

November 16, 2020

U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street N.W.
Washington, D.C. 20314-1000

Submitted via *regulations.gov* and via e-mail to nationwidepermits2020@usace.army.mil

Re: NACWA Comments on the U.S. Army Corps of Engineers' Proposal To Reissue and Modify Nationwide Permits (COE-2020-0002)

To Whom It May Concern:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to provide comments on the U.S. Army Corps of Engineers' (Corps) *Proposal To Reissue and Modify Nationwide Permits*, 85 Fed. Reg. 57,298 (Sept. 15, 2020). NACWA represents the interests of more than 330 public wastewater utilities and stormwater management agencies across the country that are responsible for treating and managing billions of gallons of the nation's wastewater and stormwater each day to ensure the continued protection of public health and the environment.

The proposed creation of separate nationwide permits (NWP) for critical water infrastructure and reclamation activities is supported by both technical and policy considerations, and NACWA strongly supports these new proposed permits. They will provide an important tool for NACWA's members to continue to ensure access to affordable and sustainable clean water for all Americans. Likewise, the proposed modifications to NWP 3 for maintenance of existing structures will help streamline efforts to improve the nation's aging infrastructure where environmentally appropriate. The Corps should finalize these changes to the NWP program as proposed.

However, NACWA is concerned that several of the proposed changes to the calculation of impacted "waters of the United States" (WOTUS), pre-construction notifications (PCNs) and mitigation requirements could eliminate important environmental safeguards necessary to ensure that NWPs will result in no more than minimal individual and cumulative adverse environmental impacts. NACWA asks that the Corps remove or modify these provisions prior to finalizing the new permits.

The Proposed Establishment of Separate NWPs for Water Infrastructure and Reclamation Activities is Supported by Important Science and Policy Considerations

The Corps' proposal would separate the existing NWP 12, which authorizes utility line activities, into three distinct NWPs: oil and natural gas pipeline activities (the new NWP 12); electric utility and telecommunication line activities (the new NWP C); and activities related to utility lines that convey water, sewage, and certain other substances (the new NWP D). The Corps is also proposing to create a new NWP – NWP E – for the construction, expansion, and maintenance of water reuse and reclamation facilities. NACWA strongly supports the proposed separation of NWP 12 and the creation of NWP E.

NACWA's members are committed to providing sustainable and affordable clean water for all, and the creation of dedicated NWPs for water utility lines and reclamation facilities would help streamline the construction and maintenance of critical U.S. water infrastructure where doing so would cause negligible impacts to WOTUS. It would also allow for NACWA's members to use a tailored permit that separates the work performed by clean water utilities from different linear projects which convey different substances, are subject to different standards, and are constructed in a different manner than water infrastructure.

Importantly, all of the projects undertaken by NACWA's members are designed to improve water quality and access to clean water services. In other words, the water infrastructure projects that could be performed by public clean water utilities under the newly proposed NWPs D and E are designed to result in, and are indeed constructed specifically to produce, net environmental benefits. Such activities can include repairing or replacing older sewer pipelines, modernizing collection systems, or increasing water reuse and reclamation activities.

Additionally, unlike other linear projects that may cross WOTUS, discharges from water infrastructure are typically comprehensively regulated under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) program and, where applicable, the Safe Drinking Water Act and various state permitting programs. Therefore, while, for example, spills from oil pipelines may be subject to NPDES liability, the pipelines themselves do not have outfalls subject to NPDES permits, whereas almost all publicly owned treatment works are proactively regulated under the NPDES program and as such have robust operation and maintenance programs in place to ensure the integrity of their pipes.

Moreover, public water and wastewater utilities often operate within a specific geographic area, serving cities, towns, or metropolitan areas. As such, while clean water infrastructure may cross state lines, projects tend to be limited in scope. By contrast, other linear projects currently covered by NWP 12 – particularly oil and natural gas pipelines – frequently entail interstate construction and multiple (sometimes many hundreds of) stream and wetland crossings, making their environmental impacts inherently different from those associated with activities related to clean water infrastructure.

The coronavirus pandemic has highlighted how important access to sanitation and safe, clean water is to all Americans. The Corps' proposal to streamline the activities critical to providing those services which have negligible environmental impacts under their own separate, well-supported NWP is both timely and appropriate. The Corps should finalize NWPs 12, C, D, and E as proposed.

The Proposed Changes to NWP 3 Will Help Streamline Projects Addressing the Nation's Aging Infrastructure

NACWA likewise supports the Corps' proposal to allow for the placement of new or additional riprap to protect existing structures under NWP 3, provided that the amount of riprap is the minimum necessary to protect the structure or ensure its safety. Maintenance of aging critical infrastructure located in streams or adjacent wetlands, such as culverts and bridges, is vital to preventing soil and sediment erosion and maximizing watershed preservation and stream health. However, many communities cannot afford to fully replace such infrastructure features. Therefore, the overall environmental benefits gained from streamlined maintenance of this infrastructure outweighs any negligible impacts from the placement of additional riprap.

The Proposed Changes to the Calculation of WOTUS Impacts, Pre-Construction Notifications, and Mitigation Would Eliminate Key Environmental Safeguards Needed to Ensure NWPs Will Have Minimal Environmental Impacts

The Corps is proposing to remove the 300 linear foot limit on stream impacts from multiple NWPs, and to instead rely solely on the ½ acre of wetlands limit to quantify the impacts to WOTUS permissible under the NWPs. According to the Corps, using acres instead of linear feet is "a more accurate approach to quantifying losses of stream bed and also serves as a better surrogate for losses of stream functions when a functional assessment method is not available or practical to use," and would "provide consistency across the numeric limits used by the NWP program."

The proposal fails to acknowledge, however, that elimination of the linear foot limit will result in significantly increased impacts to WOTUS authorized by the NWPs, particularly in smaller streams that are vital to overall watershed health. By way of example, a ½ acre limit would authorize a permittee to fill or culvert 2,178 linear feet of a 10-ft wide stream, or, even more strikingly, 4,365 linear feet of a 5-ft wide stream, which is a typical width for smaller streams. In addition to authorizing the filling of much longer lengths of stream, the proposed change also removes any incentives for many permittees to minimize stream impacts.

While an acreage limit is appropriate for calculating impacts to wetlands, lakes, and ponds, it is not appropriate for linear systems with flowing waters. Historic stream channelization, culverting, and filling frequently result in the degradation of downstream waters and are a major contributor to increased stormwater flows from impervious surface areas and decreased water quality nationwide. NACWA is concerned that the proposed elimination of the 300 linear foot limit on

stream impacts will therefore result in more than minimal individual and cumulative adverse environmental impacts in the watersheds its members operate in, and asks the Corps to not finalize its proposed removal.

The Corps is also considering exempting Federal agencies from submitting PCNs, and proposing to reduce the number of PCNs required for use of NWP 12. With respect to exempting Federal permittees, as well as certain state departments of transportation, the proposal provides as justification the fact that such agencies may employ environmental staff who will have reviewed projects to determine whether they qualify for an NWP.

However, not all agencies employ environmental experts, and even environmental staffers may not have expertise with the Clean Water Act Section 404 program, let alone the potential impacts of dredge or fill material on streams and wetlands. The Corps should consider modifying this blanket exemption to only encompass Federal, state, or local agencies that have established their credentials for application of the NWP program.

The Corps is also proposing to reduce the number of thresholds triggering the need for a PCN from seven to two under the new NWP 12 for oil and natural gas pipeline activities to reduce the burden on the regulated public and eliminate redundancy. This will result in fewer chances for the Corps to review projects and assign any necessary special terms or conditions to ensure that there will be minimal environmental impacts and, if necessary, impose appropriate mitigation requirements. Equally importantly for NACWA's members, the elimination of review by the Corps will result in less oversight of restoration plans and their implementation, which are critical for overall watershed health and reducing erosion. NACWA therefore urges the Corps to maintain the PCN thresholds included in the current NWP 12 in the newly proposed NWP 12.

Finally, General Condition 23 establishes a 1/10-acre threshold limit on impacts to wetlands and impacts to streams, separately, before triggering compensatory mitigation requirements. In other words, it seems to allow up to 1/10-acre of impacts to wetlands *and* 1/10-acre of impacts to streams from the same project before compensatory mitigation is required. To ensure that the impacts of the NWP program are minimal both individually and cumulatively, the Corps should require mitigation once there is a total of 1/10-acre of impacts to either streams or wetlands combined from a single project.

Additionally, as a housekeeping matter, the Corps should consider removing the term "pilot projects" from the proposed NWP 52. Water-based renewable energy generation projects have been tested, approved, and shown effective in the years since NWP 52 was originally established, and therefore removal of the "pilot project" limitation on the use of this NWP is appropriate.

Conclusion

NACWA appreciates the opportunity to comment on the Corps' proposed NWP package. The new NWPs D and E would help streamline critical water infrastructure improvements and maintenance as well as advance water reclamation and recycling development projects. These activities are specifically designed to improve and protect the nation's water quality and provide Americans with reliable access to clean, safe water, and the Corps' proposal appropriately recognizes the inherent differences between such projects and other linear activities (e.g., oil and natural gas pipelines).

Likewise, the proposed changes to NWP 3 will help permittees improve aging infrastructure and strengthen watershed health. The Corps should finalize these changes as proposed.

However, the Corps should reconsider the proposed changes to mitigation, PCNs, and threshold limits that could eliminate critical oversight and ultimately fail to ensure that the NWPs will cause only minimal individual and cumulative environmental impacts.

Thank you for your consideration of these comments. Please contact me at AAspatore@nacwa.org with any questions.

Sincerely,

A handwritten signature in blue ink that reads "Amanda E. Aspatore".

Amanda Aspatore
Chief Legal Counsel