

On November 16, comments were due to the U.S. Army Corps of Engineers (Corps) regarding their Proposal to Reissue and Modify Nationwide Permits (NWP). Western states commented both individually and through the Association of Clean Water Administrators (ACWA). States that individually commented included Colorado, Idaho, Nevada, New Mexico, Oregon, Texas, Washington and Wyoming.

Three primary concerns were raised by ACWA, as well as almost all of the individual state comments. These include: (1) concern with the removal of the Pre-Construction Notice (PCN) requirements for all federal agencies and federal permittees; (2) concern with the removal of the 300-linear foot (LF) limit for losses of stream bed from ten of the NWPs and replacing it with a half-acre threshold; and (3) requiring the states to provide a blanket Clean Water Act (CWA) Section 401 certification for the proposed nationwide permits, rather than allowing an extension to wait until the new nationwide permits are issued.

States highlighted that removal of the PCN requirement would mean full reliance on the environmental staff of the federal agencies to accurately assess impacts to the streams because states would no longer be notified when a project is submitted or being permitted. While states acknowledge the expertise of the agencies, they are concerned with the depth and breadth of their knowledge of state-specific water quality standards and cumulative impact assessments that are a central part of project certification. Comments submitted by Idaho stated, "While [the Idaho Department of Environmental Quality (DEQ)] respects the expertise of federal agencies' environmental staff, we do not believe it is reasonable to expect those staff to fully consider cumulative impacts over time and across multiple projects or to understand the intricacies of Idaho water quality standards. In contrast, [Corps] district staff has worked closely with DEQ staff to ensure an understanding of state water quality standards, including Idaho's antidegradation provisions, and to coordinate with DEQ staff when reviewing projects requiring PCN."

The 300-LF threshold also is of concern, especially to states with headwaters that have smaller, more narrow streams and that are critically important to the health of the watershed and waters downstream. Oregon's comments stated, "While the Corps acknowledges the challenges of attempting to quantify stream impacts or compensatory mitigation for streams that account for the scale or size of the affected stream reach, the proposed change to ½ acre threshold does not provide assurances that there will be minimal individual or cumulative adverse environmental impacts.... [I]f the intent of the NWP is to have no more than minimal individual and cumulative adverse environmental effects, the threshold and allowable impacts should be significantly less than the current threshold of 300 linear feet."

Wyoming was the only state that supported the conversion to a half-acre threshold, though only with the proposed addition of compensatory mitigation for stream bed losses greater than 1/10-acre, which they believe will ensure minimal adverse environmental effects. Their comments stated, "It is conceivable that these changes would improve permitting efficiency and increase regulatory certainty while requiring standard compensation for stream bed losses. The [Wyoming Department of Environmental Quality] supports the proposed removal of the 300 linear foot limit for losses of stream bed provided that the proposed addition of the 1/10-acre threshold for compensatory mitigation of stream bed losses for these NWPs is adopted." New Mexico also supported the addition of 1/10-acre threshold for compensatory mitigation, though they raised concerns that it will be overshadowed by the increase in allowable fill materials and subsequent environmental impacts from the shift of the NWPs to the half-acre threshold for stream bed losses.

Many states requested that the appropriate deadlines be changed to allow states to consider and make certification decisions based on the final nationwide permits, not the proposed versions as they are currently required to do. Nevada's comments said, "[The Nevada Department of Environmental Protection] finds it challenging to review and comment on draft proposed Nationwide Permits while simultaneously meeting concurrent federal timelines for certifying them for 401 determination. Conditions in 401 Certifications for the NWPs could conceivably change if the final NWPs are modified from the proposed versions. It is critical for States to be provided the opportunity to fully evaluate the final version of the NWPs and modify 401 Certifications as necessary."

Individually, New Mexico raised some concerns around removing the definitions of "intermittent stream" and "ephemeral stream," automatically authorizing NWPs after 45 days if the Corps district does not respond, and the addition of reservoir sediment releases as part of NWP 27, *Aquatic Restoration, Enhancement and Establishment Activities*. They also commented that, "Science clearly demonstrates the importance of headwater streams in delivering clean water to ranchers, farmers, municipalities, and wildlife," and cited numerous reports and scientific literature in

response to the Corps' request for input on the legal, regulatory, policy or scientific bases for placing greater importance or value on headwater streams.

Texas supported a proposed hybrid approach to establishing alternative quantitative limits for stream bed losses, but believed the concept needed to be further developed. "The proposed hybrid approach appears to be simply a translation of the ½-acre limit to linear feet for different stream width classes, without any consideration of whether the resulting quantitative limits are consistent with the NWP goal of authorizing only minimal environmental impacts. If an alternative approach to the 300 LF stream loss limit is to be proposed, the [Texas Commission on Environmental Quality] recommends that any such proposals go through a more thorough development and vetting process prior to being considered for use in the NWP program."

From a broad scale, Washington urged the Corps to ensure the new NWPs were protective of water quality. They wrote, "State agencies and tribes are carrying a larger regulatory burden because of EPA's new rule regarding Section 401 of the Clean Water Act. This rule seeks to limit state authority and narrow our ability to protect our state waters. At the same time, we are also striving to protect many state waters from pollution without federal partnership, as the Corps and the [EPA] have withdrawn federal protection under their new "Waters of the United States" definition.... We urge you to reconsider and engage with us in renewing a NWP program that is protective of water quality in Washington State and around the country."

Comments are available at www.regulations.gov, Docket COE-2020-0002. WSWC staff can also provide copies of the state and ACWA comments upon request.