



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington DC 20515

Peter A. DeFazio
Chairman

Katherine W. Dedrick
Staff Director

Sam Graves
Ranking Member

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Republican Staff Director

November 22, 2021

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue Northwest
Washington, DC 20003

The Honorable Michael Conner
Assistant Secretary of the Army
for Civil Works
108 Army Pentagon, Room 3E446
Washington DC 20310-0108

Dear Administrator Regan and Assistant Secretary Connor:

We are writing to express our concerns regarding recent reports that the U.S. Army Corps of Engineers (Corps) has paused issuance of Section 404 nationwide permits and individual water crossing permits for projects that involve *Clean Water Act* Section 401 certification.¹ The nationwide permit program, in particular, is critical to development of infrastructure across the country and allows the Corps to streamline the permitting process for a wide range of critical infrastructure projects that pose minimal harm to the environment.² It is imperative that the Environmental Protection Agency (EPA) and the Corps clarify their plans to move this program and its covered infrastructure projects as halting this program would be an immense setback to improving our Nation's infrastructure.

The nationwide permit program has successfully been utilized for decades by the Corps to issue permits for many types of infrastructure projects that have minimal impacts on jurisdictional waters and wetlands.³ These projects include utilities, stormwater management, pipelines, renewable energy, commercial and residential development, agriculture, and more.⁴

¹ *Corps of Engineers suspends nationwide clean water permitting action*, WRAL.COM, Nov. 12, 2021, available at <https://www.wral.com/corps-of-engineers-suspends-nationwide-clean-water-permitting-action/19977401/> [hereinafter WRAL]. See also U.S. Army Corps of Engineers Sacramento District Website, Regulatory, <https://www.spk.usace.army.mil/Missions/Regulatory.aspx> (last visited Nov. 18, 2021) [hereinafter Corps Sacramento].

² 33 U.S.C. §1344. See also NICOLE CARTER, CONG. RESEARCH. SERV., THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS, (2017), available at <https://www.crs.gov/Reports/97-223?source=search&guid=5a953e176604464bbaf47fe66411633f&index=0>.

³ *Id.*

⁴ *Id.*

However, on October 21, 2021, the U.S. District Court for the Northern District of California issued an order remanding and vacating EPA's 2020 *Clean Water Act* Section 401 Certification Rule (2020 Rule) issued under the previous administration and required a return to EPA's 1971 Rule.⁵ EPA had previously announced in May 2021 it would revise the 2020 Rule and told the Court it expected to finalize the rule in Spring 2023.⁶

Despite the Court's ruling mandated use of the 1971 Rule and EPA indicating it would take at least two years to promulgate a final rulemaking to revise the 2020 Rule, the Corps has begun quietly communicating that it would not issue new permits under Section 404 permitting programs for the time being.⁷ We are concerned this effectively places a freeze on any pending or new permits.

The Corps has failed to be transparent about these significant actions and has not made any official announcements aside from a short notice on one local Corps District's website or when providing communications about individual permits.⁸ Further, it is unclear if EPA and the Corps intend to pause this permitting until the 2020 Rule is revised, which could be as far in the future as 2023.⁹ This incredibly long suspension of the program would delay infrastructure project development in this country for years, as project proponents rely on certainty in these permitting programs to plan and invest in critical infrastructure.¹⁰ Project planning and progress halts when there is no guidance from the agencies.¹¹

With billions of dollars in recently approved infrastructure spending and the continuing supply chain crisis, unfortunately the Administration is choosing to create additional regulatory barriers for local stakeholders, governments, and communities, delaying critical infrastructure projects.¹² The Section 404 permitting program is vital for developing and building essential

⁵ *CWA Section 401 Certification*, EPA, <https://www.epa.gov/cwa-401/2020-clean-water-act-section-401-certification-rule-0> (last visited Nov. 18, 2021). See also WRAL, *supra* note 1.

⁶ Press Release, EPA, EPA Takes Action to Bolster State and Tribal Authority to Protect Water Resources, (May 27, 2021), available at <https://www.epa.gov/newsreleases/epa-takes-action-bolster-state-and-tribal-authority-protect-water-resources-0>. See also N.D. Cal., Case No. 3:20-cv-04636-WHA (consol.), (Aug. 26, 2021), available at <https://www.courthousenews.com/wp-content/uploads/2021/09/EPA-remand-motion.pdf> (motion for remand without vacatur).

⁷ Corps Sacramento, *supra* note 1. See also WRAL, *supra* note 1.

⁸ Corps Sacramento, *supra* note 1. See also WRAL, *supra* note 1.

⁹ N.D. Cal., Case No. 3:20-cv-04636-WHA (consol.), (Aug. 26, 2021), available at <https://www.courthousenews.com/wp-content/uploads/2021/09/EPA-remand-motion.pdf> (motion for remand without vacatur).

¹⁰ *Strategies for Improving Critical Energy Infrastructure: Hearing Before the Subcomm. on Government Operations and Border Mgmt. of the S. Comm. on Homeland Sec. and Governmental Affairs*, 117th Cong., (Oct. 27, 2021), available at <https://www.hsgac.senate.gov/imo/media/doc/TESTIMONY%20-%20GOVOPS%20-%20OCT27%20-%20Herrgott.pdf>.

¹¹ *Id.*

¹² David Schaper, Potholes, Grid Failures, Aging Tunnels And Bridges: Infrastructure Gets A C-Minus, NPR, Mar. 3, 2021, available at <https://www.npr.org/2021/03/03/973054080/potholes-grid-failures-aging-tunnels-and-bridges-nations-infrastructure-gets-a-c>. See also Nick Niedzwiadek, *Buttigieg warns some supply chain problems will persist into 2022*, POLITICO, Oct. 17, 2021, available at <https://www.politico.com/news/2021/10/17/buttigieg-supply-chain-problems-2022-516145>.

infrastructure projects that span numerous categories of projects and it is misguided to place this program on hold.¹³

We urge EPA and the Corps to provide a remedy to this unacceptable regulatory gridlock and immediately implement all Section 404 permitting programs to ensure we can continue to advance infrastructure projects across the nation. At a bare minimum, the agencies need to deliver transparency and guidance to the public and stakeholders on the future of this program. Accordingly, we ask that you provide the Committee a written explanation of how the Corps and EPA plan to reconcile these actions that would put in place barriers for infrastructure projects with the recent passage of billions of dollars in new infrastructure funding.¹⁴ Please also provide copies of any guidance to applicants or Corps Districts and Field Offices regarding this permitting matter.

We thank you for your attention to this matter. If you have questions, please contact Republican Staff, Subcommittee on Water Resources and the Environment at (202) 225-9446.

Sincerely,



Sam Graves
Ranking Member



David Rouzer
Ranking Member
Subcommittee on Water, Resources, and
Environment

Cc: The Honorable Peter A. DeFazio, Chair
Committee on Transportation and Infrastructure

The Honorable Grace Napolitano, Chair
Subcommittee on Water, Resources, and Environment
Committee on Transportation and Infrastructure

¹³ 33 U.S.C. §1344. *See also* NICOLE CARTER, CONG. RESEARCH. SERV., THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS, (2017), *available at* <https://www.crs.gov/Reports/97-223?source=search&guid=5a953e176604464bbaf47fe66411633f&index=0>.

¹⁴ Fact Sheet: The Bipartisan Infrastructure Deal, The White House, (Nov. 6, 2021), *available at* <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/>.