



November 13, 2020

Honorable R.D. James
Assistant Secretary for Civil Works
U.S. Army Corps of Engineers
Attn: CECW-CO-R, 441 G Street NW
Washington, DC 20314-1000

Attn: Docket Nos. COE-2020-0002; RIN 0710-AA84

RE: Comments on the Proposed Rulemaking: Proposal to Reissue and Modify Nationwide Permits. 85 Fed. Reg. 57,298 (September 15, 2020)

Dear Assistant Secretary James:

The Pennsylvania Department of Environmental Protection (“DEP”) submits these comments with enclosures in response to the notice of proposed rulemaking entitled “Proposal to Reissue and Modify Nationwide Permits” published by the U.S. Army Corps of Engineers (“Corps”) on September 15, 2020, 85 Fed. Reg. 57,298, (“Proposed Rule”).

The Corps’ Proposed Rule states that the U.S. Environmental Protection Agency’s (“EPA”) recently issued revisions to EPA regulations governing the Clean Water Act section 401 certification process on June 1, 2020, and that in the future it may be necessary or appropriate for the Corps to revise the Corps’ section 401 regulations, including 33 CFR 330.4, in light of EPA’s Clean Water Act Section 401 Certification Rule. 85 Fed. Reg. 57,363. The Corps invited comments from the public on whether and, if so, when the Corps should revise the Corps’ regulations in light of the new EPA regulations. *Id.* The Corps further notes in the Proposed Rule that the Corps will update section 401 certification language, as appropriate, in the final Nationwide Permits (NWP). *Id.*

DEP recommends that the Corps not revise the Corps’ section 401 regulations, including 33 CFR 325.2 and 330.4, in light of EPA’s “Clean Water Act Section 401 Certification Rule,” 85 Fed. Reg. 42,210; July 13, 2020, Docket No. EPA-HQ-OW-2019-0405, because provisions of the EPA’s final rule are unlawful and infringe upon states’ rights under the Clean Water Act as intended by Congress. DEP incorporates herein by reference two comment letters contemporaneously filed by DEP and the Attorneys General of California, New York, Pennsylvania, and numerous other states on the EPA August 22, 2019 proposed rule entitled, “Updating Regulations on Water Quality Certification,” 84 Fed. Reg. 44,080. See enclosures 1 and 2. The comment letters incorporated herein explain why the EPA’s “Clean Water Act Section 401 Certification Rule” is contrary to the plain language, purpose, and intent of the Clean Water Act as well as United States Supreme Court precedent.

Secretary

The Corps' Proposed Rule states that "certifying agencies will have 60 days to act on the certification request [for the proposed reissuance and modification of the nationwide permits], consistent with the "reasonable period of time" established in the Corps' regulations for the purposes of Clean Water Act Section 401(a)(1) (see 33 CFR 330.4(c)(6) and 325.2(b)(1)(ii)). We believe that 60 days is sufficient for certifying agencies to complete their WQC decisions for the proposed NWP. The Corps' regulations at 33 CFR 330.4(c)(1) states that issuance of water quality certification, or a waiver, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States. Corps districts provide a 60-day period for certifying authorities to act on a certification request for NWPs (including reviewing any regional conditions being proposed by the districts)." 85 Fed. Reg. 57,305.

DEP disagrees that 60 days is sufficient for DEP to complete its water quality certification process. Section 401(a)(1) of the Clean Water Act provides, in relevant part, "[s]uch State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a). Pennsylvania's public participation process is also required under Pennsylvania Law, which includes the requirements for publication in the *Pennsylvania Bulletin*. It is not feasible in most instances, to complete Pennsylvania's process for publication in the *Pennsylvania Bulletin*, submission and receipt of public comments, and meaningful consideration by DEP of comments received, within the Corps' proposed 60 days.

In 1992 the Pennsylvania Department of Environmental Resources (DEP's predecessor agency), entered into a settlement agreement with the Corps, incorporated herein by reference, as a result of litigation in *Dep't of Env't'l Resources v. Corps of Engineers, Dep't of the Army et al.*, Case No. 1:CV-92-374 (filed March 20, 1992) ("1992 Settlement Agreement"). See Attachment 3. The Corps statement in the Proposed Rule that DEP "will have 60 days to act on the certification request, consistent with the "reasonable period of time" established in the Corps' regulations for the purposes of Clean Water Act Section 401(a)(1) (see 33 CFR 330.4(c)(6) and 325.2(b)(1)(ii))" is not consistent with the express terms of the 1992 Settlement Agreement.

As incorporated by reference, the Corps also previously acknowledged, in part, that "[a]lthough there is a default timeframe of 60 days under existing Corps regulations, we also intend to preserve the District Commander's discretion to account for circumstances in which a longer timeframe may be warranted." See Attachment 4. DEP believes this discretion is critical to account for DEP's water quality certification public participation process and enables DEP staff to give meaningful review to public comments received before DEP takes a final action on the Corps water quality certification request. Pennsylvania's process for section 401 water quality certification associated with authorizations under section 404 of the Clean Water Act (33 U.S.C. § 1344) has not changed since 1992 and DEP believes that the Corps should continue to exercise discretion to account for instances in which a longer timeframe is warranted.

Additionally, DEP has procedural concerns regarding the Corps' Coastal Zone Management Act ("CZMA") federal consistency determination. DEP has received a complete CZMA federal consistency determination from the Corps for the Proposed Rule. In past NWP reissuances, the

Corps requested comment from state coastal programs related to CZMA federal consistency with the proposed rule, addressed comments before issuing the final rule, and provided the CZMA consistency determination to the states with the posting of the final rule. This procedure led to a cooperative and coordinated federal consistency review, allowing state coastal program concerns to be considered and addressed by the Corps in advance of the federal consistency review and allowed for a seamless integration of state comments.

In contrast, the Corps is now providing a CZMA federal consistency determination for the Proposed Rule and is asking states to concur with a federal action that is not final. If DEP were to concur with the Proposed Rule, the potential exists for substantive changes to be made to the final rule that coastal programs would not have an opportunity to review under the 15 C.F.R. Part 930 federal consistency regulations. DEP would have preferred, and would prefer in the future, an opportunity to comment on the proposed rule prior to initiating the federal consistency review process. The CZMA federal consistency determination, and DEP's review and concurrence, should be reserved for the final action. For the present federal consistency review, DEP reserves the right to object to any substantive changes made as part of the Final Rule.

DEP also has significant concerns about the proposed removal of the 300 linear foot limit for streambed losses. The most recent (2017) NWP #s 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, limited streambed impacts to a two-tier "minimal adverse effects" threshold of no more than 300 linear feet of losses or ½ acre of streambed. This limitation was effective because for low-order streams, relying on the acreage limit alone can result in significant linear stream losses, while relying on a limit of 300 linear feet for high-order streams could lead to significant losses in streambed acreage.

The Corps is proposing to eliminate the 300 linear foot threshold and rely solely on the ½ acre limit for new impacts authorized under the 2020 NWPs listed above and is proposing only the ½ acre limit for the new NWPs D, E, and F. 85 Fed. Reg. 57,311-57,320. By Corps estimates, a project authorized under one of these 2020 NWPs which relies solely on the acreage limit could result in the loss of approximately 6,900 linear feet (well over a mile) of a first order stream without being considered to have more than "minimal adverse effects." Furthermore, relying solely on the acreage limits creates the potential for extreme cumulative losses of headwaters by repeatedly authorizing high-linear foot impacts on these streams over time. DEP recognizes that these long low-order stream segments represent only a small total acreage of direct streambed habitat impacts. However, the significant indirect effects to the surrounding habitats from losing more than a mile of a headwater stream is precisely why the 300 linear foot threshold was put in place. Low-order streams also tend to have greater association with higher quality waters and ecosystems than higher-order streams which are more commonly located within developed areas. By emphasizing total acreage over linear feet, the Proposed Rule fails to protect habitats and ecosystem services associated with low-order streams. DEP does not consider losses of low-order streams at these magnitudes to be "minimal adverse effect" and opposes the removal of 300 linear foot limit for streambed impacts. DEP recommends that the Corps continues to use the dual limit because the existing approach accounts for the unique characteristics of high- and low-order streams and better controls for ecosystem impacts, better ensuring adequate protection of waters of the Commonwealth and Pennsylvania's public natural resources.

DEP is committed to fulfilling its duties under the Clean Water Act, the Coastal Zone Management Act, and state environmental laws. DEP respectfully urges the Corps not to amend its section 401 water quality certification regulations to adopt a rule contrary to the cooperative federalism model envisioned by Congress when it enacted the Clean Water Act. DEP further encourages the Corps to reconsider the elimination of the 300 linear foot limit for streambed impacts in the Proposed Rule as it is not protective of low-order stream ecosystems.

Thank you for your time and consideration of these comments.

Respectfully,

A handwritten signature in black ink, appearing to read "Patrick McDonnell". The signature is fluid and cursive, with the first name being more prominent.

Patrick McDonnell
Secretary

Enclosures: 01 - EPA Proposed 401 WQC Comments
02 - Multi-State Comment on WQ Certs
03 - DEP ACOE Settlement
04 - WQC letter from Army Corps 4-12-19