



November 6, 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 urges the Army Corps to extend the public comment period for a minimum of 30 additional days to allow for small businesses and their representatives to fully and meaningfully participate in this important 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 nationwide permits 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. Nationwide permits 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.¹⁰ 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 proposed rule would reissue existing nationwide permits, and issue five new permits.¹¹ 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 mariculture activities.¹²

Request for Extension of the Public Comment Period

While supportive, small businesses in the regulated industries believe that more information is available that would improve the rulemaking. Advocacy is concerned, however, that the current comment period does not allow for these small businesses to prepare detailed analyses and data

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

¹⁰ 85 Fed. Reg. 57298 at 57300.

¹¹ 85 Fed. Reg. 57298.

¹² *Id.*

necessary to bolster the justification for the rulemaking. The comment period currently runs from September 15, 2020 through November 16, 2020. Advocacy has heard from small aquaculture farmers and their representatives that the agency has failed to consider available science when implementing provisions of the proposed rulemaking pertaining to mariculture activities. For example, stakeholders suggested that there is data available to justify the rule changes that considers developments in commercial aquaculture and its environmental effects.

These small businesses are requesting additional time to collect, organize, and adequately summarize this data to support their comments on the proposal. Furthermore, these businesses are requesting that Army Corps initiate an interagency consultation with the National Oceanic and Atmospheric Association, as this agency has useful data that may assist the Army Corps in bolstering its analysis and use of best available science.

Finally, the ongoing global pandemic as well as many other ongoing natural disasters nation-wide continue to present strains and unique challenges to small business operations. Pursuant to Executive Order 13294, agencies are instructed to address the economic emergency caused by the pandemic by removing regulatory barriers, and specifically with respect to small businesses.¹³ Advocacy suggests that the Army Corps allowing the public to have more time to comment on the proposed rulemaking would be in line with the goals of the executive order

Conclusions and Recommendations

Advocacy urges the Army Corps to extend the public comment period to allow for small businesses to participate more meaningfully in this rulemaking process. Such extension will allow small businesses the time and preparation necessary to provide comprehensive and detailed comments and participate meaningfully in the regulatory process. 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

¹³ See Exec. Order No. 13924, 85 Fed. Reg. 3153 (May 22, 2020).

Copy to: Paul Ray, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget