WUWC
WESTERN URBAN WATER COALITION

November 16, 2020

Submitted via //www.regulations.gov/
(Docket No. COE–2020–0002)

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

RE: Comments on the "Proposal To Reissue and Modify Nationwide Permits," 85 Fed. Reg. 57298 (Sept. 15, 2020), Docket No. COE–2020–0002

The Western Urban Water Coalition (WUWC or Coalition) [1] appreciates this opportunity to comment on the U.S. Army Corps of Engineers' (Corps) proposed "Proposal To Reissue and Modify Nationwide Permits." 85 Fed. Reg. 57298 (Sept. 15, 2020) (NWP Proposal).

WUWC was established in 1992 to address the West's unique water supply and water quality challenges that threaten the economic sustainability and growth of the western population centers. WUWC consists of the largest urban water utilities in the West, which together serve more than 40 million urban water consumers in 18 major metropolitan areas across seven states. Some of these utilities also operate wastewater, natural gas, and electric, including hydroelectric, facilities for their customers.

WUWC members are nonprofit public utilities dedicated to providing a reliable, high-quality urban water supply for present and future generations. As operators of urban water supply systems, WUWC members serve the health, environmental, and economic needs of their communities around the clock, every day of the year. WUWC advocates for effective and practicable approaches to the implementation of environmental protection programs in a time when water is becoming increasingly scarce and vital to the West's sustainability. Their mission is more critical now than ever considering the essential role of clean water in combatting the spread of COVID-19 and maintaining public health, livelihoods, and sustenance during this time of crisis. In serving to meet this mission, WUWC members are involved in a number of federal

[1] WUWC consists of the following members: **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (Eastern Municipal Water District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); **Colorado** (Aurora Water, Colorado Springs Utilities, and Denver Water); **Nevada** (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); **New Mexico** (Albuquerque Bernalillo County Water Utility Authority); **Utah** (Salt Lake City Public Utilities); and **Washington** (Seattle Public Utilities).

and nonfederal activities that are subject to Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899.

Throughout its 28-year history, WUWC has been and will continue to be both a supporter of the goals of the CWA and an active participant in the Corps' administrative and regulatory improvement measures. WUWC does not believe sweeping legislative reform is needed, but instead supports a continuation of the actions taken by all Administrations since the 1990s to achieve meaningful regulatory and administrative policy reform. This includes improvements in the efficiency of the decision-making process and agency review procedures, and the encouragement of greater participation by nonfederal entities in conservation efforts.

With one exception, WUWC generally supports the proposed modified Nationwide Permits (NWPs) as well as the proposed new NWPs, and encourages the Corps to re-issue them as published in the NWP Proposal, as we discuss further below.

Specifically, we commend the Corps' stated intent to provide simplicity and clarity with respect to the NWP program, as well as to reduce burdens on the regulated public like WUWC members. Indeed, WUWC members rely on NWPs for many of their utility projects that involve fill and discharge into wetlands or other waters of the U.S. (WOTUS). Our members' use of NWPs for these projects saves the time and money that would otherwise be spent if we had to obtain individual permits for projects that do not have major impacts on WOTUS. For instance, WUWC member City of Phoenix was able to rely on authorization under NWP 12 for the proposed West Anthem Water and Wastewater Infrastructure project, the purpose of which was to allow installation of infrastructure needed to serve the West Anthem area directly from the City of Phoenix. *See* SPL-2018-00252. WUWC member Denver Water was able to rely on the Corps Omaha District authorization under NWP 12 for the construction of the new Northwater Treatment Plant facility and associated utility lines to include installation of a 42-inch diameter steel raw water line, a 24-inch corrugated metal pipe, and a 48-inch reinforced concrete pipe culvert. *See* NOW-2018-01549-DEN.

In particular, we believe the Corps' proposed addition of NWP D will help consolidate and simplify our members' use of NWPs for utilities relating to water activities (as opposed to the NWP 12, which the proposal would limit to oil and gas activities; and NWP C, which is proposed to be limited to electric and communications activities). We also anticipate that the reduced burdens of the proposed pre-construction notification (PCN) requirements (at least in certain instances) will magnify the time- and cost-saving benefits that utilities like our members already obtain from using NWPs, for instance, by allowing our members to fast track projects that will no longer require a PCN. Ultimately, we feel that NWP C and the proposed changes to the PCN process will benefit our members, customers, and the environment by allowing us to proceed quickly with projects that have minimal impact and to avoid the impacts and uncertainty created by current litigation over NWP 12, but otherwise focusing on addressing and mitigating for projects with more than minimal and unavoidable environmental impacts.

We also want to express support for the newly proposed NWP E, relating to discharges associates with construction, expansion, and maintenance of water reclamation and reuse facilities, and also to suggest a slight modification of the proposal. Many of our members are already active in the water reuse space (e.g., Aurora Water's Sand Creek Water Reclamation

Facility; City of Los Angeles's four water treatment facilities (Hyperion, L.A. Glendale, Tillman, and Terminal Island), and reuse and reclamation will be become increasingly important to our members as water resources in the future become less certain due to climate change and other reasons. Creating an NWP to streamline authorization for discharges associated with water reuse and reclamation projects is yet another "win" for flexibility and timeliness with respect to our members' future project development. However, the NWP as proposed does not appear to cover replenishment that may include water from outside a particular watershed. In order for NWP E to be most useful to our members, we strongly suggest that the proposed NWP make clear that it applies to *all* groundwater recharge projects that meet the other requirements and limitations of the proposed NWP, specifically including recharge.

On the specific issue of Endangered Species Act (ESA, or the Act) compliance, we agree with and support the Corps' reliance on its current regulations (i.e., 33 C.F.R. § 330.4(f)(2)) and General Condition 18) to meet requirements of Section 7 of the Act. To be clear, WUWC is committed to protecting critical habitat and related species—which is why under the proposed revisions, we would continue to take seriously the requirement in the regulations and General Condition 18 that non-federal permittees like our members must submit PCNs for any activity that "might" affect listed species or designated critical habitat. Under the proposal, our members could not begin work on a proposed project using an NWP unless the Corps decides that ESA requirements have been met (or consultation is needed) before the proposed work can be authorized. Ultimately, the "might" affect language requiring a PCN before using the proposed NWP C (or NWP 12 or NWP D) is a very low threshold that we believe would function to ensure that ESA consultation will take place on individual projects where appropriate, but that proposed projects will not be bogged down—the very antithesis of the NWP program's purpose. For that reason, we submit that there is no need for the Corps to do a program-wide consultation with respect to the ESA-related effects of the proposed NWP 12, NWP C, or NWP D.

On a separate note, we also want to express support for the Corps' proposal to modify NWP 17 so that it can be used for discharges relating to hydropower projects up to 10,000 kw. Many of our members have hydropower projects across the Western U.S., and we support movement to expand streamlined permits with respect to these projects. And we also support the proposed reinstatement of the provisions in NWP 3 that (1) authorize repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require Department of the Army authorization at the time it was constructed; and (2) authorize placement of new or additional riprap to protect a structure being repaired, rehabilitated, or replaced. Our members' networks include older (i.e., pre-1972) but usable structures that require repair, and these proposed clarifications to NWP 3 will allow members to keep those structures usable as part of their mission to provide water services to their customers.

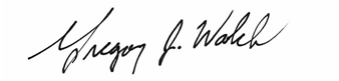
However, WUWC does not support the Corps' proposal to remove the 300-linear-foot limit for losses of stream bed that apply to the current NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, at least without some changes. While we recognize these NWPs would still rely on the 1/2-acre limit and PCN requirements with respect to minimizing adverse environmental effects, we have concerns that removing the 300-foot limit could result in increased adverse impacts to the smaller first-order streams that feed into higher order streams, together which contribute to the health of an overall watershed. Because our members' provision of water to their customers depends in part on healthy watersheds, it would be detrimental to our operations if many more

discharges are allowed via use of NWPs as a result of dropping the 300-foot limit. We suggest either adding back in the 300-foot limit, or otherwise adding a requirement that a PCN associated with these NWPs must specifically describe the effects, if any, that the proposed discharge will have on the relevant watershed at large. Another alternative would be to retain the 300-foot limit, but add a requirement that the Corps will require mitigation for impacts to these types of drainages on area-impact basis (instead of the current linear foot basis). Establishing an area impact threshold instead of a linear foot threshold makes mitigation potentially more feasible.

Finally, we support the Corps effort to reissue these proposed NWPs well before the 2022 expiration date for current NWPs. If the rule is finalized as proposed and there is litigation about the final rule (which appears likely given the recent cases challenges NWP 12), then resolution of that litigation before the current NWPs expire will provide our members with much needed certainty as they embark on utility project planning for the future.

Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please contact me at 702-258-7166 or greg.walch@lvvwd.com, or the WUWC national counsel, Don Baur at 202-654-6234 or dbaur@perkinscoie.com.

Very truly yours,



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