



November 16, 2020

Headquarters
U.S. Army Corps of Engineers
Directorate of Civil Works
ATTN: CECW-CO-R
441 G Street, N.W.
Washington, D.C. 20314-1000

Re: Notice of Proposed Rulemaking: Proposal to Reissue and Modify Nationwide Permits
(Docket Number COE-2020-0002)

To Whom it May Concern:

The American Cultural Resources Association (ACRA), the trade association for private firms that specialize in cultural resources management (CRM), appreciates this opportunity to comment on the U.S. Army Corps of Engineers' (USACE) Proposal To Reissue and Modify Nationwide Permits.

ACRA member firms undertake much of the legally mandated CRM activities in the United States and employ thousands of CRM professionals, including archaeologists, architectural historians, historians, and an increasingly diverse group of other specialists. Using free market business practices, ACRA firms deploy skilled teams to provide clients with the best service while fulfilling ethical, professional, and legal commitments to people and cultural resources, as well as providing communities with a voice in development processes.

ACRA has reviewed USACE's notice published September 15, 2020 in the Federal Register (85 CFR 57298) regarding its plan to reissue 52 nationwide permits (NWPs) and issue five new NWPs. ACRA offers the following comments.

- 1) Section I(E) (85 CFR 57303), "The 2018 Legislative Outline for Rebuilding Infrastructure in America." The document appears to exempt federal agencies from submitting a Pre-construction Notification (PCN). It is argued that Federal agencies have the necessary environmental experts on staff who can review projects prior to submitting a PCN to USACE.

2101 L Street NW, Suite 800 • Washington, DC 20037
202.367.9094 • www.acra-crm.org • info@acra-crm.org

As an industry providing services to numerous Federal agencies, ACRA member firms have seen an erosion of positions within agencies with the required expertise for such reviews. It is also not uncommon for senior level managers to make decisions without such input, or to ignore input that is provided. The recently issued “Executive Order on Creating Schedule F In The Excepted Service” also raises serious questions about whether GS13-15 positions may become subject to undue political pressure. Therefore, ACRA recommends that Federal agencies should continue to submit a PCN.

- 2) Section II(B) (85 CFR 57321), “Discussion of Additional Proposed Modifications to Existing Nationwide Permits.” With respect to permits under Nationwide Permits (NWP) 12, “Oil or Natural Gas Pipeline Activities,” ACRA members have extensive experience in conducting cultural resource surveys related to oil or natural gas pipelines. Although pipelines that are 250 miles long or greater get the bulk of public attention, mid-stream pipelines less than 250 miles long represent the majority of oil or natural gas pipeline activities. A good portion of these mid-stream projects cross waters of the United States. Therefore, ACRA believes that the 250-mile threshold is unrealistic for a large portion of the United States and will result in damage to historic properties.
- 3) Section II(A) (85 CFR 57320-57321), “Proposed Removal of the 300 Linear Foot Limit for Losses of Stream Bed.” With respect to the alternative hybrid approach to establishing consistent quantitative limits for losses of stream bed authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, ACRA is concerned that 3,470 ft, 2,540 ft, and 880 ft of first, second, and third order streams, respectively, could be completely eliminated by infill. Our streams are a critical part of maintaining a sustainable environment for our future. Because we already have eliminated ephemeral streams from the definition of U.S. waters, we need to be protective of our permanent streams. Therefore, ACRA believes that the 300-foot limit for first, second, and third order streams should remain.

There are several references regarding the development of regional conditions beyond those required by the NWP. While it is laudable that the USACE realizes that regional variability exists and should be addressed, we are concerned that “regional conditions” will take years to develop or may never be developed, largely because Federal agencies are currently understaffed in many regions and personnel are overburdened.

- 4) Section II(D) (85 CFR 57350), “Discussion of Proposed Modifications to Nationwide Permit General Conditions.” With respect to GS17, Tribal Rights, we are concerned by the proposal’s discussion about when the district engineer should consult the appropriate tribes. A district engineer may unilaterally decide that consultation is

not necessary if the project “causes only minimal adverse effects.” The USACE, like other federal agencies, has a legal responsibility to uphold a government-to-government relationship with tribes and to consider project impacts on trust resources, which are those resources for the federal government has a fiduciary responsibility to identify and protect. Unfortunately, the tribal representatives may have a very different view of what would be affected and how significant the effect is. ACRA believes that consultation should be a necessary part of the process.

Another concern is that the term “protected tribal resources” has been removed from the text with no real explanation. These resources are held in trust for the tribes by the federal government, which in turn has a responsibility to identify and protect them. We recognize there have been concerns raised that the “minimal adverse effects” standard would be applied to the full suite of tribal rights and that there might be inconsistency among the districts. ACRA recommends that the standard should apply to all tribal rights.

We appreciate USACE considering our concerns as it moves forward.

Sincerely,

A handwritten signature in black ink, appearing to read "Amanda Stratton". The signature is fluid and cursive, with a large initial 'A'.

Amanda Stratton
Executive Director