PACIFIC LEGAL FOUNDATION

July 28, 2016

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

VIA E-MAIL: NWP2017@usace.army.mil

Re: Docket No.: COE-2015-0017
RIN 0710-AA73

Dear Mr. Olson:

Pacific Legal Foundation (PLF) appreciates the opportunity to submit the following comments on the Proposal to Reissue and Modify Nationwide Permits. PLF is a nonprofit public interest law firm that litigates in defense of a balanced approach to environmental protection, which respects private property and other constitutional rights. PLF has extensive experience litigating a variety of Clean Water Act issues in federal courts, including the Supreme Court.[1]

PLF generally supports the continued use of the nationwide permit (NWP) program, which serves a vital role in streamlining the authorization process and lowering costs to property owners and businesses of projects having minimal environmental impact. The NWP program also greatly lowers costs for the Corps and permittees by exempting thousands of projects from the arduous individual permitting process. Several of the Corps' proposed changes indeed advance the program's mission of "[reducing] administrative burdens on the Corps and the regulated public while maintaining environmental protection."[2]

Nonetheless, the proposed NWPs remain deficient in multiple respects at protecting property owners from oppressive regulatory overreach. PLF hopes that the Corps will increase the overall availability of NWPs as well as provide clearer guidance to property owners regarding NWP requirements. Accordingly, PLF has several recommendations in response to the Corps' request for comments on NWP acreage limits, pre-construction notification thresholds (PCN), and waivers of NWP limits.

---

1 *See, e.g.*, Rapanos v. United States, 547 U.S. 715 (2006).

2 81 Fed. Reg. 35,187, 35,190 (June 1, 2016).

HEADQUARTERS: 930 G Street | Sacramento, CA 95814 | (916) 419-7111 | FAX (916) 419-7747
ATLANTIC: 8645 N. Military Trail, Suite 511 | Palm Beach Gardens, FL 33410 | (561) 691-5000 | FAX (561) 691-5006
DC: 300 New Jersey Avenue, NW, Suite 900 | Washington, DC 20001 | (202) 888-6881 | FAX (202) 888-6855
HAWAII: P.O. Box 235856 | Honolulu, HI 96823-3514 | (808) 733-3373 | FAX (808) 733-3374
NORTHWEST: 10940 NE 33rd Place, Suite 210 | Bellevue, WA 98004 | (425) 576-0484 | FAX (425) 576-9565
ALASKA: (907) 278-1731 | OREGON: (503) 241-8179
E-MAIL: plf@pacificlegal.org
WEB SITE: www.pacificlegal.org

The scope of the program should be expanded to allow more projects with minimal environmental impact to qualify for NWPs without unnecessary notice or mitigation requirements.

PLF would also like to communicate its concerns that the 2015 "Waters of the United States" (WOTUS) rule,[3] if implemented, would substantially restrict the availability of NWPs and introduce unnecessary complications into the permitting process.

Finally, PLF would like to comment on several overarching aspects of the NWP program and recommend that the Corps lessen the program's complexity and degree of overlap with state regulations in order to better serve the program's purpose of balancing flexible regulation and environmental protection.

I

THE TERMS AND CONDITIONS OF THE PROPOSED NWPs ARE UNNECESSARILY RESTRICTIVE

Nationwide permits, authorized under Section 404(e) of the Clean Water Act[4] and Section 10 of the Rivers and Harbors Act of 1899,[5] are "designed to regulate with little, if any, delay or paperwork certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts."[6] The proposed NWPs, while including a handful of improvements, retain several significant flaws that frustrate the goals of the NWP program.

A. The Corps Should Eliminate or Increase Pre-Construction Notification Thresholds

The Corps claims that pre-construction notification (PCN) thresholds "are an important tool for ensuring that NWP activities result in only minimal and individual and cumulative adverse environmental effects."[7] Still, the more NWP activities that require PCNs, the less streamlined the NWP program inevitably becomes, as PCNs add a mandatory notice requirement to render

---

3 *See* 80 Fed. Reg. 37,054 (June 29, 2015).

4 33 U.S.C. § 1344(e).

5 33 U.S.C. § 401, *et seq.*

6 81 Fed. Reg. at 35,186 (citing 33 C.F.R. § 330.1(b)).

7 81 Fed. Reg. at 35,191.

supposedly "nationwide" permits into case-by-case adjudications in practice.[8] PCN thresholds serve as a uniform baseline that can only be further restricted by region-specific requirements.[9] Because PCN significantly undercuts the efficiency of the NWP process, PLF is pleased that the Corps has proposed to remove PCN for NWPs 33 and 41, and also supports the Corps' proposal to develop a standardized PCN form.

For the proposed NWPs requiring PCN, thresholds should be raised or altogether eliminated if feasible. The potentially disastrous impact of PCN thresholds is illustrated by the recent battle PLF client Andy Johnson waged against the EPA. Mr. Johnson constructed a dam across the stream running through his property to create a stock pond. Despite the resulting pond's improvements to the surrounding environment, Mr. Johnson and his family were threatened with millions of dollars in fines based on an EPA compliance order alleging he had discharged an amount just over NWP 18's PCN threshold of ten cubic yards of fill material into a water of the United States without providing mandatory notice.[10] Though Mr. Johnson fortunately was able to settle with the EPA this past May, had NWP 18 not required PCN for minor discharges between ten and twenty-five cubic yards in the first place, no toilsome lawsuit would have ever arisen.

Andy Johnson's stock pond saga illustrates the precarious potential of PCN thresholds to ensnare unknowing property owners. The lower a PCN threshold, the less significant of an otherwise-permissible NWP activity will require PCN. For the individuals most likely to be aware of PCN requirements—parties who regularly submit PCN for major discharges—lowering PCN thresholds may not be too burdensome. On the other hand, a party engaging in a one-off minor project, e.g., Andy Johnson, should not be expected to know exact PCN thresholds before beginning a project or be penalized for unknowingly failing to submit a PCN.

The Corps could take multiple courses of action to more effectively implement PCN requirements. The approach the Corps takes with NWPs 13 (bank stabilization) and 36 (boat ramps) is beneficial because it eliminates the zone between the PCN threshold and the permit limits, which are subject to waiver. Thus for these two NWPs, a permittee has to submit a PCN only if the proposed activity requires a waiver from the permit's maximum discharge limits. Linking PCN to waiver requests in

---

[8] *See* Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 172–73 (2014) (describing how "the PCN mechanism, if pushed too far toward requiring applicant submission and agency assessment, could blur into a specific-permitting system . . . given its onerous case-specific requirements.").

[9] *See* 81 Fed. Reg. at 35,195.

[10] *See* Kerry Halladay, *Fighting over the existence of a $20 million stock pond*, WESTERN LIVESTOCK JOURNAL (Sept. 4, 2015), https://wlj.net/print-article-11957-print.html.

this manner is far more in line with the NWP program's purpose of "efficiently authorizing activities that have no more than minimal adverse environmental effects" than requiring every activity for a given NWP to submit PCN, as over twenty of the proposed NWPs would require. Indeed, mandatory PCN effectively transforms an NWP into the inefficient case-by-case review process that the NWP program was explicitly designed to avoid.[11]

Alternatively, the Corps could look to the subject matter of the NWPs themselves to determine which NWPs are best served by PCN. For example, while requiring PCN for a major interstate oil and gas project under NWP 12 may be quite sensible, the Corps should focus on making PCN the exception, rather than the rule, for the NWP program. As such, the Corps should no longer subject the creation of stock ponds, small ditches, additions to single-family residences, and other activities of similarly minimal magnitude to PCN requirements.

B. The Corps Should Increase NWP Limits and Waiver Availability

Many of the proposed NWPs include strict acreage and linear foot limits. The half-acre limit on loss or discharge of waters of the United States is the most common and arguably most stringent of these limitations, especially when applied to particular NWPs. In the case of a residential subdivision, for example, proposed NWP 29 would limit the "aggregate total loss of waters of the United States" to a half-acre regardless of the size of the subdivision.[12] This uniform, unwaivable limitation frustrates the Congressional intent for NWPs to provide "incentives to minimize impacts to jurisdictional waters and wetlands to qualify for a streamlined authorization process."[13] Once the developer of a large subdivision realizes that his project will unavoidably entail the loss of greater than one half-acre of jurisdictional water, he will no longer have an incentive to allocate time and resources to limiting jurisdictional water loss, especially since he now must comply with the far more costly individual permit process regardless of whatever environmental protection measures he takes.

PLF supports the practice of case-by-case waivers to the NWP limits, as this practice generally increases the availability of NWPs and provides the NWP program with additional flexibility to advance its goal of streamlining the permit process. Disappointingly, the half-acre limit cannot be

---

[11] *See* 33 C.F.R. § 330.1(b) (2016).

[12] *See* 81 Fed. Reg. at 35,224.

[13] *See id.* at 35,191.

waived under the proposed NWPs.[14] PLF strongly recommends that this half-acre limit either be increased or at least made waivable by district engineers. Particularly given the effect of the 2015 WOTUS Rule (discussed in the next section), the half-acre limitation is far too low, broad, and inflexible of a benchmark for barring otherwise qualifying prospective permittees from receiving NWPs.

While the Corps requests "relevant data and other information that explain why the acreage limits should be changed,"[15] PLF echoes other commenters in asserting that such information would inevitably be conjectural, given that the implementation of the 2015 WOTUS rule is uncertain and most NWP limit provisions, including the half-acre limit, hinge on the presently uncertain definition of "waters of the United States."[16] Even assuming the 2015 WOTUS rule does not ultimately go into effect, the Corps should in general aim to raise NWP limits whenever environmentally feasible to allow more property owners to take advantage of the streamlined NWP process.

C. The Corps Should Not Restrict or Condition Waivers of NWP Limits

The ability of district engineers to grant waivers for some NWP limits allows otherwise ineligible applicants to take advantage of NWPs. Because the individual permit process is much more expensive than the NWP process,[17] a waiver can be the determining factor in a property owner's decision to pursue or forgo an entire project. However, as discussed above, for NWPs with the half-acre limit, the Corps has cabined the availability of waivers by stipulating that "any loss of stream bed, including any losses of intermittent and ephemeral stream bed in excess of 300 linear feet that are waived . . . count towards that 1/2-acre limit."[18] PLF not only objects to adding a linear foot cap on those waivers, but also supports eliminating the mandatory half-acre cap for permits

---

[14] This is particularly significant given that proposed NWPs 12, 14, 21, 29, 39, 42, 43, 44, 50, 51, and 52 include this limit.

[15] 81 Fed. Reg. at 35,191.

[16] Unlike other commenters, PLF is not requesting an extension to the comment period window. However, PLF does agree that the sixty-day period is too short of a time period to gather precise data on every NWP with a limit.

[17] *See Rapanos*, 547 U.S. at 721 (plurality op.) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." (citation omitted)).

[18] 81 Fed. Reg. at 35,192.

whose linear foot limit has been waived. Caps of this kind end up impairing not just the availability of waivers, but also the availability of the NWPs themselves.

The Corps should also discontinue the practice of attaching compensatory mitigation requirements as a condition to receiving a waiver. A requirement of compensatory mitigation for "all losses of intermittent or ephemeral stream bed authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 through a . . . waiver of the 300 linear foot limit" limits the effectiveness of waivers.[19] Compensatory mitigation is an expensive and time-consuming process that requires property owners to develop and implement a compensation plan up front for the anticipated environmental impacts of an NWP project.[20]

Current Corps practice, in which district engineers "require compensatory mitigation on a case-by-case basis when necessary," adequately satisfies the environmental goals of the NWP program without burdening all applicants with across-the-board compensatory mitigation, which would only create unnecessary costs for both the agencies and the public. As is, general condition 23 already prescribes compensatory mitigation "at a minimum one-for-one ratio . . . for all wetland losses that exceed 1/10-acre and require pre-construction notification."[21] The condition 23 requirements for mitigation are stringent enough without imposing additional layers of inefficiency on NWP limit waivers with unnecessary compensatory mitigation requirements.

II

THE 2015 WOTUS RULE WOULD RESTRICT NWP AVAILABILITY AND INCREASE COMPLIANCE COSTS

The 2015 WOTUS Rule, if implemented, would significantly impact the NWP Program, affecting every topic discussed in the preceding section. The Corps has apparently decided to assume the stayed WOTUS rule will survive pending litigation. This decision is evidenced not only by the Corps' explicit request for comment on "how the 2015 revisions to the definition of 'waters of the

---

[19] *Id.*

[20] *See* Randall Guttery, et al., *Federal Wetlands Regulations: Compliance for Residential Homeowners*, 29 REAL EST. L.J. 126, 132 (2000) ("One of the more controversial issues involves the significant amount of time and money that landowners and developers must expend in complying with . . . mitigation obligations that they are required to satisfy in order to obtain an individual permit.").

[21] 81 Fed. Reg. at 35,234.

United States' might affect the applicability and efficiency of the proposed NWPs,"[22] but also more tellingly, by proposing modifications of two definitions, "ordinary high water mark" and "tidal wetland," in order to conform to the 2015 WOTUS rule.[23]

PLF very much appreciates the opportunity to explain the implications of the 2015 WOTUS rule change for the proposed NWPs. However, as other commenters have noted, explanation of how an unimplemented rule might affect the NWP program will necessarily be less precise than an empirical explanation based on an already implemented rule. Still, explaining the jurisdictional expansion of the Rule itself will help to clarify its likely effects on the NWP program.

A. The New WOTUS Rule Is an Unprecedented Expansion of Jurisdiction under the Clean Water Act

The agencies' 2015 interpretation of "waters of the United States"[24] expanded jurisdictional waters in several significant respects.

First, the new rule asserts jurisdiction over all tributaries of navigable-in-fact interstate waters, regardless of the quality or quantity of their flow.[25] Additionally, the rule expands categorical jurisdiction by modifying the definitions of "adjacent" and "neighboring" such that *all* waters adjacent to a jurisdictional water are jurisdictional waters,[26] with "adjacent" waters including "neighboring" waters, i.e., waters that lie (i) within 100 feet of the ordinary high water mark of a jurisdictional water; (ii) within the 100-year flood plain and within 1,500 feet of the ordinary high water mark of a jurisdictional water; or (iii) within 1,500 feet of the high tide line of a traditional navigable water or high water mark of one of the Great Lakes.[27]

---

[22] *Id.* at 35,190.

[23] *See id.* at 35,213–35,214 (proposing changes to regulation citations in these definitions so as "to be consistent with the 2015 revisions to the definition of 'waters of the United States' in 33 CFR part 328, as published in the June 29, 2015 issue of the Federal Register").

[24] *See* 80 Fed. Reg. 37,054 (June 29, 2015).

[25] *See* 33 C.F.R. § 328.3(a)(5)(2015).

[26] *See id.* § 328.3(a)(6).

[27] *See id.* § 328.3(c)(2)(i)–(iii).

Finally, the WOTUS Rule expands case-by-case jurisdiction of non-adjacent "other waters" to include any water located within a 100-year floodplain of a navigable-in-fact water (i.e., traditional navigable waters, interstate waters, and territorial seas) and any water located within 4,000 feet of the high tide line or ordinary high water mark of a jurisdictional water (including tributaries), so long as these waters have a significant nexus to a navigable-in-fact water.[28] The term "significant nexus" is taken from Justice Kennedy's concurring opinion in *Rapanos v. United States*,[29] which the agencies have defined as "present . . . if anyone of the following functions of the water (or collection of similarly situated waters in the region) contributes significantly to the chemical, physical, or biological integrity of the nearest traditional navigable water or interstate water: sediment-trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of flood waters; runoff storage; contribution of flow; export of organic matter; and export of food resources and provision of life cycle dependent aquatic habitat for a species dwelling within a traditional navigable water or interstate water."[30]

While the Court has held that the Clean Water Act was not meant to regulate isolated bodies of water, dry arroyos, and mudflats,[31] the 2015 WOTUS rule does so nonetheless. PLF has filed multiple suits challenging the rule as violating both the Constitution and the Administrative Procedure Act, as well as exceeding the scope of the Clean Water Act.[32]

B. The Potential Implications of the 2015 WOTUS Rule on the NWP Program Are Substantial

As a result of its expansive jurisdictional provisions, the proposed NWPs are heavily dependent upon the ultimate outcome of the pending litigation of the WOTUS rule.

---

[28] *See id.* § 328.3(a)(8).

[29] 547 U.S. at 779–80 (Kennedy, J., concurring in the judgment).

[30] Damien Schiff, *Defining "Water of the United States": A Litigious Task*, 45 SEC. ENV'T, ENERGY, AND RESOURCES 5 (2016) (citing 33 C.F.R. § 328.3(c)(5)).

[31] *See* Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159, 173 (2001).

[32] *See, e.g.*, Washington Cattlemen's Association v. United States Environmental Protection Agency, No. 15-3058 (D. Minn. filed July 15, 2015).

Several proposed NWPs[33] contain variations of the following provision: "All dredged [or excavated] material must be deposited and retained in an area that has *no waters of the United States*."[34] Due to adjacency jurisdiction and categorical jurisdiction over all tributaries, this provision would render an otherwise minor dredging project far more expensive by requiring dredged material to be moved much further from the dredging site. Compliance costs for the NWPs with this restriction would also increase, as the 2015 WOTUS rule's ambiguous jurisdictional contours would make it more difficult to determine whether an "area"[35] has "no waters of United States."

Notably, NWP limits specifically reference "waters of the United States," e.g., "For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than 1/2-acre of *waters of the United States*."[36] Under the 2015 WOTUS rule, many more entities would count as "waters of the United States," meaning the half-acre limit would be more easily exceeded. The resulting effect, assuming the half-acre limit remains unwaivable, would be a decrease in the availability of NWPs. For example, filling small pond in a residential subdivision "adjacent" to a "streambed" that is entirely dry almost every day of the year would not be allowed under NWP 29 if that streambed happens to qualify as a tributary.

All PCN thresholds would similarly be affected by the rule. PCNs must include a detailed "delineation of wetlands, other special aquatic sites, and other waters, such as lakes, ponds, and perennial, intermittent, and ephemeral streams, on the project site," and any loss of wetlands greater than 1/10 acre automatically triggers costly compensatory mitigation requirements.[37]

In sum, the new WOTUS rule would greatly reduce the availability of NWPs. The NWP permit limits and PCN thresholds would become more restrictive given the expansive definition of "water of the United States," and average property owners would be unlikely to intuit the rule's counterintuitive and technical interpretation of terms such as "neighboring" and "significant nexus."

---

[33] *See* NWPs 3(b), 16, 19, 31, 33, 35, 36, and Proposed NWP A.

[34] *See, e.g.*, 81 Fed. Reg. at 35,222 (emphasis added).

[35] The proposed NWPs do not define "area."

[36] *Id.* at 35,221 (emphasis added).

[37] *See id.* at 35,236.

III

THE NWP PROGRAM CAN MAKE SEVERAL GENERAL CHANGES TO IMPROVE EFFICIENCY AND BETTER SERVE PROPERTY OWNERS

From the time of the program's inception, every five-year renewal of the NWPs has increased the total number of NWPs. In theory, assuming the program was still one of mostly general permits, additional NWPs would be a net positive. However, due to a variety of factors, including increased notice requirements, mitigation compensation, and case-by-case reviews of all NWPs subject to PCN, as well "agency coordination" lags for various permitted activities, the NWP program has gradually become what it set out to avoid: a complicated, activity-specific procedure requiring unnecessary allocations of resources on the part of the Corps and unrealistic awareness on the part of the potential NWP applicants.

PLF supports both of the new proposed NWPs, and notes with approval that the Corps has proposed no acreage limit for NWP A. Still, both new permits continue what has become an all-too routine practice in requiring PCN for all activities of a NWP. As discussed above, PCN, unless absolutely necessary, is inherently detrimental to the core goals of the NWP program, as it not only puts an unrealistic burden on property owners to be aware of the legal web of NWP requirements and conditions, but also expects property owners to comprehend the extremely technical aspects of the current NWP program regime.

Incorporating the new WOTUS rule would only further jeopardize the benefits of the program. As is, it's utterly impracticable of the Corps to require all potential "non-federal permittees [to] submit a pre-construction notification to the district engineer if any listed [endangered] species or designated critical habitat *might* be affected or is in the vicinity" of a NWP activity, yet general condition 18 so requires, without even defining "vicinity" or "affected."[38]

Finally, the Corps should review every NWP and consider where regulatory red tape could be cut, and further, where there might be redundancy in terms of overlapping state and federal regulation. Section 101(b) of the Clean Water Act expressly recognizes the "primary responsibilities and rights

---

[38] *Id.* at 35,232 (emphasis added). PLF doubts the linguistic distinction the Corps makes between "might affect" as "less probable" than "may affect" in this context is intuitive to most Americans. *See id.* at 35,193. Courts have placed general restrictions on the reach of the ESA liability. *See, e.g.*, Aransas Project v. Shaw, 775 F.3d 641, 657–58 (5th Cir. 2014) (asserting no ESA violation in such cases as "where a famer tills his field, causes erosion that makes silt run into a nearby river, which depletes oxygen in the water, and thereby injures protected fish.").

of States . . . to plan the development and use (including restoration, preservation, and enhancement) of land and water resources."[39]

Andy Johnson constructed his stock pond only after responsibly obtaining a state permit. Yet the EPA decided Mr. Johnson's relatively minuscule activity was harmful enough to warrant coercive federal targeting, notwithstanding Mr. Johnson's state permit. Especially in the case of an intrastate water, the Corps and EPA should defer to a state's decisions to permit activities within its borders. To exercise this deference, the Corps could automatically waive PCN thresholds or NWP limits for projects already reviewed and permitted by a state. Such a policy would allow the Corps and EPA more time and resources to focus on major interstate projects meriting federal oversight.

CONCLUSION

PLF maintains its support for the nationwide permit program and thanks the Corps for the opportunity to offer its perspectives, recommendations, and concerns. The Corps should carefully consider the negative effects the 2015 WOTUS rule, if upheld, would have on the 2017 NWPs. As the Corps revises and prepares to reissue the final NWPs, PLF hopes the Corps will relax the limits and conditions of the NWPs to increase NWP availability and flexibility in keeping with the program's objectives.

Sincerely,

ROBERT K. FOUNTAIN
Law Clerk

---

[39] 33 U.S.C. § 1251(b).