November 16, 2020

VIA REGULATIONS.GOV

Docket No: COE-2020-0002; RIN-0710-AA84

U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314-1000

Re: Proposal to Reissue and Modify Nationwide Permits
85 Fed. Reg. 57,298 (Sept. 15, 2020)

The Waters Advocacy Coalition ("WAC" or "Coalition") offers the following 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). WAC represents a large cross-section of America's construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors—all of which are vital to a thriving economy and provide much-needed jobs.[1] WAC members' activities, projects, and operations are often subject to regulation under Clean Water Act ("CWA") section 404, 33 U.S.C. § 1344, and Coalition members frequently rely on nationwide permits ("NWPs") to comply with the CWA. WAC's comments on the Corps' proposal are limited to ensuring consistency between the NWPs and the Navigable Waters Protection Rule ("NWPR") that the Corps and the U.S. Environmental Protection Agency finalized earlier this year. *See generally* 85 Fed. Reg. 22,250 (Apr. 21, 2020).[2]

[1] A complete list of WAC members is attached to these comments as Appendix A.

[2] As the Corps noted in the proposal, the NWPR is in effect in all states and jurisdictions except for Colorado, where a court-issued preliminary injunction is currently on appeal to the Tenth Circuit. *See* 85 Fed. Reg. at 57,356.

I. The Coalition Supports the NWP Program, Which Furthers Congress's Intent to Allow the Corps to Focus Its Limited Resources on Activities Resulting in More than Minimal Impacts.

In 1977, Congress enacted CWA section 404(e), 33 U.S.C. § 1344(e), in response to EPA's and the Corps' efforts to expand the scope of CWA jurisdiction following a decision from a single federal district court, which interpreted the CWA to mean that Congress "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." *See Natural Res. Def. Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).[3] Section 404(e) authorizes the Corps to issue "general" permits on a State, regional, or nationwide basis for categories of discharges that have no more than minimal individual or cumulative environmental effects. *See* 33 U.S.C. § 1344(e).

The legislative history of section 404(e) reflects that Congress was concerned with administrative burdens and permitting delays. For instance, a House Report stated that the Corps' expanded jurisdiction would "prove impossible of effective administration" and that "[r]ather than managing a more limited program well, the Corps will be in a position of managing a too-large program poorly." H.R. Rep. No. 95-139, at 22 (1977). The Senate Report similarly decried "unnecessary regulation and red tape . . . that would ensue without a streamlined permit program." S. Rep. No. 95-370, at 75 (1977).

At the time Congress amended the CWA by adding section 404(e), the Corps was in the process of finalizing the original NWPs, which "struck a reasonable balance between" comments from regulated entities and environmental groups. *See* 42 Fed. Reg. 37,122, 37,130-31 (July 19, 1977). The text of CWA section 404(e) indicates that Congress drew upon the language in the

[3] The holding in *Callaway* has since been limited. *E.g.*, *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

Corps' initial NWPs, authorizing "nationwide" permits for "categories" of activities with "minimal" adverse individual or "cumulative" impacts. *Compare* 33 U.S.C. § 1344(e) *with* 42 Fed. Reg. at 37,146-47; *see also* 47 Fed. Reg. 31,794, 31,798 (July 22, 1982) (reissuing NWPs in 1982 and emphasizing that many of the NWPs "were in effect at the time Congress adopted Section 404(e)" and that the "legislative history clearly shows Congress' intent to endorse the program in effect at the time and to encourage its expansion").

Over time, the Corps has refined the NWPs with an eye towards meeting the statutory minimal effects standard in section 404(e), and the current proposal continues to ensure compliance with that standard.

II. The Corps Should Clarify Certain Definitions and Concepts Related to the NWPR.

The scope of the definition of "waters of the United States" (or WOTUS) directly and significantly impacts the NWP program. Many of the current NWPs include acreage or linear foot limitations on impacts to "waters of the United States," though the Corps has proposed to remove linear foot limits and instead rely on acreage limits in those permits. *See* 85 Fed. Reg. at 57,311. Either way, entities and landowners need to have a clear understanding of the scope of potential impacts to "waters of the United States" to determine whether a proposed activity qualifies for authorization under an NWP. Thus, it is important to ensure consistency between the definitions in the NWPR and the definitions and concepts in the NWPs.

A. <u>The Corps Must Ensure Consistency with the NWPR Regarding the Jurisdictional Status of Ditches</u>.

The Corps' proposal states that, under the NWPR, "some ditches will continue to be subject to Clean Water Act jurisdiction as tributaries, provided they are waters under 33 CFR 328.3(a)(1) or (2), *or were constructed in adjacent wetlands* that are waters under § 328.3(a)(4)." 85 Fed. Reg. at 57,330 (emphasis added). The italicized portion of this sentence is imprecise and

overbroad; the Corps must clarify that sentence to ensure consistency with the NWPR. Not all ditches constructed in jurisdictional adjacent wetlands are jurisdictional, as the preamble to the NWPR makes clear. According to the NWPR, a ditch is jurisdictional only if it falls under one of the following three categories:

- The ditch is a traditional navigable water under (a)(1) of the definition;
- The ditch "either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of the 'tributary' definition."
- The ditch is constructed in an adjacent wetland, "lack[s] perennial or intermittent flow (meaning they do not satisfy the 'tributary' definition in paragraph (c)(12))" but "develop[s] wetlands in all or portions of the ditch that satisfy the 'adjacent wetlands' definition in paragraph (c)(1)."

85 Fed. Reg. at 22,286-87. As the foregoing makes clear, ditches that are constructed in jurisdictional adjacent wetlands are not jurisdictional in every circumstance. Rather, such ditches must also either satisfy the tributary definition or develop wetlands that meet the "adjacent wetlands" definition in the rule. Thus, for example, a ditch that carries ephemeral flow and does not develop wetlands would not be jurisdictional even if it was constructed in an adjacent wetland.

In short, the Corps' discussion of the jurisdictional status of ditches under the NWPR should mirror the discussion of jurisdictional ditches in the NWPR's preamble.

B. NWPs 41 and 46 Should State that Certain Discharges May Qualify for an Exemption Under Section 404(f) and Further Clarify when Permits Are Not Necessary.

Unlike several other NWPs (*e.g.*, NWPs 3, 12, 14, 30, 40), neither of the NWPs relating to ditches (NWPs 41 and 46) mentions the statutory exemptions from section 404 permitting for certain activities related to irrigation ditches (construction and maintenance) and drainage ditches (maintenance). *See* 33 U.S.C. § 1344(f). The Corps should explicitly state in both permits that certain discharges related to activities in ditches may qualify for an exemption under section 404(f). In addition to that modest revision, the Corps should provide more clarity as to when exactly permits would be required under NWP 41 or NWP 46 in light of the NWPR and the recently issued "Ditch Exemptions Memo."[4]

The Corps proposes to modify NWP 41 to add irrigation ditches to the scope of the permit, but the permit remains mostly unchanged in that it continues to authorize the reshaping of existing ditches to modify the cross-sectional configuration (by regarding with gentler slopes) for the purpose of improving water quality, so long as the reshaping neither increases drainage capacity beyond the original as-built capacity nor expands the area drained by the ditch as originally constructed. *See* 85 Fed. Reg. at 57,330 & 57,378. The "Ditch Exemptions Memo," however, provides that a CWA section 404 permit is *not* required for "[m]inor changes to the cross-section of the ditch to conform with current engineering standards (*e.g.*, where more graduated side-slopes result in greater stability) qualify as maintenance, so long as those

[4] Joint Memorandum to the Field Between the U.S. Department of the Army, Corps of Engineers, and the U.S. Environmental Protection Agency Concerning Exempt Construction or Maintenance of Irrigation Ditches and Exempt Maintenance of Drainage Ditches under Section 404 of the Clean Water Act (July 2020), *available at* https://www.epa.gov/sites/production/files/2020-07/documents/final_ditch_exemption_memo_july_2020_with_epa.pdf.

modifications of the ditch will not result in the drainage, degradation, or destruction of additional jurisdictional waters." Ditch Exemptions Memo at 4. Given this potential inconsistency, the Corps should explain when modifications to the cross-sectional configuration of ditches would require a permit versus when such modifications are sufficiently minor such that the section 404(f)(1)(C) exemption from permitting would apply.

Furthermore, the Corps proposes to reissue NWP 46 without any changes, but the proposal conspicuously is silent regarding what effect the NWPR has on this permit. NWP 46 authorizes discharges into ditches that satisfy the following four conditions: (i) the ditch was constructed in uplands; (ii) receives water from an area determined to be WOTUS prior to the construction of the ditch; (iii) diverts water to an area determined to be WOTUS prior to the construction of the ditch; *and* (iv) the ditch itself is determined to be WOTUS. When the Corps initially finalized this NWP in 2007, it proclaimed that the permit is consistent with longstanding policy that the Corps "reserves the right on a case-by-case basis to determine whether non-tidal ditches excavated on dry land or other features constitute waters of the United States." 72 Fed. Reg. 11,092, 11,143 (Mar. 12, 2007).

More recently, in the NWPR, EPA and the Corps conducted a comprehensive analysis of the statute, its legislative history, and the Corps' prior regulatory interpretations concerning the jurisdictional status of ditches, ultimately concluding that "[u]pland ditches (other than those ditches that relocate a tributary or that meet the conditions of paragraph (a)(1) do not fall under the ordinary meaning of the term 'waters' within the scope of the CWA" and thus, are not WOTUS. 85 Fed. Reg. at 22,298. The NWPR further explains that upland ditches that do not relocate a tributary and are not traditional navigable waters "are not part of the naturally occurring tributary system and are not something the agencies consider to be within their

authority to regulate under the CWA."[5] *Id.* To be sure, the Agencies acknowledged that the Corps has, at times, taken different positions on the jurisdictional status of upland ditches, but they explained that the "final rule clarifies the regulatory status of ditches in a manner that is more consistent with the Corps' regulations following the 1972 and 1977 CWA amendments[.]"*Id.* at 22,296. Given these recent findings in the NWPR, the Corps should affirm that nothing in this proposal changes the interpretations in the NWPR concerning the non-jurisdictional status of upland ditches.

C. The Corps Should Eliminate the "Waterbody" Definition.

The definition of "waterbody," which is identical to the definition in the 2017 NWPs, causes considerable confusion in the current proposal, because the Corps defines the term to mean something different than the nearly identical term, "water body." The definition of "waterbody" still states that a "waterbody is a jurisdictional water of the United States." *See* 85 Fed. Reg. at 57,395. Yet elsewhere in the proposal, the Corps uses the term "water body" is to refer to both jurisdictional waters and non-jurisdictional waters. For instance, in the section discussing the impact of the NWPR, the proposal states that "Corps general permits are not intended to make or imply a final conclusion *regarding what water bodies are or are not subject to CWA jurisdiction." Id.* at 57,356 (emphasis added). That discussion further differentiates between jurisdictional and non-jurisdictional "water bodies" by using phrases such as "to the extent that the water body is subject to CWA jurisdiction" and "to the extent that the water body

[5] Interestingly, when reissuing NWP 41 in 2000, the Corps clarified that "[t]his NWP *does not apply to reshaping drainage ditches constructed in uplands, since these areas are not waters of the United States*, and thus no permit from the Corps is required, or to the maintenance of existing drainage ditches to their original dimensions and configuration, which does not require a Section 404 permit (see 33 CFR 323.4(a)(3))." 47 Fed. Reg. 12, 818, 12,891 (Mar. 9, 2000) (emphasis added).

is no[t] jurisdictional under the CWA" and by referencing "discharges of dredged or fill material into water bodies that are not subject to CWA jurisdiction." *Id.* at 57,356-57.

The Corps should avoid using nearly identical terms ("waterbody" and "water body") to mean very different things. This confusion can be easily avoided by substituting the term "water of the United States" for "waterbody" throughout the proposal, while simultaneously deleting the definition of "waterbody." If the Corps insists on maintaining the definition of "waterbody" for some reason, it should use a term other than "water body" when referring to non-jurisdictional waters.

III. The Proposed Revision to General Condition 23 (Mitigation) Is Not Necessary to Ensure No More than Minimal Adverse Impacts.

The Corps proposes to revise paragraph (d) of General Condition (GC) 23 to establish a 1/10-acre threshold for requiring compensatory mitigation for losses of stream beds that require pre-construction notification (PCN), which resembles the existing 1/10-acre threshold for wetlands in paragraph (c) of GC 23.[6] This requirement can be waived by Corps district engineers on a case-by-case basis if it is determined that compensatory mitigation should not be required because other forms of mitigation would be more environmentally appropriate.[7] According to the Corps, the 1/10-acre threshold for requiring compensatory mitigation for wetland losses that require PCN has been effective in minimizing losses of wetlands.[8] For instance, in FY 2018, the Corps notes that 82% of the fills in jurisdictional waters authorized by NWPs impacted 1/10-acre

[6] *See* 85 Fed. Reg. at 57,351, 57,388.

[7] *See id.* at 57,351.

[8] *See id.*

(Continued...)

or less.[9] And those verified impacts "include both permanent and temporary impacts."[10] Elsewhere in the Proposal, the Corps cites a 2015 report, which similarly shows that "a substantial majority of fill impacts authorized by NWPs and other general permits were less than 1/10-acre in size[,]" noting that "these authorized fill impacts were for wetlands, streams, and other waters."[11] The Corps believes that "[p]roject proponents likely designed their projects to minimize losses of jurisdictional waters and wetlands to qualify for general permit authorization and avoid the cost of providing compensatory mitigation to offset the authorized losses" and that "adding a compensatory mitigation requirement for losses of greater than 1/10-acre of stream bed can be equally effective in minimizing losses of stream bed under the NWP authorization process."[12]

The Corps' own rationale calls into question the necessity of this proposed revision. If the vast majority of authorized fill impacts for *wetlands, streams, and other waters* under the NWP program are already less than 1/10-acre in size, it does not appear that project proponents need any additional incentive to minimize losses of jurisdictional waters in the form of the proposed new 1/10-acre threshold for losses of stream beds. WAC recommends that the Corps decline to finalize this proposed revision to GC 23. At a minimum, the Corps should clarify, consistent with the definition of "Loss of waters of the United States," that compensatory mitigation is only required for permanent impacts to stream bed loss exceeding 1/10 acre.[13] The reference to

[9] *See id.*

[10] *Id.*

[11] *Id.* at 57,315.

[12] *Id.*

[13] *See* 85 Fed. Reg. at 57,393 ("The loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation because of the regulated activity.")

"permanent and temporary impacts" in the Proposal's discussion of GC 23 is misleading in that respect.

IV. Conclusion

WAC appreciates the opportunity to submit these comments. Subject to the requested clarifications above, WAC generally supports the Corps' proposal to reissue NWPs, which would continue to carry out Congress's intent to allow more streamlined section 404 permitting for activities that have minimal adverse environmental effects. If you have any questions, please feel free to contact the undersigned.

Sincerely,

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WATERS ADVOCACY COALITION

APPENDIX A

Agricultural Retailers Association
American Exploration & Mining Association
American Exploration & Production Council
American Farm Bureau Federation
American Forest & Paper Association
American Fuel & Petrochemical Manufacturers
American Gas Association
American Iron & Steel Institute
American Petroleum Institute
American Public Power Association
American Road & Transportation Builders Association
American Society of Golf Course Architects
Associated Builders & Contractors
Associated General Contractors of America
Association of American Railroads
Association of Oil Pipelines
Club Management Association of America
Corn Refiners Association
Edison Electric Institute
Florida and Texas Sugar Cane Growers
Golf Course Builders Association of America
Golf Course Superintendents Association of America
Independent Petroleum Association of America
Industrial Minerals Association North America
International Council of Shopping Centers
Leading Builders of America
National Association of Home Builders
National Association of Manufacturers
National Association of Realtors
National Association of State Departments of Agriculture
National Cattlemen's Beef Association
National Club Association
National Corn Growers Association
National Cotton Council of America
National Mining Association
National Multifamily Housing Council
National Oilseed Processors Association
National Pork Producers Council
National Rural Electric Cooperative Association
National Stone Sand & Gravel Association
Responsible Industry for Sound Environment
Southeastern Lumber Manufacturers Association
Texas Wildlife Association
The Fertilizer Institute
Treated Wood Council
USA Rice Federation
US Chamber of Commerce