



July 18, 2025

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

U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314-1000
E-mail: 2026nationwidepermits@usace.army.mil

Re: Proposal to Reissue and Modify Nationwide Permits; RIN 0710-AB56

Dear Ms. McCafferty:

The American Petroleum Institute, Center for Liquefied Natural Gas, Energy Infrastructure Council, Natural Gas Supply Association, the Petroleum Alliance of Oklahoma, and the Utah Petroleum Association (collectively, “the Associations”) appreciate the proposal to reissue and modify Nationwide Permits (“NWP”) (“Proposal”) by the U.S. Army Corps of Engineers (“USACE”) and we offer our full support for the prompt reissuance of all the proposed NWPs and General Conditions (“GCs”), on time and with minimal changes.¹ Completing this process prior to March, 14, 2026 is critical to ensure that the current permits do not lapse and that American infrastructure can continue to develop resiliently in response to dynamic market conditions.

The Associations are committed to meeting the challenge of providing affordable and reliable energy. Our members represent nearly the entire value chain of the U.S. oil and gas industry, and we support policies that strengthen our nation's energy security and our economy while protecting our environment. Robust regulations and complementary permitting programs are essential to realizing the vision established in President Trump’s

¹ 90 Fed. Reg. 26,100 (June 18, 2025).

Executive Orders, including *Unleashing American Energy* and *Unleashing Alaska's Extraordinary Resource Potential*.²

For over 40 years, the NWP's have streamlined approvals of activities with minimal adverse impacts to Waters of the United States ("waters of the U.S."). This allows the USACE to focus its limited resources on reviewing projects with greater environmental impacts, while still providing timely and cost-effective permitting for the regulatory community. We look forward to the timely renewal and issuance of the 2026 NWP's.

Sincerely,



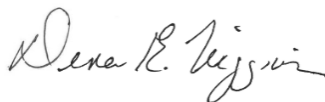
Amy Emmert
Senior Policy Advisor
American Petroleum Institute
Emmert@api.org



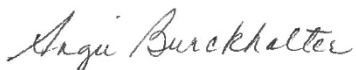
Charlie Riedl
Executive Director
Center for LNG
Charlie.riedl@ngsa.org



Lori E. L. Ziebart
President & CEO
Energy Infrastructure Council
lori@eic.energy



Dena Wiggins
President & CEO
Natural Gas Supply Association
Dena.wiggins@ngsa.org



Angie Burckhalter
Sr. V.P. of Regulatory and Environmental
Affairs
The Petroleum Alliance of Oklahoma
angie@okpetro.com



Rikki Hrenko-Browning
President
Utah Petroleum Association
rhrenko-browning@utahpetroleum.org

² Executive Order 14154, *Unleashing American Energy*, Jan. 20, 2025; Executive Order 14153, *Unleashing Alaska's Extraordinary Resource Potential*, Jan. 20, 2025.

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I. EXECUTIVE SUMMARY

The NWP program is essential to the U.S. economy, ensuring the prompt and efficient permitting of important and necessary energy infrastructure projects that benefit the nation's energy security while incentivizing developers to design their projects in a way that have minimal environmental impacts.

Our members regularly use NWPs for many of their essential energy production, transportation, and development activities. The Associations actively participated in notice and comment rulemakings for past NWP renewals, USACE regulatory reform efforts, and various waters of the U.S. rulemakings.

Given the time constraints with the fast-approaching March 14, 2026, expiration of the current NWPs, we believe that the most expeditious route for the USACE is to simply reissue all of the proposed 2021 NWPs with a new five-year effective date, keeping all the NWPs in the same cycle. Nevertheless, we appreciate that the USACE is soliciting comments on all changes to the NWPs, GCs, and definitions — including both the proposed changes and the NWPs for which no changes are currently proposed.³ We also recognize that the USACE is soliciting comments on situations that might warrant NWP coverage but that are not covered by a current NWP. The opportunity to be heard is nonetheless valuable to stakeholders.

The proposed changes are modest in scope. The USACE now proposes to reissue and modify 56 NWPs, adding a new NWP A (activities to improve the passage of fish and other aquatic organisms), and deleting NWP 56 (finfish maritime activities). Within the 2021 NWPs, changes are also proposed to 12 NWPs and 6 GCs. The USACE also proposes changes to 2 definitions and to add a new definition of “nature-based solutions.”

The Associations therefore generally support the reissuance of all 56 proposed NWPs and 32 GCs as well as other modifications to facilitate a prompt and timely reissuance for NWPs currently set to expire on March 14, 2026. The proposal will promote effective administration while continuing to meet essential environmental protection requirements under the Clean Water Act (“CWA”) and other applicable statutes. We also support the Administration in facilitating a permitting process that is intended to be streamlined and efficient for NWP-authorized activities designed for minimal environmental impact.

Based on our members' extensive expertise in the CWA and related rulemakings, as well as environmental permitting and regulatory compliance, we offer detailed comments on some of the USACE's suggested changes (please see the Table of Contents beginning on

³ Proposal at 26,112.

page 3) as well as the following overarching principles that are critical to a successful renewal:

- Renew the NWP, keep all NWP on the same renewal cycle, and set compatible expiration and effective dates only one day apart. A typical NWP renewal (for permits which last at most 5 years) encompasses scrutiny of over 50 NWP, 32 GCs, and a myriad of definitions – and that is just at the federal level. Additionally, there are nearly contemporaneous processes of regional conditioning by the USACE District Offices, Section 401 water quality certifications by states and tribal governments, and consistency determinations under the Coastal Zone Management Act (“CZMA”) – all of which together render the renewal process a massive undertaking. While this year, we support renewing the NWP without delay, we recommend submitting the next NWP for public comment approximately 1 year prior to their Congressionally-mandated 5 year expiration. Moreover, to provide regulatory certainty, NWP that are in compliance with the Administrative Procedures Act (“APA”) and all other applicable statutes should be renewed and/or reissued in the same cycle for a defensible rulemaking with a new effective date.
- At a minimum, retain the 1/2-acre impact limits for certain NWP. We agree that the current 1/2-acre acreage threshold for the applicable NWP should be retained and no further lowering of the limits is necessary. The USACE should also clarify that the 1/2-acre impact limit applies to discharges that would result in a complete loss of waters of the U.S. rather than temporary or long-term impacts of waters of the U.S., as has been inconsistently interpreted by some USACE districts based on some of our members’ experience (see further discussion below). In some cases, acreage increases in NWP from their current thresholds may be appropriate although those increases are unlikely to be feasible at this time due to the delay such changes could potentially cause to the overall renewal process.
- Maintain Pre-Construction Notifications (PCNs) generally but remove PCN requirements where the requirements are duplicative or overly broad and add no additional unnecessary PCN requirements. We caution the USACE against adding any more restrictive and unnecessary PCN threshold requirements into any new NWP or GCs especially since the “paperwork burden associated with the NWP relates exclusively to the preparation of the PCN.”⁴

⁴ 90 Fed. Reg. at 26,136.

- For durability, keep NWP terms and definitions free of any cross references to any particular waters of the U.S. definitions as well as not include any standalone definitions from any particular waters of the U.S. rule. Over the last 10 years, each Administration has tried to leave an enduring waters of the U.S. rule, resulting in numerous changes to the WOTUS definitions. Therefore, it is critical that the NWP language remain agnostic.

With respect to the specific changes proposed this year, we offer limited comments on 1) proposed changes that we support, 2) as relating to GC 11 where we request not to adopt the proposed changes, and 3) clarifying changes.

- We have no position on the new NWP A (except that we support the proposed 1-acre acreage threshold) or the deletion of NWP 56 and generally agree with all the proposed changes except we offer clarifying changes to the “nature-based solution” definition, ask for GC 11 (equipment) to be adopted without the proposed changes due to existing industry practices and the districts’ ability to tailor GCs at the regional level, and suggest a small change to GC 25.
- We appreciate clarifying language in GC 25 making it clear that the proposed activity which **may** result in any discharge from a point source would have to be into a water of the U.S. We simply ask that the bolded language be changed to “will” rather than “may.”
- We also appreciate the USACE providing clear guidance on the water quality certification process’s “reasonable period of time” by providing six months for certifying authorities to act on the certification request.

Additionally, for this cycle of renewals, we request that the two onerous and unnecessary 2021 additions, along with burdensome information collection requirements relating to NWP 12 (the arbitrarily set 250-mile pipeline PCN trigger targeting oil and gas pipelines) and the new 2021 3/100th-acre stream mitigation threshold introduced in GC 23 (and a significant departure from longstanding agency practice), be removed.

Finally, in each appropriate section, we offer more extensive technical and policy comments for future rulemakings. These adhere to the Administration’s policy directives as set out in the applicable 2025 executive orders. They are also grounded in legal requirements and our members’ longstanding technical experience with NWPs. While these may not be feasible for this renewal cycle, we urge you to consider these comments as you contemplate future renewals.

II. THE ASSOCIATIONS' INTERESTS

API and a coalition of national and state oil and natural gas trade organizations have been actively involved in participating in the notice and comment process in the 2022 Request for Input relating to NWP 12,⁵ 2021 and 2016 NWPs reissuance process,⁶ 2017 USACE's regulatory reforms efforts,⁷ the Navigable Waters Protection Rule ("NWPR"),⁸ December 7, 2021, Revised Definition of Waters of the U.S. rulemaking,⁹ and other related rulemakings (e.g., the 2019 USFWS/NMFS rules).

Our members actively use 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. We fully support the Administration and the USACE's position that 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 support for a timely reissuance of the 56 NWPs. Also, understanding time constraints, we provide comments for your consideration for this rulemaking as well as in anticipation for future reissuances. The Associations and their interests are summarized below.

⁵ API and a coalition of 12 national and state energy industry trade organizations, Comment Letter, 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, May 27, 2022. Available at: <https://www.api.org/~media/Files/News/2022/05/27/NWP-12-Filed-Comments-2022>

⁶ API and a coalition of 21 national and state energy industry trade organizations, Comment Letter, Proposed 2020 NWPs, Docket No. COE-2020-0002, November 16, 2020; API, Comment Letter, Proposed 2016 NWPs, Docket No. COE-2015-0017, Aug. 1, 2016. 2020 comments available at: <https://www.ipaa.org/wp-content/uploads/2020/11/2020-NWPs-Complete-Package-Final-Filed.pdf>

⁷ API and AOPL, Comment Letter to the USACE Subgroup to the DOD Regulatory Reform Task Force, Oct. 18, 2017. Available at: <https://aopl.org/documents/en-us/8107597b-f3f8-4b4c-9b1c-21563b35d722/1>

⁸ API, IPAA, AXPC, and AOPL, Comment Letter to the EPA and USACE's Proposal to define waters of the U.S., 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>

⁹ API, IPAA, and AXPC, Comment Letter to the EPA and USACE's Proposed Rule to Revise the Definition of "Waters of the U.S." Docket No. EPA-HQ-OW-2021-0602, Feb. 7, 2022. Available at: <https://www.ipaa.org/wp-content/uploads/2022/02/2022-API-AXPC-IPAA-Reponse-to-WOTUS-Proposal-FINAL-FILED-02-07-22.pdf>

A. American Petroleum Institute

API is a nationwide, non-profit trade association that represents all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly eight percent of the U.S. economy. API's more than 600 member companies include large integrated companies, as well as exploration and production, refining, marketing, pipeline and marine businesses, and service and supply firms. API was formed in 1919 as a standards-setting organization, and API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

B. Center for Liquefied Natural Gas

The Center for Liquefied Natural Gas (CLNG) advocates for public policies that advance the use of liquefied natural gas (LNG) in the United States, and its export internationally. A committee of the Natural Gas Supply Association (NGSA), CLNG represents the full LNG value chain, including major large-scale LNG export facilities 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.

C. Energy Infrastructure Council

The Energy Infrastructure Council (EIC) is a non-profit trade association committed to advancing the interests of companies that build and operate essential energy infrastructure and related activities. EIC focuses on key public policy issues critical to fostering investment in America's energy. Our membership spans public and private midstream companies, midstream and non-midstream Master Limited Partnerships (MLPs), as well as service providers, businesses, and individuals dedicated to supporting the energy industry. Our core mission is to advocate for and promote the interests of energy infrastructure companies, with a strong focus on critical public policy areas. We concentrate on tax issues; regulatory matters before the U.S. Securities and Exchange Commission (SEC); fostering investor relations and investor outreach; and sustainability considerations. We actively engage with government officials, the public and media to highlight the essential role our member companies play in securing our nation's energy future, supporting economic stability, and driving the development of a new, reliable energy economy on a global scale.

D. Natural Gas Supply Association

The Natural Gas Supply Association (NGSA) represents integrated and independent companies that supply natural gas. Founded in 1965, NGSA is the only national trade

association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSAs advocates for regulatory certainty and well-functioning markets for natural gas. Through our support for innovative technologies and partnerships with all energy sources, NGSAs is dedicated to sustainably meeting our nation's growing energy demand.

E. Petroleum Alliance of Oklahoma

The Petroleum Alliance of Oklahoma represents more than 1,700 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 working throughout the Mid-Continent oil and natural gas-producing region of the United States. Our members produce, transport, process, and refine the vast majority of Oklahoma's crude oil and natural gas.

F. Utah Petroleum Association

UPA is a statewide oil and gas trade association established in 1958, representing companies involved in all aspects of Utah's oil and gas industry. UPA members range from independent producers to midstream and service providers, as well as major oil and natural gas companies widely recognized as industry leaders driving technological advancements that lead to environmental and efficiency gains. UPA members operate extensively on federal lands and have a long history of stewardship and conservation.

III. THE TIMELY REISSUANCE OF THE NWPS IS CRITICAL TO THE REGULATED COMMUNITY.

CWA Section 404 authorizes the USACE to issue permits for discharges of dredged or fill material into waters of the U.S. Congress amended Section 404 of the CWA in 1977 to authorize the USACE to issue general permits for categories of discharges that (1) "are similar in nature;" (2) will cause only minimal adverse effects; and (3) will have only minimal cumulative adverse effects.¹⁰ For over 40 years, consistent with Congress's direction, the USACE has issued general CWA permits for discharges of dredged or fill material into navigable waters for specific categories of activities with no more than "minimal adverse environmental effects."¹¹ Under Section 10 of the Rivers and Harbors Act of 1899 ("RHA"),

¹⁰ 33 U.S.C. Section 1344(e).

¹¹ *Id.*

the USACE also has the authority to issue general permits and after-the-fact permits for structures and work in navigable waters of the U.S.

NWPs are essential tools for: a) providing an efficient and effective permitting process for minor activities having no more than minimal individual and cumulative adverse environmental effects to federal jurisdictional waters; and b) reducing administrative burdens on the USACE and the regulated public by providing a streamlined process for activities with minor environmental impacts while allowing the USACE to focus its limited resources on individual permits that have the potential for causing significant environmental impacts to waters of the U.S. as Congress intended.¹²

As the USACE states succinctly in its proposal: “The NWP program allows the Corps to authorize activities with only minimal adverse environmental impacts in an efficient, effective, and timely manner. The NWPs contribute to environmental protection because they encourage project proponents to minimize the amount of adverse impacts to waters of the [U.S.] to qualify for NWP authorization. For example, in FY 2023, 74 percent of the NWP verifications involving discharges of dredged or fill material into waters of the [U.S.] had impacts of less than 1/10-acre, well below the 1/2-acre limit in numerous NWPs.”¹³

The Associations concur that unnecessary regulatory burdens can obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources. As a corollary, efficient and timely permitting processes enhance energy security. Undue delays and burdensome permitting processes create uncertainty and add further obstacles to attracting investment for needed energy infrastructure. Ultimately, the added cost and delays both harm the project sponsor and hinder access to affordable energy for everyday consumers and businesses.

Unlike individual permits, Congress specifically intended NWPs to require minimal paperwork and shorter timeframes to obtain authorization. As related to the new proposed NWP A and proposed substantive revisions to NWPs 13 and 27, the Associations appreciate the USACE’s efforts and recommendations to further streamline critical NWP processes – including PCN procedures and information collection requirements – to better align with these key principles. We ask that the USACE remain committed to these core NWP principles in the consideration of other key NWPs such as NWPs 3, 12, 14, 18, and 39 and associated GCs 18, 20, and 23, and continue to facilitate the continued authorization of

¹² Proposal at 26,127.

¹³ Id. at 26,112.

NWPs in a timely and cost-effective manner that will serve both the USACE and the regulated community.

A. A timely renewal is consistent with the Administration’s priorities, as well as with process-based realities.

Under the CWA, the NWPs may be issued for a period of no more than five years after the date of issuance.¹⁴ The current NWPs all expire on March 14, 2026. The Associations support the USACE’s proposal to reissue the 56 NWPs at the same time so that all NWPs remain on the same 5-year permit renewal cycle.

Timely reissuance is critical to maintaining continuity, providing certainty and predictability in the NWP permitting process, minimizing unnecessary disruptions for the regulated community, and limiting unnecessary costs for consumers and additional burdens for the USACE.

Moreover, this timely renewal is critical to satisfying the Trump Administration’s articulated priorities in the Executive Order “Unleashing American Energy” which directs agencies “to undertake all available efforts to eliminate all delays within their respective permitting processes, including through, but not limited to, the use of general permitting and permit by rule.”¹⁵ The NWPs protect the environment and promote timely development in all sectors, including the energy industry.

We urge the finalization and reissuance of legally defensible NWPs as soon as reasonably possible, particularly given recent retirements at the USACE headquarters and the additional timing constraints of contemporaneous Section 401 water quality certifications and consistency determinations pursuant to the CZMA.

B. The Associations support the USACE’s decision to keep all NWPs in the same cycle.

Separating the NWPs into multiple renewal cycles is not practical due to the interplay between various NWPs and GC requirements, the need for regional conditioning of the NWPs at the USACE’s district levels, and the required coordination between states and tribal governments. Separate renewals would complicate an already complex process for both regulators and the stakeholders; therefore, a single renewal cycle is strongly recommended.

¹⁴ 33 U.S.C. Section 1344(e).

¹⁵ Executive Order 14154, Section 5(d).

C. For future NWP rulemakings, we recommend beginning the NWP reissuance process at least one year in advance and planning for at least a 90-day comment period for stakeholder comment.

We understand the current need to fast track the renewal with a shorter comment period given the March 14, 2026, expiration date; however, in future rulemakings, we recommend that the proposed NWPs be issued at least one year prior to the expiration date, so that stakeholders can benefit from a longer 90-day comment period. The USACE's practice has been a 60-day comment period, however, based on our experience submitting national and numerous district-level comments, we believe that a 90-day comment period will serve to facilitate a more engaged public participation process. Additionally, we encourage the USACE to open an outreach docket to gauge stakeholder interest in changes prior to issuing the next renewal proposal (presumably for the 2031 NWPs, unless an off-cycle renewal occurs earlier).

D. The Associations support the reissuance of all 32 GCs without additional unnecessary and burdensome requirements. We suggest the following: 1) that the proposed language in GC 11 not be adopted and that a small change to the proposed language in GC 25 be adopted; 2) that the USACE remove the GC 23(d) provision and GC 32(b)(6) as relating to the 3/100-acre stream mitigation threshold, 3) that the USACE conduct a review and revision of corresponding burdensome information collection requirements under GC 32, and 4) in future rule making, the USACE engage stakeholders and undertake a review and modification of GCs 18 and 20 terms associated with burdensome time delays for PCN reviews and to provide consistency in the implementation of key terms.

Fundamentally, the Associations support reissuing the GCs with no unnecessary and burdensome requirements added. This would be consistent with the overall Congressional intent to streamline permits for projects with comparatively minor environmental impacts as well the aforementioned infrastructure-focused policies of the current Administration. The final GC framework should serve that intent and not unreasonably obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of any project (including those related to energy resource development).

We support the proposed GCs except we request that the proposed language in GC 11 (equipment) not to be adopted for reasons explained below and we suggest a small clarifying change to GC 25.

After careful review, we suggest modifications beyond the proposed GCs because the Administration's directives under its 2025 Executive Orders are not reflected in the following:

1) the additional information collection requests that were added in the 2007 and 2021 NWP's under GC 32 (e.g. as related to the 250-mile pipeline PCN trigger); and the 2) the entirely new and unnecessary requirement added to GC 23 (Mitigation) for stream mitigation for projects designed for minimal impacts – which contains an unexpected burdensome change from proposed 1/10-acre stream mitigation threshold in 2020 to 3/100-acre in the final 2021 NWP's. Under the 2007, 2012, and 2017 NWP's, the District Engineers (“DEs”) made a determination on case-by-case basis on whether stream compensatory mitigation was required. This longstanding agency practice which was effective in considering local conditions should be reestablished and the new mitigation threshold be removed.

Despite the time constraints of the current proposal, we ask the USACE to give careful consideration under the framework set out by Congress and the current Administration’s permitting directives for GCs 23 and 32 as well as GCs 18 and 20 considerations for future rulemaking. We provide specific comments for each of these sections below for the USACE’s consideration for this proposal as well as any future rulemakings.

E. The Associations generally support the proposed changes to the definitions but recommend the removal of “perennial stream” definition and a clarifying revision to the “nature-based solutions” definition to remove ambiguous language.

We generally support the definitions and recommend reissuance with minimal change to the definitions. We agree with the USACE in making clarifying changes to the definitions of the NWP's and we recommend the issuance of the NWP's with no other substantive changes. We particularly support no additional changes being made to long standing definitions of “single and complete linear project,” “single and complete non-linear project,” and “independent utility.” We provide the following specific comments for your consideration for this rulemaking and for future iterations.

1. For durability, the Associations request to keep NWP's terms and definitions free of any cross references to any particular waters of the U.S. definition – and recommend not including any standalone definitions from individual Waters of the U.S. rules but instead ensuring that the NWP-authorized activities are in compliance with the most recent Supreme Court case *Sackett v. EPA*.¹⁶

Any final NWP's should be issued without reference to internal sections of a particular waters of the U.S. rule or any standalone definitions from a particular waters of the U.S. rule. In other words, the NWP's should remain neutral as to the definition of jurisdictional waters

¹⁶ *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).

in 33 CFR Part 328 and should not require any additional rulemaking based on any revision to the waters of the U.S. definition in effect. We appreciate that the current proposal mirrors the Associations' past recommendations in that it does not include any cross-references to particular iterations of evolving waters of the U.S. rules.

For regulatory certainty, we support the overall position that for determining jurisdictional waters, any 33 CFR Part 328 waters of the US definition that is in effect should apply to the NWP activity that is being authorized. In the 2021 rulemaking, the USACE also had agreed in response to comments that it was not necessary to copy the entire definition of waters of the U.S. into the NWPs because that definition is available at 33 CFR Section 328.3.¹⁷

Notably, the NWPs and many of the districts' regional conditions use varying terms for jurisdictional waters and wetlands - including but not limited to waterbodies, intermittent and perennial streams, ditches, springs, riffles, peatlands, bogs, and fens. In these situations, we support the USACE and its districts' efforts to consistently maintain the position that, regardless of the term used for a particular water, the NWP terms only apply to federally jurisdictional waters.

2. The definition of “perennial stream” should be removed, and the definitions of “intermittent stream” and “ephemeral stream” should remain deleted.

Regarding specific changes, we had recommended and appreciated the USACE's decision in 2021 to delete the definitions of “intermittent stream,” and “ephemeral stream” in the current NWPs.¹⁸ For the same reason, we also requested that the proposed definition of “perennial stream” based on the NWPR be deleted. While the two flow definitions were removed because the USACE did not see the need to add definitions when they are provided in the NWPR and are not in the text of the NWPs, the perennial stream definition remained with a reference to typical year which had its own definition under NWPR. However, since the NWPR has been vacated and the new waters of the U.S. rule does not include any flow definitions, we suggest removing “perennial stream” here to avoid any ambiguity with waters of the U.S. rulemakings and policies set under *Sackett v. EPA*.

¹⁷ 86 Fed. Reg. 2,744 (Jan. 13, 2021) at 2,838.

¹⁸ Id.

3. The “loss of waters of the U.S.” definition should include the method of calculating stream losses using “linear feet” as was available prior to the 2021 rulemaking revision.

As discussed under GC 23 section, the USACE removed the 300 linear foot limit for losses of stream bed from NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. However, this change was not limited to the small group of aforementioned 10 NWPs - it expanded to requiring compensatory mitigation for all losses of stream bed that exceed 3/100-acre and requiring a PCN. We did not support this change, and we continue to assert that the associated removal of one more method for calculating losses of stream beds is an additional impediment to an already onerous provision.

In the proposed 2021 rulemaking, the USACE explained, “the USACE uses a variety of approaches to quantify losses of stream beds and assessing impacts to those stream beds.”¹⁹ Yet, in the final rule, the USACE dismissed our comment stating that using acres or square feet is a better surrogate than linear feet for the losses of stream functions when a functional assessment method is not available or practical to use.²⁰ The USACE, however, failed to discuss that the same issues arise with the use of width in terms of large variance depending on the physical geography, terrain, topography, and locale. We ask that the USACE continue providing linear feet as an additional option for calculating the loss of stream beds along with other methods such as acreage.

4. We recommend modifying the definition of “Nature-based solutions” by deleting overly broad and ambiguous language relating to societal challenges.

The Associations have reviewed the new proposed definition of “nature-based solutions” and support the language that includes “actions to protect, sustainably manage, and restore natural or modified ecosystems.”²¹

We propose deleting the remaining overly broad language “that address societal challenges effectively and adaptively, simultaneously providing human well-being and biodiversity benefits.” Removing this language will improve clarity, reduce ambiguity, and ensure regulatory consistency during implementation of the related NWPs. The proposed language introduces subjective and potentially expansive criteria that go beyond the scope of CWA permitting. Terms like “societal challenges,” “human well-being,” and “biodiversity benefits” are broad and undefined in the regulatory context, which could lead to inconsistent

¹⁹ 85 Fed. Reg. 57,298 (Sept. 15, 2020) at 57,311.

²⁰ 86 Fed. Reg. at 2,761.

²¹ 90 Fed. Reg. at 26,126.

interpretation and application across the USACE districts. This ambiguity may create uncertainty for permittees and regulators alike, complicating project planning and review. Moreover, the inclusion of these aspirational outcomes risks shifting the focus of the definition from the physical characteristics and functions of nature-based solutions, such as habitat restoration, bank stabilization, or stormwater management, to speculative or secondary social benefits that are outside the scope of NWP permitting terms. While such benefits may occur, they should not be prerequisites for defining or authorizing a nature-based solution under the NWP program.

F. At a minimum, the USACE should maintain and not decrease the current 1/2-acre impact limit to loss of waters of the U.S. that is currently in place to qualify for NWP authorization for NWPs 12, 14 (non-tidal waters), 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

The USACE establishes maximum acre limits that certain NWPs must meet 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. That is, an activity under these applicable NWPs cannot result in the loss of greater than 1/2-acre of waters of the U.S. for each single and complete project.

At a minimum, the USACE should maintain and not decrease the current 1/2-acre impact limit that is currently in place to qualify for NWP authorization for the following NWPs: NWPs 12, 14 (non-tidal waters), 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. However, we recommend that the USACE provide clear direction that the 1/2-acre impact limit applies to discharges that would result in a complete **loss** of waters of the U.S. (i.e. conversion to a terrestrial habitat or grey infrastructure) rather than the temporary or long-term impacts to the waters of the U.S. (e.g. conversion of forested wetland to an emergent wetland within a newly maintained right of way). That is, similar to the NWP A discussion of types of loss of water of the U.S., there may be loss or change in one sense, but it may not result in a permanent loss of waters of the U.S.²²

Based on our members' experiences, **loss** of waters of the U.S. in terms of acreage thresholds has been inconsistently interpreted by some USACE districts and thus our recommendation to provide clear and consistent guidance to the USACE districts. The regulated industry requires regulatory certainty and consistent applications of core terms across all USACE districts and inconsistent applications can lead to delays in permitting

²² See *Id.* at 26,125.

processes, and even unnecessary elevations to individual permit reviews. In sum, the language in the NWP and definition section is clear and should be consistently applied.

Note that the USACE is soliciting comments on the one-acre proposed threshold and whether it should be a different number. We support the one-acre as proposed and recommend no further decreases. As USACE notes in the NWP A discussion, there are a number of safeguards available with an increased threshold: “As another safeguard, division engineers can impose regional conditions on this NWP if it is issued to reduce the one acre limit or the 1/10-acre PCN threshold if it is necessary to do so in a particular watershed or other geographic region to ensure that this NWP authorizes only those activities that have no more than minimal individual and cumulative adverse environmental effects.”²³

Additionally, in future iterations of the NWPs, we would like to see the USACE change its decision to remove the 300 linear foot limit as a threshold for certain NWPs. The USACE should either return to its longstanding practice of keeping the 300 linear foot limit applying to 10 NWPs at most and allowing permittees to use the linear foot method as a means to calculate stream losses or to follow the USACE’s recommendation in the 2017 Energy-Related Permits (removing the 300 foot limit for losses of stream bed in NWPs such as 21, 39, 50, 51, and 52 along with the associated waiver language).²⁴ During that review, we agreed with the USACE that the removal of the 300 linear foot limit for losses of stream beds is justified because all of these NWPs still require PCNs, and include a 1/2-acre limit, which suffices to address the minimal environmental effects requirement. We also supported the USACE’s proposal to include other non-energy related NWPs with the same 300 linear foot limit requirement (i.e. NWPs 29, 40, 42, 43, and 44).

Instead, the USACE’s chosen approach in 2021 added unnecessary complexities. By applying the provision to all NWP activities with losses of stream that exceed 3/100- acre and that require a PCN, the USACE is in essence proposing that in order to balance the removal of the 300 linear foot limit for losses of stream beds for 10 NWPs, it needs to propose new compensatory mitigation requirements at a minimum one-for-one ratio for **ALL** losses of stream bed that exceed 3/100-acre (unless waived by the DE).²⁵ As noted by USACE, under the 2007, 2012, and 2017 NWPs, district engineers determined on a case-by-case basis

²³ Id. at 26,124.

²⁴ Review of 12 Nationwide Permits Pursuant to Executive Order 13783, Sept. 25, 2017 (“2017 Energy-Related 12 NWPs Review”)

²⁵ 85 Fed. Reg. at 57,388; 86 Fed. Reg. at 2,766, 2,856.

whether stream compensatory mitigation is required for an NWP activity, and this case-by-case standard should be reestablished.²⁶

G. Additional acreage limits including 1/10-acre for NWP 6 and NWP 18, and 1/3-acre for tidal waters for NWP 14 should be reassessed and revised as necessary to be consistent with other similar NWPs with 1/2-acre impact limit.

Notwithstanding the time constraints for this rulemaking and in contemplation of future rulemakings, the Associations recommend that additional acreage limits including the current 1/10-acre for NWP 6 (survey activities) and NWP 18 (minor discharges), and 1/3-acre for tidal waters for NWP 14 (linear transportation projects) should be reassessed and revised as necessary for consistency with other similar NWPs that have a 1/2-acre impact limit for **loss** of waters of the U.S. For example, NWP 14 includes a separate 1/3-acre limit for tidal waters which is inconsistent with similarly authorized activities in the current NWP 12 or NWP 51, and we recommend that requirement be changed to 1/2-acre impact limit for consistency. This comment was previously made in 2020 and while the comment was acknowledged, no change was made. In keeping with the policies set out by the current administration for streamlining the permitting process and for removing unnecessary burdens that prevent efficiencies in the NWP process, we ask for a reconsideration with an appropriate consistency review of the acreage limits of NWPs 6, 14, and 18.

H. PCNs should generally be maintained unless they are duplicative, inconsistent, or overly broad, and no additional unnecessary PCN requirements should be added to NWPs or GCs.

In general, the Associations caution against adding any more restrictive and unnecessary PCN threshold requirements into any new NWPs or GCs. The purpose of NWPs is to simplify authorizations for activities with minimal environmental impacts; and adding PCN triggers contributes to additional paperwork and increased processing times unnecessarily. The NWP process already includes a regional conditioning process where region-specific or case-specific conditions can be added as an additional protective measure where deemed necessary by the DE. Additionally, PCNs are required for all activities that trigger the PCN requirements under GCs such as GC 18 — Endangered Species, and GC 20 — Historic Properties. With that caution, the Associations support the USACE's efforts in reviewing existing PCNs threshold requirements embedded in certain NWPs and GCs, as well as identifying opportunities to further streamline PCN thresholds as related to NWP 27 for example.

²⁶ 86 Fed. Reg. at 2,856.

In terms of the proposal, however, we do not support the additional 250-mile PCN threshold added to NWP 12 in 2021, and we ask the USACE to reissue NWP 12 with no additional encumbrances. (See further discussion below).

Similar to the USACE's 2017 assessment of NWP 33 and reducing its PCN triggers when compared to other similar activities, we also believe that certain NWPs (such as NWP 39 where all activities unnecessarily trigger PCNs) require a consistency review and revision (e.g., other similar activities authorized by NWPs 12, 14 and 51 which have PCN triggers that are more judiciously tailored).

The GC 23's 3/100-acre mitigation threshold should be removed as discussed above and with that, the corresponding language under GC 32(b)(6). As discussed above, the DE case-by-case process that was in place prior to 2021 should be adhered to.²⁷ It offers a number of safeguards and follows longstanding agency practice such as the use of regional conditions and applying DE's discretionary authority to prevent more than minimal adverse environmental effects.

Similarly, GCs 18 and 20 also have a PCN threshold on a project-by-project basis which also can become unnecessary if regions or districts performed regional consultations and developed regional conditions to mitigate impacts to those resources.

The proposal specifically requests comments on NWP-activities and GCs that can be improved, and for future rulemaking, we ask the USACE to conduct a thorough review of NWPs 14 and 39, as well as GCs 18, 20, and 23 that include a process similar to an individual permit with lengthy review times and onerous paperwork. The USACE is also soliciting public comment on NWP 27 regarding whether a different PCN threshold should be used for this NWP, such as requiring PCNs for all proposed activities or for proposed discharges of dredged or fill material into special aquatic sites. While we do not have a position on this NWP, as an overall matter, we would ask USACE to be consistent with other NWPs and consider a tailored PCN requirement rather than a one size fits all approach that is overly broad. We ask that the same question be asked of NWP 39 as well with similar tailored adjustments to be made.

²⁷ 86 Fed. Reg. at 2,856.

I. DEs should retain their authority to modify, suspend or revoke specific NWP on a regional basis or consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote consistency in the use of this discretionary authority.

During and after the terms and conditions provided in the NWPs – the DE has the authority to modify, suspend, or revoke NWPs on a regional basis as well as consider case-by-case situations for activity-specific waivers or conditions. We agree that the DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable.

We support the continued use of waivers for activities authorized under NWPs because without the ability of DEs to issue waivers, the alternative would be to require individual permits that would unnecessarily burden the USACE’s staff and resources and further delay projects, without any environmental benefit.

Notwithstanding the above comments and recognizing certain districts with unique physiological variations, we recommend continued vigilance over the DE’s assessments such that there is a coordinated approach across districts with applying regulatory requirements consistently, that these region-specific determinations remain reasonable, and that any DE-driven conditions are not overly broad.

We encourage the USACE to continue appropriately limiting the DE’s assessment to regulated crossings of waters of the U.S., as authorized by the USACE, for certain segments of the linear project that cross jurisdictional waters and involve discharges of dredged or fill material into waters of the U.S., and/or involve structures or work in navigable waters.

J. Our 2022 NWP 12 outreach comments are attached for inclusion into this 2026 proposed rule so as to make the comments a part of the administrative record in full support of the USACE’s position to reissue NWP 12, and with additional technical comments for future rulemakings.

In 2022, the USACE requested input on potential future modifications to NWP 12 in multiple categories. Recognizing that there have been multiple changes in staffing at the USACE, we are re-submitting those comments to bolster the administrative record for this rulemaking.

We appreciate that the USACE “exercised its discretion,” considered comments in the 2022 NWP 12 request for input docket, and now without unfairly separating out NWP 12, are proposing to reissue this important NWP 12 without modifications to its conditions.²⁸

Our comments support the USACE’s proposal and per the direction provided by the USACE in the proposal, we are resubmitting the NWP 12 comments for your consideration. These comments support the position that as a threshold matter, NWP 12 is a robust and legal defensible NWP that must be reissued as part of the regular cycle with all the other NWPs expiring in March, 2026. Additionally, in line with the President’s Executive orders for efficient rulemaking that promotes oil and natural gas infrastructure projects, our 2022 comments in Appendix A include helpful comments relating to the appropriate scope of any future NWP 12 rule making.

K. The USACE should continue to look for ways to reduce burdensome variability among districts and divisions, encourage regulatory consistency among districts, and develop a user-friendly depository of all NWP-relevant documents.

In the past, the USACE has explained that the purpose of regional conditions is “to tailor the NWPs to account for regional differences in aquatic resource types, the functions they provide, and their value to the region, . . . and requiring consistency at the national level would be contrary to the purpose of regional conditions and would reduce the utility of the NWPs.”²⁹ We value that opportunity for tailoring, but we also believe there should be consistency in applying fundamental regulatory requirements and there is a need for better coordination among the districts.

1. The Associations encourage the USACE to prioritize improving coordination among the districts and divisions to alleviate the burdens caused by variability.

Inconsistencies in application requirements and regulatory interpretation among the districts have been of particular concern on projects that cross multiple USACE Districts, such as linear projects. These inconsistencies range from procedural requirements to technical and regulatory requirements. For example, in terms of PCN submittal procedural requirements, some districts have PCN checklists, some have open-ended requirements to submit all relevant information and others have specific permit application procedures for that locality. Consistency in the approach to information requests would help applicants structure project planning.

²⁸ 90 Fed. Reg. at 26,102.

²⁹ 85 Fed. Reg. at 57,308.

It is also important for permittees to have clear direction in understanding the components of a PCN that are needed to make a PCN complete for the purposes of other key timelines relating to when to begin the activity.³⁰ Similarly, districts have different requirements for how information is submitted leading to complexities for consultants and applicants, especially with linear projects crossing more than one district.

Moreover, different districts have varying approaches for determining USACE action areas for the purpose of evaluating cultural resources. Some districts have an established distance parameter and others make subjective determinations on a crossing-by-crossing basis. Districts should have a consistent approach to defining the extent of USACE jurisdiction for purposes of assessing impacts to cultural resources. Our members have found similar variations in key proposed regional conditions for certain GCs. Examples include GC 23 (variations in types of compensatory mitigation required for wetlands impacts); GC 20 (inconsistent interpretations of historical property determinations “that might have the potential to be affected”); and GC 6 (variations in what various districts consider to be “unsuitable materials.”)

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.³¹ The lead district is also responsible for coordinating the development of the regional conditions.³²

Building on the lead USACE district designation, we also suggest 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 across the board. We continue to support these types of measures to further assist in greater coordination among the USACE districts, especially for projects that cross multiple state and district boundaries.

³⁰ See GC 32(a).

³¹ 85 Fed. Reg. at 57,301.

³² Id.

2. Furthermore, for nearly 10 years, the Associations have requested that the USACE develop a user-friendly display of NWP and all related documents, including regional conditions, Section 401 water quality certifications, and CZMA consistency concurrences at a central easy-to-find USACE online repository.

During the NWP reissuance process, we ask that copies of proposed as well as final regional conditions, WQCs, and CZMAs should be timely posted in the www.regulations.gov docket with clear comment deadlines specified. These documents should be easy to find for the public under clearly labeled files/tabs.

In previous proposals, the USACE has recognized prior comments requesting a need for a “single, national website” for regional conditions where “the NWPs could be posted, to facilitate public review of the proposed regional conditions” and we appreciate that the USACE has posted copies of certain district public notices under the Supporting and Related Material tab. However, notices are posted in no particular order with all the decision documents and the Regulatory Impact Analysis.

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 conditions per processes outlined by individual districts. This will 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 the process for proposed rules. The public then would also be able to view comments that are being posted, and the districts should post responses to comments along with final regional comments.

Finally, there should also 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. All enforceable conditions should be clearly provided in one document. It is also important for stakeholders to understand the changes that are being made to existing regional conditions, and proposed conditions should clearly explain the changes that are being proposed including provisions that are being removed.

L. Public participation opportunities during the NWP national permitting process are sufficient; and expanding the existing requirements at the district level would cause unwarranted delays in permitting.

Public involvement is appropriately provided during the NWP reissuance process. Additional public involvement at district levels for specific activities being authorized for the general permit would cause further delays and not impede the streamlined process intended by Congress for the NWPs with minor impacts.

M. Six months for certifying authorities to act on the water quality certification request is a reasonable period of time and we support the USACE's reasoned justification for establishing the 6 month time period.

We appreciate and support the USACE providing clear guidance on the water quality certification process's "reasonable period of time" by providing six months for certifying authorities to act on the certification request.³³ This is an important consideration for us because delays in the approval of water quality certification process is a serious impediment to much needed energy infrastructure projects that benefit U.S. economy. We support the reasoned justification provided in the preamble for the 6 month time period.³⁴

IV. SIGNIFICANT NWPS FOR ENERGY INFRASTRUCTURE

The Associations support the reissuance of all 56 NWPs, and for this section, provide comments to NWPs of particular interest to the oil and natural gas industry. While our steadfast position is that the current NWPs be reissued in a timely manner by the 2026 expiration date, we recognize that they may be opportunities now for modest changes, or in future revisions and we include comments for your consideration.

A. NWP 3 — Maintenance should be reissued with no additional changes except that we recommend a review of the proposed clarifying changes in 2020 that were not adopted in the 2021 Rule. In future iterations, clarifications for grandfathering prior authorized structures and the use of riprap would be especially beneficial.

NWP 3 authorizes the repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification.

³³ 90 *Fed. Reg.* at 26,105

³⁴ *Id.* at 26,105.

NWP 3 is important to the oil and natural gas industry and should be reissued as is or with limited changes. We continue supporting the use of temporary mats as introduced in the 2017 NWPs. We ask for reconsideration of the 2020 proposed language.

- 1. Once a structure is authorized, it should remain authorized; and we also support the USACE’s 2020 proposed language that allows the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require a permit at the time it was constructed.**

We do not believe that any additional documentation is required for meeting the “previously authorized” requirement and we agreed with the USACE that once a structure is authorized, it remains authorized. Also, the 2020 proposal added clarifying language that allows the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require a permit at the time it was constructed is a helpful change.³⁵ We support this language.

- 2. We support the proposed 2020 language allowing new or additional riprap to be added to protect the structure or for safety, provided that the placement of riprap is the “minimum necessary.” The term “minor deviations” should be clarified with examples. No additional quantitative limit should be added, other than the 200 foot limit under NWP 3(b).**

We supported the USACE’s 2020 proposed language to clarify NWP 3(a) to authorize new or additional riprap to protect the repaired structure or fill, as long as that riprap results in only the “minimum necessary” to protect the structure or fill or the safety of the structure or fill. This language was not added into the final NWP. If this language is added as we are requesting, the rule language should be clear in providing further clarification on the “minimum necessary” standard.

In addition, the term “minor deviations” in NWP 3(a) is also left undefined. In 2021, the USACE declined to define this term but the response to comments did indicate that the determination would be dependent on the degree to which changes in the structure’s configuration or filled area would occur as a result of the repair, rehabilitation, or replacement activity relative to the size and shape of the existing structure or fill as well as any deviations that are necessary because of the changes in materials, construction techniques, the requirements of other regulatory agencies, concurrent construction codes or safety standards.³⁶ In future iterations of the NWPs, we ask for further clarification on this

³⁵ 85 Fed. Reg. at 57,321.

³⁶ 86 Fed. Reg. 73,522 (Dec. 27, 2021) at 73,528.

term, including illustrative examples of minor deviations and how that term would be applied consistently across districts.

Since this NWP authorizes maintenance activities and only allows minor deviations, we also do not support any additional restrictions on this NWP other than the 200-foot limit in NWP 3(b).

B. NWP 12 — Oil and Natural Gas Pipeline Activities provides adequate CWA Section 404 and RHA Section 10 protections and must be reissued with no additional changes except for non-substantive proposed changes such as the two notes relating to reporting requirements. We also do not support the additional 250-mile PCN threshold added to the 2021 NWP 12. While we supported PCNs being reduced from 7 to 2, we ask the USACE to reissue NWP 12 with no additional encumbrances and to remove the 250-mile PCN threshold.

This NWP authorizes activities with minor environmental impacts and is critical to the oil and natural gas industry as well as the nation overall. The utility line activities authorized by NWP 12 (as well as NWPs 57 and 58) play an important and sweeping role in helping the nation meet its needs for crucial goods and services transported by these utility lines, including natural gas and electricity transmission and distribution systems, and utility lines that carry water.

NWP 12 should be reissued because it meets the legal requirements under the CWA, National Environmental Policy Act (“NEPA”), and all other applicable statutory and regulatory requirements.

1. Existing, robust requirements sufficiently prevent and/or mitigate environmental impacts of pipeline/utility projects. These include the 1/2-acre impact limit for NWP 12, PCN thresholds that trigger additional reviews, and a general prohibition against any change in pre-construction contours of jurisdictional waters as well as additional GCs; and regional and district-specific conditions that can be added if appropriate.

Fundamentally, the text of the current NWP 12 with all its numerous protective conditions and terms ensures that it only authorizes those activities that will result in no more than minimal individual and cumulative adverse environmental impacts. There are protective enforceable requirements related to BMPs within the GCs that apply uniformly and are in addition to the terms of the specific NWP.

We also believe that NWP 12 should have remained as one NWP given the legal, historic, and agency’s longstanding practice relating to utility lines; however, given the split

in 2021 NWP, we recommend that any changes that are made to NWP 12 are also made to NWPs 57 and 58.

We appreciate that the USACE has recognized the similar utility activities that are shared by all these three NWPs by making the same consistent changes to the one revised note and one new note in all three NWPs.

These are specific comments as applying to core concepts as well as specific terms and conditions of NWP 12.³⁷

2. No additional BMPs or industry-specific standards are necessary in the NWPs or GCs. The DEs can tailor standards to meet regional-specific needs and issue additional regional conditions with their discretionary authority under 33 CFR Section 330.5, within the USACE’s overall authority.

We do not believe that additional BMPs or industry-specific standards are appropriate in the NWPs or GCs, and the USACE also has found that there is no need for additional standards. In 2017, when it was asked to include BMPs to minimize soil disturbance, the USACE clearly stated that it “does not believe it is necessary to provide, for NWP 12 activities, a comprehensive list of techniques to minimize soil disturbance and minimize the impacts of construction equipment.”³⁸

In 2017, in response to a commenter asking for “prescriptive national standard best management practices,” and other comments, the USACE stated clearly: “[w]e believe that it would be more appropriate to have [DEs] determine which BMPs should be applied to the construction, maintenance, or repair of utility lines in their geographic areas of responsibility, as those BMPs may vary by region and utility sector.”³⁹

Clearly, the USACE districts already do and will continue to play a key role in addressing region-specific variances within utility lines that may call for additional protective measures. The ability to tailor the NWPs, as necessary and appropriate, continues to be available through the regional conditioning process and case-specific conditions as appropriate.

³⁷ Note: The comments in this section pertain to terms as found in the current NWP 12 and as found in NWPs 12, 57, and 58.

³⁸ 82 Fed. Reg. 1,860 (Jan. 6, 2017) at 1,887.

³⁹ 82 Fed. Reg. at 1,890. See 2017 NWP comments as summarized in 2017 Energy-Related 12 NWPs Review at 46.

Also, in 2021, after previously proposing BMPs, the USACE declined to add BMPs to the three utility line NWP. Ultimately, they agreed that no national best management practices concerning the construction, maintenance, repair, and removal were sufficiently uniform for all situations, and these issues are most appropriately addressed through regional or activity-specific conditions.

We concur with this conclusion, particularly since an existing and robust collection of requirements exists to sufficiently prevent and/or mitigate environmental impacts of pipeline/utility projects such as the 1/2-acre impact limit for NWP 12, PCN thresholds that trigger additional reviews, and a general prohibition against any change in pre-construction contours of jurisdictional waters as well as additional GCs and regional and district-specific conditions that can be added if appropriate.

Moreover, there are existing protective and enforceable requirements related to BMPs within the GCs that apply uniformly and in addition to the terms of the specific NWP. These include: GC 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; GC 12, relating to soil erosion and sediment controls, has additional protective requirements during construction; GC 13, relating to temporary fills (and now proposed to include 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 GC 14, relating to proper maintenance, requires NWP activities to be maintained to ensure public safety.

We also do not believe any additional and especially unvetted standards should be added given that utility line activities covered by the current NWPs already must comply with a myriad of regulatory frameworks which are then implemented and enforced by those jurisdictional authorities. Further, any BMPs imposed on interstate natural gas pipelines must be consistent with FERC's Plans and Procedures or such pipelines will be faced with conflicting regulatory requirements. Also, no additional burdensome provisions should be added to the GCs (e.g. the proposed language in GC 11 relating to equipment should be removed).

3. Acreage impact limits for loss of waters of the U.S. should remain constant, with each separate and distant crossing of a waters of the U.S. authorized by NWP 12.

The Associations support 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 the waters of the U.S. is authorized by NWP 12 as a single and complete project.⁴⁰ The Associations support the USACE's proposal to maintain the 1/2-acre impact limit for each "single and complete project" for NWP 12.⁴¹

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 complete project for purposes of NWP authorization."⁴²

Since 1988, the USACE has calculated the 1/2-acre impact threshold separately for each separate and distant crossing.⁴³ When the DE evaluates the PCN for a linear project, he or she considers the individual crossings of waters of the U.S. 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 U.S. 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 [USACE] districts."⁴⁴ 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."⁴⁵

Accordingly, the current 1/2-acre limit for each single and complete project should be maintained.

⁴⁰ Proposal at 26,141.

⁴¹ Id.

⁴² Id. at 26,166. Note: A "waterbody" is a jurisdictional water as defined.

⁴³ 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 Tenth Circuit affirmed, upholding the structure and substance of NWP 12. Bostick, 787 F.3d 1043 (10th Cir. 2015); See also 33 CFR Section 330.2(i).

⁴⁴ 2017 Energy-Related 12 NWPs Review at 36.

⁴⁵ Id.

4. NWP 12 Note 2 should be reissued with no changes, 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. No additional definition of “separate and distant” is necessary.

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.⁴⁶ These regulations include the definition of “single and complete project” at 33 CFR Section 330.2(i)⁴⁷ and the provision on combining NWPs with individual permits at 33 Section CFR 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 “the concept of independent utility does not apply to individual crossings of waters of the U.S. for linear projects because each separate and distant crossing of waters of the U.S. is necessary to transport people, goods, or services from the point of origin to the terminal point.”⁴⁸ We also agree that these definitions are clear and unambiguous and that no additional definition of “separate and distant” is necessary.

5. Notwithstanding our main recommendation to reissue the NWP 12 as is, we supported the 2021 NWPs which reduced duplicative, inconsistent, or unnecessary 7 PCN requirements to 2 requirements; however, the new PCN threshold for pipelines over 250 miles in length is arbitrary and should be removed.

The NWPs are designed to regulate with little, if any delay or paperwork and we support decreases in paperwork burden associated with PCNs, and to that end, we recommend that no new PCNs are added to the NWP 12 and that the USACE look for opportunities where PCNs burdens can be lessened.

⁴⁶ 56 Fed. Reg. 59,110 (Nov. 22, 1991).

⁴⁷ The “single and complete project” 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).

⁴⁸ 2017 Energy-Related 12 NWPs Review at 88.

Separate from our current position to reissue the NWP 12 as is, the Associations supported the USACE's recommendation in the 2017 Energy-Related NWPs Review for limiting PCNs to utility lines crossing navigable waters subject to RHA Section 10, and to utility line activities resulting in the loss of greater than 1/10-acre of waters of the U.S. We agreed that the five PCN triggers that the USACE recommended for removal in the 2020 proposal were duplicative, unnecessary, and inconsistent with other similar NWPs. We fully supported removing the 5 PCN requirements which provided additional streamlining to the permitting process and while continuing to ensure that the authorized activity under NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects.

The same and actually stronger arguments also apply for removing the PCN for new oil and natural gas pipeline projects that are greater than 250 miles in length that the USACE added in 2021. This new PCN is contrary to the USACE's prior recommendations, and we again emphasize the need for the USACE to remove the 250-mile PCN threshold in its entirety.

It is not a question of picking another number of greater or lesser miles but simply that this threshold, based on an arbitrary limit, must be deleted. The USACE's response to our 2020 comments is not sufficient in providing a reasoned justification. Our comments had noted that the USACE has failed to explain why this arbitrary number of 250 miles was chosen as the cut-off point and instead simply solicits comments on whether it should be for a greater or lesser number of miles. Further, the 250 miles is not based on any articulated impact to the aquatic environment, and thus, no appropriate nexus for the threshold has been established. Aquatic impacts are as much or more influenced by geography and the presence of waterbodies than length.

In addition, the NWP 12-specific PCN is completely contrary to the central tenet of the current NWP 12 as well as NWPs 57 and 58, which is that each crossing is considered a single and complete project for the purpose of NWP authorization. Yet, the 250-mile PCN trigger is limited to the NWP 12 and is not applied to other projects encompassed in NWPs 57 and 58, which have similar activities and impacts to jurisdictional waters, or to projects in other NWPs, which also commonly stretch over 250 miles (e.g., roads under NWP 14). Also, the three categories of pipelines/utility lines (NWPs 12, 57 and 58) have virtually identical requirements, and therefore should have the same PCN triggers.

Moreover, the USACE explains without any evidentiary support on why a similar project size threshold should not apply to other pipelines or electric lines. It states: "The Corps does not believe that this PCN threshold is necessary for the new NWPs 57 and 58 because long-distance electric utility lines are often constructed as overhead utility lines and utility lines for water and other substances (e.g., potable water, wastewater, sewage) are

often constructed to serve local communities and thus are likely to be shorter in overall length.”⁴⁹

Yet, the APA requires, among other things, that agency action not be arbitrary and capricious.⁵⁰ Fundamental principles of administrative law require that agency action be “based on a consideration of the relevant factors,” and rest on “reasoned decisionmaking.”⁵¹ “[R]easoned decisionmaking” in turn requires the agency to “examine the relevant data and articulate a satisfactory explanation for its action including ‘a rational connection between the facts found and the choice made.’”⁵² The supporting data is absent. The USACE simply failed to explain why this arbitrary number of 250 miles was chosen as the cut-off point and instead solicits comments on whether it should be for a greater or lesser number of miles.

In addition, a national term of this kind is contrary to the established USACE determination that the DE is the appropriate decision making authority for determining the scope of the appropriate geographic region for the regional level non-NEPA cumulative effects assessment (the USACE notes that the DE’s cumulative effects analysis does not have to be an exhaustive analysis because the required NEPA cumulative effects analysis was done by Headquarters in the decision document supporting the reissuance).⁵³ This 250-mile determination, on the other hand, is simply arbitrary and has no scientific, technical, or regulatory basis.

In response to our comments, the USACE simply noted that the “Corps finds that a length of 250 miles is both a good indicator of potential cumulative effects of an oil or natural gas pipeline while minimizing the potential for inconsistent implementation of the PCN requirement across districts.”⁵⁴ There is no rationale for the numeric limit provided. Instead, the USACE stated: “Given the concerns expressed by numerous commenters regarding the potential cumulative adverse environmental effects that may be caused by NWP 12 activities, this is not an arbitrary or capricious addition to the PCN requirements for NWP 12.”⁵⁵ Adding a regulatory requirement that targets a specific industry without any additional support for the number limit other than pressure from “numerous commenters regarding the

⁴⁹ 86 Fed. Reg. at 2,776.

⁵⁰ See 5 U.S.C. Section 706.

⁵¹ Id. Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983). (citations omitted).

⁵² Id.

⁵³ 82 Fed. Reg. at 1,975. See 2025 NWP 12 Decision Document.

⁵⁴ 86 Fed. Reg. at 2,776.

⁵⁵ Id. at 2,776.

potential cumulative adverse environmental effects that may be caused by NWP 12” is not sufficient reasoned justification.⁵⁶

Regardless, in 2025, the USACE has undergone a sea change in policy as expressed in executive orders that must be adhered to, and this arbitrary PCN threshold certainly does not meet those parameters for efficient legally defensible permitting processes for energy projects needed for the nation’s security and prosperity.

We also supported the 2021 removal of the PCN trigger for the mechanized land clearing of forested wetlands and we appreciated the USACE removing that unnecessary requirement. As we had discussed, a practical aspect is also that permittees need to meet regulatory requirements for inspecting a ROW required by PHMSA for hazardous liquid pipelines under 49 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 limits permittees’ ability from being able to identify an unsafe condition.

Overall, we recommend that the USACE review the existing PCN thresholds for NWP 12 carefully and consider removing any further unnecessary PCN triggers. Removing PCN triggers does not absolve permittees from compliance. In fact, 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.”⁵⁷ 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.

6. NWP 12 should continue to authorize the remediation of inadvertent returns of fluids during drilling operations, without additional changes, and we appreciate the clarification provided by the USACE provided regarding the limited applicability of horizontal directional drilling in Section 404 permitting.

In most instances, horizontal directional drilling crossings under waters of the U.S. do not require CWA Section 404 authorization because these types of crossings avoid any

⁵⁶ Id.

⁵⁷ 82 Fed. Reg. at 1,891.

discharge of dredged or fill material into waters of the U.S. and thus do not trigger the USACE's CWA jurisdiction. The avoidance of discharges into waters of the U.S. 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. 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 waters of the U.S., 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 waters of the U.S.⁵⁸

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, DEs 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 a release of drilling fluid occur.

We also appreciate the USACE's clarifying explanations regarding horizontal directional drilling and how it fits within its jurisdiction.⁵⁹ The language in the preamble is especially helpful in providing clarity to the USACE staff and regulated industry as well as the public and will aid in with ensuring consistency in permitting decisions. The USACE explains: "For underground utility lines that are installed by horizontal directional drilling, there is no ground disturbance except at the entry and exit points for the drilling equipment."⁶⁰

The USACE further clarifies that: If the entry and/or exit points are in jurisdictional waters and wetlands, and the creation of the entry and exit points during construction result in discharges of dredged or fill material into waters of the U.S., then a [S]ection 404 permit is required. The rest of the utility line will be below any wetlands or other waters that are on the surface, but the installation of the below-ground utility line itself does not trigger a

⁵⁸ Id. at 1,883.

⁵⁹ 85 Fed. Reg. at 57,325-57,326.

⁶⁰ Id. at 57,325.

requirement for a [S]ection 404 permit because it is below the surface and does not involve a discharge of dredged or fill material.⁶¹

The USACE further acknowledges the Association's comments and appreciation for the clarification that the USACE's jurisdiction is limited to authorizing temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids through sub-soil fissures or fractures that might occur during HDD.⁶²

7. The provision facilitating the use of temporary mats should be retained.

In 2016, we supported the USACE adding further clarity to temporary structures and fills requirement by including the use of temporary mats. We appreciated the USACE noting our support in the 2021 reissuance.⁶³ Our members' field experience find that it is an excellent measure to protect wetlands for this type of temporary crossings authorized by the three applicable NWP's to minimize impacts of utility line activity. We ask the USACE to continue retaining this provision.

8. Pipeline abandonment issues in NWP 12 should be treated consistently across the districts.

Pipeline abandonment issues are currently addressed by the USACE guidance, and the approach appears to vary by the districts. Based on our experience, some districts manage pipeline abandonments under existing NWP's while other districts address pipeline abandonments through individual permits or letters of permission. This uncertainty significantly impacts project planning. In addition, the inconsistency between the districts results in a significant cost burden.

We appreciate that the USACE supporting in the 2021 reissuance our comment recommending that NWP 12 terms provide consistency in the treatment of pipeline abandonment. We wanted to continuing reiterating this position and that for future rulemaking, for pipeline activities authorized under an NWP, the same NWP should address the conditions of abandonment under typical circumstances and existing regulations while leaving individual permit evaluation for more complex conditions.

⁶¹ Id.

⁶² 86 Fed. Reg. at 2,771.

⁶³ Id.

9. NWP 12 should continue to be used to authorize emergency installation, replacement or repair of utility lines in jurisdictional waters and we ask the USACE to clarify the scope of such activities.

NWP 12 is an important permitting tool for authorizing emergency activities for installing, replacing, or repairing utility lines.⁶⁴ The USACE's emergency procedures are provided in 33 CFR Section 325.2(e)(4). The USACE should 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 immediate steps if repairs or other action are necessary.⁶⁵

The concept of including emergency activities such as integrity digs is not new to NWPs. In 2007, NWP 47 authorized time-sensitive inspection and repair activities subject to a list of strict standards.⁶⁶ In 2012, this NWP was not reauthorized because it was tied to a PHMSA pipeline repair and environmental guidance system which did not end up being developed and deployed but it remains a helpful example of types of activities that can be authorized for time-sensitive inspection and repair activities and protective conditions that can apply.⁶⁷

We ask the USACE to consider clarifying the types of time-sensitive activities including integrity digs that are authorized under NWP 12 and NWP 3. In response, the USACE stated in the 2021 NWPs that it does not believe that it is necessary to add text to specifically address integrity digs because discharges for integrity digs can be considered

⁶⁴ 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 waters of the United States. Emergency procedures for the [USACE] regulatory program are discussed in 33 CFR Section 325.2(e)(4)." 65 Fed. Reg. 12,818 at 12,843-12,844. See 86 Fed. Reg. at 2,753.

⁶⁵ 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, June 15, 2004.

⁶⁶ 72 Fed. Reg. 11,092 (Mar. 12, 2007) at 11,143-11,144.

⁶⁷ 77 Fed. Reg. 10,184 (June 1, 2016) at 10,228.

part of maintenance which is in the first part of NWP 12. The 2021 preamble also noted that NWP 12 can be used to authorize emergency installation, replacement or repair of utility lines. We appreciate USACE's response; however, we would like USACE to reconsider our comment for clarification on the types of time-sensitive activities including integrity digs that are authorized.

10. In NWP 12, the USACE 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 Associations' members as timely repairs to pipelines as part of normal maintenance activity reduce the potential for spills or leaks in waters of the U.S.

To ensure regulatory clarity in the 2020 proposed NWPs, the Associations asked the USACE to provide examples of NWP 12-permitted activities relating to utility line maintenance and repair activities that do not qualify for CWA Section 404(f)(1) exemption such as integrity digs as discussed above. The USACE noted our comment and stated that the U.S. EPA has the authority to determine which activities are eligible for the CWA Section 404(f) exemptions.⁶⁸

The Associations' members understand that repairs involving mechanized land clearing outside previously authorized ROWs may require NWP 12 authorization as well as pipeline replacement activities which may increase the size of maintained ROWs in waters of the U.S. However, normal maintenance should continue to qualify as exempt under CWA Section 404(f)(1).

11. The Associations find while in 2021, the USACE added the word "over" to activities that are routed in or under RHA Section 10 waters to read "routed in, over, or under;" these additional activities would be considered bridges regulated under RHA Section 9, and as such, this appeared to be an unnecessary addition, and we appreciated that the USACE added "may" to allow flexibility.

We were unclear with the NWP's decision to add the word "over" to existing language relating to activities that are routed in or under RHA Section 10 waters because as the USACE had stated in its 2000 NWP rulemaking: "A Section 10 permit is not required for utility lines

⁶⁸ 86 Fed. Reg. at 2,778.

constructed over navigable waters of the U.S. to transport gaseous, liquid, liquifiable, or slurry substances, because these structures are considered bridges which are regulated under Section 9, not Section 10, of the Rivers and Harbors Act.”⁶⁹ The USACE responded to our comment in the final 2021 rule and added “may” because there may be circumstances where Section 10 authorization is required for oil or natural gas pipelines routed over navigable waters of the U.S. We appreciate the USACE’s revised wording in 2021 and the response to our comment.

12. Given that the USACE took the unfortunate step of finalizing the NWP 12 with three separate NWPs, all changes relating to NWP 12 must be shared by the two other NWPs as well, which is the case with the two proposed notes; and we ask that these proposed changes are strictly non-substantive and administrative in nature only and do not add new permitting burdens.

The USACE is proposing two changes in the notes section of NWP 12 (Note 1 and a new Note 7 with similar changes in NWPs 57 and 58) as stating that RHA Section 10 permittees should provide a copy of the ‘as-built drawings’ and the geographic coordinate system used in the ‘as-built drawings’ to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), to inform updates to nautical charts and Coast Pilot corrections; and to provide the location and dimensions of the proposed structures to the U.S. Coast Guard (USCG) prior to submittal of a PCN, or prior to beginning construction. The USACE notes that additional navigation-related concerns could necessitate requirements under GC 1 such as lighting and marking.

The 2025 proposal notes that these revisions are intended to remove an administrative burden from the USACE and to encourage permittees to ensure that structures in navigable waters of the U.S. are reflected on the appropriate navigation chart.⁷⁰ The Associations support the information sharing to protect navigation and while we have no substantive issues, we ask for clarity on these notes.

We request that the USACE ensures that supplying the additional information to the NOAA, NOS, and the USCG will not create inadvertent opportunities for the agencies to comment on permittees’ submissions beyond the jurisdictional authorities of these agencies (that is, outside of Section 10 navigation-related concerns) which could lead to regulatory uncertainty and potentially longer permitting processing times.

⁶⁹ 65 Fed. Reg. at 12,844.

⁷⁰ 90 Fed. Reg. at 26,111.

13. GC 32(b)(4) and related Section D District Engineer’s Decision includes additional changes that expand information submittal requirements and evaluations for NWP that do not trigger PCNs, and we request that those submittals are used only for the narrow purpose as set out in GC 32(b)(4)(ii).

GC 32, as proposed, included the additional paperwork requirements from 2021 for information on those single and complete crossings authorized by the NWP but do not require PCNs.⁷¹

Overall, we do not support the USACE’s 2021 NWPs relating to linear projects which add informational submittal requirements for NWP activities that do not require PCNs under GC 32(b)(4)(ii). The USACE also recommended deleting the following language “that require PCNs” in Section D relating to DE’s Decision, and by this action, the USACE is expanding DE evaluation of linear projects to those that do not require PCNs. It was clearly not the CWA’s intent to have information collection requests for NWPs to resemble individual permit requirements.

However, we appreciate that GC 32 adds clarifying language that “[t]his information will be used by the [DE] to evaluate the cumulative adverse environmental effects of the proposed linear project and does not change those non-PCN NWP activities into NWP PCNs.”⁷² We request additional clarification that the DEs’ existing practices will remain the same and the DEs will not process those non-PCN NWP crossings as they would for those crossings requiring PCNs. As with non-PCN NWPs, the USACE should be clear that submission of the information does not mean an applicant needs a verification before it can proceed with non-PCN NWP crossings.

In addition, the scope of cumulative effects analysis by the DE should be clarified in Section D. The USACE has stated that the DE’s cumulative effects analysis does not have to be an “exhaustive analysis” because any additional NEPA cumulative effects analysis is done by the USACE Headquarters in the decision document supporting the reissuance of the NWPs suffices.⁷³ Instead, for pipeline and other projects, cumulative effects analysis is constrained by a period of no more than 5 years and within “the appropriate geographic area” as determined by the DE.⁷⁴ We ask that the determination of an appropriate geographic area

⁷¹ Id. at 26,162.

⁷² Id.

⁷³ 82 Fed. Reg. at 1,975. See 2025 NWP 12 Decision Document.

⁷⁴ 90 Fed. Reg. at 26,102-26,103.

should be reasonable, not arbitrary, and within the scope of DE’s authority as framed by the USACE.

The USACE is also clear in stating, “[u]nless the pipeline is constructed entirely in waters of the United States and involves activities that require [USACE] authorization, the [USACE] is not required to evaluate the entire pipeline, or linear project.”⁷⁵ The USACE further clarifies that, “[i]f the [USACE] is only authorizing the segments of the linear project, such as a pipeline, that cross jurisdictional waters and wetlands and involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States, then its analysis will focus on the regulated crossings of waters of the United States.”⁷⁶

These concepts must be consistently applied by the DE and be included as additional clarifying language in Section D to delineate the scope of the DE-level cumulative effects analysis.

14. The draft decision document relating to NWP 12 as proposed complies with the NEPA, CWA Section 404(b)(1) Guidelines, Public Interest Determination, and all other statutory and regulatory requirements.

We support the overall structure set out in the decision documents, particularly NWP 12. On the whole, the decision documents are an appropriate national evaluation of environmental consequences, including cumulative effects. Overall, we agree with the NWP 12 decision document’s impacts assessment and believe that it appropriately considers the factors as outlined in statutory and regulatory requirements and finding that activities authorized by these NWPs will have no more than minimal individual and cumulative adverse environmental effects.

We appreciate that the USACE includes the 2017 language that it “does not have the authority to control the burning of fossil fuels or the adverse environmental effects that are caused by burning those fossil fuels to produce energy.”⁷⁷ Yet, the first sentence in that paragraph relating to general environmental concerns including the burning of the fossil fuels that occurs after the oil or natural gas reaches its destination is unnecessary and outside the scope of the USACE’s jurisdiction.⁷⁸

⁷⁵ 82 Fed. Reg. at 1,975.

⁷⁶ Id.

⁷⁷ NWP 12 Decision Document at 93.

⁷⁸ Id.

We appreciate the USACE's thorough assessment of alternatives based on requirements of NEPA,⁷⁹ and, for all the reasons in this comment letter and the draft decision document, we do not believe that the no action alternative (do not reissue or modify) or national modification alternatives are appropriate. The regional modification and case-specific on-site alternatives provide sufficient protective measures in addition to the terms and conditions laid out in the national NWP.

C. NWP 13 — Bank stabilization should be reissued with the proposed language except for clarifying language to the nature-based solution definition and in a future rulemaking, we request the removal of the 1,000 linear foot limit on waivers for bulkheads which was added in 2017.

NWP 13 authorizes bank stabilization activities necessary for erosion control or prevention such as vegetative stabilization, riprap, and bulkheads. This is a helpful NWP that can be used for many environmentally beneficial activities that require bank stabilization where erosion is a concern or where proactive steps need to be taken for erosion prevention.

The Associations support reissuance of NWP 13 with no additional restrictive PCN thresholds or additional limits as proposed by the USACE. We have no additional comments on the proposed changes except as related to a clarifying change for the definition of nature-based solutions (see above). The current clarification of 'bank stabilization' should be retained. The Associations appreciate that NWP 13 authorizes a variety of bank stabilization techniques without mandating a specific approach to bank stabilization.

1. This NWP is helpful for the maintenance activities it authorizes.

The Associations also appreciate that maintenance activities are also authorized under this NWP and support this in the reissuance.

2. The Associations recommend the removal of the 1,000 linear foot limit on waivers for bulkheads.

In 2017 NWPs, a 1,000 linear foot limit on waivers for bulkheads was added to NWP 13 which we recommend removing. The DE is best able to decide on granting waivers on a case-by-case basis. The USACE acknowledged our comment in 2021, but the USACE declined to make the change explaining its reasoning that the 500 linear foot limit can be waived up to the 1,000 linear foot limit and that the DEs can also add regional conditions to impose lower linear foot limits including maximum length of the bulkheads. We appreciate

⁷⁹ Id. at 7-10.

the response; however, we ask the USACE to reconsider our comment that is specific to the removal of the waiver.

3. The Associations have reviewed the changes related to nature-based solutions and only offer comments related to the definition.

The Associations have reviewed the proposed changes and appreciate the USACE's efforts to increase the number of NWP-authorized activities and to decrease the number of individual permits. We only offer comments as related to the definition of "nature-based solutions" (see above) and we request that this NWP be reissued with no additional burdensome provisions including no new PCN thresholds should be added.

D. NWP 14 — Linear Transportation Projects should be reviewed, and we request that the USACE conduct consistency reviews of acreage limits and PCN thresholds with NWP 12 and in future rulemaking, consider increasing the acreage limits and remove unnecessary PCN thresholds in NWP 14. Additionally, we recommend consistency between NWP 12 and NWP 14.

We recommend consistency between NWP 12⁸⁰ and NWP 14 to the extent that both authorize activities for single and complete linear projects with separate and distant crossing where independent utility does not apply. The USACE attempted to draw differences between the two types of activities in response to our 2020 comments, but we ask the USACE to reconsider given that they are both linear infrastructure projects with similar minimal impacts from their NWP-authorized activities.

1. NWP 12 and NWP 14 should be consistent in terms of acreage thresholds.

We recommend making NWP 14's minimum acreage limits for NWP authorizations consistent with linear project activities under NWP 12. For example, NWP 14 sets a qualifying acreage limit of 1/3-acre for tidal waters and 1/2-acre for non-tidal waters. The USACE has already established that 1/2-acre limit is sufficient to meet the minimum impacts requirement under the CWA for several NWPs including NWP 12. The USACE in response to our comment in 2021 explained that 1/3-acre has been in place since it was first introduced; however, that does not mean its PCN threshold cannot be reviewed given changing circumstances. We respectfully resubmit this comment given the change in policy direction under the 2025 Executive Orders.

⁸⁰ Our recommendations when referencing NWP 12 under this NWP 14 section apply to all three utility line NWPs.

2. NWP 12 and NWP 14 should be consistent in their PCN triggers.

In any future revisions of NWPs related to linear projects, we recommend that the PCN triggers be the same. The PCN trigger for discharges at special aquatic sites in NWP 14 does not provide additional benefits and instead introduces inconsistent and arbitrary requirements. Overall, we believe that aligning NWP 14 with NWP 12 (and NWP 51) allows for a more efficient, streamlined, and consistent processing of NWPs especially given that the 1/2-acre limit remains in place as a protective measure. Again, the USACE provided their rationale with the USACE stating that both NWPs 12 and 14 have somewhat different PCN thresholds because of differences between oil and natural gas pipeline activities and linear transportation projects. They explain that both have 1/10 acre PCN threshold for losses of waters of the U.S. and both authorize temporary mats when use of those mats require DE authorization. We again ask the USACE to reconsider given the change in policy mandates this year and our request to reconsider our comment.

3. NWP 14 should retain temporary mats similar to NWP 12.

Temporary mats as permitted under NWP 12 should also be retained under NWP 14 .

4. We support Note 1 here for the same reasons cited above in Note 2 for NWP 12.

Similar to the discussions above for NWP 12 and Note 2, we are supportive of Note 1 here relating to the discussion of single and complete projects and the clarification that linear transportation projects do not require a showing of independent utility.

E. NWP 18 — Minor Discharges should be reissued with no additional changes.

NWP 18 allows for minor discharges of dredged or fill material provided that certain criteria are met. We support the reissuance of NWP 18 with no additional changes. NWP 18 already provides an appropriately streamlined authorization process for these types of activities. For future rulemaking, we also ask for a consistency review between NWP 18 and 19, as well as consider our comments above on increasing acreage thresholds as well as removing unnecessary PCN requirements.

F. NWP 19 — Minor Dredging should be reissued and we support increases in allowable amounts of minor dredging to 50 cubic yards as proposed in 2020 (but not ultimately adopted).

We support the reissuance of NWP 19 as proposed. Additionally, in future iterations of this NWP, we would welcome the change proposed by the USACE in 2020 to increase allowable dredging from 25 cubic yards to 50 cubic yards. We support the USACE's reasoned judgment in expanding to the previously proposed 50 cubic yards while remaining protective, and we would potentially support an increase up to 100 cubic yards so long as it is legally

defensible. In 2021, the USACE noted the importance of consistency between NWP 18 and NWP 19; consequently, we would support a similar increase in NWP 18.

In addition to the change recommended by the USACE, we support removing the burdensome and unnecessary 2017 language requiring separate authorization for placement of minor dredged material in waters of the U.S. Respectfully, we point out that dredged material is often used as erosion control or beneficial reuse in erosion-prone areas that are directly adjacent to areas proposed for minor dredging.

Lastly, we believe it would also be beneficial to add “screeding” as a minor dredging activity eligible for NWP 19 authorization. Screeding is a practice that involves displacing and moving sediment to a new area in close proximity to its original location. Such a practice does not require any limitation on volume since no additional fill is being placed. An example of this practice can be added in the preamble as well as listed in NWP 19 as an authorized activity. This type of request is in keeping with the USACE’s request in the 2025 proposal for comments on reasonable situations that might warrant NWP coverage.

G. NWP 23 — Approved Categorical Exclusions is solicited for comments on notice questions, and we support the long established Regulatory Guidance Letter (RGL) process, but we agree that publication and notice in the Federal Register offer greater opportunity for transparency and better method of providing notice to the public.

The USACE is specifically soliciting public comment on whether a RGL is the best way to document the categorical exclusions that are approved under this NWP or if another document, such as a Federal Register notice, would provide better notice to the public.

We believe that important documents such as the approval of any categorical exclusions would benefit from additional notice in the Federal Notice.

H. NWP 27 — Aquatic Ecosystem Restoration, Enhancement, and Establishment Activities should be reissued. We support USACE’s efforts in proposing additional language for a more efficient, effective, and less costly process for NWP-authorized activities.

We appreciate and support USACE’s continued efforts in removing barriers that limit use of NWPs, including removing unnecessary PCN thresholds, and overall, proposing changes for “a more efficient, effective, and less costly process for NWP-authorized activities.” We have no specific comments for proposed changes related to this NWP except to request that no additional burdensome conditions be added.

I. NWP 33 — Temporary Construction, Access, and Dewatering should be reissued with no changes, and based on NWP 33’s history, a review of PCN thresholds should be considered in the future for other NWPs.

We appreciate the USACE’s 2020 review of NWP 33 as part of its 2017 Energy-Related NWPs Review. We encourage the USACE to continue to look for opportunities to reduce unnecessary PCN requirements as it did in 2017 when removing the PCN trigger for all NWP 33 activities in Section 404 waters and limited PCNs to RHA Section 10 waters only.

In 2017 NWPs reissuance, the USACE conducted a consistency check and found that it did not require PCNs for these types of activities authorized under other similar NWPs such as NWP 3, 12, 13, and 14.⁸¹ The USACE made this assessment based on their experience with those four NWPs and “to provide more efficiency in the NWP Program.”⁸² Similarly, we also conducted an assessment of PCN requirements. Based on this review, we reiterate that in future issuances of this permit, we would like to see proposed increases to the PCN thresholds for NWP 14 and NWP 39.

J. NWP 39 — Commercial and Institutional Developments triggers PCNs for all activities and in future rulemakings, this NWP should undergo a consistency review and a tailored approach (e.g., other similar activities authorized by NWP 12 and NWP 51 which have PCN triggers of 1/10 acre that are more judiciously tailored).

This NWP is important in that it authorizes discharges of dredged or fill material into non-tidal waters of the U.S. for the construction of commercial and institutional building foundation and building pads, and attendant features that are necessary for the use and maintenance of the structures. There are “including but not limited to” attendant features and examples of commercial developments such as roads, parking lots, garages, and yards. This NWP can be used to authorize power plants, refineries, oil wells and drilling pads, and other types of energy projects.

We support the reissuance of NWP 39 with no additional acreage threshold requirements over the 1/2-acre threshold limit, or other overly broad requirements. However, in future iterations and as noted in our prior 2020 comments, we recommend a review and revision of the blanket PCN requirement for all NWP 39 activities that either removes the unnecessary PCN threshold or adopts a tailored approach similar to NWP 14 which requires PCNs only if loss of waters of the U.S. exceed 1/10-acre or if there is a discharge in a special aquatic site.

⁸¹ 81 Fed. Reg. 35,186 (June 1, 2016) at 35,200.

⁸² Id.

It also appears that due to burdensome PCN requirements, NWP 39 is underutilized and there are potential opportunities to incentivize project proponents to reduce a project's impact on aquatic resources via greater use of NWP 39 versus pursuing individual permits. We recommend that – similar to NWP 12, NWP 14 and NWP 51, which contemplate activities with same or similar attendant features relating to impervious cover such as foundations, roads and parking lots – PCN thresholds for NWP 39 be required for discharges that result in the loss of greater than 1/10-acre of waters of the U.S. The outer limit for qualifying for NWP authorization would still be no more than 1/2-acre impact limit which would ensure that the NWP continues meeting the requirement of imposing no more than minimal individual and cumulative adverse environmental effects.

K. NWP 43 — Stormwater Management Facilities should be reissued with changes as proposed and with no additional changes.

The proposed language replaces “green infrastructure” and “low impact development integrated management features” with “nature-based solutions” and the preamble provides additional examples of nature-based solutions related to stormwater management. Illustrative list of examples (stream biofilters, bioretention ponds or swales, rain gardens, vegetated filter strips, vegetated swales (bioswales), constructed wetlands, infiltration trenches, and regenerative stormwater conveyances) is helpful.

We have no comments with this provision except we have a comment and suggested changes to the definition of “nature-based solutions.”

L. In addition to the above, we specifically support the reissuance of the following NWPs with no changes except as pertaining to PCN threshold triggers as applicable which we advocate further review and removal in a future rulemaking: NWPs 7 and 8 (PCNs required for all activities). (see discussion related to NWPs 3, 18, and 19).

We reiterate our support of these NWPs to be reissued without any new encumbrances. We also ask for a review of PCN thresholds.

V. GENERAL CONDITIONS OF INTEREST

We support the reissuance of all GCs without additional unnecessary and burdensome requirements that unduly obstruct, delay, curtail, or impose significant costs to the regulated community. NWPs are designed to authorize activities with minimal impacts and conditions should not be overly complex in terms of onerous paperwork and inflexible permitting processes. Of note, we submit that GCs 2, 3, 7, 11, 15, 17, 18-21, 25-26, 28, 31 and 32 should be reissued with none or limited non-substantive changes.

We also specifically provide comments on ones of particular interest to the oil and natural gas industry as well as in response to proposed changes.

A. GC 9 — Management of Water Flows has a clarifying change related to tidal flows and we have no position on the change except that we recommend no additional burdensome provisions should be added.

This GC should be reissued as proposed and with no additional provisions added.

B. GC 11 — Equipment should be reissued without the proposed unnecessary BMP-type changes that are proposed.

We support the reissuance of this GC with no changes. The purpose of this GC is to minimize adverse effects to jurisdictional waters and wetlands that are caused by equipment that disturbs soil. We comply 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; and also, as an industry, we have proactively adopted BMPs that we follow. As such, as the USACE has stated itself in the context of NWP 12,⁸³ it would be more appropriate to have DE's determine which BMPs should be applied.

Thus, it is not necessary to include the additional language that specifies that areas affected by temporary mats must be restored. Such practices are already a part of industry's BMPs, and otherwise, should be addressed as part of regional conditioning based on local conditions and DE's discretion as appropriate. The proposed language utilizes broad nationwide terms that are unnecessary and will only promote further confusion and uncertainty. For example, the language provides for "significant soil compactions" and yet no further guidance or clarity is provided. Such a broad term is ambiguous and creates difficulty from compliance perspective for the permittee as well as limits enforcement for the USACE. Depending on regional variation relating to soil types, there may be different definitions of soil compaction leading to greater regulatory uncertainty. Clearly there is a process laid out in the NWPs for such circumstances which would be voluntary compliance and where that fails, there is the additional safeguard of the DE being able to step in with regional or specific conditions.

In prior rulemakings, the USACE has also received comments, considered and correctly rejected changes relating to water sampling or requiring equipment to be maintained in good working order to ensure that there will be no leaks of contaminants, or requiring spill kits for on-site emergency clean-ups. Based on our members' field experience,

⁸³ 82 Fed. Reg. at 1,887, 1890.

none of these are necessary because of other requirements that would come into play. And in some cases, it is outside of the USACE's authority. As the USACE also discussed in 2017, it also does not have the authority to regulate the maintenance of equipment nor to mandate the use of spill kits for on-site emergency cleanups.⁸⁴

Similar to our 2020 comments, we again ask for the reissuance of this general condition without any changes including the proposed changes or any additional burdensome conditions.

C. GC 18 — Endangered Species should be reissued as proposed given the tight timelines; however, there are serious issues with this GC that are contrary to the policy mandates set out in the Executive Orders for the efficient processing of permits, and we request that the USACE consider our comments in future rule revisions.

Generally, we support the USACE's determination that all activities authorized by the NWP's comply with Section 7 of the Endangered Species Act ("ESA"), consistent with the NWP regulations and GC 18.⁸⁵ The one change removing a reference due to a rule change is not an issue.

Overall, we agree with the USACE that federal agencies should follow their own procedures for complying with the requirements of the ESA; and that the respective federal agency should be responsible for fulfilling its obligations under Section 7 of the ESA.

For future rulemaking, however, we would like the USACE to consider the broader issues relevant to this GC and GC 20 given that this condition can serve to delay or even stop an energy project due to its PCN threshold that is triggered. Under GC 18(c), the DE makes the initial determination whether a proposed activity for non-federal permittees "may affect" or will have "no effect" on listed species or designated critical habitat within 45-days of receipt of a completed PCN. GC 18(c) further provides, however, that if the applicant has not heard back from the USACE within 45 days, it must wait for notification from the USACE regarding the DE's determination whether the proposed NWP activity "may affect" or will have "no effect" on listed species or designated critical habitat. This step has the effect of slowing down the permit processing times considerably at the detriment of crucial energy projects.

To ensure timely processing and review of PCNs, the Associations recommend that the USACE adhere to the 45-day review time from receipt of a completed PCN for the DE to make a determination; or as alternative, rewrite the provision with a not-to-exceed 90-day

⁸⁴ *Id.* at 1,950.

⁸⁵ 90 *Fed. Reg.* at 26,127.

review requirement for PCN verification in the event this provision is triggered to ensure the DE timely reviews and responds to these PCNs.

On a wider scale, the Associations also support the use of regional programmatic ESA Section 7 consultations, where appropriate, to satisfy the requirements of the NWP in GC 18 if a proposed NWP activity is covered by that regional programmatic consultation. This would eliminate the need for project by project consultation. For example, the programmatic biological opinion for activities on the North Slope makes a no jeopardy determination for all threatened and/or endangered species in the region, and this programmatic biological opinion may be used to satisfy GC 18 for proposed NWP activities covered by the North Slope regional programmatic consultation.

This condition along with GC 20 has significant issues and requires a thorough review and reconsideration of its PCN thresholds and a consideration of alternatives such as district level consultations can be attained in lieu of these GC reviews. Otherwise, these GC 18 and 20 processes mimic the timing of an individual permit which is not appropriate for NWPs designed only for minimal impacts.

Lastly, GC 18 was reissued in 2021 with a modified paragraph (c) to be consistent with 33 CFR 330.4(f)(2) that non-federal permittees shall notify the DE if there are any federally listed (or proposed for listing) endangered or threatened species or critical habitat might be affected or is in the vicinity of the project. The USACE also added “critical habitat proposed for such designation” to paragraph (c). The same language is added to other sections where appropriate. It is now also proposed to be included in GC 32.

We disagree with these changes expanding the ESA requirements for listed endangered or threatened species or critical habitat to include species proposed for listing or critical habitat proposed for such designation. In keeping with the applicable 2025 executive orders requiring rules review of requirements that exceed statutory requirements, we ask the USACE to review 33 CR 330.4(f)(2) that includes species and critical habitats that are proposed but not finalized.

We also request further guidance on the ambiguous language “in the vicinity of the project” under 33 CFR Section 330.4(f)(2) as well as GC 18(c) (note: GC 28(c) refers to the “activity” instead of “project”). A reasonable application of “in the vicinity of the project” (or activity) language by the USACE should be restricted by factors such as the nature of activity, nature of impact, and regulatory requirements of the threatened and/or endangered species in question, as well as impacts to jurisdictional waters. Clarifying the reasonable scope of this language will help both the permitting agencies as well as the permittees in processing the NWP-authorized activities correctly and in a timely manner. We welcome further

discussion of this issue in future rulemakings, and we look forward to providing technical and programmatic input on the scope of “in the vicinity of the project” language.

D. GC 20 — Historic Properties requires further review of certain terms, and we support consistent and reasonable standards that do not exceed statutory and regulatory standards. Most of our comments were unheeded in 2020 and we resubmit for USACE reconsideration.

We support the USACE’s finding that the NWP regulations and the GC 20 ensure that all activities authorized by NWPs comply with Section 106 of the National Historic Preservation Act (“NHPA”).⁸⁶

We resubmit our 2020 comments for incorporation into this proposed rule. In 2020, we supported the USACE’s language in GC 20(c) stating that the DE’s identification efforts for historic properties “shall be commensurate with potential impacts” which appears to better define and limit the scope of the DE’s identification efforts to “potential impacts.”⁸⁷

We also agree with the USACE’s reliance on Appendix C and the interim 2005 and 2007 guidance as discussed in the preamble.⁸⁸ These guidance sources are generally consistent with the Advisory Council on Historic Regulations’ (“ACHP”) regulations.

We support the USACE previously acknowledging there are challenges due to different interpretations of how Appendix C is to be implemented, specifically in infrastructure projects and where the USACE “has regulatory jurisdiction over a very small portion of the overall project.”⁸⁹ We support the USACE’s position to make it clear that that Appendix C only applies to the USACE Regulatory program and that its authority is over assessment of effects from an undertaking (i.e. project, activity or program or portion thereof) that requires a USACE permit that is “limited in scope and geography” to a “permit area” proximate to structures and other activities requiring a RHA Section 10 and/or Section 404 permit.⁹⁰ We also encourage further review and guidance to districts to allow for a more consistent Section 106 consultation. In our experience, different districts interpret the “permit area” term differently and there can be variances from project to project or even along the length of one project.

⁸⁶ *Id.* at 26,133.

⁸⁷ *Id.* at 26,159.

⁸⁸ *Id.* at 26,133.

⁸⁹ 2017 Energy-Related 12 NWPs Review at 159.

⁹⁰ *Id.* at 160.

We agree with the USACE that for linear projects, where the crossings of waters of the US involve discharges of dredged or fill material into waters of the U.S. and/or structures or work in a navigable waters of the U.S., the undertakings for the purposes of Section 106 of the NHPA are the crossings that require USACE authorization.⁹¹ In the 2017 Energy-Related 12 NWP's Review, the USACE notes that the "ACHP's regulations at 36 CFR Section 800.16(y) define 'undertaking' as: 'a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.'"⁹² The USACE find that "by including 'activity' in its definition of 'undertaking,' the ACHP's definition recognizes that federal agencies may not issue permits or licenses for entire projects, and those federal agencies might only issue permits or licenses for specific components of entire projects."⁹³ Thus, the USACE concludes that the USACE's "scope of analysis for the purposes of [S]ection 106 of the NHPA is the same regardless of whether the activities regulated by the USACE are authorized by NWP's or other general permits, or by individual permits."⁹⁴

While we are supportive of the USACE's Appendix C and interim guidance documents April 25, 2005, and January 31, 2007, we continue to recommend clarification to the policies relating to the PCN submittal requirement in GC 20(c) triggering review if an activity "might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties." "[M]ight have the potential to cause" or "potentially eligible" are vague standards and our experience indicates that districts are applying these requirements inconsistently and more expansively than is appropriate.

In addition, "might have the potential" standard is a higher threshold than the threshold set forth in the ACHP regulations which the USACE acknowledge in the 2017 Energy-Related 12 NWP's Review and in the 2021 rule, and states that it has added that language to help ensure protection of historic properties.⁹⁵

We recommend further review of these terms, and we support consistent and reasonable standards that they do not exceed statutory and regulatory standards. In our experience, some districts take the position that the DE has responsibility to determine

⁹¹ Id. at 113.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ 85 Fed. Reg. at 57,361-57,362. See 2017 Energy-Related 12 NWP's Review.

whether GC 20 is triggered by reviewing the cultural resources analysis for the entirety of a project, determining the presence of listed or eligible resources, and considering impacts.

In a future rulemaking, we request that GC 20 be drafted to clarify that it is up to the permittee to decide whether the threshold “might have the potential” standard has been met. This includes the determination of whether the NWP activity might have the potential to cause effects to any “any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Properties.” Without this clarification, we believe that districts will continue to seek information regarding cultural resources along the entirety of a linear project, for example, which has the effect of making every crossing into one for which a PCN is required.⁹⁶

In addition, to provide permittees certainty in meeting the PCN requirement for those NWP activities that “might have the potential to cause effects to any historic properties,” we recommend that GC 20(c) be revised to include the qualification of the person who would make such a determination. Our recommended language is: “Non-federal permittees must submit a PCN to a DE . . . as determined by an individual meeting the Secretary of the Interior’s Standards for Professional Qualifications in Archaeology and Historic Preservation.” In 2021, the USACE noted our comments but stated that effect determinations are made by a variety of agency officials, including USACE district staff. We ask the USACE to reconsider our comment.

Similarly, we also recommend timely review of the associated scope of work and for the USACE to deem scopes of review final with no future revisions allowed once reviews are complete. Continual changes to final scopes of review hurt applicants’ planning process and can result in delays as additional last minute and unanticipated requests such as shovel tests of deep digs may be requested by the USACE staff.

In addition, we also recommend that the USACE adhere to the 45-day review time from receipt of a completed PCN for the DE to make a determination; or as alternative, rewrite it with a not-to-exceed 90-day review requirement for PCN verification in the event this provision is triggered. In 2021, the USACE noted our comment but simply reiterated that the DE will notify the prospective permittees within 45-days of receipt of a completed PCN whether Section 106 consultation is required but that the section 106 consultation process may take longer than 45 days. That is not helpful, and we resubmit our comment for USACE’s consideration.

⁹⁶ GC 21 offers additional protections. Should a permittee discover resources covered by GC 20 that were not anticipated, the procedures set forth in GC 21 for unexpected discoveries would apply.

In 2021, the USACE noted in response to comments that it cannot precisely define terms like “might have the potential to cause effects” and involve some degree of subjectivity. However, the regulatory community requires a higher standard than some degree of subjectivity given the breadth of projects involved that are beneficial to ensuring the nation’s energy dominance as highlighted by the President’s Executive Order. We ask the USACE to reconsider GC 20 in a future iteration.

The oil and natural gas industry seeks clarification on policies relating to the PCN submittal requirements triggering review if an activity “might have the potential to cause effects . . . under GC 20(c). The PCN review then is without any time constraints and can significantly hinder a permittee’s ability to move forward on a project that by its nature is designed to have minimal impacts.

E. GC 23 — Mitigation should remove the 2022 GC 23 trigger for certain NWP’s requiring compensatory mitigation for losses of stream beds greater than 3/100-acre.

As discussed above, in 2021, the USACE adopted a significant new revision to GC 23(d) by adding compensatory mitigation at a minimum one-for-one ratio for all losses of stream bed that trigger 3/100-acre and require PCN similar to provisions relating to wetland losses.⁹⁷

It is correct that a similar provision has been in place for losses of wetlands since 2007⁹⁸ but that does not automatically mean that the same will be true for streams. Wetlands perform entirely different and unique functions and are easily distinguished from streams by their shared characteristics as defined by the USACE.

This 2021 language is also contrary to the USACE’s determination in the 2017 Energy-Related NWP’s Review that the “[t]he 1/2-acre limit and PCN requirements are sufficient to ensure that activities authorized by these NWP’s will result in no more than minimal adverse environmental effects.”⁹⁹

Also, the DE 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.

⁹⁷ See GC 23(d).

⁹⁸ 85 Fed. Reg. at 57,315.

⁹⁹ 2017 Energy-Related 12 NWP’s Review at 2.

There is no need to change this well-established pre-2021 process by adding any mandatory compensatory mitigation requirements to any of the NWP's including this 3/100-acre trigger, or any additional monitoring requirements or specific provisions for certain waters. There is also no need to add any specific restrictions in GC 23 regarding DE's discretionary authority or requiring certain types of compensatory mitigation. Indeed, such mandatory requirements remove the innovative intent behind compensatory mitigation to seek creative, cost-effective solutions to address wetlands impacts.

As discussed above, the USACE noted that the changes were made to address the removal of the 300 linear foot limit for losses of stream beds for NWP's 21, 29, 39, 40, 42, 43, 44, 50, 51, and 53; and yet, the end result overly complicates a recommendation that simply called for removal of the 300 linear foot limit. There was no requirement mandating a corresponding measure to offset any impacts because as the USACE found, the ½ acre limit on its own sufficed.

In 2020, we also supported proposed changes to GC 23(e) relating to planting vegetation. That language was adopted as proposed and because of the flexibility it provides. The USACE also states flexibility as a rationale for its position recognizing that non-native species can have positive, negative, or neutral effects on ecosystems. Those provisions should remain unchanged.

Overall, we recommend that the GC 23(d) as a condition be removed and instead, we ask for the DE to be given flexibility to consider various types and locations of compensatory mitigation, and the preamble emphasizes this point and role of DE. The preamble notes that the flexibility in GC 23 allows DEs to consider mitigation and other site-specific activities required by other agencies when determining whether to require compensatory mitigation. The USACE also states that the DE has the decision-making authority for whether compensatory mitigation is required for an NWP activity. These conditions should negate the need for an additional mitigation threshold and instead provide for language giving the DE the discretion to decide on case-by-case basis or through regional conditioning.

1. We encourage the USACE to focus on improving consistency between and within regions regarding application of mitigation requirements.

We recognize that there can be discrepancies and inconsistencies on determinations made by individual districts regarding when compensatory mitigation is required; however, that is an implementation issue which is separate from any rulemaking. We encourage the USACE to focus on improving consistency between and within regions regarding application of mitigation requirements.

2. The USACE should adhere to the 2008 Mitigation Rule until the new rule is finalized, and then potentially revise the NWP mitigation provisions for consistency.

We also encourage the USACE to adhere to the 2008 Mitigation Rule and then once the new mitigation rule is finalized, we ask that the USACE review and implement new provisions consistently in the NWP program. Also, if necessary, we ask you to reopen the NWP mitigation provisions under an APA rulemaking and revise GC 23 to be consistent with any final mitigation rule.

For wetlands where compensatory mitigation is required for a one-for-one ratio for all wetland losses that exceed 1/10-acre and require PCN (unless waived) under GC 23(c), we agree that the ratio should remain unchanged with discretionary authority given to the DE to determine appropriate ratios. And as discussed above, this requirement should continue to be limited to wetland losses.

The compensatory mitigation rule already provides for certain preferences and factors for the DE to consider. As provided in 33 CFR Section 332.3 (as part of the 2008 Mitigation Rule), the DE should be given flexibility to consider the various types and locations of compensatory mitigation within the preferred mechanisms provided for under this compensatory mitigation rule under 33 CFR Section 332.3(b).

F. GC 25 — Water Quality is a clarifying change which we fully support, and we have provided a small change for the USACE’s consideration.

The USACE is proposing to modify the text of GC 25 to clarify that the proposed activity which **may** result in any discharge from a point source would have to be into a water of the United States in order to trigger the requirement for water quality certification. The Associations have no issue with the clarifying changes in the proposal regarding GC 25 and we simply suggest amending “may” to “will” to be absolutely clear about the activity’s mandate.

We appreciate the USACE’s efforts to provide regulatory certainty and reduce the potential for overreach by certifying authorities. This change will help streamline permitting while maintaining strong environmental protections, and we encourage its inclusion in the final rule. We support the proposed clarification to GC 25 regarding water quality certification under Section 401 of the CWA and the applicable regulations. The revised language appropriately reinforces that certification is required only where a discharge from a point source into waters of the U.S. is anticipated. This clarification aligns with the statutory intent of Section 401 and helps ensure that the scope of review remains focused on water quality impacts directly associated with the discharge itself.

G. GC 28 — Use of Multiple NWP's should be reissued as proposed and with no additional changes.

We recommend reissuance of GC 28 as proposed and with no additional restrictive provisions.

The use of multiple NWP's for single and complete projects should not be prohibited so long as acreage loss of waters of the U.S. does not exceed the acreage limit of the NWP with the highest acreage limit.

We believe that these changes are clarifying changes with no substantive change in current practice and have no issues with the proposed language.

H. GC 31 — Activities Affecting Structures or Work Built by the US should be reissued as proposed with no changes.

We support the reissuance of GC 31 with no further changes.

I. GC 32 — PCNs should be reissued without additional onerous information collection requirements added as conditions of PCN submittals.

As discussed under NWP 12 and GC 18 section above, the USACE generally supports the reissuance of GC 32 without the addition of burdensome information collection requirements as part of PCN submittals. However, while we understand the underlining regulatory requirement, we are concerned that the inclusion of references to “proposed for listing” species and “critical habitat proposed for such designation” in GC 18 introduces additional operational burden. These categories are subject to change and may not be clearly defined at the time of project planning, making compliance challenging and potentially delaying project timelines. We recommend that the USACE reconsider the applicable 33 CFR 330.4(f)(2) as well as GC 32 and recommend rule changes that focus on finalized listings and designated critical habitats to ensure clarity and regulatory certainty.

We refer the USACE to the GC 18 discussion above relating to the paragraph (a)(2) language relating to species and critical habitats that are proposed but not finalized.

We support reissuance of NWP 32 with the removal of information collection requirements added in 2021 and also, no further PCN related submittals to be added in this proposal. This GC, otherwise, is being filled with onerous information requirements resembling requirements for an individual permit which was not the intent of congress in creating the NWP program. Caution needs to be exercised when considering any modifications to this GC. In addition, future rulemaking should include a serious review of all submittal requirements and any that do not meet the legal requirements or the policy mandates of the 2025 Executive Orders should be removed.

We resubmit many of our comments from 2020 which were considered but no changes were made. We believe our concerns remain and ask for you to reconsider. We appreciate some changes that were made especially regarding the change to the word “streams” and removing flow terms associated with waters of the U.S. such as ephemeral and intermittent.

1. We ask the USACE to be clear that GC 32(b)(5) only applies to jurisdictional waters and for that language to be clearly reflected in the final rule.

We ask the USACE to clearly state that GC 32(b)(5) applies only to activities that involve the discharge of dredged or fill material into waters of the U.S. that are in effect at the time of the discharge. The NWPs are standalone authorizations that can last for 5 years (if not reissued or modified earlier) and the definition of waters of the U.S. can change depending on the 33 CFR Part 328 that is in effect but what does not change is the overall CWA mandate that the USACE’s authority is limited to federal waters of the U.S. and that should be made clear.

In 2020, the USACE included scenarios where NWPS could authorize activities that are not subject to CWA jurisdiction such as the permittee proceeding in a non-jurisdictional water NWP activity where there is no PCN trigger without waiting for an official USACE determination or where the DE issues a written verification based on a wetlands delineation without the USACE making a formal jurisdictional determination.¹⁰⁰ Yet, fundamentally those scenarios do not change the base position that NWPs legally only cover jurisdictional waters and should officially require submittals of information for only those jurisdictional waters.

2. We recommend clarity and greater efficiencies in the PCN review and notification processes for completeness.

The 45-day requirement default authorization (except for certain GC or NWP exceptions such as if GC 18 or GC 20 consultations are triggered) can simply be restarted if the DE finds the PCN submittal incomplete. We recommend the USACE assess the incomplete notification process and evaluate options within its existing authority under 33 CFR Section 330.1(e) to further refine and streamline the review times. Processes such as setting a 15-day initial completeness review window for PCNs would provide notice to the applicant that the application is considered complete or incomplete and would aid in streamlining the NWP review.

¹⁰⁰ 85 Fed. Reg. at 57,356-57,357.

We also recommend that similar to GC 32(b)(4) requirements, applicants should be able to provide “sufficiently detailed” information which would deem the PCN complete and trigger the 45-day requirement under GC 32(b)(5) (wetland delineations).

In addition, the USACE should allow the use of desktop materials where appropriate and final approval of these NWP should not be based solely on completed wetland delineations per USACE methods.¹⁰¹ In 2021, the USACE noted our comments, provided a response, but declined to make changes,¹⁰² and we resubmit these comments for your consideration.

3. We recommend DEs use their discretionary authority to expedite certain time sensitive maintenance and inspection projects associated with key energy infrastructure projects.

The 2017 Energy-Related NWP Review states that the DEs “can place priority on processing NWP PCNs for time-sensitive maintenance and inspection activities associated with energy projects.”¹⁰³ We encourage the USACE to apply this discretionary authority and expedite certain time-sensitive maintenance and inspection projects associated with key energy infrastructure projects. The USACE did not agree with this comment in 2021 stating that the DEs already have the discretion to manage their workload; and given the current Administration’s priorities, we resubmit this comment for your consideration.¹⁰⁴

4. “As a general rule,” information requests by the DEs to make the PCN complete will be limited to one additional request per GC 32(a) , and there should be consistency across the districts in applying this requirement.

“As a general rule,” GC 32(a) provides direction to the DEs to make only one additional information request to make the PCN complete. We encourage the USACE to provide consistent guidance and direction to districts to adhere to this requirement and to ensure that additional information requests are reasonable and not unnecessarily delay reviews.

¹⁰¹ See above discussion relating to consistency issues among regions regarding PCN submittal requirements.

¹⁰² 86 Fed. Reg. at 2,837.

¹⁰³ 2017 Energy-Related 12 NWP Review at 144.

¹⁰⁴ 86 Fed. Reg. at 2,837.

J. Other GCs of Interest. We also support the reissuance of the following GCs with no substantive changes: GCs 2, 3, 7, 13, 17, 19, and 21.

In addition to all the GCs discussed above, we ask that all the remaining GCs and specifically GCs 2, 3, 7, 13, 19, and 21 be reissued with no additional encumbrances. These GCs are currently working well and do not need to be changed.

VI. CONCLUSION

The Associations greatly appreciate the opportunity to comment on the proposed NWRPs including changes to the NWRPs, GCs, and definitions as well as specific changes for this rulemaking and future rule revisions.

We also ask for the reissuance of all 56 proposed NWRPs and 32 GWRPs as currently in effect, and where changes are proposed for other NWRPs, GCs, and definitions, we recommend that those modifications do not unnecessarily encumber permittees with overly broad terms or burdensome requirements that create regulatory uncertainty while offering no additional protections of aquatic resources under the CWA or RHA. In this light, we provide specific comments for your consideration.

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

VII. APPENDIX A: 2022 COMMENTS CONCERNING THE REVIEW OF NWP 12



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.¹

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.

¹ 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.”² 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.³ 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,”⁴ 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.

² 82 Fed. Reg. 1,860, 1,884 (Jan. 6, 2017).

³ 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.

⁴ 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 questions⁵ 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

⁵ 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's reissuance process,⁶ the 2017 USACE's regulatory reform efforts,⁷ the 2020-2021 USACE's NWP's reissuance process, the Navigable Waters Protection Rule ("NWPR") rulemaking,⁸ 2021 Reconsideration and Revision of the CWA Section 401 Certification Rule,⁹ the 2022 Proposed Waters of the US ("WOTUS") rulemaking,¹⁰ 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 NWP's 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.¹¹ We incorporate these comments by reference.

Our members actively utilize NWP's 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 NWP's 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

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

⁷ 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>

⁸ 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>

⁹ 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>

¹⁰ 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-NWP's-Complete-Package-Final-Filed.pdf>

¹¹ API, AOPL, AXPC, et al., Comment Letter to EPA and USACE's Proposal to Reissue and Modify NWP's, Docket No. COE-2020-0002, Nov. 16, 2020. Available at: <https://www.ipaa.org/wp-content/uploads/2020/11/2020-NWP's-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.¹²

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."¹³ 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."¹⁴ 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."¹⁵

Specifically, NWP 12 is authorized under the parameters set forth in Section 10 of the RHA and Section 404(e) of the CWA.¹⁶ 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."¹⁷

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.¹⁸ CWA Section 404(e)(2) also clearly sets time limits for NWP's, that is, NWP's can be issued for a period of no more than 5 years.¹⁹ 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 NWP's.

¹² 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).

¹³ 82 Fed. Reg. at 1,883. In the 2021 reissuance, the USACE recognizes this limited authority but explained that for these three NWP's (NWP 12, NWP 57, and NWP 58) and many of the other NWP's, the categories of activities authorized by those NWP's 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.

¹⁴ Id. at 1,883-1,884.

¹⁵ Id.

¹⁶ 33 U.S.C. Section 1344(e)(1).

¹⁷ Id.

¹⁸ Id.

¹⁹ 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.”²⁰

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.”²¹ 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.²²

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.”²³

The Army mentions in its Notice that “[o]ver iterations of the NWPs issued since 1977, this NWP has evolved,”²⁴ 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,²⁵ 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).”²⁶ 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”)].”²⁷

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

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

²¹ 87 Fed. Reg. at 17,282.

²² 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.

²³ 42 Fed. Reg. at 37,122, 37,146 (July 19, 1977).

²⁴ 87 Fed. Reg. at 17,282.

²⁵ 82 Fed. Reg. at 1,883.

²⁶ 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.

²⁷ 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.”²⁸ In addition, as a “longstanding practice,” the USACE has “calculate[d] the 1/2-acre threshold separately for each separate and distant crossing.”²⁹

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.³⁰ Division engineers and district engineers were authorized to exercise discretionary authority for certain activities.³¹ 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.³²

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.³³ 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.

²⁸ See Definition of Single and Complete Linear Project.

²⁹ 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 (10th Cir. 2015) (quoted language at 1056); See also 33 CFR Section 330.2(i).

³⁰ 56 Fed. Reg. 59,110.

³¹ *Id.*

³² *Id.* at 59,114.

³³ 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.³⁴ For example, the EPA and the US Coast Guard address oil spills through the Oil Pollution Act.³⁵ 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.³⁶ 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.³⁷

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.³⁸

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.

³⁴ See discussion at 82 Fed. Reg. at 1,884-1,885.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *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.

³⁸ 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.”³⁹

1. We appreciate the Army acknowledging current world events highlighting unstable nature of energy projection⁴⁰ 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.⁴¹ 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 2030.⁴²

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.⁴³ But this volume is running up against the US’s export capacity of 12.4 bcf/day.⁴⁴ 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,⁴⁵ 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.⁴⁶

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

⁴⁰ 87 Fed. Reg. at 17,282-17,283.

⁴¹ 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/>

⁴² Id.

⁴³ 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>

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

⁴⁵ Id.

⁴⁶ Id.

2. Reopening NWP 12 for potential revisions on “all aspects of NWP 12”⁴⁷ 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%.⁴⁸ 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.”⁴⁹ 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.”⁵⁰ 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.

⁴⁷ Id.

⁴⁸ 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

⁴⁹ Id. at 6.

⁵⁰ 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.”⁵¹ 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.”⁵² An agency must also give “a reasoned explanation for [its] change.”⁵³ 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.”⁵⁴

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

⁵¹ Id.

⁵² 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.

⁵³ 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).

⁵⁴ 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.⁵⁵

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.”⁵⁶ 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.”⁵⁷ 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.”⁵⁸

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.⁵⁹ 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.”⁶⁰ The USACE states that “[s]eparate guidance will be forthcoming to address environmental justice in the Regulatory Program.”⁶¹ As such, any environmental justice changes to NWP 12 regulatory requirements would be premature at this

⁵⁵ 86 Fed. Reg. at 2,755.

⁵⁶ Id. at 2,753.

⁵⁷ Id.

⁵⁸ 82 Fed. Reg. at 1,971.

⁵⁹ 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).

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

⁶¹ 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.⁶²

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"⁶³

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.

⁶² 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).

⁶³ 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 330.5⁶⁴ 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.”⁶⁵

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 time⁶⁶ 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

⁶⁴ 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).

⁶⁵ 86 Fed. Reg. at 73,523.

⁶⁶ Id.

activities was made, in part, in response to concerns about regulatory uncertainty for various utility line sectors.”⁶⁷ 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.”⁶⁸ 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.⁶⁹ 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.

⁶⁷ Id. at 2,780.

⁶⁸ Id.

⁶⁹ 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.”⁷⁰ 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.”⁷¹ 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.”⁷² 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).⁷³ 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.”⁷⁴

⁷⁰ 86 Fed. Reg. at 2,857.

⁷¹ Id. at 2,843.

⁷² Id. at 2,842.

⁷³ Id. See supplemental documentation requirements under 33 CFR Section 330.5(c)(1)(iii).

⁷⁴ 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.”⁷⁵ “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.”⁷⁶

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.”⁷⁷

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.”⁷⁸

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.⁷⁹

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).

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ 82 Fed. Reg. at 1,969.

⁷⁹ 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.”⁸⁰ 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)).”⁸¹ 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.”⁸²

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.⁸³ The Lead District is responsible for coordinating the development of the regional conditions.⁸⁴ The Lead District can also assist potentially impacted communities with staff being available for questions at a designated district.

⁸⁰ *Id.* at 2,857.

⁸¹ *Id.* at 2,745 (emphasis added).

⁸² 82 *Fed. Reg.* at 1,969.

⁸³ 86 *Fed. Reg.* at 73,524-73,525.

⁸⁴ *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*.”⁸⁵ 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–2020–0002.⁸⁶

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*

⁸⁵ 86 Fed. Reg. at 2,759.

⁸⁶ *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.⁸⁷ And we support maintaining the 1/2-acre limit for each single and complete project for NWP 12.⁸⁸

Since 1988, the USACE has "calculate[d] the 1/2-acre threshold separately for each separate and distant crossing."⁸⁹ 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."⁹⁰ 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."⁹¹

⁸⁷ 86 Fed. Reg. at 2,777.

⁸⁸ Id.

⁸⁹ 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).

⁹⁰ 2017 Energy-Related NWPs Review, Sept. 25, 2017, at p. 36.

⁹¹ 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.⁹²

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.”⁹³

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.⁹⁴ 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.⁹⁵ 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.⁹⁶

⁹² 82 Fed. Reg. at 1,885.

⁹³ 86 Fed. Reg. at 2,753.

⁹⁴ General Condition 32(b)(4)(i) and (ii).

⁹⁵ 82 Fed. Reg. at 1,968.

⁹⁶ 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.⁹⁷ In addition, per the USACE, the new 250-mile PCN requires the location of all non- PCN crossings.⁹⁸ 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.⁹⁹

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

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

⁹⁸ 86 Fed. Reg. at 2,777.

⁹⁹ 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 NWP 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 remain 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.¹⁰⁰ These regulations include the definition of “single and complete project” at 33 CFR Section 330.2(i)¹⁰¹ 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.¹⁰²

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.¹⁰³ The 2021 NWPs also noted the same:

¹⁰⁰ See discussion above.

¹⁰¹ 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).

¹⁰² 82 Fed. Reg. at 1,951.

¹⁰³ 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.¹⁰⁴

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.”¹⁰⁵

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.¹⁰⁶

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.¹⁰⁷

¹⁰⁴ 86 Fed. Reg. at 2,778.

¹⁰⁵ *Id.* at 2,771.

¹⁰⁶ 82 Fed. Reg. at 1,883, 1,887.

¹⁰⁷ *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.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰

¹⁰⁸ 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.

¹⁰⁹ 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.

¹¹⁰ 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.¹¹¹ 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.¹¹² 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.

¹¹¹ See detailed discussion in the 2021 and 2017 NWP Final Rules.

¹¹² 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.”¹¹³ 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.

¹¹³ 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."¹¹⁴

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.

¹¹⁴ 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.”¹¹⁵ 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.”¹¹⁶ 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.”¹¹⁷

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.”¹¹⁸ 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.¹¹⁹

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.

¹¹⁵ 86 Fed. Reg. at 2,859; 82 Fed. Reg. at 1,983.

¹¹⁶ Id.

¹¹⁷ Id.

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

¹¹⁹ 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 Framework¹²⁰ 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.¹²¹

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.”¹²²

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.”¹²³ 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

¹²⁰ 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>

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

¹²² 86 Fed. Reg. at 2,755.

¹²³ 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.¹²⁴

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.”¹²⁵

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

¹²⁴ 2017 NWP 12 Decision Document at 9.

¹²⁵ 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.¹²⁶ 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.”¹²⁷ 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.”¹²⁸

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.”¹²⁹ The USACE mentions “numerous commenters” regarding the potential cumulative adverse environmental effects that may be caused by NWP 12 activities.¹³⁰ 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.

¹²⁶ 86 Fed. Reg. at 2,774.

¹²⁷ *Id.* at 2,856.

¹²⁸ *Id.*

¹²⁹ 86 Fed. Reg. at 2,776.

¹³⁰ *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,”¹³¹ 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.¹³²

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.”¹³³ 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.

¹³¹ Id. at 2,777.

¹³² Id.

¹³³ 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.”¹³⁴

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.”¹³⁵ 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.”¹³⁶ 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

¹³⁴ 82 Fed. Reg. at 1,862.

¹³⁵ *Id.* at 1,949.

¹³⁶ *Id.*

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

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.”¹³⁸ 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.”¹³⁹ 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”¹⁴⁰ 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

¹³⁷ Id. at 1,971.

¹³⁸ 86 Fed. Reg. at 2,761.

¹³⁹ Id. at 2,745.

¹⁴⁰ 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,



Amy Emmert
Senior Policy Advisor
American Petroleum Institute
200 Massachusetts Ave NW
Washington, DC 20001
(202) 682-8372
Emmert@api.org



Wendy Kirchoff
Vice President
American Exploration & Production Council
1001 Pennsylvania Avenue, NW Suite 7-127
Washington, DC 20004
Tel: (202) 909-3569
wendy.kirchoff@axpc.org



Charlie Riedl
Executive Director
CLNG

900 17th St., NW, Suite 500
Washington, DC 20006
charlie.riedl@ngsa.org



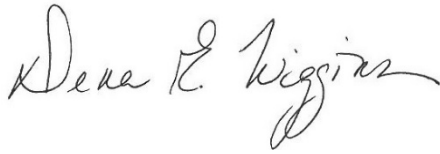
Lori E. L. Ziebart
President & CEO
Energy Infrastructure Council
300 New Jersey Ave., NW
Suite 900
Washington, DC 20001



Dan Naatz
Senior Vice President of Government Relations and Political Affairs
Independent Petroleum Association
of America
1201 15th Street NW, Suite 300
Washington, DC 20005
Tel: (202) 857-4722
Email: dnaatz@ipaa.org



Tommy Faucheux
President
Louisiana Mid-Continent Oil & Gas Association
730 North Boulevard
Baton Rouge, LA 70802
225-387-3205 office
Tommy.Faucheux@LMOGA.com



Dena Wiggins
President & CEO
Natural Gas Supply Association
900 17th Street NW, Suite 500
Washington, D.C. 20006
dena.wiggins@ngsa.org



Ryan Flynn
Executive Director
New Mexico Oil and Gas Association
123 W. Booth St.
Suite B&C
Santa Fe, New Mexico 87505
(505) 982-2568
Flynn@nmoga.org

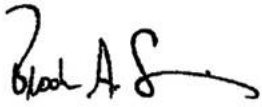


Kari Cutting
Vice President
North Dakota Petroleum Council
100 W. Broadway Ave. Suite 200
Bismarck, ND 58501
701-223-6380
kcutting@ndoil.org
khamman@ndoil.org



Andrew Casper
Director of Legal and Regulatory Affairs
The Ohio Oil and Gas Association

88 E Broad Street, Suite 1400
Columbus, OH 43215
(614) 824-3901
casper@ooga.org



Brook Simmons
President
Petroleum Alliance of Oklahoma
500 NE 4th Street, Suite 200
Oklahoma City, OK 73104



Catherine Reheis-Boyd
President
Western States Petroleum Association
1415 L Street, Suite 900
Sacramento, CA, 95814-3964
916.498.7752
creheis@wspa.org