



April 18, 2011

US Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314-1000

Subject: Docket Number COE-2010-0035 and ZRIN 0710-ZA05
Delivery via email to NWP2012@usace.army.mil

Dear US Army Corps of Engineers Personnel:

Thank you for the opportunity to review and comment on the existing and modified text of the 2012 re-issuance of the existing nationwide permits (NWP), general conditions, and definitions. As an agency that generally secures over 100 permits from the US Army Corps of Engineers (the Corps) each year, we are pleased to share our comments, based on our experiences working with the 2007 re-issuance of the NWP. Our comments are offered in an effort to facilitate our mutual goal of environmental stewardship in a streamlined and efficient manner.

Nationwide Permit 3: Maintenance

The Montana Department of Transportation (MDT) supports the proposed changes to this NWP. The changes do simplify and clarify the text.

Additionally, MDT recommends an addition to the "Note", which references the Clean Water Act Section 404(f) exemption for maintenance. MDT recommends that the note include clarification as to who can use the exemption for maintenance of irrigation and drainage ditches, if the Corps does indeed intend to limit the exemption's applicability based on applicant status (i.e., irrigator versus non-irrigator) rather than based on activity purpose (i.e., to relocate the ditch and place new control structures as described in the definition of "construction" in the Corps' Regulatory Guidance Letter No. 07-02). We respectfully suggest that including this clarification in the note would lend itself to bringing about the Corps' stated purpose of making the NWP clearer and easier to understand.

Nationwide Permit 5: Scientific Measurements

MDT requests consideration of amendments to this NWP that are similar to the amendments proposed for NWP 6. We suggest that a fill limit threshold based on area (1/10th acre), rather than on volume (25 yards), is appropriate.

Nationwide Permit 6: Survey Activities

MDT supports the proposed changes to this NWP. MDT agrees that a fill limit threshold based on area (1/10th acre), rather than on volume (25 yards), is appropriate.

Nationwide Permit # 13: Bank Stabilization

MDT generally supports the proposed changes to this NWP, with the exception of the following language: "An average of one cubic yard per running foot placed *below the plane of the* ordinary high water mark or high tide line." Please re-word and replace "below the plane of" with "within the".

MDT also supports allowing the district engineer to waive the 500 foot limit when the discharge will result in minimal adverse impact.

Nationwide Permit 27: Aquatic Habitat Restoration, Establishment, and Enhancement Activities

MDT supports the inclusion of the removal of small dams in the list of authorized activities.

Nationwide Permit 43: Stormwater Management Facilities

MDT supports the proposed addition of “low impact development stormwater features” to the examples of types of stormwater management facilities that are authorized by this NWP.

Nationwide Permit 46: Discharges in Ditches

Since certain discharges for construction or maintenance of irrigation ditches or maintenance of drainage ditches are statutorily exempted from requiring a CWA 404 Permit, MDT respectfully recommends that a “Note” be provided in NWP 46, similar to the note in the NWP 3 referencing the Clean Water Act Section 404(f) exemption for maintenance. Additionally, MDT recommends that the note include clarification as to who can use this exemption, if the Corps does indeed intend to limit the exemption’s applicability based on applicant status (i.e., irrigator versus non-irrigator) rather than based on activity purpose (i.e., to relocate the ditch and place new control structures as described in the definition of “construction” in the Corps' Regulatory Guidance Letter No. 07-02). We respectfully suggest that including this clarification in the note would lend itself to bringing about the Corps’ stated purpose of making the NWPs clearer and easier to understand.

General Condition 2: Aquatic Life Movements

The Corps proposes to add a statement requiring bottomless culverts to be used when practicable. Like the Corps, our agency supports the facilitation of aquatic life movements to protect aquatic life. However, we respectfully suggest that this condition, as proposed, is overly burdensome.

MDT requests that the Corps include language in this condition to limit the type and size of installation that would be subject to this condition. Please include language to preclude application of this condition to round pipes, as MDT is not aware of a structurally sound bottomless round pipe.

Please include language to preclude application of this condition to pipes that are installed temporarily to facilitate the construction of permanent structure, as MDT concludes that the additional disturbance associated with construction of a bottomless pipe is not environmentally preferred for a temporary installation.

MDT respectfully questions the necessity of installing bottomless culverts in ephemeral or intermittent streams that have no fishery value. This condition, as proposed, gives no consideration to the type of stream or resource value of the water of the US in which the culvert is being placed. Please include language to preclude application of this condition to streams where it will provide no real environmental benefit.

Lastly, the condition as currently written places the burden of demonstrating impracticability on the applicant. If this condition remains, MDT will frequently be preparing impracticability

demonstrations for a variety of reasons, including installation of small, round pipes; temporary culverts; pipes needed to prevent head-cuts extending upstream; and fish barriers for species separation. In situations where impracticability is obvious, it seems impractical for taxpayer funds to be used on our end in preparing the impracticability demonstration and on the Corps' end reviewing it.

Instead of requiring bottomless culverts please consider use of the following text: "Culvert crossings on streams identified as having aquatic species that normally use or migrate through the area will be designed and constructed in a manner that perpetuates the natural substrate and bed mobility throughout the culvert crossing to ensure the perpetuation of aquatic life movements." MDT understands the goal of this condition to be provision of natural substrate through the culvert crossing to maintain aquatic organism passage. This goal can be achieved with properly designed pipes, arches, concrete box culverts, bridges and open bottom culverts. FHWA Hydraulic Engineering Circular No. 26, Culvert Design for Aquatic Organism Passage, provides guidelines in achieving this goal.

General Condition 19: Endangered Species

MDT requests that the Corps utilize the US Fish and Wildlife Service's definitions from Section 7 of the Endangered Species Act, as to what constitutes an effect or jeopardizes any threatened or endangered species or their critical habitat, rather than the proposed "take" and "harm" definitions.

Definition: "single and complete linear project"

We support the inclusion of this definition as it provides clarity to the allowable discharge thresholds under the applicable Nationwide Permits.

Definition: "discrete event"

MDT requests that the Corps provide a definition of "discrete event" for purposes of the use of this phrase in NWP 3 and 45. MDT respectfully suggests that including the Corps National interpretation on this matter would lend itself to bringing about the Corps' stated purpose of making the NWPs clearer and easier to understand.

Thank you again for the opportunity to review and comment on the Proposed Nationwide Permits. If you have any questions or concerns regarding these comments, please contact me at 406.444.7228.

Sincerely,



Tom S. Martin, P.E.
Environmental Services Bureau Chief
Montana Department of Transportation

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