November 13, 2020

United States Army Corps of Engineers
Attn: CECW-CO-R
441 G Street, NW
Washington D.C. 20314 -1000

Submitted to http://www.regulations.gov

RE: Docket ID No. COE-2020-0002, NTWC Comments on "Proposal to Reissue and Modify Nationwide Permits," 85 Fed. Reg. 57298 (Sept. 15, 2020)

To Whom It May Concern:

The National Tribal Water Council (NTWC) was formed by the U.S. Environmental Protection Agency (EPA) to provide EPA with technical input from Indian Country to strengthen EPA's coordination with Indian tribes, and to allow EPA to better understand issues and challenges faced by tribal governments and Alaska Native Villages as they relate to EPA water programs and initiatives. The NTWC provides tribes and associated tribal communities and tribal organizations with research and information for decision-making regarding water issues and water-related concerns.

Further, the NTWC advocates for the best interests of federally-recognized Indian and Alaska Native tribes and tribally-authorized organizations in matters pertaining to water. The NTWC also advocates for the health and sustainability of clean and safe water, and for the productive use of water for the health and well-being of Indian Country. The NTWC takes its role seriously and has provided input to EPA on many water issues since the Council's inception.

On behalf of the NTWC, I am pleased to submit comments on the U.S. Army Corps of Engineers' (USACE) "Proposal to Reissue and Modify Nationwide Permits," 85 Fed. Reg. 57298 (Sept. 15, 2020). This action proposes to modify 32 of the existing 52 Clean Water Act (CWA) § 404 Nationwide Permits (NWPs) to comply with President Trump's Executive Order 13783 of March 28, 2017, by "reduc[ing] the regulatory burden on entities that develop or use

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domestically produced energy resources." 85 Fed. Reg. at 57300. It also proposes that the USACE will re-issue all of its NWPs, including the 20 that will remain the same, two years ahead of schedule. *Id*. Finally, USACE is proposing revisions to 11 of the 32 NWP General Conditions and to several of the NWP definitions.

In addition, the USACE district offices have provided notice of their proposed regional conditions for the NWPs, and comments are due shortly after these comments (within 45 days of the district offices' notices).

In addition to the specific comments and recommendations listed below, the NTWC calls on the USACE to withdraw this Proposal to give the incoming new administration the opportunity to re-evaluate the proposed changes to the NWPs. Furthermore, the NTWC objects to this Proposal in whole because the USACE has utterly failed to comply with Executive Order 13175, which requires government to government consultation with federally recognized Indian tribes - including the members of the NTWC - when agency action will have a substantial impact on tribal resources, governance and interests. There can be no doubt that the changes to the NWPs will have a substantial impact on tribes.

I. NTWC Analysis of Potential Impacts from Proposed Revisions to NWPs, General Conditions, and Definitions

A. Concerns Regarding Proposed Revisions to NWPs

1. General Concerns with Timeframes

Typically, USACE reissues its NWPs every five years. USACE last reissued the NWPs in 2017, with the NWPs scheduled to remain effective until 2022. In this case, however, the USACE began its review early, and will finalize its proposed NWP changes and reissue all the NWPs by the end of 2020, which is two years ahead of schedule.

In addition, as noted above, the USACE district offices have already provided notice of their proposed regional conditions for the NWPs, and comments on their proposals are due shortly after these comments are due.

As discussed in our comments on the revised Waters of the United States (WOTUS) rule, tribes and Alaskan Native Villages (villages) have limited resources as it is, for a variety of reasons (e.g., limited economic development, limited revenues, limited tax base, and so forth). As a result of the extremely fast-tracked process taking place with this NWP rulemaking, many tribes and villages are hindered in their ability to meaningfully engage with USACE prior to USACE issuing a final NWP rule that may significantly impact tribal waters, treaty resources, and other trust resources.

Furthermore, the USACE has not engaged in the appropriate degree and level of consultation with affected Indian Tribes and Alaska Native Villages, as is required under Executive Order 13175 and consistent with the federal government's trust responsibility. There are 69 tribes with treatment as state status for purposes of setting water quality standards under

the Clean Water Act. While these tribes will retain their authorities under this Proposal, the majority of tribes do not have such CWA authorities, and therefore are dependent on the USACE and EPA to protect their waters and resources. Yet, without the requisite tribal consultation to hear directly from tribes on this Proposal - and especially considering the proposed changes to General Condition 17, affecting tribal resources - this proposed action is deficient both procedurally and substantively.

2. Streambed Losses

The NTWC is specifically concerned with the proposed modifications to NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 that would remove the existing 300 linear foot limit on streambed losses and particularly for utility and road corridors, mining, residential, commercial and institutional developments, and renewable energy development activities. Our concern arises because, in the case of narrower streams, upwards of many thousands of linear feet could be lost, but the loss would still fall under the proposed new half-acre limit. The width of a stream does not determine its significance to tribes or villages, nor indeed to the surrounding environment and ecosystem.[1]

3. Pre-Construction Notification

NTWC also is concerned with proposed changes to remove a number of thresholds that would trigger pre-construction notifications (PCNs) on pipelines, mining, hydropower, and residential, commercial and institutional development activities. For example, under the proposed revisions to NWP 12 for oil and natural gas pipelines, USACE would reduce the number of triggers for filing a PCN from seven to two, namely, if the activity requires notifications under Rivers & Harbors Acts § 10, or if there is a loss of greater than 1/10 acre of a WOTUS. *See also,* proposed revisions to NWP 48 (commercial shellfish mariculture activities). This revision could greatly expedite the permitting process without leaving time for USACE to perform a thorough review of the proposed activity. As we do not know how long the review process generally takes because that information is not provided in the Federal Register preamble for any of the NWPs, we cannot know the precise ramifications of this change, but we fear they may be considerable.

The NTWC notes that the PCN requirement is one of the "tools" referenced as providing assurance that the proposed removal of the 300-foot limitation from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 will not result in any more than "minimal adverse environmental effects," that is, the 1/2-acre limit for losses of non-tidal waters of the United States. Specifically, a PCN is required for all activities authorized by the ten NWPs that would lose the 300 linear foot limit, with the exception of NWP 51, which already has and will retain a 1/10-acre PCN threshold. However, with a reduction in the number of factors triggering a PCN, the efficacy of this tool

[1] By removing the existing 300 linear foot limit on streambed losses that currently applies to NWPs 29 (Residential Developments), 39 (Commercial and Institutional Developments), 40 (Agricultural Activities), 42 (Recreational Facilities), and 43 (Stormwater Management Facilities), the USACE has gone far beyond the directive of Executive Order 13783 to reduce the regulatory burden on entities that develop or use domestically produced energy resources.

may be significantly diminished. It also may be diminished due to the proposed revision to General Condition 32, discussed below, which would allow a project to proceed automatically if USACE does not respond to a PCN within 45 days.

Other "tools" that USACE references as safeguards include:

- Authority of division engineers to impose regional permit conditions to restrict use of NWPs to address regional aquatic resource concerns; and
- Authority of district engineers to add activity specific permit conditions to address project specific aquatic resource concerns.

It is impossible for the NTWC to assess whether the above tools will have the teeth necessary to in fact ensure that "no more than minimal adverse environmental effects" will occur, or indeed whether USACE will use those tools. As discussed in this letter, the USACE undertakes many actions under its CWA § 404 authority to which the tribes and villages are not privy. Five years from now, will the tribes and villages have information and data from the USACE indicating when and how division or district engineers exercised the authorities listed above? Will it be possible to say with any certainty that the "tools" were effectively used?

USACE also asks for comments on whether federal government agencies should have to submit PCNs, like everyone else, or whether they may proceed with activities covered under NWPs without doing so in order to satisfy the "2018 Legislative Outline for Rebuilding Infrastructure in America." 85 Fed. Reg. at 57303. It is clear from the CWA itself that federal agencies must submit PCNs. CWA § 313 states in no uncertain terms that all federal agencies "shall be subject to, and comply with, all federal, state, interstate, and local requirements respecting the control and abatement of water pollution in the same manner, and to the same extent, as any nongovernmental entity."

4. Hydroelectric Development

While the NTWC supports initiatives of individual tribes or villages to develop their own hydropower resources, language is needed in NWP 17 (Hydroelectric Development) that is explicitly protective of the fisheries important to so many tribes and villages.

B. Changes to General Conditions

1. General Condition 17

General Condition 17 (Tribal Rights) specifies that "[n]o NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands."

"Protected tribal resources" are in turn defined in the current version of the NWP as "[t]hose natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources."

The USACE is proposing to revert back to the 2012 version of General Condition 17, which omits references to protected tribal resources and tribal lands and states instead that "[n]o activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights." No explanation is provided for this proposed change, other than generalities about eliminating "confusion" (for which no evidence or past history is presented) and "redundancy." 85 Fed. Reg. at 57350. Moreover, this proposal apparently was triggered by "some commenters," *id*., but the preamble does not indicate whether these were tribal commenters or, more likely, potential permit applicants.

As a tribal organization, NTWC's comments should carry particular weight with USACE on this provision, and NTWC believes this change would reduce the consideration given to impacts on tribes and villages and their resources. The 2012 language limits that consideration to tribal rights, which does not necessarily include all the tribal resources currently defined in the NWPs, such as certain cultural or subsistence resources, nor all tribal lands. Additionally, the 2012 language would likely reduce the instances of consultation with Indian tribes on other important cultural, economic, and traditional interests.

Moreover, the existing standard of "no more than minimal adverse effects" in the current version of General Condition 17 is consistent with the overall standard for the NWPs discussed above, and so is more appropriate than the 2012 language based on impairment, a term that is not defined.

As stated above, the USACE's failure to properly consult with tribes and Alaska Native Villages is violative of EO 13175. NTWC objects to and opposes the changes proposed, and urges the USACE to initiate consultation with tribes.

2. General Condition 32

NTWC is also greatly concerned with the proposed revision to General Condition 32, which would allow an applicant to proceed with a project if no response regarding a PCN is received from the District Engineer within 45 days. This proposal would provide a clear path to project initiation and even completion without regulatory review. It relies entirely on the district engineer to respond to a PCN in a timely fashion, but as noted above in the discussion of NWP 21, USACE provides no information as to the percentage of PCNs to which it responds within a 45-day window. Thus, it is impossible to determine whether this 45-day window is long enough to protect regulated waters, or indeed, whether district offices might take advantage of this provision to forgo review.

C. Proposed Revisions to Definitions

The proposed revisions to the NWPs and General Conditions come on the heels of a severe reduction in the scope of the CWA § 404 permit requirement, due to the revised, much narrower definition of WOTUS published in the Federal Register on April 21, 2020. 85 Fed. Reg. 22250. The NTWC believes that this narrowing of the definition is a detriment to waters valued by many tribes and villages.

As a result of the WOTUS rule, USACE is proposing to delete the definition "ephemeral stream," since dredge and fill activities affecting ephemeral streams will no longer be subject to the permit requirement in CWA § 404. However, USACE goes farther than this by proposing to delete the definition of "intermittent stream" as well, even though many intermittent streams are still treated as WOTUS under the new rule.

USACE also is proposing to remove the definition of "protected tribal resource" on the assumption that it will be changing General Condition 17 pertaining to Tribal Rights. As discussed above, NTWC is strongly opposed to any such change being made.

D. Potential Impacts of Proposed Changes

The proposed changes are not yet in effect. Therefore, the NTWC can only try to anticipate what they may yield as far as potential impacts. Regardless, there can be no doubt that the proposed changes will have a substantial impact on tribal waters, treaty, trust and cultural resources. The following examples illustrate concerns that are based on current and past use and abuse of environmental permitting authority.

First, we are aware that certain projects with the potential to cause significant environmental impacts have undergone insufficient and in some cases virtually no environmental review. The proposed revisions removing the 300-linear foot limitation are likely to exacerbate this problem. For example, it seems likely that tailings basin or mine expansions could be more easily permitted if the 300-foot limitation is lifted. While the mine project may have been permitted under a site-specific permit, incremental expansions would not necessarily be permitted that way and instead project proponents may make use of NWPs. A tribe or village may have significant concerns about the environmental impacts of such projects, but if the permitting process is streamlined or, in some cases, nonexistent, the tribe or village will be left without any means of input into the process.

Another illustration of potential impacts relates to downstream impacts from a developer's use of NWPs 29 (Residential Developments) or 39 (Commercial and Institutional Developments). In these instances, waters upstream from a tribe's or village's trust or fee land holdings could be impacted by development-related fills permitted under the proposed changes and in particular the removal of the 300-foot limitation. The development could result in disturbance of long reaches of one, or multiple, waters that contribute to flow through downstream tribal or village lands, resulting in environmental impacts to water quality, subsistence use of water, or cultural water use. Under the proposed changes, such a development might proceed without USACE review of the PCN for the relevant NWP.

E. Meaningful Consultation Should Occur on the Reissuance and Modification of the NWPs and General Conditions

The USACE claims to interact with tribes and villages on a government-to-government basis, guided by its trust responsibility. This obligation is recognized in Executive Order 13175, which requires USACE to engage in full and meaningful consultation regarding "the

development of regulatory policies that have tribal implications."[2] USACE therefore is required to consult with tribes regarding its proposed revisions to the NWPs, since several of these proposed changes will limit protection for rivers, streams, and wetlands that are critical for tribal drinking water, agriculture, cultural resources, and other tribal water-dependent resources, including fish and wildlife.

Despite the likely substantial consequences of USACE's proposed actions, the USACE has not conducted meaningful consultation with tribal nations and villages. The proposed rule was published in the Federal Register on September 15, 2020 and the official comment period ends on November 16, 2020. To date, the NTWC is not aware of any individual consultations that have occurred with tribes or villages on the proposed modifications.

Even if the USACE believes that it has met its consultation obligations by having provided tribes and villages with notice of the pre-publication version of its proposal (released on August 3, 2020), and by publication of the proposed rulemaking in Federal Register on September 15, 2020, these actions do not satisfy USACE's obligations in any meaningful way.

First of all, the information that the USACE provided in those documents is sorely lacking in transparency. No details are provided about the permitting process, the numbers of applications, the availability of district office staff, and many other factors that would determine the impacts of the proposed changes, as discussed in part above.

In fact, as a general policy the USACE should both track and make its NWP-related permitting actions, including its PCN responses and documentation, available to the public, complete and as issued to the applicant in a timely manner, preferably within a few weeks of issuance. As it is, the current USACE NWP system does a better job serving permit applicants and facilitating development than protecting rivers, streams, wetlands, and adjoining and downstream waters from degradation.

USACE representatives have indicated that project applicants and proponents deserve to have their applications treated confidentially to respect their privacy. The representatives have also indicated that it is incumbent upon tribes and villages to seek out project information through USACE district staff. This presumption is unrealistic; there is no way that tribal and village staff or members will somehow be aware of all projects of interest. It assumes that these individuals will have the personal relationships with USACE district representatives that would foster such an open exchange. Even if that were the case, every time there is staff turnover on either side, the necessary relationships, if they ever existed, would need to be renewed, which cannot happen immediately if at all.

A further concern arises regarding USACE staff capacity. Does the USACE staff have the capacity necessary to respond to inquiries from numerous tribes and villages pertaining to CWA § 404 applications and actions including NWPs and PCNs and run reports, and provide

[2] "USACE Tribal Consultation Policy" spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf.

other information, so that the tribes and villages are aware of USACE permitting matters of interest to them?

The USACE needs to promote and enable public access to the databases and other documents that it uses for its own tracking and action on applications. The USACE's role in implementing a permitting program that is intended to be open to the public, as embodied in the Clean Water Act and Section 404 in particular, is completely at odds with the level of secrecy and absence of transparency currently practiced by the agency in certain of its CWA § 404 activities.

The USACE's lack of transparency to tribes and villages in substantive and procedural concerns, the latter of which relate to the non-disclosure of critical information needed to evaluate the proposed changes. Lack of access to such critical information weakens the opportunity for "meaningful and informed" consultation with tribes and villages. In accordance with USACE policy, full and meaningful consultation should occur with tribal nations prior to issuance of the final rule.

Since no meaningful consultation has occurred, and given the substantial tribal interests affected here, NTWC requests that this Proposal be withdrawn and USACE should engage in appropriate government to government consultation with tribes to address tribal concerns on the proposed NWP revisions.

F. Recommendations and Conclusion

The USACE has responded to President Trump's E.O. 13783 by proposing to modify a large number of the 2017 NWPs and to finalize these changes two years ahead of schedule. The comments above highlight the proposed revisions that are of the gravest concern to the NTWC:

- removal of the 300-foot linear limit on streambed losses for mining, commercial and institutional developments, and renewable energy development activities;
- the multitude of changes being proposed to the PCN process; and
- the revisions to General Condition 17 concerning Tribal Rights.

Given the impending change of administration, and the major concerns identified by the NTWC, the NTWC requests that USACE withdraw this Proposal and maintain the 2017 language that establishes the 300-linear foot limit on streambed disturbance for certain categories of NWPs that support energy development. Further, the NTWC urges the USACE to expressly preserve the 2017 General Condition 17 definition of "Protected Tribal Resource."

The NTWC objects to the USACE's proposal for early reissuance of the 2020 NWPs, and to the fast-track schedule taking place with these revisions. The process itself violates the agency's trust obligation to tribes and villages and restricts their opportunity to evaluate impacts to tribes' and villages' trust resources through the CWA § 401 certification process. The NTWC asks that the USACE fulfill its obligation to consult directly with tribes and villages prior to the issuance of a final rule.

Further, the NTWC urges the USACE to implement a formal initiative that will fund an independent third party to collect the necessary data for and complete a quantitative, unbiased, peer-reviewed assessment of impacts resulting from the current and future rounds of NWP changes. This review should include an evaluation of the USACE methodology for assessing cumulative impacts to determine if the methodology is working to protect WOTUS in the long term. The commission should also be charged with identifying what changes need to be made to the methodology if it is not working to protect WOTUS.

As discussed above with respect to the proposed revision to General Condition 32, the USACE fails to provide sufficient information to determine whether district offices can in fact respond to PCNs within 45 days. It is conceivable that under the present or a future administration the USACE may be under-resourced or understaffed, or that CWA-related USACE resources are allocated to areas other than for response to PCNs. The NTWC requests that the USACE issue a publicly accessible annual report or database that indicates, for each of its districts, the percentage of PCNs submitted for which there was a response, along with data that identify the applicant, location of activity, type of activity, relevant NWP(s), the response provided, etc., so that full transparency on USACE PCN-related action or inaction is provided to the public.

The September 16, 2020, Federal Register notice states that:

> Nationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities in federally jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts (33 CFR 330.1(b)).

Such is far from the case as NWPs are used to permit projects that have more than minimal adverse environmental impacts. For example, NWP 12 is used to permit hundreds or even a thousand or more stream crossings for a single project, such as the Mountain Valley Pipeline, since each crossing is viewed individually by the USACE. This practice would be somewhat curtailed by the proposed limit of <u>250 miles</u> for utilization of NWP 12, but the associated environmental impacts would still be extensive. Moreover, the removal of the 300-foot limitation on stream bed disturbance for numerous NWPs will quite likely have profound impacts at many locations with the potential for repeated injury, over a period of decades and longer, to a given water, as the USACE cumulative impacts analysis appears to consider only a 5-yr period. Further the analysis appears to divorce a water from its watershed and environmental impacts that are contemporaneous but spatially distributed yet relatable at a watershed scale may be missed. The NWP introductory language should be modified to indicate that certain of these permits have been and are being utilized for projects having large geographic extents and significant cumulative impacts on multiple individual waters and across watersheds.

The NTWC urges the USACE to withdraw its proposed NWP changes that will lessen the protection afforded to waters under CWA § 404. These changes could impair waters that are vital to tribal nations and Alaska Native Villages' cultures, health, well-being, and subsistence.

Thank you for your consideration of the NTWC's concerns and recommendations in this matter. Please address your written correspondence concerning our comments and recommendations to the attention of Elaine Wilson, NTWC Project Manager, at Elaine.Wilson@nau.edu.

Sincerely,

Ken Norton, Chair
National Tribal Water Council

Cc: Kate Graf, USEPA Office of Water