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Sent: Sunday, November 08, 2020 5:54 PM
To: nationwidepermits2020
Cc: Nicole Rowan - CDPHE; Trevor Klein - CDPHE; Meg Parish - CDPHE; Scott Garncarz - CDPHE; Jennifer Opila - CDPHE; Melynda May; Perkins - DNR, Ed; George Schisler - DNR
Subject: [Non-DoD Source] Colorado comments on Nationwide Permits, Docket number COE-2020-0002
Attachments: Colorado WQCD Comment Letter - NWP - Docket number COE 2020-0002.pdf

Please see the attached comments from the Colorado Department of Public Health and Environment, Water Quality Control Division regarding the Nationwide Permits (Docket number COE-2020-0002).

Thank you for the opportunity to comment on the proposal to reissue the existing NWP and the five new NWP. We look forward to working with you on these suggestions. Please do not hesitate to contact Trevor Klein (trevor.klein@state.co.us <mailto:trevor.klien@state.co.us>), Scott Garncarz (scott.garncarz@state.co.us <mailto:scott.garncarz@state.co.us>), Meg Parish (meg.parish@state.co.us <mailto:meg.parish@state.co.us>) or myself (aimee.konowal@state.co.us <mailto:aimee.konowal@state.co.us>) with any questions.

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November 8, 2020

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Re: Colorado comments on Nationwide Permits, Docket number COE-2020-0002

To whom it may concern-

On September 15, 2020, the U.S. Army Corps of Engineers (“USACE”) published in the Federal Register its proposal to reissue the 52 existing nationwide permits (“NWPs”) and issue five new NWPs.

Pursuant to section 25-8-302(1)(f), C.R.S., the Colorado Department of Public Health and Environment (CDPHE) Water Quality Control Division (“WQCD”) is the agency responsible for the issuance of certifications under the provisions of section 401 of the federal Clean Water Act (“401 certifications”). Projects that meet the criteria for nationwide 404 permits automatically receive 401 certifications without further action by the WQCD. Colo. Rev. Stat. 25-8-302(1)(f). Therefore, it is critical for the WQCD to ensure that Nationwide Permits (NWPs) include adequate protection for water quality in Colorado. The WQCD is providing these comments to voice its concerns regarding the proposed changes.

Removal of 300 linear foot requirement

Currently, projects permitted under NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 cannot cause the loss of more than 300 linear feet of stream channel (“300 linear foot requirement”). The USACE has proposed to remove the 300 linear foot requirement for these NWPs, and to instead rely exclusively on the 0.5 acre limit on the area of waters affected. This proposed change would expand the numbers of projects that would qualify for NWP’s which do not receive the same amount of review and considerations as individual permits. The WQCD does not support this proposed change.

The WQCD has estimated that about 640 such permits were issued in Colorado between 2015 and 2020. In several mountainous watersheds, most of which are west of the continental divide, these types of NWPs comprised between 20% and 40% of the total number of NWPs issued during this time period (Figure 1). Many of the streams located in mountainous watersheds are the narrow headwaters of larger rivers downstream. Thus, authorizing dredge and fill activities under nationwide permits with a maximum impact related to streambed



area rather than channel length could result in significant damage to Colorado’s headwater streams. For example, assuming a channel width of 20 ft, a project could receive an NWP if the associated activities impacted 1,089 linear feet of channel. Assuming an average width of 10 ft, the project could impact 2,178 feet of channel before requiring an individual permit.

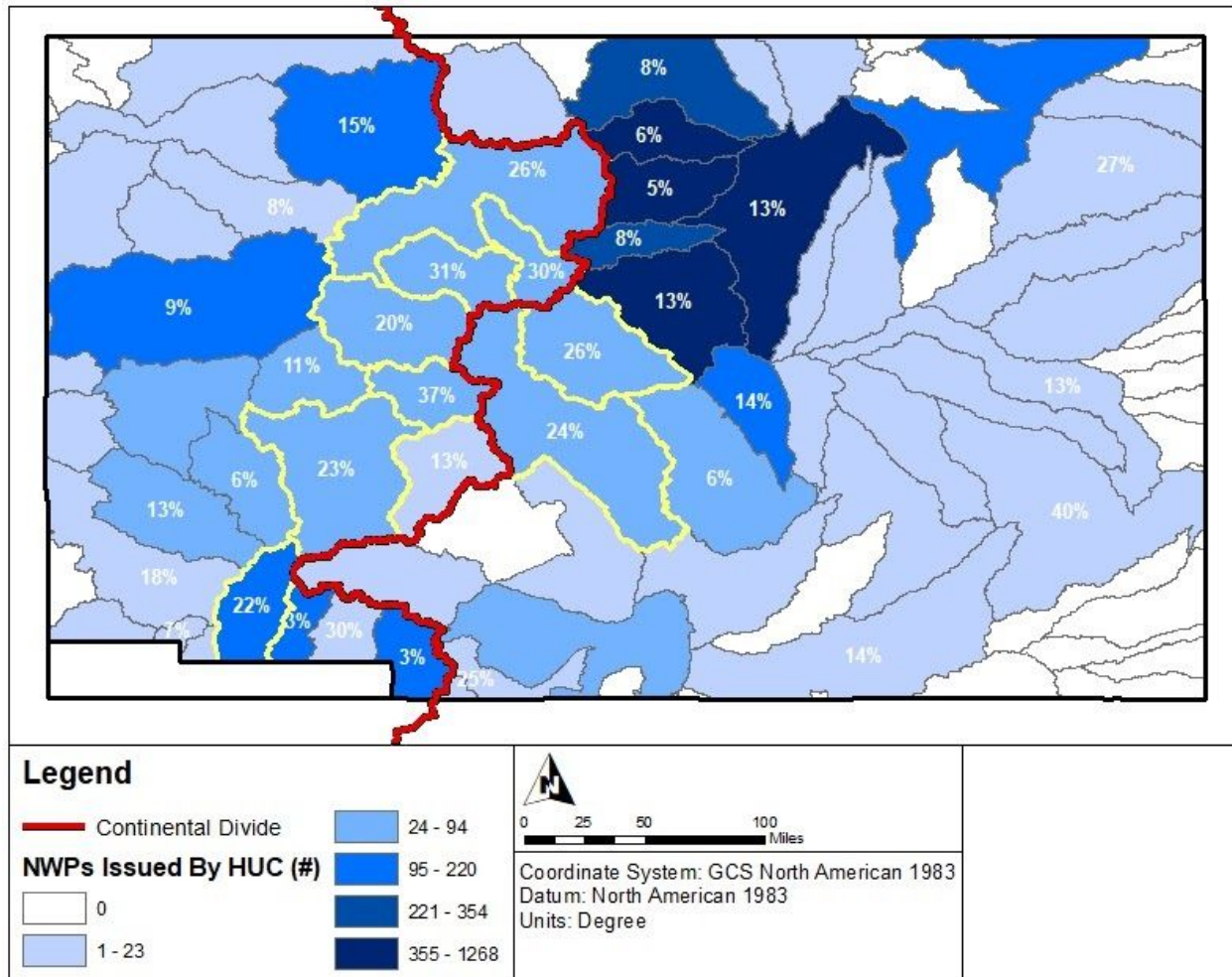


Figure 1. Percentage of NPWs subject to the 300 linear foot requirement issued in each of Colorado’s watersheds between 2015 and 2019. The color of each watershed corresponds to the total number of NPWs issued in that watershed. The watersheds outlined in yellow are some of the mountainous watersheds in which removal of the 300 linear foot requirement could encourage the use of NPWs for projects that impact much longer reaches of small headwater streams, which are critical to the protection of downstream water quality.

Despite their small size, headwater streams are critical to protecting water quality because they serve as “the first line of defense against potential contaminants such as excess fine sediment or nutrients.” Ellen Wohl, *The Significance of Small Streams*, 11 *Frontiers of Earth Science* 447, 449 (2017). Furthermore, “the characteristics of the riparian zone and the



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bankful channel strongly influence” water quality in these systems. *Id.* Thus, projects that impact headwater stream channels or their adjacent banks may compromise downstream water quality, and expanding the scope of NWP to cover a greater proportion of those projects could exacerbate those impacts. In addition, a recent study found that, where a given amount of wetland area is lost, the loss of capacity for nutrient removal is greater when the wetlands included within that area are smaller. Frederick Y. Cheng & Nandita B. Basu, *Biogeochemical Hotspots: Role of small water bodies in landscape nutrient processing*, 53 *Water Res. Rsch.* 5038, 5053. Therefore, to the extent that headwater streams are more likely to support small wetlands, increasing coverage under NWPs for these channels is likely to result in increased water quality impacts.

Because eliminating the 300 linear foot requirement could disproportionately impact Colorado’s headwater streams, the WQCD does not support this proposed change to the relevant NWPs.

Removal of Preconstruction and Verification Requirements

The USACE has proposed to remove existing terms requiring the permittee to obtain a written verification from the district engineer before commencing the regulated activities in waters of the United States from the following nationwide permits:

- NWP 21 - surface coal mining
- NWP 49 - coal remaining activities
- NWP 50 - underground coal mining activities

The USACE has also proposed removing preconstruction notifications altogether from a number of NWPs, including NWP 12. Currently, these permits become effective 45 days after the preconstruction notification is received unless the USACE objects.

The WQCD opposes these changes, which undermine water quality protections in Colorado. Without preconstruction notifications, the USACE has no opportunity to:

- Review the preconstruction notice (PCN) and determine whether the proposed activity qualifies for NWP authorization or whether discretionary authority should be exercised and an individual permit required because the district engineer determines the proposed activity may result in more than minimal individual and cumulative adverse environmental effects.
- Assess potential impacts to listed species and critical habitat and conduct section 7 consultations whenever they determine proposed NWP activities “may affect” listed species or critical habitat.
- Prevent activities from occurring that may not be appropriate for coverage under the NWP until an individual permit is received.



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- Track the location of NWP in Colorado, which is likely to make enforcement of NWP conditions far more difficult.

Without these safeguards, water quality is likely to be harmed in Colorado. For instance, if a permittee undertakes an activity that is inappropriate for NWP coverage because it will result in more than minimal individual and cumulative adverse environmental effects, under the proposed NWPs the USACE would not know about that activity and could not prevent it or likely conduct enforcement against the permittee. This would harm Colorado waters and potentially impair the uses of those waters, including drinking water and aquatic life.

Thank you again for the opportunity to comment on the proposal to reissue the existing NWPs and the five new NWPs. We look forward to working with you on these suggestions. Please do not hesitate to contact Trevor Klein (trevor.klein@state.co.us), Scott Garncarz (scott.garncarz@state.co.us), Meg Parish (meg.parish@state.co.us) or myself (aimee.konowal@state.co.us) with any questions.

Sincerely,

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