



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington DC 20515

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October 13, 2021

The Honorable Joseph R. Biden, Jr.
The President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

We are writing to bring to your attention the climate change and environmental justice impacts of Nationwide Permits (NWP) that are issued by the U.S. Army Corps of Engineers (Corps). We were heartened by your commitment on January 20, 2021 to review the deeply flawed “Reissuance and Modification of Nationwide Permits” final rule.¹ However, we must reiterate the requests from a March 16, 2021 letter that your administration halt implementation and re-open the rulemaking for comment.² A holistic review of all 57 NWP permits before their finalization is necessary to ensure adequate protection of clean water.

At the tail end of the former administration, the Corps finalized the reissuance of 12 NWPs, as well as the creation of four new permits.³ Not only were these 16 permits finalized in a rushed process with limited opportunity for public comment, but they were written based on the Trump administration’s deeply flawed National Environmental Policy Act (NEPA) updates. The NEPA final rule itself is under review.⁴ Allowing those 16 permits to remain in place despite this dubious reliance on the Trump administration’s NEPA provisions is a perilous approach to the protection of water resources nationwide. By continuing to use the 16 recently finalized NWPs, the Corps would be failing to protect the health and safety of our nation’s waters and our communities.

The remaining 41 permits the Trump administration proposed in September 2020 are currently under review by your administration. The Trump administration attempted to preempt the NWP reissuance process, starting it in September 2020 despite the NWPs not expiring until March

¹ 86 Fed. Reg. 2744 (Jan. 13, 2021).

² <https://transportation.house.gov/news/press-releases/committee-chairs-urge-president-biden-to-delay-implementation-of-flawed-trump-era-army-corps-permitting-rule>

³ 86 Fed. Reg. 2744 (Jan. 13, 2021).

⁴ <https://www.whitehouse.gov/wp-content/uploads/2021/04/M-21-23.pdf>

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2022.⁵ We strongly urge you to fully utilize the remaining months for the careful review of the NWP's and weigh their impacts to communities across the country. Their reissuance should be based on sound science, with abundant stakeholder input—including robust input from the states—and include considerations of climate change impacts and the environmental justice goals of your administration. As proposed, the 41 permits are in many ways at odds with those goals.

The nationwide permit program began within the Corps in the mid-1970s, and Congress codified the program in the Clean Water Act of 1977 (P.L. 95-217). The NWP's were intended to authorize projects with minor environmental impacts to land, wetlands, and waterways—both on an individual project level as well as the cumulative impact of similar activities within a watershed. Used for their intended purposes, they can provide expedient permitting for projects which are standard and minimally impactful. This process is not, and was never, meant to be applied to large projects that have far-reaching cumulative impacts. Any such project should require a more careful look, with in-depth study and analysis of its impacts.

The expansion of NWP's and their use for activities with more than a minimal adverse environmental effect put the nation's wetlands and marshes at risk. The Corps must not abdicate its responsibility under the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the nation's waters.”⁶ Broadening the applicability of the permits could mean impacts to hundreds of small water bodies, which cumulatively could destroy the water supplies of entire communities. If they are not more appropriately scrutinized, the permits could allow industry and polluters to avoid the Clean Water Act, NEPA, Endangered Species Act, and other laws intended to ensure sustainable, environmentally-conscious development. Should the Corps proceed with the 16 finalized NWP's and rush to finalize the remaining ones, it will be doing so against the intent of Congress and the Clean Water Act in creating the Nationwide Permits.

The March Congressional letter expressed concern that the Trump administration's reissuance would allow oil and gas pipelines, coal mining, and other potentially harmful activities to be completed without thorough review pursuant to the Clean Water Act. Those concerns have now come to fruition, nearly wreaking havoc on the water supplies and environment of a community in the suburbs of Memphis, Tennessee.

The Byhalia pipeline is a crude oil pipeline designed to connect two existing pipelines stretching from Oklahoma to the Gulf Coast. As originally planned, the pipeline was set to plow through lower income, Black neighborhoods already overburdened with polluting infrastructure. The pipeline would have crossed over the Memphis Sand Aquifer, a threat to the drinking water source for more than one million residents. The route also traversed an active earthquake zone, increasing the chance of irrevocable disaster. This project was allowed to use a nationwide permit, specifically NWP 12. Because the Corps utilized NWP's for it, the project bypassed meaningful federal public comment and thus the local community had no opportunity to weigh in on the specifics of this pipeline.

⁵ 85 Fed. Reg. 57298 (September 15, 2020).

⁶ 33 USC §1251(a).

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Fortunately, the developer backed off the project after the community's opposition received national coverage. This will not always be the case, and other projects could go forward despite widespread opposition from those put directly in harm's way. The Byhalia pipeline may not be completed, but its story illustrates all too clearly how nationwide permits can allow problematic projects to circumvent not only the Clean Water Act, but also all public input and review processes, including considerations of environmental justice.

There are several other projects that utilize these NWP's that may be familiar, including the Dakota Access pipeline, Keystone XL pipeline, Mountain Valley pipeline, and Enbridge's Line 3 and Line 5 pipelines. These include projects that are over 1,000 miles long or with over 2,000 waterbody crossings—neither instance represents “minimal adverse environmental effects.” Projects of this scale need to be properly scrutinized not just for immediate environmental impacts, but also for cumulative impacts, including potential impacts on climate change.

If we are to continue to make progress in improving the health of our nation's waters, the Corps must ensure that its NWP's are based on the law and the science, and are informed by robust public engagement. The NWP's must align with Congressional intent and be properly promulgated. That is why we urge you to immediately re-open for public comment the “Reissuance and Modification of Nationwide Permits Final Rule” and meticulously review the remaining permits before their reissuance. All NWP's must be reissued in accordance with the intent of the Clean Water Act and with the goals of your administration. This is an opportunity that cannot be wasted.

Thank you for your consideration of our request.

Sincerely,



PETER A. DEFAZIO
Chair
U.S. House Committee on
Transportation and Infrastructure



STEVE COHEN
Member of Congress

cc: Mr. Jamie Pinkham, Acting Assistant Secretary of the Army (Civil Works)