



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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November 16, 2020

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

Re: 2020 Proposal to Reissue and Modify Nationwide Permits (85 Fed. Reg. 57298)
(September 15, 2020)

Docket No. COE-2020-0002
RIN No. 0710-AA84

Dear David Olson:

On behalf of the Washington State Department of Ecology (Ecology), I write to express deep concern with various changes proposed to the nationwide permit (NWP) program by the U.S. Army Corps of Engineers (Corps) in their proposed rule, *2020 Proposal to Reissue and Modify Nationwide Permits*.

Ecology is entrusted with responsibility of protecting water quality for the 7.5 million residents we currently serve and future generations. The department meets its obligation utilizing congressionally mandated authorities including section 401 of the Clean Water Act and the federal consistency provisions of the Coastal Zone Management Act for the state of Washington. The Corps' proposed changes to the NWP program pose a risk to our mission and hamper our ability to fully exercise our authorities. For this reason, Ecology urges the Corps to reconsider several changes in its proposed rule, as follows.

Ecology Urges the Corps to Maintain the 300 Linear Foot Stream Impact Threshold

The Corps' proposal to remove the 300 linear foot limit for losses of stream bed, and replace it with a half-acre threshold, would greatly harm Washington streams. This change should be rejected because it (1) threatens Washington's environment, (2) violates the core tenet of the NWP program, and (3) is scientifically unsupported.

This change would open the door for activities to do major damage to small and headwater streams. Ecology's analysis shows that removing the 300-foot threshold would result in significantly less protection, especially for first through fourth order streams. Washington has a high percentage of headwater streams originating in many mountain ranges that support critical habitat for a variety of fish and wildlife including bull trout and salmonids. In some instances, specific spawning habitat may be limited to relatively short stream reaches. Thus, this approach would result in more than

minimal adverse environmental effects, individually and cumulatively, in Washington, violating the principle underpinning the NWP program and opening the door to major unregulated impacts.

Furthermore, the Corps has failed to provide science or rationale to justify a new acreage threshold. In fact, the Corps cites a single study, Downing et al (2012), to draw information for its stream width calculations. The Corps chose to base its calculation on the world average dataset which uses information gathered from Africa. The world average stream length is 6.3 feet, while the U.S. average is 2.9 feet. Using a world average is wholly inappropriate for estimating stream width in the United States and creates the false appearance of a minimal difference between linear foot and acreage measurements. However, use of the U.S. dataset actually more than doubles the stream miles that can be impacted. This change is a thinly veiled attempt to exempt projects and activities with massive potential water quality impacts from thorough environmental review. This is why the Corps' proposed change is opposed by the Association of Wetland Managers, a nonprofit, science-based organization comprised of managers from all 50 states and tribes.

The Corps already recognizes the need for region-specific data as exemplified in their use of regionalization in the Federal Wetland Delineation Manual. For the Corps to have a comprehensive estimate for Washington, it would need to use USGS regional regression models to estimate width based on available slope and drainage area data from the National Hydrography Datasets.

Instead, it has used a world model, despite the availability of regional data. From the Downing paper the Corps cites, below are median stream widths in Idaho, Oregon, and Washington. This limited data set gives a sample size of one to five streams per order, none of which are from western Washington. From it, Ecology has also calculated the stream length that translates to 0.1 acres and a half acre of impact. This chart shows that under the Corp's proposed change to an acreage threshold, impacts far exceeding 300 linear feet in first through fourth order streams would be permitted without requiring preconstruction notification (PCN) or mitigation.

| Stream order | PNW median width (ft)* | Length of impact per 0.1 acre – no mitigation required (ft) | Length of impact per 1/2 acre – no PCN required (ft) |
|---------------------|-------------------------------|--|---|
| 1 | 3 | 1475 | 7376 |
| 2 | 8.2 | 531 | 2655 |
| 3 | 16.7 | 260 | 1302 |
| 4 | 26.7 | 163 | 815 |
| 5 | 144.4 | 30 | 151 |
| 6 | 377.3 | 12 | 58 |
| 7 | 639.8 | 7 | 34 |
| 8 | 3041.3 | 1 | 7 |

*Data from Downing et al, 2012. Very limited sample set of one to five streams per stream order located in Idaho, Oregon, and Washington (PNW). No Western Washington streams are included in the dataset.

In short, the Corps' proposed change is baseless and should be abandoned as it does not meet the requirement under the NWP program to "result in no more than minimal individual and cumulative adverse environmental effects."

Ecology Urges the Corps to Maintain the Current Preconstruction Notification Threshold for Nationwide Permit 12 and Draft Permits C and D

PCNs are critical tools in our work as state regulators. PCNs allow us to evaluate an activity's potential impacts on streams and wetlands, and determine if changes or mitigation are required. For that reason, Ecology opposes the removal of PCNs for activities that involve mechanized land clearing in forested wetlands. Working these wetlands has the potential to adversely impact various sensitive life history stages of aquatic invertebrates, vertebrates, and more.

The Corps' proposed changes to NWP 12 would allow for as much as 250 miles of impacts to forested wetlands without a PCN. The Corps attempts to justify this change, asserting without any scientific support that impacts are temporary.

As the state regulator, Ecology has observed permanent changes to vegetation as a result of activities in forested wetlands, such as utility lines. In addition to the challenges of mitigating loss of mature or old-growth forested wetlands, utility companies do not allow the re-establishment of forested classes in utility rights-of-way. Thus, the functions and values of the forested ecosystem are lost when this conversion occurs. Projects that involve mechanized land clearing in forested wetlands should continue to require PCN and adequate mitigation.

The Corps Must Limit the Impacts to Submerged Aquatic Vegetation that Support Threatened and Endangered species

Ecology also opposes language to remove the threshold for impacts to a half acre or more of submerged aquatic vegetation that has not been used for shellfish farming within the last 100 years.

Once again, the Corps falsely claims that damage to vegetation is only temporary and fails to consider long-term impacts to aquatic ecosystems. The Corps' assessment also fails to consider the intensity and longevity of commercial shellfish activities in our region.

Kelp and eelgrass serve a wide variety of ecological functions in nearshore ecosystems, and are critically linked to other valued ecosystem components. Both are highly productive, annually producing large amounts of carbon that fuel nearshore food webs, principally through detritus pathways. Both also provide dynamic and protective habitat used by many other marine organisms.

Shellfish, such as crabs and bivalves, use eelgrass beds for habitat and nursery areas and feed indirectly on the carbon fixed by the plants. Fishes such as juvenile salmonids use eelgrass beds as migratory corridors as they pass through Puget Sound; the beds provide both protection from predators and abundant food, such as the small crustaceans associated with eelgrass.

Kelp ecosystems provide critical habitat that increases overall biodiversity (Graham 2004; Altieri and van de Koppel 2014; Unsworth et al. 2018). Kelp provides crucial habitat for salmon, and rockfish, among other economically valuable species (NMFS 2017; Shaffer et al. 2020). The

primary production characteristics of kelp ecosystems provide an essential base for Puget Sound food webs, ultimately helping support marine mammals, including endangered Southern Resident Orcas (Harvey et al. 2012; Southern Resident Orca Taskforce 2019). Kelp at high densities, can improve water quality by assimilating nitrogen (Kim et al. 2015) and slow the movement of water (Gaylord et al. 2007), potentially acting as natural breakwaters.

The federal government designated eelgrass as Essential Fish Habitat and a Habitat of Particular Concern under the Magnuson-Stevens Fishery Conservation and Management Act in 1996. Activities in areas where submerged aquatic vegetation is present should require a site specific assessment to address potential impacts to affected species and should trigger a detailed project review by the Corps.

The Corps Must Maintain Accountability for Federal Agencies

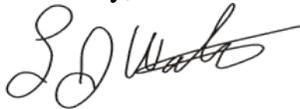
In this rule, the Corps is also proposing to exempt federal agencies from PCN requirements, granting these entities a free pass without any oversight from federal or state certifying agencies. This means federal agencies who think they qualify for coverage under the NWP program would be able to forge ahead on projects with potential water quality impacts, without accountability or public input. This includes construction at military bases and airports and federal highway projects. At the same time, the Corps intends to create a double-standard by maintaining PCN requirement for non-federal entities.

Ecology maintains that all project proponents should go through appropriate environmental review. Federal agencies do not have the expertise or resources to regulate themselves.

Ecology Urges the Corps to Work with States to Implement a Nationwide Permit Program that is Protective of Water Quality

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 U.S. Environmental Protection Agency have withdrawn federal protection under their new "Waters of the United States" definition. This NWP permit program proposal, is the latest in a deluge of attacks on our state's ability to protect our waters. 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.

Sincerely,



Laura Watson
Director