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

Submitted via www.regulations.gov
Docket ID No: COE–2020–0002
Re: Proposal to Reissue and Modify Nationwide Permits

Dear General Graham,

On behalf of the Society of Wetland Scientists (SWS) and representing 3,000+ wetland and aquatic science professionals, we respectfully submit the following comments in response to your solicitation regarding the proposed Rule *Proposal to Reissue and Modify Nationwide Permits* (85 FR 179; Docket ID No. COE-2020-0002), published in the Federal Register on September 15, 2020. SWS is an international scientific organization whose members study, manage, and restore wetlands. We are a science-based and non-profit organization with a deep commitment to objectivity and peer-review of science, policy, and management practices. Our members work in the private sector, academia, and tribal, state and federal agencies with expertise spanning the ecological, hydrological, biogeochemical, restoration and biological sciences. We support developing and using best available science to sustainably manage and restore our freshwater, estuarine, coastal, and ocean resources for the benefit of the U.S. economy, environment, and public health and safety. SWS holds multiple scientific meetings each year focused on wetlands in the US and throughout the world and publishes the premier peer-reviewed journal dealing with wetlands (*Wetlands*).

The draft 2020 Nationwide Permits (NWPs) authorize certain activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The draft rule includes the off-cycle reissuance of existing NWPs, changes to the associated general conditions and definitions, and five proposed new permits. The NWPs play a critical role in regulation of wetlands and other aquatic resources. When oversight is performed appropriately by the U.S. Army Corps of Engineers (Corps), the NWPs help streamline the permitting process, which is beneficial to project permitees While the role of NWPs is valued, the process of reviewing and certifying (some with conditions) is equally important.

SWS Comments on the Rule Review Process

Certifying Permits in a Proposed Rule, Rather than Final Rule

SWS is deeply concerned about the requirement necessitated by the timelines documented in the 2020 *Proposal to Reissue and Modify Nationwide Permits* to concurrently comment on the proposed rule *and* certify the proposed permits during the same period. These joint tasks require certifying agencies to review and add warranted permit conditions that are not yet final. The Corps' assertion that the proposed process is consistent with current water quality certification (WQC) procedures is inconsistent with prior NWP reissuance procedures and is based on a description of the process for an individual federal permit, not a NWP. The standard NWP certification process makes use of an initial rule making and comment period, followed by a certification of the permits in the final rule months later.

Recommendation: SWS recommends a separation of the two processes and an extension of the deadline for certification of the NWPs until the rule is final and the permits are no longer in draft format.

SWS Comments on Specific Nationwide Permits

Changing the 300-Linear Foot Threshold to Acreage Threshold

SWS is extremely concerned over the change from 300 linear feet loss of stream bed to a new acreage-based measurement. This change impacts NWP 21, 29, 39, 40, 42, 43, 44, 50 and 51. This change could result in major losses to streams without requiring pre-construction notice, or mitigation. Even with Pre-Construction Notifications (PCNs), and/or mitigation, this change is still likely to result in major losses of stream habitat and a concomitant impact on fish and wildlife resources. The NWPs are based on the premise that activities authorized by the NWPs "cause no more than minimal individual and cumulative environmental effects" [80 FR 1909]. The proposed threshold change would almost certainly allow permittees to impact thousands of linear feet of stream channels under a single project, without compensatory mitigation.

Smaller, often headwater, streams have a low average width and are inherently linear in their hydrogeomorphic characteristics. Impacts occur more frequently to these small streams than higher order streams because development is deterred from impacting larger stream or river features by multiple factors. Prevailing academic consensus is that these smaller features are widely undercounted and legal protections should be broad enough to account for the scale, sensitivity, and ecological importance of small streams (Owen 2017). Science and restoration practice indicate that stream mitigation for lower order stream impacts are best measured by a linear metric than an acreage metric (EPA 2015).

The Corps cites studies by Doyle et al. (2015) and Lave (2014) in justifying this change. However, these authors have expressed that the Corps' interpretation of their research is inaccurate and does not reflect either their science or common findings on this topic or the scientific literature on aquatic resources. Doyle and Lave state that their research "does not support the use of stream bed area as being a superior or preferred metric for compensatory stream mitigation, nor does it offer a scientific rationale for replacing 300 LF [linear feet] with a 0.5-acre limit for stream impacts." They argue that the Corps' decision represents a "push toward a measure that is intended to better represent larger [stream] systems than smaller ones, especially in light of the Corps statutory obligation to permit only minimally adverse environmental impacts". They conclude that this change in the rule is "not based on an accurate interpretation of our science, which the USACE purports is a basis for their proposing the change…". They strongly recommend maintaining the 300 linear feet threshold, rather than moving to the new acreage threshold, which will "likely result in a significantly greater number of unmitigated losses to the nation's stream ecosystems".

The selection of the acreage threshold is also based, according to the proposed rule, on data regarding stream width provided in Downing et al (2012). The report and its supplement provide information about stream width come from two different sources (one a U.S. dataset and another world estimate based on African stream data). The Corps bases its stream width calculations on the use of the world stream width data, which is on average 6.3 feet, despite the availability of a U.S. database, which is on average 2.9 feet. The Corps does not explain why data about African streams is superior to data about U.S. streams, which is disconcerting because the NWPs apply to projects affecting U.S. waters. The consequence of the Corps' decision is that the world average stream width results in a major increase in the allowable impact, potentially

more than doubling the stream miles that can be impacted without mitigation. The vastly increased impact would violate the basic tenet of General Permits (which includes NWPs) – that any activity authorized by a General Permit result in no more than minimal individual and cumulative adverse environmental effects.

The Corps' proposed change flagrantly ignores the prevailing body of scientific literature that documents the unique value of headwater streams. A one-half acre loss of stream bed has the potential to effectively eliminate the biologic, hydrologic and geomorphic functions of the stream. While the Corps indicates that functions will be better protected by the new acreage-based threshold, the Corps offers no factual or documented evidence to support its connection. The rule ignores the extensive literature, particularly the Corps' and EPA's own 2015 Science Advisory Board's Report - *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (*Connectivity Report), which underscores the importance of headwater streams. The Connectivity Report identifies the many unique and valued functions and ecosystem services provided by these aquatic resources. The 300-foot limit has been an efficient measure utilized by the Corps for permitting for more than twenty years. It has been considered a sufficient protective standard during this time and should not be eliminated without a clearly articulated reason based on the best available science.

While the proposed rule argues for the change to the acreage measure, in the 2017 reissuance of the NWPs, the Corps stated, "We believe that both the ½ acre [for wetlands] and the 300 linear foot [for streams] limits are necessary to ensure that the activities authorized by this NWP cause no more than minimal and individual cumulative adverse environmental impacts." A changed metric, consequently, is not supported by the scientific literature, will lead to large-scale unmitigated losses to the Nation's wetland ecosystems and contradicts recent justifications developed and used by the Corps itself.

Activity-specific impacts that result from changing from the 300-linear foot threshold to the ½ acre threshold are predicted to also negatively impact mitigation markets, especially around surface coal mining activities (NWP 49), residential, commercial and institutional developments (NWP 29 and 39), stormwater management facilities (NWP 43), linear transportation projects (NWP 14) and land-based renewable energy generation facilities (NWP 51) (BenDor et al. 2015).

Recommendation: For the above reasons, SWS recommends keeping the current 300-linear foot threshold in the final rule. Without further evidence of significant improvements in aquatic resource protection, there is no justification to change the threshold. If the Corps decides to retain the acreage threshold, it should use the U.S. average stream width, which is more reflective of U.S. waters than the world average stream width.

Changes to PCN Requirements

PCN plays an important role in allowing the public to review and comment on proposed projects and impacts. PCN helps regulators from the state and federal agencies better understand and evaluate the impacts of proposed activities in or around streams, wetlands, or other waters. These proposed activities may affect water quality, the health of the aquatic ecosystem, and/or water access/flow in the immediate or nearby drainage area. PCNs help determine if requirements are likely to be met for a project as proposed or whether additional revisions or mitigation are warranted. The PCN helps ensure that the NWP is being used properly, including ensuring that water quality standards are being implemented as permitted.

Changes to the permit language in NWP 12 would allow for impacts for up to 250 miles without a PCN. As proposed, the changed permit language allows for large, multi-acre impacts. While the NWPs have always allowed for some segmentation for "single and complete projects", the new language and requirements make segmentation even easier, despite federal requirements to avoid evaluating those harms individually.

Additionally, the non-federal permittee definition (those who would continue to be required to complete the PCN process under the proposed rule) includes state departments of transportation (DOT) with specific responsibilities (NWP Rule, p. 57304). This definition creates a potential significant conflict of interest. The permittee should not be the sole reviewer of their actions and potential impacts or mitigation requirements. Federal permittees, such as state DOTs, are often financially strained and may not have the environmental expertise on staff to make these decisions. The Corps is in the best position to provide oversight to federal certifying authorities, as they are experts in administering mitigation for the 404 program and tracking debits and credits from mitigation activities.

Recommendation: As a result of these concerns, SWS recommends that the Corps retain the PCN requirements from the current NWP Rule and continue its role of reviewing and approving PCNs.

Changing NWP 12 Thresholds

In NWP 12, SWS is concerned about the removal of the PCN threshold associated with forested wetlands. While the proposed rule justifies the removal of this requirement based on the "temporary" nature of impacts to forested wetlands (NWP 12, p. 57325), a significant body of scientific and practitioner evidence contradicts this claim. When maintaining a right of way, management practices by utilities usually require the removal of any woody material over a utility line as well as within a specific distance horizontally from the wires of an electric transmission line. As a result, those temporal impacts to the forested wetland are permanent.

Contrary to the Corps' assertion that despite the change in the general plant community structure, the wetland will still perform hydrologic functions (e.g. water storage) and biogeochemical cycling functions (e.g. nitrogen cycling), many studies have shown that these practices do indeed change the function of a wetland.

Often, the result is a change in wetland functions and type from a forested wetland to an herbaceous or scrub-shrub wetland (NWP Rule General Condition 23). In addition, the loss of shade often has a direct impact on water quality with increasing stream water temperatures. There are no studies, no industry information or best practices that provide information on how to eliminate these impacts – the removal of trees must be characterized as permanent and the impacts avoided, minimized and subjected to compensatory mitigation. Finally, there needs to be review of the restoration practices employed in the area after the line is installed, to ensure that impacts truly are temporary and that the area will remain a high-quality functioning wetland.

Additionally, in some states, water quality standards do not allow this impact (for example, Kentucky's water quality standards). This threshold has been included in the NWP since 1996 as one of the original PCN requirements. SWS is deeply concerned about removing the requirement without any recognized justification.

A second primary concern around the change in thresholds under NWP 12 is the PCN threshold for new oil and gas pipelines over 250 miles long. The 250-mile threshold would allow for major impacts from new pipelines that are under this threshold. This is especially important relating to forested wetlands in the southeast where coastal wetland loss is occurring at the highest rate nationally. Lines of this length are also more likely to cross state boundaries, making a PCN even more critical.

Recommendation: SWS strongly recommends that the Corp retain the current NWP 12 threshold related to forested wetlands, as well as the thresholds that are triggered when all crossings are considered to be part of a "single and complete project" as defined in Note 2 for the 2017 NWP 12 and in compliance with 33 CFR 330.6(d).

NWP 48 – Commercial Shellfish Mariculture Activities

The proposed revision to NWP 48 eliminates the Submerged Aquatic Vegetation (SAV) impact threshold. SAV plays a vital role in the life histories of many fish and other aquatic species, including many of the most valuable commercial and recreational species. SAV provides food, shelter, cycles oxygen and nutrients, stabilizes bottom sediments, and creates detritus essential to the food web when it decays (Atlantic Marine Fisheries Commission 2020).

It is also unclear why dredged or filled material would be needed for seeding or mariculture operations. The permit, as written, implies that the seafloor is not conducive for the targeted species and those operators would have to alter the characteristics to make it more amenable. This activity is habitat conversion, which should not be allowed.

Recommendation: If the use of dredged or fill material is left in NWP 48, SWS recommends that the Corps include some form of prescribed testing requirement to ensure that the material is clean (specifically, free of invasive species and pollutants) to use. Standard protocols should be established to determine if material is suitable for open ocean disposal. While this is a costly suite of tests, such protocols would be essential if the activity is allowed.

SWS Encourages Use of Definitions Consistent with the Navigable Waters Protection Act

In the proposed NWP Rule, the definition of Ordinary High-Water Mark (OHWM) includes only discussion of stream bed, not bank. The current definition of OHWM throughout federal regulations consistently includes reference to both the stream bed and bank, which is reflective of sound science. By referring only to stream bed, without the bank component, the proposed rule creates a contradiction with other uses of the term in federal rules and regulations. Additionally, the definition of Perennial Stream does not match with the final Navigable Waters Protection Rule (NWPR) definition. Use of conflicting definitions can cause regulatory problems or undermine intended protections.

Recommendation: SWS recommends the use of the OHWM definition from the Navigable Waters Protection Rule, which defines the Waters of the United States [33 CFR 328.3(c)(7)] and is inclusive of both bed and bank characteristics. SWS also encourages the final NWP Rule to adopt the formal definition of perennial streams from the NWPR.

In Conclusion

SWS appreciates the opportunity to comment on the Corps' Docket ID No: COE–2020–0002. Please do not hesitate to contact me should you wish to discuss these comments.

Sincerely,

John M. Lowenthal, PWS, PWD
President SWS Public Policy and Regulations Section

Loretta Battaglia, Ph.D.
President
Society of Wetland Scientists

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