



# The Association of State Wetland Managers, Inc.

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

November 13, 2020

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Submitted via [www.regulations.gov](http://www.regulations.gov)  
Docket ID No: COE-2020-0002

Re: Proposal to Reissue and Modify Nationwide Permits

To Whom It May Concern,

These comments were prepared by the Association of State Wetland Managers (ASWM) in response to the September 15, 2020 Federal Register supplemental notice of proposed rulemaking (SNPRM) for "Proposal to Reissue and Modify Nationwide Permits" (Docket ID No. COE-2020-0002).

ASWM is a nonprofit professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland programs. Since 1983, our organization and our member states and tribes have had long standing positive 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 implementing state and federal dredge and fill permit 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. Our comments are focused on the potential impact of the proposed rule on states and tribes, and the protection and management of aquatic resources across the United States.

The draft 2020 Nationwide Permits (NWP) 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 that will be commonly used by the state and tribal certifying agencies we serve. The NWPs play a critical role in state and tribal regulation of wetlands and other aquatic resources. When oversight is performed appropriately by the Corps, the NWPs help both state and tribal certifying agencies to streamline the permitting process, which is beneficial to not only project proponents but states and tribes as well.

While the role of the NWPs is valued, the process of reviewing and certifying (some with conditions) is equally important. The proposed rule poses a number of concerns for state and tribal certifying authorities. ASWM has been gathering information from states and tribes on their responses to the proposed rule, documenting legal, regulatory, implementation, and impact concerns. ASWM's comment letter is reflective of this information, sharing key issues and suggestions.

## **ASWM Comments on the Rule Review Process**

### **Certifying Permits in a Proposed Rule, Rather than Final Rule**

States and tribes express deep concerns about the requirement 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 condition permits that are not yet final. This practice is inconsistent with prior NWP reissuance procedures. 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. States and tribes have expressed serious concern that any changes that take place to the permits after certification may result in missing or inappropriate conditions, leaving states with no opportunity to remedy a deficient certification.

Being asked to review and condition draft permits puts states and tribal certifying authorities in the unprecedented position of having to consider conditioning their own certifications to ensure that they are certifying each draft federal permit. If the content of the NWPs changes between the draft and final rule, they may have to deny NWPs due to insufficient information. While this is a clear problem with the proposed review process, the proposed rule also does 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 will be treated in the final permits may lead some certifying authorities to deny certain NWPs outright for lack of adequate information to determine compliance with state water quality regulations. A process that requires certifying agencies to certify draft permits without a clearly articulated process to address any changes made in the final permits could lead to the unnecessary denial of one or more NWPs. This is neither good governance nor good business as it causes additional burden for permittees.

Additionally, some states operate under USACE issued State General permits to implement USACE wetland permitting where NWPs are revoked. However, the USACE relies on NWP stream thresholds, water certifications, and PCN processes to update its State General permits. For the above stated reasons, these issues will raise conflicts and issues when the State General Permits are updated.

*SUGGESTION: ASWM suggests a separation of the two processes and an extension of the deadline for certification of the Nationwide Permits until the rule is final and the permits are no longer in draft form.*

### **Need for More than 60 Days to Review Proposed Rule that Includes Major Changes**

Previously, the NWP Rule review period was on an expected schedule, which allowed states and tribes to plan additional time before the review period to initiate both internal and external coordination and planning in preparation for the review process. In the 2016 NWP reissuance process, the proposed rule was released on June 1, 2016, with comments received during a 60-day comment period and then finalized on January 6, 2017 with publication in the Federal Register<sup>1</sup>. Once the 2016 final NWP Rule was published in the Federal Register, the Corps provided states and tribes with an additional 90 days for both § 401 and Coastal Zone Management Act (CZMA) consistency reviews, but this was for reviewing and conditioning *final* permits in a *final* rule before the effective date.<sup>2</sup> This time, the Corps is requiring states and tribes, in the same amount of time, to simultaneously review and comment on the *draft* rule, and review and condition permits for § 401 in 60 days and for CZMA in 90 days. There is a fundamental disconnect created in the proposed rule by the separate requirements for the § 401 water quality certification review process and the CZMA review process, which must be conducted within

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<sup>1</sup> March 19, 2017 Federal Register: <https://www.govinfo.gov/content/pkg/FR-2017-01-06/pdf/2016-31355.pdf>

<sup>2</sup> June 1, 2016 Federal Register: <https://www.federalregister.gov/documents/2016/06/01/2016-12083/proposal-to-reissue-and-modify-nationwide-permits>

each coastal state. The current discrepancy between the 60-day timeline for § 401 review and the 90-day timeline for CZMA review creates an unnecessarily cumbersome, bifurcated review process.

Despite expectations of the next NWP Rule review process beginning in 2021 and culminating in a new rule in 2022, an off-cycle process was enacted, and opportunity for advanced planning and coordination has been eliminated. While states and tribes are committed to evaluating and conditioning the permits, 60 days is an unreasonably short timeline to effectively review the sheer volume of changes and meet the legal requirements of some certifying authorities to provide opportunity for comment, including public hearings. Some states require processes involving public comment and notice that will not be able to be completed on this timeline. This abbreviated timeline directly undermines and limits state and tribal input, and thus undermines cooperative federalism. Review must take into consideration significant changes in multiple NWPs, changes in general conditions, the addition of five new permits, the need to determine cumulative and interconnecting impacts from other recent federal rulemaking actions (e.g., the Navigable Waters Protection Rule and the final Clean Water Act § 401 Rule), and input from the public. By any measure, the 60-day review and comment period is clearly inadequate for this volume of review and analysis.

*SUGGESTION: ASWM suggests that the Corps extend the review period to 180 days to provide adequate time to review the proposed rule and associated draft permits.*

### **ASWM Comments on Specific Nationwide Permits**

#### **Changing the 300-Linear Foot Threshold to Acreage Threshold**

A leading concern of states and tribes in their review of the 2020 NWPs is the change from the existing 300 linear foot limit for losses of stream bed to a new acreage-based measure. This change impacts NWP 21, 29, 39, 40, 42, 43, 44, 50 and 51. Several states report that this change will result in major losses of streams in their state without requiring pre-construction notice (PCN), public input, or mitigation. Even with PCNs, public input and/or compensatory 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 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 width average 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. Smaller features are widely undercounted and, without data otherwise, legal protections should be broad enough to account for the scale, sensitivity, and ecological importance of small streams<sup>3</sup>. For example, in one state a change in map scale (e.g. 1:100,000 to 1:24,000) can result in a 50% increase in stream miles. Even at this scale, thousands of miles of actual first-order streams that are not mapped will be impacted. The majority of stream mitigation offsets needed are to service lower order stream impacts, which science and restoration practice indicate are best measured by a linear metric<sup>4</sup>.

The Corps cites studies by Doyle et al. (2015) and Lave (2014) in justifying this change. However, the authors of this scientific research 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 (see

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<sup>3</sup> See discussion in Owen, Dave (2017). *Little Streams and Legal Transformations*. ‘Utah Law Review: Vol 2017. No. 1. Article 1m p. 7-14. Available at: <http://dc.law.utah.edu/ulr/vol2017/iss1/1>

<sup>4</sup> U.S. EPA. Connectivity of Streams and Wetlands To Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-14/475F, 2015.

comment letter submitted to the Corps on November 12, 2020 by Doyle and Lave). 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 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 USACE’s statutory obligation to permit only ‘minimally adverse environmental impacts’”<sup>5</sup> (ibid). 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...” (ibid). 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” (ibid).

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 from two different sources (one is a U.S. dataset and the other is a world estimate based on Africa<sup>6</sup>). 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 they chose to use global average data based on African stream widths rather than the data available that is specific to U.S. streams. Obviously, the NWP’s only apply to projects affecting U.S. streams, not African streams or those found in other countries. The Corps’ decision to use the world average stream width dataset creates the appearance of a minimal difference between linear foot and acreage measurements; however, in reality, use of the pertinent U.S. dataset more than doubles the stream miles that can be impacted when compared to the world average. This vastly increased impact threshold would violate the basic tenet of General Permits – that any activity authorized by a general permit “result in no more than minimal individual and cumulative adverse environmental effects.”

The Corps’ proposed change ignores the prevailing body of scientific literature that documents the unique value of headwater streams. Colvin, et al (2019), demonstrate that “headwater streams and wetlands are integral components of watersheds that are critical for biodiversity, fisheries, ecosystem functions, natural resource-based economies, and human society and culture. These and other ecosystem services provided by intact and clean headwater streams and wetlands are critical for a sustainable future. Loss of legal protections for these vulnerable ecosystems would create a cascade of consequences, including reduced water quality, impaired ecosystem functioning, and loss of fish habitat for commercial and recreational fish species.”

A one-half acre loss of stream bed, based on U.S. averages for stream width, has the potential to effectively eliminate the biologic, hydrologic and geomorphic functions of the stream<sup>7</sup>. 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 conclusion. The rule ignores the extensive literature, particularly the Corps’ and EPA’s own Science Advisory Board’s Report - [\*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence\*](#), which underscores the importance of headwater streams<sup>8</sup>. The Connectivity Report identifies the many unique and valued functions and ecosystem services provided by these aquatic resources. While Executive Order 13783 makes the case for streamlining and increasing the efficiency of permitting for these NWP’s, increasing permitting efficiency cannot relieve the Corps of its statutory responsibility to protect valuable resources. The 300 linear 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

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<sup>5</sup> Clean Water Act § 404(e).

<sup>6</sup> Supplementary electronic material to Downing et al (2012), \_Table 2

<sup>7</sup> Colvin, et al. 2019. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services. *Fisheries* 44:73–91

<sup>8</sup> Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence; Downloaded from:

<https://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/7724357376745f48852579e60043e88c!OpenDocument>.

this time and should not be eliminated without a more clearly articulated reason based on the best available science.

The Corps already recognizes the need for regionalization in its use of supplements to the Federal Wetland Delineation Manual. To get a comprehensive estimate of stream width for a state/tribe would require use of USGS regional regression models to estimate width based on available slope and drainage area data from the National Hydrography Dataset (NHD), a massive GIS exercise. Analysis by the State of Washington, looking at stream size in four states, suggests that removing the 300 linear foot threshold, especially for 1st to 4th order streams would have major impacts. This approach would result in more than minimal adverse environmental effects, individually and cumulatively in many states<sup>9</sup>.

While the proposed rule argues for the change to the acreage measure, in the 2017 reissuance of the NWP, in the context of NWP 21, the Corps stated, “We believe that both the ½ acre and the 300 linear foot limits are necessary to ensure that the activities authorized by this NWP cause no more than minimal and individual cumulative adverse environmental impacts.” The Corps does not explain why it is abandoning this statement from 2017. A changed metric is not supported by the scientific literature and will consequently lead to large-scale unmitigated losses to the Nation’s aquatic ecosystems. This dramatic change will also likely have serious and unintended consequences for permits supported by recent justifications developed and used by the Corps itself regarding use of the 300-foot linear threshold.

Some long-standing mitigation programs use linear feet as a basis for determining mitigation credits for stream impacts. Using the 1/10-acre threshold for stream mitigation under NWP 51 would require changing the basis for calculating stream mitigation credits and associated costs. This would introduce uncertainty and costs for the public and for mitigation entities such as banks and in-lieu fee programs. Activity-specific impacts from changing from the 300-linear foot threshold to the ½ acre threshold for wetlands 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). Economically, these activities are regulatory drivers for credit sales. According to a 2015 study in PLOS One, the broader industry is valued at \$25 billion in annual direct and indirect economic output and supports 225,000 jobs<sup>10</sup>. Individual mitigation banking firms have analyzed the impact of the proposed NWP changes on their mitigation credit sales. Elimination of the 300 linear foot limit from the NWPs has the potential to cut credit sales in the Southeast/Gulf/mid-Atlantic by 25-60%.

#### **SUGGESTION:**

*For all these reasons, ASWM 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 Pre-construction Notification (PCN) Requirements**

Pre-construction notification (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

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<sup>9</sup> Washington State Department of Ecology, personal communication, November 13, 2020.

<sup>10</sup> <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0128339>



whether additional changes or mitigation are required. The PCN helps ensure that the NWP is being used properly, including ensuring that state/tribal water quality standards are being implemented as permitted.

Changes to the permit language in NWP 12 will allow for impacts for up to 250 miles without a PCN. As written, the changed permit language allows for large, multi-acre impacts. While the NWPs have always allowed for some segmentation, the new language and requirements make segmentation even easier, despite federal requirements to avoid evaluating those harms individually.<sup>11</sup> For some states this creates a serious catch-22, as segmentation is not allowable under state law.

The proposed 2020 NWP Rule also removes PCN requirements for federal agencies. Many states and tribes strongly asserted that staff at federal agencies do not necessarily (and certainly not categorically) have more knowledge or expertise than other certifying agencies. They specifically refer to concerns around a lack of PCN for federal highway projects, the building or modification of military bases, and FAA airports. There continues to be need for public comment and accountability for these projects, which is afforded by the PCN and its process.

Additionally, the non-federal permittee definition (those who would continue to be required to complete the PCN process under the proposed rule) include state departments of transportation with specific responsibilities (NWP Rule, p. 57304). This 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.

#### **SUGGESTIONS:**

*As a result of these concerns, ASWM suggest that the Corps keep in the PCN requirements from the current NWP Rule and continue to ensure that federal agencies also meet PCN requirements. ASWM also suggests that thresholds for the PCN address and accommodate the rights of states to have laws and requirements that prohibit segmentation and include impact thresholds.*

#### **Changing NWP 12 PCN Thresholds**

In NWP 12, states are 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), scientific and practitioner evidence refutes this claim. When maintaining a right of way, management practices by utility companies 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 impacts to the forested wetland are permanent or at least semi-permanent, not temporary. For example, the Public Utilities Commission of Wisconsin states that “building a transmission line through woodlands requires that all trees and brush be cleared from the ROW. One mile of 100-foot ROW through a forest results in the loss of approximately 12 acres of trees. Transmission construction impacts can include forest fragmentation and the loss and degradation of wooded habitat, aesthetic enjoyment of the resource, and/or the loss of income.”<sup>12</sup>

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<sup>11</sup> “Projects should not may not shirk responsible analysis of environmental harms by “segmentation,” Swain v. Brinegar, 542 F.2d 364, 368-71 (7th Cir. 1976) (en banc); Indian Lookout Alliance v. Volpe, 484 F.2d 11, 19-20 (8th Cir. 1973), that is, by evaluating those harms severally rather than jointly.” [https://ceq.doe.gov/docs/get-involved/NAEP\\_2013\\_NEPA\\_Annual\\_Report.pdf](https://ceq.doe.gov/docs/get-involved/NAEP_2013_NEPA_Annual_Report.pdf)

<sup>12</sup> Environmental Impacts of Transmission Lines. (2013). Public Utilities Commission of Wisconsin. Downloaded from: <https://psc.wi.gov/Documents/Brochures/Enviromental%20Impacts%20TL.pdf>

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. A review of HGM data for pipeline construction projects impacting palustrine forested wetlands shows that mechanized land clearing results in significant permanent impacts to those wetlands (e.g. permanent reduction in wetlands biological function by 40%, chemical function by 15% and physical functions by 15% in the USACE Galveston District)<sup>13</sup>.

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 water quality impacts resulting in increases in the stream water temperature. In some states, water quality standards do not allow this impact. There are no studies, no industry information or best practices that provide information on how to eliminate these impacts, thus the removal of trees must be characterized as permanent and the impacts avoided, minimized and subjected to compensatory mitigation. Finally, there often needs to be a review of the practices employed to restore the area after the line is installed, to ensure that impacts truly are temporary and that the area will remain a wetland. The existing PCN threshold has been included in NWP 12 since 1996 as one of the original PCN requirements. States have expressed deep concerns 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 Atlantic coast and Gulf of Mexico where coastal wetland loss has been occurring at the highest rate nationally<sup>14</sup>. In this region and others (the proposed CMP New England Clean Energy Connect project through western Maine is under the 250 mile threshold at 145 miles in length), the expansion to a 250-mile threshold will likely lead to increased habitat fragmentation and decreased habitat for forested wetland-dependent wildlife species. Lines of this length are also more likely to cross state boundaries, making a PCN even more critical.

#### **SUGGESTIONS:**

*ASWM strongly suggests that the Corp keep the current NWP 12 PCN threshold related to forested wetlands. Additionally, ASWM suggests replacing the 250-mile threshold with more protective thresholds that are triggered when all crossings are considered to be part of a total and complete project, thus lowering the threshold in a manner supported by the best available science, and requiring a PCN when a project crosses state lines. An example of this latter approach has been found to date in the State of Missouri.*

#### **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, 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<sup>15</sup>.

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<sup>13</sup> D. Groves, The Earth Partners, personal communication, November 12, 2020. (A Review of Physical, Biological, and Chemical Functional Capacity Units Required to Offset Permanent Impacts to Palustrine Forested Wetlands from Four Pipeline Projects in the USACE-Galveston District using the Hydrogeomorphic Approach for Assessing Wetland Functions.)

<sup>14</sup> T.E. Dahl and S.M. Stedman. 2013. Status and trends of wetlands in the coastal watersheds of the Conterminous United States 2004 to 2009. U.S. Department of the Interior, Fish and Wildlife Service and National Oceanic and Atmospheric Administration, National Marine Fisheries Service. (46 p.)

<sup>15</sup> Atlantic Marine Fisheries Commission (2020): <http://www.asmfc.org/habitat/hot-topics>

Some, but not all, states have specific, written SAV goals. Some states have received feedback from their Corps districts that activities under NWP 48 will have to comply with state water quality standards, so there is no SAV issue for those states. However, for states that do not have this formalized, the issue may be a significant one. Regardless of SAV, there may remain concerns among states around water quality, entanglements, invasive species, and breaks, among others.

It is also unclear to many coastal states 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. States have indicated that this activity is akin to habitat conversion, which should not be allowed.

Finally, non-native vegetation of any kind should not be allowed. Allowing them to be farmed could encourage further spread or dispersion. The current permit requirements provide an overly simplistic conceptualization of invasive species and their interactions with the marine environment. Activities in areas where submerged aquatic vegetation is present may require a site-specific assessment to address potential impacts to affected species and should trigger a detailed project review by the Corps.

**SUGGESTION:**

*If this content is left in NWP 48, in response to requests by states, ASWM suggests that the Corps include some form of prescribed testing requirement to ensure that the material is clean (specifically, free of invasives 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.*

**ASWM 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 conflict or at least 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 definition. Use of conflicting definitions can cause regulatory problems or undermine intended protections.

*SUGGESTION: ASWM suggests 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), which is inclusive of both bed and bank characteristics. ASWM also encourages the final NWP Rule to adopt the formal definition of perennial streams from the NWPR.*

**ASWM Concerns around Rule’s Regulatory Impact Analysis (RIA)**

Federal agencies must conduct a regulatory impact analysis to assess the costs and benefits of a proposed regulation. Agencies shall propose a regulatory option upon a reasoned determination that benefits of the intended regulatory action justify its costs<sup>16</sup>. Agencies should select a proposed regulatory option that has the highest net benefits, including consideration of potential economic, environmental, and other advantages<sup>17</sup>. However, the analysis conducted by the Corps does not provide adequate inclusion of cost estimates readily comparable to the figures the Corps used to document cost savings. The analysis should also include documentation of impacts to the ecological restoration industry, as changes in the rule adversely affect regulatory demand drivers for the mitigation banking sector (please refer to comments on impacts to the mitigation banking

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<sup>16</sup> EO 12866, Section 1(b)(6)

<sup>17</sup> EO 12866, Section 1(a)



industry under “Changing the 300-Linear Foot Threshold to Acreage Threshold” on page 6 of this ASWM comment letter on the proposed 2020 NWP).

*SUGGESTION: ASWM suggests that the Corps revisit the Rule’s economic analysis, incorporating more relevant existing studies to more precisely estimate the public costs resulting from loss of stream and wetland functions. A special focus should include incorporating costs from flooding events, which are likely to increase as development around headwater streams and wetland habitats continues.*

### **ASWM Comments on Enforcement of Nationwide Permit Conditions**

ASWM seeks clarification on the role of all parties around enforcement of state conditions. During the question and answer portion of a webinar entitled, “Conducting State/Tribal Review of the 2020 Nationwide Permits” hosted by ASWM<sup>18</sup> on September 16, 2020, webinar presenter David Olson, Regulatory Program Manager at the Headquarters Office of the U.S. Army Corps of Engineers, indicated that the Corps does not have the authority to enforce a state condition, but a state cannot enforce a condition of a federal permit (without independent state law grounds). This creates a catch-22 if neither the Corps nor the state can enforce state conditions. In this context, the inclusion of state conditions is nugatory (i.e. the certifications would serve no purpose if they could not be enforced by either party). States and tribes should have the ability to enforce their own conditions if Corps does not enforce them, so that environmental impacts do not occur as an unintended consequence of the permitted action.

*SUGGESTION: This conflict must be addressed, clarified, and changed if state/tribal conditions cannot be effectively enforced by any party. States/tribes must be provided with the ability to have their state/tribal conditions enforced by one party or the other.*

### **In Conclusion**

ASWM appreciates the opportunity to comment on the Corps’ Proposal to Reissue and Modify Nationwide Permits (Docket ID No: COE–2020–0002). While these comments have been prepared by ASWM with input from the ASWM Board of Directors, they do not necessarily represent the individual views of all states and tribes; we therefore encourage your full consideration of the comments of individual states and tribes and other state associations. Please do not hesitate to contact me should you wish to discuss these comments.

Sincerely,



Marla J. Stelk  
Executive Director  
Association of State Wetland Managers

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<sup>18</sup> Webinar recording can be found at: <https://www.aswm.org/aswm/aswm-webinarscalls/9722-past-2020-capacity-building-webinar#permits091620>