

Congress of the United States

March 16, 2021

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

Dear Mr. President:

Thank you for prioritizing the revocation of multiple Trump administration Executive Orders that were harmful to public health and the environment, and contrary both to the rule of law and science. In addition, we were heartened by your commitment to review the deeply flawed “Reissuance and Modification of Nationwide Permits”¹ rulemaking by the U.S. Army Corps of Engineers (Corps).

As the Chairs of the House Committee on Transportation and Infrastructure and the Senate Committee on Environment and Public Works, which have primary jurisdiction over the water quality protection of our rivers, lakes, streams, and other surface waters, we are deeply concerned that this Trump administration action would ensure oil and gas pipelines, coal mining, and other potentially harmful activities are not thoroughly reviewed pursuant to the Clean Water Act, and are thus inconsistent with the goals of the Act.

We now urge you to direct the Corps to delay implementation of the Trump administration’s nationwide permits rulemaking before it causes lasting damage to the health of our families, our environment, and our vital water resources. In addition, we request that your administration re-open for comment the “Reissuance and Modification of Nationwide Permits.”

The Corps first issued regulations for the nationwide permit program in the mid 1970s, and Congress codified the program in the amendments to the Clean Water Act in 1977 (P.L. 95-217). The nationwide permits are intended to be used to authorize projects with minor environmental impacts to land, wetlands, and waterways. This streamlined process is not meant to be applied to projects that should be looked at more carefully on a case-by-case basis and require in-depth study and analyses.

As a Nation, we have made tremendous progress in improving the health and safety of our rivers, streams, and wetlands through steady implementation of the Clean Water Act. Collectively, we have doubled the number of rivers, lakes, and streams that are now safe for fishing and swimming, but we still have a way to go to ensure *all* our waters are safe—the ultimate goal of this landmark environmental law.

The expansion of nationwide permits and their broad use may 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.”²

¹ 86 Fed. Reg. 2744 (Jan. 13, 2021).

² 33 USC §1251(a).

The Honorable Joseph R. Biden, Jr.
President
March 16, 2021
Page 2

Should the Corps proceed with implementation of the finalized nationwide permits, it will be doing so despite the known risks to our economy, our infrastructure, and the health and well-being of our communities.

By implementing the 16 recently finalized nationwide permits, the Corps would fail to protect the health and safety of our Nation's waters and our communities. The Corps' finalized nationwide permits fail to recognize the importance of our waterways to the health of our communities and our economy. In crafting this rulemaking, the administration ignored science, ignored the law, and made clear they stand with special interests and polluters rather than the American people.

The Trump administration violated the National Environmental Policy Act (NEPA) when it finalized the nationwide permits in this rulemaking. NEPA requires an evaluation of alternatives, including a no-action alternative. The decision documents for this nationwide permit rulemaking reflect no analysis of a no-action alternative and fail to evaluate alternatives to the nationwide permits. In addition, the Corps did not take a hard look at the direct or indirect effects, or the cumulative impacts, of the nationwide permits—all of which are required by NEPA.

The Corps also relies on future actions that are not certain to minimize harms associated with the finalized permits. In the decision documents, the Corps determines that the nationwide permits will not cause significant impacts yet defers portions of the effects analysis that would affirm or deny that finding to the Corps' District engineers. This flawed approach precludes the Corps from finding that the permits will not cause significant impacts, and thus invalidates the final rule.

We are also concerned that the Corps has not interacted with the states in good faith by offering the draft—not final—nationwide permits to states for their certification under section 401 of the Clean Water Act. This unprecedented expectation of states to certify draft permits prompted many states to include “re-opener” clauses in the 401 certifications, thus reserving the opportunity to revisit their certifications should the Corps make substantive changes in its final promulgated rules. We understand that Corps Districts have invalidated at least one state certification in its entirety based on the inclusion of that re-opener. Such unprecedented processes and outcomes fly in the face of Congress' intentions in crafting, passing, and having enacted section 401 of the Clean Water Act, and provide yet another justification for delaying further implementation and allowing time for additional review and public comment.

Decades ago, when rivers starting catching fire, our country recognized the value of its water-related resources, as well as the inability of the states or the private sector to independently protect our rivers, lakes, streams, and wetlands, or to always act in the best interests of the Nation. In response, Congress enacted the Clean Water Act over the veto of former-President Nixon to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” In the almost 50 years since that time, the goal of protecting clean water was championed by Democratic and Republican administrations alike.

The Honorable Joseph R. Biden, Jr.
President
March 16, 2021
Page 3

If we are going to continue to make progress in improving the health of our Nation's waters, the Corps must rely on nationwide permits that have been lawfully and properly promulgated. That is why we urge you to immediately delay the implementation of the nationwide permits and initiate a process to re-open for public comment the "Reissuance and Modification of Nationwide Permits."

Thank you for your consideration of our request.

Sincerely,



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



THOMAS R. CAMPER
Chair
U.S. Senate Committee on Environment and
Public Works

cc: Mr. Vance F. Stewart, III, Acting Assistant Secretary of the Army (Civil Works)