November 16, 2020

Via Federal eRulemaking Portal, http://www.regulations.gov

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

Re: Comments on the U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits, Docket No. COE-2020-0002

To Whom It May Concern:

The Energy Infrastructure Council ("EIC") appreciates the opportunity to submit the following comments in response to the Proposal to Reissue and Modify Nationwide Permits published by the U.S. Army Corps of Engineers ("Corps") in the Federal Register on September 15, 2020.[1] EIC is a non-profit trade association dedicated to advancing the interests of companies that develop and operate energy infrastructure.[2] EIC addresses core public policy issues critical to investment in U.S. energy infrastructure that directly impact its member companies, such as the Corps' notice of proposed rulemaking here. Many of EIC's regular members own and operate oil and gas gathering and transmission pipelines, and EIC's associate members represent a large segment of the pipeline investor community that collectively invest billions of dollars in U.S. energy infrastructure. Energy pipeline projects provide an essential service, creating an efficient, reliable, and safe transportation path for oil, natural gas, and related products to reach markets around the country. EIC is uniquely positioned to comment on how certain aspects of this proposal will chill development of infrastructure essential to the nation's energy security and independence, and will undermine the efforts of project developers to attract and retain necessary capital investments.

[1] *See* Dep't of the Army, Corps of Engineers, Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57,298 (Sept. 15, 2020).

[2] EIC was formerly known as the Master Limited Partnership Association ("MLPA"). In 2019, MLPA reorganized and changed its name to EIC to reflect a broadened mission advancing the interests of all companies that develop and operate energy infrastructure, irrespective of corporate form. EIC's membership is composed of traditional and renewable energy infrastructure companies, including public and private C-corporations, limited liability companies and partnerships, master limited partnerships ("MLPs"), infrastructure real estate investment trusts, and Yieldcos. Members also include non-energy MLPs, service providers, and other businesses and individuals supporting the industry.

The Corps' nationwide permit program is critically important for infrastructure developers from practical, legal, and economic perspectives. Obtaining an individual permit under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act is time- and cost-intensive. For that reason, Congress delegated authority to the Secretary of the Army to issue general permits, such as the nationwide permits the Corps proposes for reissuance here, covering categories of activities that are similar in nature and result in no more than minimal adverse environmental impacts individually and cumulatively.[3] For decades, EIC's members have relied on nationwide permits to undertake construction and maintenance activity for scores of essential and time-sensitive infrastructure projects in every region of the country. EIC's members strongly support the continued availability of this streamlined—but still rigorous—process for authorizing certain categories of activities that, as past experience and current environmental analysis confirm, result in no more than minimal adverse environmental impacts.

To this end, EIC strongly supports reissuance of the nationwide permits. EIC joins here, and incorporates by reference, the comments submitted contemporaneously by the American Petroleum Institute. EIC is submitting these separate comments to provide its unique perspective on some aspects of the proposed reissuance that will have negative effects on project developers' ability to finance and construct energy infrastructure projects. In particular, EIC has concerns about the proposal to divide Nationwide Permit 12 ("NWP 12") into three separate nationwide permits, and the proposal to add a pre-construction notification ("PCN") requirement to NWP 12 for new oil and gas pipelines exceeding 250 miles. For the reasons explained below, these changes will increase the overall uncertainty and risk associated with using the nationwide permit program, and chill urgently needed investment in infrastructure that is essential to growth and revitalization across numerous economic sectors.

1. Proposed changes to NWP 12 will increase litigation risk and uncertainty for those seeking to use that nationwide permit.

The Corps' nationwide permit for utility lines has been a key feature in the development, financing, and construction of essential national infrastructure since the nationwide permit program was created more than four decades ago. NWP 12 has provided a consistent, predictable, and stable regulatory backdrop that industry has relied on to authorize activities for, in the words of the original 1977 permit, pipelines conveying "any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication."[4] Over more than four decades, the only change to the scope of the utility lines covered by NWP 12 was a minor clarification in 2017 that NWP 12 authorizes optic cables and other lines that enable communications through the Internet.[5] The stability and consistency of the scope of NWP 12 has contributed to market confidence in using that permit to develop energy infrastructure.

The Corps, industry, and other stakeholders have decades of experience applying and administering NWP 12. When reissuing NWP 12 in 2017, the Corps estimated that NWP 12 would

[3] *See* 33 U.S.C. § 1344(e) (authorizing issuance of nationwide and other general permits).

[4] *See* Regulatory Programs of the Corps of Engineers, Final Rules, 42 Fed. Reg. 37,122, 37,146 (July 19, 1977).

[5] *See* Dep't of the Army, Corps of Engineers, Issuance and Reissuance of Nationwide Permits, Final Rule, 82 Fed. Reg. 1860, 1883, 1886, 1985 (Jan. 6, 2017).

be used 11,500 times annually in circumstances where a party was required (or voluntarily chose) to submit a PCN, with another 2,500 uses per year where no PCN would be required or submitted.[6] During an approximately three-year period from March 2017 to April 2020, the Corps verified 38,000 uses of NWP 12, or about 12,325 per year.[7] These tens of thousands of uses underscore that regulated entities know and understand the requirements of NWP 12, and that the Corps is adept at analyzing proposed uses of NWP 12 and verifying those uses that result in no more than minimal adverse environmental impacts.

Moreover, a substantial body of judicial precedent has been generated over the past four decades that provides predictability and certainty for the Corps, regulated entities, and other stakeholders alike. Core elements of NWP 12 that have been interpreted, applied, and upheld by the courts include the approach to calculating the loss of waters of the United States for pipelines that result in the conversion of higher functioning wetlands to lower functioning wetlands, as well as application of the "single and complete project" definition at separate and distant locations for pipelines and other linear projects.[8] This body of precedent provides regulated entities and their potential financial investors guidance and predictability about what is necessary to permit and construct a linear infrastructure project, how the Corps is likely to address questions and issues that may arise during the verification process, and how courts are likely to analyze any challenges that may be made to a developer's reliance on NWP 12.

The long history and the successful implementation of NWP 12 affords project developers valuable transparency and predictability in the Corps' regulatory process. Infrastructure developers know they can rely on longstanding Corps practice and caselaw interpreting and applying the key terms of NWP 12 and the nationwide permitting program in general. Project developers and investors depend on stability, clarity, and predictability in the regulatory process, not only while planning projects (for instance, adopting routes or construction techniques to minimize environmental effects, with nationwide permit eligibility in mind), but also while navigating the regulatory process and defending against potential challenges. Imposing new and untested restrictions on the use of NWP 12, or dividing the utility-line nationwide permit into three separate permits (each with its own set of requirements and preconditions), will inevitably increase uncertainty and disrupt the process of planning and financing infrastructure projects.

The Corps' proposal to split NWP 12 into separate nationwide permits will open the door to inevitable challenges and conflicts in how the different nationwide permits are interpreted and

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[6] U.S. Army Corps of Engineers, Decision Document for Nationwide Permit 12, at 69-70 (Dec. 21, 2016).

[7] Declaration of Jennifer Moyer, Regulatory Program Chief, U.S. Army Corps of Engineers, ¶4, *Northern Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-44-BMM (D. Mont. Apr. 27, 2020), ECF No. 131-1.

[8] *See, e.g.*, *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1055–56 (10th Cir. 2015) (affirming Corps' use of the half-acre threshold for each separate and distant crossing on a pipeline); *Optimus Steel, LLC v. U.S. Army Corps of Eng'rs*, No. 20cv374, 2020 WL 5881828 (E.D. Tex. Oct. 4 2020) (upholding the Corps' application of NWP 12's half-acre threshold and its determination that wetlands conversion was not a loss that counted toward the half-acre threshold, and accepting as reasonable the Corps' longstanding application of its definition of "single and complete project" in the pipeline context); *Ouachita Riverkeeper, Inc. v. Bostick*, 938 F. Supp. 2d 32, 37–38, 44 (D.D.C. 2013) (upholding the Corps' interpretation that conversion of forested wetlands to emergent or scrub-shrub wetlands from a pipeline project resulted in no loss of waters, even if it resulted in the loss of wetland function). *See also Sisseton–Wahpeton Oyate of Lake Traverse Reservation v. U.S. Corps of Eng'rs*, 888 F.3d 906, 920–21 (8th Cir. 2018) (deferring to the Corps' interpretation of applying the "single and complete project" definition at separate and distant locations for linear projects).

applied. This will introduce uncertainty and litigation risk for project developers, their financial backers, and other stakeholders, while increasing the bureaucratic and regulatory burden on limited Corps resources. Inevitably, each of the three new nationwide permits would build up its own body of guidance, interpretations, and case law; divergent and even conflicting interpretations and applications are all but inevitable. In that regard, the proposal is antithetical to the fundamental purpose of the nationwide permitting program, *i.e.*, to streamline permitting, not complicate it. And these costs would be incurred without any benefit in terms of additional environmental protection, because in its existing form, NWP 12 is flexible enough to apply to a range of utility lines, and its use is limited to activities that result in no more than minimal adverse environmental impacts.[9]

Similarly, the proposed 250-mile PCN trigger for oil and gas pipelines not only will add an unnecessary layer of regulatory complexity and litigation risk, but is arbitrary and lacks a rational connection to environmental protection. Similar to splitting NWP 12 into three separate permits, introducing a new legal requirement for use of NWP 12 will inevitably be subject to dispute and litigation. For example, the Corps proposes to require a PCN when "the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline (vs. conduct repair or maintenance activities) along the majority of the distance of the overall project length."[10] However, installing new pipeline and conducting repair or maintenance activities are not mutually exclusive; new pipeline is often installed during the process of repairing an existing pipeline. The rule's application to pipelines carrying substances other than oil and gas (*e.g.*, water, produced water, or carbon dioxide) that meet the length requirement and are associated with oil and natural gas activity is also unclear. Overall, this will dampen developers' willingness to undertake, and investors' willingness to fund, infrastructure projects. Recent successful development of vital

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[9] The proposal to divide NWP 12 into three separate permits also lacks an appropriate and rational basis. Under Section 404 of the Clean Water Act, the Corps regulates (and NWP 12 authorizes) the discharge of dredged or fill material associated with the *construction* of utility lines. Effects on aquatic features from *construction* do not differ depending on what type of substance will ultimately be transported in the completed pipeline. For example, the impacts of installing a pipeline across a waterbody or wetland using a particular construction technique (open-cut trenching, boring, horizontal directional drilling, etc.) will be very similar, whether the pipeline will ultimately convey water, crude oil, natural gas, or carbon dioxide. While Section 10 of the Rivers and Harbors Act, governing work in or affecting navigable waters, relates not only to construction, but also to operation of the pipeline, it is the physical presence of a pipeline that affects navigation—the substance within the pipe is irrelevant even for purposes of Section 10. Indeed, the Corps' longstanding approach of treating various types of utility lines as a single category under NWP 12 appropriately reflects Congress's instruction, in Section 404(e) of the Clean Water Act, that a general permit program should encompass activities that are similar in nature.

More than four decades of practice have shown this to be the case. To the extent the Corps' proposed changes reflect concern about possible discharges from the pipeline during its operation, that is not the discharge of fill material. The Corps itself acknowledges that it does not have the authority to regulate operations and maintenance activities, including potential discharges from spills and other accidents, that do not involve discharges of dredged or fill material into waters of the United States, that are exempt from Section 404 permit requirements under Clean Water Act Section 404(f), and that do not involve structures or work requiring Corps authorization under Sections 9 and 10 of the Rivers and Harbors Act of 1899. *See* U.S. Army Corps of Engineers, Draft Decision Document for Nationwide Permit 12, at 50-51 (Sept. 15, 2020). Thus, the substance being transported is not relevant to prospective authorization under NWP 12. Potential releases or spills from pipelines of all types are not only rare, but are regulated under other authorities, not Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

[10] *See* 85 Fed. Reg. at 57,371.

energy infrastructure, discussed below, has relied on the transparency and predictability that NWP 12 has provided. That will change if the Corps adopts the unnecessary changes to NWP 12.

The new 250-mile threshold is also practically and legally unsound. Tens of thousands of projects over many decades have confirmed what the administrative records associated with prior NWP issuances show: that use of NWP 12, in accordance with its existing terms and conditions, results in no more than minimal adverse environmental impacts. It is unnecessary and arbitrary for the Corps to add an additional PCN trigger for use of the nationwide permit, depending solely on the length of the project and what will later be conveyed in the pipeline, and not on actual construction impacts to aquatic features. For example, a short, five-mile water pipe in a water-rich region of the country such as Louisiana or Florida is likely to cross many more aquatic features and may have more significant environmental effects than a 250-mile-long oil or gas pipe in the arid West, which may cross very few aquatic features. The Corps should not apply an arbitrary and discriminatory 250-mile PCN trigger for oil and gas pipelines that improperly treats those projects differently than other utility lines, as neither the length of a pipeline nor the substance it conveys have any necessary relationship with the potential impacts on aquatic resources.

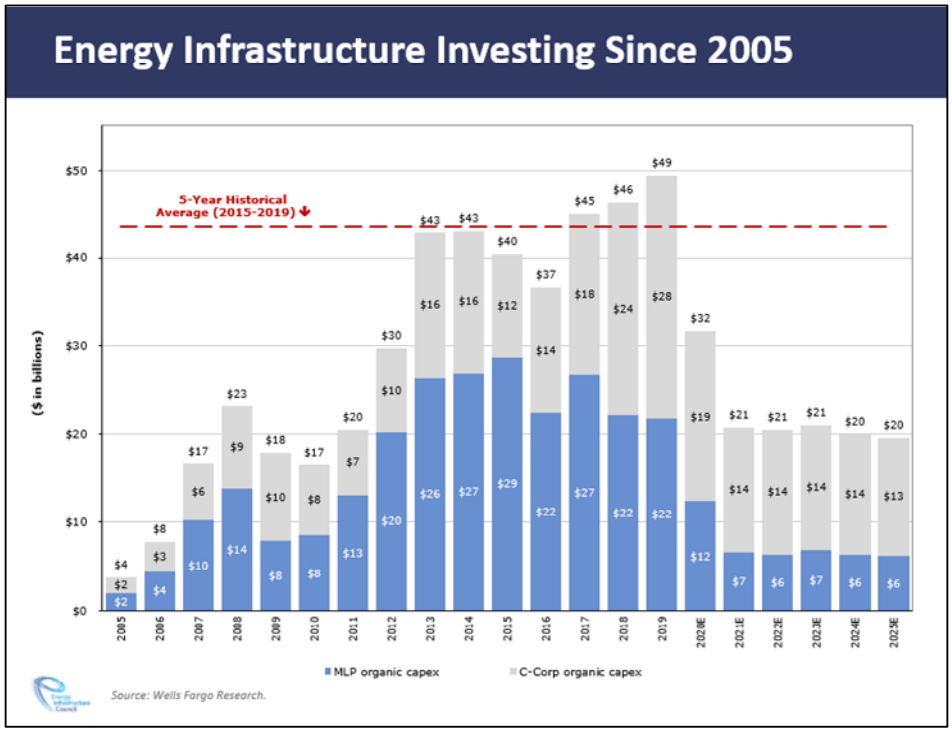
2. Increasing uncertainty and litigation risk will increase the cost and delay associated with energy infrastructure projects, chilling investment in an already capital-constrained environment.

For more than 40 years, NWP 12 has facilitated the development of essential infrastructure for activities with adverse environmental effects that are no more than minimal, both individually and cumulatively. The experience of permitting and building recent infrastructure projects provides helpful lessons about what makes development projects successful, and highlights the existence of potential concerns and pressure points for infrastructure investment. Those lessons underscore why the Corps should reissue NWP 12 in its current form, and avoid the increased uncertainty and litigation risk that would follow from the proposed drastic revisions to NWP 12. In particular, the historical record shows two important and complementary factors necessary for the construction and operation of new pipeline facilities: (a) ready access to the capital markets; and (b) a predictable regulatory environment.

In the last five years, the interstate network of oil and natural gas pipelines has added nearly 120,000 miles of "greenfield" (*i.e.*, new) pipelines and additional capacity through expansion projects for existing pipelines.[11] This buildout has helped respond to increases in hydrocarbon production made possible by modern technology; has helped foster competition for new markets and new sources of oil, natural gas, and related products; and has given shippers increased leverage to negotiate for more favorable service terms among competing pipelines. In the aggregate, these factors have benefitted end-users of hydrocarbons and have improved the reliability and robustness of the nation's pipeline grid, while supporting the Nation's energy independence. As shown on the following graphic, the 2015 to 2019 five-year average for pipeline investments was over $40 billion per year—more than double the amount invested in infrastructure just ten years ago. End-

[11] See the Pipeline and Hazardous Materials Safety Administration's annual reports of mileage for hazardous liquid and gas distribution lines, at https://www.phmsa.dot.gov/data-and-statistics/pipeline/annual-report-mileage-hazardous-liquid-or-carbon-dioxide-systems and https://www.phmsa.dot.gov/data-and-statistics/pipeline/annual-report-mileage-gas-distribution-systems.

users of oil and gas in the United States have undeniably benefitted from lower energy prices made possible by pipeline investment, which connect new sources of supply with downstream markets.

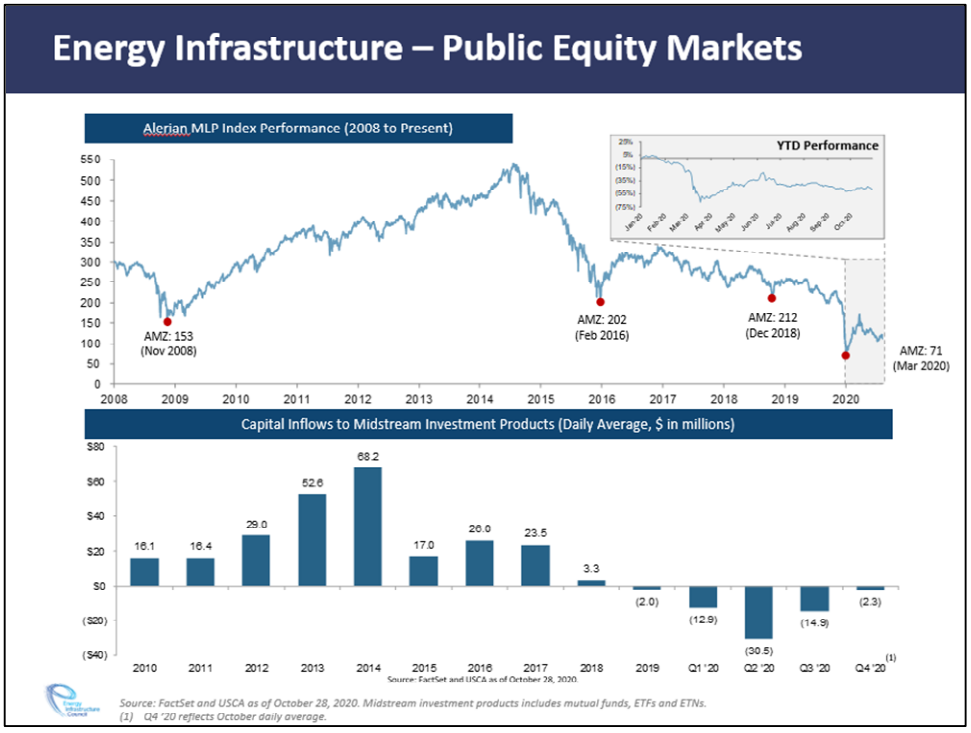


However, as the above graphic illustrates, investment in the sector has recently contracted and is likely to remain so for the foreseeable future, underscoring the need for project developers to have stable access to sources of funding. United States law makes the deliberate choice that private industry should own and operate the Nation's pipeline grid—subject, of course, to appropriate oversight at the state and federal level. The companies charged with owning, maintaining, and improving this critical infrastructure must make ongoing investment in those assets, to respond to economic and demand growth, and to ensure that the Nation has an efficient, robust, and well-functioning pipeline system that complies with all applicable regulations, including those related to the environment and pipeline integrity.

The investment environment for pipeline infrastructure is currently challenged by several factors, including dynamics in the capital markets. Investor interest in energy infrastructure has declined substantially from 2019 levels, which has adversely affected market valuations for infrastructure companies and investors' equity returns. Even prior to the COVID-19 pandemic, the market backdrop for midstream equities was challenging. This is evidenced by the sector's standing within the S&P 500 index. Energy companies represent less than 3 percent of the S&P 500, down from 16 percent in 2008, making it the smallest of the eleven major industry sectors. In the capital markets, the energy sector must compete for investment dollars with larger sectors that have shown strong performance over the last decade, such as technology and healthcare, and that have attracted significant investor interest. Reduced distributions by MLPs to retail investors (which historically have been the sector's largest investor base) have led to reduced willingness to invest in energy infrastructure. Luring retail and generalist investors back to energy infrastructure

will require, among other things, higher expected returns. This, in turn, has increased the sector's cost of equity capital—a trend that is not expected to change over the next few years.

In March 2020, a perfect storm of events led to a selloff in the energy sector, which was compounded by a limited universe of available buyers. The sector experienced simultaneous demand and supply shocks from the COVID-19 pandemic and the commodity price war between Russia and Saudi Arabia. Declines in domestic production affected midstream assets, including companies engaged in pipeline transportation. As the following graphic shows, the Alerian MLP Index, which tracks the performance of MLPs participating in the public equity markets, dropped to the lowest point in its history, losing 70% of its value from early January and late March 2020.



The midstream component of the energy sector has been seeing modest recoveries since the low points in late March 2020. However, any gains made over the past eight months could be easily diminished or destroyed by perceived increases in regulatory uncertainty and litigation risk associated with infrastructure investment. The Corps' nationwide permitting program, while not the only regulatory program infrastructure projects must navigate, can influence investment decisions. Several recent, high-profile examples underscore the significant effect that the Clean Water Act permitting process and related litigation can have on the overall trajectory of a major pipeline infrastructure project. The degree of predictability and uncertainty presented by the regulatory environment is one of several important factors that investors in midstream assets consider; others include asset quality, customer contracts, counterparty risks, market positioning (*e.g.*, supply push, demand pull, volume growth outlook), management quality, long-term marketplace trends, and environmental, social and corporate governance. As the experience of the past few years starkly illustrates, the market responds to perceived regulatory risks.

In considering whether to make changes to a well-established and well-functioning nationwide permit program, the Corps should be conscious of how changes to the framework for permitting utility lines will affect the investment community, and in turn the country's ability to continue to deliver competitively-priced energy from numerous and diverse sources to U.S. consumers and other end-users, and to further domestic energy independence. Investors will perceive the proposed NWP 12 changes as increasing the overall degree of regulatory and litigation risk, to the detriment of investments in the midstream sector generally. To encourage continued investment in energy infrastructure, the Corps should take steps that provide investors predictability in the return on investments. Clarity, transparency, and predictability are particularly important for pipeline infrastructure development, because projects in this area require companies to make significant up-front investments as they navigate years of project design, permitting, litigation, and construction, before a project enters service and finally begins to create a return on that investment.[12] Every step that regulators take to increase the degree of uncertainty and litigation risk will chill investors' willingness to commit resources to this sector.

Several recent, high-profile energy infrastructure projects illustrate the connection between market forces and perceived regulatory and litigation risks, including Clean Water Act permitting. In July 2020, Dominion Energy and Duke Energy cancelled the proposed 600-mile Atlantic Coast Pipeline Project, citing the uncertainties and risks associated with environmental permitting and litigation.[13] In particular, the developers noted continued uncertainty about the project's ability to rely on NWP 12 in light of the series of lawsuits and decisions staying or vacating that project's permits. The companies explained that those decisions "have sought to dramatically rewrite decades of permitting and legal precedent including as implemented by presidential administrations of both political parties."[14] The nearly 3.5-year delay associated with the permitting process and litigation contributed to an increase in overall project costs from approximately $4.5-$5 billion to $8 billion, underscoring "the increasing legal uncertainty that overhangs large-scale energy and industrial infrastructure development in the United States."[15] The project developers had already spent approximately $3.4 billion when the project was cancelled,[16] an outcome that will scarcely be lost on investors considering the ability of companies to develop, permit, construct, and place into service future new, largescale energy infrastructure projects.

Other major pipeline projects, including the Mountain Valley Pipeline and Keystone XL projects, have similarly faced an onslaught of regulatory and litigation-related challenges. Commentators have cited uncertainties associated with those projects as likely to deter major

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[12] *See, e.g.*, *Cheniere Corpus Christi Pipeline, LP*, 169 FERC ¶ 61,135 at PP 34-35 (noting a typical 14-percent return on equity for greenfield pipeline projects, reflecting higher risks associated with those projects, as compared to lower percentages for lower-risk incremental expansions constructed by existing pipelines).

[13] Press Release, Duke Energy, Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline (July 5, 2020), https://news.duke-energy.com/releases/dominion-energy-and-duke-energy-cancel-the-atlantic-coast-pipeline.

[14] *Id.*

[15] *Id.*

[16] Katherine Blunt, *Companies Cancel Atlantic Coast Pipeline After Years of Delays*, Wall Street Journal, July 5, 2020.

investments in new interstate pipeline projects in the foreseeable future.[17] After nearly three years in the Federal Energy Regulatory Commission's pre-filing and filing process, the Mountain Valley Pipeline began construction in early 2018 with plans to complete construction later that year.[18] Litigation subsequently interrupted construction, which only recently recommenced in some areas.[19] After the U.S. Court of Appeals for the Fourth Circuit previously vacated Mountain Valley's NWP 12 verification, the project developers spent more than a year working through the regulatory process, and the Corps ultimately re-issued the verifications. But on November 9, 2020, the U.S. Court of Appeals for the Fourth Circuit stayed the project's re-issued NWP 12 verifications. Construction costs originally estimated at $3.7 billion in 2018 have increased to between $5.8 billion and $6 billion. Similar regulatory and litigation-related obstacles have affected the Keystone XL project, including litigation related to NWP 12 in a Montana district court.[20] Construction for the project was estimated at $5.4 billion in 2014 but is currently estimated at $8 billion.

In the last four years alone, delays associated with permitting, regulatory review, and litigation have resulted in cancellations of pipeline projects that would have provided an additional 8.5 billion cubic feet per day ("Bcf/d") of new pipeline capacity, and have resulted in the delay or shelving of another 10 Bcf/d of capacity.[21] The average time to obtain federal approval to construct interstate gas pipelines rose sharply from 386 days in 2009 to 587 days in 2018, and these delays can increase the cost of delayed projects by hundreds of millions of dollars.[22] The chilling effect on investment is significant and undeniable.

Nor do risks to investors end once a project has been constructed and placed into service. The Dakota Access Pipeline entered service in mid-2017, but continued litigation has threatened to shut down the pipeline while the government completes additional environmental analysis. In particular, on July 6, 2020, a district court in Washington D.C. ordered that pipeline to be shut down and emptied of oil based on that court's concerns with the Corps' environmental review process, even though the pipeline had been safely in service for nearly three years.[23] Although a court of appeals stayed that precipitous order, project opponents renewed their request for

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[17] *See* Corey Paul & Allison Good, *Blocked: Brutal Month for Pipelines Shows a Friendly White House Is Not Enough*, S&P Global Market Intelligence, Aug. 4, 2020, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/blocked-brutal-month-for-pipelines-shows-a-friendly-white-house-is-not-enough-59426206.

[18] Mountain Valley Pipeline, LLC, Request for Extension of Time, Dkt. No. CP16-10, Accession No. 20200825-5147 (Aug. 25, 2020).

[19] *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027 (Oct. 9, 2020) (authorizing construction along all portions of the project except a 25-mile exclusion zone near where the pipeline right-of-way crosses a national forest).

[20] *Northern Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 19-cv-44, 2020 WL 1875455 (D. Mont. Apr. 15, 2020), *order amended*, 2020 WL 3638125 (D. Mont. May 11, 2020), *appeal filed*, No. 20-35412 (9th Cir. May 13, 2020), *stay granted in part*, 2020 WL 3637662 (U.S. July 6, 2020).

[21] Corey Paul & Allison Good, *Blocked: Brutal Month for Pipelines Shows a Friendly White House Is Not Enough*, S&P Global Market Intelligence, Aug. 4, 2020, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/blocked-brutal-month-for-pipelines-shows-a-friendly-white-house-is-not-enough-59426206.

[22] Hiroko Tabuchi & Brad Plumer, *Is This the End of New Pipelines?*, New York Times, July 8, 2020, https://www.nytimes.com/2020/07/08/climate/dakota-access-keystone-atlantic-pipelines.html.

[23] *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 1:16-cv-1534-JEB, slip op. at 19, 23-24 (D.D.C. July 6, 2020).

injunctive relief at the district court in October 2020[24] while seeking to defend on appeal the district court's prior order suspending pipeline operations.[25] Even after infrastructure has entered service, uncertainty and litigation risk associated with environmental and other permitting issues can erode confidence in an asset's ability to provide fair and predictable returns for investors.

At some point, ever-increasing uncertainty in the regulatory process for approving and building key infrastructure projects will exceed what the markets can support. Investors will naturally focus on other sectors and other areas for investment, to the detriment of energy end-users and broad sectors of the U.S. economy that have benefitted from having a reliable and affordable access to energy provided by the Nation's pipeline grid. The Corps' proposed changes to NWP 12 will be perceived as increasing already unfavorable levels of regulatory and litigation uncertainty, with negative effects on the cost and timing of energy infrastructure projects. Ultimately, the proposed changes to NWP 12 may derail much-needed infrastructure development without yielding any additional environmental protection.

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EIC respectfully requests that the Corps reissue NWP 12 in its present form, consistent with the agency's approach since 1977, under which NWP 12 applies to a suite of similar utility line activities—rather than dividing NWP 12 into three separate permits. The Corps should decline to impose a new PCN requirement that would single out oil and gas pipeline projects based on a 250-mile threshold. The Corps, regulated entities, the courts, and other stakeholders have ample experience applying and administering NWP 12 as it has existed for decades, and in using it to permit and construct essential energy infrastructure in a manner that results in no more than minimal environmental effects. The Corps' proposed departure from this stable and predictable framework will only increase uncertainty and litigation risk, which will in turn have an undesirable chilling effect on investors' willingness to support these necessary projects. The end result will be to harm the midstream sector, its investors, and end-users nationwide, without any commensurate environmental benefits.

Respectfully submitted,

Jeremy C. Marwell
Michael B. Wigmore
Brandon M. Tuck
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

Lori Ziebart
President and Chief Executive Officer
ENERGY INFRASTRUCTURE COUNCIL
300 New Jersey Avenue, N.W.
Suite 900
Washington, DC 20001
(202) 747-6570
lori@eic.energy

[24] *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 1:16-cv-1534-JEB (D.D.C.).

[25] *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, Nos. 20-5197 and 20-5201 (D.C. Cir.).