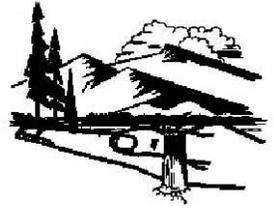




Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.



Mark Gordon, Governor



Todd Parfitt, Director

November 16, 2020

United States Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314

Submitted online via: <http://www.regulations.gov>

Re: Docket No. COE-2020-0002; RIN 0710-AA84; Proposal to Reissue and Modify Nationwide Permits

To Whom It May Concern,

Please accept the following comments from the Wyoming Department of Environmental Quality (WDEQ) regarding the U.S. Army Corps of Engineers (Corps) "Proposal to Reissue and Modify Nationwide Permits" 85 FR 57298-57395 (September 15, 2020) (hereafter referred to as the Permit Rule).

Aspects of the Permit Rule the WDEQ Supports

Proposed Modification to NWP 12 (Utility Lines)

The WDEQ supports the Corps' proposed modification of Nationwide Permit (NWP) 12 to "Oil or Natural Gas Pipeline Activities" along with the development of two new NWPs for "Electrical Utility Line and Telecommunications Activities" (proposed NWP C) and "Utility Line Activities for Water and Other Substances" (proposed NWP D). Separation of the existing NWP 12 into three separate NWPs is reasonable considering that the three types of utility lines are of varying sizes and lengths, constructed with different methods and have different relative impacts to streams and wetlands. This proposal could also allow the Corps to incorporate industry-specific standards and best management practices tailored to each NWP to better minimize impacts to waters of the United States that could also improve consistency in permit terms and conditions and provide regulatory predictability.

Proposed Changes to NWP General Condition 23 (Mitigation)

The WDEQ supports the Corps' proposal to apply the same 1/10-acre threshold for compensatory mitigation to offset losses of stream bed below the ordinary high-water mark

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that has been applied to wetland losses since 2007 for NWP that require pre-construction notification. We also approve of the proposal that allows the district engineer to require other forms of mitigation (e.g. riparian restoration or enhancement) that are commensurate with the stream bed loss in situations where replacement of all or part of the stream bed may not be feasible. This is a sensible addition to mitigation requirements that better aligns with the 2008 Compensatory Mitigation Rule (33 CFR 325 and 332) to compensate for unavoidable losses of the entire aquatic resource – not just wetlands. To provide regulatory certainty for permittees, we recommend the Corps develop clear expectations and performance standards on the types of other mitigation that would be commensurate with a loss of stream channel.

Proposed Changes to NWP General Condition 25 (Water Quality)

The WDEQ supports the Corps' proposal to add language to General Condition 25 that if a proposed NWP activity cannot comply with the conditions of the general (categorical) 401 water quality certification, that an individual 401 water quality certification is required unless a waiver is obtained. This is an important clarification that the inability of the applicant to adhere to the categorical water quality certification conditions of an NWP does not necessarily preclude the use of that NWP, provided that the applicant can secure an individual water quality certification or a waiver from the state.

Proposed Removal of the 300 Linear Foot Limit for Losses of Stream Bed

The Corps' proposes to remove the current 300 linear foot limit for losses of stream bed that applies to NWP 21 (Surface Coal Mining Activities), NWP 29 (Residential Developments), NWP 39 (Commercial and Institutional Developments), NWP 40 (Agricultural Activities), NWP 42 (Recreational Activities), NWP 43 (Stormwater Management), NWP 44 (Mining Activities), NWP 50 (Underground Coal Mining Activities), NWP 51 (Land-Based Renewable Energy Projects) and NWP 52 (Water-Based Renewable Energy Pilot Projects) and instead rely only on the existing ½-acre limit and pre-construction notification requirements to ensure these activities result in no more than minimal adverse environmental effects. With the Permit Rule's proposed addition of compensatory mitigation for stream bed losses greater than 1/10-acre to these NWPs, unavoidable losses of stream or river acreage should be adequately mitigated. It is conceivable that these changes would improve permitting efficiency and increase regulatory certainty while requiring standard compensation for stream bed losses. The WDEQ 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.

Aspects of the Permit Rule the WDEQ Requests Reconsideration

Exemption of Federal Agencies from PCN Requirements

Of the 54 existing NWPs, 31 require applicants to submit pre-construction notifications to the Corps. Pre-construction notifications give the Corps regulatory offices the opportunity to

ensure proposed discharges cause no more than minimal environmental effects and to determine the need for compensatory mitigation. States also rely on pre-construction notifications to develop 401 water quality certification conditions that ensures proposed discharges will comply with state surface water quality standards and the Clean Water Act. The pre-construction notification requirement has been in place for almost four decades and provides an effective mechanism to ensure proposed discharges meet state and federal requirements.

In the Permit Rule, the Corps proposes to limit the pre-construction notification requirement for these 31 existing NWP, as well as the five new NWP, to only non-federal applicants. This proposal would allow federal agencies to select and use NWP without notification to or review by the Corps or states as part of an effort to improve efficiencies in federal permitting of dredge/fill discharges. While it is the prerogative of the Corps to delegate environmental reviews of discharges covered under these NWP to other federal agencies, such changes would infringe upon a state's authority to ensure these discharges comply with state surface water quality standards under Section 401 of the Clean Water Act.

For example, almost one-half of the land in Wyoming is owned by the federal government and over 70% of Wyoming's roughly 82,000 miles of high-quality Class 1 waters are located on these federal lands. Class 1 waters are afforded protections in Wyoming's EPA-approved surface water quality standards that are equivalent to Tier 3 antidegradation provisions under 40 CFR 131.12(a)(3) where the existing water quality must be maintained and protected. For this reason, the WDEQ has categorically denied 401 water quality certifications for discharges to Class 1 waters that would be covered under the NWP that require pre-construction notification. This requires applicants to secure an activity-specific individual 401 water quality certification from the WDEQ. The pre-construction notification for these NWP is critical because it serves as notice to the state and the Corps of a proposed discharge to a Class 1 water and contains the information necessary for the WDEQ to develop an individual 401 water quality certification that will protect Class 1 water quality. In almost all cases where a proposed discharge is to a Class 1 water on federal lands, the applicant is a federal agency. Exempting federal agencies from submitting pre-construction notifications would result in the WDEQ being unaware of dredge/fill discharges to the majority of our Class 1 waters, and, consequently, WDEQ would be unable to ensure these discharges are compliant with state water quality requirements.

The WDEQ has a responsibility to know where dredge/fill discharges occur on Class 1 waters and to regulate them appropriately to ensure protection of the existing water quality. The pre-construction notification allows us to fulfill those obligations. The Corps' proposal would create a waiver from a federal agency's responsibility to obtain an individual 401 water quality certification from the WDEQ for discharge to a Class 1 water that simply does not exist. Not only would this be in conflict with the federal Clean Water Act but also impedes WDEQ's authority to protect surface water quality in Wyoming. Furthermore, any attempt by the federal agency to proceed with the discharge on a Class 1 water without an individual 401 water quality certification from the WDEQ would result in the federal agency violating 33 CFR

330.4(c)(1) and 40 CFR 121.2, which would impact multiple types of essential activities on Class 1 waters such as highway and utility line projects.

For these reasons, the WDEQ disagrees with the Permit Rule's proposal to limit submittals of pre-construction notifications to only non-federal employees. To address these serious concerns, the most simple and straightforward approach is for the Corps to retain language that pre-construction submittals are required of all applicants (federal and non-federal). As an alternative, the WDEQ proposes pre-construction notification requirements for all applicants as regional conditions to the NWP. This would foster interagency collaboration to develop a regionally-specific pre-construction notification requirement that could improve efficiencies in federal permitting while also recognizing the different state 401 water quality certification decisions and requirements.

401 Water Quality Certifications of Proposed NWPs

In the Permit Rule, the Corps proposes to send letters to CWA Section 401 certifying authorities to request water quality certification for the *proposed* NWPs shortly after their September 15, 2020 publication. Indeed, Wyoming and other states received the Corps' request for water quality certification on October 13, 2020 with the requirement that water quality certifications must be issued by December 12, 2020. The Corps' proposal is a reversal from the common practice whereby states have issued their water quality certifications on the *final* NWPs during the 60-day post-publication period.

The WDEQ does not agree with the Corps' proposal to require states to issue water quality certifications on proposed NWPs. States have a right and a responsibility to know exactly what they are certifying to ensure discharges authorized by NWPs will comply with state surface water quality standards. In the spirit of transparency and cooperation, it is our position that the Corps has an obligation to provide states an opportunity to reasonably review and issue their water quality certifications on the final NWPs after any changes have been made following public comment. If the December 12, 2020 deadline to issue a water quality certification on the proposed NWPs remains, the WDEQ may be compelled to issue a *conditional* 401 water quality certification on the proposed NWPs. The conditional 401 water quality certification would only be valid if the final versions of the NWPs do not change from what was proposed in the federal register on September 15, 2020. The invalidity of the water quality certification on a proposed NWP under this scenario would not equate to a waiver of water quality certification on the final NWP. Rather, it would require the Corps to request water quality certification for the final NWPs that had changed from what was proposed. If the Corps finds this approach objectionable, we would consider other options, including a water quality certification denial of all proposed NWPs which would have significant implications for streamlining federal permitting of dredge/fill discharges. For these reasons we respectfully ask that the Corps retain the common-sense approach of requesting state water quality certifications on only the *final* NWPs.

Thank you for the opportunity to comment on the Permit Rule. If you have any questions, please contact Eric Hargett on my staff at eric.hargett@wyo.gov or 307-777-6701.

Sincerely,



Todd Parfitt
Director
Department of Environmental Quality

TP/KF/DW/EGH/cf

Cc: Kevin Frederick, Administrator, WDEQ-Water Quality Division
David Waterstreet, Program Manager, WDEQ-WQD Watershed Protection Program
Beth Callaway, Governor's Office
Kelly Shaw, Attorney General's Office
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