



ASSOCIATION OF STATE FLOODPLAIN MANAGERS, INC.

8301 Excelsior Dr., Madison, Wisconsin 53717

Phone: 608-828-3000 | Fax: 608-828-6319 | asfpm@floods.org | www.floods.org

Executive Director
Chad M. Berginnis, CFM

Deputy Director Operations
Ingrid D. Wadsworth, CFM

Director Emeritus
Larry A. Larson, P.E., CFM

U.S. Army Corps of Engineers

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Docket Number COE-2020-0002

Re-Issuance and Modification of Nationwide Permits

On behalf of the Association of State Floodplain Managers, we appreciate the opportunity to submit comments on the Proposal to Reissue the Nationwide Permits and General Conditions. Nationwide permits (NWP) are an important tool to streamline Clean Water Act, Section 404 and Rivers and Harbor Act, Section 10 permitting as long as it does not come at the detriment of critical ecosystems. However, the process used to solicit and evaluate comments is ill-conceived and rushed, and many of the proposed changes would weaken clean water protections and allow greater destruction and degradation of water quality and aquatic habitat.

Process and General Concerns

Through this process, the United States Army Corps of Engineers (USACE) has cut the five-year NWP revision cycle by two years. This has not allowed USACE sufficient time to rigorously assess the impacts of both the existing NWPs issued in 2017 and the proposed NWPs. Therefore, this proposal lacks data on past impacts of NWPs and an analysis of the proposed changes. Without this information, the Corps cannot ensure that the NWPs will cause only minimal individual and cumulative impacts as required by law.

USACE must rigorously assess the direct, indirect, and cumulative impacts of each NWP and the NWP program before issuing a final NWP package. This proposal lacks data on past impacts of NWPs and an analysis of the proposed changes. Without this information, the Corps cannot ensure that the NWPs will cause only minimal individual and cumulative impacts as required by law.

The NWP rule should not be finalized until the assessment of the implementation of the 2017 NWPs is complete and the impacts of the proposed revisions are assessed.

The standard traditional five-year cycle allowed the states and tribes to plan, gather data and initiate both internal and external coordination in preparation for the review process. *Given the unexpected initiation of an off-cycle rule revision process, USACE should extend the review period to 180 days to provide adequate time to review the proposed rule and associated draft permits and provide informed comments.*

Additionally, the proposed process, to concurrently comment on the proposed rule and certify the permits during the same period, is deeply flawed. These joint tasks require certifying agencies to review and condition permits that are not yet final. The standard practice for the NWP certification process is to use an initial rulemaking and comment period, followed by certification of the permits in the final rule

Dedicated to reducing flood risk and losses in the nation.

Chair

Carey Johnson
Assistant Director
KY Division of Water
502-782-6990
carey.johnson@ky.gov

Vice Chair

Shannon Riess, CFM
Floodplain Manager
FL Div. of Em. Mgmt.
850-815-4513
shannon.riess@em.myflorida.com

Treasurer

Glenn Heistand, P.E., CFM
Sen. Hydraulic Engr.
IL State Water Survey
217-244-8856
heistand@illinois.edu

Secretary

Stacey Ricks, CFM
State NFIP Coordinator
MS Emergency Mgmt. Agency
601-933-6605
sricks@mems.ms.gov

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months later. The current process requires states and tribes to certify permits before knowing what changes may be made based on comments submitted on the draft rule. Subsequent changes that take place to the permits after certification may result in missing or inappropriate conditions and leave the certifying agencies with no opportunity to remedy a deficient certification. *The rule revision and permit certification should be separated into two processes and the deadline for certification of the Nationwide Permits should be delayed until the rule is final and the permits are no longer in draft form.*

The proposed rule allows federal agencies to use select NWP without submitting pre-construction notifications (PCNs) for USACE review creates separate systems for federal and non-federal permittees which in turn imposes a heavier burden on non-federal permittees without reason. USACE acknowledges there is no evidence that there is substantial difference in proficiency between federal and non-federal permittees to achieve environmental compliance. The proposal creates greater potential for cumulative impacts from federal projects and shifts environmental safeguards from a pre-construction permitting authority to an enforcement action that relies on a district engineer exercising discretionary authority against another federal agency. *The current PCN process should be retained for all federal agencies.* All NWPs should require a PCN.

The proposed rule does not allow a state to enforce a condition of a federal permit without independent state law grounds. However, USACE indicated that they do not have the authority to enforce a state condition. This results in the certifications process being irrelevant and risks substantial environmental and public safety harm. States and tribes should have the ability to enforce their own conditions if the Corps does not enforce them, so that environmental impacts do not occur as an unintended consequence of the permitted action. *This conflict must be addressed as states/tribes must be provided with the ability to have their state/tribal conditions enforced by one party or the other.*

Comments on Individual of Classes of Nationwide Permits

Streambed losses (NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51 and 52) – The proposal to change from a linear foot to acreage standard eligibility for NWPs related to streambed losses will result in significant additional loss of streams, especially smaller streams, without requiring pre-construction notice (PCN), public input, or mitigation; likely resulting in major losses of stream habitat, ecological functionality and a concomitant impact on fish and wildlife resources. USACE cites studies by Doyle et al. (2015) and Lave (2014) in justifying this change. However, the authors of this scientific research have expressed that the Corps' interpretation of their research is inaccurate and does not reflect either their science or common findings on this topic. *The current 300-linear foot should be retained as the threshold in the final rule.*

Allowing use of multiple NWPs for high impact linear projects (NWP 12) – The proposal to use multiple NWPs to authorize individual segments of high impact linear projects, including pipelines and bank stabilization projects violates the Clean Water Act minimal impact limitation and other legal requirements for rigorous and transparent environmental reviews and safeguards to protect the nation's waters through the Clean Water Act, National Environmental Policy Act, and the Endangered Species Act. This would likely result in a substantial proportion of new pipeline mileage in the United States being subject to minimal or no review by USACE. Many pipelines shorter than the 250-mile threshold are likely to have the same or similar cumulative impacts to longer pipelines and may have more river,

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stream and wetland crossings on a per mileage basis than longer pipelines. *If USACE establishes a mileage threshold for the projects covered under NWP 12, it should be no greater than 25 miles.*

Bank Stabilization (NWP 13) – This draft rule authorizes activities that cause significant adverse impacts, violating Clean Water Act §404(e). The use of living shorelines and other nature-based solutions, as opposed to stand alone or in conjunction with grey infrastructure solutions can provide results that are environmentally beneficial and can be more sustainable. *NWP 13) should be withdrawn or at minimum modify the permit to: (1) significantly reduce the linear feet impact limit; (2) require 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.*

Maintenance of Existing Flood Control Facilities (NWP 31) -- We urge the Corps to withdraw this NWP as it authorizes activities that cause significant adverse impacts in violation of Clean Water Act §404(e). USACE should instead require individual permits. Additionally, the range of adverse impacts of such activities can result in impacts to natural and beneficial floodplain functions, including adjacent and downstream impacts of floodwaters on communities and properties. At a very 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 additional 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.

ASFPM appreciates the opportunity to comment on the Corps' Proposal to Reissue and Modify Nationwide Permits (Docket ID No: COE-2020-0002). Please do not hesitate to contact me should you wish to discuss these comments.

The ASFPM and its 37 Chapters represent over 19,000 state and local officials as well as other professionals engaged in all aspects of floodplain management and flood hazard mitigation including management of local floodplain ordinances, flood risk mapping, engineering, planning, community development, hydrology, forecasting, emergency response, water resources development and flood insurance. All ASFPM members are concerned with reducing our nation's flood-related losses. More information on the Association, its 14 policy committees and 37 State Chapters can be found at: www.floods.org.

Respectfully,



Chad Berginnis, CFM
Executive Director