

November 16, 2020

Submitted via Regulations.gov and via email to nationwidepermits2020@usace.army.mil

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

Re: Comments in Response to Department of the Army, Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits, Docket No. COE-2020-0002

Dear Mr. Olson:

The undersigned 117 conservation, faith, and health organizations and businesses urge the U.S. Army Corps of Engineers (Corps) to withdraw its rushed Proposal to Reissue and Modify Nationwide Permits (NWP). This proposal would weaken clean water protections and fast-track greater destruction and degradation of water quality and aquatic habitat. On behalf of our millions of members and supporters, we urge the Corps to make full use of the standard five-year NWP revision cycle, postponing this NWP reissuance until 2022, to ensure that activities authorized under the NWPs cause only minimal harm, as required by the Clean Water Act.

The Corps of Engineers has needlessly cut short the five-year NWP revision cycle by two years, failing to rigorously assess the impacts of both the existing NWPs issued in 2017 and the proposed NWPs. Even so, it is clear that the NWPs as proposed would violate Clean Water Act requirements for NWP-authorized activities to cause no more than minimal impacts, individually or cumulatively. Proposed changes to NWP terms and conditions would roll back critical protections for clean water, especially smaller streams, compounding the harm from other recent roll backs, including but not limited to: the drastic narrowing of the definition of "Waters of the United States" protected by the Clean Water Act, undercutting states' and tribes' water quality certification authority under Clean Water Act Section 401, and gutting National Environmental Policy Act implementing regulations.

Instead of rushing to issue a NWP package, the Corps should adopt the recommendations below to ensure that activities authorized under the NWPs cause no more than minimal harm, as required by law:

- **Strengthen or at a minimum retain, rather than remove or weaken, limits to the extent of impacts of activities authorized under NWPs.** The proposed removal of the 300-linear-foot limit for streambed losses for NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 is unacceptable and would be especially harmful to smaller streams.¹ The Corps should instead reinforce the importance of the linear foot limitations on NWPs affecting stream beds. Across all NWPs, the Corps should at a minimum retain, and for high impact NWPs reduce, the existing acreage and linear feet limitations in the NWPs, and impose acreage and linear feet limits for the numerous NWPs that currently have no limits. NWPs that lack such limitations on their face allow unlimited impacts to waters of the United States in violation of Clean Water Act §404(e).

¹"For example, a project that impacts 300 linear feet of a 5-foot-wide stream would currently trigger a compensatory mitigation requirement, and an Individual Permit would be required if the impacts exceeded 300 linear feet. Under the Corps' proposal, that project could impact more than 870 feet of that same stream without triggering the need for an Individual Permit or compensatory mitigation." <https://www.natlawreview.com/article/updated-army-corps-proposes-to-reissue-nationwide-permits-two-years-ahead-schedule>

- **Strengthen the pre-construction notification (PCN) requirements to improve understanding and analysis of individual and cumulative impacts.** The Corps should require PCNs for all activities authorized under NWP, not weaken PCN thresholds as proposed for many NWPs. Without the detailed information in a PCN, decision-makers have no ability to assess whether the impacts of a proposed project are in fact minimal. Furthermore, the Corps should abandon the proposal to automatically allow projects to proceed if the District Engineer does not respond to a PCN within 45 days.
- **Eliminate the ability to use multiple NWPs to authorize individual segments of high impact linear projects, including pipelines and bank stabilization projects.** This violates the Clean Water Act §404(e) minimal impact limitation; and the Clean Water Act, National Environmental Policy Act, Endangered Species Act and other legal requirements for rigorous and transparent environmental reviews and safeguards to protect the nation's waters.
- **Rigorously assess the direct, indirect, and cumulative impacts of each NWP and the NWP program before issuing a final NWP package.** Without this information, the Corps cannot ensure that the NWPs will cause only minimal individual and cumulative impacts as required by law.

Comments on Individual Nationwide Permits

- We urge the Corps to withdraw **Proposed NWP A (Seaweed Mariculture Activities) and Proposed NWP B (Finfish Mariculture Activities)**. There is not sufficient information to inform whether or not the activities covered under the proposed NWPs would cause no more than minimal impacts to comply with Clean Water Act §404(e).
- As currently drafted, **NWP 3 (Maintenance)** authorizes activities that cause significant adverse impacts, violating Clean Water Act §404(e). The Corps is proposing changes that would further expand the adverse impacts of this permit, allowing maintenance activities on structures that did not have a permit at the time of construction. Our organizations urge the Corps to withdraw NWP 3 as formulated. An improved NWP for maintenance activities should, at a minimum, impose stricter impact limitations (both areal and linear) and restrict covered activities to those that are in fact similar in nature, as required by law.
- We urge the Corps to withdraw **NWP 12 (Oil or Natural Gas Pipeline Activities, currently NWP 12 Utility Line Activities), Proposed NWP C (Electric Utility Line and Telecommunications Activities), and Proposed NWP D (Utility Line Activities for Water and Other Substances)**, as they authorize activities that cause significant adverse impacts in violation of Clean Water Act §404(e), and instead require individual permits for these activities. At minimum, these NWPs should be further limited to ensure only minimal adverse impacts, and PCN requirements for all should be strengthened instead of weakened. Our organizations also oppose explicitly allowing multiple segments of the same pipeline to qualify for NWP authorization, in violation of the Clean Water Act §404(e) minimal impact limitation; and the Clean Water Act, National Environmental Policy Act, Endangered Species Act and other legal requirements for rigorous and transparent environmental reviews and safeguards.²
- As currently drafted, **NWP 13 (Bank Stabilization)** authorizes activities that cause significant adverse impacts, violating Clean Water Act §404(e). Our organizations urge the Corps to withdraw NWP 13 or at minimum modify the permit to: (1) significantly reduce the linear feet impact limit; (2) require

² The note states, in part: "For utility line activities crossing a single waterbody more than one time a separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization." NWP 12 currently allows use for multiple segments of the same pipeline through an inappropriate definition and interpretation of the term "single and complete linear project," and this definition and practice should also be prohibited.

PCNs; and (3) require that any applicant for a structural bank stabilization method must first demonstrate that a nature-based approach such as a living shoreline would be insufficient to stabilize the shoreline, and that the applicant's proposed method would be the least environmentally damaging practicable alternative.

- Our organizations urge the Corps to withdraw **NWP 17 (Hydropower Projects)**, as it authorizes activities that cause significant adverse impacts in violation of Clean Water Act §404(e), and instead require individual permits. At a minimum, the Corps should abandon the proposed change to increase from 5,000 kw to 10,000 kw the total allowable generating capacity for hydropower project eligible for authorization under NWP 17.
- Our organizations urge the Corps to withdraw **NWP 31 (Maintenance of Existing Flood Control Facilities)**, as it authorizes activities that cause significant adverse impacts in violation of Clean Water Act §404(e), and instead require individual permits. At a minimum, the Corps should: (1) impose strict impact limitations (both areal and linear) rather than continuing to allow unlimited impacts to waters of the United States, including both wetlands and streams; (2) restrict covered activities to those that are in fact similar in nature as required by law; and (3) not limit mitigation to one time only despite the fact that maintenance efforts could be carried out on multiple occasions causing adverse impacts each time. The impacts of NWP 31 are exacerbated by the fact that it also authorizes removal of vegetation from levees, which would instead be best addressed by a regional approach based on science and permitted individually, with public notice and comment as well as state and federal interagency consultation.

Comments on General Conditions

- Our organizations urge the Corps not to change the definition of effect in **General Condition 18 (Endangered Species)**, which would increase the likelihood of endangered species suffering adverse impacts from activities authorized under NWPs.
- **General Condition 23 (Mitigation)**, and each NWP as appropriate, should be revised to: (1) eliminate all language allowing the use of mitigation buy-downs to justify a finding that an activity has less than minimal impacts; (2) require that permit applicants take all steps practicable to avoid and minimize adverse impacts, as required by law; (3) eliminate the ability of the District Engineer to allow riparian area compensatory mitigation in lieu of compensatory wetland mitigation for wetland losses; and (4) make mitigation requirements consistent for all NWPs with both areal and linear impact thresholds. The Corps should also abandon proposed changes to: (1) allow District Engineers to waive compensatory mitigation requirements for NWP-authorized activities and (2) apply a weaker 1/10-acre threshold instead of a 300 linear foot threshold for streambed losses to require mitigation.

Conclusion

Our 117 organizations and businesses urge the Corps to withdraw the rushed Proposal to Reissue and Modify Nationwide Permits (NWPs). Instead, the Corps should continue the five-year NWP revision cycle and adopt the recommendations above in order to meaningfully assess NWP impacts and fix the mistaken approach to permitting activities that would be authorized through the NWP package as proposed. Please do not hesitate to contact Melissa Samet at sametm@nwf.org with regard to these comments.

Sincerely,

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