



November 16, 2020

VIA ELECTRONIC SUBMISSION

The Honorable Ryan D. McCarthy, Secretary
U.S. Army
114 Army Pentagon
Washington, D.C. 20310

Re: Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57298 (September 15, 2020).

Dear Secretary McCarthy:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration submits the following comments in response to the U.S. Army Corps of Engineers' (Army Corps) proposed rule titled: *Proposal to Reissue and Modify Nationwide Permits*. Advocacy suggests modifications to the section on Nationwide Permit 48 to add additional regulatory clarity and justification for the rulemaking.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),¹ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

¹ 5 U.S.C. § 601 et seq.

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).



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The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.³ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁵

Background

On September 15, 2020 the Army Corps published a proposed rule reissuing nationwide permits (NWP) and issuing five new permits. Under Section 1344 of the Clean Water Act, the Secretary of the Army has the authority to issue nationwide permits for categories of activities involving dredged or fill material if the Secretary determines that such activities will have a minimal adverse effect on the environment.⁶ Similar NWPs may be issued to authorize activities pursuant to the Rivers and Harbors Act Section 10.⁷ This authority has been delegated to the Chief of Engineers. NWPs can be issued for a period of no more than five years.⁸

There are currently 52 NWPs published in 2017 and set to expire in 2022. Pursuant to Executive Order 13783 signed in March 2017, the heads of federal agencies were directed to review existing regulations that burden the development of domestically produced energy resources.⁹ During this review, the Secretary of the Army identified nine NWPs that could be modified to reduce the regulatory burdens on entities that develop or use domestically produced energy resources. This proposed rule provides modifications to those NWPs identified, as well as reissuing and modifying the remaining NWPs so they remain on the same five-year schedule. The new permits cover electric and telecommunications utility lines not covered by other permits, construction and maintenance of water reuse and reclamation facilities, and two new permits for seaweed and finfish aquaculture activities.¹⁰

The Army Corps is proposing to update NWP 48, which regulates commercial shellfish aquaculture activities. This permit is the subject of litigation in *Coalition to Protect Puget Sound Habitat v. United States Army Corps of Engineers*, 417 F. Supp. 3d 1354 (W.D. Wash. 2019). In that case the court ruled that the Army Corps' earlier issuance of NWP 48 had been arbitrary and capricious because the agency had failed to consider the full environmental impacts under the National Environmental Policy Act and the Clean Water Act. The court set aside the NWP for activities in the waters of the State of Washington.

³ Small Business Jobs Act of 2010 (Pub. L. No. 111-240) § 1601.

⁴ Id.

⁵ 5 U.S.C. § 601 note.

⁶ 33 U.S.C. § 1344 (e) (1).

⁷ 33 U.S.C. § 403.

⁸ 33 U.S.C. § 1344 (e) (2).

⁹ Exec. Order 13783, 82 Fed. Reg. 16093 (March 31, 2017).

¹⁰ 85 Fed. Reg. 57298 at 57300.

In response to the outcome of that litigation, and the agency's review of all NWP's, Army Corps has proposed several changes to NWP 48 and offered additional data to support the issuance of this permit. Key changes to the permit that are pertinent to Advocacy's comments are summarized here:

1. The Army Corps is proposing to revise the title of this NWP from "Commercial Shellfish Aquaculture Activities" to "Commercial Shellfish Mariculture Activities."
2. The agency is proposing to remove the ½-acre limit for impacts to submerged aquatic vegetation for those areas that have not been used for commercial shellfish activities during the past 100 years. The Army Corps states that it is removing this limit because the impacts of commercial shellfish mariculture activities are temporary and do not convert aquatic habitat to non-aquatic habitat. The agency will also remove the definition of "new commercial shellfish aquaculture operation" as this definition is no longer necessary given the removal of the ½ acre limit.
3. The agency is proposing to remove the preconstruction notification threshold for commercial shellfish mariculture activities that include a species that has never been cultivated in the water body.
4. The Army Corps is proposing that shellfish seed placed on the bottom of the waterbody is not discharge of fill material and does not require a Section 4040 permit.
5. The Army Corps asserts that some commercial shellfish activities involve mechanical harvest techniques that may result in discharges of dredged material into jurisdictional waters.¹¹

Small Aquaculture Businesses are Supportive of the Rule with Modification

While supportive, small businesses in the aquaculture industry have stated that modifications are necessary to ensure additional regulatory clarity and to bolster the agency's justification for the rulemaking. Specifically, these businesses are concerned that Army Corps has not provided enough justification for NWP 48 to overcome a potential legal challenge to the permit.

Advocacy spoke with small aquaculture farmers and their representatives in the Pacific northwest, coastal regions throughout the Atlantic, and the Gulf of Mexico. These small businesses are concerned that the Army Corps has once again not provided enough of an environmental analysis to overcome deficiencies raised in the litigation concerning the previous issuance of NWP 48. Businesses in Washington state are particularly concerned that the Army Corps be diligent in presenting sound environmental analysis and justification for NWP 48 so that they are not once again subject to an unfavorable outcome in litigation; however small businesses nationwide could be subject to unfavorable litigation outcomes were the justification for this rulemaking not sound.

Small businesses are also worried that certain aspects of the proposal would impose permitting requirements in situations where it is not necessary. Certain aquaculture activities fall outside the scope of permitting requirements and should therefore not be subject to these regulatory hurdles. A lack of clarity in the rulemaking may lead to permitting delays and uncertainty, both of which have negative effects on small businesses. Permit delays may stall operations of small businesses, and any revenue that may have been earned during the delay would be lost and would not be recovered. Uncertainties about the permitting process, including whether a permit will be issued and whether it will be valid, may result in small entities postponing or cancelling investments or incurring additional costs to prepare for contingencies.

¹¹ *Id.* at 57298-57335.

Advocacy Comments on the Rule

- I. *The Army Corps should retain the term aquaculture and not implement the proposed change to the term “mariculture.”*

Advocacy has heard from numerous small businesses that the term “mariculture” has been abandoned by industry and is thus not an accurate term for use in this proposed rulemaking. Advocacy and small businesses would suggest changing this term to “marine aquaculture” to more closely align with the terms used by industry while also achieving the Army Corps’ goal of clarifying that it is only regulating aquaculture activities in coastal waters.

- II. *The agency should reconsider classifying certain seeding activities and equipment as “structures” subject to permitting requirements.*

In its proposed rule, Army Corps states that shellfish seed placed at the bottom of a waterbody is not considered a discharge of fill material and is therefore not subject to a Section 404 permit.¹² Advocacy asks that Army Corps further clarify that shellfish seed does not meet the definition of an obstruction subject to permitting requirements under the Rivers and Harbors Act either.¹³ To be clear, shellfish seed does not include shell clutch, gravel, or any other objects that materially alter the topography of a water bottom. Small businesses also use predator nets, and low-profile cages to protect bottom-planted seeds. Advocacy suggest that such equipment not be considered navigation hazards subject to permitting requirements unless they create a vertical profile of greater than 25 percent of the water depth because again they do not materially alter the topography of the water bottom, nor do they create a navigation hazard or obstruction.

- III. *The Army Corps is improperly categorizing aquaculture harvest activities as “dredge and fill” activities.*

The term “dredged” material includes excavated material incidental to activities such as mechanized land-clearing, ditching, channelization, or other excavation.¹⁴ Small businesses have stated however that the methods and equipment used in aquaculture harvest do not rise to the level of “dredging” and should therefore not be categorized as such for purposes of activities requiring a 404 permit. Such harvest activities merely rake the bottom of the water body causing temporary disruption to sediment which then settles back to the bottom. These activities do not create ditches, channels, or substantially redeposit excavated soil material.¹⁵ Furthermore, the definition states that “incidental fallback” is not included in the definition of “discharge of dredged material.”¹⁶ This implies that merely temporarily disrupting sediment which settles on or near where it originally existed should not rise to the level of being considered dredged material. Advocacy strongly encourages Army Corps to review comments from small business outlining the specific methods and equipment used in mechanical aquaculture harvest, hydraulic aquaculture harvest, and dredge harvest, and to consider not classifying these actions as “dredge and fill” activities subject to permitting

¹² *Id.* at 57334.

¹³ 33 U.S.C. § 403.

¹⁴ 33 U.S.C. § 323.2 (d) (1) (iii).

¹⁵ *Id.*

¹⁶ *Id.* at (d) (2) (iii).

requirements.

Conclusions and Recommendations

Advocacy urges the Army Corps to consider the above comments when finalizing NWP 48. These suggested changes will bring needed regulatory certainty to small businesses in the aquaculture industry. Furthermore, Advocacy strongly encourages Army Corps to consider the additional comments and data sources provided by small businesses in bolstering its environmental impact analyses for the rulemaking. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Prianka P. Sharma
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Paul Ray, Administrator
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