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November 14, 2017

Via Certified Mail
Return Receipt Requested

The Honorable Ryan D. McCarthy
Acting Secretary of the U.S. Army
101 Army Pentagon
Washington, DC 20310-0101

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: *Notice of Intent to Sue over Violations of the Clean Water Act in Connection with the Corps' and EPA's Approval of the South Carolina Electric & Gas Company's "Capping" Proposal for the Tar-Like Material Pollution in the Congaree River*

Dear Sirs:

We write on behalf of Congaree Riverkeeper ("Riverkeeper") to notify you of our intent to bring suit against the United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA") for violations of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1344 *et seq.*, in connection with the Corps' authorization for work in waters of the United States associated with the South Carolina Electric & Gas Company's ("SCE&G") proposal to install a liner over some of its tar-like material pollution remnants in the Congaree River pursuant to Nationwide Permit 38, 77 Fed. Reg. 10,184 (Feb. 21, 2012) ("NWP 38") ("NWP Authorization," attached with the Corps' "Memorandum for Record" as Exhibit 1). The Corps and EPA have violated Section 404 of the CWA, 33 U.S.C. § 1344, by issuing a NWP 38 authorization in contravention of applicable law and regulations.

As discussed in more detail below, the Corps and EPA have failed in their duties under the Act. Citizens are authorized to remedy these failures through the Act's citizen suit provision. 33 U.S.C. § 1365(a).¹ If the Corps and EPA do not take action within 60 days to remedy these violations of the CWA, Riverkeeper will pursue litigation over these claims.²

¹ Section 505(a)(2) of the CWA, 33 U.S.C. § 1365(a)(2), provides that any citizen may commence a civil action "where there is alleged a failure of the Administrator to perform any act or duty under this Chapter which is not discretionary with the Administrator." In *National Wildlife Federation v. Hanson*, 859 F.2d 313, 315 (4th Cir. 1988), the Fourth Circuit ruled that EPA and the Corps have the non-discretionary duty to regulate the discharge of dredged or fill material into waters of the United States. Although Section 505(a)(2) only refers to the

I. BACKGROUND

From the early 1900s through the 1950s, SCE&G and its predecessor companies operated a manufactured gas plant that discharged coal tar into a former stream channel that flowed into the Congaree River. Today, coal tar and other tar-like substances still coat a 10- to 14-acre stretch of the river near the Gervais Street bridge in the heart of downtown Columbia.³ In some places, the tar is as much as five feet thick.⁴ The tar is highly toxic and contains hazardous compounds—including benzene, ethylbenzene, toluene, phenol, and polynuclear aromatic hydrocarbons—that can significantly harm aquatic life.⁵ For example, the National Marine Fisheries Service has noted that research indicates that “coal tar . . . mixed with sediments is toxic to shortnose sturgeon embryos.”⁶ These compounds are also known to cause cancer and can irritate skin and eyes when people come into contact with them. As the successor-owner of the polluting gas plant, SCE&G is responsible for cleaning up this contamination.⁷

State environmental agencies pressured SCE&G to address the coal tar in the river in 2010. Soon after, the company publicly committed to removing the material.⁸ Now, however, the company has backpedaled on that promise. Rather than build a cofferdam in the river to enable removal, or pursue a smaller-scale removal option in the area of the river with the largest tar deposits, SCE&G will pursue a “capping” alternative that will cover some, but not all, of the coal tar remnants. SCE&G’s decision to pursue a capping solution was reached after the Corps expressed concerns about the cofferdam proposal and after one smaller-scale removal field demonstration project yielded certain problems that were in part attributable to the historic flooding event in October of 2015. According to an independent expert who has reviewed SCE&G’s plans, “the process for determining the remedy, leading to the selection of the cap remedy, appeared to be directed toward a foregone conclusion. There are certainly technical and regulatory challenges associated with the dewatering of portions of the river for excavation, yet these challenges are not generally insurmountable for large works projects.” Newfields Consulting, *Evaluation of Proposed Congaree River Cap for Control of Coal Tar Sediments*, April 2017, attached hereto as Exhibit 2.

Administrator, the Fourth Circuit held that “[i]t is quite clear that both the Corps and the EPA are responsible for the issuance of permits under the CWA and enforcement of their terms.” *Id.*

² Riverkeeper is simultaneously sending a notice of intent to sue for violations of the Resource Conservation and Recovery Act in connection with SCE&G’s continued pollution of the Congaree River.

³ SCANA Services, Inc., *Final Engineering Evaluation / Cost Analysis* ii (Jan. 2013), <http://www.scdhec.gov/HomeAndEnvironment/Docs/Final%20EECA.pdf>.

⁴ Management & Technical Resources, Inc., *Project Delineation Report* Table 3-1 (Mar. 2012), [http://www.scdhec.gov/HomeAndEnvironment/Docs/Project%20Delineation%20Report%20\(PDR\).pdf](http://www.scdhec.gov/HomeAndEnvironment/Docs/Project%20Delineation%20Report%20(PDR).pdf).

⁵ *Id.* at Table 3-2.

⁶ Letter from Roy Crabtree, National Oceanic and Atmospheric Administration, to Charleston District Corps of Engineers regarding the “Remediation Project to Remove Tar-Like Material from the Congaree River” (May 23, 2014).

⁷ South Carolina Department of Health and Environmental Control, *Site History* <http://www.scdhec.gov/HomeAndEnvironment/Pollution/CleanUpPrograms/OngoingProjectsUpdates/CongareeRiverSediment/History/> (last visited Oct. 4, 2017); SCANA Services, Inc., *Final Engineering Evaluation / Cost Analysis* ii (Jan. 2013), <http://www.scdhec.gov/HomeAndEnvironment/Docs/Final%20EECA.pdf>.

⁸ Letter from the Department of Health and Environmental Control to SCE&G Re: “Removal Action Decision” (May 8, 2013), <http://www.scdhec.gov/HomeAndEnvironment/Docs/Removal%20Action%20Decision%205-8-13.pdf> (citing the January 2013 Engineering Evaluation / Cost Analysis).

The supposed “cap” is in reality a highly permeable fabric liner held down by concrete blocks. A map produced from information which SCE&G generated to show the extent of coal tar pollution and location of the liner reveal that the liner will leave the majority of the tar in the river exposed (Ex. 3). As SCE&G has admitted, the liner is expected to improve environmental quality by just 5%, human health protection by 75%, and risk reduction by 25% (as opposed to a 95% improvement for all categories from removal).⁹ In addition, the liner will “reduce, but not eliminate, the potential for flux of dissolved chemicals into the water column” and will be designed to withstand only “routine flooding.”¹⁰ SCE&G plans to place a fence to prevent access to the lined area and to monitor the liner to detect tar movement for just 30 years or less, after which time the site will apparently go unmonitored.¹¹ This raises the possibility that a disruption could destroy the liner and fully expose future generations of wildlife and human visitors to the pollution. In an early pre-application meeting request, SCE&G acknowledged that “[g]iven the extent of impacts and swift, fluctuating river current, maintaining a cap material in-place over a prolonged period of time would prove difficult.”¹²

Nonetheless, on September 22, 2016, SCE&G submitted a Joint Federal and State Application to the Corps for permission to pursue this “capping” alternative under NWP 38. Congaree Riverkeeper submitted comments on the application criticizing: the use of a nationwide permit due to the project’s controversial nature, the potential that leaving coal tar exposed in the environment would impact water quality and endangered species, and the potential impacts on recreation due to the placement of permanent fencing and concrete blocks that could cause foot entrapment.¹³ Although SCE&G characterizes its proposal as one that will address the coal tar contamination, the project will not actually contain, stabilize, or remove the hazardous compounds at the site. Instead, the project will cover approximately 900 linear feet of river bottom with a permeable fabric liner without any mitigation to restore the lost benthic habitat. For this reason, the South Carolina Department of Natural Resources also objected to the application, noting that the project will cause more than 300 linear feet of streambed to be lost.¹⁴

On October 18, 2017, the Corps authorized SCE&G’s proposed liner project under NWP 38. In doing so, the Corps made an illegal authorization that was necessary for the project to proceed under Section 404 of the Clean Water Act. The specific terms of NWP 38, as well as regulations applicable to all nationwide permits, exclude projects such as this liner from their coverage.

⁹ SCANA Services, Inc., *Final Engineering Evaluation / Cost Analysis* vi (Jan. 2013), <http://www.scdhec.gov/HomeAndEnvironment/Docs/Final%20EECA.pdf>.

¹⁰ *Id.* at 20-21.

¹¹ *Id.* at v; SCE&G Post-Construction Monitoring /Mitigation Plan (Dec. 2016).

¹² U.S. Army Corps of Engineers – Charleston District – Regulatory Division Pre-Application Meeting Request (Dec. 9, 2011).

¹³ See Riverkeeper Comment Letter, attached as Exhibit 4.

¹⁴ Letter from Greg Mixon, South Carolina Department of Natural Resources, to Chip Ridgeway, Corps of Engineers, regarding the “South Carolina Electric & Gas Company Congaree River” Nationwide Permit (Nov. 29, 2016), attached as Exhibit 5.

II. LEGAL VIOLATIONS—THE CORPS UNLAWFULLY ISSUED A NWP 38 AUTHORIZATION FOR THIS PROJECT.

The scope of the Corps' analysis is governed by the agency's jurisdiction under Section 404 of the Clean Water Act. Section 404 authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into "waters of the United States," such as the Congaree River, when certain conditions are met. 33 U.S.C. § 1344. The term "fill material" is defined by the Corps as "material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a water body,"¹⁵ 33 C.F.R. § 323.2(k), and by the EPA as any pollutant that has such an effect to be a fill, 40 C.F.R. § 232.2(i). Unless exempted by section 404(f)(1), all discharges of dredged or fill material into waters of the United States must be authorized under a section 404 permit issued by the Corps.

The Corps may issue two types of permits for section 404 compliance: individual permits that authorize specific activities on a case-by-case basis, and general permits that provide a blanket authorization for all activities that fit the description in the permit. *See* 33 U.S.C. § 1344 (a), (e). "Nationwide" permits are available only where the authorized activities will have minimal adverse cumulative or individual effects on the environment, are noncontroversial, and are in the public interest. *See* 33 C.F.R. §§ 330.1, 330.5(a)(3)(i); 64 Fed. Reg. 39,348 (July 21, 1999); 77 Fed. Reg. 10,184, 10,185 (Feb. 21, 2012) ("NWP's authorize minor activities that result in minimal adverse effects on the aquatic environment that would likely generate little, if any, public comment if they were evaluated through the standard permit process with a full public notice.").

In the Decision Document, the district engineer must include a statement declaring whether the proposed NWP activity, plus any required mitigation, will result in more than minimal individual and cumulative adverse environmental effects. *See* Issuance and Reissuance of Nationwide Permits, 82 FR 1860-01. If the Corps "finds that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest," it must "modify the NWP authorization to reduce or eliminate those adverse effects, or [] instruct the prospective permittee to apply for a regional general permit or an individual permit." 33 C.F.R. § 330.1(d); *see id.* at 325.2(e)(1)(i). In contrast to nationwide permits, individual permits require an evaluation of the public interest, including foreseeable benefits and detriments or the potential for alternative locations. *See id.* § 320.4(a)(2).

Of relevance to this letter, authorizations under Nationwide Permit 38 are limited to "specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with

¹⁵ The liner proposal is expected to "raise the riverbed elevation by approximately 12-16 inches." SCANA Services, Inc., *Final Engineering Evaluation / Cost Analysis* 22 (Jan. 2013), <http://www.scdhec.gov/HomeAndEnvironment/Docs/Final%20EECA.pdf>. In addition, the project will involve the excavation and movement of "approximately 930 cubic yards of sand bar to facilitate the smooth and continuous mat placement." Letter from Brice McKoy, Corps of Engineers, to Tom Effinger, SCANA, responding to a Pre-Construction Notification (PCN) (SAC-2011-01356) (Oct. 18, 2017).

established legal or regulatory authority.”¹⁶ The ordering or sponsoring of the activity sought to be authorized under NWP 38 by the relevant state agency—here the South Carolina Department of Health and Environmental Control (“DHEC”)—is thus a pre-requisite to the applicability of this permit. Similarly, NWP 38 also requires that the activities authorized actually result in “containment, stabilization, or removal” of hazardous waste.

A. The Corps erred in issuing a NWP 38 authorization for a project that is not performed, ordered, or sponsored by a government agency with established legal or regulatory control.

The Corps first erred in issuing NWP 38 authorization for a project that is not yet “performed, ordered, or sponsored by a government agency with established legal or regulatory control.” As explained in the authorization itself, DHEC is the state agency ultimately responsible for permitting any future remedial actions at this site. Yet at this point, DHEC has not “ordered” or “sponsored” SCE&G’s performance of any particular remedial action.

Instead, DHEC explains on its website that “[a]dditional opportunities for public engagement will be provided by DHEC *prior to selection of a final cleanup action*.”¹⁷ Similarly, at a public meeting in February of 2017, DHEC explained that there would be a series of future public meetings before a final solution was selected.¹⁸ DHEC has not yet approved a final work plan for this site. Accordingly, DHEC has not “ordered” or “sponsored” SCE&G’s performance of the remedial action for which the Corps attempts to grant NWP 38 authorization. A conclusion that DHEC has already “ordered” or “sponsored” SCE&G’s proposed capping solution renders DHEC’s future public meetings a sham gesture, and is inconsistent with DHEC’s own explanation for the status of permitting at this site.¹⁹ Because DHEC has yet to “order” or “sponsor” the proposed capping solution, the Corps’ authorization under NWP 38 is unlawful on its face.

B. The Corps erred by applying NWP 38 to activities that do not “effect the containment, stabilization, or removal of hazardous or toxic waste materials.”

The Corps erred by applying NWP 38 to this project that does not contain, stabilize, or remove the majority of coal tar at the site. By its own terms, NWP 38 is limited to activities that

¹⁶ NWP 38 may also be used to authorize activities pursuant to “[c]ourt ordered remedial action plans or related settlements.” This portion of NWP 38 is not relevant here because there has been no court proceeding related to the Congaree site.

¹⁷ See DHEC Congaree River Sediment Cleanup, *available at* <http://www.scdhec.gov/HomeAndEnvironment/Pollution/CleanUpPrograms/OngoingProjectsUpdates/CongareeRiverSediment/> (emphasis added).

¹⁸ See Allison Willingham, Murky waters: Public, DHEC, SCE&G grapple with Congaree pollution, *Midlands Anchor*, Feb. 14, 2017, <http://www.midlandsanchor.com/public-dhec-sceg-grapple-with-congaree-pollution/>.

¹⁹ Similarly, in an email exchange discussed in the Decision Document, DHEC has explained to the Corps that it has not directed SCE&G to perform the capping solution for which the Corps has granted authorization under NWP 38. See MFR at 7.

“effect the containment, stabilization, or removal of hazardous or toxic waste materials.”²⁰ As noted in the 2012 reissuance of nationwide permits, the “cleanup of hazardous and toxic wastes [under NWP 38], if conducted properly, will *improve the aquatic environment* by *removing* harmful chemicals and other substances that are likely to degrade the quality of wetlands, streams, and other aquatic resources, as well as the functions they provide.” 77 Fed. Reg. 10,184, 10,222 (Feb. 21, 2012) (emphases added). NWP 38 is not available to authorize actions that do not clean up waste, but instead allow continued degradation of the Congaree River and its aquatic habitat.

SCE&G’s proposed “capping” plan does not actually “contain[], stabiliz[e],²¹ or remov[e]” hazardous materials because it leaves the majority of the tar-like material completely exposed to the environment. A map produced from information which SCE&G generated to show the extent of coal tar pollution and location of the liner reveal that the liner will leave the majority of the tar in the river exposed (Ex. 3). The liner will cap approximately 2,630 yards³ over 2.3 acres, whereas the cofferdam removal option would have excavated more than 40,000 tons of contaminated sediment over a much larger area.²² The “cap” allows any hazardous material that is covered to continue to dissolve into the water column, diffuse into overlying sediment, and to percolate into groundwater. Hazardous coal tar constituents are not stabilized under the current proposal. SCE&G itself has stated that the liner will “reduce, but not eliminate, the potential for flux of dissolved chemicals into the water column.”²³ Moreover, as noted above, the capping authorized here will improve environmental quality by just 5% and risk reduction by 25% (as opposed to a 95% improvement for all categories from removal, which would be authorized under NWP 38). And SCE&G admits that it will be “difficult” to keep a cap in place over time.

The 2017 NWP 38 Decision Document further demonstrates that it is not appropriate to authorize this project under NWP 38.²⁴ The document details the general “environmental consequences” that may be expected from individual and cumulative activities authorized by the NWP over the next five years, as well as the impacts of the activities on the public interest. Many of the consequences and impacts described in the document are significantly at odds with the anticipated consequences and impacts of SCE&G’s cap and associated fencing. For example, the Decision Document describes the public health and safety improvements associated with hazardous waste cleanups, economic benefits of toxic waste cleanup, greater opportunities for recreation after cleanup, and net improvements to water quality.²⁵ The cap and fencing will not necessarily improve health and safety in the long run, will not improve surrounding sediment and water quality, and will not provide economic benefits or greater opportunities for recreation.

²⁰ NWP 38 Decision Document, *available at*

http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/NWP_38_2017_final_Dec2016.pdf?ver=2017-01-06-125517-607.

²¹ Black’s Law Dictionary defines “stabilize” as “1. To make firm or steadfast <to stabilize the ship>. 2. To maintain a particular level or amount <stabilize prices>.” Black’s Law Dictionary (10th ed. 2014).

²² SCANA Services, Inc., Joint Application and Pre-Construction Notification Phase 2 – Modified Removal Action – Sediment Capping Project 4 (Mar. 9, 2017).

²³ SCANA Services, Inc., *Final Engineering Evaluation / Cost Analysis* 21 (Jan. 2013), <http://www.scdhec.gov/HomeAndEnvironment/Docs/Final%20EECA.pdf>.

²⁴ http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/NWP_38_2017_final_Dec2016.pdf?ver=2017-01-06-125517-607.

²⁵ *Id.* at 20, 34, 37, 38.

The fencing will instead make recreation more difficult and the concrete blocks may make recreation more dangerous if they increase the risk of foot entrapment.

Because the project is not one that will actually “contain[], stabiliz[e], or remov[e]” the tar like material from the Saluda River, the Corps’ has violated its Section 404 and Section 10 duties by authorizing this activity under NWP 38.

C. The Corps erred by authorizing a project with significant adverse effects under NWP 38.

The South Carolina Department of Natural Resources comments, Congaree Riverkeeper comments, and other documents noted above demonstrate the significant negative environmental impacts that are expected to occur as a result of this project, which preclude lawful coverage under any nationwide permit. *See, e.g.*, Ex. 4 at 1-2 (noting potential problems with the amount of streambed that will be lost, liner stability in the event of flooding, scouring and instability above and below the project area, habitat loss, and nutrient exchange impairment); Ex. 5. These significant adverse effects include:

- Impacts to at least 900 linear feet or 2.3 acres of tributaries due to liner activities:
 - The liner may result in the loss of greater than 300 feet of streambed habitat for endangered species and other wildlife during construction and until habitat is reestablished in the area, if it becomes reestablished at all;
 - The liner and concrete blocks will elevate the streambed and may lead to increased scouring and instability above and below the project area as well as to changes in the flow regime, which will in turn affect sediment transport and fish and macroinvertebrate communities;
 - The liner may impair nutrient exchange until river bottom substrates are reestablished, if they become reestablished at all.²⁶
- Impacts from equipment, construction materials, silt deposition due to destabilization of the shoreline during and after construction.²⁷
- Impacts to recreational users because the concrete blocks may increase the potential for foot entrapment and fencing will block river access.²⁸
- Impacts to humans and wildlife, including endangered species, from continued exposure to toxic coal tar through direct contact and through leaching into sediments, surface water, and groundwater.²⁹

²⁶ South Carolina Department of Natural Resources comments, Ex. 4.

²⁷ *Id.*

²⁸ *Id.*, Congaree Riverkeeper comments, Ex. 5.

- Additional impacts to human health and wildlife in the event of flooding that destroys the liner and fully exposes the tar, a distinct possibility given that the liner may not withstand a significant flooding event and SCE&G does not plan to monitor the site in the long term.³⁰

Given these significant environmental impacts, the Corps was required to authorize this activity under an individual permit versus the streamlined approval process under NWP 38. 33 C.F.R. § 330.1(d); *see id.* at 325.2(e)(1)(i). The Corps has violated the law by failing to prepare an individual permit here.

D. The Corps erred by authorizing a project that is neither “non-controversial” nor in the public interest under a Nationwide Permit.

A nationwide permit should also not be used in this case because the authorized activities are controversial and are not in the public interest. During the 2012 nationwide permits reissuance, the Corps specifically stated that NWPs authorize activities that “would likely generate little, if any, public comment if they were evaluated through the standard permit process with a full public notice.”³¹

Had this permit undergone a full public notice through the standard permitting process, it likely would have generated a significant number of public comments. During the 2013 public comment period about cleanup alternatives at the site *all* of the comments were in favor of removal.³² When removal options were abandoned in favor of a cap, approximately 100 Columbia residents attended a public meeting held in February 2017 to voice criticisms about SCE&G’s plan to leave the pollution in the river rather than clean it up. The vast majority of speakers at the meeting urged the DHEC to require SCE&G to completely remove the tar from the Congaree River to ensure that future generations can fully use and enjoy the River without interference from toxic tar. In fact, public outcry at the event was so intense that the Department promised to host another meeting before issuing its final approval. No meeting was held before SCE&G submitted its application to proceed under NWP 38 and the public is still waiting for the opportunity to weigh-in on this project. After the Corps issued its NWP Authorization, numerous news outlets ran stories about the authorization, generating hundreds of comments critical of the proposal and the Corps’ action on Facebook and news sites.³³

²⁹ Congaree Riverkeeper comments, Ex. 5; SCANA Services, Inc., *Final Engineering Evaluation / Cost Analysis* vi, 20-21 (Jan. 2013), <http://www.scdhec.gov/HomeAndEnvironment/Docs/Final%20EECA.pdf>.

³⁰ *Id.* at v; SCE&G Post-Construction Monitoring / Mitigation Plan (Dec. 2016); U.S. Army Corps of Engineers – Charleston District – Regulatory Division Pre-Application Meeting Request (Dec. 9, 2011).

³¹ 77 Fed. Reg. 10,184, 10,185 (Feb. 21, 2012).

³² Letter from DHEC to SCE&G regarding the “Removal Action Decision” (May 8, 2013).

³³ *See, e.g.,* Sammy Fretwell, *Feds OK plan to leave slick of polluted coal tar in SC river*, The State (Oct. 20, 2017), <http://www.thestate.com/news/local/article179911486.html>; Terry Ward *Coal tar from old gaslight company to be covered and remain in the Congaree River*, ColaDaily (Oct. 24, 2017), <http://www.coladaily.com/2017/10/24/coal-tar-old-gaslight-company-covered-remain-congaree-river/>. An Associated Press story was reprinted in multiple outlets, including http://www.postandcourier.com/news/feds-ok-plan-to-leave-slick-of-polluted-coal-tar/article_3cdf4170-54bc-5da9-8917-e2b30319ca71.html, and several television news programs ran stories, including <http://www.wistv.com/story/36653952/feds-ok-plan-to-leave-slick-of-polluted-coal-tar-in-sc-river>;

Clearly, the sanctioning of this project is controversial and not in the public interest. Even Corps officials have told other agencies that the project is controversial, but arbitrarily proceeded to grant NWP authorization anyway.³⁴

E. The Corps has violated general conditions applicable to NWP 38.

Further, the Corps has violated the general conditions applicable to all nationwide permits by failing to require compensatory mitigation for the loss of valuable freshwater habitat, and by failing to consider comments from the South Carolina Department of Natural Resources.

1. *The Corps has violated general condition 23 requiring appropriate mitigation.*

When the Corps permits an activity pursuant to Section 404, the permit is often conditioned upon the performance of mitigation, to compensate for any unavoidable loss of aquatic resources caused by the activity. Corps regulations establish standards and criteria “for the use of all types of compensatory mitigation . . . to offset unavoidable impacts to waters of the United States authorized through the issuance of Department of the Army permits pursuant to Section 404 of the Clean Water Act (33 U.S.C. § 1344) and/or Sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401, 403).” 33 C.F.R. § 332.1. General condition 23 sets out the Corps’ duty to determine the “appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.”

SCE&G—the party responsible for proposing appropriate mitigation—claims that no mitigation is necessary for this project because the liner already mitigates the impact of the coal tar by “isolating human contact from potentially accessible areas where the [tar-like material] may exist” and by “prevent[ing] further erosion in a dynamic river habitat while potentially increasing benthic habitat.”³⁵ This claim is unsatisfactory for two reasons. First, mitigation is intended to reduce the effects of the permitted activities on the River and its aquatic resources. Mitigation is not intended to reduce the problems and liability that the activities are designed to resolve. And mitigation is certainly not intended to reduce just a subset of the problems and liability the activities are designed to resolve—i.e. just the negative effects of the tar associated with human contact. The full impacts of SCE&G’s proposed activities must be taken into account when determining whether mitigation is warranted, including impacts from leaving some tar in the River unlined, impacts from covering stretches of streambed with a permeable liner and concrete blocks, and impacts from allowing tar constituents to continue to leach into sediment, surface water, and groundwater.

Second, even if mitigation *were* related to decreasing exposure to tar, SCE&G’s dismissal of any mitigation requirement now is undercut by its claim in 2013 that no mitigation was

<http://www.live5news.com/story/36650229/feds-ok-plan-to-leave-slick-of-polluted-coal-tar-in-sc-river>;

<http://wach.com/news/local/ok-plan-to-leave-slick-of-polluted-coal-tar-in-sc-river>.

³⁴ Email from Kelly Shotts, Section 7 Coordinator, to Kristin Andrade, Charleston District Corps of Engineers (Feb. 1, 2017) (“you mentioned controversy associated with the project”).

³⁵ SCE&G, Response to Comments, Nationwide Permit 38, Congaree River Sediments 4 (Jan. 23, 2017).

needed for the cofferdam proposal specifically because the cofferdam approach would permanently improve the aquatic environment:

This mitigation project is an environmental clean-up project . . . and is intended to remove approximately 40,000 tons of tar-like material[] and impacted sediment from the Congaree River. The removal of the impacted sediment will result in a permanent improvement to the aquatic environment in the project area. Upon completion of the removal activities in the Congaree River, the project area will be allowed to return to its original pre-impacted state. Therefore, this project is intended as the mitigation plan for the project area. Any adverse impacts to the river, boating public, aquatic and/or plant species will be minimal, temporary in nature and limited to the project timeline. Therefore, no additional mitigation plan is required.³⁶

Mitigation should not be required for hazardous cleanup activities that do not adversely impact aquatic resources and that return a project area to its “original pre-impacted state.” But if hazardous cleanup activities do not result in permanent improvement and instead allow adverse impacts to continue and create additional adverse impacts, mitigation must be required.

The Corps refuses to impose any compensatory mitigation because “[t]here will not be a permanent loss of waters of the U.S.” and because “the activity consists of construction of a structure that would not adversely impact aquatic resources.”³⁷ But compensatory mitigation is not tied only to permanent loss of waters, but to all of the direct and indirect effects associated with the activity. In fact, general condition 23 states that compensation is “normally” required for the “restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters” when NWP activities take place “in or near streams or other open waters.” As explained above, there are significant adverse effects associated with SCE&G’s project. The Corps should have rejected SCE&G’s failure to submit a mitigation proposal and imposed sufficient mitigation to ensure that the project results in no more than minimal individual and cumulative adverse effects.

2. The Corps has violated general condition 31(d) requiring consideration of sister agencies’ comments.

General condition 31(d) requires the Corps to “consider any comments from Federal and state agencies concerning the proposed activity’s compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity’s adverse environmental effects so that they are no more than minimal.” The South Carolina Department of Natural Resources submitted comments to the Corps on November 29, 2016 stating that the Department did not support authorization under NWP 38 unless certain concerns and questions were addressed. In addition, the Fish and Wildlife Service recommended that “the permit be held in abeyance until the [Department’s] issues have been addressed.”³⁸ SCE&G responded to some of the Department’s comments, but did so inadequately. For example, SCE&G did not provide

³⁶ SCE&G, Mitigation Statement (Aug. 7, 2013).

³⁷ Corps’ Memorandum for Record, Ex. 1 at 4, 6.

³⁸ Letter from Jay. B. Herrington, Fish and Wildlife Service Field Supervisor, to John T. Litz, District Engineer (Sep. 19, 2013).

requested information about how the sandbar would be removed, about how blocks would be placed, or about how the company planned to deal with flooding or high water during the construction process. SCE&G denied that other concerns were legitimate; it disagreed that this project would result in the loss of stream bed and stated that “[i]t is beyond the scope of this project to prevent scouring and streambed instability above and below the project area outlined in the permit request.”

For its part, the Corps never addressed the Department of Natural Resources comments in its Memorandum for the Record or indicated whether the SCE&G comments were sufficient to respond to the Department’s concerns. The Corps cannot claim to have “considered” the Department’s comments as general condition 31(d) requires.

III. LEGAL VIOLATIONS—EPA’S VIOLATION OF ITS DUTIES UNDER THE CLEAN WATER ACT.

EPA has not expressed any opposition to the Corps’ NWP 38 authorization. Pursuant to the U.S. Court of Appeals for the Fourth Circuit’s decision in *National Wildlife Federation v. Hanson*, 859 F.2d 313, 315-16 (4th Cir. 1988), “[i]t is quite clear that both the Corps and the EPA are responsible for the issuance of permits under the CWA and enforcement of their terms. . . . The EPA is ultimately responsible for the protection of [waters of the United States].” According to the Fourth Circuit, the Clean Water Act’s citizen suit provision “should be interpreted . . . to allow citizens to sue the Administrator and join the Corps when the Corps abdicates its responsibility” under the CWA. *Id.* at 316. Because it has sanctioned the Corps’ failures here and abdicated its ultimate responsibility to protect waters of the United States, EPA is also liable for the violations alleged herein.

IV. CONCLUSION

The Corps’ and EPA’s authorization pursuant to NWP 38 violates the CWA. If the Corps and EPA do not act within 60 days to correct the violations described in this letter, Riverkeeper will pursue these claims in litigation in federal court.

Pursuant to 40 C.F.R. §§ 135.2, 135.3, you are hereby notified of the name and address for the organization giving this notice:

Bill Stangler, Congaree Riverkeeper
P.O. Box 5294
Columbia, SC 29250
(803) 760-3357

In the meantime, if you have any questions or would like to discuss this matter, please feel free to contact the undersigned at 843-720-5270 or Southern Environmental Law Center, 463 King Street, Suite B, Charleston, SC 29403.

Sincerely,



Catherine M. Wannamaker
Elizabeth A. Jones

cc: The Honorable Jefferson B. Sessions, III, Attorney General of the United States
LTC Jeffrey Palazzini, U.S. Army Corps of Engineers, Charleston District
LTG Todd T. Semonite, Chief of Engineers, U.S. Army Corps of Engineers
Trey Glenn, Regional Administrator, EPA Region 4
David Wilson, Acting Director, SC Department of Health & Environmental Control
Tom Effinger, South Carolina Gas & Electric Director of Environmental Services