



Environmental Council of the States

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

Dear Major General Graham:

Members of the Environmental Council of the States (ECOS) appreciate the opportunity to provide comments on the U.S. Army Corps of Engineers (USACE) *Proposal To Reissue and Modify Nationwide Permits* (NWP). Our members believe that NWPs are important regulatory tools that can streamline permitting processes while also incorporating conditions that mitigate negative environmental impacts. States are supportive of efforts to streamline NWPs, but have concerns to share regarding this proposal.

ECOS asks USACE to make allowances for the challenges created for states by the timing of the *Proposal To Reissue and Modify Nationwide Permits*, reconsider the waiving or changing of some Pre-construction Notification (PCN) requirements, ensure that state conditions included in Clean Water Act (CWA) Section 401 certifications are enforceable, and keep the 300 linear foot limit for the loss of streambed to better protect small streams.

States have expressed concerns with the requirement that they certify nationwide permits based on the proposed, rather than the final permits, and that they do so in a time period overlapping the comment period for the proposal to reissue and modify those permits. This creates several challenges for states:

- Some states may be unable to fully evaluate the proposed permits and complete a thorough water quality certification review within the 60 days provided (for example, many states cannot comply with public participation requirements in that time period).
- The time period may not be sufficient for states to evaluate impacts of the proposed NWPs in conjunction with other recent rules, including changes to the CWA Section 401 process and the Navigable Waters Protection Rule.
- By requiring CWA Section 401 certifications on a draft permit, to the extent that any changes are incorporated into the final NWPs, those changes could impact the state certifications.

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The proposed NWPs have also raised concerns by changing or waiving some PCN requirements for federal agencies. PCN requirements help states determine whether or not water quality standards are being met, and therefore should be included in NWPs. In addition to the proposed changes to PCN requirements, due to recent changes to the CWA Section 401 rules, it is unclear that it would be allowable for states to include PCN requirements in their conditions to water quality certifications. These changes could allow significant cumulative impacts to waterways or wetlands affected by projects authorized by the NWP, and also limit the ability of states to ensure that state water quality standards are being met by those projects.

Some states, particularly western ones, oppose the removal of the 300 linear foot limit for the loss of streambed. Because many perennial streams in those states have average widths of under 4 feet, using a ½ acre of streambed limit instead could lead to thousands of linear feet of fill or wetland loss, and could potentially fragment watersheds or cause total loss of streams. Additionally, shifting from the linear foot threshold to the proposed acreage threshold would introduce uncertainty and costs in some long-standing state mitigation programs, which use linear feet for mitigation calculations. States encourage USACE to keep the 300 linear foot limit in addition to the proposed ½ acre limit.

Some states operate under USACE issued State General Permits instead of NWPs. USACE relies on NWP stream thresholds, water certifications, and PCN processes to update its State General Permits, meaning that the proposed changes to NWPs will raise the same conflicts and issues when the State General Permits are updated.

While states are supportive of the use of NWPs, ECOS encourages USACE to be responsive to the concerns above as it moves forward with finalizing NWPs. ECOS also asks that USACE consider these comments in conjunction with those received from other state associations, like the Association of Clean Water Administrators and the Association of State Wetland Managers, and also individual or multi-state comment letters.

If you would like to discuss these comments further, please feel free to contact me at dwelsh@ecos.org or 202-266-4920.

Sincerely,



Donald S. Welsh
Executive Director, ECOS