



May 15, 2026

Comments regarding:

March 16, 2026 Notice of Solicitation of Input on Potential Future Changes to Nationwide Permits; Establishment of a Public Docket; Request for Input

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

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

Docket No. COE-2026-0001

The Energy and Wildlife Action Coalition (EWAC)¹ submits these comments in connection with the U.S. Army Corps of Engineers (Corps) March 16, 2026 “Solicitation of Input on Potential Future Changes to Nationwide Permits” (Notice).² According to the Notice, this request for comment will inform future rulemaking related to the nationwide permit (NWP) program and is intended to gather input on ways to increase the overall efficiency of the NWP program.³

The NWP program is an exceptional example of an efficient permitting program that effectively protects the nation’s natural resources while not overburdening the regulated community or the Corps. Each year, a substantial number of energy infrastructure projects critical to the reliability of the nation’s electric grid rely on NWPs to achieve compliance under Clean Water Act section 404. EWAC supports the efficiencies built into the NWP program and appreciates the time and thought the Corps has put into refining the program over time. In particular, the ability for a project proponent to self-certify its use of an NWP is a key feature driving the efficiency of the NWP program.

EWAC greatly appreciates this opportunity to provide recommendations to further increase the efficiency of the NWP program. The comments set forth below focus on improvements to implementation of NWP General Condition 18 (GC 18) related to compliance with the Endangered Species Act (ESA) that would optimize the efficiencies of the NWP program while adhering to the requirements of the ESA.

I. Revise Requirements for Addressing Species Proposed for Listing and Areas Proposed for Designation as Critical Habitat under GC 18

The Corps should consider adjusting how GC 18 addresses species proposed for listing (proposed species) and areas proposed for designation as critical habitat (proposed critical habitat) under the ESA in order to eliminate unnecessary use of agency resources, reduce project delays on important infrastructure projects, reduce costs, and reduce inconsistent program administration. Specifically, GC 18 should be revised to limit the circumstances in which a project proponent must submit a pre-construction notification (PCN) on the basis of proposed species or proposed critical habitat.

As discussed in greater detail below, because ESA section 7 (Section 7) and relevant Section 7 implementing regulations provide different standards for addressing listed and proposed species and designated and proposed critical habitat, EWAC urges the Corps to consider revising GC 18 to, likewise, maintain these distinctions.

¹ EWAC is a national 501(c)(6) trade association formed in 2014 whose members consist of electric utilities, electric transmission providers, and independent power producers, operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

² 91 Fed. Reg. 12,591 (March 16, 2026).

³ *Id.*

With respect to listed species and designated critical habitat, Section 7(a)(2) requires federal agencies “consult” with the U.S. Fish and Wildlife Service or National Marine Fisheries Service (collectively, Service), as relevant, to ensure projects the agency funds, authorizes, or carries out do not jeopardize the continued existence of⁴ those species or destroy or adversely modify designated critical habitat (Adverse Modification).⁵ Pursuant to Section 7 implementing regulations, where a federal agency action “*may affect*” a listed species or designated critical habitat, the agency must engage in consultation with the Service in order to ensure against Jeopardy and Adverse Modification.⁶

Importantly, with respect to proposed species and proposed critical habitat, Section 7(a)(4) and Section 7 implementing regulations only require an action agency “confer” with the Service where the action agency has determined that the federal action “*is likely to*” result in Jeopardy to a proposed species or Adverse Modification of proposed critical habitat.⁷ Thus, whereas Section 7(a)(2) and relevant regulations require federal agencies to consult with the Service whenever listed species or designated critical habitat *may be affected* to ensure against Jeopardy or Adverse Modification, Section 7(a)(4) and relevant regulations only require federal agencies confer with the Service when an agency action is *likely to* cause Jeopardy or Adverse Modification.

In order to meet its own obligations under Section 7, the Corps, through GC 18, requires a permittee under the NWP program to submit a PCN when listed or proposed species or designated or proposed critical habitat “might be affected or is in the vicinity of the activity [to be permitted under a NWP] ...”⁸ In practice, because the language of GC 18 does not draw a distinction between proposed species and proposed critical habitat and listed species and designated critical habitat, project proponents frequently submit PCNs based solely on proposed species or proposed critical habitat. Consider, for example, wide-ranging species that are proposed for listing such as the monarch butterfly (*Danaus plexippus*)⁹ or tricolored bat (*Perimyotis subflavus*),¹⁰ whose ranges expand over a majority of the country and whose habitats are relatively ubiquitous and general in nature. In many parts of the country, it is nearly impossible to self-certify use of a NWP due to the presence of these two species or their habitats.

PCNs require time and effort on the part of the regulated community to prepare and then require time and agency resources for the Corps to review and issue verifications. Additionally, Corps districts vary widely in their implementation of GC 18 for proposed species and proposed critical habitat. Some districts are quick to make a “no Jeopardy” or “no Adverse Modification” determination and issue a NWP verification consistent with Section 7(a)(4). Other districts are not comfortable making these determinations unless certain restrictions or measures are implemented,

⁴ “Jeopardize the continued existence of” is defined by Service regulations as “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

⁵ 16 U.S.C. § 1536(a)(2). “Destruction or adverse modification” is defined by Service regulations as “a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” 50 C.F.R. § 402.02.

⁶ 50 C.F.R. § 402.14(a).

⁷ 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10; *see also* U.S. Fish and Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook* (March 1998), xi.

⁸ Nationwide Permit General Condition 18 - Endangered Species Act (91 Fed. Reg. 768, 877 (Jan. 8, 2026)).

⁹ 89 Fed. Reg. 100,662 (December 12, 2024).

¹⁰ 87 Fed. Reg. 56,381 (Sept. 14, 2022).

which can take time to negotiate, create project delays, and increase costs for the projects. And still other districts will not issue a verification until potential effects of a given activity (that could never be likely to cause Jeopardy of the species or result in Adverse Modification of proposed critical habitat) have been discussed with the Service, despite there being no legal requirement to confer with the Service unless Jeopardy or Adverse Modification is likely. These inconsistent approaches significantly impede the efficiencies that are the hallmark of the NWP program.

To maintain and enhance the efficiency of the NWP program, the Corps should consider adjusting GC 18 to better align treatment of proposed species and proposed critical habitat with the legal requirements of Section 7 and relevant implementing regulations. The Corps has long recognized that the types of activities authorized under the NWP program will result in minimal adverse impacts to the environment.¹¹ Given Section 7(a)(4) and Section 7 implementing regulations only require an agency confer with the Service where an activity is likely to result in Jeopardy of a proposed species or Adverse Modification of proposed critical habitat, there should be no need for the Corps to review activities that merely have proposed species or proposed critical habitat in the vicinity or might affect such species or habitat. Thus, the Corps should consider adjusting GC 18 to remove the requirement for project proponents to submit a PCN where proposed species and proposed critical habitat are in the vicinity or might be affected and, instead, only require submission of a PCN in those exceptional circumstances where a given activity would be likely to result in Jeopardy of a proposed species or cause Adverse Modification to proposed critical habitat. Those exceptional circumstances should be limited to instances where the NWP activities occur in areas where the proposed species is endemic to a particular location or the activity occurs within the sole geographic area proposed for critical habitat designation. Making this adjustment to GC 18 will reduce the number of PCNs the Corps must process and will still allow the Corps to meet its obligations under Section 7.

In addition to the adjustments to the language of GC 18, the Corps' districts and regulated community would also benefit from direction on how GC 18 should be applied when a PCN is triggered on the basis of proposed species or proposed critical habitat. EWAC encourages the Corps to issue guidance making clear that, with respect to proposed species and proposed critical habitat, the Corps should make a no Jeopardy or no Adverse Modification determination without imposing further measures or process, except in those exceptionally rare circumstances where a particular activity seeking coverage under a NWP would actually be likely to result in Jeopardy or Adverse Modification (such as when a species is endemic to the area in which the NWP activity will occur). These improvements will help retain the efficiencies of the NWP program, reduce the demand for agency resources, allow important infrastructure projects to proceed without delay, and maintain compliance with the ESA.

II. Consider Clarifying Treatment of Habitat Removal under General Condition 18

The Corps should consider issuing guidance clarifying that removal of potential listed species habitat that has not been designated as critical habitat will not always trigger a PCN under GC 18. Frequently, habitat removal is considered by the Corps as automatically triggering

¹¹ 91 Fed. Reg. 768, 842 (Jan. 8, 2026) (The Corps issued National Environmental Policy Act decision documents for each NWP which included a finding of no significant impact for each environmental assessment.)

submission of a PCN. EWAC understands that the Corps has set the threshold for submitting a PCN purposefully low to ensure that the NWP program complies with Section 7.¹² While EWAC appreciates that the Corps has implemented a more rigid standard to ensure vigilant compliance with its Section 7 obligations, it results in increased PCN submissions for removal of potential habitat that has a discountable effect on listed species. It is not uncommon for the regulated community to receive guidance from the Corps and biological consultants that even the most minimal removal of habitat, even where the species is not present or the quality of habitat is so low that it is unlikely to be occupied by a listed species, is an effect that triggers a PCN. By taking this position, the efficiencies of the NWP program, in particular the ability to self-certify, are lost for negligible impacts.

The Corps should consider clarifying that where habitat removal causes a discountable,¹³ insignificant,¹⁴ or beneficial effect¹⁵ that the “might affect” threshold to submit a PCN is not met. Service guidance makes clear that a “not likely to adversely affect” finding is the appropriate determination for discountable, insignificant, or beneficial effects.¹⁶ Further, Service regulations are clear that where an action is not likely to adversely affect a listed species, it is the action agency’s choice whether to enter into informal consultation with the Service.¹⁷ Making this clarification to the implementation of the GC 18 PCN threshold will help project proponents confidently apply GC 18 to their activities without defaulting to a PCN, which in turn will reduce the demand for agency resources, allow important infrastructure projects to proceed without delay, and maintain compliance with the ESA.

III. Conclusion

EWAC appreciates the Corps’ consideration of these comments and believes incorporating these suggestions will increase the efficiency of the NWP program while ensuring continued compliance with the ESA. EWAC welcomes the opportunity to discuss its comments in greater detail with the Corps.

Please feel free to contact the following EWAC representatives:

John M. Anderson, EWAC Executive Director, janderson@energyandwildlife.org, 202-674-8569

Brooke Marcus, Nossaman LLP, bmarcus@nossaman.com, 512-813-7941

¹² The Corps has stated that it purposefully established the “‘might affect’ threshold in 33 CFR 330.4(f)(2) and in paragraph (c) of [GC 18] because it is more stringent than the “may affect” threshold for Section 7 consultation in the Services regulations at 50 CFR part 402.” 91 Fed. Reg. at 827.

¹³ “Discountable effects are those extremely unlikely to occur.” U.S. Fish and Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook* (March 1998), xvi.

¹⁴ “Insignificant effects relate to the size of the impact and should never reach the scale where take occurs.” *Id.* at xv-xvi.

¹⁵ “Beneficial effects are contemporaneous positive effects without any adverse effects to the species.” *Id.* at xvi.

¹⁶ *Id.* at xv-xvi.

¹⁷ 50 C.F.R. § 402.13(a) (“Informal consultation is an optional process . . .”).