North Carolina
Coastal Federation
Working Together for a Healthy Coast

July 27, 2016

Wilmington District
U.S. Army Corps of Engineers
69 Darlington Avenue
Wilmington, NC 28403

Re: Comments on Proposal to Reissue and Modify Nationwide Regional Conditions

Overview

The North Carolina Coastal Federation submits these comments on the proposed 2017 Regional Conditions for Nationwide Permits (NWPs). Our comments address the proposed regional conditions associated with NWP 13 for Bank Stabilization and NWP B for Living Shorelines. In particular, the federation asserts that the continuation of NWP 13, as well as the regional conditions for NWP 13 and NWP B make it significantly more difficult to permit a living shoreline than a bulkhead, and consequently these conditions disincentivize the use of living shorelines. In doing so, the Corps fails to adhere to the guidelines of the Clean Water Act, Section 404 (b)(1), that requires the usage of the *"least environmentally damaging practicable alternative".* For this reason, and for the additional reasons outlined in this letter, NWP 13 should be removed from the Nationwide Permits, and the Regional Conditions should be modified accordingly.

The scientific community has demonstrated the significant benefits of living shorelines. Living shorelines enhance many naturally occurring ecosystem services, such as carbon sequestration, water filtration, and nutrient cycling.[1] They support and provide habitat for many estuarine species, fostering a strong and productive coastal ecosystem. These benefits are provided at little cost, as living shorelines have been found to be equally as effective at erosion control as hardened structures, particularly in low wave energy environments.

Hard bank stabilization structures, alternatively, have been proven to cause significant damage to our state's estuaries in scientific literature. Hardened structures, such as bulkheads, destroy estuarine habitat by severing the connection between the land and the water. Wave energy that bounces off of the vertical

[1] Currin, C. A., Chappell, W. S., and Deaton, A. (2010). Developing alternative shoreline armoring strategies: the living shoreline approach in North Carolina. *Shipman, H., Dethier, M. N., Gelfenbaum, G., Fresh, K. L., and Dinicola, R. S., eds,. Puget Sound Shorelines and the Impacts of Armoring-Proceedings of a State of the Science Workshop.* 91-201.

structure increases scouring, which in turn increases erosion in areas adjacent to, and surrounding the structure. In addition, hardened structures are less economically viable than living shorelines. These structures weaken over time and are more susceptible to damage from storms, requiring maintenance and upkeep and driving up costs. Living shorelines, on the other hand, can exist and thrive in perpetuity.

In order to ensure that the most practical, least environmentally damaging erosion control option is selected, and thus comply with the Clean Water Act, the Corps must develop permit conditions that result in the use of living shorelines where they are practical and effective. This means that should NWP 13 continue to exist, both NWP B and NWP 13 must be administered in a way that result in the proper selection of the consistent selection of the *"least environmentally damaging practicable alternative".* Should NWP 13 continue to be used, the federation has provided suggestions as to how the selection of the best alternative can be accomplished through our following comments on the proposed Regional Conditions on NWP 13 and NWP B.

Pre-Construction Notification

The federation's first concern with the regional conditions is that a pre-construction notification (PCN) is required for living shorelines in the NWP B Living Shorelines Regional Condition 4.1.1, but is not a requirement when applying for permitting for bulkheads or other bank stabilization techniques covered in NWP 13. This inconsistency makes permitting much easier for bulkheads than living shorelines.

A PCN requires significantly more time and resources to fulfill. One of the many additional steps required by a PCN is that a permittee must provide a delineation of wetlands and other special aquatic sites. This requirement, as well as the many other requisites of a PCN, can take 30-45 days or more for the Corps to review, posing an additional obstacle for those wishing to receive NWP B. The added difficulty as compared to the ease of receiving NWP 13 implies that the Corps supports the implementation of bulkheads over living shorelines and consequently has failed to comply with the Clean Water Act.

Ultimately, the federation requests that the Corps remove NWP 13 completely. However, if this is not accomplished by the Corps, we suggest that it adds a pre-construction notification requirement as a regional condition for bulkheads under NWP 13 in order to address the inequality in permit requirements between living shorelines and bulkheads. Requiring pre-construction notification for both living shorelines and bulkheads would not only allow the regional conditions to comply with the Clean Water Act, but would also importantly situate living shorelines and bulkheads on an even playing field in the permitting process.

Mid-tide Depth Contour
The federation is secondly concerned with the use of the term "mid-tide depth contour" in Regional Condition 4.1.3 for NWP B Living Shorelines. The term is difficult to define and many marine and coastal professionals are entirely unfamiliar with the terminology. The common lack of understanding of this term could lead practitioners to develop their own interpretation of the term and to manipulate the definition. Due to general unfamiliarity of the "mid-tide depth contour," the federation requests that it be removed from the regional conditions and be replaced with an understandable, measurable, quantitative standard.

More specifically, we ask that the waterward distance of the sill in the regional conditions should be a limit of 30-feet waterward from mean high water or normal high water. We suggest that the regional condition should be the same wording as found in draft NWP B issued by your headquarters:

The structures and fill area, including sills, breakwaters, or reefs, cannot extend into the waterbody more than 30 feet from the mean high water line or ordinary high water mark, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects.

This standard should apply for all shorelines, even those with some wetland vegetation. Moreover, we recommend a condition that provides the discretionary authority for the district engineer to reduce the distance offshore that a sill can be built when it is concluded that 30 feet is too much for local site conditions. We also recommend that the Corps have the authority to deny use of the NWP B (and therefore require an individual permit) in any case where it is uncertain about whether a sill in a specific location is an environmentally acceptable alternative. The federation is confident the Corps will use this discretionary authority appropriately to safeguard the environment as needed.

Sill Height
Furthermore, the federation asks that the sill height, limited to six inches above mean high water in the draft regional conditions for NWP B Living Shorelines in 4.1.4, be adjusted to 12 inches above mean high water. In most cases, sills will settle after they are constructed, and therefore will ultimately be about six inches above sea level over time.

Appropriate Resource Agencies
The next regional condition for NWP B Living Shorelines that raises concerns is 4.1.5. The federation is troubled by some of the language of the requirements, specifically the sentence: "Deviation from these opening requirements shall be allowable following coordination with appropriate resource agencies and personnel."

Rather than the phrase, “following coordination with appropriate resource agencies and personnel,” the federation recommends that the phrase, “with approval from appropriate resource agencies” be employed by the Corps under this permit. The current wording creates significant uncertainty as to what “coordination” would involve. The word, “approval”, on the other hand, makes it explicit that the given resource agency would be involved in the permitting process. Additionally, the word “personnel” does not need to be included in this condition, as it is already implied that personnel exist within the resource agencies.

“Restoration Plan”

The federation is concerned with the stipulation that a “Restoration Plan” be included as a condition for NWP B in 4.1.9 as we find the term to be problematic in its ambiguity. In addition, the condition in and of itself creates another barrier to receiving a living shoreline permit, a barrier that does not exist in NWP 13, which permits the much more damaging bank stabilization.

The term, “Restoration Plan,” used in 4.1.9 is extremely vague. It is unclear whether or not this involves an engineering component. If this was the intention of the condition, it would require living shoreline practitioners to consult with engineering firms, which would be excessively expensive and unnecessary. If the intent of this condition is to solely present a design that describes how the marsh will be planted, then the federation suggests that the language of condition 4.1.9 elucidate that no engineer approval is required in the planning documents. We recommend that the Corps change the name of the document from “Restoration Plan” to “Proposed Design” or “Marsh Creation Plan,” in order to explicitly communicate the protocol that a permittee is required to complete for 4.1.9.

The federation also finds that if this condition is to be required of NWP B applicants, it should also be required of NWP 13 applicants, in order to create a hierarchy of erosion control techniques in which the least damaging technique involves just as simple of a permitting process, if not simpler, than the permitting process of more damaging techniques.

Remediation for Failed Structures

The federation’s final request regarding the regional conditions for NWP B, is that the condition 4.1.10 be reconsidered. Regional Condition 4.1.10 states that if a structure fails to restore a marsh, it must be remediated or removed. This requirement, however, is too strict and does not consider the nuance of what it means for a living shoreline to fail. For example, what if the living shoreline fails to restore a marsh, but creates fish habitat instead? Fish habitat has significant value for coastal ecosystems and should not be overlooked. Thus, the federation asks that the Corps address the nuances of living shoreline success and failure in this condition by changing the wording of this condition to specify that “if a structure fails to restore a marsh, it must be remediated or removed unless it has created a significant amount of estuarine habitat.” The federation asks the Corps to remove

this condition entirely from the regional conditions if it finds issue with this language.

Submerged Aquatic Vegetation

The regional condition 3.8 concerning submerged aquatic vegetation states that a permittee must provide a PCN if any SAV is to be affected by the proposed project. The federation finds that the Corps needs to make a distinction among projects, through the way that these projects are permitted, based on the degree to which they affect SAV. The federation suggests that the regional conditions allow for 1/10th of an acre of SAV to be adversely impacted in the case of shellfish mariculture projects before requiring a PCN for a given project. The Seattle and Norfolk Districts of the U.S. Army Corps of Engineers both enacted this stipulation. This could help resolve the disparities that arise when a much less damaging project is required to go through just as many bureaucratic restrictions as a project that is more harmful to SAV.

The federation finds issue with the fact that this rule applies to all permittees. This is problematic because it fails to create a distinction between the types of projects that would be beneficial to SAV and those that would be harmful to SAV. For example, the operation of mariculture sites would, in fact, be initially detrimental to SAV on which those new sites would sit. However, scientific research shows that, once these site are operational, they can be beneficial to the growth and abundance of these plants.

In a paper by the National Research Council of the National Academies, it states that "SAV and other benthic plant production can be enhanced by greater penetration of light through reductions in turbidity from suspension feeding and also by fertilization of the bottom through bio deposition by the bivalves."[2] This sharply contrasts with the long term impact caused by other projects. For example, dredging is not known to be favorable to SAV under any circumstances. A PCN should not be required for shellfish mariculture projects that provide benefits to SAV and its surrounding environment. In brief, projects that will produce a nuanced outcome with respect to SAV should be categorized accordingly, which is why we are suggesting the 1/10 of an acre threshold for aquaculture sites. We would also support a condition in the permit language that gives the Corps the discretion to deny issued of the general permit if it determines the impacts to SAV are unacceptable even when impacts would be less than 1/10 acre.

Inconsistencies with Coastal Area Management Act

The proposed 2017 Regional Conditions and permit for bank stabilization contain language and standards that are not present in the N.C. Division of Coastal Management's (DCM) CAMA general permit for bulkheads, or within the statutory authority of this state agency to administer and enforce. Therefore, when the Corps

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[2] Peterson, P., Costa-Pierce, B., & Dumbauld, B. (2010). Ecosystem Concepts for Sustainable Bivalve Mariculture. *The National Academies Press.*

issues its regional permit for bulkheads and these regional conditions, it incorrectly assumes that the DCM has the legal authority to enforce all of these federal requirements. The federation has submitted a detailed comment letter on the District's proposed general permit for bulkheads that outlines many specific inconsistencies between federal and state requirements. For these reasons, the Corps needs to adopt a PCN requirement for its regional general permit for bulkheads to ensure its authority to enforce on required regional conditions.

Summary of Recommendations

The federation recommends that the Corps develop a hierarchical structure under the permitting process for shoreline stabilization by removing NWP 13 for bank stabilization. Should the Corps fail to do so, we request that the Nationwide Regional Conditions show preference for the most practical and least environmentally damaging erosion mitigation alternative. In order to accomplish this, we recommend that the specific conditions and requirements of each regional condition be more explicit and suggest the following to remedy this:

(a) A regional condition should be added to require a PCN for all bank stabilization techniques;
(b) The "mid-tide depth contour" term under the NWP B regional conditions should be removed and replaced with the following standard: the landward edge of the sill shall be no more than 30 feet waterward from mean high water or normal high water.
(c) The permitted sill height should be adjusted from a maximum of 6 inches to a maximum of 12 inches above mean high water in Regional Condition 4.1.4;
(d) The language in the regional condition 4.1.5 for NWP B Living Shorelines should be modified by omitting the phrase "following coordination with appropriate resource agencies and personnel," and replacing it with "with approval from appropriate resource agencies," to clarify what role that resource agencies will play in the permitting process;
(e) The regional condition 4.1.9 titled "Restoration Plan," should be reworded to make it evident that the intention of the condition is not to require an official, engineered report;
(f) The condition requiring that any structures failing to halt shoreline erosion to be removed (4.1.10) should be amended with the language, "if a structure fails to restore a marsh, it must be remediated or removed unless it has created a significant amount of estuarine habitat." Otherwise, this regional condition should be removed entirely from the regional conditions; and
(g) The regional condition 3.8 on SAV should be revised in order to distinguish the projects based on the degree in which they affect SAV. This should be done so by allowing for $1/10^{th}$ of an acre of SAV to be adversely affected, in the case of shellfish mariculture, before requiring the submission of a PCN.
(h) The Corps should pursue regulations that are consistent with the CAMA state general permit, in order to ensure that the state is functioning within its statutory authority when enforcing these regulations.

Thank you for your consideration.

Sincerely,

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