



May 27, 2022

Via Federal eRulemaking Portal: <http://www.regulations.gov/>

United States Army Corps of Engineers  
441 G. Street NW  
Washington, DC 20314-1000

**Re: Notice of Virtual Public and Tribal Meetings Regarding the Review of Nationwide Permit 12; Establishment of a Public Docket; Request for Input. Docket No. COE-2022-0003.**

Dear Ms. Jensen and Mr. Olson:

The American Petroleum Institute ("API"), the American Exploration & Production Council ("AXPC"), the Center for Liquefied Natural Gas ("CLNG"), the Energy Infrastructure Council ("EIC"), the Independent Petroleum Association of America ("IPAA"), the Louisiana Mid-Continent Oil & Gas Association ("LMOGA"), the North Dakota Petroleum Council ("NDPC"), the Natural Gas Supply Association ("NGSA"), the New Mexico Oil and Gas Association ("NMOGA"), the Ohio Oil and Gas Association ("OOGA"), the Petroleum Alliance of Oklahoma, and the Western States Petroleum Association ("WSPA") together represent a broad spectrum of the oil and natural gas industry, including but not limited to entities involved in upstream, midstream, downstream refining, marketing, and petrochemical operations as well as market development/Liquefied Natural Gas ("LNG") activities.

We are pleased to participate in the United States ("US") Department of the Army and the US Army Corps of Engineers ("USACE" or "Corps") (together "Army") formal review of the Nationwide Permit ("NWP") 12, and we submit written comments for your consideration.<sup>1</sup>

With energy costs high for American consumers and European allies looking to the US for access to an affordable and stable energy supply, we need policies in place that provide certainty and ensure American producers can meet rising demand at home and abroad. A clear, transparent, and timely permitting process for energy infrastructure, including the continued authorization of NWP 12, is vital to provide reliable energy now and in the future.

***To aid review, an Executive Summary follows, and a Table of Contents with helpful headings begins on page 5.***

<sup>1</sup> 87 Fed. Reg. 17,281 (Mar. 28, 2022) ("Notice").

## I. EXECUTIVE SUMMARY

As emphasized in the 2017 NWP rulemaking, “[t]he utility line activities authorized by NWP 12 will continue to be needed by society, including the goods and services transported by those utility lines.”<sup>2</sup> This remains true in 2022 with NWP 12-authorized activities remaining essential to the construction, operation, and maintenance of efficient oil and gas facilities which in turn help meet the energy needs of the nation.<sup>3</sup> NWP 12 serves as a strong motivator for the regulated industry to design projects in a way that reduces environmental impacts. The regulatory certainty provided by the orderly cycle of NWP issuance allows private companies to secure the investments that make private operation of this important public infrastructure system reliable.

**To assure regulatory certainty, we urge the USACE to not reopen NWP 12 at this time, and instead allow NWP 12 to continue to be authorized and reissued as part of the current cycle of the NWPS set to expire on March 14, 2026.**

We strenuously object to any “potential off-ramps” that go beyond the statutory requirements and the underlying intent of NWPs to lessen administrative burdens. We object to any additional triggers mandating individual reviews of permits.

**In support of our position, we provide the following overall practical, technical, legal, and economic reasons for your consideration.**

- Current energy market dynamics as well as the nation’s energy demands would not be well served by adding additional uncertainty to NWP 12. ***NWP 12 is a proven process and well-defined permit pathway established specifically for projects with minimal environmental impacts.*** Singling out NWP 12 for rulemaking will create regulatory uncertainty, add further obstacles to attracting investment for needed energy infrastructure, hamper our ability to address global energy needs and support our allies, and create further costs and delays for American consumers.
- As a baseline matter, “[the Clean Water Act [“CWA”]] Section 404(e) does not prohibit the issuance of general permits for utility lines and other infrastructure projects,”<sup>4</sup> but instead sets the parameters for a streamlined permitting pathway for certain qualifying new construction and maintenance utility line activities with minimal individual and cumulative impacts. As such, NWP 12 is a longstanding tool in planning for essential energy projects as well as helping to promptly address crucial maintenance and repair needs of the nation’s complex infrastructure of oil and natural gas pipelines.

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<sup>2</sup> 82 Fed. Reg. 1,860, 1,884 (Jan. 6, 2017).

<sup>3</sup> Our comments focus on oil and natural gas pipeline activities given the new language of NWP 12 but in splitting activities for different types of utility lines into NWP 12, NWP 57, and NWP 58, the USACE acknowledged that “there will be some redundancies because of similarities among these different types of utility lines . . .” meaning there is some potential for overlap. 86 Fed. Reg. at 2,771. As such, any formal review of NWP 12 should also fully consider the broader scope of activities that could be burdened by revisions to NWP 12.

<sup>4</sup> 86 Fed. Reg. 2,744, 2,783 (Jan. 13, 2021).

- We believe that reopening NWP 12 ahead of schedule is premature and unnecessary especially given the fact that NWP 12 and all other NWPs underwent a comprehensive rulemaking process in 2020-2021, including appropriate CWA Section 404(b)(1) Guidelines and National Environmental Policy Act (“NEPA”) compliance analysis. Any input from the formal review process should serve to inform the Army’s decision making on NWP 12 as part of the overall reissuance process. At that time, any modifications must be considered within the statutory bounds of the USACE’s jurisdictional authority and should be limited to modest clarifying changes.
- Utility lines were first authorized in 1977 under a specific NWP, and over many reissuances since then, NWP 12 has undergone rigorous vetting and the USACE has consistently determined that the NWP 12 adequately meets the CWA and Section 10 of the Rivers and Harbors Act of 1899 (“RHA”) requirements as well as all other applicable provisions.

***We have carefully considered the Army’s nine guidepost questions<sup>5</sup> and provide the following overview of our comments while noting that more comprehensive discussion is included later in the document.***

- **Response to Question 1.** To ensure predictability, ease of administrability, and consistency with other NWPs, we ask that NWP 12 be reissued in the same cycle as all other NWPs, and no procedures under 33 CFR 330.5 should be utilized in advance of the current nationwide reissuance cycle.
- **Response to Question 2.** NWP 12 has already been reissued with a determination that it has no more than minimal and cumulative adverse environmental effects under Section 404(e) of the CWA, and no further modifications are necessary for a NWP that meets the underlying requirements.
- **Response to Question 3.** The USACE follows a consistent process for notice and opportunity for a public hearing under the Clean Water Act for NWP reissuance, and expanding to case-specific NWP 12 activities would be impermissible. Also, we respectfully note there are a multitude of public engagement opportunities when the NWPs are issued. For example, in 2020, stakeholders had opportunities to comment on the federal proposal concerning NWP 12 as well as through regional conditioning process with over 40 modifications proposed by the USACE’s district offices. We encourage the USACE to consider adding transparency to the reissuance process (possibly with a dashboard listing the opportunities) and to consider expanded comment deadlines (e.g., 180 days) so that stakeholders can fully reflect on the myriad of proposals.
- **Response to Question 4.** For future rulemakings, no further modifications to NWP 12 or additional triggers mandating other elements of review are necessary. NWP 12 includes a maximum ½ acre limit, a robust set of general conditions and specific terms that are environmentally protective, PCN triggers, as well as the discretionary authority given to division engineers and district engineers to modify, suspend, or revoke NWP authorizations on regional or case-specific basis.
- **Response to Question 5.** Both new construction of oil and natural gas pipelines and maintenance and repair of existing oil and natural gas pipelines are important elements of energy infrastructure projects, and NWP 12 authorizations should be available for both types of qualifying activities without additional burdensome requirements being added that require new and lengthy permitting reviews.
- **Response to Question 6.** No regulatory distinctions should be drawn between oil pipelines and natural gas pipelines in the NWP program based on differences in other federal regulation of different types of pipelines. In

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<sup>5</sup> 87 Fed. Reg. at 17,283. These are referenced herein as the Army’s questions 1-9, respectively.

any future reissuance of NWP 12, the USACE should focus on CWA and RHA considerations related to the construction, maintenance, repair, and removal of a utility line within the USACE's scope which does not include regulating the substance conveyed within the utility line.

- **Response to Question 7.** We recognize that climate change and environmental justice are key priorities of the Administration; however, any review should consider the USACE's own assessments to-date which have found that the USACE's authority is limited and that within those parameters, climate change and environmental justice factors have been adequately considered during the NWP reissuance. In addition, the Army has not yet Issued Its forthcoming guidance to address environmental justice In Its Regulatory Program. Any environmental justice changes to any individual NWP would therefore be premature. Instead, we recommend the USACE wait until this guidance is available, and then seek additional Input from stakeholders as part of the current cycle for overall NWP reissuance.
- **Response to Question 8.** The PCN requirements underwent rigorous scrutiny during the NWP 12 reissuance, and the two reissued PCNs, together with the acreage limits and additional PCN triggers in certain general conditions, are more than adequate in meeting the CWA Section 404(e) requirements. However, the 250-mile PCN requirement specific to the construction of new oil and gas pipelines includes an arbitrary and capricious distance limitation, and this must be removed during the regular 5-year review. Overall, any fair consideration of this question must recognize that there are additional mechanisms available for further reviews where appropriate and reasonable. Division engineers have the discretionary authority to require PCNs for activities through regional conditions; and for activities where a PCN is not required, the district engineers also have the opportunity to review PCNs submitted through the voluntary NWP verification process.
- **Response to Question 9.** No new triggers mandating individual permit reviews should be required because there is already a process in place where projects are reviewed at the district level on case-specific basis, and district engineers can use their discretionary authority to reasonably trigger review under an individual permit. We support the district engineer retaining its discretionary authority; and while we agree with the flexibility afforded to the district engineer, any individual permit triggers should be based on statutory and regulatory authority, longstanding USACE practice, and supported by science.

In conclusion, we ask that the Army remain committed to working in the national interest to promote the safe and clean development of all of the nation's multiple energy sources by continuing to facilitate the timely and consistent authorization of all NWPs including NWP 12.

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### III. THE ASSOCIATIONS AND THEIR INTERESTS.

The Associations have been actively involved in the notice and comment process in the 2016 NWP reissuance process,<sup>6</sup> the 2017 USACE's regulatory reform efforts,<sup>7</sup> the 2020-2021 USACE's NWP reissuance process, the Navigable Waters Protection Rule ("NWPR") rulemaking,<sup>8</sup> 2021 Reconsideration and Revision of the CWA Section 401 Certification Rule,<sup>9</sup> the 2022 Proposed Waters of the US ("WOTUS") rulemaking,<sup>10</sup> as well as other related rulemakings, such as the 2019 US Fish and Wildlife Service and National Marine Fisheries Service rule revisions.

Our most recent NWP comment submission in November 2020 was on behalf of 20 national and state oil and natural gas associations representing a broad spectrum of the oil and natural gas industry, and included a thorough assessment of the NWPs significant to our industry, as well as comments and a comprehensive review of regional comments proposed by USACE offices in 44 states and 2 US territories.<sup>11</sup> We incorporate these comments by reference.

Our members actively utilize NWPs for many of their essential energy production, transportation, and development activities that have little or no adverse impact on the nation's aquatic resources. The NWPs' faster processing times with reduced paperwork incentivize developers to design projects that reduce environmental impacts and facilitate more efficient processing of environmental permits that would otherwise require an individual permit. Based on our members' extensive experience and expertise in the CWA and related rulemakings, as well as environmental permitting and regulatory compliance, we offer our comments.

The Associations and their interests are summarized as follows:

API represents all segments of America's oil and natural gas industry which supports more than 11 million US jobs and is backed by a growing grassroots movement of millions of Americans. Our nearly 600 members produce, process, and distribute the majority of the nation's energy, and participate in API Energy Excellence®, which is accelerating environmental and safety progress by fostering new technologies and transparent reporting. API was formed in 1919 as

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<sup>6</sup> API, AOPL, AXPC, et al., Comment Letter to USACE's Proposal to Reissue and Modify NWPs, Docket No. COE-2015-0017, Aug. 1, 2016. Available at: <https://www.regulations.gov/comment/COE-2015-0017-0441>

<sup>7</sup> API and AOPL, Comment Letter to USACE Subgroup to the DOD Regulatory Reform Task Force's Review of Existing Rules, Docket No. COE-2017-004, Oct. 18, 2017. Available at: <https://aopl.org/documents/en-us/8107597b-f3f8-4b4c-9b1c-21563b35d722/1>

<sup>8</sup> API, AOPL, AXPC, and IPAA, Comment Letter to US Environmental Protection Agency ("EPA") and USACE's Proposal to Define Waters of the United States, Docket No. EPA-HQ-OW-2018-0149, Apr. 15, 2019. Available at: <https://www.api.org/-/media/Files/News/Letters-Comments/2019/april/WOTUS-2019.pdf>

<sup>9</sup> AFPM, API, AXPC, and IPAA, Comment Letter to EPA on Reconsidering and Revising the Agency's 2020 CWA Section 401 Certification Rule, Aug. 2, 2021. Available at: <https://www.ipaa.org/wp-content/uploads/2021/08/Joint-Trade-CWA-401-Comments-080221.pdf>

<sup>10</sup> API, AXPC, and IPAA, Comment Letter to EPA and USACE's Proposed Rule to Revise the Definition of "Waters of the United States," Feb. 7, 2022. Available at: <https://www.ipaa.org/wp-content/uploads/2020/11/2020-NWPs-Complete-Package-Final-Filed.pdf>

<sup>11</sup> API, AOPL, AXPC, et al., Comment Letter to EPA and USACE's Proposal to Reissue and Modify NWPs, Docket No. COE-2020-0002, Nov. 16, 2020. Available at: <https://www.ipaa.org/wp-content/uploads/2020/11/2020-NWPs-Complete-Package-Final-Filed.pdf>

Note: We appreciate the USACE's responses provided to our comments in the final rulemaking; however, we believe that those responses lack reasoned justification per the Administrative Procedure Act ("APA"), and our underlying positions regarding the USACE's unprecedented division of NWP 12 on the basis of the contents of the pipe, remain unchanged.

a standards-setting organization and has developed more than 800 standards to enhance operational and environmental safety, efficiency, and sustainability.

AXPC is a national trade association representing 28 of the largest independent oil and natural gas exploration and production companies in the United States. AXPC companies include worldwide leaders in clean and safe onshore production of oil and gas, and support millions of Americans in high-paying jobs while investing a wealth of resources in our communities. Dedicated to safety, science, and technological advancement, our members strive to deliver affordable, reliable energy to consumers while positively impacting the economy and the communities in which we live and operate. As part of this mission, AXPC members understand the importance of ensuring positive environmental and public-welfare outcomes and responsible stewardship of the nation's natural resources.

CLNG advocates for public policies that advance the use of LNG in the United States, and its export internationally. A committee of the NGSA, CLNG represents the full LNG value chain, including large-scale LNG producers in the United States, shippers, and multinational developers, providing it with unique insight into the ways in which the vast potential of this abundant and versatile fuel can be fully realized.

The Energy Infrastructure Council (EIC) is a non-profit trade association dedicated to advancing the interests of companies that develop and operate energy infrastructure. EIC addresses core public policy issues critical to investment in America's energy infrastructure. EIC's core mission is to represent and actively promote the interests of energy infrastructure companies. We focus on public policy issues affecting our member companies, including tax, discrete permitting issues, and other matters of importance to our membership; as well as on educational activities for government officials, the public and media on the important role our member companies play in our nation's economy and throughout the world.

IPAA is a national upstream trade association representing thousands of independent oil and natural gas explorers and producers and service companies across the United States. Independent producers develop 91 percent of the nation's oil and natural gas wells. These companies account for 83 percent of America's oil production, 90 percent of its natural gas and natural gas liquids ("NGL" production, and support over 4.5 million jobs.

LMOGA, founded In 1923, is a trade association exclusively representing all sectors of the oil and gas industry operating in Louisiana and the Gulf of Mexico. LMOGA serves exploration and production, refining, transportation, marketing, and mid-stream companies as well as other firms in the fields of law, engineering, environment, financing, and government relations.

Founded in 1965, NGSA represents integrated and independent energy companies that produce and market domestic natural gas. NGSA is the only national trade association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSA encourages the use of natural gas within a balanced national energy policy and has a long-established commitment to promoting a public policy environment that fosters a growing, competitive market for natural gas.

NMOGA is a coalition of more than 1,000 oil and natural gas companies and Individuals operating in the state of New Mexico. NMOGA members Include all facets of oil and gas production, transportation, and delivery, and is the oldest and largest organization representing the oil and gas Industry In New Mexico. Oil and gas is the greatest economic contributor to the state of New Mexico, supporting more than 134,000 jobs and \$17 billion in annual economic activity. The oil and gas industry was responsible for \$5.3 billion in state and local revenue In 2021. In addition, taxes and royalty from the oil

and gas industry account for one third of the State of New Mexico's annual budget, including over \$1.4 billion for public schools.

The NDPC is a trade association that represents more than 650 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oil field service activities in North Dakota, South Dakota, and the Rocky Mountain Region.

The Ohio Oil & Gas Association is a trade association with members representing the people and companies directly responsible for the production of crude oil, natural gas, and associated products in Ohio. Expansion of shale drilling into the Utica has resulted in an expansion of OOGA membership. The core OOGA membership is comprised of independent oil and natural gas producers, major national oil and natural gas producing companies, and major international oil and natural gas companies—all focused on the exploration, discovery, and production of crude oil, natural gas, and associated liquids in Ohio.

The Petroleum Alliance of Oklahoma represents more than 1,300 individuals and member companies and their tens of thousands of employees in the upstream, midstream, and downstream sectors and ventures ranging from small, family-owned businesses to large, publicly traded corporations. Our members produce, transport, process, and refine the bulk of Oklahoma's crude oil and natural gas.

Western States Petroleum Association (WSPA) is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining, transportation and marketing in the five western states of Arizona, California, Nevada, Oregon, and Washington. WSPA members operate in Upstream, Midstream, and Downstream segments of the oil and natural gas industry. WSPA is particularly concerned that energy development permits feature prominently in this NWP renewal process. In this space, NWP 3 Maintenance, NWP 12 Utility Line Activities, and NWP 39 Commercial and Institutional Developments.

#### **IV. LEGAL, ENVIRONMENTAL, ECONOMIC, AND PRACTICAL REASONS SUPPORT LEAVING NWP 12 UNCHANGED.**

As the Army undertakes a formal review of NWP 12, which we believe is unnecessary at this time, it is important to frame any NWP 12 issues with a clear understanding of the robust legal framework that continues to provide the basis for NWP 12 as well as the important role of NWP 12 in assuring energy independence, providing jobs, and serving as an incentive to developers for minimizing environmental impacts in the design of projects.

##### **A. NWP 12 is based on established legal authority and meets all applicable compliance requirements.**

Statutes provide the basis for authorizing activities under NWP 12 and set the parameters for USACE's jurisdictional authority. As such, NWP is structured with terms and conditions designed to comply with all applicable statutory provisions. These terms and conditions have been thoroughly vetted each time NWP 12 has been reissued since 1977. In addition, there are extensive federal, state, and local frameworks in play that ensure additional safeguards for communities within which these utility lines are authorized.

**1. *The USACE's jurisdiction for authorizing activities under NWP's resides within the statutory authority under CWA Section 404 and RHA Section 10.***

Fundamentally, the USACE's jurisdiction under the CWA and RHA is limited to regulating discharges of dredged or fill material into jurisdictional waters and structures or work in navigable waters.<sup>12</sup>

In prior rulemakings including the 2017 and 2021 reissuances, the USACE has appropriately recognized that "the Corps does not regulate oil and gas pipelines, or other utility lines, per se."<sup>13</sup> The USACE has also stated: "For utility lines, including oil and gas pipelines, our legal authority is limited to regulating discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States, under [S]ection 404 of the Clean Water Act and [S]ection 10 of the Rivers and Harbors Act of 1899, respectively."<sup>14</sup> The USACE has succinctly maintained that it "does not have the authority to regulate the operation of oil or gas pipelines, and [the USACE does] not have the authority to address spills or leaks from oil and gas pipelines."<sup>15</sup>

Specifically, NWP 12 is authorized under the parameters set forth in Section 10 of the RHA and Section 404(e) of the CWA.<sup>16</sup> Section 404 of the CWA as amended by Congress in 1977 authorizes the USACE to issue general permits for categories of discharges that (1) "are similar in nature;" (2) "will cause only minimal adverse effects when performed separately"; and (3) "will have only minimal cumulative adverse effects on the environment."<sup>17</sup>

Furthermore, when proposing to issue a NWP on a nationwide basis, CWA Section 404(e)(1) provides opportunities for public participation, including notice and an opportunity for a public hearing.<sup>18</sup> CWA Section 404(e)(2) also clearly sets time limits for NWPs, that is, NWPs can be issued for a period of no more than 5 years.<sup>19</sup> And this is further clarified under 33 CFR Section 330.5 which provides the procedures for USACE's chief engineer, division engineers, and district engineers to issue, reissue, modify, suspend, or revoke NWPs.

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<sup>12</sup> The USACE's substantive authority is limited to the discharge of dredged or fill material into a WOTUS. Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs, 941 F.3d 1288, 1296 (11th Cir. 2019) ("CBD"). Thus, the USACE's focus must be on the minor discharges authorized by NWP 12, not oil spills or other operational impacts from utility lines that could make use of NWP 12. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 770 (2004) (the scope of a federal agency's analysis under NEPA is determined by the precise nature of the federal action, which in turn depends on the activities subject to the agency's control and responsibility) ("Public Citizen"). CBD, 941 F.3d at 1296-98. The USACE's review does not extend to any larger activity outside the USACE's jurisdiction. Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1115-18 (9th Cir. 2000) (USACE's NEPA review of CWA permit need not include effects of larger development project). Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 195 (4th Cir. 2009) (citations omitted) ("the fact that the [USACE's] § 404 permit is central to the . . . valley-filling process [of a mine] does not itself give the [USACE] 'control and responsibility' over" area outside the USACE's jurisdiction).

<sup>13</sup> 82 Fed. Reg. at 1,883. In the 2021 reissuance, the USACE recognizes this limited authority but explained that for these three NWPs (NWP 12, NWP 57, and NWP 58) and many of the other NWPs, the categories of activities authorized by those NWPs relate to how the constructed activity will be used. 86 Fed. Reg. at 2,780-2,781. We find this explanation lacking because how the use of the constructed activity relates directly to the operation of utility lines over which the USACE does not have jurisdiction over.

<sup>14</sup> Id. at 1,883-1,884.

<sup>15</sup> Id.

<sup>16</sup> 33 U.S.C. Section 1344(e)(1).

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

Overall, the USACE has promulgated its own regulations for the NWP program that clearly explain that “[n]ationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities in federally jurisdictional waters and wetlands, where those activities would have no more than minimal adverse environmental impacts.”<sup>20</sup>

**2. NWP 12 which has been in place since 1977, authorizes utility line activities that have minimal impacts on jurisdictional waters and follows longstanding USACE practice.**

The Army requests comments “on all aspects of NWP 12.”<sup>21</sup> But before undertaking any drastic changes, it is important to recognize that NWP 12 was one of the first NWPs issued by the USACE as part of its efforts to streamline the authorization process for these types of minor activities. And for the past 40 years, the USACE has safely and efficiently issued authorizations for NWPs, including utility line activities.<sup>22</sup>

The 1977 definition of a “utility line” applied to “any type of pipe or type of pipe or pipeline for the transportation of any gaseous, liquid, liquescent, 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.”<sup>23</sup>

The Army mentions in its Notice that “[o]ver iterations of the NWPs issued since 1977, this NWP has evolved,”<sup>24</sup> but the plain fact is that the applicability of the NWP 12 to “utility lines” has remained largely unchanged over the decades except for the addition of the word “internet” added in the 2017 reissuance,<sup>25</sup> and the most recent 2021 unprecedented division of the NWP into the three NWPs.

The same is true for the central tenet of NWP 12, NWP 57, and NWP 58 comprising the concept of single and complete project. As the USACE has acknowledged in numerous reissuance documents, “[c]onsidering separate and distant crossings of waters of the United States to be linear projects that can be authorized by separate NWPs is a long-standing practice that has been codified in the Corps regulations at 33 CFR 330.2(i) since 1991 (see 56 FR 59110).”<sup>26</sup> The USACE notes that, “[t]his practice does not violate Section 404(e) of the Clean Water Act, NEPA, or the [Endangered Species Act (“ESA”)].”<sup>27</sup>

Specifically, a “single and complete project” is defined as “that portion of the total linear project . . . that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location,” and “linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and

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<sup>20</sup> 86 Fed. Reg. at 75,253 citing 33 CFR Section 330.1(b).

<sup>21</sup> 87 Fed. Reg. at 17,282.

<sup>22</sup> 86 Fed. Reg. at 2, 745 (“After 1977, NWPs have been issued or reissued in 1982 (47 FR 31794), 1984 (49 FR 39478), 1986 (51 FR 41206), 1991 (56 FR 59110), 1995 (60 FR 38650), 1996 (61 FR 65874), 2000 (65 FR 12818), 2002 (67 FR 2020), 2007 (72 FR 11092), 2012 (77 FR 10184), and 2017 (82 FR 1860).”). See for e.g., USACE’s Regulatory Impact Analyses for various reissuances.

<sup>23</sup> 42 Fed. Reg. at 37,122, 37,146 (July 19, 1977).

<sup>24</sup> 87 Fed. Reg. at 17,282.

<sup>25</sup> 82 Fed. Reg. at 1,883.

<sup>26</sup> 86 Fed. Reg. at 2,814. This longstanding language is reflected in other USACE documents. See for e.g. 82 Fed. Reg. at 1,978.

<sup>27</sup> Id. The 2017 NWP rule also states that “[t]he Corps’ practices for authorizing linear projects by NWP does not violate any laws.” 82 Fed. Reg. at 1,978.

complete project for purposes of NWP authorization.”<sup>28</sup> In addition, as a “longstanding practice,” the USACE has “calculate[d] the 1/2-acre threshold separately for each separate and distant crossing.”<sup>29</sup>

Moreover, discretionary authority is a vital and longstanding part of the NWP program. In 1991, modifications were made to the NWP program to give greater authority to the district engineers to assert discretionary authority to modify, suspend, or revoke nationwide permits on a case by case basis for specific activities.<sup>30</sup> Division engineers and district engineers were authorized to exercise discretionary authority for certain activities.<sup>31</sup> In responding to objections to the single and complete project language, the USACE succinctly explained its intent which still holds true today:

The purpose of separating out “linear projects”, within the text of the definition for “single and complete project” was to effectively implement the NWP program by reducing the effort expended in regulating activities with minimal impacts. It was never our intention to encourage the use of this definition to justify piecemealing of projects. It is the responsibility of each [District Engineer] to assure against piecemealing through the appropriate use of discretionary authority. We believe that this procedure will assure effective and efficient administration of the NWP program.<sup>32</sup>

As the USACE seeks input on the “appropriate balance for allowing efficient authorization processes,” any modifications should be limited and within the context of these baseline practices.

**3. NWP 12 has been reissued through multiple renewal cycles and it has been found to be in compliance with additional applicable statutes and regulations that are protective of public health and the environment.**

As is evidently clear from any prior NWP 12 final rulemaking that has authorized its reissuance, NWP 12 undergoes an extensive assessment at least every 5 years and the USACE has consistently found NWP 12 to be in compliance with applicable statutes.<sup>33</sup> Additionally, relevant NWP regulations (i.e. 33 CFR Section 330.4 and NWP general conditions such as general conditions 18, 20, 25, and 26) ensure that all activities authorized by NWPs comply with these statutes.

**4. Over and beyond the CWA, a myriad of federal frameworks effectively regulate the safe transportation of oil and natural gas with numerous enforceable measures to appropriately design, site, construct, and monitor these pipelines to prevent and control any releases.**

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<sup>28</sup> See Definition of Single and Complete Linear Project.

<sup>29</sup> See *Sierra Club, Inc. v. Bostick*, No. CIV-12-742-R, 2013 WL 6858685 (W.D. Okla. Dec. 30, 2013) (citations omitted). The district court upheld the “single and complete linear project” definition. The U.S. Court of Appeals for the Tenth Circuit affirmed, upholding the structure and substance of NWP 12. *Bostick*, 787 F.3d 1043 (10<sup>th</sup> Cir. 2015) (quoted language at 1056); See also 33 CFR Section 330.2(i).

<sup>30</sup> 56 Fed. Reg. 59,110.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 59,114.

<sup>33</sup> See 86 Fed. Reg. at 2,841-2,854, Section III, Compliance with Relevant Statutes.

As the Army strives to align with the Administration's stated priorities, it is important to note that there is a complex set of federal frameworks that effectively regulate the safe and efficient transportation of oil and natural gas. The oil and natural gas industry also complies with all applicable federal, state, and local laws and regulations related to the operation and maintenance of construction equipment and spills prevention requirements from that equipment during construction activities. As an industry, we have proactively adopted best management practices that we follow.

There are other federal agencies under other statutory frameworks that regulate programs relating to spill prevention, protection, and control.<sup>34</sup> For example, the EPA and the US Coast Guard address oil spills through the Oil Pollution Act.<sup>35</sup> The US Department of Transportation ("DOT") extensively regulates the safety of oil and natural gas pipeline transportation and facilities (including design, installation, construction, and maintenance) and the siting and construction of interstate natural gas pipelines are regulated by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act.<sup>36</sup> Specific to oil pipelines, the DOT regulates pipeline transportation of hazardous liquids, including crude oil and petroleum products, and the Pipeline and Hazardous Materials Safety Administration ("PHMSA") reviews oil spill response plans for, and comprehensively regulates the integrity of, onshore oil pipelines, among other things.<sup>37</sup>

The oil and natural gas industry also proactively works closely with federal, state, tribal and local government agencies as well as the local communities where it operates, and looks for input from those potentially impacted by pipeline construction and operations. API's Engagement Guidelines outline best practices for pipeline operators to incorporate the local communities in the development and operations of pipelines and facilities. For instance, one of the core elements of the Pipeline Safety Management System under API's Recommended Practice ("RP") 1173 for pipeline operators is stakeholder engagement, and a key initiative is the development of new RP 1185 which builds on stakeholder engagement to support more community involvement and dialogue, and looks for ways to ensure that the public is actively involved in pipeline safety.<sup>38</sup>

All of these frameworks provide for an efficient and environmentally protective landscape within which oil and natural gas pipelines operate.

**B. NWP 12 is a meaningful and effective NWP that serves an important function for authorizing certain oil and gas pipeline activities with minimal environmental impacts while providing the clarity, certainty, and timely decision-making needed for effective energy-related investment decisions. In fact, NWP 12 is critical to the responsible, safe, and efficient development and maintenance of vital energy infrastructure projects across America.**

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<sup>34</sup> See discussion at 82 Fed. Reg. at 1,884-1,885.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Id.; See, e.g., *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 874 (9th Cir. 2006) (discussing PHMSA's comprehensive regulation of pipeline safety). PHMSA has exclusive authority to regulate pipeline safety under the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. Section 60101, et seq.

<sup>38</sup> API Recommended Practice for Pipeline SMS (A Pipeline Safety Management System). RP 1173 (developed in partnership with PHMSA, state pipeline regulators, and other interested stakeholder; API Recommended Practice for Pipeline Public Engagement, RP 1185 (in development). See <https://piconfluence.com/api-1185-advancing-stakeholder-engagement-through-two-way-communication/>

Energy infrastructure projects serve the national interest by providing secure domestic energy supplies for the nation, strengthen our national security, all while being the engines for economic growth and job creation. And as forecast in the 2017 NWP 12 Decision Document and the final rule, “the utility line activities authorized by NWP 12 will continue to be needed by society, including the goods and services transported by those utility lines.”<sup>39</sup>

**1. We appreciate the Army acknowledging current world events highlighting unstable nature of energy projection<sup>40</sup> and we fully support and provide additional information for the Army’s consideration of domestic oil and natural gas projection and distribution in review of NWP 12.**

The US’ oil and natural gas abundance is a strategic asset that we must continue to utilize to strengthen our national security. On March 25, 2022, President Biden and European Commission President Ursula von der Leyen issued a joint statement on bolstering energy security as the European Union (“EU”) reduces its dependence on Russian natural gas.<sup>41</sup> Among other things, the EU will work with its member states to ensure demand for approximately 50 billion cubic meters (bcm) of US LNG through 2030.<sup>42</sup>

We are committed to ensuring the safe and reliable delivery of oil and natural gas across the United States. US LNG exports have grown to account for more than 20% of the global LNG market and in January 2022, the US exported a record high of 11.4 billion cubic feet (“bcf”)/day of LNG.<sup>43</sup> But this volume is running up against the US’s export capacity of 12.4 bcf/day.<sup>44</sup> Clearly, additional LNG will need to come from newly constructed terminals to meet the EU’s goal. And while there is 33.9 bcf/day of new LNG capacity either under construction, approved, proposed, or pre-filed,<sup>45</sup> ensuring that these, and other projects come to fruition will be paramount to global energy market stability.

Additionally, as the US oil and natural gas industry works to supply our European allies with much needed energy (in the form of US LNG, additional pipeline capacity is key to ensuring US LNG export facilities can receive increased volumes of natural gas. Currently, there are an additional 28.13 bcf/day of pipeline projects proposed to support LNG demand that end in Texas or Louisiana.<sup>46</sup>

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<sup>39</sup> 2017 NWP 12 Decision Document at 9; 82 Fed. Reg. at 1,884.

<sup>40</sup> 87 Fed. Reg. at 17,282-17,283.

<sup>41</sup> Remarks by President Biden and EU President Ursula von der Leyen in Joint Press Statement, Mar. 25, 2022. Available at: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/25/remarks-by-president-biden-and-european-commission-president-ursula-von-der-leyen-in-joint-press-statement/>

<sup>42</sup> Id.

<sup>43</sup> US Energy Information Administration (“EIA”), US Exported Record Amounts of Liquefied Natural Gas in 2021. Available at: <https://www.eia.gov/todayinenergy/detail.php?id=51818#:~:text=U.S.%20exports%20of%20liquefied%20natural,most%20recent%20Natural%20Gas%20Monthly>

<sup>44</sup> EIA, US Liquefaction Capacity. Available at: <https://www.eia.gov/naturalgas/data.php#imports>

<sup>45</sup> Id.

<sup>46</sup> Id.



**2. *Reopening NWP 12 for potential revisions on “all aspects of NWP 12”<sup>47</sup> unnecessarily could have a chilling effect on vital energy projects and long-term investment decision at a time when harnessing American energy is critical to national security.***

The United States oil and natural gas abundance is a strategic asset that we must continue to utilize to strengthen our national security.

The Shale Revolution has brought wealth and prosperity to a wide swath of the US and led the US from being a net oil and gas importer to being a net oil and gas exporter. This growth in domestic production was only possible because the pipeline system was able to expand. Looking forward, the ability to expand the oil and gas pipeline system will continue to be critical. The EIA analysis of the impacts of no additional interstate natural gas pipelines shows that production falls almost 5% and natural gas prices rise by 11%.<sup>48</sup> Importantly, the EIA finds that “total CO2 emissions from all fuel sources are only 34 million metric tons (“mmt”) (0.7%) lower in the No Interstate Pipeline Builds case than in the Reference case in 2050.”<sup>49</sup> This is due, per the EIA, to the substitution of coal to generate electricity in the face of rising natural gas prices, which counters the reduction in CO2 emissions related to natural gas production and use.

Given the current dynamics with the energy markets as well as the nation’s energy demands and the oil and natural gas industry’s reliance on NWP 12 for permitting projects with minimal impacts, this is not the time for considering “going beyond the current construct towards what any new or revised NWP 12 should look like.”<sup>50</sup> Any attempts to reopen NWP 12, whether it be as part of a formal review or actual rulemaking, could have a chilling effect on vital energy projects leading to unintended consequences that could be felt across the nation.

The oil and natural gas industry depends on regulatory certainty when making long-term investment decisions for meeting the domestic energy needs of the nation and supporting our allies. Aside from new construction of utility lines, there is also ongoing maintenance and repair needed for the upkeep of this complex infrastructure system spread across the nation that NWP 12 facilitates through streamlined permitting.

Reopening NWP 12 at this time could result in undue delays, and any additional burdensome permitting processes could create uncertainty and add further obstacles to attracting investment for needed energy infrastructure and hamper our ability to address global energy needs and support our allies. Ultimately, the added cost and delays could harm not only the project sponsor, but could also hinder access to affordable energy for everyday consumers and businesses.

We ask the Army to remain committed to working in the national interest to promote the safe and clean development of the nation’s vast energy sources, and to continue to facilitate the authorization of NWPs in a timely and cost-effective manner that will serve both the USACE and the regulated community.

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<sup>47</sup> Id.

<sup>48</sup> EIA, Exploration of the No Interstate Natural Gas Pipeline Builds Case. March, 2022. Available at: [https://www.eia.gov/outlooks/aeo/IIF\\_pipeline/pdf/AEO2022\\_IIF\\_pipelines.pdf](https://www.eia.gov/outlooks/aeo/IIF_pipeline/pdf/AEO2022_IIF_pipelines.pdf)

<sup>49</sup> Id. at 6.

<sup>50</sup> 87 Fed. Reg. at 17,282.

**C. Framing issues of concern for “potential revisions to NWP 12, including potential off-ramps, to address the type of concerns raised” in one withdrawn pipeline project misses the wider context, and is an unreasonable basis for modification at the national level.**

The Notice places undue emphasis on one project that has long been withdrawn as the basis for “potential revisions to NWP 12, including potential off-ramps.”<sup>51</sup> This language is deeply concerning and indicates further singling out of oil and natural gas activities without any legal or technical justification.

Climate change impacts, drinking water impacts, notice to impacted communities, and environmental justice are specific issues of concerns noted by the Army and while we appreciate the gravity of these concerns, we respectfully note that these issues should be properly considered within the context of the USACE’s limited authority, the existence and efficacy of other regulatory frameworks, and the USACE’s own assessments in its prior rulemakings and decision documents.

In fact, even the USACE acknowledges that “there is not a single Federal agency charged with the responsibility for regulating oil pipeline routes or construction as well as the fact that the Corps has limited statutory authorities for construction of such pipelines in jurisdictional waters.” But the Army then notes that it is not precluded from considering alignment of NWP 12 with Administration priorities and policies.

Certainly, the APA and case law allows for a policy shift from past rulemaking decisions but there are legal parameters that the executive branch cannot exceed. So long as “the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”<sup>52</sup> An agency must also give “a reasoned explanation for [its] change.”<sup>53</sup> In addition, an agency is held to a higher standard when its “new policy rests upon factual findings that contradict those which underlay its prior policy” or “when its prior policy has engendered serious reliance interests that must be taken into account.”<sup>54</sup>

In the context of the four issues raised as concerns in the Notice, we provide the following observations.

First, climate change impacts are discussed by the USACE in its decision documents, but ultimately, the USACE has consistently determined:

Although some activities authorized by various NWPs may be associated with energy production, distribution, and use, the Corps does not have the authority to regulate or control the production, distribution, or combustion of hydrocarbons and other materials

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<sup>51</sup> Id.

<sup>52</sup> National Ass’n of Homebuilders v. EPA, 682 F.3d 1032, 1043; See also Chevron USA Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865 (1984) (“[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”). See also API et al., Comments on Proposed WOTUS Rule, Apr. 15, 2019, pp. 16-17.

<sup>53</sup> Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016). (citations omitted). See National Ass’n of Homebuilders v. EPA, 682 F.3d 1032, 1043 (D.C. Cir. 2012).

<sup>54</sup> FCC v. Fox Tel. Stations, Inc., 556 U.S. 502, 515 (2009).

[that] are sources of carbon dioxide and other greenhouse gases that contribute to global climate change.<sup>55</sup>

Second, drinking water impacts are already considered as part of the public interest factors discussed in the decision document for NWP 12. And it is important to note that the USACE does not have the legal authority to enforce the Safe Water Drinking Act. In fact, the USACE has consistently determined that, “[p]ublic water systems source water areas are generally watersheds, and the Corps does not have the authority to regulate activities in uplands in these watersheds that may affect water supplies for communities.”<sup>56</sup> In addition, there is general condition 7 that states that, “[n]o activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.” The USACE also provides discretionary authority to those NWP activities that require PCNs where “the district engineers can consider effects to water supplies caused by regulated activities, as one of the Corps’ public interest review factors (*i.e.*, water supply and conservation at 33 CFR 320.4(m)) that can be a basis for exercising discretionary authority.”<sup>57</sup> The USACE found that, the district engineer’s review process is more than adequate to ensure that “the proposed activities comply with all applicable general conditions, including general condition 7, water supply intakes.”<sup>58</sup>

Third, the issue of notice to local communities is constrained by the requirements of CWA Section 404(e). As discussed below in response to Army’s question 3, it would simply be unprecedented and an unreasonable agency action to add NWP 12-specific notice and opportunity provisions that exceed the current CWA-appropriate notice and comment requirements. For one, all NWPs follow the same notice requirement at the national level and not at the individual project level.<sup>59</sup> Any attempts to target oil and gas activities for additional public participation requirements would be arbitrary and capricious. Also, permitting of a pipeline does not occur in the vacuum of a NWP 12 authorization alone but can require numerous other federal, state, and local authorizations which can include mechanisms that trigger further regulatory reviews and public participation opportunities.

Fourth, there are no statutory requirements that mandate environmental justice review. But as discussed below in response to the Army’s question 7, there are reviews undertaken by the USACE that assure that environmental justice is adequately considered. In addition, the USACE has issued interim guidance and direction to the USACE Civil Works programs related to the implementation of all civil works programs and missions, other than the “Regulatory Program.”<sup>60</sup> The USACE states that “[s]eparate guidance will be forthcoming to address environmental justice in the Regulatory Program.”<sup>61</sup> As such, any environmental justice changes to NWP 12 regulatory requirements would be premature at this

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<sup>55</sup> 86 Fed. Reg. at 2,755.

<sup>56</sup> Id. at 2,753.

<sup>57</sup> Id.

<sup>58</sup> 82 Fed. Reg. at 1,971.

<sup>59</sup> See 33 CFR Section 330.5 (d)(3) (The district engineer need not issue a public notice when asserting discretionary authority over a specific activity). Public notice procedures by the chief engineer at the national level are provided under 33 CFR Section 330.5(b)(2). See also, 33 CFR Section 330.5(c) (Certain public participation opportunities are also specified for division engineer’s use of his discretionary authority to modify, suspend, or revoke NWP authorizations for specific geographic areas, class of activities, or class of waters).

<sup>60</sup> USACE Memorandum, Implementation of Environmental Justice and the Justice40 Initiative, Mar. 15, 2022.

<sup>61</sup> Id.

time. We recommend the USACE wait until this guidance as applicable to the regulatory program is issued, and then seek comments as part of the overall NWP reissuance proposal.

Environmental justice and climate change issues are discussed further in response to Army's question 7, public notice concerns are discussed in response to Army's question 3, and these issues along with drinking water concerns are discussed in response to Army's question 9.

**D. The Army's Notice fails to consider benefits associated with NWP 12-authorized activities that align with EO 13990's priorities.**

The Notice raises a limited list of concerns identified in EO 13990 and solicits comments on potential revisions related to these concerns. However, there is no consideration given to the benefits provided by NWP 12. As the Army seeks alignment with the priorities set forth in EO 13990 which includes key policy goals such as to listen to the science, to improve public health and protect our environment, to ensure access to clean air and water, and to hold polluters accountable, it is important to recognize that NWPs are subject to numerous terms, conditions, and limits to ensure that they have minimal adverse environmental effects.<sup>62</sup>

A reasonable and fair review of the NWP 12 program to-date would find that its terms and conditions do reflect the Administration's policy "to listen to the science." Moreover, regional conditioning and flexibility provided to the division engineers and district engineers under the NWP program to assess regional and site-specific characteristics of the affected aquatic resources make it clear that NWP 12 is structured with additional assurances for meeting CWA's objectives. In fact, as the USACE has consistently found, the NWP 12 is a valuable asset which "provides incentives to project proponents to design their activities to avoid and minimize adverse impacts to jurisdictional waters and wetlands to qualify for the streamlined NWP authorization" and that NWPs "are an important tool for adapting to the effects of climate change, by authorizing a variety of activities such as utility line crossings . . . ."<sup>63</sup>

Overall, as part of its formal review, we encourage the Army to provide a fair assessment of NWP 12 showing that the USACE has managed a robust and rigorous NWP program that has resulted in the safe and effective utilization of NWP 12 for qualifying activities. Adding "off-ramps" to limit the use of NWP 12, and requiring more individual permits, would actually preclude alignment with the Administration's priorities and policies.

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<sup>62</sup> EO 13990, 86 Fed. Reg. 70,387, Jan. 25, 2021; See 87 Fed. Reg. at 17,282; 33 CFR Parts 325 and 330; 33 CFR Section 330(2)(c).

<sup>63</sup> 82 Fed. Reg. at 1,862, 1,864. Note that NWP 12 also authorizes utility line activities used to convey renewable natural gas. See 86 Fed. Reg. at 2,820.

## V. SPECIFIC COMMENTS TO THE NINE GUIDEPOST QUESTIONS

**A. Should the Corps consider the utilization of the procedures in 33 CFR Section 330.5<sup>64</sup> in advance of the current cycle for nationwide permit review?**

**1. *NWP 12 should not be arbitrarily singled out for rulemaking in advance of the current cycle but instead should be considered and reissued with all NWPs in the same cycle with the current expiration date of March 14, 2026.***

While we understand that the USACE has the authority to reopen NWPs at any time, the USACE specifically took the proactive and helpful step to put all 57 NWPs on the same expiration date. The USACE stated clearly that, “[e]stablishing the same expiration date for 16 NWPs issued in January 2021 and the 41 NWPs issued in today’s final rule will help provide consistency and clarity to the regulated public and the Corps, and align all of the NWPs in terms of scheduling the next rulemaking to issue or reissue the NWPs.”<sup>65</sup>

These stated goals of providing consistency and clarity to the regulated public are fundamental to the NWP program and assure regulatory certainty. The USACE should continue to firmly stand behind these policy objectives and keep all 57 NWPs in the same cycle and the same expiration date.

We understand that in the final rule the USACE noted that it may take steps to rescind, revise, or suspend one or more NWP prior to that time<sup>66</sup> but targeting NWP 12 alone is a mistake. NWP 12 is “similar in nature” to the point of being virtually identical to threshold terms and conditions to other NWPs that regulate linear utility line activities. Core definitions such as each crossing considered a single and complete project for the purpose of NWP authorization is central not just to NWP 12 but also to the new NWP 57 and NWP 58. All of these NWPs serve important functions, and should be considered and reissued together.

We strenuously objected to the NWP 12 split and the USACE concurred with similarities in the three NWPs but stated that, “[t]he proposal to issue three separate NWPs for utility line activities instead of reissuing NWP to authorize all utility line

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<sup>64</sup> As discussed above, 33 CFR Section 330.5 sets out procedures for issuing and reissuing NWPs and for modifying, suspending, or revoking NWPs by the chief engineer, the division engineers, and the district engineers. The issuance or reissuance of new or existing NWPs require public notice and preparation of applicable NEPA documentation and Section 404(b)(1) Guidelines compliance analysis under 33 CFR Section 330.5(b). In addition, the APA procedures, including a notice and comment rulemaking, are used to promulgate the terms and conditions of NWPs in any reissuance package. See for e.g. 78 Fed. Reg. 5,726, 5,727 (Jan. 28, 2013) (noting USACE’s longstanding compliance with APA requirements). Also, the division engineers and district engineers may use their discretionary authority but those decisions must take into account factors and procedures set out in 33 CFR Section 330.5(c) and (d).

We interpret the Army’s question 1 to concern whether to utilize the procedures under 33 CFR Section 330.5(b) to initiate rulemaking outside of the current cycle per the procedures set forth under the APA and USACE regulations. On the remaining sections of 33 CFR Section 330.5(c) and (d), we believe that regional or case-specific reviews should remain within the reasonable discretion of the division engineers and district engineers (See Army’s question 4).

<sup>65</sup> 86 Fed. Reg. at 73,523.

<sup>66</sup> Id.

activities was made, in part, in response to concerns about regulatory uncertainty for various utility line sectors.”<sup>67</sup> While we find this justification flawed and lacking, regulatory uncertainty remains a key concern of this formal review and we ask the USACE to keep the status quo at this time.

Considering NWP 12 separately could cause undue hardship to the regulated community as well as agency staff and result in delays in the planning and processing of projects. Project planning can take anywhere from three months to three years or more, and Irregular or abrupt changes in NWP requirements can result in a complete recycle of a project. Recycling a project can significantly impact essential energy production, transportation, and development. In addition, the NWP program contemplates the use of multiple NWPs at a site and the USACE even provided the scenario that “if a project proponent proposes to construct a water line next to an oil or natural gas pipeline,” general condition 28 would apply, and “both NWP 58 and [NWP] 12 could be used, as long as the loss of waters of the United States at each single and complete project does not exceed 1/2-acre.”<sup>68</sup> Yet, if the NWP 12 is subject to more onerous conditions, it could potentially delay an entire infrastructure project that encompasses various elements of utility lines or even result in potentially different outcomes for utility line activities with same impacts at the same location. Depending on the NWP that is being requested, one could receive a green light easily or be stalled or disapproved. This is just one example illustrating a fundamentally unfair and an unreasonable use of USACE’s authority for regulating “similar in nature” activities.

Also, the USACE recognizes “its lack of authority to regulate the substances being conveyed by those utility lines” but yet, it took steps to authorize various sectors of utility line activities that are differentiated by the substances those utility lines carry.<sup>69</sup> The supporting arguments the USACE makes are thin and stretch the outer bounds of its authorities. We caution the Army against continuing to go down this slippery slope of arbitrarily targeting NWP 12 with a separate rulemaking; and instead to reasonably consider all NWPs, especially NWP 57 and NWP 58 in the same cycle, such that the terms and conditions are applied consistently and provide regulatory certainty for all of the utility line sectors.

***2. As a practical matter, NWP 12 just underwent a major substantive revision and there are no changes in circumstances; proposing another review is premature and will be a burden to the regulatory industry as well as a drain on agency resources.***

The 2021 NWP reissuance was a comprehensive assessment of all existing 52 NWPs and also added 5 new NWPs. Each of the 57 NWPs were accompanied by their own substantive decision documents and underwent additional key assessments including Water Quality Certifications (“WQCs”), Coastal Zone Management Act (“CZMA”) concurrences, ESA compliance, and regional conditioning at the USACE district levels. Over and above the extensive input generated from commenters, this entire effort involved coordination and collaborations across states, tribal, and state governments, and other applicable federal agencies.

At our end, as an example of efforts exerted by stakeholders to meaningfully engage in the process, our efforts involved a comprehensive assessment of the proposal as well as tracking of USACE districts’ varying comment periods posted in different locations, and ultimately submitting comments on draft regional conditions in 44 states and 2 US territories.

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<sup>67</sup> Id. at 2,780.

<sup>68</sup> Id.

<sup>69</sup> Id.

The USACE then reviewed the extensive comments received and prepared a final rule with a substantive response to comments. The response to comments was comprehensive and demonstrated the USACE's thoroughness in providing explanations with which we may not agree with but provide an illustration of the vast staff time used to prepare these final documents.

It is clear that all of these steps engaged tremendous resources of the USACE and other agencies as well as stakeholders; and proposing another review so soon is not only unnecessary but as a practical matter, will be a further drain on these limited resources for all involved without any apparent benefits.

**B. Should modifications be considered to further ensure NWP 12 has no more than minimal individual and cumulative adverse environmental effects under Section 404(e) of the Clean Water Act?**

***1. NWP 12 already has been reissued with a determination that it has no more than minimal individual and cumulative adverse environmental effects under Section 404(e) of the CWA; and no further modifications are necessary for a NWP that meets the underlying requirements.***

As the USACE has stated, “[a]nother requirement of [S]ection 404(e) of the Clean Water Act is that general permits, including NWPs, authorize only those activities that result in no more than minimal adverse environmental effects, individually and cumulatively,” and “[t]he terms and conditions of the NWPs, such as acreage limits and the mitigation measures in some of the NWP general conditions, are imposed to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.”<sup>70</sup> In addition, “[t]he various terms and conditions of these NWPs, including the NWP regulations at 33 CFR Sections 330.1(d) and 330.4(e), allow district engineers to exercise discretionary authority to modify, suspend, or revoke NWP authorizations or to require individual permits, and ensure compliance with [S]ection 404(e) of the Clean Water Act.”<sup>71</sup> These determinations apply to the NWP program as well as to NWP 12, and were not new to the 2021 reissuance, but reflect prior USACE practice across many different administrations.

As to the issue of cumulative effects analysis, “the assessment of cumulative effects under the Corps’ public interest review occurs at three levels: National, regional, and the verification stage.”<sup>72</sup> For NWP 12 as with other NWPs, a national scale cumulative effects analysis is undertaken during the reissuance process. Next, before the final NWPs go into effect, division engineers will issue supplemental documents to evaluate environmental effects on a regional basis (*e.g.*, state or Corps district).<sup>73</sup> As the USACE explains, “[t]he supplemental documents are prepared by USACE districts, but must be approved and formally issued by the appropriate division engineer, since the NWP regulations at 33 CFR Section 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations for any specific geographic area within his or her division.”<sup>74</sup>

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<sup>70</sup> 86 Fed. Reg. at 2,857.

<sup>71</sup> *Id.* at 2,843.

<sup>72</sup> *Id.* at 2,842.

<sup>73</sup> *Id.* See supplemental documentation requirements under 33 CFR Section 330.5(c)(1)(iii).

<sup>74</sup> *Id.*

Next, “[w]hen a district engineer issues a verification letter in response to a PCN or a voluntary request for a NWP verification, the district engineer prepares a brief decision document” that “explains whether the proposed NWP activity, after considering permit conditions such as mitigation requirements, will result in no more than minimal individual and cumulative adverse environmental effects.”<sup>75</sup> “If the NWP is not suspended or revoked in a state or a Corps district, the supplemental document includes a certification that the use of the NWP in that district, with any applicable regional conditions, will result in no more than minimal cumulative adverse environmental effects.”<sup>76</sup>

Once NWPs are issued, the USACE works within a particular geographic area to assess how well the NWPs are working. As the USACE states, “[t]he Corps staff that evaluate NWP PCNs that are required by the text of the NWP or by NWP general conditions or regional conditions imposed by division engineers, or voluntarily submitted to the Corps district by project proponents to receive written NWP verifications, often work in a particular geographic area and have an understanding of the activities that have been authorized by NWPs, regional general permits, and individual permits over time, as well as the current environmental setting for that geographic area.”<sup>77</sup>

This practice was also noted in the 2017 NWPs: “The Corps tracks the use of the NWPs, especially the NWP PCNs and the activities voluntarily reported to Corps district offices that do not require PCNs, to assess the NWP program’s incremental contribution to cumulative environmental effects.”<sup>78</sup>

The ability of division engineers and district engineers to revoke, modify, or suspend NWPs provides a safeguard to ensure that the activity will have only minimal individual and cumulative adverse effects on the environment. The USACE explains the process succinctly:

If the Corps district staff believe that the use of an NWP in that geographic region may be approaching a threshold above which the cumulative adverse environmental effects for that category of activities may be more than minimal, the district engineer may either make a recommendation to the division engineer to modify, suspend, or revoke the NWP authorization in that geographic region in accordance with the procedures in 33 CFR 330.5(c). Alternatively, under the procedures at 33 CFR 330.5(d), the district engineer may also modify, suspend, or revoke NWP authorizations on a case-by-case basis to ensure that the NWP does not authorize activities that result in more than minimal cumulative adverse environmental effects.<sup>79</sup>

Simply put, in addition to the rigorous cumulative effects analysis undertaken to support the reissuance of NWP 12, there are several opportunities for considering cumulative impacts at the district level that further help to meet the requirements of CWA Section 404(e).

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<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Id.

<sup>78</sup> 82 Fed. Reg. at 1,969.

<sup>79</sup> 86 Fed. Reg. at 2,842.



**C. Should modifications to NWP 12 be considered to provide notice to and an opportunity to be heard by potentially impacted communities, particularly with regard to environmental justice communities?**

- 1. Under CWA Section 404(e), notice and an opportunity for public hearing is available at the national level, but unlike standard permits, NWPs authorize activities without the requirement for public notice and comment on each proposed activity and considering any NWP 12 specific notice modifications would be out of bounds.**

As noted by the USACE, “[u]nlike standard permits, NWPs authorize activities without the requirement for public notice and comment on each proposed activity.”<sup>80</sup> Instead, CWA Section 404(e) “provides the statutory authority for the Secretary of the Army, **after notice and opportunity for public hearing, to issue general permits on a nationwide basis** for any category of activities involving discharges of dredged or fill material into waters of the United States for a period of no more than five years after the date of issuance (33 U.S.C. 1344(e)).”<sup>81</sup> Further modifications for additional notice at the district level and/or for each proposed activity would be unprecedented and outside the statutory bounds.

Consistent with the USACE’s policy as stated in the 2017 NWPs reissuance, “[r]equiring the solicitation of public comment on case-specific NWP activities would be contrary to the streamlined process envisioned by [S]ection 404(e) of the Clean Water Act.”<sup>82</sup>

In addition, given that there is a consistent process for notice and public hearing opportunity outlined in the CWA for the NWP program, expanding public participation requirements for only NWP 12 activities could be deemed an arbitrary and capricious act under the APA, making NWP 12 vulnerable to potential legal challenges.

- 2. As a practical and administrative matter, the USACE is not precluded from improving transparency in its regional conditioning process and we encourage such efforts.**

Notwithstanding legal constraints, as a matter of practical application, we have consistently supported greater transparency in the NWP regional conditioning process to aid the public in participating effectively.

We had previously recommended a single lead contact with oversight responsibility to ensure consistent interpretation of conditions across the entire project. To that end, we appreciate the May 15, 2018 Memorandum titled “Designation of a Lead USACE District for Permitting of Non-USACE Projects Crossing Multiple Districts or States” which has established a policy for designating a lead district for activities that require USACE permits that cross district or state boundaries.<sup>83</sup> The Lead District is responsible for coordinating the development of the regional conditions.<sup>84</sup> The Lead District can also assist potentially impacted communities with staff being available for questions at a designated district.

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<sup>80</sup> *Id.* at 2,857.

<sup>81</sup> *Id.* at 2,745 (emphasis added).

<sup>82</sup> 82 *Fed. Reg.* at 1,969.

<sup>83</sup> 86 *Fed. Reg.* at 73,524-73,525.

<sup>84</sup> *Id.*

Building on the lead USACE district designation, we suggested a team of national subject matter experts that can serve as a resource to district-level staff and assist with providing regulatory interpretations to ensure consistency in applying rules. We continue to support these types of measures to further assist in greater coordination amongst the USACE districts, especially for projects that cross multiple state and district boundaries.

Furthermore, we had requested that the USACE develop a user-friendly display of NWP and all related documents, including regional conditions, Section 401 WQCs, and CZMA consistency concurrences at a central easy-to-find USACE online repository. We also submitted that members of the public should be able to submit comments via one uniform docket number instead of having to locate the individual public notices posted by the districts and then having to separately submit comments to regional comments per processes outlined by individual districts. This would improve transparency in the process in that the public can clearly see the notice for each district and the public would have the opportunity to submit comments electronically for each clearly delineated docket similar to proposed rules process. The public then would be able to view comments that are being posted and the districts should post responses to comments along with final regional comments.

We also recommended that there should be consistency in the format of the public notices and the regional conditions that are being proposed. These tend to vary considerably across the USACE districts and we request that all districts follow a consistent format with sections on regional conditions applying to all activities and regional conditions applying to specific NWPs. In any future NWP rulemakings, we asked that all enforceable conditions should be clearly provided in one document because it is important for stakeholders to understand the changes that are being made to existing regional conditions.

In responding to these comments, the USACE signaled in the 2021 reissuance its support to improve transparency and that the USACE “is considering revising the regulations governing the regional conditioning process at 33 CFR 330.5(c)” and “[s]pecifically, the Corps is considering whether to require the districts to post and solicit public comment on notices proposing regional conditions in separate dockets at *www.regulations.gov*.”<sup>85</sup> Most recently, in December 2021, the USACE noted that it will post copies of these district public notices in the *www.regulations.gov* under docket number COE–2020–0002.<sup>86</sup>

We are supportive of such administrative changes and in any future NWP reissuance process, we recommend continuing with these efforts to further transparency in the USACE’s processes.

**D. Would it be prudent for the USACE to consider further limits on the NWP 12, PCN requirements, general conditions, and the ability of division engineers and district engineers to modify, suspend, and revoke NWP authorizations to further ensure that the NWP 12 causes no more than minimal cumulative adverse environmental effects at the national, regional, and site scales?**

- 1. *No further limits on NWP 12 are needed because the maximum acreage limit, PCN triggers, general conditions, protective conditions set out in NWP 12, as well as the ability of division engineers***

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<sup>85</sup> 86 Fed. Reg. at 2,759.

<sup>86</sup> *Id.* at 73,568.

***and district engineers to modify, suspend, or revoke NWP authorizations and/or to add regional-specific or case-specific conditions, all help to ensure this NWP causes no more than minimal cumulative adverse environmental effects at the national, regional, and site scales.***

As discussed above in response to Army's question 2, the general conditions, PCN requirements, ½-acre threshold limit, and the discretionary authority of the division engineers and district engineers are all well-established conditions the USACE has come to rely on for meeting the requirements of CWA Section 404(e). This process is set for all NWPs and it would be imprudent to consider further limits on NWP 12.

***2. The ½-acre limit for NWP 12 is a longstanding environmentally protective threshold and should remain unchanged, with each separate and distant crossing of a WOTUS authorized by NWP 12.***

The USACE has historically established maximum acre limits that must be met in order to qualify for certain NWP-activities and those limits together with PCN thresholds and other applicable provisions, are in place to ensure that these activities will result in no more than minimal individual and cumulative adverse environmental effects. For activities under NWP 12 and other similar utility lines, NWPs cannot result in the loss of greater than 1/2-acre of a WOTUS for each single and complete project.

We support remaining consistent with the USACE's long-standing practice articulated in the NWP regulations at 33 CFR Section 330.2(i), that for linear projects, each separate and distant crossing of a WOTUS is authorized by NWP 12 as a single and complete project.<sup>87</sup> And we support maintaining the 1/2-acre limit for each single and complete project for NWP 12.<sup>88</sup>

Since 1988, the USACE has "calculate[d] the 1/2-acre threshold separately for each separate and distant crossing."<sup>89</sup> When the district engineer evaluates the PCN for a linear project, he or she considers the individual crossings of a WOTUS to determine whether they individually satisfy the terms and conditions of NWP 12, as well as the cumulative effects caused by all crossings that require USACE authorization.

We agree with the USACE that the "acreage limit should not apply to the entire utility line because the separate and distant crossings of waters of the United States are usually at separate waterbodies scattered along the length of the utility line, and are often in different watersheds especially for utility lines that run through multiple counties, states, or Corps districts."<sup>90</sup> We also agree with the USACE's evaluation that, "[f]or utility lines that cross the same waterbody (e.g., a river or stream) at separate and distant locations, the distance between those crossings will usually dissipate the direct and indirect adverse environmental effects so that the cumulative adverse environmental effects are no more than minimal."<sup>91</sup>

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<sup>87</sup> 86 Fed. Reg. at 2,777.

<sup>88</sup> Id.

<sup>89</sup> Bostick at No. CIV-12-742-R, 2013 WL 6858685 upholding the "single and complete linear project" definition. The U.S. Court of Appeals for the Tenth Circuit affirmed, upholding the structure and substance of NWP 12. Bostick, 787 F.3d at 1043; See also 33 CFR Section 330.2(i).

<sup>90</sup> 2017 Energy-Related NWPs Review, Sept. 25, 2017, at p. 36.

<sup>91</sup> Id.

The 2017 NWP's justification for retaining the 1/2-acre limit continues to hold true today:

We are retaining the 1/2-acre limit for this NWP because we believe it is an appropriate limit for authorizing most utility line activities that have no more than minimal individual and cumulative adverse environmental effects. Division engineers can modify this NWP on a regional level to reduce the acreage limit if necessary to ensure that no more than minimal adverse environmental effects occur in that region. We do not agree that the acreage limit should apply to the entire utility line because the separate and distant crossings of waters of the United States are usually at separate waterbodies scattered along the length of the utility line, and are often in different watersheds especially for utility lines that run through multiple counties, states, or Corps districts.<sup>92</sup>

In sum, we ask the USACE to remain consistent with its prior position that “the 1/2-acre limit for the NWP's, the PCN review process, and the ability of division engineers to modify, suspend, or revoke the NWP's on a regional or case-specific basis is sufficient for ensuring that the NWP's that have the 1/2-acre limit authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects.”<sup>93</sup>

***3. Existing PCN triggers as well as rigorous PCN documentation submittal requirements for additional district engineer's reviews are more than adequate.***

We understand that PCNs play a key role in giving the USACE the opportunity to evaluate certain proposed NWP activities on a case-by-case basis to ensure that they will cause no more than minimal adverse environmental effects, individually and cumulatively but this must also be balanced with the intent of NWP's. NWP's are intended to regulate with little, if any delay or paperwork, and existing PCNs and supporting documentation requirements are more than sufficient in meeting the CWA requirements.

We recommend that no new PCNs or information submittal requirements are added to the NWP 12 and that in any future rulemaking, the USACE look for opportunities where PCNs burdens can be lessened.

It is important to note that a completed PCN already requires an extensive list of information under general condition 32(b), including a number of additional information requirements added in the 2021 and 2017 rulemakings, for the district engineer's review and assessment of impacts.<sup>94</sup> Most recently in 2017, general condition 32(b)(4)(i) was modified to preemptively require a description of mitigation measures the applicant intends to use to reduce adverse environmental effects caused by the proposed activity regardless of whether any mitigation requirements had been triggered.<sup>95</sup> In addition, there were specific requirements added for linear projects requiring that the PCN should identify all crossings of a WOTUS that require DA authorization as well as PCNs to include the quantity of proposed losses of the WOTUS for each single and complete crossing of those waters.<sup>96</sup>

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<sup>92</sup> 82 Fed. Reg. at 1,885.

<sup>93</sup> 86 Fed. Reg. at 2,753.

<sup>94</sup> General Condition 32(b)(4)(i) and (ii).

<sup>95</sup> 82 Fed. Reg. at 1,968.

<sup>96</sup> *Id.*

General Condition 32(b)(4)(ii) as it stands currently requires project proponents to include in PCNs for linear projects where one or more single and complete crossings require a PCN, the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those waters and wetlands. This quantification also must include those single and complete crossings authorized by an NWP not requiring PCNs.<sup>97</sup> In addition, per the USACE, the new 250-mile PCN requires the location of all non- PCN crossings.<sup>98</sup> The USACE noted that this information would be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project, and would not change those non-PCN NWP activities into NWP PCNs.<sup>99</sup>

The existing PCN triggers together with documentation requirements do not necessitate any further conditions. Specific-NWP 12 related PCN triggers are further discussed below in response to the Army's question 8.

***4. To ensure predictability, ease of administrability, and consistency with other NWPs, general conditions and definitions should remain unchanged; and any revisions should be reissued in the same cycle following notice and comment.***

The Army raises the question of whether additional modifications to general conditions and definitions should be considered for NWP 12; and we would again caution the agencies against taking this step. Fundamentally, creating a different group of conditions for NWP 12 would be arbitrary and capricious given the applicability of the same general conditions and definitions to other NWPs that authorize linear projects. As a practical matter, it would cause enormous regulatory uncertainty and ambiguity, especially if the terms are issued under a new expiration date not aligned with other NWPs. In addition, as discussed below, no additional definitions such as one for "separate and distant" are necessary.

***5. NWP 12 already includes a robust set of general conditions and specific terms that are environmentally protective and no further limits are required.***

The existing robust collection of NWP 12 terms sufficiently prevent and/or mitigate environmental impacts of pipeline/utility projects such as the 1/2-acre limit for NWP 12, PCN thresholds that trigger additional reviews, and a general prohibition against any change in pre-construction contours of jurisdictional waters.

There are key conditions in NWP 12 and other similar NWPs that regulate the use of temporary mats, provide for remediation of inadvertent returns of drilling fluids during horizontal directional drilling activities, and specify trench excavation and backfilling requirements.

NWP 12 is also subject to enforceable requirements within the general conditions that apply uniformly and are in addition to the terms of the specific NWP. These include: general condition 11, relating to equipment, requires that heavy equipment working in wetlands or mudflats be placed on mats, or other measures must be taken to minimize soil disturbance; general condition 12, relating to soil erosion and sediment controls, has additional protective requirements during construction; general condition 13, relating to temporary fills and structures, requires that temporary fills and structures must be removed in their entirety and the affected areas returned to the pre-construction elevations and for the affected areas to be revegetated; and general condition 14, relating to proper maintenance, requires NWP activities

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<sup>97</sup> General Condition 32(b)(4)(iii). 86 Fed. Reg. at 2,777.

<sup>98</sup> 86 Fed. Reg. at 2,777.

<sup>99</sup> Id. at 2,873.

to be maintained to ensure public safety. Additional general conditions, such as general condition 19, require compliance with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act.

Supplemental regional and district-specific conditions can also be added if appropriate. In fact, as our review found in 2020 and 2021, additional NWP 12-specific regional conditions are included by many USACE districts.

**6. For any future reissuance rulemaking, we submit clarifying comments consistent with our prior submittals.**

- a. Overall, for durability, we recommend generally to keep NWPs terms and definitions free of any cross references to any particular WOTUS definition as well as not include any standalone definitions from any particular WOTUS rule.**

Any final NWPs should be issued without any reference to internal sections of a particular WOTUS rule or any standalone definitions from a particular WOTUS rule. In other words, the NWPs should remain neutral as to the definition of jurisdictional waters in 33 CFR Part 328 and should not require any additional rulemaking based on any revision to the WOTUS definition in effect.

- b. NWP 12 Note 2 should remained unchanged, as it clarifies concepts such as “single and complete project,” “single and complete non-linear project,” “independent utility,” and the interaction of the NWPs with individual permits.**

We support the NWP 12 Note 2 which is based on the NWP regulations that were published in 1991 and represent long-standing practices in the NWP program.<sup>100</sup> These regulations include the definition of “single and complete project” at 33 CFR Section 330.2(i)<sup>101</sup> and the provision on combining NWPs with individual permits at 33 CFR Section 330.6(d).

We are also supportive of the USACE’s definitions as relating to “single and complete linear project,” “single and complete non-linear project,” and “independent utility,” and recommend that these definitions be reissued with no revisions.

Additionally, we appreciate the USACE’s explanation that “[t]he concept of independent utility does not apply to individual crossings of waters of the United States for linear projects because each separate and distant crossing of waters of the United States is necessary to transport people, goods, or services from the point of origin to the terminal point.”<sup>102</sup>

In the 2017 NWPs, the USACE correctly declined to define this term “separate and distant” because as the USACE explained, it depends on a variety of factors and is best determined on a case-by-case basis.<sup>103</sup> The 2021 NWPs also noted the same:

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<sup>100</sup> See discussion above.

<sup>101</sup> The “single and complete” definition was first adopted in 1988 regulatory guidance and then in 1991, codified through notice and comment rulemaking. 56 Fed. Reg. at 59,113-59,114; 33 CFR Section 330.2(i).

<sup>102</sup> 82 Fed. Reg. at 1,951.

<sup>103</sup> Id. at 1,978.

The Corps declines to define the phrase “separate and distant” because what constitutes separate and distant crossings can vary across the country because of differences in the distribution of waters and wetlands in the landscape, local hydrologic conditions, local geologic conditions, and other factors. What constitutes separate and distant crossings is more appropriately determined by district engineers on a case-by-case basis. When reviewing a PCN, the district engineer considers the cumulative effects of all crossings of waters of the United States for the oil or natural gas pipeline activity, and applies the 10 criteria listed in paragraph 2 of Section D, District Engineer’s Decision.<sup>104</sup>

***c. NWP 12 should continue to authorize the remediation of inadvertent returns of fluids during drilling operations, without additional changes.***

In most instances, horizontal directional drilling crossings under a WOTUS do not require CWA Section 404 authorization because these types of crossings avoid any discharge of dredged or fill material into a WOTUS and thus do not trigger the USACE’s CWA jurisdiction. The avoidance of discharges into a WOTUS is beneficial to the environment. If a horizontal directional drilling crossing has an inadvertent return of drilling fluid during installation of the pipeline, that inadvertent release is regulated by other agencies under CWA Section 402, and is outside the scope of the USACE’s Section 404 authority because drilling fluid is not dredged or fill material. As the USACE stated, it does not have jurisdiction over inadvertent returns, leaks, or spills that may occur during horizontal directional drilling to install or replace oil or natural gas pipelines.”<sup>105</sup>

In the event of an inadvertent release of drilling fluid, other regulatory agencies will respond and work with the permittee to develop a remediation plan to contain the release and repair any damage. If the remediation plan includes activities that involve discharges into a WOTUS, then to ensure that the remediation plan can be efficiently and effectively authorized and to minimize impacts to aquatic resources, the USACE modified NWP 12 in 2017 to allow for any necessary remediation activities in the WOTUS.<sup>106</sup>

We support allowing NWP 12 to continue to authorize activities associated with remediation of inadvertent returns of drilling fluids that may occur during horizontal directional operations to install utility lines. In addition, district engineers may add special conditions or case-specific conditions, where there is the possibility of inadvertent returns, requiring activity-specific remediation plans to address these situations, should they occur during the installation or maintenance of the utility line. This approach ensures appropriate mechanisms are in place should an inadvertent release of drilling fluid occur. As the USACE notes, the purpose of this section is to provide authorization for regulated activities that are necessary to remediate inadvertent returns of drilling fluids to reduce adverse environmental effects that might be caused by releases of drilling fluids to the surrounding environment.<sup>107</sup>

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<sup>104</sup> 86 Fed. Reg. at 2,778.

<sup>105</sup> *Id.* at 2,771.

<sup>106</sup> 82 Fed. Reg. at 1,883, 1,887.

<sup>107</sup> *Id.*

***d. NWP's specific provisions relating to the use of temporary mats should remain.***

The 2017 NWP 12 added provisions relating to the use of temporary mats which were continued in 2021 and we ask for this condition to be retained in any new rulemaking. It adds further clarity to temporary structures and fills requirement by including the use of temporary mats which helps to minimize impacts of utility line activity. We ask the USACE to continue retaining this provision.

***e. NWP 12 should continue to be allowed to be used to authorize emergency installation, replacement or repair of utility lines, including time-sensitive inspection and repair activities.***

NWP 12 is an important permitting tool for authorizing emergency activities for installing, replacing, or repairing utility lines.<sup>108</sup> The USACE's emergency procedures are provided in 33 CFR Section 325.2(e)(4).

We had asked in our comments for the USACE to clarify that pipeline integrity digs in certain circumstances qualify as an "emergency" as defined under 33 CFR Section 325.2(e)(4) and these types of activities that fall within defined conditions disturbing less than 1/10-acre of jurisdictional water should proceed swiftly without a PCN. Integrity digs are key components of comprehensive pipeline integrity systems for evaluating the condition of pipelines and require taking prompt steps under stipulated timeframe if repairs or other action are necessary.<sup>109</sup>

The USACE declined to make any changes but we appreciate its response considering integrity digs as maintenance authorized under NWP 12:

The Corps does not believe that it is necessary add text to the NWP to specifically address integrity digs, because discharges of dredged or fill material into waters of the United States for integrity digs can be considered part of maintenance, which is included in the first sentence of this NWP.<sup>110</sup>

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<sup>108</sup> The 2000 NWP preamble explains in a response to questions about NWP 12 concerning emergency authorization for utility line activities that: "This NWP can be used to authorize the emergency installation, replacement, or repair of utility lines in WOTUS. Emergency procedures for the [USACE] regulatory program are discussed in 33 CFR Section 325.2(e)(4)." 65 Fed. Reg. 12,818, Mar. 9, 2000, at 12,844.

<sup>109</sup> Note that the Pipeline Safety Improvement Act of 2002 directs federal agencies to coordinate certain pipeline repairs to be conducted either immediately, within 60 days or within 180 days by regulation, and that there is a need for coordinated effort among the agencies to allow the permitting activities associated with those pipeline repairs to happen expeditiously to allow compliance with those regulations. USACE, Memorandum of Understanding on Coordination of Environmental Reviews for Pipeline Repair Projects, May 2004.

<sup>110</sup> 86 Fed. Reg. at 2,770.



***f. NWP 12 should continue to authorize utility line maintenance and repair activities beyond CWA Section 404(f).***

NWP 12 (as well as NWP 3) authorizes utility line maintenance and repair activities that do not qualify for the CWA Section 404(f)(1) exemption for maintenance of currently serviceable structures. CWA Section 404(f) provides broad exemption applicable to currently serviceable structures including transportation structures. This is an important exemption for our industry as timely repairs to pipelines as part of normal maintenance activity reduce the potential for spills or leaks in the WOTUS.

***g. District engineers and division engineers are authorized to modify, suspend, or revoke NWP authorization on a case-specific basis as well as to create region conditions; and no further limits on its authority are needed.***

As discussed above and in past USACE rulemakings, it is clear that the district engineers are best able to consider case-by-case scenarios where waivers or where additional conditions may be appropriate and reasonable.<sup>111</sup> Both the division engineers and district engineers should retain their authority to modify, suspend, or revoke specific NWPs on a regional basis or consider case-by-case scenarios where waivers are reasonably appropriate. This discretionary authority applies to all NWPs, is longstanding, and should continue to operate as intended.

The division engineer's and district engineer's discretionary authority is peppered throughout the key terms and conditions of NWP 12 providing flexibility to address specific characteristics of the affected aquatic resources.<sup>112</sup> For example, the district engineer has the discretion to determine compensatory mitigation on a case-by-case basis for NWP activities (which can in addition include additional on-site avoidance and minimization of adverse impacts to jurisdictional waters). This process recognizes regional variations and places responsibility at the USACE district level. Any mandatory requirements requiring certain types of compensatory mitigation could remove the innovative intent behind compensatory mitigation to seek creative, cost-effective solutions to address wetlands impacts.

There is no need for changing this well-established process by adding any mandatory or any additional monitoring requirements or specific provisions limiting the use of waivers on nationwide level. No further limits are necessary on the district engineer's authority except that we ask that the USACE continue to promote consistency and reasonableness in the use of this discretionary authority. We recognize the need for conditioning based on regional variations but we would also encourage greater consistency and coordination in applying fundamental regulatory requirements amongst the USACE's districts.

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<sup>111</sup> See detailed discussion in the 2021 and 2017 NWP Final Rules.

<sup>112</sup> 82 Fed. Reg. at 1,869-1,870.

**E. Should distinctions be drawn between new construction of oil and natural gas pipelines and maintenance of existing oil and natural gas pipelines?**

- 1. *Both new construction of oil and natural gas pipelines and maintenance and repair of existing oil and natural gas pipelines are important elements of energy infrastructure projects, and NWP 12 authorizations should be available for both types of qualifying activities without the addition of burdensome requirements that require new and lengthy permitting reviews.***

NWP 12 has long authorized activities required for the construction, maintenance, repair, and removal of utility lines in the WOTUS with the same conditions and terms applying to any of these authorized activities. We do not believe that any arbitrary distinctions should be drawn between new construction of oil and natural gas pipelines and maintenance of existing oil and natural gas pipelines as a basis for adding further limits to existing requirements.

To-date, both new construction and maintenance activities for NWP 12 have been authorized with requirements for environmental protection being the same for new construction and maintenance activities. For example, both activities have the same acreage thresholds and include the requirement that there must be no change in pre-construction contours of the WOTUS.

The only departure from this consistent application has been in the 2021 NWP 12 which added a new PCN trigger for new installation of oil and natural gas pipelines that are greater than 250 miles in miles. There was no such requirement added for other similar NWPs that also authorize new construction of utility lines. We strenuously objected to this arbitrary requirement in our comments to the 2020 proposal, and we would again ask the Army to hold the line against any further singling-out of NWP 12 activities related to new pipelines or otherwise.

Adding more onerous requirements or arbitrary distinctions for NWP 12 for activities relating to new construction of pipelines would be arbitrary and capricious and also would introduce further delays and uncertainties to much needed energy infrastructure projects.

The USACE responded to many comments relating to the 250-mile distance PCN and stated without any support that, “[t]he maintenance of existing oil or natural gas pipelines is likely to have fewer adverse environmental effects than the construction of new oil or natural gas pipelines, because those maintenance activities occur to existing pipelines for which some degree of adverse environmental effects has already occurred and a current environmental setting that includes the existing pipeline.”<sup>113</sup> For one, this argument appears to be limited to oil or natural gas pipelines but given this logic, could apply to any new construction of utility lines that disturbs new areas but yet the targeted NWP was only NWP 12.

Another key point is that both the construction and maintenance of pipelines can be only authorized for activities with minimal impact and if there are adverse environmental impacts, that would fall within the district engineer’s discretionary authority. In fact, there are very specific requirements and constraints for the use of NWP 12 which apply equally to both new construction and maintenance activities and these requirements have been found to meet the CWA Section 404(e) requirements.

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<sup>113</sup> 86 Fed. Reg. at 2,777.

Definitions of new construction versus maintenance can also overlap. It is unclear if the USACE would consider replacing old pipelines to be new construction or a maintenance activity under this apparent push for creating distinctions. But what this example demonstrates is that the requirements should remain the same. As the nation faces an aging infrastructure, maintaining pipelines including replacing old pipelines promptly and efficiently is a key step toward protecting the environment.

Overall, allowing for timely construction of new pipelines as well as maintaining existing infrastructures are both equally important to meeting the nation's energy demands. Any delays in both areas due to increased hindrances on the efficient approval processes under NWP 12 for activities with minimal impacts would hurt the nation's economy as well as the everyday consumer.

**F. Should distinctions be drawn between oil pipelines and natural gas pipelines, especially in consideration of differences in overall federal regulation of different types of pipelines?**

**1. *No further distinctions should be drawn between oil pipelines and natural gas pipelines based on differences in overall federal regulation of different types of pipelines.***

We represent both oil and natural gas pipeline interests, and we stand by our position as stated in our prior comments responding to the division of NWP 12, that the USACE has no jurisdiction over the substance conveyed within the utility line because its CWA jurisdiction over NWPs is confined to authorizing the activities related to the discharge of dredged or fill material into jurisdictional waters. The USACE has also stated that, it "does not have the discretion to control the types of substances conveyed by oil or natural gas pipelines or other types of utility lines."<sup>114</sup>

In any reissuance of NWP 12, the USACE should focus on CWA and RHA considerations related to the construction, maintenance, repair, and removal of a utility line within the USACE's scope. A myriad of federal frameworks effectively regulate the transportation of those substances with numerous enforceable measures to appropriately design, site, construct, and monitor these pipelines to prevent and control any releases.

Considering distinctions based on differences in overall federal regulation regarding different types of pipelines would exceed the USACE's authority immeasurably. Administratively, the USACE has limited experience with regulations relating to pipeline contents, and implementing and enforcing any regulation relating to the contents of the pipe should be left to the agencies that deal in these matters routinely.

There are no practical benefits given that environmental protective conditions for all of the utility line NWPs remain almost identical as should be the case for similar activities.

Based on our direct experience and expertise with the oil and natural gas industry, it is our steadfast position that the NWP 12 should continue to be applied for activities regulating utility lines uniformly and without any further limits added for either sectors.

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<sup>114</sup> Id. at 2,783.

**G. Does the NWP 12 verification process ensure that environmental justice and climate change factors are adequately considered?**

**1. *The USACE’s own recent assessment finds that environmental justice issues were adequately considered under EO 12898 during the NWP reissuance process.***

There are no statutory requirements for requiring that the NWP 12 verification process consider environmental justice. As a matter of practice, however, the USACE does conduct a review under EO 12898 which requires that, “to the greatest extent practicable and permitted by law, each federal agency must make achieving environmental justice part of its mission.”<sup>115</sup> And it provides for federal agencies to “conduct its program in a way that such programs, policies, and activities do not have the effect of excluding persons from participation in, denying persons the benefits of, or subjecting persons to discrimination under such programs, policies, and activities because of their race, color, or national origin.”<sup>116</sup> As part of this review, the USACE concluded that, “[t]he NWPs are not expected to have any discriminatory effect or disproportionate negative impact on any community or group, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.”<sup>117</sup>

These assessments are done on NWP-wide basis, and introducing any NWP 12-specific environmental justice limits would be arbitrary and capricious. No separate environmental justice conditions should be considered for NWP 12 alone; and if these issues are considered during the regular cycle, these issues should be limited and within the statutory bounds of the USACE’s authority, and applied to all NWPs equally.

In addition, we are aware that environmental justice initiatives are being considered by the USACE and other applicable agencies. The USACE has provided additional guidance and direction to the Civil Works Program, and is working on a separate guidance for the Regulatory Program “that will be forthcoming.”<sup>118</sup> The Council on Environmental Quality is also planning to address environmental justice issues in Phase 2 of the rulemaking process that will revisit the 2020 NEPA regulations.<sup>119</sup>

Given these variables in play, any changes to the NWP 12 is premature at this time. The USACE should ensure its approach in considering impacts on environmental justice communities is consistent with the adopted federal regulatory actions which align with congressional intent, as well as the underlying legal authorities. In so doing, the USACE will allow project proponents to know what is expected of them and, provide industry with much-needed certainty in the permitting process. Such an approach is particularly warranted in situations such as this, where federal environmental justice policy is undergoing review and re-evaluation.

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<sup>115</sup> 86 Fed. Reg. at 2,859; 82 Fed. Reg. at 1,983.

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> USACE Memorandum, Implementation of Environmental Justice and the Justice40 Initiative, Mar. 15, 2022.

<sup>119</sup> 87 Fed. Reg. 23,453, 23,466 (Apr. 20, 2022).

**2. The USACE's own assessments consistently find that the USACE's authority is limited and within those bounds, climate change factors are adequately considered during the NWP reissuance process.**

API shares with global leaders the goal of reduced greenhouse gas (GHG) emission across the broader economy and, specifically, those from energy production, transportation, and use of society. To achieve meaningful GHG emissions reductions that meet the climate challenge, it will take a combination of policies, innovation, industry initiatives, and a partnership of government and economic sectors. The API Climate Action Framework<sup>120</sup> outlines the oil and natural gas industry action plan to reduce GHG emissions through industry-led solutions, and to actively work on policies that address the risks of climate change while meeting the global need for affordable, reliable, and sustainable energy.<sup>121</sup>

API does not believe that the NWP 12 process needs to be revised with regards to potential climate change factors because of the USACE's limited authority and because of the active policy making by other federal and state regulators in this regard. The USACE has responded to these types of issues raised by commenters in past rulemakings that are similar to concerns noted in this Notice. It has explained its position succinctly and then declined to take any further steps. USACE has said the following: "The Corps has considered climate change during the reissuance of the NWPs, and each of the national decision documents includes a discussion of climate change."<sup>122</sup>

The USACE does not regulate any potential GHG emissions related to projects subject to NWP 12 where the jurisdiction required to do so has been delegated to other agencies and to state bodies. API supports governmental review of GHG emissions related to proposed projects where such review is refined to only address GHG emissions actually caused by the authorization under review, but this review for any potential GHG emissions of projects subject to NWP 12 is beyond the USACE's authority. API is actively involved on the actions of other federal and state regulators that do have authority for the regulation of any potential GHG emissions of projects subject to NWP 12.

The limits of the USACE's authority – and the work of other federal and state regulators – is particularly important for upstream or downstream activities which are outside of the USACE's jurisdiction, generally too speculative and generated by third party activity beyond the ownership and control of the project developer, and are otherwise best addressed by other federal and state regulatory mechanisms.

Furthermore, "the Corps does not have the authority to regulate or control the production, distribution, or combustion of hydrocarbons and other materials [that] are sources of carbon dioxide and other greenhouse gases that contribute to global climate change."<sup>123</sup> These consistent positions of the USACE are not limited to the 2021 rulemaking but are reflected in prior rulemakings under different administrations. The 2017 decision document language stated:

The Corps does not have the legal authority to regulate the burning of fossil fuels that are transported by pipelines where the Corps authorized crossings of waters of the United States by NWP 12, other general permits, or individual permits. Therefore, in its

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<sup>120</sup> API Climate Action Framework. Available at: <https://www.api.org/-/media/Files/EHS/climate-change/2021/api-climate-action-framework.pdf?la=en&hash=E6BB3FA3013B52153E10D3E66C52616E00411D20>

<sup>121</sup> Climate Change. Available at: <https://www.api.org/news-policy-and-issues/climate-change>

<sup>122</sup> 86 Fed. Reg. at 2,755.

<sup>123</sup> Id.

environmental documentation the Corps is not required to fully evaluate the burning of fossil fuels, except to respond to specific comments submitted in response to a proposed rule (in the case of these NWP) or comments submitted in response to a public notice for an individual permit application.<sup>124</sup>

The USACE also stated its position on the use of equipment during construction which we support and highlight as an example where no further limit should be considered given the insignificant contribution to greenhouse gas emissions. The USACE has specifically stated that, “[p]ermittees may use equipment during the construction of the NWP activity that emits carbon dioxide and other greenhouse gases, but those emissions occur during the construction period for the authorized activity and have an insignificant contribution to cumulative greenhouse gas emissions in the region.”<sup>125</sup>

#### **H. Are the PCN requirements for the current NWP 12 adequate?**

***1. The PCN requirements underwent rigorous scrutiny during the NWP 12 reissuance, and the two reissued PCNs, together with the acreage limits and protective general conditions that trigger PCNs as well as the division engineer's discretionary authority to add PCN requirements through regional conditions where appropriate, are more than adequate in meeting the CWA Section 404(e) requirements.***

As a threshold matter, all of the PCN requirements must be considered within the scope of the overall NWP program which is to regulate certain federally regulated activities with little, if any, delay or paperwork. NWP 12 already has three PCNs that require additional extensive documentation requirements and district engineer’s review.

In addition to these triggers, there are PCN requirements under general conditions 16, 18, 20, and 31 allowing for DE review and scrutiny for further environmental protections relating to the National Wild and Scenic River System, ESA, preservation of historic properties under the National Historic Preservation Act, and for circumstances where there are corresponding Section 408 permissions to be authorized. The general condition 31 PCN trigger was newly introduced in 2021 which we found to be not necessary but it serves as another example of PCN requirements that NWP 12 is subject to. Based on the division engineer’s discretionary authority, PCN requirements are also added to NWPs by division engineers through regional conditions that require PCNs for additional activities.

As revised in the last NWP reissuance, the two PCNs that specifically apply to all utility line NWPs are those activities that cross navigable waters subject to RHA Section 10, and those utility line activities resulting in the loss of greater than 1/10-acre of a WOTUS.

We believe that these are adequate PCNs for NWP 12, and we fully supported the USACE’s well-reasoned justification for removing the five PCN triggers that were duplicative, unnecessary, and inconsistent with other similar NWPs. Removing the five PCN requirements provides additional streamlining to the permitting process while continuing to ensure that the

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<sup>124</sup> 2017 NWP 12 Decision Document at 9.

<sup>125</sup> 86 Fed. Reg. at 2,755.

authorized activity under NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects.

We also supported the removal of the PCN trigger for the mechanized land clearing of forested wetlands. In the 2021 NWP, the USACE was careful to respond to comments related to the removal of the PCN for mechanized land clearing of a forested wetland for utility line activities. The USACE clarified that the removal of this PCN will not lessen environmental protections but that forested wetlands that have been converted to herbaceous or scrub-shrub wetlands continue to function as wetlands.<sup>126</sup> The USACE provided additional assurances that removing this PCN “will not eliminate compensatory mitigation requirements for those activities, and could require PCNs in certain conditions.”<sup>127</sup> The USACE stated: “[i]f the impacts to forested wetlands caused by mechanized land clearing for an oil or natural gas pipeline right-of-way cannot be restored to pre-construction contours in waters of the United States, and there is a loss of greater than 1/10-acre of forested wetlands, then the project proponent is required to submit a PCN to the district engineer.”<sup>128</sup>

A practical aspect is that permittees need to meet regulatory requirements for inspecting a ROW required by PHMSA for hazardous liquid pipelines under 40 CFR Section 195.412. Aerial patrol is the safest and most efficient way to inspect the surface conditions of the ROW for evidence of a release, erosion, encroachments or condition which would place the pipeline or public in danger. Areas with dense tree cover restrict an aerial patrol which then limit permittees’ ability from being able to identify an unsafe condition.

For these reasons, we recommend no further PCN thresholds to be added for NWP 12.

***2. The 250-mile PCN requirement specific to the construction of new oil and gas pipelines includes an arbitrary and capricious distance limitation without reasoned justification, and must be removed during the regular 5-year review.***

The 2021 NWP also added a PCN for NWP 12 only and as discussed in our 2020 comments, we do not find the 250-mile PCN threshold to be an appropriate addition under any circumstance. As such, the new PCN includes an arbitrary and capricious distance limitation without reasoned justification, and must be removed during the regular 5-year review.

In the final NWP, the USACE states that, “[i]t is a new PCN threshold to address stakeholder concerns about cumulative effects.”<sup>129</sup> The USACE mentions “numerous commenters” regarding the potential cumulative adverse environmental effects that may be caused by NWP 12 activities.<sup>130</sup> This statement is offered without support or basis in science or law. In any rulemaking, stakeholder concerns must be considered within the parameters of statutory and regulatory requirements and not based on unsubstantiated concerns. Also, as discussed in the USACE’s own decision documents, NWP 12 already undergoes adequate review of cumulative effects and even if there was a need to address this issue, it is entirely unclear how this additional PCN requirement with an arbitrary distance limitation of 250-miles length would help.

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<sup>126</sup> 86 Fed. Reg. at 2,774.

<sup>127</sup> *Id.* at 2,856.

<sup>128</sup> *Id.*

<sup>129</sup> 86 Fed. Reg. at 2,776.

<sup>130</sup> *Id.*

In addition, the USACE does not appear to adequately account for additional costs associated with the new PCN requirement for new oil and natural gas pipelines projects over 250 miles in length. In the final 2021 Rule, the USACE states that, “the new PCN threshold should not impose any additional burdens on the regulated public,”<sup>131</sup> but again provides no data to back this claim.

It is also hugely problematic that the USACE is turning away from its longstanding practice for single and complete projects as outlined in Note 2 and making an exception for this one PCN applying only to oil and natural gas pipelines. As the USACE states:

Note 2 differs from the 250-mile PCN threshold in that an individual permit is required for the proposed oil or natural gas pipeline if one or more crossings of waters of the United States does not qualify for NWP authorization. Under the 250-mile PCN threshold, an individual permit is required if the district engineer determines the cumulative adverse environmental effects of all crossings of waters of the United States that require [Army] authorization will result in more than minimal cumulative adverse environmental effects.<sup>132</sup>

The 250-mile threshold must be removed with Note 2 reverted back to its longstanding practice applying to all activities uniformly.

***3. Non-PCN NWP activities can still be within the scope of district engineer’s discretionary authority, and no additional PCN requirements on a nationwide basis are necessary.***

For those NWP 12 activities that do not require PCNs, the USACE has noted that: “voluntary compliance is an appropriate means of compliance” and that “[d]istrict engineers will take appropriate action if they discover cases of non-compliance with the terms and conditions of NWP 12.”<sup>133</sup> We support this approach as striking an appropriate balance of regulatory oversight to ensure compliance. Voluntary verification requests are also another tool that are available where no PCN is required. We ask for the continued use of these tools in ensuring NWP compliance.

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<sup>131</sup> Id. at 2,777.

<sup>132</sup> Id.

<sup>133</sup> 82 Fed. Reg. at 1,891.



**I. Should there be new triggers for oil or natural gas pipeline activities in jurisdictional waters that mandate review under an individual permit?**

- 1. *No new triggers mandating individual permit reviews should be required because there is already a process in place where projects are reviewed at the district level on case-specific basis, and district engineers can use their discretionary authority to reasonably trigger review under an individual permit.***

There are many tools the district engineers can use to require individual permits on a discretionary basis. Providing this level of flexibility to the division engineers and district engineers is a longstanding practice and appropriate for regional and case-specific scaling. A district engineer, for example, has the flexibility to require individual permits for several reasons including if an applicant exceeds the acreage or other limits for an NWP. As another illustration provided by the USACE, “[i]f the district engineer determines, after considering mitigation, that there will be more than minimal cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for the proposed activity.”<sup>134</sup>

Adding limits to the use of NWP 12 and thereby increasing individual permit reviews would be an unprecedented step for NWPs that are intended for activities with minimal impacts. At this point, given the robust nature of the NWP program, no additional triggers are necessary at the national level.

- 2. *We support the district engineer retaining its discretionary authority; and while we agree with the flexibility afforded to the district engineers, any individual permit triggers should be based on statutory and regulatory authority, longstanding USACE practice, and supported by science.***

The USACE notes concerns relating to drinking water, environmental justice, and climate change, and while these concerns are laudable, they cannot form the basis for mandating individual permits. As discussed above, there are no statutory requirements pertaining to environmental justice, and the USACE does not have the authority to regulate or control the production, distribution, or combustion of hydrocarbons and other materials that are sources of carbon dioxide and other greenhouse gases that contribute to global climate change.

As pertaining to drinking water protections, the USACE itself stated in the 2017 NWPs that, “[w]e do not agree that all NWP activities should be prohibited in water source protection areas for public water systems.”<sup>135</sup> The reason goes back to the USACE’s baseline position that “NWP activities can be conducted in those areas with little or no minimal adverse effects to water quality.”<sup>136</sup> In addition, general condition 7 states that, “[n]o activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.” The USACE found that, the district engineer’s review process is more than

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<sup>134</sup> 82 Fed. Reg. at 1,862.

<sup>135</sup> *Id.* at 1,949.

<sup>136</sup> *Id.*

adequate to ensure that “the proposed activities comply with all applicable general conditions, including general condition 7, water supply intakes.”<sup>137</sup>

The district engineer utilizes certain well-defined parameters for mandating individual permits in lieu of NWP, and those parameters must continue to remain tethered to statutory and regulatory requirements as well as longstanding consistent USACE practice, and applied reasonably and with restraint.

***3. Arbitrarily adding triggers for oil and gas activities and mandating individual permits would be an enormous burden on agency resources, add lengthy permit review times, costs, and delays to the permitting process, and remove incentives for developers to design their projects in a way that qualifies for an NWP by reducing environmental impacts.***

As noted by the USACE, the “[g]eneral permits are an important tool for the Corps managing its personnel and workload so that it can focus its efforts on evaluating permit applications for proposed activities that have the potential to cause more than minimal adverse environmental effects.”<sup>138</sup> Relying on USACE data, it was noted that in “fiscal year 2018, the average processing time for an NWP PCN was 45 days and the average processing time for a standard individual permit was 264 days.”<sup>139</sup> We agree with the USACE that “[t]his difference in burden can incentivize project proponents to reduce the adverse effects that would otherwise require an individual permit . . . .”<sup>140</sup> Conversely, any process that will lengthen average processing times and make it difficult to attain NWPs efficiently and subject applicants to the more onerous and lengthy individual permit will have far-reaching consequences on the USACE as well as the regulated communities.

This is especially true for activities authorized under NWP 12 which directly affect the nation’s ability to continue to deliver competitively-priced energy from diverse sources to US consumers and other end-users, and to further domestic energy independence.

## **VI. CONCLUSION.**

We greatly appreciate the opportunity to comment on the Army’s request for input to inform future decision making related to NWP 12. We base our comments on a complete set of legal, regulatory, policy, and technical reasons that we provide. In addition, we have carefully considered the Army’s nine guidepost questions and provide detailed responses for your consideration.

NWP 12 is a longstanding NWP that has been frequently utilized and relied on by utility line sectors for facilitating cost-effective processing of activities with minimal impacts. Maintaining, and even enhancing regulatory certainty in the NWP permitting process is crucial to the oil and natural gas industry. As such, no additional burdensome limits should be

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<sup>137</sup> Id. at 1,971.

<sup>138</sup> 86 Fed. Reg. at 2,761.

<sup>139</sup> Id. at 2,745.

<sup>140</sup> Id.

considered for NWP 12 at this time or in any future rulemakings. We also ask that NWP 12 not be reopened at this time but instead be considered with all 57 NWPs during the current cycle with expiration date of March 14, 2026.

The role of the division engineers and district engineers and their discretionary authority to suspend, modify, or revoke NWPs cannot be overemphasized. We are supportive of this discretionary authority and we agree with the flexibility afforded at the district level, allowing reasonable consideration to regional or site-specific aquatic resource characteristics. In any future rulemaking, we ask the USACE, at the national or district level, to not unnecessarily encumber permittees as well as the USACE staff with overly broad terms or burdensome requirements that create regulatory uncertainty while offering no additional protections of aquatic resources under the CWA or RHA.

Thank you for your time and your careful review of this document. We look forward to your response, and encourage you to reach out to the lead signatory below for clarification if you have any questions.

Sincerely,



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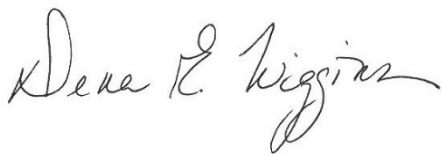
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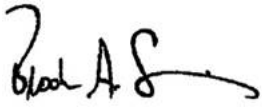


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