



The Association of State Wetland Managers, Inc.

"Dedicated to the Protection and Restoration of the Nation's Wetlands"

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Mr. Jaime A. Pinkham

Acting Assistant Secretary of the Army for Civil Works

108 Army/Pentagon

Washington DC 20310-0108

June 25, 2021

RE: Request for Corps to suspend the January 2021 sixteen Nationwide Permits and revert to the prior NWP until a new review of all NWPs can be conducted on the regular five-year schedule for renewal in 2022

Dear Mr. Pinkham:

This following request was prepared by the Association of State Wetland Managers (ASWM) in response to substantive and ongoing process concerns surrounding the Army Corps of Engineers' (Corps) review of state and tribal Nationwide Permits (NWPs).

ASWM is a nonprofit organization that supports the use of sound science, law, and policy in the development and implementation of state and tribal wetland programs. Since 1983, the organization and its member states and tribes have had longstanding and effective working relationships with federal agencies in the implementation of regulatory programs designed to protect our nation's aquatic resources. ASWM works with states and tribes that implement state, tribal, and federal wetland protection programs, including § 404 of the Clean Water Act (CWA), state water quality standards for wetlands, and § 401 of the CWA for certification of federal permits and licenses. [ASWM submitted previous comments](#) on November 16, 2020, regarding the Corps' proposal to reissue and modify NWPs (Docket ID No. COE-2020-0002).¹

States and tribes have shared deep concerns over the last year about numerous process issues around the January 2021 reissuance of a subset of the NWPs. These multiple process issues have created a significant amount of confusion and inefficiencies surrounding the NWPs program across the U.S. among both regulators and the regulated entities who are trying to implement projects.

To respond to these issues, ASWM respectfully requests that the Corps take three related actions. The first two actions are concurrent: The Corps should suspend the January 2021 subset of NWPs and revert to using their predecessors which when issued were to be in effect until March 2022, in order to avoid a gap in NWP coverage. As a third action, the Corps should establish a clear process for evaluating a NWP certification, notifying states and tribes as to the status of their certification, and clarifying implementation processes.

¹ Association of State Wetland Managers, RE: Proposal to Reissue and Modify Nationwide Permits, Docket ID No. COE-2020-0002, 13 November 2020, available online https://aswm.org/pdf_lib/comments_proposal_reissue_modify_nwps111620.pdf.

Issue Background

In September 2020, the U.S. Army Corps of Engineers (Corps) published for public comment a set of NWP, which proposed to renew the existing fifty-two (52) 2017 NWP and associated general conditions and definitions (several with modifications) and proposed to create five new NWP. The final rule issued January 13, 2021, reissued and modified twelve of the existing NWP, modified some general conditions and definitions, and issued four new NWP. The sixteen new and modified NWP went into effect on March 21, 2021, and will expire March 14, 2026. Existing NWP unchanged by the January 2021 final package remain in effect until March 2022.

CWA § 401 requires the Corps to receive water quality certifications from states and tribes prior to the final NWP taking effect. The Corps required state and tribal § 401 certification authorities to certify the proposed NWP instead of the final permits even though the proposed permits were subject to change. Requiring certification of proposed NWP is a departure from longstanding practice. The Corps also indicated 60 days was the “reasonable period” for certification decisions despite requests for extensions to accommodate mandatory state public processes. The Corps has indicated they will not initiate a new certification process when they renew and revise the remaining NWP in March 2022, but instead will rely on the certification of the September 2020 proposed NWP.

The Corps should follow longstanding practice for reissuance of NWP.

ASWM has received significant feedback from states and tribes that demonstrate the process being followed by the Corps, which is contrary to longstanding practice, is untenable for states and tribes. Our association has identified several critical process concerns, which are detailed in the following section. In response to the confusion and inefficiencies created by those process issues, **ASWM requests that the Corps concurrently 1) suspend the sixteen January 2021 NWP and 2) revert to the prior NWP until a new review of all NWP can be conducted on the regular five-year schedule for renewal in 2022.** Reverting to the former NWP will allow for states and tribes to provide meaningful review and conditioning of finalized published NWP. It will also allow states and tribes to evaluate the water quality effects of an entire package of NWP rather than a disconnected subset.

States and tribes have communicated to ASWM several critical process concerns around the reissuance of the NWP:

- **States and tribes were required to comment on and condition draft Nationwide Permits.** States and tribes express deep concerns about the requirement documented in the 2020 Proposal to Reissue and Modify Nationwide Permits for state and tribal certifying agencies to review and condition permits that were not yet final. This practice is inconsistent with prior NWP reissuance procedures, and arguably is inconsistent with the CWA. The standard NWP certification process makes use of an initial rulemaking and comment period, followed by certification of the permits in the final rule months later. Multiple states and tribes submitted comment letters to the Corps (Docket ID No. COE-2020-0002) to express serious concerns about changes that could take place to the permits after certification. These changes may raise issues not found in the proposed permits, resulting in missing or inappropriate conditions and leaving states with no opportunity to remedy a deficient certification.
- **The proposed rule did not outline a process for states and tribes to address changes made to the draft permit language in the final rule.** Uncertainty around how certifications and conditions would be treated in the final permits may have led some certifying authorities to deny certain NWP outright for lack of adequate information to determine compliance with state water quality regulations. This lack of process led certifying agencies to consider unnecessary denials of NWP.

This absence of process is neither good governance nor good business as it causes additional burden for permittees.

- Many Corps Districts have been interpreting statements relating to review of substantive changes between draft and final permits as inappropriate “reopener clauses.” In order to address concerns raised by certifying draft permits, several certifying agencies included some form of statement that allowed them to revisit their certifications should the language in one or more permits change substantively between the draft permit and final permit. While the preamble to EPA’s § 401 Certification Rule states that reopener clauses are inconsistent with CWA section § 401, statements regarding the impact of being required to certify a draft permit that may differ substantially from the final permit should not be interpreted as a reopener clause. An actual reopener indicates the certifying authority intends to take an action to reconsider or otherwise modify a previously issued certification at some unknown point in the future, extending certification deliberations beyond the statutory limit of one year (Preamble at 42,280). The Corps appears to be considering the term “reopener clauses” overly-broadly, including where they are specific as to trigger and timeframe.

For example, the Corps has considered as an impermissible reopener clause a certification provision for the NWP indicating the certification applies to the proposed NWP and might not apply without modification to final NWP if the final NWP differs markedly from the proposal. States have noted such conditions were intended merely to clarify the permits covered by the certification and not as an unbounded reopener clause.

- In some states, the short timeframe for review made it impossible for the certifying agency to meet mandatory public notice and comment processes. In these cases, a state often requested an extension to meet these requirements. In at least two states, the Corps waived certifications when the time limit was exceeded due to state mandatory public involvement processes which required more time than allowed by the 60-day § 401 review time limit.
- Notification practices vary widely among Corps districts. States and tribes have said it would be helpful to have a consistent and transparent process for notifying certification authorities of the status of their certification. Corps notifications about the status of § 401 certifications have been made by phone, by email, or by letter. Some notifications have been informal with minimal specifics followed later by a more formal notification letter. In some cases, it appears that notifications may not be happening at all.
- In some states (and likely some tribes) the status of their certifications (accepted, rejected, other) was unclear to them even past the date of March 15, 2021, when the new NWPs came into effect. While some states received Corps letters that accepted or “declined to rely” on all or part of the certification, others received no specific information about certification status. As a result, several states and tribes did not know if the NWPs were available in their jurisdiction and with which conditions. Washington State, for example, heard initially that the Corps district was rejecting one condition, and later was notified that the Corps is “Declining to Rely” on their § 401 decisions for the 2020/21 NWPs.
- Corps districts are not uniformly keeping state and tribal certification authorities informed about the status of their certification. The NWPs provide that if certification is denied for any of the NWPs a project proponent can request an individual § 401 certification to make an NWP

available. Certifying authorities need to know the status, including for each condition. If Corps districts are telling project proponents a NWP is available provided that they get an individual certification from the state or tribe, this requires the state or tribe to establish a process for individual NWP certification requests.

Some states and tribes may choose to deny one or more permits and opt for individual § 401 certifications; however, certifying authorities that certified a particular nationwide can be caught by surprise if the Corps did not make the nationwide applicable. The current Corps process has left many states and tribes unsure if they should prepare to receive requests for individual § 401 certifications where they do not already have a process and/or staff sufficient to handle the increased volume.

- The Fall 2020 out-of-cycle § 401 certification review process was unnecessarily burdensome. States and tribes were surprised by the Corps' request in Fall 2020 to certify a set of NWPs out of the five-year cycle, which would have normally begun roughly six months prior to the expiration of the current permits. Changes in workload would be more readily accommodated when on a predictable cycle. ASWM recommends that the Corps reunite all the NWPs in a single request for certification on the customary five-year cycle and remain on that cycle going forward.

The Corps should seek new § 401 certification for reissuance of the remaining 40 Nationwide Permits that expire in March 2022.

In an April 2021 presentation at ASWM's State/Tribal/Federal Coordination Meeting, Jennifer Moyer, Chief of the Corps' Regulatory Branch, stated that the Corps does not plan to seek certifications for reissuance of the remaining 40 NWPs in March 2022, instead relying on the certification decisions submitted in December 2020. We believe that failing to seek a new § 401 certification for reissuance of the remaining NWPs is inconsistent with the Clean Water Act. CWA § 401 requires certification for any new federal permit or license that may discharge into a water of the U.S. A certification on draft permits that differ substantively from final permits does not satisfy § 401. If the final NWPs differ from the permits as proposed in September 2020, they would require a new certification.

The Corps should revert to the 2017 Nationwide Permits and allow review of a new and complete NWP package for the following reasons:

- Water quality effects of a subset of the NWP package may be different from effects envisioned in the 2020 certification;
- Certifying authorities based their review and conditions on the entire package of permits, as well as the Navigable Waters Protection Rule and 2020 § 401 Rule, which are currently being revisited by the EPA and the Corps. The decision whether to approve, condition, deny or waive each NWP may be affected by these federal regulatory changes; and
- Certifying agencies seek the opportunity to determine whether or not they choose to make the same or different decisions during the reissuance.

In Summary

Considering these significant process issues, ASWM respectfully requests that the Corps:

1. **Suspend the sixteen January 2021 NWPs**
2. **Revert to the prior NWPs** finalized at 82 Federal Register 1860 (January 6, 2017, and described as in effect until March 18, 2022) until a new review of all NWPs can be conducted on the regular five-year schedule for renewal in 2022; and

3. Develop a consistent process responding to state and tribal certifications submitted to the Corps, including review, ability to address deficiencies, notification, and implementation processes.

ASWM appreciates the opportunity to share this request with the Corps. While this request has been prepared by ASWM with input from the ASWM Board of Directors, these comments do not necessarily represent the individual views of all states and tribes; we therefore encourage you to consult with individual states and tribes, as well as other state associations. Thank you for considering our concerns and comments regarding the review of state and tribal NWP.

Sincerely,

A handwritten signature in black ink, appearing to read "Marla J. Stelk". The signature is fluid and cursive, with a long horizontal stroke at the end.

Marla J. Stelk
Executive Director
Association of State Wetland Managers

Cc: ASWM Board of Directors
Vlad Dorjets, Office of Management and Budget