



**Region 10 Tribal Consortium
P.O. Box 689
Spokane, Washington 99210**

November 13, 2020

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

SUBMITTED VIA FEDERALREGISTER.GOV

RE: USACE's Proposed Rules for NWP's Docket ID: COE-2020-0002

Dear Mr. Olson:

This letter is sent on behalf of the Tribal Caucus members of EPA Region 10's Tribal Operations Committee ("RTOC"). This letter is not sent on behalf of EPA Region 10 or any employees of EPA, but solely tribal government representatives of the RTOC. This letter will specifically address the proposed amendment of General Condition 17—Tribal Rights ("GC 17") and the removal of the definition of protected tribal resources.

EPA Region 10 includes Tribes across Alaska, Washington, Idaho, and Oregon. Clean water is essential to many Tribes, not just as a source of sustenance, but also for cultural, medicinal, and spiritual reasons. The protection of water quality is vital to the survival of Tribes. Almost no activity on the reservation has more potential for significantly affecting the economic and political integrity and the health and welfare of all reservation citizens than water use, quality, and regulation.

1. The proposed amendment to GC 17 from the current standard is inconsistent with the stated purpose and should not be adopted.

The Proposed Rule proposes to eliminate the current language of GC 17 that provides that NWP activities cannot "cause more than minimal adverse effects on tribal rights, protected tribal

resources, or tribal lands.”¹ The Proposed Rule would replace this with the standard provided in the 2012 NWP, which states that activities may not “impair reserved tribal rights including, but not limited to, reserved water rights and treaty fishing and hunting rights.”² This proposed change removes explicit terms defining tribal rights, protected tribal resources, and tribal lands. Importantly, this also allows a larger impact to tribal resources – from no minimum impact to no impairment. This is a significant step backward in protection of tribal resources.

The stated purpose of this change is that it is meant to “eliminate any confusion” about applicable standards, tribal consultation policies, tribal rights, and Clean Water Act requirements.³ These changes do not achieve these goals.

First, the term “minimal adverse effect” term is consistent with the wording found in Section 404(e) of the Clean Water Act and throughout sections of the 2020 Proposed Rules for NWPs. The reversion from the minimal adverse effect standard to the word “impair” does not add, but only diminishes, the clarity of this condition. There are several General Conditions and statutory requirements that follow the minimal adverse effect standard. Further, there is an entire section that lists out ten factors of paragraph 2 of Section D, “District Engineer’s Decision” regarding making minimal adverse environmental effect determinations.⁴ The extensive guidance and prevalence of the minimal adverse standard would suggest that there is no additional clarification needed and that “impair” would not provide that clarification.

Second, the 2017 NWPs were changed to provide clarity and definitions to tribal lands, tribal protected resources, and tribal rights.⁵ Each of these definitions clearly establish the scope and standard for tribal consultation. The change made to GC 17 in the 2017 NWPs is consistent with the 1998 Department of Defense American Indian and Alaska Native Policy (1998 DoD Policy).⁶ It was noted in the adoption of the 2017 NWPs that the 2012 NWPs “does not accurately reflect the Corps’ responsibility to uphold tribal treaty rights.”⁷ Further, the Corps acknowledged that the change addresses the full suite of tribal rights.⁸ Removing these terms from the condition makes the rule more confusing, not less.

Finally, a division (or district) engineer has statutory authority under 33 C.F.R. § 330.4(e) to modify, suspend, or revoke NWP authorizations.⁹ This authority is also explicitly stated in the 2017 NWPs.¹⁰ The Proposed Rule states that: “[t]he proposed changes to this general condition

¹ Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57,298, 57,350 (Sept. 15, 2020).

² *Id.*

³ *Id.* at 57,316.

⁴ *Id.*

⁵ Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1875 (Jan. 6, 2017).

⁶ *Id.* at 1876.

⁷ *Id.* at 1875.

⁸ *Id.* at 1976.

⁹ 33 C.F.R. § 330.4(e) (2017).

¹⁰ Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. at 1982.

are also intended to clarify that the identification of a potential effect to a tribal right does not mean that a district engineer must exercise his or her discretionary authority to require an individual permit for a proposed activity.”¹¹ This is contrary to the statutory authority and authority in the 2017 NWP that is bestowed upon the district engineer when it comes to tribal rights.

2. The proposed amendment to GC 17 would not accurately fulfill the Corps’ responsibility to tribes.

The Proposed Rule changes from reading that an activity must not “cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands” to “impair reserved tribal rights” is a significant rollback in protection of tribal rights and resources and inconsistent with the Corps’ trust obligation to tribes.

The 2017 NWP sought to address concerns with the language of GC 17 in the 2012 NWP. As discussed above, it was noted that 2012 NWP “does not accurately reflect the Corps’ responsibility to uphold tribal treaty rights.”¹² There were also comments regarding additional protections such as full consultations and PCNs for more activities on tribal lands, and usual and accustomed hunting or fishing grounds.¹³ The Corps acknowledged that the change to the 2017 NWP addresses the full suite of tribal rights.¹⁴ Protections for reserved tribal rights is simply not enough for the Corps’ to fulfill their obligations and responsibilities to tribes. The Corps should be working with tribes to expand protection of tribal resources, not diminishing them

3. The proposed change to GC 17 does not advance the goals laid out in E.O. 13783.

The Trump Administration issued E.O. 13783—Promoting Energy Independence and Economic Growth in March 2017, which directed the heads of federal agencies to review current regulations that “potentially burden the development or use of domestically produced energy resources.”¹⁵ The stated purpose of the proposed changes to the 2017 NWP is to reduce regulatory burdens and allow for the development of natural resources to be more efficient.¹⁶ The 2017 NWP stated that “[the Corps’] believe[s] that the revised general condition will not change the number of activities that qualify for NWP authorization. Compared to prior versions of this general condition, the revised general condition more clearly identifies the tribal rights that must be considered by district engineers.”¹⁷ There was no evidence or support in the Proposed Rule that the change to GC 17 would be more efficient or that the 2017 NWP did not provide

¹¹ Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. at 57,350.

¹² Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. at 1875.

¹³ *Id.*

¹⁴ *Id.* at 1976.

¹⁵ Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. at 57,300.

¹⁶ *Id.*

¹⁷ Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. at 1876.

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additional clarification. Additionally, there was no information given that the 2017 NWP's created a significant increase in the number of activities. Therefore, with no evidence to support that the 2017 GC 17 created more confusion or increased regulation, the proposed revision should not be adopted.

In conclusion, the Proposed Rule changes are (1) will not accurately fulfill the Corps' responsibility to tribes and (2) inconsistent with the goals of the Executive Order because it will not add clarity or efficiency to the process.

We appreciate your consideration of this request.

Sincerely,

A handwritten signature in black ink that reads "Raymond Paddock III". The signature is written in a cursive, slightly slanted style.

Raymond Paddock
RTOC Co-Chair