



May 17, 2021

The Honorable Joseph R. Biden, Jr.
President of the United States of America
The White House
1600 Pennsylvania Ave NW
Washington, DC 20500

Dear President Biden:

Thank you for your continued commitment to clean water, a healthy environment, and thriving communities. As governors, we understand that the prosperity of our economy and environment, as well as that of our residents, are inextricably linked. This is why we write today to ask you to direct the Army Corps of Engineers (“the Corps”) to delay further implementation of the 16 recently finalized Nationwide Permits (NWP), as well as the 40 remaining NWPs expected to soon move to interagency review. The NWPs that have been certified by the states provide an effective and efficient way for many projects that discharge dredge or fill materials to waters of the United States to proceed with appropriate state water quality protections. Further, we echo the call of Chairs DeFazio and Carper to initiate a process to reopen the “Reissuance and Modification of Nationwide Permits” for public comment and allow the states and Tribes to provide revised Section 401 Water Quality Certifications (Certifications).

As background, under the previous administration, the Corps began a process to renew NWPs that asked state certifying agencies to issue water quality certifications on draft, rather than final, Corps permits. Many states, such as Washington, sought to reserve the right to revisit certifications if the final NWPs changed substantially, or to review applications that fail to meet state criteria under the NWP program. Often, this took the form of language similar to language that states had historically used for certifying NWPs. Since the states provided certification decisions in December 2020, the Corps is now waiving, denying, or invalidating those certifications. The Corps’ actions waived certifications or overrode state determinations on NWPs’ authorization of routine activities on pipelines, electric utility and telecommunications lines, and utility lines for water, among other activities. The Corps’ decisions create legal jeopardy for businesses and require state certifying entities to individually certify any covered activity.

Swift action is needed. On January 13, 2021, the Corps published a final rule announcing that 16 of the NWPs would go into effect on March 15, 2021. The Corps has also communicated that it intends to forge ahead soon – possibly within days – with finalizing the remaining NWPs, applying their determination regarding state certifications to all of them. This means that states will be charged with issuing thousands of individual certifications for previously covered

activities, creating an untenable burden for states and significant delays for businesses and communities, including those businesses currently seeking individual certifications that the Corps is already struggling to address. They have no viable plan for addressing the burden the Corps' actions will create for the regulated community as it pertains to having to obtain an individual certification for every project previously authorized by the NWP in states where the Corps has now invalidated certifications. This goes against the intent of the NWP program, which is to provide expedited and efficient permitting where the discharge and associated activities meet the conditions of the NWPs.

The Corps' determination to proceed in this manner will cause significant consequences for businesses that have struggled to survive the pandemic. Regulated shellfish growers relying on the certifications that the Corps intends to invalidate are facing the loss of another growing season, which will damage their ability to harvest for years to come. In other states, the Corps' invalidation of certifications is causing harms to businesses and communities that rely on these permits for their economic livelihood. For example, in California, hundreds of minor maintenance projects that have no impacts or very small permanent impacts have relied on the state's partial certification of NWP 12. Requiring these projects to get individual certifications threatens to add time and cost to fixing minor problems. Residential development projects authorized under NWP 29 will be required to get individual certifications, adding time and cost to address the affordable housing concerns in many states and delaying needed economic growth as communities strive to rebound from the current recession.

Infrastructure projects that have been in the planning phase for years may now need to reevaluate their schedules and budgets to accommodate the need to get individual certifications for projects previously covered by the NWP program and state programmatic certifications. Aquatic habitat restoration and enhancement projects authorized under NWP 27 will not be efficiently and expeditiously permitted, which will cause unnecessary delays and additional costs to projects that help mitigate climate change and improve water quality and overall watershed resilience, including resilience to wildfires. Finalizing the entire group of 57 permits, as the Corps intends to do, will greatly compound existing problems, expand their impacts, and create a bottleneck for our economy.

The Corps' intention to proceed with their decisions on the states' certifications is based on the Clean Water Act Section 401 rule promulgated by the previous administration, which is inconsistent with your administration's policy to review such federal regulations. While this rule is currently under review at EPA, the Corps is using it to justify their waiver, denial, and inability to rely on state's water quality certification decisions and other changes to the implementation of the NWP program. It is premature for the Corps to finalize these NWPs and invalidate state certifications under this EPA rule while it is under review. It is also premature for the Corps to undertake such significant actions while your nominees for Assistant Secretary of the Army for Civil Works and other key positions await consideration by the Senate.

States are determined to work in good faith with your administration, including the Corps, to protect our country's water quality and water resources and to provide regulatory certainty for businesses and communities. Many of our states are working with the Corps at both the regional

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and headquarters levels to secure these outcomes, and we look forward to continuing those efforts. But precipitous action by the Corps to finalize permits based on the previous administration's flawed Section 401 rule and nationwide permitting will greatly undermine the chances of a successful resolution. Even states that are not covered by nationwide permits share these concerns and fear that this approach may be extended to programmatic general permits in those Army Corps regions.

Thank you again for your commitment to working with states to achieve our shared vision of a more healthy and prosperous future for our communities. We look forward to working with your administration to establish an NWP program that is robust and fully protective of our nation's waters.

Thank you for your consideration.

Sincerely,



Governor Jay Inslee, Washington



Governor Gavin Newsom, California



Governor Ned Lamont, Connecticut



Governor Michelle Lujan Grisham, New Mexico



Governor Kate Brown, Oregon

cc:

Headquarters, U.S. Army Corps of Engineers

Brenda Mallory, Chair, Council on Environmental Quality

Michael Regan, Administrator, Environmental Protection Agency

State Congressional Delegations