



July 29, 2016

Submitted via electronic mail

Mr. David Olsen
Regulatory Program Manager
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Re: Proposal to Reissue and Modify Nationwide Permits
U.S. Army Corps of Engineers

Dear Mr. Olsen:

The American Exploration & Production Council (“AXPC”) and the Independent Petroleum Association of America (“IPAA”) are pleased to submit comment to the U.S. Army Corps of Engineers (“USACE”) on its *Proposal to Reissue and Modify Nationwide Permits* (“Proposal”) published in the federal register on June 1, 2016 (Volume 81, Number 105). While AXPC and IPAA jointly requested a comment extension deadline of 60-days, in a June 13, 2016, letter to USACE, AXPC understands USACE’s refusal to grant such a request in an effort to ensure adequate time for publishing the 2017 Nationwide Permits (NWP) prior to the expiration of the 2012 NWPs. Thus, having only a 60-day comment deadline has caused AXPC and IPAA to focus only on some of the principal topics¹ that USACE is specifically seeking for comment and submits the following response.

NWPs were established to create a streamlined process to, “authorize activities that have minimal individual and cumulative adverse environmental effects (Clean Water Act, Section 404).” Further, the general permitting scheme is intended to create a *simplified, streamlined* process intending to ease the regulatory burden on both USACE and the public. On June 29, 2015, the *Clean Water Rule: Definition of “Waters of the United States”* (“Clean Water Rule”) was published in the federal register (Volume 80, Number 124) defining the “scope of waters protected under the Clean Water Act,” and remains ineffective as a nationwide stay of the rule was issued by the U.S. Court of Appeals for the Sixth Circuit on October 9, 2015. Given the uncertainty of the rule, USACE’s broad discretion to base its decisions (significant nexus and connectivity determinations) on both data and case specific factors, and the variability of

¹ AXPC and IPAA are commenting on USACE’s request for comment on the following areas: How the 2015 revisions to the definition of “waters of the United States” might affect the applicability and efficiency of the proposed NWPs; Comment on whether to retain the ½ acre limit that has been imposed on certain NWPs; Comment on whether Pre-Construction Notification (“PCN”) thresholds for specific NWPs should be changed to improve the efficiency of the NWP Program while maintaining strong protection of the aquatic environment, and; Comment on the five aspects of waivers.

interpretations amongst regions and individual USACE field staff, the NWP program could become highly uncertain and limit permittees desire and ability to use it. Thus, AXPC and IPAA submit that the uncertainty of the legal challenges to the Clean Water Rule itself, and the Clean Water Rule revisions to the definition of waters of the United States (“WOTUS”) adversely affects the applicability and efficiency of the proposed 2017 NWPs

Using the new, stayed Clean Water Rule WOTUS definition, AXPC and IPAA posit that permittees would have a more difficult time meeting the minimal impact requirement for the NWP program as the list of waters deemed to be non-navigable, and thus outside of the U.S. Environmental Protection Agency (USEPA) and USACE’s authority, is exceptionally narrow. However, the Proposal has not made clear which statutory definitions will be applied to certain terms within the 2017 NWPs and at times appear to reference the stayed Clean Water Rule WOTUS definitions. An example of such is the explanation for “waterbody,” which is a term used in the proposed 2017 NWP 12, 14, 45, and 48. As this term and several other Clean Water Rule WOTUS related concepts are interspersed throughout the Proposal, AXPC and IPAA submit that USACE should clearly define all WOTUS definitions and caution against applying definitions and general notions that are subject to a nationwide stay. More clearly, AXPC and IPAA recommend removing all inferences to the stayed Clean Water Rule for the 2017 NWPs.

AXPC and IPAA additionally contend that there are several administrative concerns that adversely affect the applicability and efficiency of the proposed NWPs considering the new, stayed WOTUS definition. As stated in the paragraph above, the Clean Water Rule WOTUS definition leaves few, if any, waters outside of federal jurisdiction; likely resulting in an increase in the number of Section 404 jurisdictional determinations authorized by USACE. AXPC and IPAA are concerned that an increase in authorized jurisdictional determinations will allow for greater variability of interpretations in the field; resulting in uncertainty that runs counter to the consistency permittees have come to expect from the NWP program. Further, permittees now enjoy the right to challenge in court Section 404 jurisdictional determinations,² which while a welcomed ruling, may lead to permitting delays and effect the streamlined process of the NWP program. Another administrative matter concerning to AXPC and IPAA, is USACE’s ability to meet established deadlines with current staffing and available resources. The more waters that are deemed jurisdictional, per the Clean Water Rule WOTUS definition, presumably results in more projects that will require USACE approval that then requires more staff time devoted to authorizing projects. Thus, creating a greater regulatory burden on USACE and permittees; converse to one of the objectives of the NWP program which is to streamline, “the general permit process eliminat[ing] individual review and allow[ing] certain activities to proceed with little or no delay.” In an alternate scenario more jurisdictional waters may result in more permittees required to forgo NWPs and seek an individual permit instead. An increase in these time consuming individual permits would only further the regulatory burden to USACE and permittees.

As a final point in regard to USACE’s request of, “how the 2015 revisions to the definition of ‘waters of the United States’ might affect the applicability and efficiency of the proposed NWPs,” and as detailed in AXPC and IPAA’s July 1, 2016, comment letter to the Office of

² United States Army Corps of Engineers v. Hawkes Co., Inc. (No 15-290) decided May 31, 2015 by the Supreme Court of the United States.

Management and Budget, AXPC and IPAA believe that USACE asking public commenters to think through hypothetical circumstances while providing specific, practical examples, with supporting data has little, if any, practical utility. Given the previously referenced ongoing litigation concerning the stayed Clean Water Rule, public commenters are being asked to make their own interpretations on a wide range of scenarios and definitions which may likely never materialize. AXPC and IPAA appreciate USACE's desire to understand how the stayed Clean Water Rule WOTUS definition could affect, "the applicability and efficiency of the proposed NWP," however, it is irresponsible to burden the public with the task of determining the potential impacts when the outcome is uncertain and possibly year(s) away and when it appears that USACE itself may not fully understand the degree of implications this rule could create.

In regard to USACE's comment request concerning, "whether to retain the 1/2 acre limit that has been imposed on certain NWPs or to impose different acreage limit on these NWPs," AXPC and IPAA submit that this comment request will likely need to be revisited once the fate of the stayed Clean Water Rule is decided as acreage thresholds would probably have to be expanded to, "ensure that the NWPs continue to meet their intended purpose of providing a streamlined authorization process for activities resulting in no more than minimal individual and cumulative adverse environmental effects." Considering the current statutory authority, AXPC and IPAA recommend that the current acreage thresholds for certain 2017 NWPs be sustained.

Pertaining to USACE's PCN comment request concerning whether thresholds for specific 2017 NWPs, "should be changed to improve the efficiency of the NWP Program while maintaining strong protection of the aquatic environment," AXPC and IPAA understand that PCN thresholds have been developed over many successive reissuances and issuances of NWPs, which has allowed the current thresholds to be appropriate and as such, AXPC and IPAA recommend that the current PCN thresholds for certain 2017 NWPs be sustained. Having that said, there are various criteria that would trigger submittal of a PCN for a certain 2017 NWP, not just acreage thresholds, so the PCN requirement, regardless of acreage impact, can be burdensome to permittees. While AXPC and IPAA understand that, "PCNs allow district engineers to evaluate the activity and site-specific circumstances of proposed NWP activities to decide whether those activities are eligible for NWP authorization or require individual permits," permittees may have to wait up to 45 days for USACE authorization. Further, should the United States Fish and Wildlife Service ("USFWS") and/or National Heritage Act ("NHA") consultation be required, PCN authorization typically far exceeds the established 45-day authorization deadline as USFWS and NHA have no established timeframe for authorization and PCN approval cannot be granted until USFWS and/or NHA issues comment. Therefore, AXPC and IPAA recommend that a practical timeframe be established for USFWS and NHA instead of the current open-ended review these agencies enjoy.

Relating to waivers, AXPC and IPAA are supportive of USACE district engineers retaining the authority to issue waivers on a case-by-case basis. Waivers reinforce the intent of the NWP program, "to have a streamlined process for authorizing pre-approved categories of activities." USACE district engineers possess institutional knowledge and expertise of their jurisdiction therefore making them most qualified to have this authority. Thus, AXPC and IPAA recommend that no change in authority be made. In regard to USACE's request for comment

concerning whether to impose linear foot caps for certain 2017 NWP³, AXPC and IPAA submit that this comment request will likely need to be revisited once the fate of the stayed Clean Water Rule is decided as a linear foot cap alongside the Clean Water Rule could significantly alter permittees ability to utilize NWPs. For example, new jurisdictional features per the Clean Water Rule (isolated wetlands) may be impossible for permittees to avoid and institution of a low linear foot cap likely would restrict the permittees ability to utilize the NWP program. As stated above, USACE district engineers are highly capable of evaluating and issuing waiver requests and should be allowed that opportunity, and, not be impeded by an arbitrary linear foot cap. Consequently, AXPC and IPAA oppose USACE instituting any linear foot cap to waivers.

To reiterate, the intent of the NWP program is that of, “streamlining the process for authorizing activities that result in no more than minimal individual and cumulative adverse environmental effects.” AXPC and IPAA submit that for USACE to honor that intent the 2017 NWPs should not be considered within the context of the stayed Clean Water Rule and would do well to remove all Clean Water Rule inferences from the language in the Proposal and clearly define all WOTUS related terms. AXPC and IPAA appreciates USACE’s efforts to continually streamline the program’s procedures as this program is of much value to AXPC and IPAA members. AXPC and IPAA are happy to participate in this important public process and appreciates USACE’s consideration on this comment letter. Additionally, AXPC and IPAA fully support the comments filed by the American Petroleum Institute and the Water Advocacy Coalition concerning this matter.

AXPC is a national trade association representing 29 of America’s premier independent natural gas and oil exploration and production companies. AXPC’s members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce crude oil and natural gas, and that allow our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

IPAA is a national trade association representing the thousands of independent crude oil and natural gas explorers and producers in the United States. It also operates in close cooperation with 44 unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies that provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong and viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

³ The Proposal is seeking comment on whether to impose a linear foot cap on waivers to the 500 linear foot limit for NWPs 13 and proposed NWP B, and the 20 foot limit in NWP 36. The Proposal is also seeking comment on whether to impose a linear foot cap on losses of intermittent and ephemeral stream bed potentially eligible for waivers of the 300 linear foot limit for losses of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

Respectfully Submitted,



V. Bruce Thompson
President
American Exploration & Production Council
101 Constitution Avenue, NW Suite 700E
Washington, DC 20001



Lee Fuller
Executive Vice President
Independent Petroleum Association of
America
1201 15th Street NW, Suite 300
Washington, DC 20005