November 16, 2020

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

Re: Proposal to Reissue and Modify Nationwide Permits
RIN 0710-AA84, Docket COE-2020-0002

Dear Mr. Olson:

The Coalition for American Heritage appreciates the opportunity to comment on the Army Corps of Engineers' proposal to reissue and modify Nationwide Permits. The Coalition for American Heritage (Coalition) is an advocacy coalition that protects and advances our nation's commitment to heritage preservation. Many of our members serve as consultants to project applicants engaged in federal projects and facilitate compliance with the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) on projects sought to be approved under Nationwide Permits.

The Coalition is concerned with several of the changes proposed in this rule, including the elimination of certain Pre-Construction Notification thresholds, and those comments are set forth in more detail below. The Coalition's underlying concern, however, is the Nationwide Permit system's failure to adequately protect historic properties, in large part because the Section 106 process is carried out programmatically or at an individual level.

Instead of attempting to address these systemic issues, the Army Corps proposes to reissue the Nationwide Permits early, in response to Executive Order 13783, which, according to a report by the Assistant Secretary of the Army (Civil Works), "require[d] the review of agency existing regulations…that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear resources."[1] In addition to providing specific comments and recommendations, the Coalition more generally urges the Army Corps to take a systematic and programmatic approach to ensure that historic properties are protected in issuing Nationwide Permits.

The Proposed Change to General Condition 20 (Historic Properties) Further Complicates a General Condition that Already Fails to Adequately Protect Historic Properties.

The Corps asserts in the proposed rule that "the issuance or reissuance of NWPs does not require NHPA section 106 consultation because no activities that might have the potential to cause effects to historic properties can be authorized…without first completing activity-specific NHPA Section

[1] Review of 12 Nationwide Permits Pursuant to Executive Order 13783, Executive Summary (Sept. 25, 2017).

106 consultations, as required by the "Historic Properties" general condition."[2] General Condition 20 (Historic Properties), however, does not ensure compliance with the NHPA as it currently stands, meaning that Section 106 is never properly carried out.

The General Condition puts the burden on non-federal permittees to "submit pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties." This framework relies upon the non-federal applicant to determine whether Pre-Construction Notification (PCN) is required in a particular situation and therefore does not ensure that properties in the project area will be identified. For instance, if the district engineer does not receive a PCN notification due to an oversight by a non-federal permittee, the General Condition does not make clear that the district engineer will still carry out identification efforts and what information the Corps would rely on in carrying out those efforts.

Additionally, General Condition 20 states that the applicant *can* seek assistance from a State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), designated tribal representative, and the National Register of Historic Places. The process would be better served, and the Corps could better ensure compliance with the NHPA, by requiring the involvement and consultation of these sources early in the process.

Furthermore, General Condition 20(c) references 33 C.F.R. § 330.4(g)(1), which incorporates the Corps' Appendix C regulations. Appendix C has consistently been found inadequate and unlawful by the courts, the ACHP, and other federal agencies.[3] Last year, the United States Government Accountability Office found that:

> The long-standing nature of the differences between the Corps procedures and the ACHP regulations, as well as the agencies' inability to resolve these differences over almost two decades despite numerous attempts to do so, suggests that legislative action may be needed to resolve this issue. Without action by Congress, we believe the Corps may continue to use procedures that have not been approved by the ACHP and may not be consistent with regulations developed by the ACHP for implementing section 106 of the NHPA.[4]

[2] 85 F.R. 57361-62.
[3] *See, e.g., Sayler Park Village Council v. U.S. Army Corps of Engineers*, Case No. C-1-02-832, 2002 U.S. Dist. LEXIS 26208, at *23-24 (S.D. Ohio 2002); *Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d 776, 791-92 (N.D. Ohio 2001); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985).
[4] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-22, TRIBAL CONSULTATION: ADDITIONAL ACTIONS NEEDED FOR INFRASTRUCTURE PROJECTS 55 (2019).

The NHPA requires an agency's Section 106 compliance regulations be consistent with the ACHP's Section 106 regulations.[5] In particular, the Corps restricts the scope of review to the "permit area" rather than the "area of potential effects," as required by Section 106 regulations.[6] The Corps' consistent failure to bring Appendix C into compliance is in violation of the law, and the Coalition recommends that this latest rule be changed accordingly.

In addition to the existing problems with General Condition 20, the Corps proposes to add "commensurate with potential impacts" language to the requirement that a district engineer identify historic properties: "The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts *commensurate with potential impacts*[.]"[7] Limiting the district engineer's identification responsibilities to be commensurate with potential impacts gives the Corps justification to decline to identify certain historic properties if the district engineer determines that the property or properties will not be impacted. This provision violates the procedures of Section 106 of the NHPA, which requires identification of historic properties that *could* be affected, followed in a separate step by an assessment of the project's effects on those properties. While in certain limited instances it may be appropriate to conclude Section 106 where the historic properties in the area will not be affected by the project, if there is a possibility that the property could be affected, the Corps must proceed to the next steps in the process. Given that it is not always obvious what the possible effects on historic properties are, the Coalition strongly opposes the addition of "commensurate with potential impacts" to General Condition 20.

The Coalition Opposes the Removal of Five Pre-Construction Notification Requirements from Proposed Nationwide Permit 12 (Oil or Natural Gas Pipeline Activities), Proposed NWP C (Electric Utility Line and Telecommunications Activities), and Proposed NWP D (Utility Line Activities for Water and Other Substances).

The Corps proposed to remove the following PCN requirements from proposed Nationwide Permit 12 (Oil or Natural Gas Pipeline Activities):

(1) Utility line activities involving mechanized land clearing in a forested wetland for the utility line right-of-way;
(2) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet;
(3) the utility line is placed within a jurisdictional area (*i.e.,* water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area;
(4) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; and
(5) permanent access roads are constructed in waters of the United States with impervious materials.[8]

These PCN requirements would also be deleted with respect to electric utility line and telecommunications activities and utility line activities for water and other substances: proposed

[5] 54 U.S.C. § 306102(b)(5)(A).
[6] 36 C.F.R. § 800.16(d).
[7] 85 F.R. 57351, 57387.
[8] 85 F.R. 57324.

NWP C (Electric Utility Line and Telecommunications Activities) and proposed NWP D (Utility Line Activities for Water and Other Substances). The Coalition understands that the Corps proposes to split current NWP 12 into three NWPs, with two new NWPs being C and D. Because these PCN requirements are proposed for removal across all three of the proposed NWPs, the Coalition is addressing them together.

Removal of these PCN requirements will prevent the Corps from receiving notice of activities that cause more than minimal adverse effects. The Corps requires PCN for certain activities to give the district engineer the opportunity to ensure that the proposed activity qualifies for authorization under a NWP. The PCN thresholds slated for elimination were carefully crafted to account for situations where activities may not qualify for NWP authorization. The Corps justifies deleting these requirements by claiming that the deletion will "reduce burdens on the regulated public, simplify the NWP, and eliminate redundancy."[9] In reality, however, deleting these PCN thresholds eliminates important agency oversight over the permitting process. Notification ensures compliance before major problems can arise, particularly in these situations where construction could have greater than minimal impacts.

The Corps' specific reasons for deleting each of these PCN requirements are also not convincing. For example, the Corps references in its justifications for the first three to be removed that the impacts are usually temporary or that the other NWP requirements ensure that the impacts are temporary. Ensuring the impact is temporary, however, is not necessarily the same thing as ensuring the effects are "minimal" – which is the standard Nationwide Permits must meet. The Corps also argues that because PCN is required where the loss is greater that 1/10 of an acre, certain of the PCN requirements would be redundant. If the requirements are truly redundant and PCN must be submitted, it does not appear to impose any additional burden on applicants to retain the PCN thresholds slated for deletion. The Coalition opposes the deletion of these PCN requirements.

The Addition of a PCN Requirement for Oil or Gas Pipelines Over 250 Miles in Length Does Not Go Far Enough.

The Corps proposes to require a PCN where "the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install a new pipeline (vs. conduct repair or maintenance activities) along the majority of the distances of the overall project length."[10]

Given the removal of numerous PCN requirements discussed above, the addition of this requirement in NWP 12 seems intended to placate those critical of pipeline projects. Combined with the reduction of PCN requirements for oil and natural gas pipelines, this imposition of a 250-mile PCN requirement at best requires early notice for pipeline projects so large they are bound to cause more than minimal effects, and thus should not be approved under a NWP at all. At worst, imposing a 250-mile PCN requirement, combined with the removal of other PCN requirements,

[9] *Id.*
[10] 85 F.R. 57371.

will result in pipelines slightly under 250 miles being approved without adequate review. Restricting PCN requirements to a 250-mile pipeline is an arbitrary decision, and the Coalition recommends reducing the size for which PCN is required and to provide a basis for the selection of the pipeline length requiring PCN.

The Coalition also recommends the inclusion of a mileage requirement for NWP C and D, in addition to the replacement of the other PCN requirements that the Corps proposes to delete (as discussed above).

The Corps' Request for Comments on Best Management Practices for NWP 12, C, and D.

With respect to NWP 12, and proposed NWP C and D, the Corps seeks comments regarding "best management practices that could be added as terms to any of these NWPs to help ensure that a particular type of utility line results in no more than minimal individual and cumulative adverse environmental effects."[11]

The Coalition recommends that the Corps adopt a policy of early consultation with Indian Tribes and other actors on these three types of projects, above the timeline required by the Section 106 process. A more proactive approach would allow the Corps to preemptively address concerns and avoid delays, litigation, and other increased costs for both the Corps and applicants. Additionally, to ensure protection of historic properties, a professional meeting the Secretary of the Interior's standards should be required to certify that the 106 process is carried out correctly. Finally, the Coalition recommends that the Corps require free, prior, and informed consent on projects impacting Indian tribes.

The Coalition notes that some entities believe the imposition of nationwide best management practices may not be the best course of action in every case, and that for certain types of projects, best management practices would be better imposed through more tailored regional conditions. While this may be the case for some standard and projects, the Coalition believes that early consultation, a requirement to engage a professional meeting the Secretary of the Interior's standards, and the requirement of free, prior, and informed consent would be beneficial in all projects.

The Corps Should Retain the Requirement that Permittees Obtain Written Verification Before Proceeding with Work Under NWP 21 (Surface Coal Mining), NWP 49 (Coal Remining Activities), and NWP 50 (Underground Coal Mining Activities).

For NWP 21 (Surface Coal Mining), NWP 49 (Coal Remining Activities), and NWP 50 (Underground Coal Mining Activities), the Corps proposes to remove the requirement that permittees must obtain written verification before proceeding with authorized work in waters of the United States.[12] The Corps states that removing this requirement "would make this NWP consistent with the other NWPs that required PCNs and are authorized under 33 CFR 330.1(e)(1)

[11] 85 F.R. 57310.
[12] 85 F.R. 57328, 57342.

if the district engineer does not respond to the PCN within 45 days of receipt of a complete PCN."[13] Due to the impact mining can have on cultural resources, the Coalition opposes the removal of the written verification requirement from these NWPs.

The Corps Should Not Exempt Federal Agencies from Pre-Construction Notification Requirements.

The Coalition opposes exempting federal agencies from PCN requirements. The Corps proposes this different treatment for federal and non-federal permittees because federal permittees "that want to use the NWPs often hire consultants to help them secure NWP authorization in compliance with applicable federal laws, regulations, and policies and that these consultants may have similar expertise to staff at Federal agencies."[14] The Corps should not rely on other actors—federal or non-federal—to follow best practices without regulatory oversight.

If the Corps follows through with this change, it must ensure that federal agencies still meet compensatory mitigation requirements, as the Corps currently makes such mitigation requirements binding on federal agencies following PCN notification. The Coalition is also concerned about the Corps relying on other agencies rather than ensuring that its legal obligations are met as the permitting agency.

The Army Corps Is Required to Consult with Indian Tribes on this Proposed Rule.

Finally, the Coalition disagrees with the Corps' decision to not conduct tribal consultation for this rule because the proposal to reissue the NWPs "does not have tribal implications."[15] Tribes have important rights in the Section 106 process and, as discussed above, the current NWP framework does not adequately ensure that historic properties, including those of significance to Tribes, are protected. Moreover, the explanation of the proposed change to General Condition 17, Tribal Rights, is vague and the impacts this change will have on Tribes is difficult to ascertain from the information provided. Reissuance of the NWPs will undoubtedly have tribal implications, and the failure to consult with any federally recognized tribes is a significant oversight by the Corps. For these reasons, at a minimum, the Corps must consult with Indian tribes on this proposed rule.

***

[13] *Id.*
[14] 85 F.R. 57303.
[15] 85 F.R. 57367.

Thank you for the opportunity to comment. Please do not hesitate to contact us with any questions on these comments.

Best regards,

Marion Werkheiser
Policy Director
Coalition for American Heritage
Phone: 703.489.6059
www.heritagecoalition.org
info@heritagecoalition.org