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November 16, 2020

Alvin B. Lee
Directorate of Civil Works
U.S. Army Corps of Engineers
ATTN: CECW-CO-R
441 G Street, N.W.
Washington, D.C. 20314-1000
Via regulations.gov docket submittal

RE: Notice of Proposed Rulemaking to Reissue and Modify Clean Water Act Section 404 Nationwide Permits; Docket Number COE-2020-0002

Dear Mr. Lee:

On behalf of the New Mexico Environment Department (NMED), enclosed please find our comments on the U.S. Army Corps of Engineers (Corps) proposed 2020 Clean Water Act (CWA) Section 404 Nationwide Permits (NWP), Docket ID No. COE-2020-0002. *See* 85 FR 57,298 (September 15, 2020).

As we submit these comments, NMED continues to conduct our CWA Section 401 certification review, which is due December 15, 2020. In addition to your careful consideration of the comments conveyed today, it is NMED's expectation that the Corps uphold forthcoming state conditions certified by NMED and regional conditions developed by NMED and the Corp's Albuquerque District. NMED and the Albuquerque District have a decades-long successful track record of working together to protect New Mexico surface waters.

Furthermore, NMED supports the comments of the Environmental Council of States and the Association of Clean Water Administrators. NMED shares their concern about the Corps' decision to require state Section 401 certification of the *proposed* NWPs. This sequence sends the message that the Corps' is not interested in meaningfully considering public comments on the proposed permits, while also causing states to expend significant resources to certify permits that are subject to change if, in fact, the Corps' does take public comments into account and make changes to the proposed permits. NMED objects to the Corps' apparent intention to rush the process for reissuing and modifying the NWPs, particularly considering that the current permits do not expire until 2022.

Thank you for the opportunity to comment.

Sincerely,

Rebecca Roose
Director, Water Protection Division

Enclosure (1)

cc: James C. Kenney, Cabinet Secretary, NMED
Courtney Kerster, Director of Federal Affairs, Office of Governor Michelle Lujan Grisham
John Verheul, Assistant General Counsel, NMED
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New Mexico Environment Department (NMED) Comments on the U.S. Army Corps of Engineers' Proposed 2020 Nationwide Permits

Introduction

The New Mexico Environment Department (NMED) is the state agency charged with certifying federal permits issued pursuant to the Clean Water Act (CWA). NMSA 1978, Section 74-6-5.B, 20.6.2.2001 - 2003 NMAC. NMED's role is to ensure that these federal permits comply with the requirements of state law in order to maintain and protect water quality within our borders. The CWA Section 401 certification is part of a larger water quality protection effort that is an integral part of the CWA. New Mexico and the U.S. Army Corps of Engineers (Corps) have collaborated and applied state certifications to federal permits successfully for many years to the benefit of the state's surface waters.

NMED certified the 2017 Nationwide Permits (NWP) with conditions on March 1, 2017. Certification is required by CWA Section 401 to ensure that the NWPs are consistent with state law and comply with the state Water Quality Standards (20.6.4 NMAC) and Water Quality Management Plan/Continuing Planning Process, including Total Maximum Daily Loads (TMDLs) and Antidegradation Policy. Certification is also required to comply with General Condition 25 (Water Quality) and General Condition 27 (Regional and Case-By Case Conditions) of the NWPs.

It is essential that the Corps maintains the intent of the NWP program to ensure that NWP activities result only in no more than minimal individual and cumulative adverse environmental effects. However, several of the proposed NWPs result in more than a minimal individual and cumulative environmental impact. NMED's specific comments below detail the deficiencies of the proposed NWPs.

Comment 1: NMED strongly objects to the removal of the Pre-Construction Notification (PCN) requirement for federal permittees.

The Corps' is "seeking comment on whether to modify the NWPs that require pre-construction notification to limit the PCN requirement to nonfederal permittees." 85 FR at 57,303. NMED objects to any such modification of NWPs. All federal and non-federal permittees should remain subject to the PCN requirement.

The language of CWA Section 401(a)(1) is written very broadly with respect to the activities it covers and does not differentiate between federal and non-federal permittees. It states, "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates." Additionally, CWA Section 101(g) states that "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

The Notice of Proposed Rulemaking itself outlines many of the reasons why the PCN requirement is central to permit compliance. "The Pre-Construction Notification (PCN) process is a critical tool, because it provides flexibility for district engineers to take into account the activity-specific impacts of the proposed activity and the effects those activities will have on the specific waters and wetlands

affected by the NWP activity. It also allows the district engineer to take into account to what degree the waters and wetlands perform functions, such as hydrologic, biogeochemical cycling, and habitat functions, and to what degree those functions will be lost as a result of the regulated activity.” 85 FR at 57,314. The Corps’ rationale that federal agencies employ experienced staff to make proper determinations about permit compliance fails to provide an ample substitute for the PCN.

In the State of New Mexico, all applicants are currently required to notify the certifying authority when projects authorized under an NWP are located in intermittent or perennial streams. This notification process nearly always begins with the submittal of a PCN and provides NMED the opportunity to review the project. Notification also ensures that the project described in the PCN is consistent with the applicable water quality certification conditions necessary to comply with the state Water Quality Standards, Water Quality Management Plan/Continuing Planning Process including TMDLs, and Antidegradation Policy.

Most of NMED’s time and efforts related to CWA Section 404 permits is devoted to activities conducted under NWPs. Between 2010-2019, NMED cooperated with the U.S. Forest Service, U.S. Bureau of Reclamation, and U.S. Bureau of Land Management on approximately 40 projects requiring PCNs. PCNs contain vital information such as “detailed description of the work and materials used,” “detailed description of erosion controls,” “assessment of direct and indirect environmental effects,” “a statement describing how adverse environmental effects will be reduced,” and the rationale for compliance with General Condition 25, which allows the “district engineer or State or Tribe the opportunity to require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.” NMED review of these PCNs under CWA Section 401 allows NMED to meet its 401 responsibilities and improve project outcomes with respect to restoring and maintaining water quality.

In a state with over 30% of lands under federal control, removing the PCN requirement for federal activities would cause NMED to be in the dark regarding many active projects and precludes NMED’s review of compliance with the conditions of the state’s water quality certification. In addition, removing the PCN requirement for federal agencies will remove a valuable opportunity for coordination between state and federal agencies.

Comment 2: NMED does not support excluding State Departments of Transportation from the definition of “non-federal permittee.”

The proposal explains that state transportation agencies that have been assigned NEPA responsibilities for federal highway projects would be considered a “federal permittee” under the proposed NWPs and therefore no longer required to submit a PCN based on the proposed change addressed in Comment 1 above.

For the same reasons discussed above, NMED does not support removing PCN requirements for state transportation departments. Between 2010-2019, NMED reviewed approximately 35 PCNs submitted by the New Mexico Department of Transportation. NMED’s review of these PCNs under CWA Section 401 allows NMED to meet its 401 responsibilities and improve project outcomes with respect to restoring and maintaining water quality.

Furthermore, the Corps' proposal explains that District Engineers (DE) would retain the right to take action to address situations where the "Federal agency" incorrectly determined that the NWP terms and conditions were met and would continue to exercise this discretionary authority to modify NWP authorizations when they find that proposed activities will have more than minimal individual and cumulative adverse environmental effects or otherwise may be contrary to the public interest. Without the vital information provided by a PCN, it will be difficult for the DE to know if the "Federal agency" (including, as proposed, state transportation departments) correctly applied the NWP terms and conditions or if the project is expected to have more than minimal adverse environmental impacts. In addition, NMED (and other certifying agencies) will not know if a "Federal agency" correctly applied the water quality certification terms and conditions.

NMED does not doubt that state transportation agencies across the country are committed to environmental reviews and regulations. However, given the large number of projects and the scale of many transportation projects, without adequate notification and review from the State and the Corps it will be impossible to ensure that the projects will comply with state and federal law and will result in no more than a minimal individual and cumulative environmental impact. For example, from 2005 through 2019, NMED reviewed 66 New Mexico Department of Transportation (NMDOT) projects. Consultation with NMED, through PCN confirmation, resulted in improved project outcomes with respect to water quality in approximately 50% of these projects, mostly by improving how best management practices (BMPs) were implemented, particularly when BMPs were found to be missing or inadequate. Eliminating PCN requirements, and, consequently, CWA Sections 404 and 401 oversight, will inevitably increase CWA violations and the potential for enforcement actions. Such easily preventable impacts to national waters, which individually or cumulatively may result in more than minimal impacts, should not be permitted under the NWPs. The only way to guarantee these activities meet NWP and 401 certification terms and conditions is to review project proposals through a PCN.

Comment 3: NMED does not support the removal of the 300-foot threshold for first, second and third order streams.

In another effort to "streamline the NWPs," the Corps proposes to remove the 300 linear foot limit for losses of stream bed from 10 NWPs¹ and to instead rely on the 1/2-acre limit and PCN requirements.

The proposed 1/2-acre threshold corresponds to an estimated 3,470 linear feet of allowable impacts to first order streams averaging seven feet in width, and more than 2,000 linear feet for second order streams. The Corps did not demonstrate that increasing the limit 10-fold for first order streams will "...result in no more than minimal individual and cumulative adverse environmental impacts." All surface waters in New Mexico have designated uses of livestock watering, wildlife habitat, recreational contact, and aquatic life. NMED is not aware of any projects that have successfully demonstrated that filling in 3,470 linear feet of a first order stream can be done without adversely affecting the designated uses for that reach. Riparian areas along first and second order streams are important habitat and exhibit high biodiversity. Research is ongoing in New Mexico with regard to

¹The ten NWPs that would be affected are: 21 (Surface Coal Mining Activities), 29 (Residential Developments), 39 (Commercial and Institutional Developments), 40 (Agricultural Activities), 42 (Recreational Facilities), 43 (Stormwater Management Facilities), 44 (Mining Activities), 50 (Underground Coal Mining Activities), 51 (Land-Based Renewable Energy Generation Facilities), and 52 (Water-Based Renewable Energy Generation Pilot Projects).

the number of species that utilize these critical ecosystems.² Permitting this much fill in perennial streams will result in more than “minimal” environmental harm.

Part of the Corps rationale for removing the 300-foot limit from these 10 permits relates to reliance on the PCN tool to ensure that NWP activities result only in no more than minimal individual and cumulative adverse environmental effects. 85 FR at 57313. However, as noted above, the Corps is simultaneously considering removing the PCN requirement for federal activities. The Corps also relies heavily on compensatory mitigation for losses that exceed 1/10 of an acre of stream bed. This is a clear admission that significant impacts will occur under the increased 1/2-acre threshold. Projects with significant impacts are more appropriately evaluated and permitted through the Individual Permit process, which includes public comments, analyzes alternatives, and selects the Least Environmentally Damaging and Practicable Alternative through careful avoidance, minimization, and mitigation.

Minimizing paperwork to expedite construction and development activities is not a justification for increasing the NWPs thresholds for stream bed losses that will permanently alter watersheds.

Comment 4: NMED does not support the removal of the definitions of “intermittent stream” and “ephemeral stream.”

The Corps proposed to eliminate definitions for “intermittent stream” and “ephemeral stream” because they would not be needed if the 300 linear foot limit is eliminated, as proposed. Consistent with NMED’s opposition of the proposal to eliminate the 300 linear foot limit, NMED opposes elimination of these two definitions in the new NWPs. While the 2020 Navigable Waters Protection Rule (NWPR) excludes ephemeral streams from the definition of waters of the U.S. (WOTUS), the definition of ephemeral stream should be retained to verify that activities do or do not need coverage under an NWP. In addition, the definition of intermittent stream should be retained because intermittent streams may be a WOTUS under the NWPR if certain conditions are met. If the intermittent stream is a WOTUS, then it would need coverage under an NWP. The Corps also must confirm that the activities permitted under an NWP result in minimal adverse impact on the environment, individually and cumulatively. A cumulative impacts analysis may include a determination of flow through ephemeral and intermittent streams and the potential impact on downstream waters and properties. To support clarity and consistency for the Corps, certifying agencies and regulated entities, and in conjunction with retention of the 300-foot limit, the new NWPs should provide definitions of ephemeral and intermittent streams.

Comment 5: NMED does not support automatic authorization of NWPs after 45 days.

The proposed NWPs state that if the Corps district does not respond to the PCN within 45 days after receipt of a complete PCN the activity is automatically authorized by the NWP. This provision is contrary to water protection goals of the CWA. Permit authorization decisions may depend on many factors that extend beyond a 45-day decision period, such as (1) untimely submission of information or comments from the applicant, (2) changes in circumstances since the NWP was issued, (3) evaluation of the need for specific conditions, (4) significant objections to authorization, (5) multifaceted cumulative impacts analysis, and (6) other concerns for the environment, including the

² See <http://www.wildlife.state.nm.us/riparian-areas-bursting-with-biodiversity/>.

aquatic environment under the CWA Section 404(b)(1) Guidelines, and other relevant factors of the public interest.

Any of the factors above may cause an appropriate and necessary modest delay in permit issuance. Automatically authorizing NWP after 45 days will result in deficient reviews by the Corps, insufficient or inappropriate conditions to minimize project environmental impacts, and uncertainty that state water quality standards will be met.

Comment 6: NMED does not support the addition of reservoir sediment releases as part of NWP 27.

NWP 27 is for *Aquatic Habitat Restoration, Enhancement, and Establishment Activities*. The Corps is seeking comment “on adding ‘releasing sediment from reservoirs to restore downstream habitat’ to the list of examples of activities authorized by NWP 27.” 85 FR at 57,329.

Based on well-established variability and site-specific considerations, NMED finds that this type of activity is not suitable for an NWP. The downstream release of reservoir sediment can have short-term, but notable impacts on the downstream channel and aquatic habitat. In some cases, it can improve habitat; however, adverse effects on wetland and riparian areas are known to occur. The volume of reservoir sediment relative to the stream’s mean annual sediment load and the concentration of any contaminants relative to background levels are key parameters for determining downstream environmental impacts.

Reservoir sediment management strategies can be developed that both prolong reservoir life and benefit downstream reaches by mitigating the sediment starvation that results from sediment trapping. Generally, these strategies rely on complex sediment transport models to determine appropriate release flows and predicted downstream impacts. There is also the potential for contaminants to be released that have accumulated in the reservoir sediments. For example, nutrients are often associated with fine sediments and their release can have significant ecosystem impacts downstream.

Sediment management requires complex analysis and modeling to determine the appropriate flow release, the desired sediment transport, the necessary maintenance flows, and the predicted impacts to downstream water quality and habitats. NWPs are designed for minor discharges with minimal environmental harm. NMED supports the use of Individual Permits to authorize discharges of sediment for habitat improvement, including development of a sediment management strategy and consideration of the CWA Section 404(b)(1) Guidelines (40 CFR Part 230).

Comment 7: NMED supports the addition of a 1/10-acre threshold for compensatory mitigation for losses of stream bed authorized by NWPs that require compensatory mitigation.

While requiring mitigation for stream impacts is a good addition to the proposed NWPs, it is overshadowed by the substantial increase in allowable fill materials and subsequent environmental impacts to first, second and third order streams. It is more environmentally protective to reduce impacts (i.e., use a different threshold; see Comment 3) than it is to mitigate impacts after-the-fact.

Comment 8: Science clearly demonstrates the importance of headwater streams in delivering clean water to ranchers, farmers, municipalities and wildlife.

The Corps requested that commenters provide information on whether there are bases in statute, regulation, science, or policy on placing greater importance or value on headwater streams to support more stringent quantitative limits on losses of stream bed authorized by NWP activities, or whether consistent quantitative limits should apply to all non-tidal waters and wetlands.

The importance of headwater streams is well documented in the literature and by the Corps and the U.S. Environmental Protection Agency (EPA). For example, in 2015 EPA's Office of Research and Development published *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*.³ From the Abstract, "The report reviews more than 1,200 peer-reviewed publications and summarized current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in aggregate, affect the physical, chemical, and biological integrity of downstream waters." This report found that "the scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function."

The Journal of the American Water Resources Association lists numerous scientific articles regarding the connectivity between headwater streams and downstream waters.⁴ For example, the paper titled *Southwestern Intermittent and Ephemeral Stream Connectivity*⁵ found that the "connectivity of ephemeral and intermittent streams to the relatively few perennial reaches through runoff is a major driver of the ecohydrology of the region. These streams supply water, sediment, nutrients, and biota to downstream reaches and rivers. In addition, they provide runoff to recharge alluvial and regional groundwater aquifers that support baseflow in perennial mainstem stream reaches over extended periods when little or no precipitation occurs."

As the scientific literature demonstrates, and has demonstrated for decades, headwater streams are critically important to hydrologic function and sustained streamflow, and nowhere is this more evident than in the western United States. Ranchers, farmers, municipalities, and wildlife rely on the snowpack, which accumulates in the mountains each winter and flows downstream in the spring through mostly ephemeral and intermittent streams. The Corps should not allow smaller, first and second order headwater streams to be filled for 3000+ linear feet under NWPs. This type of activity is not a "minor" discharge with "minimal" environmental impacts. This magnitude of activity will result in irreparable environmental harm that will be exacerbated by the recent loss of federal protections in ephemeral waters. Such activities should be required to go through the Individual Permit process.

Based on the sheer volume of scientific evidence, the Corps should place greater importance and value on headwater streams to support more stringent quantitative limits on losses of stream bed authorized by NWP activities, or require Individual Permits to protect headwater streams.

³ 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, available at <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>.

⁴ See https://scholar.google.com/scholar?q=stream+connectivity+jawra&hl=en&as_sdt=0&as_vis=1&oi=scholar.

⁵ *Southwestern Intermittent and Ephemeral Stream Connectivity*, D.C. Goodrich W.G. Kepner L.R. Levick P.J. Wigington Jr. First published: 01 March 2018 <https://doi.org/10.1111/1752-1688.12636>. Paper No. JAWRA-17-0074-P of the Journal of the American Water Resources Association (JAWRA).

Comment 9: Deference to NMED for 401 Certification.

With the recent changes to Section 401 of the Clean Water Act, regional conditions discussed with the Albuquerque District or state conditions issued by NMED in the certification can be overturned by the Corps South Pacific Division. NMED and the Albuquerque District understand the waters of New Mexico and the conditions necessary to protect those waters and comply with state Water Quality Standards. NMED fully expects the Corps to uphold the state and regional conditions issued by NMED in coordination with the Albuquerque District.