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STATE OF MISSOURI

Matt Blunt, Governor • Doyle Childers, Director

DEPARTMENT OF NATURAL RESOURCES

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Nov. 27, 2006

Mr. David B. Olson
ATTN: CECW – OR/MVD
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

RE: Comments on *Federal Register's* Proposal to Reissue and Modify Nationwide Permits, COE-2006-0005/ZRIN 0710-ZA02

Dear Mr. Olson:

The Missouri Department of Natural Resources has reviewed the text of the proposals and offer the following commentary:

General:

- The department supports the general efforts of the draft writers to simplify the language and make it more user-friendly and understandable. This is a very positive development.
- Staff is supportive of the additional consideration/protection being afforded to ephemeral streams. These small tributaries are an important part of the overall aquatic ecosystem.
- The department is generally not supportive of the authority of the district engineers to waive many of the limitations that apply to many nationwide permits (NWPs) based solely on the district engineer's judgment that the impacts will only ". . .result in minimal individual and adverse cumulative adverse impacts on the aquatic environment." This broad authority implies the district engineer will define what minimal aquatic impacts are, when in fact members of the environmental community study and work for years to make cautious judgments in only small areas of their disciplines.
- The department is very concerned about the potential for change in jurisdictional applications due to judicial limitations in recent and pending cases. The support of the federal government in our state's protection of our waters is not just mutually beneficial to our success, but crucial.
- The U.S. Army Corps of Engineers (Corps) should recognize the parallel authority of the U.S. Environmental Protection Agency (EPA), state and tribal governments in assuring water quality protection. These proposals should be used as a way to minimize the potential for conflict between the Corps and these agencies. The district engineers need to keep in mind the need for close collaboration in decision-making to avoid such conflicts.

- The department strongly encourages the Corps to engage states and tribes that are designated to issue Water Quality Certifications under Section 401 of the Clean Water Act sooner in the re-issuance process. By not involving those agencies until the public notice was issued, the Corps has created a significant potential for conflict in the 401/404 process as states and tribes will need to go through a rule-making process to bring their Section 401 rules into alignment with the re-issued Section 404 permitting.

Specific

- General Condition 6 (GC 6), which references *Suitable Materials*, should be improved further. The old text referencing the use of materials that may cause unacceptable chemical pollution was removed. The new condition refers to 'toxic pollutants in toxic amounts.' Many pollutants are mutagenic, carcinogenic, and bio-accumulate within the food chain without being definitively toxic. While there may be other ways to improve the current proposal, it is our belief that the removal of the word 'unacceptable' in the old definition and a general prohibition against chemical pollution would be a better alternative. Substances like creosote and pentachlorophenol that have in the past been commonly used in the open water environment should be prohibited in any amounts.
- The department is not generally supportive of the provision under General Condition 20 (GP 20) for the district engineers to make case by case determinations on whether mitigation will be done at all, and what form it will take " . . . based on consideration of what is best for the aquatic environment on a watershed basis." This broad authority implies a huge amount of scientific knowledge resides in the district engineer, even on entire watersheds and all life therein. In fact, such judgments are more realistically based on subjective criteria and/or very limited knowledge of the "needs" of all the flora, fauna and ecological niches in entire watersheds. Mitigation should always be at a minimum ratio of 1:1. With temporal losses involved, mitigation in excess of 1:1 is often very reasonable. Wetlands in particular should always be replaced with another wetland if net losses of this diminished resource are to be avoided.
- While the department is supportive of the construction of farm ponds in the upper reaches of watersheds, the department would like to see the NWP 40 only cover the construction of farm ponds in streams without aquatic life use designations. The national conditions only prohibit perennial streams for the construction of farm ponds. This means that farm ponds can be constructed on intermittent streams with aquatic life designated uses with a case by case review of the district engineers and use of their judgment that only minimal individual or cumulative effects will be inflicted on the aquatic environment. Many intermittent streams support a diverse aquatic life. In addition, these structures alter the hydrologic regime downstream, potentially impacting flows in intermittent and perennial stream segments. These most likely would constitute more than a minimal impact. It is recommended that only farm ponds on streams without aquatic life designated uses be allowed under the NWP 40. Any such ponds considered for intermittent tributaries with aquatic life designated uses

should be permitted under the individual permit process to give opportunity for downstream land owners and other concerned parties to provide comment.

- The proposed NWPs in some cases have text removed on the submission of a compensatory mitigation proposal (NWP 42 for example), and the text on the submission for an avoidance and minimization statement (NWP 43 for example). This is supposedly done because the requirements of Special Condition 20 (SC 20/*Mitigation*) now addresses these issues. This, however, is not believed desirable. The previous requirements placed the burden, as well as gave a special opportunity to the applicant to clearly state how they had addressed these requirements. The way General Condition 20 is written places the burden of fleshing out avoidance and minimization efforts and selecting mitigation on the shoulders of the district engineer. The department believes the intent may be to give approval authority to the district engineer, but it in reality may greatly increase his burden on each project. This burden should clearly be placed on the applicant.
- It appears that NWP 43, *Stormwater Management Facilities*, goes well beyond the intention for minimal adverse impact from this category of permits. It allows these facilities to be placed in all except perennial streams and to have an impact of up to ½ acre and 300 feet of stream (this is again unless the district engineer deems fit to waive the requirement as of little environmental consequence). In order to reach this ½ acre limit a stream 300 feet long would have to be 72.5 feet wide. And yet the district engineer can waive this if he/she chooses. The limit of impact should be 1/10 acre if adverse impacts are to be minimal. It is recommended that only these facilities be allowed on ephemeral streams. Any such facilities considered for intermittent tributaries with aquatic life use designations should be permitted only under the individual permit process to give opportunity for downstream land owners and other concerned parties to provide comments.
- There is a proposal to remove references to stream gradient, water velocities and turbidity due to the new general conditions 3, 9 and 12 as well as case specific conditions that may be added by the district engineer (see NWP 44 for example). While the issue of turbidity is more commonly understood and is largely covered, it is felt that specific references to stream velocity and particularly stream gradient are not nearly as clear. The impacts of velocity and grade change are not commonly understood by many in the regulated community. Parties doing pipeline repairs, which may now fall under the newly proposed NWP C, quite commonly have proposed methods that would in fact constitute a repair that would act as a grade control structure if permitted. It is recommended that references to velocities and stream gradient be restored to the NWPs.
- New NWP A (*Emergency Repair Activities*) does not seem to fit the usual connotation of an emergency. The pre-construction notification (PCN) must be submitted within 12 months of the damage and the work must be completed within two years of the PCN. This NWP should better define the instances where this permit would be applicable.

- On General Condition 2 (GC2/*Aquatic Life Movements*) the department has a concern about adding the words "when known" when referring to life cycle movements. This places an impossible burden on the scientific community to know definitively all life cycles of all species in a waterbody. There is no definition of life cycle movements to back up the addition of the term either. Life cycle movements could involve breeding, feeding, a preference to a temperature range or oxygen level or chemical availability, seasonable variation, etc. It is our position that the condition's first sentence should merely state that, "No activity may substantially disrupt the free movement of any organisms up and downstream, unless the activity's primary purpose is to impound water."
- On General Condition 4 (GC4/*Migratory Bird Breeding Areas*) the current condition simply asks that breeding areas be avoided to the maximum extent practicable. It is our belief that this condition could be structured where impacts within wetlands, and perhaps even some other waterways, could be largely prohibited during a period of, for example 60 days per year, when it is the core breeding period for a majority of the migratory birds. Certain exceptions for reasons of national security or public welfare could be provided.
- On General Condition 5 (GC 5/*Shellfish Beds*), it states that, "No activity may occur in areas of concentrated shellfish populations . ." It is our opinion that the condition could more appropriately be worded to read, "No activity may occur in, or immediately upstream of, areas of concentrated shellfish populations . ." A significant threat to mussel beds is being smothered in their entirety by sediments generated from activities above the beds, which redeposits downstream at first opportunity.
- On General Condition 13 (CG 13/*Removal of Temporary Fills*) the wording is such to require removal of the fills and restoration of the area. However, it is our belief that this condition could and should be improved by the addition of some reasonable time limit to assure the fill is truly temporary. Any fill left in place at any one location beyond 6 months without any movement or activity should not be considered temporary, but treated the same as semi-permanent or permanent, as its placement will have potential for much greater impact on the aquatic environment.
- On General Condition 14 (CG 14/*Proper Maintenance*) it specifically refers public safety as an issue. It is our belief that the condition should also include a specific reference to insuring minimal impacts on the aquatic environment. If, for example, a low water crossing is not maintained (kept clear of brush and debris), not only may a public safety concern exist, but also a barrier to the movement of aquatic life may exist even earlier as the blockage develops.
- General Condition 20 (GC 20/*Mitigation*) appears to allow too much discretionary authority to the district engineer. It allows the district engineer to waive mitigation for impacts deemed minor. Also, it again allows him to determine appropriate mitigation based on what is ". . best for the aquatic environment on a watershed basis." It also allows the district engineer to waive or reduce the requirements to provide wetland compensatory mitigation of wetland losses. Such broad discretionary authority, based on a number of flawed

assumptions about how much knowledge anyone can have about entire ecosystems, leads to a variety of interpretations and applications by Corps' district staff. In a state such as Missouri where our staff deal with five different Corps districts, such broad allowances further complicate matters and increase the likelihood of conflict between agencies. Since most states have mitigation banks available for wetlands and streams, there is little if any reason why all impacts cannot be mitigated properly.

- General Condition 23 (GC 23/*Regional and Case-By Case Conditions*) could benefit by a wording change to clarify that EPA and many states issue Section 401 Water Quality Certifications. The current wording alludes only to EPA carrying out this function.
- General Condition 25 (GC 25/*Transfer of NWP Verifications*) we would recommend an addition to the statement to be signed. It is recommended that a sentence be added that states specifically that any changes in the permitted project will require the permit to be reviewed and possibly modified, and that such changes must be brought to the prior attention of the district engineer.
- General Condition 26 (GC 26/*Compliance Certification*) might benefit by selection of a new word to be emphasized rather than the word "certification." Use of this word can contribute to confusion with the "Water Quality Certification" under Section 401. To simplify matters and alleviate any possible confusion a new term like 'verification' is suggested.
- The elimination of the previous General Condition 27 (CG 27/Construction Period) in the new proposal is wholly supported by our department. This should eliminate unnecessary confusion about the effective term of NWP's. As we read it, the norm will now be five years with a possible one-year extension if the activity was underway by the expiration date of the NWP.
- The definition of *Best Management Practices (*BMPs) would benefit from one very minor change. When referencing effects, the definition says it applies to surface waters. BMPs can and do also have an impact on groundwater and subsurface aquifers. This is very important in a state like Missouri where a great deal of water moves through subsurface processes and may re-emerge yards to many miles downstream as seeps or springs. Many of these subsurface flows support species that are rare, threatened or endangered. In Missouri a failure to protect groundwaters will make attempts to keep surface waters of a high quality futile at best.
- It is suggested that two important definitions be added to the list. One definition is "jurisdictional waters" and the second is "upland." It is recognized that the specific application of the definition of jurisdictional waters may change, however, it remains an important concept in association with NWPs. The term upland is used frequently enough to warrant a clear definition.

The department appreciates the opportunity to comment on the proposed changes to the NWPs. We hope that our comments, in conjunction with all the other interested parties, will assist you as you move forward on the NWP re-issuance. If you have any questions, please contact

Mr. Don Boos of the NPDES Permits and Engineering Section at (573) 751-1404, e-mail don.boos@dnr.mo.gov, or by mail at Missouri Department of Natural Resources, Water Protection Program, P.O. Box 176, Jefferson City, MO 65102-0176.

Sincerely,

DEPARTMENT OF NATURAL RESOURCES

Original signed by Doyle Childers

Doyle Childers
Director

EG/dbp

c: Mr. Doyle Brown, Missouri Department of Conservation
Mr. Joshua Marx, U.S. Army Corps of Engineers, Kansas City District
Mr. Rick Hansen, U.S. Fish and Wildlife Service
Mr. Thomas Taylor, U.S. Environmental Protection Agency