



SOCIETY FOR AMERICAN ARCHAEOLOGY

November 12, 2020

Mr. Alvin (Al) B. Lee, SES
Director of Civil Works
U.S. Army Corps of Engineers
ATTN: CECW-CO-R
441 G Street N.W.
Washington, D.C. 20514-1000

RE: COE-2020-0002

Dear Mr. Lee,

This letter constitutes the comments of the Society for American Archaeology (SAA) on the Army Corps of Engineers' (COE) Proposal to Reissue and Modify Nationwide Permits, as published in the Federal Register on September 15, 2020.

The SAA is an international organization that, since its founding in 1934, has been dedicated to research about and interpretation and protection of the archaeological heritage of the Americas. With nearly 7,000 members, SAA represents professional and avocational archaeologists, archaeology students in colleges and universities, and archaeologists working at Tribal agencies, museums, government agencies, and the private sector. SAA has members throughout the U.S., as well as in many nations around the world.

The work of the COE has a great impact upon the cultural resources of the United States. As such, it is vital that the regulations framing COE nationwide permits be consistent with the statutes that ensure the preservation of our irreplaceable heritage assets for present and future generations. To that end, the comments below reflect the input of expert archaeologists on how the proposed rule on nationwide permitting can be improved to maximize protections for cultural resources.

A. General Comments:

1. The shift from the 300 foot linear restriction to 1/2 acre restriction on NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 will likely result in a reduction in projects reviewed as individual permits. SAA understands that there is a valid argument for the change, but coupled with other proposed changes, projects covered by the nationwide permits will likely have less environmental review, less federal oversight, and possibly lack appropriate cultural resource considerations.
2. The SAA advises that the Corps' proposal "...*exempting Federal agencies from PCN [preconstruction notification] under the theory that Federal agencies may employ staff who are environmental experts and who already review these projects before submitting PCNs to the Corps to determine whether they meet the criteria for the applicable NWP*" is very misguided. This provision would allow agencies that do not have the appropriate expertise to make decisions impacting natural and cultural resources. Additionally, given that many of the general conditions have review deadlines that are dependent upon the receipt of a preconstruction notification, the SAA is concerned that there will be no way

for the Corps to notify an agency of environmental or cultural concerns if that agency wasn't already aware.

3. The language regarding how applicants use environmental consultants is troubling. The language of the proposal implies that federal personnel would consider allowing applicants to review their own projects. There is a long history of failure when it comes to self-review and self-certification of compliance with federal regulations.
4. Limiting preconstruction notifications to non-federal applicants also limits appropriate oversight of federal actions. For those agencies that lack appropriate staff, it would not allow for the timely consideration of impacts prior to construction. The fact that this would involve NWP 7, 8, 45, 31, 33, 36, 38, 53, and 54 highlights just how expansive this change would be. The fact that state departments of transportation would be considered federal agencies when they have been delegated NEPA responsibility is even further grounds for concern. That the proposed changes purposefully indicate that NEPA and NHPA compliance are not the same, and that delegation of responsibility would need to be for both, does not ameliorate our unease.
5. The Corps' 30 day review for completeness of a preconstruction notification and 45 day timeline for review after completeness has been determined matches the previous NWP rulemaking. The SAA supports this provision.
6. The SAA applauds the decision to maintain flexibility in how regional conditions are written and framed. We also agree with the considered requirement that regional districts post and solicit public comment on regional conditions on regulations.gov. The idea, however, that copies of final WQCs issued by states, tribes, and EPA also be posted means that longer timelines for public comment may be required.

B. Specific NWP Comments:

1. NWP 12 and proposed NWPs C and D:
 - a. The proposed changes to NWP 3 include "*The placement of riprap to protect the structure or fill, or to comply with current construction codes or safety standards.*" This practice must be done carefully. While it may protect against bank erosion, which in itself could threaten cultural resources, the placing of the riprap could also impact cultural resources.
 - b. The SAA strongly urges that "*national best management practices*" must explicitly include consideration of cultural resources.
 - c. The SAA supports the Corps proposal to "*...change the last sentence to state that oil or natural gas pipelines routed in, over, or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.*"
 - d. The inclusion of temporary structures should be clarified to state that temporary structures should be reviewed for impacts to NHPA
2. Proposed NWPs A, B and E: these NWPs may lead to a lack of appropriate consideration of the impact of these activities on offshore cultural resources (i.e., shipwrecks, flooded sites, etc.). All reviews of submerged cultural resources must be done by appropriately trained individuals.

C. Specific General Condition Comments:

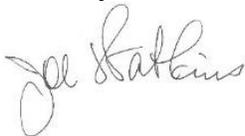
- a. Regarding Tribal Rights (GC 17), the proposed rule represents a significant step back from existing protections. Whereas current language says "*No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands*", the proposed language says "*No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.*" This would remove tribal resources and lands from consideration. Additionally, the change from "*cause more than minimal*

adverse effects" to *"impair"* may have greater consequences than depicted in the proposal.

- b. The SAA recommends that Historic Properties (GC 20) be reworked. The phrase *"We are proposing to modify paragraph (c) of this general condition to state that the district engineer's identification efforts for historic properties shall be commensurate with potential impacts"* would seem to put into regulation a situation that is happening all too often: the Corps claiming that it cannot carry out a cultural resources review or consultation on project impacts because the cultural resource lies outside the area that the Corps considers its jurisdiction. This practice has resulted in a great deal of unnecessary segmentation between state and federal agency obligations over the same project. In some states the issue is further complicated because their laws state that once §106 is triggered, state review ceases and is subsumed by federal review. Section D of GC 20 states *"For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps."* The regulations also state, however, that *"Except activities conducted by non-Federal permittees that require PCNs under paragraph (c) of the 'Endangered Species' and 'Historic Properties' general conditions (general conditions 18 and 20, respectively), if the Corps district does not respond to the PCN within 45 days of a receipt of a complete PCN the activity is automatically authorized by the NWP (see 33 CFR 330.1(e)(1))."* The Corps must clarify this seeming contradiction.
- D. Relevant Studies Comments: compliance with §106: The requirement of a PCN to review for compliance with §106 creates confusion with those NWPs that do not require advanced notification (discussed above). Also, this language would remove the Corps' §106 responsibilities when another federal agency is involved, and it would no longer be responsible for compliance contra the requirements of 36 CFR §800.2(2): *Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.*
- E. EO 13045 compliance: the assertion that *"The proposal to issue NWPs does not have tribal implications. It is generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes"* is deeply problematic at best. The SAA is glad that the Corps has provided the tribes opportunity for comment, however we believe formal consultation is necessary under EO 13045.

Thank you for your time and consideration of these important issues.

Sincerely,



Joe E. Watkins, Ph.D., RPA
President