



April 18, 2011

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

**Sent via submission through www.regulations.gov on April 18, 2011
and via email: NWP2012@usace.army.mil**

RE: Docket # COE-2010-0035; ZRIN 0710-ZA05

Dear Mr. Olson:

Thank you for the opportunity to comment on the Proposed Nationwide Permit Reissuance (76 Fed. Reg. 9174 (February 16, 2011)). Public Employees for Environmental Responsibility (PEER) is a Washington D.C.-based non-profit, non-partisan public interest organization concerned with honest and open government. Specifically, PEER serves and protects public employees working on environmental issues. PEER represents thousands of local, state and federal government employees nationwide.

PEER has submitted comments on the proposed Nationwide Permits (NWP) and General Conditions in a joint letter signed by National Wildlife Federation, Southern Environmental Law Center, Earthjustice, American Rivers, and a variety of other groups. We are submitting the following comments to supplement that letter. Specifically, we are providing more detailed comments on the two new NWPs only: NWP A for Land-Based Renewable Energy Generation Facilities, and NWP B for Water-Based Renewable Energy Generation Pilot Program.

I. Proposed NWP A and B are not eligible for general permits. The two new proposed NWP A and B both address renewable energy facilities. The first, NWP A, Land-Based Renewable Energy Generation Facilities, allows up to ½ acre of fill in non-tidal wetlands and waters, and up to 300 linear feet of stream (although this limit can be waived by the District Engineer (DE) for intermittent and ephemeral streams). The type of facilities contemplated under this NWP includes solar, wind, biomass, or geothermal energy, as well as utility lines to transfer the energy and attendant features such as roads, parking lots, utility lines, and storm water management facilities.

NWP B, Water-Based Renewable Energy Generation Pilot Projects, allows up to ½ acre of fill in tidal and non-tidal wetlands and waters, and up to 300 linear feet of stream (although this limit can be waived by the District Engineer (DE) for intermittent and ephemeral streams). The type of facilities contemplated under this NWP include:

the construction, expansion, or modification of water-based wind or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to, land-based distribution facilities, roads, parking lots, stormwater management facilities, utility lines, including utility lines to transfer the energy to land-based distribution facilities.... For each single and complete project, no more than 10 generation units (e.g., wind turbines) are authorized. This NWP does not authorize activities in coral reefs.

NWPs are a type of general permit, and when Congress authorized their use, they intended these permits to apply only to activities similar in nature, and those having minimal individual and cumulative adverse environmental effects. Specifically, 33 U.S.C. § 1344(e) states:

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may ... issue general permits on a ... nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

In order for these renewable energy projects to be eligible for NWPs, the Corps must find that each proposed permit covers activities that: 1) are similar in nature, and 2) “cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” We will address each of these in turn.

A. The activities proposed under each of the two NWPs are not “similar in nature.” NWP A contemplates permitting solar, wind, biomass, or geothermal energy, as well as utility lines to transfer the energy and attendant features such as roads, parking lots, utility lines, and storm water management facilities. The types of infrastructure needed for solar, wind, biomass and geothermal are

distinctly different. More importantly, the impacts associated with these types of facilities are vastly diverse. Indirect impacts associated with solar power include shading and loss of habitat; for wind, they are collision with turbine blades and changes in pressure, as well as noise and vibration; for biomass, indirect impacts include large swaths of forests being cut down. The Merriam-Webster dictionary defines “similar” as “having characteristics in common; alike in substance or essentials.” (<http://www.merriam-webster.com/dictionary/similar?show=0&t=1302895697>). The only thing in common that these facilities have is that they produce renewable energy (although one could argue that biomass is not truly renewable in the short-term). Finally, the attendant features (roads, parking lots, utility lines, stormwater management facilities, etc.) are not at all similar in nature to the energy producing facilities.

NWP B contemplates facilities and/or structures that include “construction, expansion, or modification of water-based wind or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to, land-based distribution facilities, roads, parking lots, stormwater management facilities, utility lines, including utility lines to transfer the energy to land-based distribution facilities.” While water-based wind turbines can look similar to some hydrokinetic energy facilities, most are drastically different. Wind turbines sit atop monopoles, and the blades spin in the air. Many hydrokinetic energy facilities have the moving parts of the facility under water. As such, the impacts associated with these two types of facilities can be drastically different. And, as with NWP A, the attendant features are very different from the energy facilities themselves.

B. The activities proposed under NWP A and NWP B do not result in minimal adverse effects either individually or cumulatively. The Corps states in its decision documents that NWP A will be used 225 times per year, resulting in 64 acres of impacts to wetlands and waters, while NWP B will be used 50 times per year, resulting in 20 acres of impacts. The Corps concludes that these impacts are indeed minimal both individually and cumulatively.

However, elsewhere in its decision documents, the Corps concedes it cannot quantify these impacts. Specifically, the Corps spouts identical language in both decision documents:

The issuance of an NWP is based on a general assessment of the effects on public interest and environmental factors that are likely to occur as a result of using this NWP to authorize activities in waters of the United States. As such, this *assessment must be speculative or predictive* in general terms. Since NWPs authorize activities across the nation, projects eligible for NWP authorization may be constructed in a wide variety of environmental settings. Therefore, it is *difficult to predict all of the indirect impacts that may be associated with each activity authorized by an NWP* (emphasis added).

If the assessment of impacts is “speculative,” and it is “difficult to predict all of the indirect impacts” associated with the NWP, it is impossible for the Corps to ensure that these impacts are minimal. Therefore, from a purely legal standpoint, these NWPs must not be issued.

II. The impacts associated with the two proposed NWPs violate the Section 404(b)(1) guidelines. 33 U.S.C. § 1344(e) states:

Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

These guidelines, referred to as the 404(b)(1) guidelines, prohibit discharges which have not minimized potential impacts (40 CFR 230.10(d)) and those that “cause or contribute to significant degradation of waters of the United States” (40 CFR 230.10(c)). Because the impacts associated with these two proposed NWPs are speculative, the Corps cannot ensure that their impacts will be minimal. And, in fact, it is almost certain that the impacts will be significant.

Stream Impacts. For example, allowing up to 300 linear feet or more of ephemeral, intermittent and perennial stream impacts violates the more than minimal impact threshold. The proposed NWP allows filling of up to 300 feet of perennial stream, and unlimited amounts of intermittent or ephemeral stream. All types of streams, including intermittent and ephemeral, are critical, and provide flood storage, drinking water, and wildlife habitat. Fifty-nine percent of all stream kilometers in the United States outside of Alaska are ephemeral or intermittent. <http://azriparian.org/docs/arc/publications/EphemeralStreamsReport.pdf>. The United States Environmental Protection Agency (EPA) states that:

In the continental United States, about 117 million people, over one third of the total U.S. population, get some or all of their drinking water from public drinking water systems that rely at least in part on intermittent, ephemeral, or headwater streams. In the continental U.S., 357,404 total miles of streams provide water for public drinking water systems. Of that total, 58% (207,476 miles) are intermittent, ephemeral, or headwater streams.

http://water.epa.gov/lawsregs/guidance/wetlands/surface_drinking_water_index.cfm

Small streams can also absorb significant amounts of flood water, and provide habitat for several dozen species listed under the Endangered Species Act. See Judy L. Meyer, et al., *Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, at 18 (Sept. 2003) at

<http://www.americanrivers.org/site/DocServer/WhereRiversAreBorn1.pdf?docID=182>.

Individual headwater streams can also support hundreds to thousands of species. *Id* at 16. Given the importance of these small streams to drinking water, flood storage, and water purification, it is likely that filling thousands of feet of streams, if not miles, would cause or contribute to significant degradation of waters of the United States.

Wildlife impacts. The Corps has very little information on the effects on wildlife of turbines based in waters, but recent data suggest that birds, bats, marine mammals and even squid will be adversely impacted by water-based turbines. Although the proposed permit only allows 10 turbines per project, the Corps expects it will be used 50 times per year. This means that up to 500 turbines per year could be authorized under this permit, and the effects of 500 turbines, particularly if they are in a migratory corridor, could be enormous. As such, these projects should not be permitted through the NWP system until we fully understand the direct, indirect, and cumulative impacts associated with water-based renewable energy.

Conclusion

We therefore urge the Secretary to continue to require individual permits for renewable energy projects, as the two NWPs as written do not comply with the intent and restrictions of general permits.

Thank you for the opportunity to comment.

Sincerely,

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