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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 16, 2020

Mr. David Olson
U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, D.C. 20314-1000

Subject: Proposal to Reissue Nationwide Permits [Docket Number COE-2020-0002]

Dear Mr. Olson:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to provide the attached comments on the U.S. Army Corps of Engineers (Corps) proposal to reissue and modify the Nationwide Permits (NWP). In particular, the TCEQ is concerned about the potential adverse impact to state aquatic resources of the proposed removal of the 300 linear foot limit on stream bed losses. The TCEQ is also concerned that the Corps' proposed timeframe for reissuance of the NWPs will not provide the TCEQ the opportunity to consider the final NWPs before the deadline to provide state water quality certification.

If you require additional information or further assistance, please contact Earl Lott, Director of the Office of Water at (512) 239-2047 or by email at earl.lott@tceq.texas.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Toby Baker".

Toby Baker
Executive Director
Texas Commission on Environmental Quality

Attachment

Texas Commission on Environmental Quality (TCEQ)

Comments on Proposal to Reissue and Modify Nationwide Permits

Docket Number: COE-2020-0002

Background

On September 15, 2020, the U.S. Army Corps of Engineers (Corps) published a notice of proposed rulemaking to reissue existing Nationwide Permits (NWP) and associated general conditions and definitions, with modifications, and to propose five new NWPs. The Corps issues NWPs, which are generally updated every five years, to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that will result in no more than minimal individual and cumulative adverse environmental effects. Proposed modifications to existing NWPs include: removal of the 300 linear foot (LF) limit for losses of stream bed (10 affected NWPs); limiting NWP 12, which authorizes various types of utility lines, to oil and natural gas pipeline activities, and creating two new NWPs to cover electrical/telecommunication lines and water conveyance lines, respectively; and revising the text of some NWPs, general conditions, and definitions for improved clarity. In addition to the two new NWPs resulting from the narrowed focus of NWP 12, three additional new NWPs are proposed for seaweed mariculture activities, finfish mariculture activities, and water reclamation and reuse facilities.

The TCEQ offers the following comments on EPA's proposed rule.

1. Proposed Removal of 300 LF Limit for Stream Bed Losses

- A. The TCEQ does not support the proposed removal of the 300 LF stream bed loss limit and requests that the Corps retain the limit in the 10 NWPs that currently contain it.**

Removing the stream loss limit would mean that stream losses associated with activities covered by these 10 NWPs would only be limited by the existing 1/2-acre limit on overall impacts to waters of the U.S. This could significantly affect state stream resources by allowing upwards of several thousand linear feet of stream impacts under these permits, depending on the dimensions of the streams being impacted. The TCEQ has traditionally relied on and used linear feet as the preferred unit of measure of stream impacts and stream mitigation in our Section 401 water quality certification program.

- B. The TCEQ believes that the concept of the hybrid approach mentioned in the notice has potential for establishing alternative quantitative limits for stream bed losses, however additional work is needed to develop the concept.**

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 TCEQ recommends that any

such proposals go through a more thorough development and vetting process prior to being considered for use in the NWP program.

2. Timeframe for Certifying Final NWPs

A. The TCEQ requests that the Corps shift the appropriate deadlines to allow states to consider and make certification decisions based on final NWPs.

Comments on the proposed reissuance of the NWPs are due to the Corps on November 16th, whereas TCEQ's certification of the NWPs and the proposed regional conditions are due to the lead Corps district in Texas (Galveston) by December 18th. The TCEQ anticipates that the final NWPs will not have been issued by the December 18th deadline and requests that additional time be given to ensure that any potential changes in the NWPs are known and considered prior to rendering our certification.