



Date November 16, 2020

William H. Graham, Major General
U.S. Army Deputy Commanding General for Civil and Emergency
Operations
Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314-1000

RE: Docket Number: COE-2020-0002 *Proposal To Reissue and Modify
Nationwide Permits*

Dear Major General Graham:

As the primary entities responsible for carrying out Clean Water Act (“CWA”) programs, states are uniquely positioned to provide input responsive to *Proposal To Reissue and Modify Nationwide Permits* (NWPS) and highlight the potential impacts to water quality programs nationwide. The Association of Clean Water Administrators (“ACWA”) is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers, who on a daily basis implement the water quality programs of the CWA. We write today to express several concerns with the proposal to reissue and modify nationwide permits (NWPS).

The NWPS are an important part of the regulatory system and enable efficient and effective regulatory review of construction and development activities that have a minimal individual and cumulative adverse environmental impacts. NWPS are permits used by the U.S. Army Corps of Engineers (USACE) to permit a wide range of activities that, upon incorporation of identified conditions and mitigation measures, have been determined to result in minimal adverse effects to the environment. NWPS are useful for project applicants and states because they streamline the permitting processes necessary for approval. However, the states have several concerns, such as the water quality certification process, removal of the 300 linear foot limit for loss of stream bed and pre-construction notice requirements (PCN) with the changes outlined in the proposal and offer the following comments.

General Comment All NWPS: Water Quality Certification Process

States are very concerned with the requirement that they certify the *proposed* nationwide permits rather than the traditional approach of certifying the *final* nationwide permits after the final rule has been published in the *Federal Register* as required by the Administrative Procedure Act. Under CWA

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Section 401, states have authority to certify that any applicant for a federal license or permit to conduct activity that may result in a discharge to navigable waters within the states' jurisdiction will comply with specific sections of the CWA and other water quality-related requirements of state law.

Asking states to concurrently review the proposed NWPS and asking them to certify the proposed NWPs, will pose a significant challenge for states and makes it difficult for some to fully evaluate the proposed permits and undertake an efficient and thorough water quality certification review. Similarly, this truncated schedule limits the states' ability to evaluate the proposed NWPS in the context of several recent CWA rule changes, including the new Navigable Waters Protection Rule/WOTUS. Because of this, some states would like the Corps to issue a nationwide extension on the time for certifying the NWPS.

States cannot fully evaluate and condition, if appropriate, the NWPS if they are limited to reviewing the proposed permits. The notice and comment period is designed to solicit input and expertise from the public and the regulated community such that the agency may revise the proposal to reflect this input or expertise. Moreover, requiring states to certify the proposed NWPS presumes there will be no changes made to the proposed permits based upon the comments received and will impact the ability of the states to fully evaluate and, if appropriate, condition these permits. Water quality certifications include conditions that require the applicant to follow certain best management practices and perform monitoring to ensure that water quality standards are met. If there are unavoidable impacts to waterways and/or wetlands, projects are required to provide mitigation for the loss of water quality functions. Additionally, the recent changes to the Section 401 Water Quality Certification process limiting states' ability to include modification clauses in their certifications to address project changes to ensure that a federally licensed or permitted project will meet a state's water quality requirements. Any changes in the NWPS between the notice of the proposed rule in the Federal Register and the notice of final rule may impact state 401 water quality certifications. States must be able to fully evaluate, and if appropriate, condition the *final* NWPs and urge the Army Corps to alter its approach. Some states are also concerned that removing the PCN will make it difficult for states to identify any violations and make it impossible for the USACE to ensure that the conditions of the permits are being properly implemented.

Eliminating PCN along with the recent changes in section 401 water quality certification reviews, raises several enforcement concerns for states. The new 401 rules preclude states from enforcing conditions included in water quality certifications as well as revisiting those conditions in final permits, and, therefore, the states must rely on the permitting/ licensing agency to ensure compliance with the conditions in the certification. However, it is not clear under what statutory authority a permitting/ licensing agency must enforce CWA conditions. According to a USACE presentation on the NWPs, the agency has interpreted its statutory authority to enforce water quality certification conditions as limited to section 404 of the CWA.

NWPS 29, 39, 40, and 51: Removal of the 300 Linear Foot Limit for Loss of Stream Bed

States that have headwater streams to our major river systems often observe bed widths that average less than 4 feet and are concerned with the proposal to remove the 300 linear foot limit for the loss of stream bed. Even though these streams may be narrow, they provide essential functions in the watershed. A reliance on a ½ acre, especially for smaller streams, could equate to thousands of linear feet of fill or wetland loss. This change may lead to large impacts to small streams that provide important baseline flows even during periods of drought or winter freeze. A ½ acre loss of stream bed has the potential to effectively eliminate the biologic, hydrologic and geomorphic functions of the stream. Moreover, allowing a ½ acre to be removed or lost will lead to fragmentation in the watershed and potentially total loss of a stream. For these reasons, the states request USACE keep the 300 linear foot limit as well as the ½ acre limit. If the 300 foot linear limit is maintained, states also request the opportunity to provide comment if the USACE maintains the waiver to the 300 linear foot limit. Some states also request that for these NWPs 29, 40 and 51 listed mitigation should be required for any impacts in excess of 1/10th of an acre for those activities in accordance with the General Condition 23 for Mitigation and District Engineer Decision Section 3.

NWPS 7, 13,14, and 53 Pre-Construction Notice Requirements

PCN requirements are important to ascertain if the NWPs are being used properly and states request that all NWPS require PCN for federal and federal permittees. PCN requirements enable states to ascertain whether water quality standards are being supported and to confirm if the action was implemented as permitted. Exempting federal agencies or their agents because they may employ environmental experts does not provide enough certainty for states to ensure that projects will not adversely impact the water quality standards of the state.

The types of projects authorized by the NWPS with changes to the PCN requirements could have significant cumulative impacts on nearby waterways or wetlands crossed by the project. A project may have multiple crossings that can impact hundreds of miles of a waterway or wetland system and without PCN there will be no way to evaluate if the NWPS is being implemented properly. Some states may consider including PCN requirements as part of the conditions included in their water quality certification decisions and other states have indicated that they may include PCN as part of the regional conditions they propose USACE adopt. Yet, it is unclear if such conditions would be permissible under the revised 401 water quality certification rule because they are not directly related to water quality. PCN is an important part of the process to ensure that NWPS are not used improperly and it should not be eliminated from the NWPS.

Conclusion

NWPS are an important regulatory tool that reduce permitting times and project costs and the states remain supportive of their use. As the USACE moves forward with finalizing

the NWPS, the states encourage the agency to consider the comments outlined here. While ACWA's process to develop comments is comprehensive and intended to capture the diverse perspectives of the states that implement these programs, EPA should also seriously consider the recommendations that come directly from individual states, interstates, and territories. Thank you again for the opportunity to provide pre-proposal recommendations on this effort. Please contact ACWA's Executive Director Julia Anastasio at janastasio@acwa-us.org or (202) 756-0600 with any questions regarding ACWA's comments.

Sincerely,



Tom Stiles
ACWA President
Director, Bureau of Water
Kansas Department of Health and Environment