies, the Conservation Groups, and others informed the Corps that activities under NWP 13 have significant environmental impacts. A substantial amount of information and scientific evidence was submitted to the Corps demonstrating the adverse effects of NWP 13 activities.

166. The Corps was required to "collect information and solicit information from other sources about the cumulative impact on the aquatic ecosystem [and] [t]his information shall be documented and considered during the decision making process concerning the evaluation of . . . the issuance of the General Permit." 40 C.F.R. § 230.11(g)(2). The Corps was required to give "full consideration to all comments received prior to reaching a final decision" (33 C.F.R. § 330.1(b)) and must document "how substantive comments were considered." *Id.* § 330.5(b)(3).

167. The Corps failed to respond to concerns over the environmental effects of NWP 13 and failed to provide a factual basis for its determination in violation of the APA. The Corps failed to explain why it "rejected or ignored contradictory evidence" submitted to the Corps that demonstrated significant impacts caused by NWP 13 activities. *See Islander E. Pipeline Co. v. Conn. Dep't of Env'tl. Prot.*, 482 F.3d 79, 100 (2d Cir. 2006).

168. Also, in issuing NWP 13 in the face of substantial record evidence showing significant impacts, the Corps failed to "examine relevant data and articulate a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43. The Corps' issuance of NWP 13 is arbitrary and capricious and in violation of the APA.

**Claim Six: The Savannah District's authorization of the Bull River Bulkhead is arbitrary and capricious and in violation of the CWA, RHA, and the APA.**

169. Paragraphs 1 through 168 are incorporated by reference.

170. The Corps' authorization of the Bull River Bulkhead is a final agency action subject to judicial review under the APA. *See* 5 U.S.C. § 704.

171. In reviewing PCNs for proposed bulkheads, the Corps must determine if the activities will result in more than minimal individual or cumulative adverse effects and whether they are contrary to public interest. *See* 77 Fed. Reg. at 10,287. The Corps must consider "the site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, and the functions provided by the aquatic resources that will be affected by the NWP activity . . . ." *Id.*

172. The Corps' authorization of the Bull River Bulkhead is arbitrary and invalid because the Corps failed to examine and document the environmental effects of the bulkhead—including the cumulative impact of the project.

173. The Corps provides no factual basis for its determination that the bulkhead would result in minimal adverse effects on the environment. Thus, the Corps' authorization is arbitrary and capricious and in violation of the CWA, RHA, and the APA.

**RELIEF**

Plaintiffs respectfully request this Court to grant the following relief:

- A. Declare that the Corps' issuance of NWP 13 violates section 404(e) of the CWA, 33 U.S.C. § 1344(e), and its implementing regulations, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA;
- B. Declare that the Corps' issuance of NWP 13 violates the RHA and its implementing regulations, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA;
- C. Declare that the Corps' FONSI for NWP 13 and its failure to prepare an EIS on the permit violate NEPA, 42 U.S.C. § 4332(2)(C), and that its FONSI is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA;
- D. Declare that the Corps violated section 7(a)(2) of the ESA;
- E. Vacate NWP 13 and enjoin the Corps from further authorizing projects under the permit until it fully complies with the CWA, RHA, NEPA, ESA, and APA and their implementing regulations;
- F. Declare that the Corps' Savannah District violated the CWA, RHA, and APA in authorizing the Bull River Bulkhead and vacate the Corps' authorization of that bulkhead;
- G. Award the Conservation Groups their costs and expenses, including reasonable attorneys' and expert witness fees; and
- H. Grant the Conservation Groups any other relief this Court deems appropriate.

Respectfully submitted this December 22, 2014.

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**CERTIFICATE OF SERVICE**

I certify that on this 22nd day of December 2014, I electronically transmitted this **second amended complaint** to the Clerk of Court using the CM/ECF system for filing, which caused all ECF registrants to be served by electronic means as reflected on the CM/ECF Notice of Electronic Filing.

/s/ Nathaniel H. Hunt  
NATHANIEL H. HUNT