

Attached are Southern Company comments on Corp's proposal to reissue and modify nationwide permits published in the Federal Register on June 1, 2016. If you have questions or experience difficulty with the attachment, please contact Howard Shelnu at [hshelnu@southernco.com](mailto:hshelnu@southernco.com) <<mailto:hshelnu@southernco.com>>

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August 1, 2016

**Via Electronic Submission at [www.regulations.gov](http://www.regulations.gov)**

Attention: Docket No. COE-2015-0017

Mr. David Olson  
Regulatory Program Manager  
U.S. Army Corps of Engineers  
ATTN: CECW-CO-R  
441 G Street, NW  
Washington, DC 20314-1000

**RE: Comments on Corps' Proposal to Reissue and Modify Nationwide Permits:  
81 Fed. Reg. 35,186 (June 1, 2016)**

Dear Mr. Olson:

Southern Company submits the attached comments on the U.S. Army Corps of Engineers Proposal to Reissue and Modify Nationwide Permits published in the Federal Register on June 1, 2016, (81 Fed. Reg. 35,186). Southern Company provides these comments on behalf of itself and its seven subsidiaries potentially affected by the proposal: Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Gas, Southern Nuclear Company, and Southern Power Company.

These subsidiaries are comprised of 11 regulated electric and natural gas distribution companies, serving some 9 million customers with a projected regulated rate base of approximately \$50 billion. The companies have a generating capacity of approximately 44,000 megawatts and operate nearly 200,000 miles of electric transmission and distribution lines and more than 80,000 miles of gas pipelines.

Southern Company and its vertically integrated electric utilities, competitive generation company, and licensed nuclear operating company are members of the Utility Water Act Group (UWAG), a voluntary, ad hoc, non-profit, unincorporated group of 210 individual energy companies and three national trade associations of energy companies with an interest in Clean Water Act (CWA) rulemakings and issues. Southern Company is also

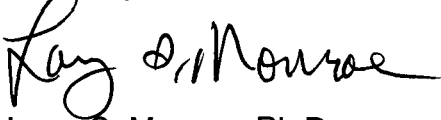
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a member of the Edison Electric Institute (EEI), an association that represents all U.S. investor-owned electric companies, international affiliates, and industry associates worldwide. Southern Company supports the views and positions provided by UWAG and EEI in their comments filed in this proceeding.

We appreciate this opportunity to comment on this rulemaking and strongly encourage the Corps to consider these comments.

If you have any questions about these comments or need additional information, please don't hesitate to contact Donna Hill at [dbhill@southernco.com](mailto:dbhill@southernco.com) or (205) 257-5234.

Sincerely,

A handwritten signature in black ink that reads "Larry S. Monroe". The signature is written in a cursive style with a large initial "L" and "M".

Larry S. Monroe, Ph.D.  
Chief Environmental Officer  
SVP Research & Environmental Affairs

**Comments of Southern Company on  
U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits  
Docket No. COE-2015-0017  
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**Comments of Southern Company on  
U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits  
Docket No. COE-2015-0017  
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**1. Overview of Comments**

Southern Company generally supports the U.S. Army Corps of Engineers' (Corps) proposed reissuance and modification of the 2017 nationwide permits (NWP). We specifically support—

- the continued availability of NWP 12 for separate crossings as single and complete projects;
- the application of NWP 39 for industrial wastewater treatment facilities; and
- the clarification that mitigation is required only in response to jurisdictional activity.

We urge the Corps—

- to remove the limitation “non-tidal” in NWP 12 and elsewhere;
- to clarify that a pre-construction notification (PCN) is not required under NWP 43 for activity at stormwater facilities located in upland areas and for areas excluded from CWA jurisdiction;
- to consider enlarging the PCN threshold for NWP 51;
- to provide clear direction to the district offices that the Corps does not mandate particular erosion control methods, including living shoreline techniques;
- not to impose a PCN requirement where none otherwise would apply solely due to § 408 applicability;
- not to impose additional requirements in General Condition (GC) 32 relating to description of mitigation measures and single and complete projects;
- to provide clear direction to the district offices not to use additional information requests as a means to delay consideration; and
- not to incorporate any aspect of the waters of the United States (WOTUS) rule into the NWP program while that rule is stayed pending judicial review.

**2. Southern Company Supports the NWP Program**

Southern Company supports the NWP program. We concur in UWAG's description of the legislative history of CWA § 404(e) as well as its explanation of the important role of the NWP program in the electric utility industry's delivery of energy with reliability and resiliency. We urge the Corps to maintain reasonable limits as to acreage and linear feet and in other respects, so that the NWPs remain available in practical application while continuing to allow only minimal impacts to jurisdictional resources.

We appreciate the Corps' efforts to ensure better consistency among its various districts, where the NWP program is implemented. Our operations span several Corps

districts, particularly in the Southeast, and consistency and predictability in the NWP program is important to realizing the goals of § 404(e). The Corps has provided several policy statements that are particularly helpful in ensuring consistency between the Districts. For example, the Corps makes clear that the applicant specifies which of the NWPs it seeks coverage under and discourages, if not prohibits, the District Engineers from requiring or requesting that the applicant select another available NWP.<sup>1</sup> Similarly, the preamble makes clear that the District Engineer's authority to require mitigation is limited to requiring mitigation for regulated activities (i.e., the discharge of dredged or fill material) and would not extend to mechanized clearing (e.g., along a utility line).<sup>2</sup>

### **3. NWP 12, Utility Line Activities**

Southern Company supports the continued availability of NWP 12 on reasonable terms and conditions. NWP 12 addresses the discharge of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States in connection with the "construction, maintenance, or repair of utility lines."<sup>3</sup> Southern Company's subsidiaries frequently rely on NWP 12 to build and maintain power lines and related facilities. System reliability and safety require keeping transmission and distribution lines clear.

Consistent with longstanding Corps policy and practice, proposed Note 2 would add new language explaining that utility line crossings over a single waterbody at distant and separate locations as well as over separate water bodies qualify for separate NWP authorizations as "single and complete projects." Southern Company supports the concept of "single and complete project" and the specific changes for Note 2. In the 1991 NWP regulations, EPA defined "single and complete project" as:

[T]he total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers ... For linear projects, the "single and complete project" (i.e. single and complete crossing) will apply to each crossing of a separate water of the United States (i.e. single waterbody) at that location; except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies.<sup>4</sup>

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<sup>1</sup> See 81 Fed. Reg. at 35,197.

<sup>2</sup> See *id.* at 35,210.

<sup>3</sup> See *id.* at 35,198.

<sup>4</sup> See 33 C.F.R. § 330.2(i); 56 Fed. Reg. 59,110 (Nov. 22, 1991).

The 2012 NWP's implemented separate definitions for "single and complete linear project" and "single and complete non-linear project,"<sup>5</sup> again in a manner that remained faithful to the original intent. The Corps' rationale for applying the NWP to each distinct crossing remains valid, and the limits included in the NWP's provide an assurance that impacts will be minimal.

Southern Company supports the Corps' continued efforts to clarify the "single and complete" concept in the context of linear projects, where, unlike non-linear projects, "independent utility" is not a factor. We understand the Corps' intent is only to support and codify the settled interpretation of "single and complete project." In particular, we note that the phrase "independent utility" has appeared at 33 C.F.R. § 330.6(d) since 1991.<sup>6</sup> We urge the Corps to clarify that the phrase "independent utility" and the reference to § 330.6(d) of the Corps' regulations does not represent any intent to change current practice associated with that phrase. However, given that any change in the language of the NWP's can raise new and perhaps unintended issues of interpretation, we raise the question of whether the second sentence of Note 2 is necessary.

In the paragraphs in NWP 12 on utility line substations and access roads, the language includes limits to certain "non-tidal" waters of the United States and wetlands. We urge the Corps to strike the phrase, "non-tidal," and make NWP 12 available on a uniform basis. We also urge the Corps to reconsider whether "non-tidal" as a qualifier is necessary where it appears elsewhere in the NWP's.

#### **4. NWP 39, Commercial and Institutional Developments**

The Corps has modified NWP 39 to provide explicit coverage for wastewater treatment facilities, and the preamble indicates intent to cover industrial plants. We support this clarification as consistent with the intent of NWP 39.

#### **5. NWP 43, Stormwater Management Facilities**

NWP 43 addresses stormwater management facilities. Southern Company's subsidiaries frequently rely on NWP 43 to expand or maintain existing stormwater management facilities (i.e. constructed stormwater detention ponds). Historically, some Corps Districts have considered online stormwater management facilities to be jurisdictional waters of the US, regardless of location, if the facility has not been maintained within five years' time. We urge the Corps to consider allowing the maintenance and expansion of existing stormwater management facilities of those constructed within an upland area without requiring the submittal of a PCN.

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<sup>5</sup> See 77 Fed. Reg. 10,184, 10,290 (Feb. 21, 2012).

<sup>6</sup> See 56 Fed. Reg. 59,110, 59,117, 59,140 (Nov. 22, 1991).

## 6. NWP 51, Land-Based Renewable Energy Generation Facilities

NWP 51 addresses land-based renewable energy generation facilities. The Corps is proposing to split Note 1 of the 2012 NWPs into two notes. The first would explain that the Corps typically considers utility lines constructed to transfer energy from land-based renewable energy generation facilities to distribution systems, regional grids, or other facilities as linear projects.<sup>7</sup> The new proposed Note 2 would state that utility line crossings should be authorized by NWP 12 and road crossings by NWP 14, if they satisfy the requisite terms and conditions.<sup>8</sup>

The Corps also seeks input on changing the PCN threshold for NWP 51. Currently the NWP requires PCNs for all authorized activities. In response to the Corps' request for comments, we urge the Corps to require a PCN only for impacts of 1/2 acre or more and increase the threshold amount to 1 acre or more. With the increased emphasis on renewable projects, we are concerned that a low threshold acreage for NWP 51 may cause some projects to be eliminated from consideration solely because of the added uncertainty and extended timeframes associated with individual permitting. The same threshold criteria are also recommended for utilization of NWP 52.

As an example, one utility company conducted a siting evaluation for a new solar facility that identified two large playa lakes within the project area. Under current WOTUS regulations, the Corps determined that the two large playa lakes were isolated due to no hydrologic connection or a significant nexus to a relatively permanent water or traditional navigable waterway. If the proposed WOTUS rule applied to this project, the two playa lakes would be classified as jurisdictional waters. Under the proposed rule, the new definition of Category 7 and 8 (Case Specific WOTUS) could result in a finding that the playa lakes as jurisdictional due to the playa lakes being similarly situated, performing similar functions, and being located sufficiently close together or sufficiently close to a water of the U.S. That could result in them being evaluated as a single landscape unit in regards to chemical, physical, or biological integrity to a traditionally navigable water, interstate water, or the territorial seas. In that circumstance, an otherwise attractive project area for a new renewable facility under the current WOTUS rule would become much more difficult. Additionally, the utility company could utilize NWP 51 for up to half-acre impacts; however, the half-acre threshold would not allow the utility company to permit the two playa lakes as the playa lakes totaled one acre. The low acre thresholds of NWP 51 would preclude the utility company from utilizing the site for a renewable energy facility, and the current tax credit incentives would be unavailable as well.

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<sup>7</sup> See 81 Fed. Reg. at 35,203.

<sup>8</sup> *Id.*

## 7. Proposed NWP B, Living Shorelines

The term “living shoreline” describes the use of marsh grasses and “soft” structures for erosion control at the shoreline in place of traditional, hardened features such as rip rap, seawalls and bulkheads. This issue has received attention in recent years in the context of preventing erosion in coastal areas. The leading federal guidance on the issue was released by the National Oceanic and Atmospheric Administration (NOAA), the jurisdiction of which is mostly associated with coastal areas and the oceans.<sup>9</sup> The guidance notes that “living shoreline” is “a broad term that encompasses a range of shoreline stabilization techniques along *estuarine coasts, bays, sheltered coastlines, and tributaries.*”<sup>10</sup> Thus, even while explaining the breadth of the term, NOAA references only coastal applications.

We are not aware of significant research or pilot projects to identify and apply these techniques in the specific context of inland, impounded reservoirs. The wave action from boats and vessels can occur at different frequencies, times of day, and intensity compared to tidal action. Further, most if not all inland reservoirs are subject to periodic drawdowns for purposes of repairs, and reservoirs with flood control responsibilities may be drawn down on a seasonal, annual basis. Depending on the slope of the lake bottom, that can leave shoreline vegetation a considerable distance from the water and drying out. Accordingly, we believe it is inappropriate to require living shoreline techniques in inland reservoirs. We support language in proposed NWP B that defers substantially to the permittee as to the appropriate techniques for bank stabilization in the context of a specific project or situation.

We concur with the Corps that living shoreline methods have not been proven to be consistently effective in all circumstances. According to the preamble:

The appropriate approach for bank stabilization is dependent on site conditions, and landowners and contractors may have preferences for specific approaches. In addition, there can be a substantial amount of variation in the effectiveness of a particular bank stabilization technique across these different environments.<sup>11</sup>

There are legitimate concerns as to whether a living shoreline approach is as consistently effective to control erosion as rip rap and bulkheads. Contractors that install rip rap and seawalls at our operating company reservoirs have indicated that in circumstances involving bank stabilization, living shoreline techniques are significantly less likely to prevent erosion adequately. Shoreline property is typically privately owned. If a particular measure proves to be ineffective, then greater erosion is the result, resulting in the loss of private property and impacts to water quality through increased

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<sup>9</sup> See NOAA, Guidance for Considering the Use of Living Shorelines (2015).

<sup>10</sup> *Id.* at 7 (emphasis added).

<sup>11</sup> 81 Fed. Reg. at 35,199.

sedimentation and turbidity in the reservoir. We agree with the Corps that “landowners have a general right to protect their property from erosion (see 33 CFR 320.4(g)(2)).”<sup>12</sup> Indeed, if a governmental requirement led directly to erosion, the resulting loss of private property to erosion would expose the Corps to claims for a physical taking.

Proposed NWP B should continue to reflect an approach that defers substantially to reservoir operators and lakeshore property owners, who are the most directly affected parties in the event of ineffective bank stabilization measures. We also urge the Corps to provide clear direction to the district offices to refrain from imposing specific methods such as living shorelines where reservoir operators or shoreline property owners object.

## **8. General Condition 23, Mitigation**

Any mitigation that may be required should be no greater than what is required under the Mitigation Rule, 33 C.F.R. Part 332. That rule applies to all 404 permits, including NWPs, and we urge the Corps to acknowledge that limitation to provide clear direction to the division and district offices.

We are in agreement that “compensatory mitigation should only be required for impacts directly related to the activity that requires DA authorization.”<sup>13</sup> Thus, Southern Company supports the language in proposed paragraph (i) clarifying that compensatory mitigation should be required by the district engineer only for losses caused by regulated activities. We encourage the Corps to consider further expanding on this clarification by providing additional examples of activities that are beyond the scope of the District’s authority or discretion to require mitigation. For example, under the Corps’ policy, mitigation is not required for tree cutting where there is no fill or a structure over but not in a jurisdictional feature, even if other aspects of the same project may be jurisdictional. Similarly, mitigation is not required for impacts to non-jurisdictional isolated wetlands, notwithstanding the fact that the same project may also impact jurisdictional features. We believe these additional clarifications are import to ensuring consistency between the Districts.

## **9. New General Condition 31, Activities Affecting Structures or Works Built by the United States**

The new GC 31 acknowledges the possible overlap of the Corps’ review under § 14 of the Rivers and Harbors Act of 1899 (RHA)<sup>14</sup>—commonly referenced as the 408 process—and authorization under CWA § 404 or RHA § 10. Compared to the mature NWP program, the Corps’ 408 process is still relatively new, and significant questions remain as to some of the basics of program administration. The 408 process has been authorized by statute since the nineteenth century, but only in recent years has the

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<sup>12</sup> *Id.* at 35,199-200.

<sup>13</sup> *Id.* at 35,211.

<sup>14</sup> 33 U.S.C. § 408.

Corps implemented a robust 408 program. Unfortunately, § 408 has been implemented in a manner that is inconsistent across the Corps' district offices. Within any given district, it is not always integrated seamlessly with other required processes such as permitting or real estate review.

We understand that the Corps is reviewing the 408 process separately and working to increase efficiency and consistency. We appreciate and support that effort. However, in the meantime, given current questions and burdens on the regulated community associated with 408 implementation, we urge the Corps not to require a PCN for projects that happen to require 408 authorization, if the PCN is not otherwise required by the NWP program. Adding another layer of bureaucracy adds time and cost, but it does not provide a significant benefit for environmental purposes if the Corps has otherwise concluded that a PCN is unnecessary for purposes of § 404.

#### **10. General Condition 32, Pre-Construction Notification**

As the Corps has explained, PCNs serve to “give the district engineer an opportunity to review a proposed NWP activity (generally 45 days after receipt of a complete PCN) to ensure that the proposed activity ... is authorized by NWP.”<sup>15</sup> Southern Company supports many of the existing acreage PCN threshold limits that are based on prior WOTUS determinations, as well as the modification that allows for submitting PCNs and related information electronically.

We oppose the proposal to add requirements to identify mitigation measures and to quantify areas affected by different single and complete crossings of linear projects. Existing PCN requirements, such as delineations, are burdensome already, and they provide a sufficient basis for district offices to fulfill the verification function.

We urge the Corps to limit information requests following receipt of the PCN to a single occasion, which is limited to the information indicated in GC 32(b). Those requirements are reasonably clear, and a single response from the Corps following receipt of the PCN is sufficient to identify any information that remains outstanding. The Corps should expressly disavow the practice of issuing repeated requests for information. Only by imposing a clear limit at the headquarters level can the Corps communicate effectively down the chain of command not to use the process of additional requests to buy more time and delay action on the request for verification. We trust the Corps would agree that such a practice is an improper use of additional information requests.

#### **11. Effect of WOTUS Rule**

The WOTUS rule is set to greatly expand the jurisdictional reach of the CWA. The uncertainty of this broadened applicability will likely result in higher costs and longer delays in the issuance of NWPs. UWAG's and EEI's comments provide several

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<sup>15</sup> 81 Fed. Reg. at 35,187.

examples of these negative effects. We share the concerns and support the views expressed by UWAG and EEI in this area.

We urge the Corps to respond in two ways in light of the rule's status as pending and the potential expansion of CWA jurisdiction. First, the NWP's should not reflect or incorporate any requirement or concept that is specific to the WOTUS rule before the rule takes effect. Second, because the rule would change both the nature and quantity of "waters" within the Corps' jurisdiction, we urge the Corps to account for that and respond to NWP and PCN limits accordingly. Specifically, under the rule, the Corps may assert jurisdiction over areas that are functionally or literally more removed from traditionally navigable waters. They may be smaller, or more distant, or flowing only certain times of year, and so on. Those considerations suggest that different limits may be appropriate, such as larger acreage thresholds or limits that may vary based on time of year.