



November 16, 2020

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

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

Re: Proposal to Reissue and Modify Nationwide Permits, Docket No. COE-2020-0002, RIN 0710-AA84

To Whom It May Concern:

The American Petroleum Institute ("API"), American Exploration and Production Council ("AXPC"), Association of Oil Pipe Lines ("AOPL"), Center for Liquefied Natural Gas ("CLNG"), Domestic Energy Producers' Alliance (DEPA), Energy Infrastructure Council ("EIC"), Independent Petroleum Association of America ("IPAA"), Council (Natural Gas Supply Association ("NGSA"), Alaska Oil and Gas Association ("AOGA"), Louisiana Mid-Continent Oil and Gas Association ("LMOGA"), Mississippi Energy Institute, Montana Petroleum Association ("MPA"), New Mexico Oil and Gas Association ("NMOGA"), North Dakota Petroleum Council ("NDPC"), Ohio Oil and Gas Association ("OOGA") Southeast Oil and Gas Association, Texas Oil and Gas Association ("TXOGA"), Treasure State Resource Association, West Slope Colorado Oil and Gas Association ("West Slope COGA") and the Western States Petroleum Association ("WSPA"), (collectively, "The Associations") 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 submit comments on the proposal to reissue and modify Nationwide Permits ("NWP") ("Proposal") by the U.S. Army Corps of Engineers ("USACE").¹

Our comments represent a thorough assessment of the NWPs significant to our industry, as well as a comprehensive review of over 40 states' regional conditions. Our comments contain extensive citations to the current proposal, applicable statutes and regulations, relevant case law, and an annex encompassing our District submissions regarding the proposed regional conditions in 44 states and 2 U.S. territories. To aid review, we have included a concise Executive Summary, as well as a Table of Contents with helpful headings.

While we support the NWP program as essential to the U.S. economy and a strong motivator for developers to design projects in a way that reduces environmental impacts, we regrettably cannot support the proposed division of NWP 12 into three separate permits. The proposed division contains multiple fundamental definitional issues that will certainly confuse both applicants and USACE staff. Moreover, the varying conditions in the federal proposal and multiple USACE Districts validate this confusion, and could be vulnerable to arbitrary and capriciousness challenges because the same 12-

¹ 85 Fed. Reg. 57,298 (Sept. 15, 2020).

inch pipe (with similar and often indistinguishable impacts to aquatic resources within the USACE's jurisdiction) would be treated differently based solely on the contents of that pipe (which is outside the jurisdiction of the USACE). Finally, the economics support a single combined permit - as the USACE's proposal Identified no cost savings from the division and seems to have significantly underestimated the costs associated with implementing a division based on ambiguous definitions and a lack of clarity among districts as well as even among individual states within districts. ***We therefore believe the most expeditious route for the USACE to address these deficiencies is to simply reissue the 2017 version of NWP 12 for all utility lines with a new effective date, and we urge the USACE to do so without delay.***

I. Executive Summary.

As groups like the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Waters Advocacy Coalition have emphasized, the NWP program is a valuable asset which incentivizes developers to design their projects in a way that reduces environmental impacts. Our members, like much of the economy, rely on the NWP program and appreciate the careful review which the program and permitting process has undergone since 2016.

The Associations urge the USACE to simply REISSUE the 2017 version of NWP 12 for the following practical, technical, economic and legal reasons.

- 1. Reissuing the 2017 version of NWP 12 would be the most expedient and defensible approach. It would favor the status quo (i.e., combined utility lines) according to an already agency-approved and administratively cleared rationale that would merely need to be bolstered by additional discussion of the comments.*** This expedient approach could be justified as a logical outgrowth of the USACE's request for comments on the division of NWP 12.
- 2. The USACE has the laudable goal of reducing permit processing times; however, the lack of clarity in the untested definitional issues associated with the division of 2017 NWP 12 will increase rather than decrease permit processing times.*** Critical confusing terms include "utility lines" (as pipelines under NWP 12 could possibly be both pipelines and utility lines), "other substances" (e.g., gas, and petrochemicals can be found in many types of infrastructure and industrial products) and "gas" and/or "natural gas" (e.g., Liquified petroleum gas or "LPG" is not a natural gas). The confusion also extends to common situations (e.g., ethanol may not be petroleum-derived but has petrochemicals added during denaturing which occurs prior to transportation, or similarly natural gasoline and liquid petroleum gas will quickly vaporize at room temperature but can be stored and transported as a liquid under pressure). At this point in the rulemaking process, these terms are unlikely to be effectively clarified or workarounds added without unintended consequences that promise to increase processing complications for both applicants and USACE staff.
- 3. The economic component of the analysis to reissue 2017 NWP 12 could rely on the past analysis, and would be faster than updating the 2020 proposal (which demonstrated no cost saving from the division) to rectify the significantly underestimated actual permitting, compliance, and enforcement challenges associated with the definitional issues and vagaries discussed above).*** Economic impacts and underlying assumptions and methodologies for calculating compliance costs and burdens are minimally assessed according to unequal and cherry-picked data for proposed NWP 12, NWP C, and NWP D. The proposed division will likely introduce unnecessary strain on agency resources, delays in the permit reviews, regulatory inconsistency in the permitting process, and promises to even increase the number of permits potentially needed by an applicant. These items need to be addressed.

4. ***The 2017 version of NWP 12 is less vulnerable to arbitrary and capriciousness challenges, given that the same 12-inch pipeline could not be treated differently under the existing terms and conditions.*** Already, the 250-mile PCN requirement applies only to proposed NWP 12, is introduced without any reasoned basis for the 250-mile numeric limit and can be considered arbitrary and capricious under the APA. The additional tailoring through regional conditioning is confirming the uncertainty, as there are already wide divergences in district approaches. Many proposed regional conditions are inconsistent in applying Clean Water Act ("CWA")-type conditions across the three proposed NWPs, with examples of state-wide regional conditions adding CWA-water specific quality/construction conditions only for the proposed NWP 12.
5. ***Reissuing the 2017 version of NWP 12 would obviate challenges concerning the treating the same 12 inch pipe differently based on its contents (which are outside of the USACE's authority under Section 404 of the CWA and Section 10 of the Rivers and Harbors Act of 1899 ("RHA")) instead of the impacts to jurisdictional waters of constructing or conducting maintenance work on that pipe (which are within the USACE's authority).*** 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. 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.
6. ***The 2017 version of NWP 12 has integrity from a CWA perspective because activities that are similar in nature are grouped together.*** Based on representations and the highly deficient data concerning the division in the 2020 proposal's text, its preamble and its supporting documents, there is no correlation or logical grouping to be found for dividing the proposed NWPs activities based on pipe diameter, size, and any associated ground disturbances. The division is contrary to the USACE's previous application of the CWA's "similar in nature" requirement.
7. ***The 2017 version of NWP 12 will provide necessary confidence for both permittees and investors, given that the USACE's argument that other permits have been successfully divided in the past is tenuous at best.*** For example, the division of coal mining permits concerned underground mining, surface mining, and re-mining - the logical equivalent of dividing permits by aerial lines, subterranean, and submerged lines - which is not analogous to treating three 12" pipes installed with exactly the same impacts differently merely because of their contents. Similarly, the split of NWP 39 and NWP 29 was enacted only after extensive stakeholder input and a series of multiple exploratory comment periods that reduced uncertainties and largely pre-empted challenges. This process differs substantially than a time-sensitive public comment period associated with a single final rulemaking with a change in policy contrary to everything the USACE has signaled to stakeholders for years. Simply reissuing the 2017 NWP 12 with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance while still minimizing impacts to waters of the United States ("waters of the US," "WOTUS," or "jurisdictional waters.").
8. ***The 2017 version of NWP 12 contains appropriate environmental protections.*** The 2017 version of NWP 12 limits activities to losses of less than 1/2-acre of jurisdictional waters for each single and complete project, pre-construction notification ("PCN") thresholds that trigger district engineer ("DE") review, requirements that sites must be restored to pre-construction contours of waters of the US, and several other GCs for erosion and sediment control, proper maintenance, and heavy equipment use.

Our additional top-line recommendations are summarized in the paragraphs below:

1. ***Renew the NWP, keep all NWPs on the same renewal cycle, and set compatible expiration and effective dates only one calendar day apart.*** The Associations support the reissuance of the 52 NWPs and 32 General Conditions ("GCs") as a logical next step following the USACE's comprehensive review of environmental permitting. To provide regulatory certainty, NWPs 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.
2. ***Retain the 1/2-acre limits for certain NWPs.*** We agree that the current 1/2-acre acreage threshold for the applicable NWPs should be retained and no further lowering of the limits is necessary.
3. ***Maintain PCNs generally, but remove PCNs where 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 NWPs or GCs.
4. ***Do not expand the recommendations in the 2017 USACE Review of Nationwide Permits Pursuant to Executive Order 13783 ("2017 Energy-Related NWPs Review") to the additional proposed language in GC 23 triggering compensatory mitigation for losses of stream beds greater than 1/10-acre, and related new methods for calculating losses of stream beds.***
5. ***The Associations support the proposed changes to NWP 3 to clarify the use of riprap as well as the applicability of prior authorized structures, increases in allowable amounts of minor dredging in proposed NWP 19, and adding driveways to the list of examples of types of linear projects allowed under proposed NWP 14.***
6. ***For durability, keep NWPs terms and definitions free of any cross references to any particular WOTUS definition as well as not include any standalone definitions from any particular waters of the US rule.***

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D.	The NWP, as issued, should refer to jurisdictional waters without referencing or adopting a particular “waters of the United States” definition under 33 CFR Part 328. As such, any 33 CFR Part 328 definition that is in effect should apply to the NWP activity that is being authorized.	19
E.	At a minimum, acreage thresholds should be maintained at the 1/2-acre limit for the applicable NWP, and not lowered from current limits.	20
F.	While we were supportive of the initial 2017 USACE recommendation to remove the 300 linear foot limit applying to 10 NWP at most, our close assessment of the proposal finds that the USACE is now proposing changes to longstanding practices associated with calculating losses of stream beds as well as new compensatory mitigation requirements for all losses of stream bed that exceed 1/10-acre and require PCN (unless waived). We ask the USACE to follow its 2017 recommendation or revert to current 2017 NWP requirements.	20
G.	PCNs should generally be maintained or removed where duplicative or overly broad, and no additional PCN requirements should be added to NWP or GCs unnecessarily.	21
H.	The USACE should continue to look for ways to reduce burdensome variability among districts and divisions, encourage regulatory consistency amongst districts, and also develop a user-friendly depository of all NWP-relevant documents.	22

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.	24
V.	Specific Comments on the Modification, Division, and Technical Aspects related to NWP 12.	25
A.	On a practical level, the USACE’s overall goal of creating efficiencies will not be served by dividing a single NWP into three separate NWPs with ambiguous critical terms like “gas” and “petrochemicals,” and instead may amplify uncertainty for both permittees USACE staff that may not be corrected without unintended consequences so late in the rulemaking process.	25
1.	The existing NWP 12 used the valuable category “utility lines” (which continues to be used in NWP C and D); however, proposed NWP 12 uses the new term “oil and natural gas pipelines” which causes conflicting redundancies with various aspects of the proposed NWP 12, NWP C, and NWP D.	26
2.	Similarly, the term “petrochemicals” also lacks clarity and will create confusion and regulatory inconsistency in the applicability of the proposed NWP 12 and NWP D.	26
3.	The applicability of the proposed NWP 12 and NWP C may also not be clear.	27
4.	Any definitions the USACE or districts attempt to correct or clarify in this short time would be untested, without stakeholder input, and could cause unintended implementation consequences.	27
B.	A review of the proposed 2020 regional conditions across various USACE Districts already confirms extensive inconsistency among district interpretations relating to the various terms used in proposed NWP 12, NWP C, and NWP D.	27
1.	Many proposed regional conditions are inconsistent in applying CWA-type conditions for utility lines activities across proposed NWP 12, NWP C, and NWP D.	27
2.	Other state-wide regional conditions add CWA-specific water quality/construction type conditions for NWP 12 but not for the proposed NWPs C and D.	28
3.	Three state-wide regional conditions also have entirely different interpretations relating to utility line activities applicable to manholes.	28
4.	Other districts vary in their treatment of the three NWPs by either removing NWP 12 conditions entirely, adding identical terms for all three NWPs, or revising with slight differences.	29
C.	Economic impacts and underlying assumptions and methodologies for calculating compliance costs and burdens are minimally assessed for the proposed NWP 12, NWP C, and NWP D, and more analysis is required.	29
1.	The proposal’s RIA estimates zero annual costs savings to permittees and the federal government for proposed NWP 12, NWP C, and NWP D and identifies no benefits to the division. This further supports the Associations’ position to reinstate the 2017 NWP 12.	29
2.	The RIA contains only a cursory analysis of cherry-picked costs, and more analysis is needed for actual compliance costs. Our assessment indicates that industries using proposed NWP 12, NWP C, and NWP D are likely to be materially disadvantaged in the implementation of the proposed changes due in part to definitional ambiguities and proposed inconsistencies at the district levels.	30

D.	A strong potential for legal challenges exists when the same 12-inch pipeline would be treated differently under any final NWP 12, NWP C, and NWP D.	31
1.	The 250-mile PCN requirement in the proposed NWP 12 applies only to oil and natural gas pipelines, and is arbitrary and capricious under the APA.	32
2.	The record includes reasons for the proposed division that are unsupported by data related to construction parameters such as pipeline diameter and length, and therefore, fails to provide an appropriate nexus or reasoned justification for the division.	33
E.	A key point that cannot be overstated is that the USACE’s jurisdiction as related to these NWPs is limited to its statutory authority under CWA Section 404 and RHA Section 10.	35
F.	The decision to separate NWP 12 into three NWPs lacks rational basis and is contrary to the USACE’s previous application of the CWA’s “similar in nature” requirement as related to utility lines.	36
1.	A history of the NWPs to-date also indicates that there is no prior precedent in past NWP rulemakings for abruptly and arbitrarily breaking up longstanding NWPs that are intended to cover categories of activities that are similar in nature.	37
2.	The three categories of utility lines (proposed NWP 12, NWP C, and NWP D) authorize sufficiently similar activities and require the same or similar environmental provisions in order to meet the minimal impacts requirement under the CWA.	40
G.	The draft decision documents comply with the NEPA, CWA Section 404(b)(1) Guidelines, Public Interest Determination, and all other statutory and regulatory requirements, except that we ask that the decision documents for proposed NWP 12, NWP C, and NWP D, should be recombined as one decision document for NWP 12.	40
H.	Technical Review: 2017 NWP 12 – Utility Line Activities should be reissued with no additional restrictive conditions.	43
1.	The Associations believe that the 2017 NWP 12 provides adequate CWA Section 404 and RHA Section 10 protections. Even if the permits are inadvisably divided, no additional industry-specific standards or best management practices (“BMPs”) should be added to the NWPs as national enforceable terms.	43
2.	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, and as drafted, within the USACE’s overall authority.	44
3.	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.	45
4.	Acreage limits should remain constant, with each separate and distant crossing of a WOTUS authorized by NWP 12.	45
5.	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.	46

6.	Notwithstanding our main recommendation to reissue the NWP 12 as is, we support the USACE’s recommendations to reduce duplicative, inconsistent, or unnecessary PCN requirements.	46
7.	NWP 12 should continue to authorize the remediation of inadvertent returns of fluids during drilling operations, without additional changes, and we appreciate the clarification the USACE provides in the preamble regarding the limited applicability of horizontal directional drilling in Section 404 permitting.	47
8.	The 2017 provision facilitating the use of temporary mats should be retained.	48
9.	Pipeline abandonment issues in NWP 12 should be treated consistently across the districts.	48
10.	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.	49
11.	In NWP 12, the USACE should continue to authorize utility line maintenance and repair activities beyond CWA Section 404(f) and provide appropriate examples to aid the use of this provision in the field.	49
12.	The Associations find while the USACE proposes to add 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 appears to be an unnecessary addition.	50
13.	GC 32(b)(4) and related Section D – District Engineer’s Decision includes additional changes that expand information submittal requirements and evaluations for NWPs 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).	50
14.	Assuming that the USACE takes the unfortunate step of finalizing the NWP 12 with three separate NWPs, all changes relating to reorganization of the NWP into three NWPs should be clearly stated as being non-substantive in nature only.	51

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A.	NWP 3 – Maintenance should be reissued with the USACE’s proposed changes as well as additional clarifying changes that we recommend as related to “minimum necessary” and “minor deviations.”	51
1.	Once a structure is authorized, it should remain authorized; and we also support the USACE’s provision 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.	52
2.	We support the proposed 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).	52
B.	NWP 6 – Survey Activities should be reissued with no additional changes.	52

C.	NWP 7 – Outfall Structures and Associated Intake Structures should be reissued with no additional changes.	53
D.	NWP 8 – Oil and Gas Structures on the Outer Continental Shelf should be reissued with no additional changes.	53
E.	NWP 13 – Bank Stabilization should be reissued without any additional restrictions and one change we recommend related to removing a limit on DE waiver authority.	53
1.	The current clarification of ‘bank stabilization’ should be retained.	53
2.	This NWP is helpful for the maintenance activities it authorizes.	53
3.	The Associations recommend removal of the 1,000 linear foot limit on waivers for bulkheads.	53
F.	NWP 14 – Linear Transportation Projects should be reissued with the one proposed change and additional changes as recommended by the Associations.	54
1.	We support the USACE’s one change to the proposed NWP 14 that includes adding “driveways” to the list of examples of allowed activities.	54
2.	It is important to have consistency between the NWP 12 and NWP 14.	54
3.	NWP 12 and NWP 14 should be consistent in terms of acreage thresholds.	54
4.	NWP 12 and NWP 14 should be consistent in their PCN triggers.	54
5.	NWP 14 should allow temporary mats similar to NWP 12.	54
6.	We support Note 1 here for the same reasons cited above in Note 2 for NWP 12.	54
G.	NWP 18 – Minor Discharges should be reissued with no additional changes.	55
H.	NWP 19 – Minor Dredging should be reissued with the proposed language increasing allowable dredging from 25 cubic yards to 50 cubic yards.	55
I.	NWP 20 – Response Operations for Oil or Hazardous Substances should be reissued with no changes.	55
J.	NWP 27 – Aquatic Habitat Restoration, Enhancement, and Establishment Activities includes 2 new activities which as presented appear robust and environmentally beneficial.	55
K.	NWP 33 – Temporary Construction, Access, and Dewatering should be reissued with no changes.	55
L.	NWP 39 – Commercial and Institutional Developments should be issued with the change recommended by the USACE as well as with tailored PCN threshold limits similar to NWP 12, NWP 14, and NWP 51.	56
M.	NWP 41 – Reshaping of Existing Drainage and Irrigation Ditches is an appropriate NWP to reissue and we have no issues with the USACE’s proposal to add irrigation ditches as an authorized activity.	56
N.	NWP 43 – Stormwater Management Facilities should be reissued with no additional changes except for the clarifying provision related to green infrastructure.	57

<i>O.</i>	NWP 44 – Mining Activities should be reissued with the proposed changes except for the changes relating to RHA Section 10 waters.	57
<i>P.</i>	NWP 51 – Land-Based Renewable Energy Generation Projects should be reissued with none or minimal changes.	58
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<i>B.</i>	GC 2 – Aquatic Life Movements should be reissued with no changes.	58
<i>C.</i>	GC 3 – Spawning Areas should be reissued with no changes.	59
<i>D.</i>	GC 7 – Water Supply Intakes should be reissued with no changes.	59
<i>E.</i>	GC 11 – Equipment should be reissued with no changes.	59
<i>F.</i>	GC 13 – Removal of Temporary Structures and Fills should be reissued and we have no issue with the one minimal change proposed by the USACE that adds the term “structures” to the title. We believe this change is a clarifying non-substantive change that does not revise existing USACE requirements and practice.	59
<i>G.</i>	GC 15 – Single and Complete Projects should be reissued with no changes.	60
<i>H.</i>	GC 17 – Tribal Rights	60
<i>I.</i>	GC 18 – Endangered Species should be reissued and we support the USACE’s proposed language changes to match terms used in the 2019 ESA rulemaking.	61
<i>J.</i>	GC 19 – Migratory Birds and Bald and Golden Eagles should be reissued with no additional changes.	62
<i>K.</i>	GC 20 – Historic Properties should be issued with proposed changes and we submit additional comments relating to Appendix C, interim guidance documents, regulatory consistency, and timely review.	62
<i>L.</i>	GC 21 – Discovery of Previously Unknown Remains and Artifacts should be reissued with no additional restrictive provisions.	64
<i>M.</i>	GC 23 – Mitigation should be reissued with no changes or minimal clean up type revisions while retaining the authority of the DEs. We do not support any additional changes. The proposal’s push toward requiring compensatory mitigation for NWP activities with losses of stream beds greater than 1/10-acre that require PCNs is contrary to the USACE’s prior	

	policies and recommendations and is an unnecessary and burdensome expansion of current requirements.	64
1.	We support the flexibility provided by the USACE’s proposed language relating to GC 23(e) as relating to planting vegetation.	65
2.	We encourage the USACE to focus on improving consistency between and within regions regarding application of mitigation requirements.	66
3.	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.	66
4.	Language relating to mitigation banking mechanisms should include the caveat “where practicable” and the USACE should directly reference the 1994 Alaska Wetlands Initiative Summary Report and Memorandum that states that compensatory mitigation is not practicable in Alaska due to a lack of mitigation banking instruments.	66
N.	GCs 25 and 26 – Water Quality and Coastal Zone Management should be reissued with the clarifying proposed changes as well as additional GC 25 language that states that any condition added to the WQC must be consistent and within the parameters as set out in the applicable regulatory requirements.	67
O.	GC 28 – Use of Multiple Nationwide Permits should be renewed as proposed and with no additional restrictive provisions.	67
P.	GC 31 – Activities Affecting Structures or Works Built by the US should be renewed with one change that is, a PCN should not be required for a Section 408 review or permission if the underlying NWP activity does not otherwise require a PCN.	67
Q.	GC 32 – Overall, PCNs should be reissued while maintaining the completeness provision and ability to use desktop materials and no other substantive changes. GC 32 issues related to linear crossing are covered under the NWP 12 section.	68
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.	68
2.	We support the USACE in its removal of language relating to intermittent and ephemeral to reflect changes with the 300 linear foot limit language removal and we ask that language be clearly reflecting in the final rule.	69
3.	We do not support the addition of “streams” to GC 32(b)(6) requiring additional mitigation submittals for ALL stream losses that exceed 1/10 acre and a PCN is required. It is an unnecessary expansion over and above prior USACE recommendations and established practices as well as an overreach especially since the removal of 300 foot limit only applies to 10 NWPs.	69
4.	We recommend clarity and greater efficiencies in the PCN review and notification processes for completeness.	70
5.	We recommend DEs use their discretionary authority to expedite certain time-sensitive maintenance and inspection projects associated with key energy infrastructure projects.	70
6.	“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.	70

7.	The USACE proposes new language requiring Form ENG 6082 to be used for PCN submittals. We request more transparency and stakeholder engagement with any future PCN form revision process.	71
R.	Definitions should remain unchanged except for the proposed deletion regarding GC 17, and additional removals relating to the definitions of ephemeral, intermittent, and perennial streams.	71
1.	We request that the USACE keep NWP's terms and definitions free of any cross references to any particular waters of the US definition as well as not include any standalone definitions from any particular waters of the US rule.	71
2.	The "loss of waters of the United States" definition should not remove the method of calculating stream losses using "linear feet."	72
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III. The Associations and Their Interests.

The Associations have been actively involved in participating in the notice and comment process in the 2016 NWP reissuance process,² the 2017 USACE's regulatory reforms efforts,³ the Navigable Waters Protection Rule ("NWPR") rulemaking,⁴ as well as other related rulemakings, such as the 2019 U.S. Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service ("NMFS") rule revisions. Our members actively utilize NWPs for many of their essential energy production, transportation, and development activities that have little or no adverse impact on the nation's aquatic resources. The NWPs' faster processing times with reduced paperwork incentivize developers to design projects that reduce environmental impacts and facilitate more efficient processing of environmental permits that would otherwise require an individual permit.⁵ 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. Our more than 600 members produce, process and distribute most of the nation's energy. The industry supports more than ten million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. API was formed in 1919 as a standards-setting organization. In our first 100 years, API has developed more than 700 standards to enhance operational and environmental safety, efficiency and sustainability.

AXPC is a national trade association representing the largest independent oil and natural gas exploration and production companies in the United States. We lead the world in the cleanest and safest onshore production of oil and gas, while supporting millions of Americans in high-paying jobs and investing a wealth of resources in our communities.

AOPL is a non-profit national trade association that represents the interests of oil pipeline owners and operators before regulatory agencies, the judiciary, and the U.S. Congress. AOPL's members operate pipelines that carry approximately 97% of the crude oil and petroleum products moved by pipeline in the United States, extending over 218,000 miles in total length. These pipelines safely, efficiently, and reliably deliver more than 21 billion barrels of crude oil and petroleum products each year. AOPL members bring crude oil to the nation's refineries, natural gas liquids such as ethane, butane, propane and carbon dioxide to manufacturers and industrial users, jet fuel to airports, and petroleum products to our communities, including all grades of gasoline, diesel, home heating oil, kerosene, propane and biofuels.

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

² API, Comment Letter to USACE's proposed 2016 NWPs, Docket No. COE-2015-0017, Aug. 1, 2016.

³ API and AOPL, Comment Letter to USACE Subgroup to the DOD Regulatory Reform Task Force's Review of Existing Rules, Oct. 18, 2017. Available at: <https://aopl.org/documents/en-us/8107597b-f3f8-4b4c-9b1c-21563b35d722/1>

⁴ API, IPAA, AXPC, and AOPL, U.S. 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>. (Final rule published at 85 Fed. Reg. 22,250 (Apr. 21, 2020).

⁵ Proposal at p. 57,300.

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 Domestic Energy Producers Alliance (DEPA) is a nationwide collaboration of 39 coalition associations – from California to West Virginia, Texas to Montana – representing more than 10,000 individuals and companies engaged in domestic onshore oil and natural gas exploration and production (E&P). We believe in seeking common ground, and in common-sense solutions to the challenges that face us in our businesses, including our relationship with the federal legislative and executive branches of government. In just over ten years, DEPA now represents a majority of the individuals and companies responsible for the current renaissance in American oil and natural gas production.

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 trade association representing the thousands of independent crude oil and natural gas explorers and producers in the United States. It also operates in close cooperation with forty-four unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies that provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

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.

The Alaska Oil and Gas Association (AOGA) is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefits of all Alaskans. We represent the majority of companies that are exploring, developing, producing, refining, or marketing oil and gas on the North Slope, in the Cook Inlet, and in the offshore areas of Alaska. AOGA supports removing unnecessary and burdensome conditions while clarifying NWP terms to allow for improved consistency and greater efficiencies in permitting. Modernization of the approval process will help USACE become more efficient and will work to alleviate some of the administrative burden on industry.

Louisiana Mid-Continent Oil and Gas Association, 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. LMOGA's mission is to promote and represent the oil and gas industry operating in Louisiana and the Gulf of Mexico by extending representation of our members in the Louisiana Legislature, state and federal regulatory agencies, the Louisiana congressional delegation, the media and the general public.

The Mississippi Energy Institute's mission is to conduct research and develop coordinated state level policies that support a reliable and expanding energy portfolio that is environmentally responsible; to understand and engage in the national energy debate; and to take advantage of the market opportunities ensuring Mississippi's economic development competitiveness. The Institute is a private organization, and its membership includes companies in oil and gas production, electric power, natural gas transportation/distribution, and manufacturing.

MPA represents over 150-member companies involved in all aspects of the oil and natural gas industry. MPA's members include producers, refiners, suppliers, pipeline operators, and transporters, as well as service and supply companies that support all segments of the industry and employ a great number of people in our great state. MPA works with elected officials, business groups, regulatory boards and agencies to promote policies which incentivize revenue generating resource production and opposes rules and regulations which hamper opportunities for future oil and gas opportunities in Montana.

The New Mexico Oil & Gas Association (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. In addition, taxes and royalty from the oil and gas industry account for 39% 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 is the only trade association in Oklahoma to represent all sectors of the state's oil and natural gas industry. Representing more than 1,300 companies and 1,700 individual members, the Petroleum Alliance membership includes oil and natural gas producers, service providers to the oil and natural gas industry, midstream companies, refiners and other associated businesses. Our members include companies of all sizes, ranging from small, family-owned companies to large, publicly traded corporations.

The Southeast Oil and Gas Association exists to represent the public policy interests towards the furtherance and success of the oil and gas exploration/production industry in Mississippi due to its substantial local economic impact. Association members are engaged in oil and gas production or in providing other services into the industry. Sound public policy outcomes are a primary goal of the Association and its work.

The Texas Oil & Gas Association (TXOGA) is a statewide trade association representing every facet of the Texas oil and gas industry including small independents and major producers. Collectively, the membership of TXOGA produces in excess of 80 percent of Texas' crude oil and natural gas, operates over 80 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. In fiscal year 2019, the oil and natural gas industry supported

more than 428,000 direct jobs and paid more than \$16 billion in state and local taxes and state royalties – the highest total in Texas history – funding our state’s schools, roads and first responders.

TSRA represents a broad coalition of business and industry, members of organized labor, as well as over twenty other membership organizations who support the responsible use and development of our natural resources.

West Slope Colorado Oil & Gas Association (West Slope COGA) provides a unified political and regulatory voice for the oil and natural gas industry in the Piceance Basin of Western Colorado. West Slope COGA represents over 90 member companies and its mission is to produce natural gas products for the benefit of society. West Slope COGA is an affiliated chapter of the Colorado Oil & Gas Association – a nationally recognized trade association that promotes the expansion of Rocky Mountain natural gas markets, supply, and transportation infrastructure through its growing and diverse membership. West Slope COGA strives to educate stakeholders, encourage technology enhancements and foster environmental stewardship throughout oil and gas operations and supply chains.

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. Overall Comments on the Importance of NWPs and Continued Reissuance: Key issues Concerning Core Program Elements (See Subsequent Section for NWP 12-Specific Comments).

CWA Section 404 authorizes the USACE to issue permits for discharges of dredged or fill material into WOTUS. 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.⁶ For over 40 years, consistent with Congress’ 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.”⁷

The Associations’ overall comments on the NWP program are outlined below, followed by other sections containing comprehensive comments on NWP 12, specific comments on other NWPs of interest, and specific comments on GCs and definitions, as well as an annex of our comments to various USACE Districts concerning their proposed conditions.

A. The NWPs serve an important purpose by protecting the environment while promoting timely development in all sectors, including the energy industry.

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

⁶ 33 U.S.C. Section 1344(e).

⁷ Id.

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 WOTUS as Congress intended.⁸

NWPs are designed to be fully protective of human health and the environment, and can be obtained in about one-third the time⁹ it takes to acquire individual permits, saving substantial administrative and professional permit application and preparation costs to both the regulatory authority and the permittee.

As the USACE states succinctly in its Regulatory Impact Analysis (“RIA”), “[t]he convenience and time savings associated with the NWPs encourage users of the NWPs to minimize their proposed impacts to waters of the United States and design their projects within the scope of the NWPs rather than apply for individual permits for activities that could result in greater adverse impacts to the environment.”¹⁰ The USACE concludes its summary stating that “[t]he reduction of impacts to waters of the United States encouraged by the issuance of an NWP, as well as compensatory mitigation that may be required for specific activities authorized by an NWP, helps reduce adverse environmental effects to jurisdictional waters and wetlands, as well as resources protected under other laws, such as listed species and designated critical habitat and historic properties.”¹¹

The Associations also appreciate the USACE’s review and recommendations of particular NWPs pursuant to EO 13783.¹² The EO 13783 states that: “[I]t is in the national interest to promote the clean and safe development of our Nation’s vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.”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 harm not only the project sponsor, but also hinder access to affordable energy for everyday consumers and businesses.

The Associations therefore support the reissuance of all 52 NWPs and 32 GCs. Additionally, the Associations support the recommendations as carefully assessed and presented in the USACE’s 2017 Energy-Related NWPs Review. Those recommendations promised to facilitate effective administration while continuing to meet essential environmental protection requirements under the CWA and other applicable statutes.

⁸ Proposal at p. 57,299 (“Nationwide permits are a type of general permit . . . designed to regulate with little, if any, delay or paperwork certain activities in federal jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts.” (citation omitted). H.R. Rep. No. 95-139 (1977), reprinted in 4 A Legislative History of the Clean Water Act of 1977, at 1217 (1978).

⁹ The mean total application times during FY 2018 are listed as 329 days for standard individual permits versus 123 days for NWPs. See Regulatory Impact Analysis for the Proposed 2020 Nationwide Permits (“RIA”), See Table 1.2.

¹⁰ RIA at p. 12.

¹¹ Id.

¹² See 2017 Energy-Related NWPs Review.

¹³ Promoting Energy Independence and Economic Growth, EO 13783, March 28, 2017 (“EO 13783”).

However, the Associations believe new, fundamental changes being proposed as additions to these recommendations, including the proposed NWP 12 division, would create regulatory uncertainty, are arbitrary and capricious, do not offer any additional benefits to the environment, and introduce enormous needless complexities to a permitting process that is intended to be streamlined.

Unlike individual permits, NWPs are specifically intended to require minimal paperwork and shorter timeframes to obtain authorization. The Associations appreciate the USACE's overall efforts and recommendations to further streamline critical NWPs processes – including PCN procedures and information collection requirements – to better align with these key principles. We ask that the USACE remain committed to those principles and continue to facilitate the continued authorization of NWPs in a timely and cost-effective manner that will serve both the USACE and the regulated community.

B. The Associations support the USACE's proposal to reissue all NWPs in the same cycle.

The Associations support the USACE's proposal to reissue all NWPs at the same time so that all NWPs remain on the same 5-year permit renewal cycle. We support the USACE's broad discretion with respect to proposing NWPs in 2020 and urge the finalization and reissuance of legally defensible NWPs as soon as reasonably possible. 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. It is important to note that the interplay between various NWPs and GCs – as well as the need for modifications of the federal proposal at the USACE's district levels – would render it difficult to conceptualize an effective way to separate the NWPs into multiple renewal cycles. Therefore, a single renewal cycle best serves both stakeholders and the USACE.

C. The Associations support the slightly early reissuance of all NWPs and GCs, without any additional unnecessary and burdensome requirements, in keeping with Congressional intent, and in satisfaction with the notice and comment requirements of the APA.

Fundamentally, the Associations support reissuing the NWPs with no unnecessary and burdensome requirements added, in accordance with the overall Congressional intent to streamline permits for projects with comparatively minor environmental impacts. The final framework should serve that intent without unreasonably obstructing, delaying, curtailing, or otherwise imposing significant costs on the siting, permitting, production, utilization, transmission, or delivery of any project, including those related to energy resource development.

Here, the USACE requests several comments on wide-ranging issues, including “modifying this NWP [12] to limit it to oil or natural gas pipeline activities,” and we have taken the opportunity to provide the USACE with our detailed responses.¹⁴

¹⁴ Proposal at p. 57,327. The draft decision document for NWP 12 also includes these options as part of their alternative analysis under National Environmental Policy Act (“NEPA”). Draft NWP 12 Decision Document at pp. 7-9. See also discussion relating to the draft decision document for NWP 12.

We believe that the USACE has provided fair and reasonably foreseeable notice on the question of whether or not NWP 12 should be limited to oil or natural gas pipeline activities.¹⁵

Our clear response to the USACE's request for comment to consider alternatives, including keeping the 2017 NWP 12 intact is that we do not believe the proposed NWP 12 should be limited to oil and natural gas pipeline activities only. Instead, we ask that at final adoption for all NWPs, the USACE reissue a single NWP 12 that applies to all utility lines, currently in effect, without any division and with a new effective date.¹⁶ Our reasons are provided below in Section V below.

The USACE also requested comment on numerous other issues. We respectfully request that the USACE not add any new and burdensome requirements to the existing NWPs, which already include a 1/2-acre limit, PCN thresholds and robust protective conditions to limit impacts of dredged or fill utility line¹⁷ activities on jurisdictional waters and ensure the "minimal adverse environmental effects" standard is met, as well as numerous regional and district-level conditions. This industry is also already heavily regulated and is subject to numerous other regulatory frameworks outside of the USACE's jurisdiction.

D. The NWPs, as issued, should refer to jurisdictional waters without referencing or adopting a particular "waters of the United States" definition under 33 CFR Part 328. As such, any 33 CFR Part 328 definition that is in effect should apply to the NWP activity that is being authorized.

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 waters of the US definition in effect.

As the preamble notes, the NWPR Rule went into effect on June 20, 2020 in all states and jurisdictions except for the state of Colorado due to a court-issued stay.¹⁸ We appreciate that the proposal mirrors the Associations' recommendations in

¹⁵ See Miami-Dade Cty. v. EPA, 529 F.3d 1049, 1059 (11th Cir. 2019) ("[A]n agency is not restricted to adopting the position it proposed and on which it sought comment."); Stringfellow Mem'l Hosp. v. Azar, 317 F. Supp. 3d 168, 190 (D.D.C. 2018) (Proposed rule provided adequate notice by stating that agency was considering changing the existing policy, "thereby giving notice both that he was considering changing the policy and that, if the proposal was rejected, the stated current policy would remain in effect.")

¹⁶ In Long Island Care at Home, Ltd. v. Coke, the Supreme Court has explained that, a proposed rule "was simply a proposal, its presence meant that the [agency] was *considering* the matter; after that consideration the [agency] might choose to adopt the proposal or to withdraw it." Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).

¹⁷ Note that the term "utility line," unless otherwise specified or within the context of its use, is applied in this document per the longstanding definition of "utility line" in the 2017 NWP 12, which states: "A 'utility line' is defined as any 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 message, and internet, radio, and television communication." 82 Fed. Reg. 1,850 (Jan. 6, 2017) ("2017 NWPS"). The regulated industry and the USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, "internet" added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. at p. 1,883. In 2017, the term "internet" was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. Id.

¹⁸ Proposal at p. 57,311.

that it does not include any cross-references to the new rule. We also support the USACE's decision to delete the definitions of "intermittent stream," and "ephemeral stream" in the current NWP. For the same reason, we also request that the proposed definition of "perennial stream" based on the NWPR be deleted.¹⁹ Where the NWPR is in effect, the "perennial" definition in the NWPR will automatically apply and there is no reason for a separate definition under the NWPs.²⁰

Also, the proposed NWPs as well as a number of districts' proposed 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.

E. At a minimum, acreage thresholds should be maintained at the 1/2-acre limit for the applicable NWPs, and not lowered from current limits.

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

At a minimum, the USACE should maintain and not decrease the current 1/2-acre 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.

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. 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 for consistency. (see NWP 14 discussion below.)

F. While we were supportive of the initial 2017 USACE recommendation to remove the 300 linear foot limit applying to 10 NWPs at most, our close assessment of the proposal finds that the USACE is now proposing changes to longstanding practices associated with calculating losses of stream beds as well as new compensatory mitigation requirements for all losses of stream bed that exceed 1/10-acre and require PCN (unless waived). We ask the USACE to follow its 2017 recommendation or revert to current 2017 NWP requirements.

To simplify and streamline the authorization process, the Associations initially supported the USACE's recommendation in the 2017 Energy-Related NWPs Review to remove the 300 linear foot limit for losses of stream bed that is included in NWPs such as NWPs 21, 39, 50, 51, and 52 along with the associated waiver language. We agreed with the USACE that

¹⁹ 85 Fed. Reg. at p. 22,341.

²⁰ Id.

the removal of the 300 linear foot limit for losses of stream beds is justified because all of these NWP's 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 NWP's with same 300 linear foot limit requirement (i.e. NWP's 29, 40, 42, 43, and 44).

Yet, the current proposal does not follow the 2017 recommendations; rather, it introduces enormous uncertainty to the well-established NWP process by adding unnecessary complexities. Starting with recommendations covering five NWP's in 2017, then including 10 NWP's, and now applying to all NWP activities with losses of stream losses that exceed 1/10 acre, 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 NWP's, it needs to propose new compensatory mitigation requirements at a minimum one-for-one ratio for ***ALL*** losses of stream bed that exceed 1/10-acre and require PCNs (unless waived by the DE).²¹ The USACE also proposes new methods to calculate stream losses including possibly some untried hybrid approach.²²

The USACE solicits comments on this novel approach. The Associations disagree with the USACE's proposal regarding losses of streams and we ask that the USACE strictly follow its own 2017 recommendation or, in the alternative, retain the 300 linear foot limit as the threshold for certain 10 NWP's, continue allowing permittees to utilize the linear foot method as a means to calculate stream losses as is the longstanding current practice, and refrain from adding any more burdensome and unnecessary obligations under GC 23.

G. PCNs should generally be maintained or removed where duplicative or overly broad, and no additional PCN requirements should be added to NWP's or GCs unnecessarily.

In general, the Associations caution against adding any more restrictive and unnecessary PCN threshold requirements into any new NWP's or GCs. The purpose of NWP's 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 NWP's and GCs, as well as identifying opportunities to further streamline PCN thresholds.

²¹ Proposal at p. 57,388.

²² The proposal solicits comments on alternative hybrid approaches for establishing consistent quantitative limits for losses of stream bed authorized by certain NWP's. Proposal at pp. 57,321-57,322. We agree with a consistent approach based on the well-established linear foot metric currently in use. Note that a number of districts include regional conditions for losses of stream for all NWP activities or for specific enumerated list of NWP's (including NWP 12) to which this would apply also. For example, the USACE's Wilmington District has proposed conditions for the state of North Carolina that does not authorize NWP's for any activity that may result in the loss of more than 0.05 acres or 500 linear feet of stream bed, except for NWP 32 (this applies to NWP's that do not have specific notification requirements and if a NWP has specific notification requirements, the requirements of the NWP shall be followed). In addition, PCNs are required for any NWP activity which impacts more than 0.02 acres or 150 linear feet of stream channel. The USACE's Fort Worth District proposes regional conditions which require PCNs for any NWP activity that results in the loss of greater than 300 linear feet of streams, 0.1 acre of wetlands, other special aquatic sites, and/or other waters. These are just a few examples. Any changes that occur without measured deliberation and stakeholder/district input, will result in inconsistencies across not just NWP's but the extensive network of regional conditions.

In terms of the proposal, however, we do not support the additional 250-mile PCN threshold added to the proposed NWP 12 and while we would support PCNs being reduced from 7 to 2 as proposed; at this time, we ask the USACE to reissue NWP 12 with no additional encumbrances.

Our review of the proposal and associated documents also indicates that additional rationale and support is needed for supporting these recommendations and the arguments raised in the proposal need to be further reflected and bolstered in the decision documents.

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 NWP 12, NWP 14 and NWP 51 which have PCN triggers that are more judiciously tailored).

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

We appreciate the USACE's efforts to solicit comments in this proposal to clarify and improve the regional conditioning process.

The USACE explains in the proposal 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."²³ **However, we believe there should be consistency in applying fundamental regulatory requirements and there is a need for better coordination amongst the districts.**

We also appreciate the USACE sharing comments relating to regional conditions being overly broad and numerous unnecessary terms being imposed on NWPs and agreeing that "regional conditions should be written clearly and provide only the additional restrictions that are necessary to ensure that NWP activities in that region" result in minimum adverse environmental effects.²⁴

As noted in our 2017 USACE Subgroup to the DOD Regulatory Reform comment letter, 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,

²³ Proposal at p. 57,308.

²⁴ Id.

and some districts have permit application procedures for that locality. Consistency in the approach to information requests would help applicants structure project planning. 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.²⁵ 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.

In another example, different districts have varying approaches for determining USACE action areas for the purposes 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, and some 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.²⁶ The lead district is also responsible for coordinating the development of the regional conditions.²⁷

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 also 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 amongst the USACE districts, especially for projects that cross multiple state and district boundaries.

Furthermore, the Associations request that the USACE develop a user-friendly display of NWP and all related documents, including regional conditions and Section 401 water quality certifications (“WQC”), Coastal Zone Management Act (“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 this proposal, we appreciate that the USACE 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 the USACE posted copies of the district public notices under the Supporting and Related Material tab.²⁸ The USACE was clear that this docket was intended as a “central location for interested parties to obtain information on

²⁵ See GC 32(a).

²⁶ Proposal at p. 57,301.

²⁷ *Id.*

²⁸ Proposal at p. 57,308 (“In response to these comments, we will be posting copies of the district public notices soliciting input for proposed regional conditions . . .”).

the [USACE] regional conditions being proposed by [USACE] districts” with comments on proposed regional conditions still having to be timely filed with the districts identified in the public notice.²⁹

We appreciate the USACE’s consideration for providing a venue for copies of regional conditions to be more easily available in one location. During this process, it was our experience that copies of regional conditions were being posted at times that varied from the official district notices. As users of this information, we also request that regional conditions be posted on the national website concurrently with the public notices that are published at the district level. We understand the district notices were properly noticed but we find that it would be helpful if the copies were also posted at the same time on the national website.

In addition, 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 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 proposed rules process. 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.

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 should follow a consistent format with sections on regional conditions applying to all activities, and regional conditions applying to specific NWP. 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. For example, the state of New York’s proposed regional conditions provide redline-strikeout language of all changes which is very helpful.

I. DEs should retain their authority to modify, suspend or revoke specific NWPs 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.

We recognize that – in addition to reissuing and modifying 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 DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable. This process negates the need for national standards that the USACE is considering for the proposed NWP 12, NWP C, and NWP D.

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 physiographical variations, we recommend continued vigilance over DE’s assessments such that there is a coordinated approach across districts with

²⁹ Id.

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 US, 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 US, and/or involve structures or work in navigable waters.

V. Specific Comments on the Modification, Division, and Technical Aspects related to NWP 12.

In response to specific comments the USACE requested in its proposal, the Associations have reviewed the documents in the docket and present the incontrovertible case for keeping NWP 12 as one NWP for all utility lines activities and not segregated for oil or natural gas pipeline activities only. Based on our careful consideration of legal, regulatory, technical, policy and practical factors, the longstanding NWP 12, first introduced in 1977, should be reissued in its 2017 form rather than divided.

A. On a practical level, the USACE's overall goal of creating efficiencies will not be served by dividing a single NWP into three separate NWPs with ambiguous critical terms like "gas" and "petrochemicals," and instead may amplify uncertainty for both permittees USACE staff that may not be corrected without unintended consequences so late in the rulemaking process.

The proposal states clearly that NWPs "are intended to reduce administrative burdens on the [USACE] and the regulated public while maintaining environmental protection, by efficiently authorizing activities that have no more than minimal adverse environmental effects, consistent with Congressional intent in the 1977 amendments to the Federal Water Pollution Control Act."³⁰

And the proposal maintains that, "[k]eeping the number of NWPs manageable is a key component for making the NWPs protective of the environment and streamlining the authorization process"³¹ ***As such, creating more virtually identical permits with ambiguous definitions is not streamlining, particularly when the all three NWPs authorize sufficiently similar construction and maintenance activities that will result in minimal environmental impacts.***

In fact, for the proposed NWP E relating to water reclamation and reuse facilities, the USACE sees utility in having requirements in one single place for needed clarity and to simplify the application process.³² Yet, here, applicants who are long used to existing NWP 12 for utility lines will be subject to regulatory uncertainty and increased costs for permitting and potential delays as the USACE and the regulated industry try to understand and implement this new system.

From the perspective of USACE staff decision-making and reducing potential escalation issues, we also believe that asking staff to also evaluate what is being carried by a utility line as part of its NWP review will add strain on their limited resources

³⁰ Proposal at p. 57,356.

³¹ Id.

³² Proposal at p. 57,310.

and will introduce inefficiencies and delays to permitting review times. Review of the proposed NWP's will also require staff expertise in areas that turn on a series of complex chemical factors outside of the USACE's statutorily designated expertise under the CWA Section 404 and the RHA Section 10 concerning the assessment of impacts to jurisdictional waters.

For proposed NWP 12, NWP C, or NWP D activities not requiring PCNs, the permittees will also need to address the question of contents identification and rely on a series of terms such as "utility lines," "natural gas," "petrochemical," and "other substances" which are currently not defined with sufficient clarity for applicants or evaluators and which, regrettably, cannot be changed in the final proposal without re-proposal to stakeholders under the APA. Currently, the USACE allows permittees to submit voluntary requests for NWP's to determine where proposed activities are authorized NWP-activity, and those verifications as well as requests for individual permits are likely to increase with uncertainties in definitions and NWP applicability. This will add increased burdens on the USACE staff.

Within this context, we provide a few examples of definitional issues for illustrative purposes:

1. The existing NWP 12 used the valuable category "utility lines" (which continues to be used in NWP C and D); however, proposed NWP 12 uses the new term "oil and natural gas pipelines" which causes conflicting redundancies with various aspects of the proposed NWP 12, NWP C, and NWP D.

The proposal creates distinctions between pipelines and utility lines; however, lines contemplated under the proposed NWP 12 and NWP D could potentially be both pipelines and utility lines (e.g. underground utilities can include pipelines carrying various types of gas along with electrical, water, and wastewater utility lines) and both would pertain to activities related to construction, maintenance, repair, and removal. This further highlights the USACE's unnecessary step in separating, thereby drawing an ambiguous distinction, between these two similar categories.

2. Similarly, the term "petrochemicals" also lacks clarity and will create confusion and regulatory inconsistency in the applicability of the proposed NWP 12 and NWP D.

The proposal states that, "[i]ncluding petrochemical products in the proposed definition is intended to clarify that this NWP covers utility lines that convey chemicals isolated or derived from petroleum or natural gas."³³ Yet, "petrochemicals" is a very broad and ambiguous term referring to chemicals manufactured at or from the products of refineries. Petrochemicals are always by definition petroleum-derived. While ethanol transportation by pipeline is not widespread, the question of which NWP fits best for a potential corn ethanol pipeline, for example, would not be easy given that the corn fuel may be non-petroleum-derived (hence not a petrochemical) but denaturing, to render the ethanol unfit for consumption, generally introduces petrochemicals (typically 2-5 percent gasoline or pentanes plus) into the ethanol. All of this is well outside of the USACE's jurisdiction.

Without consideration to CWA requirements, petrochemicals would also be arbitrarily covered by the proposed NWP 12 while other similar pipelines carrying non-petroleum-based or inorganic substances (gas or in liquid form such as corn-ethanol or inorganic commodity chemicals such as ammonia or sulfuric acid), would potentially be covered by proposed NWP D under potentially different national standards.

³³ Proposal at p. 57,323.

3. The applicability of the proposed NWP 12 and NWP C may also not be clear.

For example, some underground electric cables contain oil as an insulator and it is not clear if the presence of these oils would make the activity subject to the proposed NWP 12.

4. Any definitions the USACE or districts attempt to correct or clarify in this short time would be untested, without stakeholder input, and could cause unintended implementation consequences.

The USACE has developed complex interdependent frameworks that rely on national and district-specific conditioning to make the NWP program successful, and like any complex systems, when more parts are introduced such as the proposed division, there are increased chances for inconsistencies and unintended consequences to creep in over time. Thus, even if there is some attempt to correct these issues, it will be a Sisyphean task for the USACE staff to continuously maintain regulatory consistency for 3 sets of almost the same NWPs and associated regional conditions across 38 districts and through the various cyclical reissuances.

Thus, we highlight our concerns with the definitions and terms to indicate the level of regulatory uncertainty and confusion that will arise from the proposed division of NWP 12.

Any "band-aid" measures proposed by the USACE to address the definitional issues would likely lead to unintended consequences, and require a biologist trained to evaluate jurisdictional water impacts to instead assess sophisticated petrochemical classifications.

B. A review of the proposed 2020 regional conditions across various USACE Districts already confirms extensive inconsistency among district interpretations relating to the various terms used in proposed NWP 12, NWP C, and NWP D.

Our assessment of how districts are concurrently handling the proposed three-NWPs approach suggests uneven implementation of these provisions during this rulemaking. And while it may appear that some of the issues we identify may be easy to fix at this time, our review is only a snapshot in time of certain proposed regional conditions and further vetting of all proposed regional conditions is required. Also, maintaining regulatory consistency over time will be challenging for the USACE and its 38 districts.

Illustrative examples of inconsistencies are delineated in the following sections.

1. Many proposed regional conditions are inconsistent in applying CWA-type conditions for utility lines activities across proposed NWP 12, NWP C, and NWP D.

Proposed regional conditions for the states of Idaho and North Carolina modify the 2017 NWP 12-specific regional conditions to include one regional condition relating generally to "utility lines." However, since the proposed NWP 12 refers to "oil and gas natural pipelines" and deletes the term "utility lines," the Idaho regional condition would not apply to oil and natural gas pipelines. Yet, from a regulatory CWA perspective, a regional condition relating to side casting of

exploratory trenching and installation of utility lines should apply to all utility lines as defined in the current NWP 12.³⁴ The state of North Carolina has also modified its 2017 NWP 12-specific regional condition to one applying to utility lines which again would no longer apply to oil and natural pipelines under the division set out in the proposal but it appears to be intended to apply to all 2017 NWP utility line activities given that provisions such as activities related to horizontal directional drilling would apply to all 3 proposed NWPs.³⁵

2. Other state-wide regional conditions add CWA-specific water quality/construction type conditions for NWP 12 but not for the proposed NWPs C and D.

The Georgia-specific regional conditions propose regional conditions for proposed NWP 12 but not proposed NWPs C and D which is again inconsistent given that the regional conditions for proposed NWP 12 relate to suitable materials for riprap and provisions for intake structures employing best practicable means to minimize impingement or entrainment of fish or aquatic life which are appropriate CWA-related conditions for all three types of utility lines.³⁶

In another example, the state of Louisiana already has 2017 NWP 12-specific regional conditions but these are now proposed only for the proposed NWP 12 oil and natural gas pipeline activities and not for the proposed NWPs C and D.³⁷ Specifically, the current NWP 12 and proposed 2020 regional conditions are essentially the same and relate to a PCN requirement for activities within tidal waters and requirements for side cast materials associated with construction. It is not clear why the same 2017 water-quality and construction-related provisions which apply to all 2017 utility-lines activities should now apply only to oil and natural gas pipelines. Arkansas also has proposed to reissue its 2017 general regional conditions relating to PCN requirements for certain special aquatic features as well as provisions for intake structures to prevent the entry of fish which apply to a whole suite of NWPs including the proposed NWP 12 but not proposed NWP C or NWP D even though all utility line activities were included in the 2017 regional conditions.³⁸

3. Three state-wide regional conditions also have entirely different interpretations relating to utility line activities applicable to manholes.

The Portland District's Oregon-specific regional conditions include a proposed regional condition requiring DE approval for manholes in streams or other waterways only for proposed NWP D but not proposed NWP 12 or NWP C.³⁹ Meanwhile, the state-wide Ohio regional conditions take a different approach to manholes. Ohio includes the same regional condition relating to a PCN requirement for permanent conversion of certain wetlands for proposed NWP 12, NWP C, and NWP D

³⁴ Available at: https://media.defense.gov/2020/Sep/30/2002508513/-1/-1/1/ATTACHMENT%20A_DRAFTREGIONALCONDITIONS_20200930.PDF

³⁵ Available at: https://saw-reg.usace.army.mil/PN/2020/Enclosure-A_Proposed_SAW_RCs.pdf

³⁶ Available at:

https://www.sas.usace.army.mil/Portals/61/docs/Regulatory/publicnotices/SAS%20Public%20Notice%20Advertising%20Proposed%20NWP%20Regional%20Conditions_508%20Compliant.pdf?ver=7jadu2dGX4VoEjZS5RwiQw%3d%3d

³⁷ Available at: https://www.mvn.usace.army.mil/Portals/56/docs/regulatory/publicnotices/2020-10-01_NWP_LRC_SPN.pdf?ver=m2efwx4IKmYdZUwAw3Zopg%3d%3d;

https://www.mvk.usace.army.mil/Portals/58/docs/regulatory/4%20LA%20Regional%20Conditions%202017%20NWPs_1%20FEB%202017.pdf?ver=2017-03-21-120313-923

³⁸ Available at: <https://www.swl.usace.army.mil/Portals/50/docs/regulatory/publicnotices/2020%20NWP%20Renewal%20PN.pdf>

³⁹ Available at:

<https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/announcements/CombinedReissuanceofNationwidePermits.pdf>

but then includes a second provision relating to a prohibition for manholes in wetlands for proposed NWP 12 only.⁴⁰ Oregon only requires DE approval for the proposed NWP D and no restrictions for proposed NWP 12 and NWP D while Ohio appears to prohibit manholes only for proposed NWP 12 but not for proposed NWP C or NWP D. Meanwhile the Commonwealth of Pennsylvania has proposed to delete its 2017 regional condition in its entirety -- prohibition relating to manholes in wetlands, unless demonstrated to the satisfaction to the DE that the placement is unavoidable.⁴¹

4. Other districts vary in their treatment of the three NWPs by either removing NWP 12 conditions entirely, adding identical terms for all three NWPs, or revising with slight differences.

A number of USACE districts also remove their current NWP 12-specific regional conditions (e.g. Missouri, Washington State) or reissue/modify their current NWP 12 regional conditions and use the same or similar language for proposed NWP C and NWP D (e.g. Delaware, Indiana, New Jersey, Tennessee, West Virginia).⁴²

Michigan, Montana, and Virginia also create virtually the same regional conditions for proposed NWP 12, NWP C, and NWP D, but continue to use the term “utility lines” within the provisions. Others like New York’s current regional conditions for NWP 12 include language such as “submerged cables and pipelines” and the proposed regional conditions for NWP 12, NWP C, and NWP D basically are the same provisions but adjusted for the new proposed terms.⁴³ For proposed regional condition relating to the proposed NWP 12 and NWP D, “submerged cables” is deleted and now applies only to “pipelines.”⁴⁴ But note, the proposed NWP D uses the term “utility lines” while the New York regional condition references pipelines which again indicates inconsistent use of the terms as well as shows that pipelines and utility lines are seen as being same or similar for the purposes of NWPs.⁴⁵ And the proposed NWP C has an added term to “submerged cables” to state “submerged cables and conduits” which is also slightly different.⁴⁶

C. Economic impacts and underlying assumptions and methodologies for calculating compliance costs and burdens are minimally assessed for the proposed NWP 12, NWP C, and NWP D, and more analysis is required.

1. The proposal's RIA estimates zero annual costs savings to permittees and the federal government for proposed NWP 12, NWP C, and NWP D and identifies no benefits to the division. This further supports the Associations’ position to reinstate the 2017 NWP 12.

⁴⁰ Available at: <https://www.lrh.usace.army.mil/Portals/38/Users/007/87/1287/Enclosure%201%20-%20OH%20Regional%20Conditions.pdf?ver=TWcyCP6R9uSwzRP-JbZ2jg%3d%3d> (Note: proposed NWP 12’s regional condition is still referred to as utility line activities).

⁴¹ Available at: [https://www.nab.usace.army.mil/Portals/63/docs/Regulatory/PN/ENCLOSURE%203%20PA%20\(Final\).pdf?ver=FWE9nnXQqn2kE_BQUpn9sw==](https://www.nab.usace.army.mil/Portals/63/docs/Regulatory/PN/ENCLOSURE%203%20PA%20(Final).pdf?ver=FWE9nnXQqn2kE_BQUpn9sw==)

⁴² Language relating to aerial transmission lines that appear in the current NWP 12 may be moved to NWP C but otherwise, the conditions tend to be identical. We refer you to the public notices for each of the states mentioned. Several also do not include any NWP 12-specific provisions such as Colorado, Iowa, New Mexico, North Dakota, Nebraska, South Dakota, and Wyoming. As noted, West Virginia has the same provisions for proposed NWP 12, NWP C, and NWP D but its title for NWP 12 still refers to utility lines.

⁴³ Available at: <https://www.nan.usace.army.mil/Portals/37/docs/regulatory/Nationwide%20Permit/NWP2020/Sept20/Initial%20PN%20NWP%20Regional%20Conditions%20with%20Enclosures.pdf?ver=WLA9s2PIYthwCUyMSz2vpQ%3d%3d>

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

According to the USACE, there are no annual cost savings to be gained from dividing the NWP, which begs the question of the basis for the USACE's action. The USACE appears to estimate an increase of 255 activities being eligible for NWP authorizations per year, instead of the standard individual permit process, and none of these 255 activities are estimated to derive from the proposed NWP 12, NWP C, and NWP D division.⁴⁷ As such, estimated annual cost savings for permittees and the federal government are zero for the proposed NWP 12, NWP C, and NWP D.⁴⁸ Benefits associated with the division are not clear because none are explicitly provided. Other sections with new NWPs include a discussion of benefits but a benefits section for the proposed NWP 12, NWP C, or NWP D is noticeably absent.⁴⁹ As discussed in these comments, the potential burdens associated with the division of existing NWP 12 can be substantial.

In fact, the USACE offers the counter-intuitive concept of potential avoided costs to permittees with "the potential to add industry-specific requirements to each of these NWPs tailored to address differences among the various types of utility lines."⁵⁰ ***(emphasis added.) Adding new unvetted enforceable permit conditions is not in any scenario an avoided cost to a permittee.*** And the USACE appears to recognize that, by signaling to the permittees that a potential consequence of additional permit terms is that "there could be an increase in the number of activities that require standard individual permits because a proposed oil or natural gas pipeline, an electric line or telecommunications lines, or a utility line for water or other substances cannot comply with one or more of the national performance standards or best management practices, or it would be impractical to comply with those national performance standards or best management practices."⁵¹ This statement introduces enormous regulatory uncertainty to all industries that rely on long-term planning for its infrastructure projects related to utility lines.

Reissuing these proposed NWPs as one NWP 12 as we recommend would allow for much needed regulatory certainty, not change any baseline economic impacts analysis, and allows the USACE to continue to proceed with a legally defensible reissuance of an important NWP.

2. The RIA contains only a cursory analysis of cherry-picked costs, and more analysis is needed for actual compliance costs. Our assessment indicates that industries using proposed NWP 12, NWP C, and NWP D are likely to be materially disadvantaged in the implementation of the proposed changes due in part to definitional ambiguities and proposed inconsistencies at the district levels.

If the USACE proceeds with finalizing the three NWPs, we believe that more analysis is needed to be completed of regulatory and economic impacts that have not been taken into account. First, we question the accuracy of the "sample" numbers used for estimating the annual reported use of 2017 NWP 12 and then the associated estimates used to fill the proposed NWP C and NWP D data points. We are not clear on the rationale used to classify the 5,887 activities from 11,495

⁴⁷ RIA at p. 6 and Table 4.5, p. 33. Note the -5,587 figure on Table 3.1 is an error. It should be -5,887 as found on Table 4.5.

⁴⁸ *Id.*, Table 4.5.

⁴⁹ *Id.*, pp. 45-46 relating to the 3 NWPs, includes 3 Sections – Baseline, Avoided Costs to Permittees, and Potential Consequences to Permittees. Compare, for example, to Section 5.4 relating to new NWP for seaweed mariculture activities with 3 sections – baseline, benefits, and disbenefits. RIA at pp. 46-48.

⁵⁰ *Id.* at p. 46.

⁵¹ *Id.*

“[e]stimated annual reported uses of 2017 NWP 12 activities (from ORM2)” as activities assigned to proposed NWP C and NWP D for “[e]stimated change in annual number of NWP authorizations.”⁵²

The USACE also estimates 85 fewer PCNs being needed annually for the new NWP 12 (similar to the NWP activity column, 65 fewer PCNs are added to the proposed NWP C and NWP D columns).⁵³ There is no explanation provided on how these numbers were reached. The additional benefit of the reduction from 7 PCNs to 2 PCNs is not readily apparent and one interpretation lends itself at most to 20 fewer PCNs annually attributable to the proposed NWP 12 once all the reorganizational apportionments have occurred (deducting 65 PCNs as listed for proposed NWP C and NWP D).⁵⁴ The USACE also does not appear to account for additional PCNs and costs associated with the new PCN requirement for new oil and natural gas pipelines projects over 250 miles in length.

There are also no changes with new compensatory mitigation requirements for activities that exceed 1/10-acre losses of stream beds as well as changes in methodologies to calculate losses of stream beds.⁵⁵ With such an expansion, we disagree with the USACE that the number of activities authorized by NWPs is unlikely to change.⁵⁶ The options the USACE lay out will most certainly place new additional costs on permittees where none such exist currently in the form of additional mitigation to get below the threshold for requiring compensatory mitigation or performing the required mitigation for NWP authorization.⁵⁷

in the proposal, the USACE is silent on costs to projects that involve overlapping utility line activities at a single crossing (e.g. a water line and an electric/telecommunication utility line co-existing on a shared crossing) that are grouped currently as a single and complete project requiring just one NWP authorization. As such, we believe that staff resources will be burdened with authorizing activities for single and complete projects under three similar NWPs as well as in interpretations and compliance issues associated with the three NWPs. For prospective permittees, there are additional compliance costs and burdens associated with multiple NWPs authorizations being required for the same activities currently authorized as a single and complete project.

The USACE underscores this point with GC 15, that the same NWP cannot be used more than once for the same single and complete project. These are burdens in added permitting and compliance costs for the regulated industry that must be considered fully.

In sum, the USACE proposes new definitions for the proposed NWP 12, NWP C, and NWP D that can have serious consequences and its economic and regulatory impact assessment provides a perfunctory review and fails to properly consider impacts to permittees.

D. A strong potential for legal challenges exists when the same 12-inch pipeline would be treated differently under any final NWP 12, NWP C, and NWP D.

⁵² *Id.* at A-2, A-8.

⁵³ *Id.* at Table 3.1., page 21.

⁵⁴ *Id.* at p. A-8.

⁵⁵ *Id.* at p. A-10 and A-12.

⁵⁶ *Id.* at p. A-10.

⁵⁷ *Id.*

1. The 250-mile PCN requirement in the proposed NWP 12 applies only to oil and natural gas pipelines, and is arbitrary and capricious under the APA.

The USACE is proposing an arbitrary PCN trigger for a proposed “oil or natural gas pipeline activity [that] is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline (vs. conduct repair or maintenance activities) along the majority of the distance of the overall project length.”⁵⁸ The USACE also states that it is requiring the PCN “to provide the [DE] the opportunity to review all crossings of waters of the United States for long-distance oil or natural gas pipelines to ensure that the activities authorized by NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects.”⁵⁹ For these oil or natural gas pipeline activities, the USACE would require the prospective permittee to include in the PCN, “the locations and proposed losses of waters of the United States for all crossings of waters of the United States that require [USACE] authorization, including those crossings that would not require pre-construction notification.”⁶⁰ The USACE is specifically requesting comments on this new proposed PCN requirement as well as whether it should be a greater or lesser number of miles.

This proposed NWP 12-specific PCN is completely contrary to the central tenet of the current NWP 12 as well as the proposed NWP 12, NWP C, and NWP D, which is that each crossing is considered a single and complete project for the purpose of NWP authorization. Also, the 250-mile PCN trigger is limited to the proposed NWP 12 and is not applied to other projects encompassed in the current NWP 12 (now in proposed NWP C and NWP D), 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 proposed three categories of pipelines/utility lines (proposed NWP 12, NWP C and NWP D) have virtually identical requirements, and therefore should have the same PCN triggers. Moreover, the USACE does not explain why a similar project size threshold should not apply to other pipelines or electric lines.

The APA requires, among other things, that agency action not be arbitrary and capricious.⁶¹ Fundamental principles of administrative law require that agency action be “based on a consideration of the relevant factors,” and rest on “reasoned decisionmaking.”⁶² “[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.’”⁶³ ***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, 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-

⁵⁸ Id. at p. 57,371.

⁵⁹ Id. at p. 57,327.

⁶⁰ Id.

⁶¹ See 5 U.S.C. Section 706.

⁶² 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).

⁶³ Id.

National Environmental Policy Act (“NEPA”) cumulative effects assessment.⁶⁴ This 250-mile determination, on the other hand, is simply arbitrary and has no scientific, technical, or regulatory basis.

The RIA is also flawed in that it anticipates no additional PCNs resulting from a whole new PCN requirement that is being added.

Overall, our assessment indicates that the proposed language as well as the basis for the PCN trigger is faulty, without reasoned justification, and should be removed.

- 2. The record includes reasons for the proposed division that are unsupported by data related to construction parameters such as pipeline diameter and length, and therefore, fails to provide an appropriate nexus or reasoned justification for the division.**

While the USACE has jurisdiction to consider issues regarding construction parameters,⁶⁵ the discussions in the preamble and the draft decision document on various utility lines and pipeline diameters and length is anecdotal at best, superficial, and unsupported by robust data. The proposal appears to suggest that there are differences in ground disturbances or impacts to wetlands and other waters for oil and natural gas pipelines, electric transmission lines and pipelines that carry all other substances but it does not provide data to support this assertion.⁶⁶ In fact, even the proposal's concluding remarks are lukewarm at best, stating that “there are likely generally to be differences in the relative amounts of ground disturbance and other related activities . . . that suggest there is a potential for adding different terms for each of these three proposed NWP’s”⁶⁷ (emphasis added.)

The USACE provides various carefully curated facts about utility lines but it does not ask critical questions regarding commonalities amongst the various utility lines with respect to their dredged or fill material impacts. The USACE needs to ask questions such as how are the dredged or fill material impacts of constructing a 12-inch gas line any different than constructing a 12-inch water line? The record also discusses the construction of electric power lines, fiber-optic cables, and telecommunications lines on poles or towers and it discusses how electric transmission cables may also use trenching and backfilling, and through horizontal directional drilling.⁶⁸ These are very similar activities to other utility lines and there is no supporting data provided on different impacts from these activities except some broad generalized discussion on diameters of pipelines.

There is also some discussion related to above-ground or underground impacts but there is variability amongst all utility lines that makes it difficult to neatly divide these activities on this basis. In fact, underground, above-ground, elevated, offshore, and underwater pipeline installation can be utilized by any industry. For example, as the proposal discusses, electric power line activities can involve overhead transmission lines but they can also involve installations in the ground

⁶⁴ 82 Fed. Reg. at p. 1,975, Proposal at p. 57,300.

⁶⁵ Based on our observations and experiences, construction of a pipeline/utility line is dictated by four key factors: type of pipe, diameter of pipe, location of installation, and governing entities regulating the construction and maintenance of the pipe.

⁶⁶ Proposal at pp. 57,322-57,323.

⁶⁷ Id.

⁶⁸ Id.

through trenching and backfilling,⁶⁹ and include horizontal boring, and conduit piping for underground in ways similar to the other utility lines.

The same applies to the USACE's utility line diameter discussions that seem incongruent to the proposed division. For example, as related to water lines, diameters are discussed as ranging from 4 to 12 inches, 16 to 20 inches or 24 inches and while the proposal notes that some of these water lines can be larger, the USACE appears to be conveying a message that these lines tend to be on the smaller size.⁷⁰ Yet, pipe diameters can vary and water mains can be 6 feet or more in diameter.⁷¹

In fact, there is also no natural grouping to be found in the size of the pipeline diameter to provide a basis for USACE's division. By its own admission, the proposal finds that all these utility lines vary in size and length. The USACE's own statements in the proposal are: "[e]lectric utility lines and telecommunications vary in size and length, and how they are constructed,"⁷² "[u]tility lines for transporting water, sewage, and other substances vary in diameter,"⁷³ and "[o]il and natural gas pipelines can vary substantially in length and diameter."⁷⁴

The USACE's focus on diameter is related to its stated position that potential sizes of trenches and associated ground disturbance "likely varies" with the size of the pipeline.⁷⁵ This base hypothesis is correct but there is no correlation between pipe diameter and the three-tiered division that the USACE is proposing. Our members' experience indicates that standard industry-wide practices for any conventional single-pipe construction require larger trenches when the diameter of a line is 12 inches or larger. However, it is important to note that several types of pipes that are 12 inches or larger fall within this category and they are not limited only to one type of industry. These can also include municipal drinking water and wastewater lines as well as oil and natural gas pipelines and others. As such, the existing NWP 12 terms are correctly applicable to all utility lines while allowed to be further tailored as appropriate for soil and surface conditions based on regional geographic variations and conditions. The issue is not the size of the pipe that is important, but rather the size of the trench required to install the pipe which relates to the impacts to WOTUS. For example, a small diameter pipeline that is being installed in an unstable soil may require a larger trench than a larger diameter pipe that is installed in a stable soil that will hold a trench.

The USACE also provides the approximate mileage for crude oil pipelines and natural gas pipelines and electrical transmission lines but no comparable data is provided for other utility lines.⁷⁶ A sweeping statement is made that "[u]tility lines for conveying potable water, water, sewage, stormwater, wastewater, brine, irrigation water, and

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Examples include: The Las Vegas Valley District with water pipes larger than 8 feet or smaller than an inch in diameter, available at <https://www.lvwd.com/water-system/how-water-gets-to-you/index.html>; Denver Water's pipes over 5 feet in diameter and 50 feet long section, available at <https://denverwatertap.org/2018/02/16/big-dig-under-i-70-clears-path-for-future-water-delivery/>.

⁷² Proposal at p. 57,322.

⁷³ Id. at p. 57,323.

⁷⁴ Id. at p. 57,322. The statement "vary substantially" is noted specifically for oil and natural gas pipelines but the same can be said for the other types of utility pipelines especially utility lines under proposed NWP D that cover a wide spectrum of utility lines including "water, sewage, and other substances."

⁷⁵ Id.

⁷⁶ Id. at pp. 57,322-57,323.

industrial products that are not petrochemicals, are often limited to specific areas, where they serve cities, towns, and other communities, residential developments, commercial developments.”⁷⁷ (emphasis added.) Many oil and gas pipelines permitted under NWP 12 also fit into this characterization, which is not acknowledged. Further, this characterization is a very large catch all category for which very little data is provided for each of the covered utilities, their approximate mileage, and their scope. And even though some of these pipes may not have national reach, like only some of the oil and gas pipelines permitted under NWP 12, their expanse within their areas can be extensive and with the same or similar consideration to ground disturbances. Simply for illustrative purposes, the Metropolitan Water District of Southern California’s distribution system consists of 830 miles of large diameter pipelines, including approximately 400 connections.⁷⁸ Its California River Aqueduct is a 242-mile system of aqueduct, tunnels, and siphons.⁷⁹

The most troubling aspects are the USACE’s sweeping statements about oil and natural gas pipeline activities based on a sample of NWP 12 verifications issued between March 19, 2017 and March 18, 2019.⁸⁰ This represents a very brief snapshot in the NWP cycle and it is only a general estimate (which by USACE’s admission is based only on a “sample”) especially since verifications can include voluntary requests where the NWPs or GCs do not require PCNs. Yet, this estimate is used as a policy basis for the division and used for projecting key figures such as the mean annual use of 2020 NWPs by specific NWPs as well as projected mean annual acreage impacted and projected mean annual acreage of compensatory mitigation.⁸¹ Given that the underlying data is not adequately defined or justified, the resulting projections are suspect and should be disregarded.

Also, as the Congressional Review Service (“CRS”) noted in 2017, the USACE “does not have a centralized database or other information on the number of individual permits it issues for pipeline and utility line projects, nor does it have a database on utility line activities that are authorized by NWP 12.”⁸² (emphasis added.) **Thus, any attempt by the USACE to draw out a reasoned data-driven basis for division is premature at this time.**

E. A key point that cannot be overstated is that the USACE’s jurisdiction as related to these NWPs is limited to its statutory authority under CWA Section 404 and RHA Section 10.

The USACE is specifically proposing to change the title of this long-established NWP for utility line activities to “Oil and Natural Gas Pipeline Activities’ **to reflect the type of substances that can be conveyed** by these utility lines.”⁸³ (emphasis added). This statement clearly indicates the USACE’s overreach of its own statutory jurisdiction that is limited to activities relating to the discharge of dredged or fill materials into jurisdictional waters.⁸⁴

⁷⁷ Id. at p. 57,323.

⁷⁸ More information available at: <http://www.mwdh2o.com/AboutYourWater/Storage-And-Delivery/Pipelines-and-Tunnels>

⁷⁹ Id.

⁸⁰ Proposal at p. 57,322.

⁸¹ RIA at Appendix B.

⁸² CRS, [USACE’s] Nationwide Permit Program: Issues and Regulatory Developments, 2017. p. 9.

⁸³ Proposal at p. 57,323.

⁸⁴ The USACE’s substantive authority is limited to the discharge of dredged or fill material into 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

To date, the USACE has also appropriately recognized that “it does not regulate oil and gas pipelines, or other utility lines, per se.”⁸⁵ 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).”⁸⁶ The USACE has succinctly maintained that it “does not have the authority to regulate the operation of oil or gas pipelines, and [USACE does] not have the authority to address spills or leaks from oil and gas pipelines.”⁸⁷ And in the 2017 proposal, the USACE also stated: “We do not have the authority to regulate the operation of oil and gas pipelines, and we do not have the authority to address spills or leaks from oil and gas pipelines.”⁸⁸ Prevention of spills as well as controlling a spill if one is to occur are appropriately regulated under various other regulatory frameworks which were listed in the 2017 preamble but not in the proposal.⁸⁹

These are important frameworks for clearly laying out the outer bounds of the USACE’s NWP authority. The 2017 proposal language should be added with clarifications that only activities relating to the discharges of dredged or fill matter into jurisdictional water that are specifically associated with the construction, maintenance, repair, and removal of these utility lines/pipelines, are appropriate for NWP consideration. That is, a utility line crossing, in and of itself, is not an appropriate trigger for requiring NWP 12 coverage.

F. The decision to separate NWP 12 into three NWPs lacks rational basis and is contrary to the USACE’s previous application of the CWA’s “similar in nature” requirement as related to utility lines.⁹⁰

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). The Council on Environmental Quality (“CEQ”) recently updated its NEPA regulations, consistent with Public Citizen, to confirm that “[e]ffects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.” 85 Fed. Reg. 43,304, 43,375 (July 16, 2020) (codified at 40 CFR Section 1508.1(g)(2)).

⁸⁵ 82 Fed. Reg. at p. 1,883. See Proposal at p. 57,323 (language is modified to explain “activities” that the USACE regulates but the underlying point is still that the USACE’s authority to authorize NWPs is limited to dredged or fill material type of activities as related to construction and maintenance) .

⁸⁶ Id. at pp. 1,883-1,884.

⁸⁷ Id.

⁸⁸ Id. at p. 1,884. The preamble to the 2017 NWPs provided the following case in point: “For example, for a recent oil pipeline (e.g., the Flanagan South pipeline), the segments of the oil pipeline that were subject to the [USACE’s] jurisdiction (i.e., the crossings of waters of the United States, including navigable waters of the United States, that were authorized by the 2012 NWP 12) was only 2.3% of the total length of the pipeline; the remaining 97.7% of the oil pipeline was constructed in upland areas outside of the [USACE’s] jurisdiction.” Id.

⁸⁹ Id. Unlike the 2020 proposal, the preamble to the 2017 NWPs lays out a thorough explanation of applicable federal laws addressing the operation of pipelines and spills and leaks of substances from pipelines. Id.

⁹⁰ 33 U.S.C. Section 1344(e)(1).

The proposal's division of NWP 12 is a dramatic departure from longstanding USACE NWPs as first promulgated in 1977, as well as the Administration's objectives and recommendations set out in significant EOs and USACE regulatory reform documents. For example, the 2017 Energy-Related NWPs Review found: "The utility line activities are authorized by NWP 12 are similar in nature because they involve linear pipes, cables, or wires to transport physical substances or electromagnetic energy from a point of origin to a terminal point."⁹¹ It also stated: "The substations, tower foundations, roads, and temporary fills that are also authorized by NWP 12 (when those activities require [USACE] are integral to the fulfilling the purpose of utility lines, and thus fall within the 'categories of activities that are similar in nature' requirement for general permits stated in [S]ection 404(e) of the Clean Water Act."⁹²

In fact, in the 2016 NWPs proposal, the USACE received multiple "not similar in nature" comments that pipelines that carry fluids such as oil are different than pipelines that carry water or sewage, which are different than utility lines that carry electricity.⁹³ The USACE evaluated these comments and stated that ***the agency "interpret[s] the 'categories of activities that are similar in nature' requirement broadly to keep the NWP program manageable in terms of the number of NWPs."***⁹⁴ (emphasis added.) For example, in the 2006 NWPs proposal, other NWP proposals, and now in 2020, the USACE specifically states: ***"The 'similar in nature' requirement does not mean that activities authorized by an NWP must be identical to each other"***⁹⁵ and ***"[w]e believe that the 'categories of activities that are similar in nature' requirement of [S]ection 404(e) is to be interpreted broadly, for practical implementation of this general permit program."***⁹⁶ (emphasis added.)

In short, the USACE's proposed division of NWP 12 contradicts its well-established policy by interpreting this provision narrowly and looking for unsubstantiated ways to create arbitrary subgroups for simple utility line activities as well as introducing complexities that will further impede the USACE in keeping the NWP program manageable.

1. A history of the NWPs to-date also indicates that there is no prior precedent in past NWP rulemakings for abruptly and arbitrarily breaking up longstanding NWPs that are intended to cover categories of activities that are similar in nature.

There is no analogous precedent or justification for the current steps being undertaken to divide NWP 12 into entirely new 3 NWPs. NWP 12 has been an activity-based NWP applying to utility lines since 1977 but yet prior to proposing this division, there has been no information gathering or stakeholder input. In the past, when faced with issues with certain NWPs, the USACE has been measured and looked for dredged or fill material activity-driven solutions within its jurisdictional authority.

Also, a close review of the NWPs for activities in coal mining and development industry sectors suggests that these NWPs evolved as separate NWPs for entirely different reasons, and do not provide support for the USACE's position for the NWP 12 division.

⁹¹ 2017 Energy-Related NWPs Review at pp. 31-32.

⁹² Id.

⁹³ 82 Fed. Reg. at p. 1,868.

⁹⁴ Id.

⁹⁵ 71 Fed. Reg. 56,258, 56,259-56,260 (Sept. 26, 2006); Proposal at p. 57,356.

⁹⁶ Id.

a. Mining NWP's are not analogous to the proposed NWP 12 division.

To illustrate, four NWP's involving mining activities are: NWP 21 relating to surface coal mining activities, NWP 49 relating to coal remining activities, and NWP 50 relating to underground coal mining activities which all are about the coal mining industry; and NWP 44 which relates to mining activities other than coal mining activities. But it would be a fallacy to see these NWP's as examples lending support for this unexpected NWP 12 division.

In fact, the development of these mining NWP's indicate that not only did these NWP's evolve in entirely different ways but that when considering major changes, the USACE proceeded with careful deliberation over extended periods of time with extensive information gathering and stakeholder input.

Faced with "controversies" relating to NWP 21, the USACE undertook several steps over a number of NWP rulemakings to add modifications specific to NPW 21.⁹⁷ At no time did the USACE propose breaking up the NWP 21's *surface* coal mining activities into separate subsets. Instead of dividing NWP 21 or halting its use altogether, the USACE focused on modifying the base NWP 21 provisions under its CWA jurisdictional authority, including, for example, in 2002, requiring explicit authorization before an activity can take place, rather than requiring preconstruction notification, as in the past, or taking region-specific action in Appalachia, such as suspending the use of NWP 21 in 2010.⁹⁸ Then 10 years later, in 2012, the USACE "added limits of 1/2-acre or 300 linear feet of loss of stream bed; impacts above those limits could not be authorized with NWP 21."⁹⁹

Separately, NWP 44 was first proposed in the 1996 reissuance process as a part of a broader initiative to replace NWP 26 which was a non-activity specific NWP authorizing discharges in headwaters or isolated water and after substantial stakeholder input, NWP 44 was finally issued in 2000.¹⁰⁰ First, the aggregate and hard rock/mineral mining industries provided information and proposed draft NWP's that they believed would satisfy the minimal adverse effect criterion.¹⁰¹ Then, in 1998, a NWP was proposed and based on comments received, the NWP was revised substantially.¹⁰² Commenters asked to further divide the NWP into 2 NWP's – aggregate mining and crushed stone mining activities.¹⁰³ The USACE declined stating that "the activities authorized by this NWP were similar in nature and focus on mining activity and support activity."¹⁰⁴

Also, NWP 49 and NWP 50 were proposed in 2006 and then issued in 2007.¹⁰⁵ NWP 49 was issued for a very specific purpose "to authorize the restoration of mine sites throughout the United States that are causing physical and/or chemical impacts to waters of the United States."¹⁰⁶ The USACE provided its justification as, "[m]any of these sites were abandoned or closed prior to the 1977 Surface Mining Control and Reclamation Act (SMRCA) and are currently on state lists for

⁹⁷ See CRS, [USACE's] Nationwide Permits Program: Issues and Regulatory Developments, June 23, 2016 for background information (controversies such as surface coal mining operations in Appalachia are noted) ("2016 NWP's CRS Report").

⁹⁸ 2016 NWP's CRS Report at p. 10-11.

⁹⁹ Id.

¹⁰⁰ See 64 Fed. Reg. 39,252, 39,329-39,330 (July 21,1999) (includes a summary), 65 Fed. Reg. 12,818 (Mar. 9, 2000).

¹⁰¹ 64 Fed. Reg. at p. 39,330.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ 71 Fed. Reg. 56,258; 72 Fed. Reg. 11,091 (Mar. 12, 2007).

¹⁰⁶ 71 Fed. Reg. at p. 56,276.

reclamation, although funding is limited.”¹⁰⁷ NWP 50 was also issued for a very specific purpose of activities that result from underground coal mining activities (different from NWP 21 which relates to surface coal mining activities)¹⁰⁸ with CWA-type justification provided for mining involving “excavating rock and soil on the surface to expose the coal seam and providing access for people, equipment, and ventilation facilities, a process referred to as ‘facing up.’”¹⁰⁹ Additional conditions were added in the 2012 NWP 49 placing a 1/2-acre limit, as well as a 300- linear foot limit for losses of stream bed (with DE waiver).¹¹⁰ The 2016 CRS Report states succinctly: “The [USACE’s] intention with these [NWP 49 and NWP 50] permits, . . . was to provide incentives to coal remining and underground mining activities, arguing that for permittees that meet specified terms and conditions such as acreage impact limits, it will be faster to gain authorization under an NWP than it would be to obtain an individual permit and that the environment will benefit from encouraging coal remining in this manner.”¹¹¹

b. Development activities related to NWP 29 and NWP 39 are not analogous to the proposed NWP 12 Division.

NWP 29 and NWP 39 authorize construction activities for residential developments and commercial/institutional developments, respectively. Once again, these divisions evolved over time following different rationale and after much deliberation.

Separate from the regular reissuance 5-year process, NWP 29 was proposed in 1995 “to reduce the regulatory burden on small landowners proposing to build or expand a single-family home while simultaneously maintaining environmental safeguards.”¹¹² In 2000, in an action midway before routine permit reissuance was due in 2002 and faced with criticism regarding NWP 26 which authorized discharges in headwaters or isolated waters, the USACE repealed NWP 26 entirely and replaced it with five specific activity-based permits including NWP 39 which covered residential, commercial, and institutional development.¹¹³ Then, in 2006, the USACE proposed to move the provisions of NWP 39 that authorized residential developments to the already existing NWP 29.¹¹⁴ One reason that the USACE provided is that residential developments are often subject to different state and local requirements.¹¹⁵ Here, proposed NWP D is a catch-all provision that covers wide ranging activities with considerable overlap with NWP 12 from a CWA perspective.

¹⁰⁷ Id.

¹⁰⁸ The preamble explains: “This permit replaces the 2002 version of NWP 21 for underground coal mining activities.” 72 Fed. Reg. at p. 1,1151. Any coal mining activities can be considered for authorization under NWP 21 to the extent the activities occur on the surface of the land. In particular, while discharges associated with underground coal mining activities now require authorization under NWP 50 rather than NWP 21, surface processing activities associated with underground coal mining may still be authorized by this permit provided they meet the conditions for its use.” 72 Fed. Reg. at p. 1,113. Further distinctions, similarities, and scope for overlap (e.g. activities that are not a part of the underground mine site) are also covered within the scope of CWA (i.e. “not involve underground disturbances in a way that underground mining does.”) Id. at pp. 1,1151. Additional surface coal mining activity examples include: “contour mining, mountaintop mining, and area mining.” 71 Fed. Reg. at p. 56,267.

¹⁰⁹ Id.

¹¹⁰ 77 Fed. Reg. 10,184, 10,274 (Feb. 21, 2012).

¹¹¹ 2016 NWPs CRS Report at p. 11.

¹¹² 60 Fed. Reg. 38,650 (July 27, 1995).

¹¹³ See 2016 NWPs CRS Report at p. 4 for background.

¹¹⁴ 71 Fed. Reg. at p. 56,260.

¹¹⁵ Id. at p. 56,270.

During adoption, additional rationale that was provided was that the USACE was seeking to eliminate the different set of requirements for single family residential projects in NWP 29 as compared to NWP 39 because of their determination that “that all residential projects using an NWP, whether single- family or multi-family, should face the same set of requirements.”¹¹⁶ The USACE stated that, “[i]n particular, we have determined that residential projects in wetlands adjacent to tidal waters should not be authorized through an NWP, so we are combining all residential development activities in NWP 29 and eliminating its use in wetlands adjacent to tidal waters.”¹¹⁷ All of this rationale was provided within the context of CWA impacts and as related to specific changes in environmental conditions which is not the case in the current proposed NWP 12 division.

2. The three categories of utility lines (proposed NWP 12, NWP C, and NWP D) authorize sufficiently similar activities and require the same or similar environmental provisions in order to meet the minimal impacts requirement under the CWA.

There is considerable overlap between utility lines and resulting impact from dredged or fill material activities relating to construction, maintenance, repair, and removal requirements under the current NWP 12. Arbitrarily separating these activities would be administratively burdensome and not justified by the rulemaking record. Even the proposal states that the USACE is proposing “to retain the basic structure of the 2017 NWP 12 since many of the activities authorized by the 2017 NWP 12 could apply to any utility line, regardless of what substances it conveys.”¹¹⁸

From a CWA Section 404 perspective, key requirements are the same with respect to restoring areas to pre-construction contours, use of temporary fills, remediation of inadvertent returns of drilling fluids during horizontal directional drilling activities, and trench excavation and backfilling requirements. Activities related to substations, foundations, and access roads are all substantially similar. Except for the new 250-mile PCN threshold being added to the new NWP 12, there are very few differences separating the three proposed NWPs.

These substantially similar NWPs appear inconsistent with the USACE’s attempts to justify the division as a means to more effectively address “differences in how the different linear projects are constructed, the substances they convey, and different standards and best management practices”¹¹⁹

G. The draft decision documents comply with the NEPA, CWA Section 404(b)(1) Guidelines, Public Interest Determination, and all other statutory and regulatory requirements, except that we ask that the decision documents for proposed NWP 12, NWP C, and NWP D, should be recombined as one decision document for NWP 12.

Fundamentally, we believe that the NWP 12 should be issued as one NWP and not be limited to the oil or natural gas pipeline activities, and we also submit that no additional national enforceable terms are necessary. The decision documents for the proposed NWP 12, NWP C, and NWP D should be recombined to reflect that change. It should not be an onerous change since there are only minimal differences that reflect the proposed action and resulting new definitions for the proposed three NWPs.

¹¹⁶ 72 Fed. Reg. at p. 11,123.

¹¹⁷ Id.

¹¹⁸ Proposal at p. 57,323. See also at p. 57,347.

¹¹⁹ Id. at p. 57,298.

The Associations' comments and recommendations are directly in response to the fair and reasonable notice that the USACE provides in Section 2.2, National Modification Alternatives, Draft Decision Document for NWP 12, where the USACE directly requests comments on the proposed reissuance of this NWP.¹²⁰ The issues for which comments are solicited are clearly laid out as – 1) “to modify this NWP to limit it to oil and natural gas pipeline activities, such as crossing of waters of the United States, the construction of substations for oil or natural gas pipelines, and the construction of access roads for oil or natural gas pipelines;” 2) the PCN threshold changes;¹²¹ and 3) “also requested comments and suggestions regarding national best management practices and national standards that could be added to the text of this NWP . . .”¹²²

We also encourage the USACE to take this opportunity to further refine as well as bolster the decision document based on overall comments submitted by the Associations.

While we do not agree with the decision documents' proposed alternative modifications regarding creating a separate NWP 12 for oil and natural gas pipelines and corresponding proposed NWP C and NWP D, and establishing unnecessary new national terms, we do support the overall structure set out in the decision documents. On the whole, the decision documents are an appropriate national evaluation of environmental consequences, including cumulative effects. “[T]he NWPs provide mechanisms for more robust analyses at the site-specific scale” through PCNs and voluntary requests as well as on a regional scale based on the DE's discretionary authority to modify, suspend, or revoke NWP authorizations.¹²³ To that extent, we believe that the USACE's national cumulative effects assessment is adequate. We also support the cumulative effects analysis scope encompassing the past, present, and reasonably foreseeable future actions.

We appreciate the clarification the decision document provides that the USACE's jurisdiction is limited to authorizing temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to jurisdictional waters through sub-soil fissures or fractures that might occur during horizontal directional drilling. As the USACE has recognized, the inadvertent release of drilling fluid is outside the scope of the USACE's CWA Section 404 authority because drilling fluid is not a fill material.¹²⁴ The USACE has stated that “the fluids used for directional drilling operations consist of a water-bentonite slurry and is not a material that can be considered ‘fill material’ under 33 CFR Section 323.2(e).”¹²⁵ In the decision document, the USACE notes that: “These drilling fluids may be released into aquatic and terrestrial environments and may contribute to cumulative adverse environmental effects to those environments.”¹²⁶

¹²⁰ Draft NWP 12 Decision Document at pp. 7-8.

¹²¹ *Id.* The USACE solicits comments on PCN thresholds and we have provided our opinion that, at this time, we believe that the NWP 12 should be simply reissued as is. We do not find the 250-mile PCN threshold to be an appropriate addition under any circumstance; however, we welcome future discussions regarding the reductions of 7 PCNs to 2 PCNs. Discussion and rationale related to the proposal to reduce PCNs from 7 to 2 were sparse in the decision document. We would ask the USACE to further reflect and build on the rationale in the proposal as related to temporary impacts of certain activities.

¹²² *Id.* at p. 8.

¹²³ *Id.* at p. 44.

¹²⁴ 2017 Energy-Related NWPs Review at p. 39.

¹²⁵ *Id.*

¹²⁶ Draft NWP 12 Decision Document at p. 50.

This generalized statement needs to be qualified with the USACE's prior recognition that "[h]orizontal directional drilling for utility line activities is an important technique for avoiding and minimizing adverse effects to jurisdictional waters and wetlands during the construction of utility lines."¹²⁷ A further explanation should be provided that (as provided previously by the USACE), "[t]his water-bentonite mixture is not a toxic or hazardous substance but it can adversely affect aquatic organisms if released into bodies of water" and that while inadvertent returns of these drilling fluids are not regulated under CWA Section 404, "activities necessary to contain and clean up these drilling fluids may require [USACE] authorization (e.g. temporary fills in waters of the United States), or fills to repair a fracture in a stream bed.)."¹²⁸

The decision document for the proposed NWP 12 treats oil spills and gas pipeline leaks as reasonably foreseeable in the NEPA impact analysis. The USACE does not have jurisdiction over pipeline operation and spills, or leaks of substances from pipelines. When discussing those sections (and recognizing that the analysis is assessed qualitatively),¹²⁹ the USACE should reference and add to the language in Section 5.1.(d) that, while it does not regulate the operation of oil or gas pipelines such as spills/leaks that may occur, there are myriad other federal agencies under other statutory frameworks that regulate programs relating to spill prevention, protection, and control.¹³⁰ For example, the EPA and the US Coast Guard address oil spills through the Oil Pollution Act.¹³¹ The U.S. 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.¹³² Specific to oil pipelines, 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.¹³³

More thorough context for regulatory frameworks needs to be provided to sections starting with "[a] variety of pollutants might be released into the environment during the operation and maintenance of oil or natural gas pipelines" and ending with "[p]ollutants may also be discharged through spills and other accidents."¹³⁴ Similarly, the USACE adds a new sentence as related to aesthetics that "[s]pills from oil pipelines may alter aesthetics in the vicinity of the pipeline."¹³⁵ This again needs to be explained within the context of regulatory frameworks and industry efforts to prevent and control spills, and minimize impacts.

We appreciate that the USACE keeps the 2017 decision document 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

¹²⁷ 2017 Energy-Related NWPs Review at p. 39.

¹²⁸ Id.

¹²⁹ Id. at p. 28.

¹³⁰ Id. at p. 50.

¹³¹ Id.

¹³² Id.

¹³³ 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 Pipeline Safety Act, 49 U.S.C. Section 60101, et seq.

¹³⁴ Id. at p. 56.

¹³⁵ Id. at p. 49.

energy.”¹³⁶ 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.¹³⁷

Overall, we agree with the 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 this NWP will have no more than minimal individual and cumulative adverse environmental effects.

We appreciate the USACE’s thorough assessment of alternatives based on requirements of NEPA,¹³⁸ and, for all the reasons in this comment letter and the draft decision document, we do not believe that the no action alternative 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 NWPs.

H. Technical Review: 2017 NWP 12 – Utility Line Activities should be reissued with no additional restrictive conditions.

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 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 as one NWP 12 relating to utility line activities. NWP 12 meets the legal requirements under CWA, NEPA, and all other applicable statutory and regulatory requirements.

Notwithstanding our fundamental position that NWP 12 should remain as one NWP, these are specific comments as applying to core concepts as well as specific terms and conditions of NWP 12.¹³⁹

1. The Associations believe that the 2017 NWP 12 provides adequate CWA Section 404 and RHA Section 10 protections. Even if the permits are inadvisably divided, no additional industry-specific standards or best management practices (“BMPs”) should be added to the NWPs as national enforceable terms.

The USACE proposes to tailor the three proposed NWPs to address “potential differences in how the different types of utility lines are constructed, maintained, repaired, and removed and to potentially add industry-specific standards or best management practices that would be appropriate to add as national terms”¹⁴⁰

¹³⁶ Id. at p. 50.

¹³⁷ Id.

¹³⁸ Id. at pp. 6-9.

¹³⁹ The comments in this section pertain to terms as found in the current NWP 12 and as found in proposed NWP 12, NWP C, and NWP D.

¹⁴⁰ Id. at p. 57,322.

This ignores the existing and robust collection of requirements that 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 as well as additional GCs and regional and district-specific conditions that can be added if appropriate.¹⁴¹

Specifically, 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. 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.

In fact, 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.”¹⁴² (emphasis added.) There is no new information in the proposal to indicate otherwise.

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.

2. 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, and as drafted, within the USACE's overall authority.

In 2017, in response to a commenter asking for “prescriptive national standard best management practices,”¹⁴³ the USACE stated clearly: “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.”¹⁴⁴

Clearly, the USACE districts already and will continue play a key role in addressing region-specific variances within utility lines that may call for additional protective measures. The solution to addressing “potential differences” (that the USACE

¹⁴¹ See, for illustrative purposes a list of required BMPs being proposed as regional conditions for Montana, Nebraska, North Dakota, South Dakota, and Wyoming. Sept. 29, 2020. We are currently reviewing and will be participating in the comment process. Available at: <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/15665>

¹⁴² 82 Fed. Reg. at p. 1,887.

¹⁴³ Id. at p. 1,889.

¹⁴⁴ Id. at p. 1,890. See 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at p. 46. See also, for example, Omaha District's proposed regional conditions for Montana, Nebraska, North Dakota, South Dakota, Montana, and Wyoming.

has yet to identify) does not lie with an unsupported division at the national level but within the USACE's own processes. The ability to tailor the NWP, as necessary and appropriate, continues to be available through the regional conditioning process and case-specific conditions as appropriate.

3. 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 provide the streamlined process intended by Congress for the NWPs with minor impacts.

4. Acreage limits should remain constant, with each separate and distant crossing of a WOTUS 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 WOTUS is authorized by NWP 12 as a single and complete project.¹⁴⁵ The Associations support the USACE's proposal to maintain the 1/2-acre limit for each "single and complete project" for NWP 12.¹⁴⁶

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."¹⁴⁷

Since 1988, the USACE has "calculate[d] the [1/2]-acre threshold 'separately for each separate and distant crossing.'"¹⁴⁸ When the DE evaluates the PCN for a linear project, he or she considers the individual crossings of 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 [USACE] districts."¹⁴⁹ 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."¹⁵⁰

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

¹⁴⁵ Proposal at p. 57,370.

¹⁴⁶ Id.

¹⁴⁷ Proposal at p. 57,394. Note: A "waterbody" is a jurisdictional water as defined.

¹⁴⁸ 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).

¹⁴⁹ 2017 Energy-Related NWPs Review at p. 36.

¹⁵⁰ Id.

5. 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.¹⁵¹ These regulations include the definition of “single and complete project” at 33 CFR Section 330.2(i)¹⁵² 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 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.”¹⁵³ We also agree that these definitions are clear and unambiguous and that no additional definition of “separate and distant” is necessary.

6. Notwithstanding our main recommendation to reissue the NWP 12 as is, we support the USACE’s recommendations to reduce duplicative, inconsistent, or unnecessary PCN requirements.

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.

Separate from our current position to reissue the NWP 12 as is, the Associations support 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 US. We agree that the five PCN triggers that the USACE recommends for removal are duplicative, unnecessary, and inconsistent with other similar NWPs. Removing these 5 PCN requirements would provide additional streamlining to the permitting process and continue 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 is proposing to add. This new proposed PCN is contrary to the USACE’s prior recommendations as well as its own rationale in this proposal. (See above discussion).

¹⁵¹ 56 Fed. Reg. 59,110 (Nov. 22, 1999).

¹⁵² 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 pp. 59,113-59,114; 33 CFR Section 330.2(i).

¹⁵³ 2017 Energy-Related NWPs Review at p. 88.

The USACE is specifically requesting comments on PCN thresholds and we again emphasize the need for the USACE to remove this proposed 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, should be deleted.

We also support the removal of the PCN trigger for the mechanized land clearing of forested wetlands. As the USACE notes, “mechanized land clearing of forested wetlands in the utility line right of way [“ROW”] usually results in temporary impacts to the wetlands and other waters as the trees are removed to clear a [ROW] for the utility line” and that “[e]ven though the trees are removed, the disturbed wetland will develop a new plant community, and because of the maintenance that is normally required for utility line [ROWs] to protect the utility line, the plant community will likely consist primarily of herbaceous plants and shrubs.”¹⁵⁴

A practical aspect is also 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 limits permittees’ ability from being able to identify an unsafe condition

Additionally, 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.”¹⁵⁵ 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.

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

In most instances, horizontal directional drilling crossings under WOTUS do not require CWA Section 404 authorization because these types of crossings avoid any discharge of dredged or fill material into WOTUS and thus do not trigger the USACE’s CWA jurisdiction. The avoidance of discharges into WOTUS is beneficial to the environment. If an 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. (See discussion above). 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 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 WOTUS.¹⁵⁶

¹⁵⁴ Proposal at p. 57,325.

¹⁵⁵ 82 Fed. Reg. at p. 1,891.

¹⁵⁶ Id. at p. 1,883.

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 an inadvertent release of drilling fluid occur.

We also appreciate the USACE's clarifying explanations as regards to horizontal directional drilling and how it fits within its jurisdiction.¹⁵⁷ 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."¹⁵⁸

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 United States, 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 requirement for a [S]ection 404 permit because it is below the surface and does not involve a discharge of dredged or fill material.¹⁵⁹

8. The 2017 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 which helps to minimize impacts of utility line activity. We ask the USACE to continue retaining this provision.

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

Pipeline abandonment issues are currently addressed by USACE guidance and the approach appears to vary by the districts. Based on our experience, some districts manage pipeline abandonments under existing NWPs 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 recommend that NWP 12 terms provide consistency in the treatment of pipeline abandonment. 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.

¹⁵⁷ Proposal at pp. 57,325-57,326.

¹⁵⁸ Id. at p. 57,325.

¹⁵⁹ Id.

10. 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.¹⁶⁰ 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.¹⁶¹

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.¹⁶² 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.¹⁶³

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.

11. In NWP 12, the USACE should continue to authorize utility line maintenance and repair activities beyond CWA Section 404(f) and provide appropriate examples to aid the use of this provision in the field.

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 WOTUS.

To ensure regulatory clarity, the Associations ask 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.

¹⁶⁰ 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. at p. 12,844.

¹⁶¹ 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.

¹⁶² 72 Fed. Reg. at pp. 11,143-11,144.

¹⁶³ 77 Fed. Reg. at 10,228.

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 WOTUS. However, normal maintenance should continue to qualify as exempt under CWA Section 404(f)(1).

12. The Associations find while the USACE proposes to add 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 appears to be an unnecessary addition.

We are unclear with the proposal's recommendation 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 has stated in its 2000 NWP rulemaking: “A Section 10 permit is not required for utility lines constructed over navigable waters of the United States 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.”¹⁶⁴ The USACE stated that: “Pipelines constructed over navigable waters may be considered bridges under Section 9 of the Rivers and Harbors Act.”¹⁶⁵ We believe that the addition of “over” will create unnecessary ambiguity and it appears to be an unnecessary addition.

13. GC 32(b)(4) and related Section D – District Engineer's Decision includes additional changes that expand information submittal requirements and evaluations for NWPs 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).

The proposal calls for additional paperwork where one more single or complete crossings in a linear project require PCN including information on those single and complete crossings authorized by the NWP but do not require PCNs.¹⁶⁶ Overall, we do not support the USACE's proposal relating to linear projects to add informational submittal requirements for NWP activities that do not require PCNs under GC 32(b)(4). The USACE also recommends 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.”¹⁶⁷ 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.

¹⁶⁴ 65 Fed. Reg. at p. 12,844.

¹⁶⁵ Id.

¹⁶⁶ Proposal at p. 57,354.

¹⁶⁷ Id. at p. 57,391.

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 NWP's suffices.¹⁶⁸ Instead, for pipeline and other projects, cumulative effects analysis is constrained by a period of no more than 5 years and "within an appropriate geographic region" as determined by the DE.¹⁶⁹ We ask that the determination of an appropriate geographic decision 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."¹⁷⁰ 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."¹⁷¹

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

14. Assuming that the USACE takes the unfortunate step of finalizing the NWP 12 with three separate NWP's, all changes relating to reorganization of the NWP into three NWP's should be clearly stated as being non-substantive in nature only.

We ask the USACE to be clear that all provisions relating to substations, foundations, and access roads, and as well as provisions on inadvertent returns of drilling fluids, temporary structures and fills including use of temporary mats, and accompanying notes, remain with the same legal effect and with no additional restrictions on conditions that permittees have come to rely on. In other words, for example, if a permittee would expect activities related to the construction or maintenance of foundations to be a covered NWP activity in the 2017 NWP's, that would continue to be true with 2020 NWP's as proposed. Notwithstanding revisions associated with PCN thresholds, there would be no substantive changes with the reorganizational changes in the 2020 NWP's.

VI. NWP's Other Than NWP 12: Technical Comments and Recommendations

The Associations support the reissuance of all 2017 NWP's, and in this section provide comments to NWP's of particular interest to the oil and natural gas industry as well as provide comments in response to the USACE's proposal. While our steadfast position is that the current NWP 12 should be simply reissued with a new effective date, we recognize that there 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 the USACE's proposed changes as well as additional clarifying changes that we recommend as related to "minimum necessary" and "minor deviations."

¹⁶⁸ Id.

¹⁶⁹ Id. Proposal at p. 57,300.

¹⁷⁰ 82 Fed. Reg. at p. 1,975.

¹⁷¹ Id.

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.

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.

1. Once a structure is authorized, it should remain authorized; and we also support the USACE's provision 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 agree with the USACE that once a structure is authorized, it remains authorized. Also, the proposed provision 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. We support this language.

2. We support the proposed 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 support the USACE's 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. The preamble language, however, adds this concept of “small amounts” while the rule language provides a different standard which is “minimum necessary” to protect the structure or fill or to ensure its safety.¹⁷² The preamble language should be reconciled with the rule language to prevent any ambiguity.

“Minor deviations” is still left undefined and we ask for further clarification on this term including 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 6 – Survey Activities should be reissued with no additional changes.

NWP 6 allows survey activities such as core sampling, seismic exploratory operations, plugging exploratory boreholes, exploratory trenching, soil surveys, wetland delineations and historic resource surveys.

We support the reissuance of NWP 6 with no additional changes. NWP 6 already provides a streamlined authorization process for these types of activities which are essential for project design and permitting and does not impose any additional and unnecessary PCN requirements.

¹⁷² Id. at p. 57,322.

C. NWP 7 – Outfall Structures and Associated Intake Structures should be reissued with no additional changes.

NWP 7 authorizes activities related to the construction or modification of outfall structures and associated intake structures.

We support the reissuance of NWP 7 with no additional changes. NWP 7 already provides a streamlined authorization process for these types of activities and is appropriate for the activities being authorized.

D. NWP 8 – Oil and Gas Structures on the Outer Continental Shelf should be reissued with no additional changes.

NWP 8 authorizes structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Bureau of Ocean Energy Management.

We appreciate the USACE's review of this NWP 8 in the 2017 Energy-Related NWPs Review and we concur with the USACE that this NWP 8 should be reissued with no additional changes.

E. NWP 13 – Bank Stabilization should be reissued without any additional restrictions and one change we recommend related to removing a limit on DE waiver authority.

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 support the USACE's one additional note referencing NWP 54 (Living Shorelines).

1. The current clarification of 'bank stabilization' should be retained.

The Associations appreciate the clarification that NWP 13 authorizes a variety of bank stabilization techniques without mandating a specific approach to bank stabilization.

2. 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.

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

In 2017 NWP's, 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.

F. NWP 14 – Linear Transportation Projects should be reissued with the one proposed change and additional changes as recommended by the Associations.

1. We support the USACE's one change to the proposed NWP 14 that includes adding "driveways" to the list of examples of allowed activities.

While already permitted under the current NWP 14, the explicit reference will provide additional clarity.

2. It is important to have consistency between the NWP 12 and NWP 14.

We recommend consistency between NWP 12¹⁷³ 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.

3. 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 NWP's including NWP 12.

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

In any future revisions of NWP's 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 NWP's especially given that the 1/2-acre limit remains in place as a protective measure.

5. NWP 14 should allow temporary mats similar to NWP 12.

Temporary mats as permitted under NWP 12 should be allowed under NWP 14 as well.

6. 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.

¹⁷³ Our recommendations when referencing NWP 12 under this NWP 14 section apply to the proposed NWP 12, NWP C, and NWP D (i.e. all linear projects).

G. 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.

H. NWP 19 – Minor Dredging should be reissued with the proposed language increasing allowable dredging from 25 cubic yards to 50 cubic yards.

We support the reissuance of NWP 19 with the change as proposed by the USACE to increase allowable dredging from 25 cubic yards to 50 cubic yards. The USACE also solicits comments on whether that amount should be increased or decreased to another limit. We support the USACE's reasoned judgment in expanding to 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 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 WOTUS. Also, 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.

I. NWP 20 – Response Operations for Oil or Hazardous Substances should be reissued with no changes.

NWP 20 allows for activities conducted in response to a discharge or release of oil or hazardous substances that are subject to the National Oil and Hazardous Substance Pollution Contingency Plan.

We support the reissuance of NWP 20 with no additional changes. NWP 20 already provides an appropriately streamlined authorization process for these types of time-sensitive activities.

J. NWP 27 – Aquatic Habitat Restoration, Enhancement, and Establishment Activities includes 2 new activities which as presented appear robust and environmentally beneficial.

The USACE proposes 2 new authorized activities including “releasing sediment from reservoirs to restore or sustain downstream habitat” and “coral restoration or relocation.” We have reviewed the proposal and we find the USACE's recommendations as presented appropriate for the issues it seeks to address.

K. NWP 33 – Temporary Construction, Access, and Dewatering should be reissued with no changes.

We appreciate the USACE's 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 for NWP 33 in 2017 where it removed the PCN trigger for all NWP 33 activities in Section 404 waters and limited PCNs to RHA Section 10 waters only.

In 2017 NWP 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 14.¹⁷⁴ The USACE made this assessment based on their experience with those four NWPs and “to provide more efficiency in the NWP Program.”¹⁷⁵ Similarly, we have also conducted an assessment of PCN requirements in the NWP program and based on our review, we make recommendations to revise PCN thresholds for NWP 14 and NWP 39.

L. NWP 39 – Commercial and Institutional Developments should be issued with the change recommended by the USACE as well as with tailored PCN threshold limits similar to NWP 12, NWP 14, and NWP 51.

This NWP is important in that it authorizes discharges of dredged or fill material into non-tidal waters of the US 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, we do recommend a review and possible revision of the blanket PCN requirement for all NWP 39 activities. This requirement is inconsistent with other similar activities such as NWP 14 which requires PCNs only if loss of waters of the US exceed 1/10-acre or if there is a discharge in a special aquatic site.

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 WOTUS. The outer limit for qualifying for NWP authorization would still be no more than 1/2-acre which would ensure that the NWP continues meeting the requirement of imposing no more than minimal individual and cumulative adverse environmental effects.

We also supported the USACE’s recommendation to remove the 300 linear foot limit for losses of stream beds and to remove the corresponding waiver provision as provided in the 2017 Energy-Related NWPs Review but now we find that USACE has introduced a number of additional burdensome conditions to it that we cannot support. We disagree with the new and expanded proposed language to add compensatory mitigation requirements for all activities with losses of stream bed that exceed 1/10-acre and require PCN (unless waived by the DE); and for removing the use of linear feet as a method to calculate stream bed losses.

M. NWP 41 – Reshaping of Existing Drainage and Irrigation Ditches is an appropriate NWP to reissue and we have no issues with the USACE’s proposal to add irrigation ditches as an authorized activity.

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

¹⁷⁵ Id.

Similar to NWP 33, we appreciate the USACE assessing this NWP carefully during the previous rulemaking, and then removing the PCN requirement for NWP 41 after review. The USACE correctly found that even with the removal of the PCN threshold, the proposed NWP 41 activities would still need to comply with GC 18, Endangered Species, and GC 20, Historic Properties. The USACE also stated that it felt that potential project proponents may be less reluctant to pursue these activities if they were not impeded by PCN requirements. We encourage the USACE to conduct similar reviews in this 2020 NWP review and reissuance and take steps to reduce PCN triggers where appropriate.

The USACE also proposes to add jurisdictional irrigation ditches as authorized activities for the purpose of improving water quality.¹⁷⁶ The USACE finds that reshaping ditches with gentler slopes will reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. We are supportive of the USACE's efforts to incentivize activities that will aid in improving water quality.

N. NWP 43 – Stormwater Management Facilities should be reissued with no additional changes except for the clarifying provision related to green infrastructure.

We support reissuing this NWP 43 as is with no changes including keeping the 1/2-acre limit. We also supported the USACE's recommendation to remove the 300 linear foot limit for losses of stream beds and to remove the corresponding waiver provision as provided in the 2017 Energy-Related NWPs Review but now we find that the USACE has introduced a number of additional burdensome conditions to it that we cannot support. We disagree with the new and expanded proposed language to add compensatory mitigation requirements for all activities with losses of stream bed that exceed 1/10-acre and require PCN (unless waived by the DE); and for removing the use of linear feet as a method to calculate stream bed losses.

We also support adding the proposed language "such as features needed" to clarify that green infrastructure type of features are not just to reduce TMDL loads.

O. NWP 44 – Mining Activities should be reissued with the proposed changes except for the changes relating to RHA Section 10 waters.

We support reissuing this NWP 44 as is with no changes including keeping the 1/2-acre limit. We also supported the USACE's recommendation to remove the 300 linear foot limit for losses of stream beds and to remove the corresponding waiver provision as provided in the 2017 Energy-Related NWPs Review but now we find that USACE has introduced a number of additional burdensome conditions to it that we cannot support. We disagree with the new and expanded proposed language to add compensatory mitigation requirements for all activities with losses of stream bed that exceed 1/10-acre and require PCN (unless waived by the DE); and for removing the use of linear feet as a method to calculate stream bed losses.

The USACE also proposes allowable mining activities to include non-tidal RHA Section 10 waters and we have no issue with this change.

¹⁷⁶ Note: The jurisdictional status of ditches as laid out under the NWPR should apply to NWP 41.

P. NWP 51 – Land-Based Renewable Energy Generation Projects should be reissued with none or minimal changes.

We appreciate the USACE assessing this NWP carefully during the previous rulemaking, and then reducing the PCN requirement. This NWP 51 authorizes activities that are similar to NWP 12, NWP 14, and NWP 39 in that it applies to attendant features that include impervious features such as roads and parking lots.

In 2017, the USACE recognize that “land-based renewable energy projects provide an important public interest function by producing energy while contributing to energy industry reductions in greenhouse gas emissions.”¹⁷⁷ The USACE reviewed the PCN threshold and limited it to activities greater than 1/10-acre while still retaining the overall 1/2-acre threshold limit as a backstop.¹⁷⁸ We encourage the USACE to conduct similar reviews in this 2020 NWP review and reissuance; and to take steps to reduce PCN triggers where appropriate.

We also support reissuing this NWP 51 as is with no changes including keeping the 1/2-acre limit. We also supported the USACE’s recommendation to remove the 300 linear foot limit for losses of stream beds and to remove the corresponding waiver provision as provided in the 2017 Energy-Related NWPs Review but now we find that the USACE has introduced a number of additional burdensome conditions to it that we cannot support. We disagree with the new and expanded proposed language to add compensatory mitigation requirements for all activities with losses of stream bed that exceed 1/10-acre and require PCN (unless waived by the DE); and for removing the use of linear feet as a method to calculate stream bed losses.

VII. Comments and Recommendations Concerning General Conditions and Definitions.

The Associations’ comments and recommendations concerning GCs and definitions are outlined below. We support reissuance of all GCs and specifically provide comments on ones of particular interest to the oil and natural gas industry as well as in response to comments being solicited by the USACE on the proposal.

A. The 32 GCs should be reissued without additional unnecessary and burdensome requirements.

We support the reissuance of the 32 GCs without any additional unnecessary and burdensome requirements that unduly obstruct, delay, curtail, or impose significant costs to the regulated community.

B. GC 2 – Aquatic Life Movements should be reissued with no changes.

We support reissuance of this GC with no changes. We support the USACE’s assessment in 2017 NWPs that “[g]iven the wide variation in river and stream structure, functions, and dynamics across the county, as well as the various geomorphic and hydrologic settings in which NWP activities are conducted, it is not possible to add more specific requirements to this general condition.”¹⁷⁹

¹⁷⁷ 82 Fed. Reg. at p. 1,932.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at p. 1,947.

C. GC 3 – Spawning Areas should be reissued with no changes.

We support reissuance of this GC with no changes. We support the USACE’s assessment in 2017 that it “is not practical to completely avoid impacts to spawning areas,” and that the purpose is “to require permittees to avoid, to the maximum extent practicable conducting NWP activities during spawning seasons.”¹⁸⁰

D. GC 7 – Water Supply Intakes should be reissued with no changes.

We support reissuance of this GC with no changes.

We disagree with comments that stated in 2017 that PCNs should be required for all NWP 12 activities within a certain distance of public water supply intakes or if NWP 12 does not require a PCN for those types of activities, then that NWP should be prohibited in the watershed of a public water supply intake.¹⁸¹ We agree with the USACE that the DEs “can restrict or prohibit the use of NWP 12 in water source protection areas for public water systems” or “take action if certain activity does not comply with this general condition and therefore does not qualify for NWP authorization.”¹⁸²

E. GC 11 – Equipment should be reissued with no changes.

We support 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.

We agree with the USACE’s assessment in 2017 that no additional restrictions requiring water sampling are needed.¹⁸³ No additional language that requires equipment to be maintained in good working order to ensure that there will be no leaks of contaminants, and require spill kits for on-site emergency clean-ups, are necessary because of other requirements that would come into play. 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.¹⁸⁴

F. GC 13 – Removal of Temporary Structures and Fills should be reissued and we have no issue with the one minimal change proposed by the USACE that adds the term “structures” to the title. We believe this change is a clarifying non-substantive change that does not revise existing USACE requirements and practice.

¹⁸⁰ Id. at p. 1,948.

¹⁸¹ Id. at p. 1,949.

¹⁸² Id.

¹⁸³ Id. at p. 1,950.

¹⁸⁴ Id.

We support reissuance of this GC with no changes and have no issue with the USACE's additional minor change that reflects current requirements.

The USACE adds "and structures" to this GC. The existing GC 13 applies only to temporary fills but it is our experience that existing USACE requirements and practice cover structures also. As such, this change does not appear to be substantive in nature. The USACE's intentions are also reflected by the RIA on Table A-9 which state that no change for GC 13 including no changes expected across the board including the column for any new individual permits resulting from this change.

Also, NWP 3 and NWP 12 authorize temporary mats and are often used to minimize adverse effects but whether they constitute a discharge of dredged or fill material is at the DE's discretion. We support the flexibility provided to the DE in defining temporary fills on a case-by-case basis, including the length of time needed to meet the "temporary" requirement. The USACE also supported this position in 2017 by stating that "[w]hat constitutes a temporary fill is at the discretion of the [DE]." ¹⁸⁵

G. GC 15 – Single and Complete Projects should be reissued with no changes.

We support reissuance of this GC with no changes. See above discussion as relating to NWP 12 in Section V.

H. GC 17 – Tribal Rights

We support the proposed language within the reissuance as the USACE proposes reverting to a pre-2017 provision. The current GC 17 states that "[n]o NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands." The proposed GC 17 is: "No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights." We agree with the USACE that "cause more than minimal adverse effect" already applies as a restriction for all general permit actions, and that the word "impair" which will be clearer in that the NWPs does not change existing tribal trust duties of the USACE, or the rights of tribes. ¹⁸⁶ Reverting back to pre-2017 NWPs eliminates any redundancy and avoids any confusion in the future. ¹⁸⁷ It also deletes unnecessary definitions such as "protected tribal resources." ¹⁸⁸ The two remaining definitions relating to "tribal rights" and "tribal lands" do not apply to GC 17 because those terms are removed; however, the definitions are left because they pertain to terms used in GC 20 relating to historic properties. ¹⁸⁹

Additionally as it relates to tribal engagement, the Associations encourage the USACE to engage prospective applicants for larger projects that have a greater potential to affect tribal rights, in an optional informal pre-application phase prior to submittal of a verification request that encourages open communication and common understanding of issues of concern and involves the tribes early in the process for such projects. Addressing potential mutual issues and conflicts that

¹⁸⁵ Id.

¹⁸⁶ Proposal at p. 57,350.

¹⁸⁷ Id.

¹⁸⁸ Id.

¹⁸⁹ Id.

can be considered earlier in the development and design of the project with the goal of avoiding and minimizing potential impacts early in the overall development and verification phases should simplify and expedite approvals.

I. GC 18 – Endangered Species should be reissued and we support the USACE’s proposed language changes to match terms used in the 2019 ESA rulemaking.

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 18.¹⁹⁰

The Associations support the USACE’s proposed language to align GC 18 with the 2019 ESA regulations relating to USFWS and NMFS (“Services”).¹⁹¹ Among other things, the 2019 ESA regulations simplify the definition of “effects of the action.”¹⁹² The Associations support the USACE’s proposal to replace the prior definitions of “direct effects” and “indirect effects” in GC 18, with text referencing the current ESA regulation’s definition of “effects of the action” found at 50 CFR Section 402.02.¹⁹³ The “effects of the action” are defined in the Services’ ESA regulations at 50 CFR Section 402.02 as “[a]ll consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action.”¹⁹⁴ That is, “[a] consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur.”¹⁹⁵ The USACE’s NWP regulations and GC 18 should utilize the same definitions. In addition, the Associations support the USACE’s proposal to add a reference to 50 CFR Section 402.17, which further defines “activities that are reasonably certain to occur” and “consequences caused by the proposed action.”¹⁹⁶ The Associations were supportive of the Services’ updated ESA regulations as clarifying changes and improving the interagency consultation process. We support the changes made to GC 18 to be consistent with the 2019 ESA rule changes.

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.

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

¹⁹⁰ Proposal at p. 57, 350, p. 57,357.

¹⁹¹ 84 Fed. Reg. 44,976 (Aug. 27, 2019)

¹⁹² *Id.* at p. 45,016.

¹⁹³ Proposal at p. 57,350.

¹⁹⁴ 50 CFR Section 402.02.

¹⁹⁵ *Id.*

¹⁹⁶ Proposal at p. 57,350.

The Associations 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. 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.

J. GC 19 – Migratory Birds and Bald and Golden Eagles should be reissued with no additional changes.

As provided in GC 19, we agree with the USACE that “the permittee is responsible for ensuring that an action authorized by NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act.”¹⁹⁷ In response to the Solicitor’s Opinion M-37050, the USACE proposes revising GC 19 to change from “applicable measures” to “what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds”¹⁹⁸ This opinion has been in litigation and has been vacated since.

The Associations and their members fully understand their obligations and responsibilities and rely on the statute and applicable USFW regulations. We appreciate the helpful changes that the USACE seeks to provide. The NWPs are standalone permits that can last at least 5 years and we recommend reverting to the current GC 19 language in keeping with the statutory obligations.

K. GC 20 – Historic Properties should be issued with proposed changes and we submit additional comments relating to Appendix C, interim guidance documents, regulatory consistency, and timely review.

We support the USACE’s determination that the NWPs comply with Section 106 of the National Historic Preservation Act (“NHPA”) and we also support the USACE’s proposed 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.”¹⁹⁹ The move of one sentence from GC 20(c) to GC 20(d) appears to be non-substantive clean up change.

We also agree with the USACE’s reliance on Appendix C and the interim 2005 and 2007 guidance as discussed in the preamble.²⁰⁰ 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.”²⁰¹ We support the USACE’s position to make it clear that that Appendix C only applies

¹⁹⁷ Id. at p. 57,351.

¹⁹⁸ Id.

¹⁹⁹ Id. at p. 57,352.

²⁰⁰ Proposal at p. 57,361.

²⁰¹ 2017 Energy-Related NWPs Review at p. 159.

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.²⁰² 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.

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 WOTUS and/or structures or work in a navigable waters of the US, the undertakings for the purposes of Section 106 of the NHPA are the crossings that require USACE authorization.²⁰³ In the 2017 Energy-Related NHPs 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.’”²⁰⁴ (emphasis added.) 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.”²⁰⁵ (emphasis added.) 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 NHPs or other general permits, or by individual permits.”²⁰⁶ (emphasis added.)

While we are supportive of the USACE’s Appendix C and interim guidance documents April 25, 2005, and January 31, 2007, we 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 acknowledges in the 2017 Energy-Related NHPs Review and this proposal, and states that it has added that language to help ensure protection of historic properties.²⁰⁷

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 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. 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

²⁰² Id. at p. 160.

²⁰³ Id. at p. 113.

²⁰⁴ Id. at p. 113. (emphasis added).

²⁰⁵ Id.

²⁰⁶ Id.

²⁰⁷ Proposal at pp. 57,361-57,362. See 2017 Energy-Related NHPs Review.

“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.²⁰⁸

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.”

Similarly, we also recommend timely review of 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.

L. GC 21 – Discovery of Previously Unknown Remains and Artifacts should be reissued with no additional restrictive provisions.

We recommend reissuance of GC 21 with no additional restrictive provisions.

We agree with the USACE’s clarification in the 2017 NWPs that the purpose of this GC “is to address previously unknown remains and artifacts that are revealed during while the authorized NWP activity is being conducted.”²⁰⁹ The USACE also noted the process when previously unknown remains and artifacts are revealed and that GC 21 is not a substitute for Section 106 consultation.²¹⁰

M. GC 23 – Mitigation should be reissued with no changes or minimal clean up type revisions while retaining the authority of the DEs. We do not support any additional changes. The proposal’s push toward requiring compensatory mitigation for NWP activities with losses of stream beds greater than 1/10-acre that require PCNs is contrary to the USACE’s prior policies and recommendations and is an unnecessary and burdensome expansion of current requirements.

²⁰⁸ 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.

²⁰⁹ 82 Fed. Reg. at p. 1,961.

²¹⁰ Id.

The USACE proposes 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 1/10-acre and require PCN similar to provisions relating to wetland losses.²¹¹ The USACE states that they “are proposing to replace the 300 linear foot limit for losses of stream bed with a different tool to encourage minimization of losses of stream bed and comply with the requirements of [S]ection 404(e) of the Clean Water Act.”²¹² The USACE is also proposing to add a provision allowing the DE to provide an activity-specific waiver this requirement.²¹³

It is correct that a similar provision has been in place for losses of wetlands since 2007²¹⁴ 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 proposed 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.”²¹⁵

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.

There is no need for changing this well-established process by adding any mandatory compensatory mitigation requirements to any of the NWP’s including this 1/10-acre trigger, or any additional monitoring requirements or specific provisions for certain waters. There is also no need for adding 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.

1. We support the flexibility provided by the USACE’s proposed language relating to GC 23(e) as relating to planting vegetation.

The USACE proposes: “If restoring or enhancing riparian areas involves planting vegetation, only native species should be planted.”²¹⁶ The proposal is requiring native species for initial actions to restore or enhance riparian areas; however, it recognizes that initial plantings can die and non-native plants may colonize the areas.²¹⁷

²¹¹ *Id.* at p. 57,388. See GC 32(c).

²¹² *Id.* at p. 57,315.

²¹³ *Id.* at p. 57,388.

²¹⁴ *Id.* at p. 57,315.

²¹⁵ 2017 Energy-Related NWP’s Review at p. 2.

²¹⁶ Proposal at p. 57,351.

²¹⁷ *Id.* at pp. 57,351-57,352.

We recognize the importance of planting native species but appreciate the USACE's assessment that "[n]on-native riparian plant species can provide important contributions to the ecological structure and functions of riparian areas" as well as the associated flexibility that the proposed language provides.²¹⁸

2. 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.

3. 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).

4. Language relating to mitigation banking mechanisms should include the caveat "where practicable" and the USACE should directly reference the 1994 Alaska Wetlands Initiative Summary Report and Memorandum that states that compensatory mitigation is not practicable in Alaska due to a lack of mitigation banking instruments.

In addition, in 2017, the USACE based its rationale for the language in GC 23(f)(1) that gives preference to mitigation bank credits in-lieu fee program activity stating that there is "increased availability of mitigation banks and in-lieu fee program credits in much of the country;" however, that is not universally true, especially for certain locations such as the North Slope of Alaska, where there are no mitigation bank or in-lieu fee credits available.²¹⁹ The USACE added language that if either of the 2 preferred options are not available, then the DE may approve the use of permittee-responsible mitigation.²²⁰ We ask the USACE to take this a step further and reference the 1994 Alaska Wetlands Initiative Summary

²¹⁸ Id. at p. 57,352.

²¹⁹ 81 Fed. Reg. at p. 35,210.

²²⁰ Id.

Report and Memorandum that states that compensatory mitigation is not practicable in Alaska. Language relating to this prioritization of mechanisms should include “where practicable.”

N. GCs 25 and 26 – Water Quality and Coastal Zone Management should be reissued with the clarifying proposed changes as well as additional GC 25 language that states that any condition added to the WQC must be consistent and within the parameters as set out in the applicable regulatory requirements.

The Associations have no issue with the clarifying changes in the proposal regarding GCs 25 and 26.

We also recommend the re-issuance of GC 25 with additional clarification regarding the scope of conditions that may be added by certifying agency to a WQC for the issuance of a general permit and incorporated by the DE as a regional condition.

We suggest the inclusion of additional language to clarify that any condition added to the WQC that is not within the established scope of the certification may not be included as a regional condition. Historical interpretations of certifying agencies related to their authority to impose conditions through the Section 401 review process has posed significant problems, delays, and ultimately denials for permittee applicants. The USACE needs to clarify that all additional conditions for WQC by certifying agencies are consistent not only with 33 CFR Section 325.4 but also within the parameters for conditions set out under 40 CFR Section 121.7(d).

O. GC 28 – Use of Multiple Nationwide Permits should be renewed as proposed and with no additional restrictive provisions.

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

The use of multiple NWPs for single and complete project should not be prohibited so long as acreage loss of waters of the US does not exceed the acreage limit of the NWP with the highest acreage limit. Here, the USACE proposes to retain this language with some clarifying revisions in GC 28 that “[i]f [o]nly one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit.”²²¹ The USACE also adds another clarifying provision that “If one or more of the NWPs used to authorize the single and complete project has specified acreage limits, the acreage loss of waters of the United States authorized by those NWPs cannot exceed their respective specified acreage limits.”²²²

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

P. GC 31 – Activities Affecting Structures or Works Built by the US should be renewed with one change that is, a PCN should not be required for a Section 408 review or permission if the underlying NWP activity does not otherwise require a PCN.

²²¹ Proposal at p. 57,390.

²²² Id.

This is a new GC from 2017 and the USACE now proposes to add a PCN trigger for Section 408 reviews along with the PCN trigger for permissions that was established in 2017. The USACE explains in the proposal that the “districts are required to conduct [S]ection 10 and [S]ection 404 permit evaluations and requests for 408 permissions in a coordinated and concurrent manner.”²²³ The USACE explains that “[u]nder Appendix G-4 of EC 1165-2-220, when proposed activities may impact the usefulness of a USACE Navigation project and the scope of analysis for activities that require [S]ection 10 authorization and [S]ection 408 permission is identical, the [USACE] will review the proposed activities and may issue a single [S]ection 10 authorization that covers the [S]ection 408 activity.”²²⁴ Yet, as the 2017 Energy-Related NWP Review indicates, “[w]here possible, the [S]ection 408 and the NWP PCN reviews are conducted concurrently” but that both reviews “are independent of each other and they both occur in different USACE offices.”²²⁵

This raises concerns with uncertainty with timely processing of NWPs. Once a PCN is triggered, the 45-day authorization is no longer in play and as stated in GC 31, “[a]n activity that requires [S]ection 408 permission and/or review is not authorized by NWP until the appropriate [USACE] office issues the [S]ection 408 permission or completes its review to alter, occupy, or use the USACE project, and the [DE] issues a written NWP verification.” And the USACE has stated that it “does not have any statistics on how long [S]ection 408 reviews typically take” so this can potentially hold up authorizations without any timelines applying.²²⁶ The USACE also noted that the “PCN requirement is necessary to give [DEs] the opportunity to add conditions to the NWP authorization to protect the USACE project and to ensure that internal coordination is done.”²²⁷

We disagree. We believe that the NWP activity for which review or permission is being sought and its associated PCN thresholds should determine whether or not a PCN is triggered, and no PCN should be triggered simply because the activity requires a Section 408 review or permission. For that reason, we ask the USACE to remove the GC 31-specific PCN triggers.

Q. GC 32 – Overall, PCNs should be reissued while maintaining the completeness provision and ability to use desktop materials and no other substantive changes. GC 32 issues related to linear crossing are covered under the NWP 12 section.

There are several changes proposed for GC 32. While we support clean up type of changes or formatting changes such as moving the sketches requirement to its own section with no other substantive change, we continue to support the reissuance of GC 32 without additional onerous information collection requirements added as conditions of PCN submittals.

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 US that are in effect at the time of the discharge. The NWPs are standalone authorizations that

²²³ Id. at p. 57,353.

²²⁴ Id.

²²⁵ 2017 Energy-Related NWPs Review at p. 137.

²²⁶ Id. at p. 136.

²²⁷ Id. at p. 137.

can last for 5 years (if not reissued or modified earlier) and the definition of waters of the US 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 US and that should be made clear.

The USACE includes 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.²²⁸ 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 support the USACE in its removal of language relating to intermittent and ephemeral to reflect changes with the 300 linear foot limit language removal and we ask that language be clearly reflecting in the final rule.

We agree with the USACE that language and terms such as perennial, intermittent, and ephemeral streams related to wetland delineations must be updated to be consistent with the USACE's proposed changes. Yet, inadvertently, the proposed GC 32(b)(5) still includes the terms perennial, intermittent, and ephemeral streams²²⁹ even though the preamble notes that "[i]n the first sentence of paragraph (b)(5), we are proposing to remove the phrase 'and perennial, intermittent, and ephemeral streams,' and replace it with 'streams.'"²³⁰ GC 32(b)(5), as proposed, states that the "PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site."²³¹

Therefore, as reflected in its intentions in the preamble for GC 32(b)(5), the phrase "and perennial, intermittent, and ephemeral streams" should be replaced with streams with the additional clarification that these are jurisdictional streams.

3. We do not support the addition of "streams" to GC 32(b)(6) requiring additional mitigation submittals for ALL stream losses that exceed 1/10 acre and a PCN is required. It is an unnecessary expansion over and above prior USACE recommendations and established practices as well as an overreach especially since the removal of 300 foot limit only applies to 10 NWPs.

We believe that contrary to its thorough review of this GC 32 in the 2017 Energy-Related NWPs Review, the USACE is now arbitrarily expanding the long-established wetlands requirement to losses of streams greater than 1/10-acre without including any reasoned justification or any evaluation of costs and benefits related to this substantial change.

The 2017 Energy-Related NWPs Review recommended only 2 modifications which were to revise GC 32(a)(2) "to remove the provision requiring written verification from the [USACE] prior to proceeding with NWP 21, 49, and 50 activities . . .

²²⁸ Proposal at pp. 57,356-57,357.

²²⁹ *Id.* at p. 57,391.

²³⁰ *Id.* at p. 57,354. Note: The preamble adds that "[i]f there are streams on the project site, then the PCN must include a delineation of those streams." *Id.* As discussed above, the USACE should be clear in stating that "those streams" would be jurisdictional waters only.

²³¹ *Id.* at p. 57,391.

and to modify paragraph [GC 32](d)(2) to remove NWP 21, 29, 50, 51, and 52 from agency coordination process for waivers of the 300 linear foot limit for losses of stream beds.²³² Yet, the USACE is now proposing to also modify GC 32(b)(6) and states it is “to be consistent with [their] proposal to remove the 300 linear foot limit for losses of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 and rely on the ½-acre limit.”²³³

The 300 linear foot limit applies to only a handful of NWPs but this change to GC 32(b)(6) is expanded without a reasoned justification to apply to all NWPs that meet these requirements. As such, we ask the USACE to remove this additional requirement, or in the alternative, bracket it to the NWPs affected by the 300 linear foot limit and per the recommendation of the 2017 Energy-Related NWPs Review. (See also GC 23 above for further discussion).

4. 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 incompleteness 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.

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 NWPs should not be based solely on completed wetland delineations per USACE methods.²³⁴

5. 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 NWPs Review states that the DEs “can place priority on processing NWP PCNs for time-sensitive maintenance and inspection activities associated with energy projects.”²³⁵ We encourage the USACE to apply this discretionary authority and expedite certain time-sensitive maintenance and inspection projects associated with key energy infrastructure projects.

6. “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.

²³² 2017 Energy-Related NWPs Review at p. 155.

²³³ Proposal at p. 57,354.

²³⁴ See above discussion relating to consistency issues amongst regions regarding PCN submittal requirements.

²³⁵ 2017 Energy-Related NWPs Review at p. 144.

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.

7. The USACE proposes new language requiring Form ENG 6082 to be used for PCN submittals. We request more transparency and stakeholder engagement with any future PCN form revision process.

The USACE notes that this form was approved earlier this year and is now added in the proposal.²³⁶ Form ENG 6082 was proposed for comment in 2018 under the docket titled, “Proposed Collection; Comment Request.”²³⁷ It was then issued as final once approved by the Office of Management and Budget in February 2019.²³⁸ It was not until October 2019 timeframe that the Associations and members began to be made more actively aware when special public notices began to be published by individual districts announcing the release of Form ENG 6082.²³⁹

We appreciate the USACE’s efforts toward having a streamlined form that may reduce requests for additional information requests and time to process and conclude reviews;²⁴⁰ however, we ask that stakeholders be actively involved in all future revisions of this form with clear engagement and participation solicited under a clearly labelled notice.

R. Definitions should remain unchanged except for the proposed deletion regarding GC 17, and additional removals relating to the definitions of ephemeral, intermittent, and perennial streams.

We agree with the USACE in making clarifying changes to the definitions of the NWP and we recommend issuance of the NWP 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.”

1. We request that the USACE keep NWP terms and definitions free of any cross references to any particular waters of the US definition as well as not include any standalone definitions from any particular waters of the US rule.

We also support the overall position that for determining jurisdictional waters, any 33 CFR Section 328 waters of the US definition that is in effect should apply to the NWP activity that is being authorized. Based on this, we support the USACE’s decision to delete the dueling definitions of “intermittent stream,” and “ephemeral stream” in the current NWP. For the same reason, we also request that the proposed definition of “perennial stream” based on the NWPR be deleted.²⁴¹ Where the NWPR is in effect, the “perennial” definition in the NWPR will automatically apply and there is no reason for a separate definition under the NWP.

²³⁶ Proposal at p. 57,354.

²³⁷ 83 Fed. Reg. 19,261 (May 2, 2018).

²³⁸ See for e.g. Special Public Notice SPN-19-59 issued by the Pittsburgh District, Oct. 10, 2019.

²³⁹ Id.

²⁴⁰ Id.

²⁴¹ Proposal at p. 57,394.

2. The “loss of waters of the United States” definition should not remove the method of calculating stream losses using “linear feet.”

The USACE states: “For consistency with our proposal to remove the 300 linear foot limit for losses of stream bed from 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, and rely on the 1/2-acre limit and other tools to comply with the statutory requirement that the NWP only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects, we are proposing to remove ‘linear feet’ from the third sentence.”²⁴²

This change, however, is also not limited to the small group of aforementioned 10 NWPs but it is being expanded to requiring compensatory mitigation for all losses of stream bed that exceed 1/10-acre and require PCN. This term would apply to numerous regional conditions that require additional PCNs for stream losses. We disagree with the proposed language in GC 23; and the associated removal of one more method for calculating losses of stream beds is an additional impediment to an already onerous provision.

The USACE also states broadly that “using an acreage limit for losses of stream bed instead of a linear foot limit will more accurately quantify losses of stream bed, since a linear foot limit does not take into account the width of the stream bed.”²⁴³ It then offers the argument that “[u]sing linear feet to quantify impacts to streams does not provide an adequate surrogate for the functions lost as a result of a regulated activity because it does not accurately represent the physical space in which the hydrologic, biogeochemical, and habitat functions are being performed by that stream.”²⁴⁴ The USACE, however, fails 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.

As the agency explains, “the USACE uses a variety of approaches to quantify losses of stream beds and assessing impacts to those stream beds.”²⁴⁵ 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.

VIII. Conclusion.

The Associations greatly appreciate the opportunity to comment on all changes to the NWPs, GCs, and definitions as well as specific comments including the threshold question of whether the USACE should modify NWP 12 to limit it to oil or natural gas pipelines.²⁴⁶

We ask the USACE to reconsider their proposal to modify NWP 12 to limit it to oil or natural gas pipelines. We most strenuously recommend that the USACE take the most effective and straightforward option available which is to simply reissue the current NWP 12 for utility line activities with a new effective date.

²⁴² Id. at p. 57,355.

²⁴³ Id. at p. 57, 318.

²⁴⁴ Id.

²⁴⁵ Id. at p. 57,311.

²⁴⁶ Id. at p. 57,327.

We base our request on a complete set of legal, regulatory, policy, and technical reasons that we have provided, including the key argument that authorized NWP activities should not be based on substances that are being conveyed within a utility line which is ably regulated by numerous other federal frameworks; and instead the focus should remain on CWA and RHA considerations related to the construction, maintenance, repair, and removal of a utility line within the USACE's scope.

There should be additional weight given to the fact that this is a longstanding NWP that has been frequently utilized and relied on by the USACE and permittees for facilitating cost-effective processing of activities with minimal impacts. Proposing three NWPs for the same types of utility line activities when one NWP has been sufficient is the antithesis of streamlining and the USACE's rationale related to the "potential" need for industry-specific national terms rings hollow especially when there are ample opportunities available for tailoring activities at regional or case-specific level.

We also ask for the reissuance of all 52 NWPs and 32 GWPs as currently in effect, and where changes are proposed for other NWPs, 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 this document. We look forward to your response, and encourage you to reach out to the lead signatory below for clarification if you have any questions

Sincerely,



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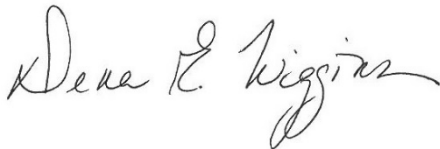


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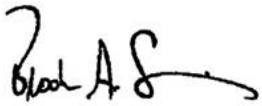
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IX. Annex I: District Filings Covering Regional Conditions for 44 States and 2 U.S. Territories

Alabama
Alaska
Arkansas
California
California and Arizona
California, Nevada, and Utah
Colorado
Delaware
Florida, Puerto Rico, and the U.S. Virgin Islands
Georgia
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maryland
Michigan
Minnesota and Wisconsin
Mississippi
Missouri
Montana
Nebraska
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
South Carolina
South Dakota
Tennessee
Texas
Virginia
Washington, DC and Certain Military Installations in Virginia
Washington State
West Virginia
Wyoming



October 30, 2020

Mr. Michael Moxey
P.O. Box 2288
Mobile, Alabama 36628
Via e-mail to Michael.B.Moxey@USACE.ARMY.MIL

Dear Mr. Moxey:

The American Petroleum Institute ("API") represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Mobile District for the state of Alabama seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that the USACE should simply REISSUE 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Alabama Regional Conditions (September 15, 2020), available at https://www.sam.usace.army.mil/Portals/46/docs/regulatory/public_notices/Special%20Public%20Notice%20-%20NWP%20reissuance%20request%20comments.pdf?ver=wWugiAL62IBWM4YnGO0tcw%3d%3d.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWPS"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵ For additional context, we provide the Executive Summary of our federal comments for your consideration below and Annex I contains a detailed outline of our federal recommendations concerning specific NWPs, conditions, and definitions.⁶

At the district level, we appreciate the Mobile District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

⁶ For a complete set of comments, we refer you to our comments that will be timely filed in www.regulations.gov.



Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWP, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁷

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to Alabama

We have reviewed the Mobile District's request for comment on the appropriateness of regional conditions for Alabama, noting that no regional conditions are currently proposed - which is essentially a continuation of the status quo given that no regional conditions were proposed in 2017 as well. We generally support regional conditions that are appropriate and narrowly-tailored; however, the Mobile District has demonstrated an ability to effectively

⁷ 85 Fed. Reg. at 57,309.



approve projects based on Coastal Zone Management Act ("CZMA") and Clean Water Act Section 401 water quality certifications. Therefore, we concur with Alabama's position and support no further regional conditions for Alabama.

Should any regional conditions be proposed, we would suggest that modification be done through a notice-and-comment rulemaking appropriate to the Administrative Procedure Act ("APA"), which would allow all stakeholders sufficient time to review and provide constructive comments to the proposal.

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWP's are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

III. Conclusion

We appreciate your ongoing commitment to administering the NWP's in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP's as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.



American Petroleum Institute
Gulf Coast Region

Gifford Briggs
Region Director
API
850-562-6300
briggsg@api.org

Sincerely,

A handwritten signature in black ink, appearing to read 'Amy Emmert'.

A handwritten signature in black ink, appearing to read 'Amy Emmert'.

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



November 4, 2020

Ms. Shannon Morgan, CEPOA-RD
P.O. Box 6898,
JBER, Alaska 99506-0898
Via email at regpagemaster@usace.army.mil

Dear Ms. Morgan:

The Alaska Oil and Gas Association ("AOGA"), and the American Petroleum Institute ("API") (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Alaska District for the state of Alaska seeking comments on the proposed regional conditions as well as consideration of any additional regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces additional regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little or no delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Alaska Regional Conditions, September 21, 2020, available online at <https://www.poa.usace.army.mil/Missions/Regulatory/Public-Notices/Article/2354777/nationwide-permit-reissuance/>

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWPS"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).

Our unequivocal position is that USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPs [best management practices] 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.”⁵

At the district level, we appreciate the Alaska District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

The Alaska Oil and Gas Association ("AOGA") is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefits of all Alaskans. We represent the majority of companies that are exploring, developing, producing, refining, or marketing oil and gas on the North Slope, in the Cook Inlet, and in the offshore areas of Alaska. AOGA supports removing unnecessary and burdensome conditions while clarifying NWP terms to allow for improved consistency and greater efficiencies in permitting. Modernization of the approval process will help USACE become more efficient and will work to alleviate some of the administrative burden on industry.

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in Alaska. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and

⁶ 85 Fed. Reg. at 57,309.

its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP), which affect the oil and natural gas industry.

II. General Comments on Alaska's Regional Conditions

The Associations have reviewed the regional conditions proposed for activities in Alaska, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and should be reissued as a single NWP for all utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state level, and if any new regional conditioning is considered, additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not unnecessarily require onerous paperwork.

III. Regional Conditions applicable to specific NWPs within Alaska

The Associations' have no comment regarding the proposed Regional Conditions applicable to only specific NWPs or districts within Alaska. We also support no need for any further regional conditions applicable to specific NWPs.

IV. Regional General Conditions (GCs) Applicable to all NWPs within the State of Alaska

The Associations' comments regarding the proposed Regional General Conditions applicable to all NWPs within Alaska are as follows:

Regional Condition D (Site Restoration for Projects with Ground Disturbing Activities) contains significant changes. Topsoil is now defined as at least the top six inches as compared to the 2017 RC which provided it as “usually” the top 2 to 8 inches. We see no issue with this change. Additionally, language previously allowing for additional time for climactic conditions upon approval by the USACE is now deleted. We do not support that deletion, and recommend that the USACE include it again and provide the necessary flexibility that is evident in this prior language. Finally, we believe that language should revert partially back to the 2017 provision, “Re-vegetation of the site shall begin as soon as site conditions allow and in the same growing season as the disturbance unless climactic conditions warrant additional time.” We further suggest that it be modified to include the language, “if possible” after growing season so that the passage would read, “Re-vegetation of the site shall begin as soon as site conditions allow and if possible in the same growing season as the disturbance unless climactic conditions warrant additional time.” The addition of “if possible” allows for the circumstance where a project may not be completed in a timeframe that allows successful planting in the same growing season. This is similar to the Alaska Department of Natural Resources (ADNR) Plant Materials Center publications *Interior Alaska Revegetation & Erosion Control Guide* and *Alaska Coastal Revegetation & Erosion Control Guide* state that “the optimum planting season is just before the longest period of favorable conditions.” These guidance documents indicate that the end of the planting season for Interior Alaska can be as early as August 15, and the latest date to seed for the Arctic Coast is July 15. This guidance further supports the need for seasonal flexibility in the condition.

Regional Condition F (Maintenance of Hydrology Patterns) has revised language to facilitate selection of “appropriate methods” to retain natural hydrology patterns. Out of respect for Alaska’s unique environmental conditions, we recommend the following language, “Excessive ponding or drying adjacent to fill areas shall indicate non-compliance with this condition unless the ponding/drying is determined to be the result of a naturally occurring change in the pre-development hydrologic conditions at the site, such as that caused by shifting soils during flood events.”

V. Conclusion

We appreciate your ongoing commitment to administering the NWP in a manner appropriately protective of your jurisdiction’s environmental resources, while striving to streamline permitting for projects with minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE’s guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.



If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Bergt".

Patrick N. Bergt
Regulatory & Legal Affairs Manager
Alaska Oil & Gas Association
121 N. Fireweed Lane, Suite 207
Anchorage, Alaska 99503
(907) 222-9604

A handwritten signature in black ink, appearing to read "Amy Emmert".

Amy Emmert
Senior Policy Advisor
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200 Massachusetts Ave NW
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(202) 682-8372
Emmert@api.org



November 16, 2020

Ms. Lisa Boyle
Little Rock District Corps of Engineers
Regulatory Division,
PO Box 867,
Little Rock, Arkansas 72203-0867,
Via email at ceswl_nationwides@usace.army.mil.

Dear Ms. Boyle:

The American Petroleum Institute ("API"), represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Little Rock District for the state of Arkansas seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 30, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWPs"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



Our unequivocal position is that the USACE should reissue 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the Little Rock District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45.



Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWP, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to Arkansas

API has reviewed the regional conditions proposed for activities in Arkansas and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular,

⁶ 85 Fed. Reg. at 57,309.



is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

A. Regional Conditions applicable to specific NWPs within Arkansas

Arkansas is to be commended for providing helpful commentary with each condition. No other district thus far has done that, and It should be considered a model for other districts., (along with New York's redline version of changes)

We appreciate the one clarifying change and no further modifications to regional conditions proposed for activities in the State of Arkansas.

There are now 4 Regional Conditions of which all 4 have no significant changes and we support no further new conditions to be added.



Regional Condition No. 2. For NWPs 4, 5, 12, 13, 14, 15, 18, 19, 20, 23, 25, 29, 30, 35, 36, 39, 40, 42, 43, 51, 52, and 53 in the following listed waters, when federally jurisdictional, the prospective permittee shall provide written notification to the appropriate District. Notification will be to the District Engineer according to General Condition No. 32 (Federal Register, Vol. 82, No. 4, FR 1860-2008).

- The Little Rock District currently applies this condition to NWP 12, but not to Proposed NWP C and NWP D. If proposed NWP C and proposed NWP D are adopted, we would suggest that NWP C and NWP D be added here. Please note that we disagree with the division at the federal level because the permits are almost Indistinguishable from a CWA Section 404 and RHA Section 10 perspective. As such, we believe wherever there is a RC for NWP 12, the same conditions should apply to proposed NWP C and D. Additionally, In the absence of clear environmental justification, we respectfully reserve the right to challenge as arbitrary and capricious any condition applied to NWP 12 without equally being applied to NWP C and NWP D.
- We support the addition of the phrase, "when federally jurisdictional."
- Regarding the definition of peatlands, we have noted that other districts have deleted the reference to fens. We support that deletion, and respectfully recommend the Little Rock definition of "peatland" use the proposed Colorado language: "For the purposes of this requirement, a peatland is defined as a wetland with saturated organic soil (greater than or equal to 16 inches in thickness) that is classified as a histosol in the Natural Resources Conservation Service (NRCS) Field Indicators of Hydric Soils in the United States (Version 8.0, 2016). A copy of the document can be obtained from the NRCS at [http://www.nrcs.usda.gov/Internet/ DOCUMENTS/nrcs142p2_053171.pdf](http://www.nrcs.usda.gov/Internet/DOCUMENTS/nrcs142p2_053171.pdf)"

Regional Condition No. 4. For NWPs 4, 5, 12, 13, 14, 15, 18, 19, 20, 23, 25, 27, 29, 30, 35, 36, 39, 40, 41, 42, 43, 44, 51, 52, and 53 in the waters listed below, the prospective permittee shall provide written notification to the appropriate District. Notification will be to the District Engineer according to General Condition No. 32 (Federal Register, Vol. 82, No. 4, FR 1860-2008). This notification shall be used to review the project to ensure that the proposed project will have "no effect" on federally listed threatened or endangered (T&E) species and to determine if the project would have a minimal impact on the aquatic environment. The application will be coordinated with the U.S. Fish and Wildlife Service and other agencies as determined appropriate by the Corps of Engineers. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed (refer to NWP General Condition No. 18). The list of waters may be revised periodically in the case of future updates to the status of T&E species. Regional Condition 4 proposes updating the list to reflect the current status of threatened and endangered species within the listed waters. While including listed threatened and endangered species is appropriate, we caution the Corps District from including species that are only proposed for listing as endangered by the U.S. Fish and Wildlife Services.



III. Conclusion

We appreciate your ongoing commitment to administering the NWP's in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP's as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

/s/ Elizabeth Van Holt

Elizabeth Van Holt
Midwest Region Director
API
202-682-8304
vanholte@api.org

A handwritten signature in cursive script that reads 'Amy Emmert'.

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



November 3, 2020

Ms. Naomi Schowalter,
USACE, San Francisco District, Regulatory Division
450 Golden Gate Avenue,
San Francisco, CA 94102
Via email at naomi.a.schowalter@usace.army.mil

Dear Ms. Schowalter:

The Western States Petroleum Association ("WSPA") and the American Petroleum Institute ("API"), (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") San Francisco District seeking comments on the proposed regional conditions as well as consideration of any additional regional conditions for portions of the state of California within the boundaries of San Francisco District.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWP) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWP allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWP. Yet, the Associations find that the proposal overextends in key areas including unnecessarily

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on San Francisco Regional Conditions, (September 18, 2020) available online at <https://www.spn.usace.army.mil/Missions/Regulatory/Public-Notices/Article/2353460/nationwide-permit-reissuance-request-for-comments/>

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs," Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWP"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).

dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that It Is In the best Interest of all stakeholders for the USACE to reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act ("CWA") Section 404 impacts and Rivers and Harbors Act of 1899 ("RHA") Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: "It would be more appropriate to have district engineers determine which BMPs [best management practices] 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."⁵

At the district level, we appreciate the San Francisco District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

⁴ Note that the term "utility line," unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A "utility line" is defined as any 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 message, and internet, radio, and television communication." 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, "internet" added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term "internet" was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

⁶ 85 Fed. Reg. at 57,309.

I. The Associations and their Interests

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.

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

II. General Comments on San Francisco District's Regional Conditions

The Associations have reviewed the regional conditions proposed for activities within the boundaries of San Francisco District within California, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly-tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

To that end, we appreciate the significant review and streamlining that the San Francisco District has undertaken and we are pleased with the overall shortened list of RCs and deletions of numerous unnecessary provisions.

III. Regional Conditions applicable to specific NWP within San Francisco District

The Associations' have the following comments regarding the proposed Regional Conditions applicable to only specific NWPs or districts within the San Francisco District. First, we appreciate the removal of all NWP 12 specific RCs as well as ones related to NWPs 35 and 39. We also agree that there is no need for any further regional conditions applicable to specific NWPs.

Bank stabilization activities which are specific to NWPs such as NWP 13 and NWP 54 are covered under B.3. and we appreciate the streamlining changes associated with these provisions including removal of additional unnecessary information submittal requirements. For consistency, however, we respectfully suggest the San Francisco District use the language from the 2017 Regional Condition for the Sacramento District.

IV. Regional General Conditions (GCs) Applicable to all NWPs within the San Francisco District

The Associations' comments regarding the proposed Regional General Conditions applicable to all NWPs within the San Francisco District are as follows:

Proposed RC (B)(2) includes new language relating to Essential Fish Habitat with the broader language “the potential to adversely affect” and that is different from the 2017 language which is an ambiguous standard. We do not support this change and we ask the district to revert to the 2017 language that states “would result in an adverse effect.”

Two new PCN requirements as relating to RCs (B)(4) and (B)(5) are proposed to be added relating to stream channelization as well as for new/replacement stream crossings that do not employ free-span or soft-bottom designs or construct existing flows. These are additional requirements that will create additional burdens for permittees especially since GC 32 is comprehensive in the information it requests. The DE also has the discretion to request additional information on case-by-case basis. These existing tools negate the need for these types of additional overbroad PCN triggers and thus, we request these additional requirements be removed.

Proposed RC (B)(6) relating to tribal lands now broadly requires PCNs for all activities resulting in a discharge of dredged or fill materials in waters of the U.S. on Tribal Lands. This is broader than the prior 2017 RC and we ask that the USACE

revert to the 2017 language for this provision. It is important to provide the broader context that the PCN is triggered for water quality certificate issuance consideration as was noted in the previous language.

V. Conclusion

We appreciate your ongoing commitment to administering the NWP in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,



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November 6, 2020

U.S. Army Corps of Engineers
Ventura Field Office, ATTN: Antal Szijj
2151 Alessandro Drive, Suite 110,
Ventura, CA 93001
Via email to: Antal.J.Szijj@usace.army.mil

To Whom It May Concern:

The Western States Petroleum Alliance ("WSPA") and the American Petroleum Institute ("API"), (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") District for Los Angeles District seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWP) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWP allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWP. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWP through the regional conditioning process as well as district-specific

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 22, 2020

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWP"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).

conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that it is in the best interest of stakeholders for the USACE to REISSUE 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the Los Angeles District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

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We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

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.

⁶ 85 Fed. Reg. at 57,309.

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to the Los Angeles District in California and Arizona

API has reviewed the regional conditions proposed for activities in the Los Angeles District in California and the state of Arizona, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

The Associations' specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

III. Regional Conditions applicable NWPs within the Los Angeles District in California and Arizona

Overall, the proposed regional conditions in the Los Angeles District appear substantially streamlined (from 10 in 2017 to 5 currently proposed). We support this effort to streamline the conditions to promote consistency across USACE Districts,

and consistent with Congressional intent for a truly Nationwide Permit program for activities with demonstrably minimal adverse environmental impacts.

We support the deletion of a number of PCN requirements, as again Indicative of Congressional Intent.

More detailed comments based on the numbering used In Enclosure 2 of the applicable Public Notice are attached.

Within the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California (USGS Hydrologic Unit Code (HUC) accounting units: Lower Colorado -150301; Northern Mojave-180902; Southern Mojave-181001; and Salton Sea-181002), Nationwide Permits (NWP) 3, 7, 12-15, 17-19, 21, 23, 25, 29, 35, 36, 39-46, 48-54, C, D and E, cannot be used to authorize structures, work, and/or the discharge of dredged or fill material that would result in the loss* of wetlands, mudflats, vegetated shallows or riffle and pool complexes as defined at 40 CFR Part 230.40-45, in excess of 0.1 acre. With respect to this particular condition, we are glad to see that the USACE applied It equally to NWP 12, as well as NWP C, and NWP D and note that we may challenge as arbitrary and capricious conditions that are not applied equally across those three permits without substantial detailed differential Impacts to waters of the U.S. ("WOTUS"). We support the specified .1 acre threshold, as the condition was previously overly broad. We further support the clarification of "loss" as permanent loss.

Within the Murrieta Creek and Temecula Creek watersheds in Riverside County NWPs 29, 39, 42 and 43, and NWP 14 combined with any of those NWPs, cannot authorize a loss* of waters of the United States greater than 0.25 acre. We and do not feel that sufficient environmental justifications have been provided to explain the institution of a full condition versus the previous PCN threshold. Additionally, we do not support the proposed decrease in acreage thresholds. For example, both NWP 39 and NWP 14 currently have .5 acreage limits (although NWP 14 has additional constraints In tidal waters).

Individual Permits (Standard Individual Permit or 404 Letter of Permission) shall be required in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County for bank stabilization projects, and in Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures. We support that this condition was left unchanged from 2017.

In conjunction with the Los Angeles District's Special Area Management Plans (SAMPs) for the San Diego Creek Watershed and San Juan Creek/Western San Mateo Creek Watersheds in Orange County, California, the Corps' Division Engineer, through discretionary authority has revoked the use of the following 26 selected NWPs within these SAMP watersheds: 03, 07, 12, 13, 14, 16, 17, 18, 19, 21, 25, 27, 29, 31, 33, 39, 40, 41, 42, 43, 44, 46, 49, 50, C, and D. Consequently, these NWPs are no longer available in those watersheds to authorize impacts to waters of the United States from discharges of dredged or fill material under the Corps' Clean Water Act section 404



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authority. We support the continuation of this Regional Condition, and also the addition of NWP C and NWP D since this condition previously applied to NWP 12. This RC is unchanged except proposed C and D are added here. We respectfully note that we may challenge as arbitrary and capricious conditions that are not applied equally across those three permits without substantial detailed differential impacts to waters of the U.S. ("WOTUS").

The permittee must submit a pre-construction notification (PCN) in accordance with General Condition 32 in the following circumstances:

All areas designated as Essential Fish Habitat (EFH) by the Pacific Fishery Management Council (PFMC). For non-federal permittees, if the NWP activity **might have the potential to adversely affect EFH** as designated by the PFMC, the PCN must include an EFH assessment and analysis of the effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). If the site is in estuarine or marine waters and contains eelgrass (*Zostera marina* or *Z. pacifica*) the EFH assessment shall also include an eelgrass survey according to the methods described in the most recent version of the California Eelgrass Mitigation Policy published by the National Marine Fisheries Service. For NWP activities that require pre-construction notification, Federal permittees must provide the documentation demonstrating compliance with the Magnuson-Stevens Fishery Conservation and Management Act. Adverse effects to EFH are defined at 50 C.F.R. § 600.910 (a). This is similar to the 2017 condition, with additional language for federal permittees but with new language concerning Essential Fish Habitats (EFH) that is substantially more expansive. The new language "might have the potential" (emphasis added above) is more expansive, more ambiguous, and more likely to delay USACE staff as they review permitting decisions. It is not consistent with the federal language, and we believe the USACE should revert to the previous version.

All watersheds in the Santa Monica Mountains in Los Angeles and Ventura counties bounded by Calleguas Creek on the west, by Highway 101 on the north and east, and by Sunset Boulevard and Pacific Ocean on the south, **for any regulated activity that would result in a loss* of waters of the United States**. This condition contains new language emphasized in bold, which more appropriately narrowly tailors the condition. However, the lack of an acreage trigger here will likely result in a large number of PCNs for the USACE to manage and we encourage the addition of an acreage threshold to provide additional certainty for both permittees and USACE staff.

The Santa Clara River watershed in Los Angeles and Ventura counties, including but not limited to Aliso Canyon, Agua Dulce Canyon, Sand Canyon, Bouquet Canyon, Mint Canyon, South Fork of the Santa Clara River, San Francisquito Canyon, Castaic Creek, Piru Creek, Sespe Creek and the main-stem of the Santa Clara River, **for any regulated activity that would result in a loss* of waters of the United States**.



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This condition contains new language emphasized in bold, which more appropriately narrowly tailors the condition. However, the lack of an acreage trigger here will likely result in a large number of PCNs for the USACE to manage and we encourage the addition of an acreage threshold to provide additional certainty for both permittees and USACE staff.

The Murrieta and Temecula Creek watersheds in Riverside County, California for any regulated activity that would result in a loss* of waters of the United States. We support the simplification of this condition, but request the USACE to consider adding an acreage threshold to provide additional certainty for both permittees and USACE staff.

All waterbodies designated by the Arizona Department of Environmental Quality as Outstanding Arizona Waters (OAWs), within 1600 meters (or 1 mile) upstream and/or 800 meters (1/2 mile) downstream of a designated OAW, and on tributaries to OAWs within 1600 meters of the OAW (see <http://www.azdeq.gov/index.html>). We support the lack of changes to this provision.

All waterbodies designated by the Arizona Department of Environmental Quality as 303(d)-impaired surface waters, within 1600 meters (or 1 mile) upstream and/or 800 meters (1/2 mile) downstream of a designated impaired surface water, and on tributaries to impaired waters within 1600 meters of the impaired water (see <http://www.azdeq.gov/index.html>). We support the lack of changes to this provision, as the current version is working effectively.

Activities in waters of the United States involving the permanent channelization, realignment, or relocation of streams. We encourage the addition of an acreage threshold to provide additional certainty for both permittees and USACE staff

IV. Conclusion

We appreciate your ongoing commitment to administering the NWP in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented



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needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

Catherine Reheis-Boyd
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November 5, 2020

U.S. Army Corps of Engineers
Regulatory Division, Attn: Leah M. Fisher
1325 J Street, Room 1350, 95814-2922.
By email to: Leah.M.Fisher@usace.army.mil

Dear Ms. Fisher

The Western States Petroleum Alliance ("WSPA") and the American Petroleum Institute ("API"), (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Sacramento District for the states of California, Nevada, and Utah seeking comments on the proposed regional conditions as well as consideration of any additional regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWP) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWP allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWP. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWP through the regional conditioning process as well as district-specific

¹ Public Notice Nationwide Permit Reissuance Request for Comments and Comment Request on California, Nevada, and Utah Regional Conditions, (September 21, 2020), available at <https://www.spk.usace.army.mil/Media/Regulatory-Public-Notices/Article/2355185/2020-nationwide-permits-and-regional-conditions-request-for-comments/>

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

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conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that It Is In the best Interest of stakeholders for the USACE to reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the Sacramento District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

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.

⁶ 85 Fed. Reg. at 57,309.



API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to California, Nevada, and Utah

The Associations have reviewed the regional conditions proposed for activities in California, Nevada, and Utah, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly-tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

The Associations' specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

III. Regional Conditions applicable to specific NWP within California, Nevada, and Utah.

A. Revoked NWPS

For Activities In Peatlands containing histols, including bogs and fens, the USACE proposes to revoke NWP 4, 5, 7, 12 - 15, 17 - 19, 21 - 23, 25, 29-34, 36, and 39 - 51. It is our understanding that this is essentially a restatement of the status quo. We generally would support this condition, but may contest as arbitrary and capricious any condition applied to NWP 12 that is not equally applied to the similar dredge-and-fill impacts associated with NWP C and NWP D.

Additionally, we recommend a definition of peatlands based on the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) Field Indicators of hydric soil, such as that in the proposed 2020 Omaha District's Regional Conditions for Colorado. Our comments in Colorado suggest the following: "For the purposes of this requirement, a ~~fen~~ peatland is defined as a ~~ground-water-fed~~ wetland with saturated organic soil (greater than or equal to 16 inches in thickness) that is classified as a histosol in the Natural Resources Conservation Service (NRCS) Field Indicators of Hydric Soils in the United States (Version 8.0, 2016). A copy of the document can be obtained from the NRCS at http://www.nrcs.usda.gov/Internet/DOCUMENTS/nrcs142p2_053171.pdf."

For discharges of dredged and/ fill materials below the ordinary high water mark of the Great Salt Lake containing bioherms (microbialites), the USACE proposes to revoke NWPs 4, 5, 7, 12 - 15, 17 - 19, 21 - 23, 25, 29 - 34, 36, and 39 - 51 are revoked for discharges of dredged and/or fill material. As mentioned above, we may contest as arbitrary and capricious any condition applied to NWP 12 that is not equally applied to the similar dredge-and-fill impacts associated with NWP C and NWP D. Additionally, we oppose this change because we respectfully note that these activities were previously managed successfully through PCNs and no environmental justification or appropriate nexus accompanies this proposed change.

B. Activities Requiring Pre-Construction Notification

Generally, we fully support the USACE's efforts to considerably streamline activities requiring PCN notifications. Without compelling district or region-specific hydrological justifications, we believe the Congressional intent for streamlining permitting is best applied through consistency in requirements among USACE Districts.

In the items below (lettered consistently with the USACE's proposal, we respectfully note that at first blush, these appear to be the types of Regional Conditions that the NWPs contemplate as appropriate for region-specific conditions at the discretion of the District Engineer pursuant to the General Conditions contained in the overall NWP regime. We encourage

the Sacramento District to carefully consider whether the lack of granularity (particularly in letter a and letter b risks overgeneralization.

Our comments on the PCN requirements proposed in condition with General Condition 32 In the following circumstances are below:

a. For activities in waters of the U.S. involving the construction of a permanent structure that would constrict existing flows, or reduce the width or reach, of a stream below the ordinary high water mark or high tide line. This appears to be a new, somewhat of a catchall regional condition adapting deleted regional conditions, and we support the simplification

b. For activities in waters of the U.S. involving the permanent channelization, realignment, or relocation of streams. This is new language to combine various regional conditions slotted for removal, and we support this change

c. For NWP 13 activities in waters of the U.S. that do not involve bioengineering techniques. Bioengineering techniques may include using live plants alone or may be combined with dead or inorganic materials; including rock, sand, or gravel, to protect the bank. This language is more finely drafted specific to the bioengineering techniques, and we support this additional granularity.

d. For all activities resulting in a discharge of dredged or fill material in waters of the U.S. on Tribal Lands. Regrettably, we believe this condition is an overreach of USACE authority and that it should be limited to the context of Section 401 Water Quality Certifications. We believe this should revert to the 2017 language, which was “For Water Quality Certificate issuance considerations, all activities in waters of the U.S. on Tribal Lands.”

e. For activities in waters of the U.S. that have the potential to adversely affect essential fish habitat (EFH), as designated by the Pacific Fishery Management Council, and for which there is no applicable National Marine Fisheries Service issued General Concurrence or Programmatic Consultation. The PCN shall include an EFH assessment and analysis of the effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). For Federal permittees, if a PCN is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the Magnuson-Stevens Fishery Conservation and Management Act. With respect to this condition, we encourage the Sacramento District to work with the San Francisco District and Los Angeles District to create a consistent condition within the state of California. If doing so, we would recommend adopting the San Francisco District’s 2017 language, which is specific and narrowly tailored: “The permittee shall submit a PCN, in accordance with General Condition 32, for all activities located in areas designated as Essential Fish Habitat (EFH) by the Pacific Fishery Management Council and that would result in an adverse effect to EFH, in which case the PCN shall include an EFH assessment and extent of proposed impacts to EFH. Examples of EFH habitat assessments can be found at: <http://www.habitat.noaa.gov/protection/efh/consultations.html>.” Additionally, we respectfully note that we would

prefer the 2017 language requiring an analysis of the “extent of proposed impacts to EFH” rather than the currently proposed effects of the action on EFH.”

IV. Conclusion

We appreciate your ongoing commitment to administering the NWP in a manner appropriately protective of your jurisdiction’s environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE’s guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,



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November 8, 2020

Albuquerque District, USACE
Southern Colorado Regulatory Branch
Attn: Joshua Carpenter
201 West 8th Street, Suite 350
Pueblo, Colorado 81003
Joshua.g.carpenter@usace.army.mil

Dear Mr. Carpenter:

The American Petroleum Institute ("API"), the Colorado Petroleum Association ("CPA"), West Slope Colorado Oil & Gas Association ("West Slope COGA") and the Western Energy Alliance ("WEA"), (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Albuquerque, Omaha, and Sacramento Districts ("Districts") seeking comments on the proposed regional conditions ("RC") as well as consideration of any additional regional conditions for the state of Colorado.¹ This request for comments on RCs is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, the Associations find that the proposal overextends in key areas including unnecessarily

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Colorado Regional Conditions, September 23, 2020, available online at <https://www.nwo.usace.army.mil/Media/Public-Notices/Article/2358856/2020-nationwide-permits-and-regional-conditions-request-for-comments/>

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWPs"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



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dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that the USACE should simply reissue 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act ("CWA") Section 404 impacts and Rivers and Harbors Act of 1899 ("RHA") Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: "It would be more appropriate to have district engineers determine which BMPs [best management practices] 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."⁵

At the district level, we appreciate the efforts in reviewing and/or updating state-wide the RCs. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

⁴ Note that the term "utility line," unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A "utility line" is defined as any 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 message, and internet, radio, and television communication." 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, "internet" added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term "internet" was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45.



We are generally supportive of removing burdensome and unnecessary RCs as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that RCs as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the RCs should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed RCs remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and

⁶ 85 Fed. Reg. at 57,309.



its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP), which affect the oil and natural gas industry.

CPA is a longstanding advocate in legislative and regulatory matters on behalf of Colorado's petroleum refiners, exploration and production companies, pipeline, and transportation interests critical to bringing energy products to consumers. CPA members operate in challenging environments and settings across the United States and around the world. In addition to adhering to strict governmental regulatory regimes, members accommodate the unique needs of the communities where we operate. Our member companies have demonstrated leadership in addressing the impacts of energy production through the application of practical and innovative site-specific solutions.

West Slope Colorado Oil & Gas Association (West Slope COGA) provides a unified political and regulatory voice for the oil and natural gas industry in the Piceance Basin of Western Colorado. West Slope COGA represents over 90 member companies and its mission is to produce natural gas products for the benefit of society. West Slope COGA is an affiliated chapter of the Colorado Oil & Gas Association – a nationally recognized trade association that promotes the expansion of Rocky Mountain natural gas markets, supply, and transportation infrastructure through its growing and diverse membership. West Slope COGA strives to educate stakeholders, encourage technology enhancements and foster environmental stewardship throughout oil and gas operations and supply chains.

Western Energy Alliance represents 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

II. General Comments on State of Colorado's Regional Conditions

The Associations have reviewed the RCs proposed for activities within the State of Colorado, and notwithstanding specific comments below, we find the RCs as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the RCs, including deleting unnecessary or duplicative RCs, and reducing ambiguity in the application of the RCs through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous RCs, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with



minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

To that end, we appreciate the significant review and streamlining that the Districts have undertaken for the State of Colorado and we are pleased with the overall shortened list of RCs and deletions of numerous unnecessary provisions.

III. Regional Conditions applicable to specific NWP within the State of Colorado

The Associations have no comment regarding the proposed RCs applicable to only specific NWPs within Colorado. We also find the proposed NWPs will ensure that the authorized activities have no more than minimal environmental impacts and as such, the Associations do not identify the need for any additional regional conditions applicable to specific NWPs.

IV. Regional Conditions Applicable to all NWPs within the State of Colorado

The Associations' comments regarding activities applicable to all NWPs within the State of Colorado are as follows:

We appreciate the removal of unnecessary PCN triggers for all activities occurring within 100 feet of the discharge point of a spring, as well for specific PCN triggers for NWPs 13 and 23.

Regional Conditions 1 and 2 Construction of Diversions and Intakes and Open Trenching in Perennial Streams propose to extend the PCN thresholds to all activities which is significantly different from the 2017 RCs. In keeping with overall objectives for regulatory reform and targeted RCs, we ask you to review these provisions for additional granularity where a trigger is not set in motion for all activities and instead tied to a reasoned justification for specific activities.

Regional Condition 3 Fens, Bogs, and Peatlands requires PCN for all activities proposed in peatlands. Peatlands are then appropriately defined. Since this provision is related to peatlands specifically, references to fens and bogs are unnecessary and should be deleted. We agree with the Districts in their definition of peatlands being tied to the Natural Resources Conservation Service (NRCS) and we would encourage consistency amongst all the USACE districts to use this definition. We also support the substantive change of removing the 2017 revocation language for certain NWPs as related to this activity.

Regional Condition 4 Suitable Materials includes a PCN trigger that now proposes to broaden the requirement from activities involving the use of broken concrete to stream stabilization activities that utilize non-native material within the State of Colorado. The definition of non-native materials is extensive. This departs from what the Albuquerque District is requiring for permittees in its jurisdiction for the States of Texas and New Mexico. The five states covered by the Omaha District (ND, SD, NE, WY, and MT) which Colorado shares jurisdiction with, also do not have a PCN trigger for these types



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of activities. These are types of regulatory inconsistencies that are entirely not based on region-specific aquatic needs and can be standardized. We request that the Districts reflect the RC language for suitable fill that is found in Texas and New Mexico RCs.

The Omaha District also has an extensive required list of prohibited materials which applies to Colorado but is not referenced here.⁷ We would encourage coordination with Omaha district (Colorado is also partly in that district) and others to provide a streamlined list that is consistent across the regions.

V. Conclusion

We appreciate your ongoing commitment to administering the NWP in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP as proposed, the Associations are supportive of RCs that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the RCs are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

⁷ For the Omaha District, a list of materials prohibited or restricted as fill material in waters of the U.S. can be found at: <http://www.nwo.usace.army.mil/Media/FactSheets/FactSheetArticleView/tabid/2034/Article/12320/prohibited-restricted-materials.aspx>



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November 8, 2020

Philadelphia District
U.S. Army Corps of Engineers
Via email to Philadelphiadistrictregulatory@usace.army.mil

To Whom It May Concern:

The American Petroleum Institute (API) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit comments in response to the U.S. Army Corps of Engineers (USACE) Philadelphia District for the State of Delaware seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits (NWP) under the Clean Water Act (proposal).²

We fully support the renewal of the 52 NWPs and 32 General Conditions (GC) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the United States (WOTUS), NWPs allow the USACE to focus resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's (DE) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or no delay.

API's unequivocal position is that the USACE should reissue 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 24, 2020.

² 85 Fed. Reg. 57,298 (September 15, 2020). Comments due November 16, 2020.

³ Executive Order (EO) 13771, Reducing Regulation and Controlling Regulatory Costs, January 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, February 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, September 25, 2017. (2017 Review of Energy-Related NWPS). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (September 15, 2017).

regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (CWA) Section 404 impacts and Rivers and Harbors Act of 1899 (RHA) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has previously stated previously: “[i]t would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵ For additional context, we provide the Executive Summary of our federal comments for your consideration below and Annex I contains a detailed outline of our federal recommendations concerning specific NWPs, conditions, and definitions.⁶

API appreciates the Philadelphia District's efforts in reviewing and updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (January 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (January 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at 44-45.

⁶ For a complete set of comments, please see API comments that will be timely filed in www.regulations.gov.

regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWP are no more than minimal.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b)). Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁷

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency (EPA) and the USACE's development of CWA regulations including NWPs, which affect the oil and natural gas industry.

⁷ 85 Fed. Reg. at 57,309.

II. General Comments on Regional Conditions to Delaware

API has reviewed the regional conditions proposed for activities in Delaware, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive pre-construction notice(PCN) or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

III. Regional Conditions applicable to all NWPs within Delaware

We support the continuation of Regional General Condition-1 (G-1), Condition 2 (G-2), Condition 3 (G-3) and Condition 4 (G-4) with no substantive changes. In many cases, the Philadelphia District is encouraged to follow the federal approach of consistency for the NWPs, and to follow other districts by removing extra PCN submittal requirements accompanying NWPs that are Intended to be for minimal Impacts and with little or no paperwork.

With respect to condition G-5 pertaining to endangered species, we support Delaware retaining its no effect language regarding NMFS protected resources and no further consultation is required under the ESA: 2, 21, 29, 30, 34, 39, 41, 44, 45, 46, 49, 50 and 51.

With respect to Condition G-6(b), support the proposed addition of the opportunity to obtain a waiver by submitting a PCN to the USACE.

We are pleased to see effectively no change to Condition G-8 from 2017, but respectfully note that, if applied to NWP 12, it should be extended to newly proposed NWP C and NWP D. We respectfully reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without being applied to NWP C and NWP D, as the impacts to jurisdictional waters are similar regardless of the material carried in or produced by the pipeline activity in question.

IV. Regional Conditions applicable to specific NWPs within Delaware

We support regional conditions relating to NWP 3 Maintenance, NWP 5 Scientific Measurement Devices, NWP 6 Survey Activities, NWP 7 Outfall Structures and Associated Intake Structures, NWP 10 Mooring Buoys, NWP 11 Temporary Regional Structures being renewed as proposed with no substantive changes from its 2017 version.

We support the renewal of Regional Conditions NWP 12 for Oil or Natural Gas Pipeline activities being renewed with little or no substantive changes for the majority of its conditions. Our comments are as follows:

- We respectfully note that we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without equally being applied to NWP C and NWP D without sufficient environmental justification. Additionally, we respectfully note that condition (a) requiring PCN notifications for all activities under NWP 12 per condition (a) seems inconsistent with the national NWP proposal to reduce the number of PCNs from 7 to 2.
- With respect to condition (b), we respectfully request the Philadelphia to delete this provision as was done in New Jersey for regional consistency. If retained, we encourage the USACE to add a reasonableness standard for both condition (b) and condition (e).
- With respect to condition (f) where the NWP notes that it does not “authorize the discharge of any drilling muds that may be generated through such methods as directional boring or drilling,” we suggest that Philadelphia District clarify the requirements and provide full context within the context of national NWP 12 language, which states, “[t]his NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines.” Similarly, the preamble states, “[f]or 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. 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 United States, then a section 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 requirement for a section 404 permit because it is below the surface and does not involve a discharge of dredged or fill material.”

- With respect to condition (i), we believe this was part of the aerial transmission section that was meant to be Included In NWP C.

We support the renewal, as proposed, of the conditions relating to Buried Pipelines Across Navigable Waters and the Delaware River Federal Navigation Channel, and Buried Pipelines Across All Other Federal Navigation Channels.

We support the renewal with no changes of Regional Conditions for: NWP 13 Bank Stabilization; NWP 14 Linear Transportation Projects; NWP 18 Minor Discharges; NWP 23 Approved Categorical Exclusions; NWP 27 Aquatic Habitat Restoration Establishment and Enhancement Activities; NWP 28 Modifications of Existing Marinas; NWP 29 Residential Developments; NWP 33 Temporary Construction, Access, and Dewatering; NWP 38 Maintenance Dredging of Existing Basins; and NWP 36 Boat Ramps.

We support the removal of the PCN under NWP 39 for Commercial and Institutional Developments.

We support the renewal for the Regional Conditions as proposed (with no changes or only minor changes) for the following NWPs: NWP 40 Agricultural Activities; NWP 41 Reshaping Existing Drainage and Ditches; and NWP 42 Recreational Facilities.

With respect to NWP 43 Stormwater Management facilities, we encourage the Philadelphia District to adopt a definition of 'Intermittent' based on the Navigable Waters Protection Rule (NWPR).

We support the renewal as proposed and unchanged for NWP 52 Water-Based Renewable Energy Generation Pilot Projects.

We do not support the Institution of any additional conditions that were not proposed for stakeholders.

With respect to NWP C Electric Utility Lines and Telecommunications Activities and, we respectfully note unnecessary and unjustified divergences in the as discussed in NWP 12 above and respectfully remind the Philadelphia District that we may challenge as arbitrary and capricious any condition not equally applied across the three permits without sufficient environmental justification. We are pleased to note that NWP D Utility Line Activities for Water and Other Substances reflects the same provisions as NWP 12.

We support the renewal as proposed for the conditions pertaining to Buried Utility Lines Across Navigable Waters, Buried Utility Lines Across the Delaware River Federal Navigation Channel, Buried Utility Lines Across All Other Federal Navigation Channels.

Although we note the Philadelphia District requested comments for Regional Conditions for NWP E pertaining to Water Reclamation and Reuse Facilities, we respectfully note that, to avoid a logical outgrowth issue, any conditions beyond those proposed should be subject to public comment opportunities consistent with the Administrative Procedures Act.



V. Conclusion

We appreciate your ongoing commitment to administering the NWP's in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. As noted above, we support regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes. If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael S. Giaimo'.

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November 13, 2020

Bob Barron, Project Manager,
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U.S. Army Corps of Engineers,
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Via email to Robert.B.Barron@usace.army.mil

Re: Florida, Puerto Rico, and the U.S. Virgin Islands

To Whom It May Concern:

The American Petroleum Institute ("API") represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Jacksonville Districts for the states of Florida, Puerto Rico, and the U.S. Virgin Islands seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

We fully support the renewal of the 52 Nationwide Permits (NWP) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWP allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWP. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWP through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 29, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWP"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



Our unequivocal position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵ For additional context, we provide the Executive Summary of our federal comments for your consideration below and Annex I contains a detailed outline of our federal recommendations concerning specific NWPs, conditions, and definitions.⁶

At the district level, we appreciate the Jacksonville District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

⁶ For a complete set of comments, we refer you to our comments that will be timely filed in www.regulations.gov.



Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWP, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWP authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWP in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁷

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in Florida. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to Florida, Puerto Rico, and the U.S. Virgin Islands

API has reviewed the regional conditions proposed for activities in Florida, Puerto Rico, and the U.S. Virgin Islands, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any

⁷ 85 Fed. Reg. at 57,309.



new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWP's are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWP's are limited to certain NWP's of interest to the oil and gas industry.

III. Regional Conditions for the 2020 NWP's in the Jacksonville District

While we appreciated the Idea of the table organized by specific NWP's, we noted that It was unfortunately hard to do a comparison since the 2020 proposed NWP's were grouped by topic rather than by NWP. The 2018 table also includes WQC conditions and the only way to tell the difference between RC's and WQC's is to look for COE in parenthesis. All of this can be confusing to permittees as well as to entities trying to participate in the public comment period. It would be helpful to have a redline strikeout version as has been done in the past, to facilitate notice to permittees on what is being changed.

Overall, we agree with removal of some PCN's in NWP 12/14 and we have some comments about others. We appreciate the deletion of the following conditions:

- PCN required for projects in the following rivers, creeks, and their tributaries: Escambia River, Yellow River, Shoal River, Choctawhatchee River, Chipola River, Apalachicola River, Ochlockonee River, Santa Fe River, New River (Bradford and Union County line), and Econfina Creek. (COE)
- PCN required for projects in WOTUS accessible to the Florida panther. (COE)
- Excluded from use in, under, and over all Federal channels, including federal flood control and navigation channels.(COE)
- PCN required for projects in waters accessible to sea turtles, small tooth sawfish, Gulf sturgeon, or short nose sturgeon. If any of these species occurs, the permittee shall utilize the following "Sea Turtle and Small tooth Sawfish Construction Conditions. (COE)
- PCN required for projects proposed within critical habitat for the small tooth sawfish. (COE)
- PCN required for projects in waters that are accessible to manatees. In Florida, the permittee shall utilize the following "Standard Manatee Conditions for In-WaterWork." In Puerto Rico, the permittee shall use the following "Antillean Manatee Conservation Measures for In-Water Work." (COE)
- PCN required for work in areas designated as critical habitat for coral and sea turtles. (NMFS)



While we appreciate the PCN streamlining for NWP 12, it seems to be replaced by a more general PCN applicable to all NWP activities which is less granular ("NMFS species. A PCN must be submitted when the project occurs within estuarine and marine waters, including within the geographic area of designated critical habitat."). We hope that the USACE will provide needed clarity to this condition.

Similarly, we support the following PCN deletions from NWP 14 proposes PCN deletions:

- PCN required for projects in WOTUS accessible to the Florida panther. This NWP does not authorize impacts which may result in adverse effects to the Florida panther or designated CH unless consultation with USFWS has been concluded with a determination of no jeopardy and/or no adverse modification to critical habitat. (COE)
- PCN required for projects in waters that are accessible to manatees. In Florida, the permittee shall utilize the following "Standard Manatee Conditions for In-Water Work:" (<http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/endangeredspecies/Manatee/2011StandardConditionsForIn-waterWork.pdf>).
- PCN required for projects in waters accessible to sea turtles, smalltooth sawfish, Gulf sturgeon, or shortnose sturgeon. If any of these species occurs, the permittee shall utilize the following "Sea Turtle and Smalltooth Sawfish Construction Conditions" (see <http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/endangeredspecies/turtles/inwaterWorkSeaTurtle032306.pdf> (COE)
- PCN required for projects proposed within critical habitat for the smalltooth sawfish (COE)
- PCN required for projects in the following rivers, creeks, and their tributaries: Escambia River, Yellow River, Shoal River, Choctawhatchee River, Chipola River, Apalachicola River, Ochlockonee River, Santa Fe River, New River (Bradford and Union County line), and Econfinia Creek. (COE)

A. Excluded Waters and/or Areas

- A NWP cannot be used in an exclusion areas designated by the Regional Condition. The exclusions areas should be clearly stated in one section.
- Designated Critical Resource Waters
 - Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, a PCN is required for any activity proposed by permittees in the designated critical resource waters including wetlands adjacent to those waters. NWP 12 and 14 should be included in the second category of PCN required rather than a straight out exclusion. Additionally, we respectfully note that, In the absence of specific environmental justification, we reserve the right to challenge as arbitrary and capricious any condition which is applied to NWP 12 but not equally applied to NWP C and NWP D.
 - State natural heritage sites, and the Marjorie Harris Carr Cross Florida Greenway State Recreation and Conservation Area. We support the deletion of condition c) but also respectfully note that D is incorrectly numbered.



B. Regional Conditions Applicable to All NWP

Endangered Species. In accordance with General Condition 18, a PCN must be submitted if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat.

- NMFS species. A PCN must be submitted when the project occurs within estuarine and marine waters, including within the geographic area of designated critical habitat. This is a new PCN and we believe it should follow the processes laid out in GC 18 for consistency and the framework that is being laid out by Corps Headquarters instead of a specific Regional Condition. (GC 18 only requires a PCN for non-federal permittees if any listed species or designated critical habitat might be affected or is in the vicinity of the activity or if the vicinity is located in designated critical habitat.)
- USFWS species. A PCN must be submitted if the USFWS Information for Planning and Conservation (IPaC) online database (<https://ecos.fws.gov/ipac/>) map search identifies species that may be potentially affected by activities in the location of the project. While this condition is not new, it now requires a PCN. We believe it should follow the processes laid out in GC 18 for consistency and the framework that is being laid out by Corps Headquarters instead of a specific Regional Condition. (GC 18 only requires a PCN for non-federal permittees if any listed species or designated critical habitat might be affected or is in the vicinity of the activity or if the vicinity is located in designated critical habitat.)

C. Regional Conditions Applicable to Specific NWP

- Coral Assemblages:
 - NWPs 7, 10, 11, 12, C, D, 19, 22 and 28 in Antilles. Activities cannot cause adverse impacts to coral assemblages. We support the removal of the PCN trigger for NWP 12. Additionally, we are pleased to see this condition applied equally to NWP 12, C, and D.
- Activities affecting structures or works built by the United States. In accordance with General Condition 31, a PCN is required when the proposed activity will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works Project.
 - PCN typically required if the proposed activity: (1) is within the right-of-way for a deep draft federal navigation project; (2) does not meet the Setback Guidance from a federal navigation project; or (3) crosses (above or below) a USACE project levee, dike, dam or other water retaining structure. An additional PCN is required. Our position in the federal comment letter for GC 31 is that a PCN is should only be required if the underlying NWP activity triggers a PCN. We respectfully request this PCN condition be removed.
 - For NWP 3. If the previously authorized, serviceable, structure was destroyed by an act of nature or other event, the project will be reviewed pursuant to the setback guidance in effect at the time of the PCN. It is possible that any authorized reconstruction will not be authorized or rebuilt in the same dimensions or design as the original structure. The current Regional Conditions contains an extra



added phrase, " For projects adjacent to a federal navigation channel." We believe that phrase provides essential granularity and respectfully request it be reinserted.

- Adjacent to Tribal lands.
 - NWPs 3, 18, 27, 40, 41 and 46. PCN required for projects adjacent to Tribal lands, which will require review for impacts to Tribal trust resources prior to use of this NWP when the property on which the project is occurring is adjacent to Tribal lands. We support the "deleting the definition of protected tribal resources" and that we request that the Adjacent to Tribal Lands be stricken.
- Submerged aquatic vegetation. We appreciate condition b) being applied equally to NWP 12, C, and D. Provision a) states "in" and provision b) states "within" - the usage should be consistent. The consistency Issue also arises in the Tidal Wetland condition a) ("within") and Forested wetland condition a) and b) ("both in").

D. Activity-Specific Regional Conditions

The Jacksonville district should clearly provide RCs by activity-specific regional conditions since many permittees only use certain NWPs. It would be helpful and provide transparency to have all conditions for the NWPs in one place.

IV. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, we support regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,



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Gulf Coast Region

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A handwritten signature in black ink that reads 'Amy Emmert'. The signature is written in a cursive, flowing style.

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November 16, 2020

Louisville District, CELRL-OPF-S, Rm 752,
P.O Box 59,
Louisville, Kentucky 40201
Via email to: lrl.regulatorypubliccomment@usace.army.mil.

Re: LRL-2020-00006

To Whom It May Concern:

The American Petroleum Institute (“API”), and represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers (“USACE”) Louisville District for the state of Kentucky seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE’s overall proposal to reissue and modify the Nationwide Permits (“NWPs”) under the Clean Water Act (“proposal”).²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions (“GC”) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE’s comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 28, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order (“EO”) 13771, Reducing Regulation and Controlling Regulatory Costs,” Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. (“2017 Review of Energy-Related NWPs”). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).

Our unequivocal position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWP, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

⁶ 85 Fed. Reg. at 57,309.

II. General Comments on Regional Conditions to Kentucky

API has reviewed the regional conditions proposed for activities in Kentucky and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

A. Kentucky Regional General Conditions

We respectfully note that Kentucky has expanded its requirements in several areas. Its list of RCs has grown from 4 RCs in 2017 to 7 in 2020, which, in the absence of environmental justification, seems contrary to the USACE directive for streamlining.

Notifications for all Nationwide Permits (NWPs) shall be in accordance with General Condition No. 32.

- For activities that would result in a loss of Outstanding State or National Resource Waters (OSNRWs), Exceptional Waters (EWs), Coldwater Aquatic Habitat Waters (CAHs) and waters with Designated Critical Habitat (DCH) under the Endangered Species Act for the NWPs listed below, a Pre-Construction Notification (PCN) will be required to the Corps. The Corps will coordinate with the appropriate resource agencies (see attached list) on these NWPs for impacts to these waters.
 - Again, we respectfully note that PCNs requirements have expanded significantly from 2017 to include all the new additional NWPs in bold. We respectfully request a return to 2017 language in light of Corps directive for regulatory reform. In the absence of clear environmental justification, we believe the list below is overly extensive given the general sufficiency of PCNs in the federal NWPs.



- Additionally, in some cases, a PCN may not be reasonable. For example, NWP 20 is included now and requires a PCN but activities under NWP 20 can be time sensitive emergency type operations for which no PCN is required under the national NWP. The same should be the case here.
- As an exception, if this condition applies to NWP 12, we support its extension to proposed NWP C and proposed NWP D. In the absence of clear environmental justification, we reserve the right to challenge as arbitrary and capricious any condition applied to NWP 12 but not equally applied to NWP C and NWP D.
- The list of applicable NWPs is below, with newly added ones in bold.
 - NWP 3 (Maintenance)
 - **NWP 4 (Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities)**
 - **NWP 5 (Scientific Measurement Devices)**
 - **NWP 6 (Survey Activities)**
 - NWP 7 (Outfall Structures and Associated Intake Structures)
 - NWP 12 (Utility Line Activities)
 - **NWP 13 (Bank Stabilization)**
 - NWP 14 (Linear Transportation Projects)
 - **NWP 15 (U.S. Coast Guard Approved Bridges)**
 - **NWP 16 (Return Water from Upland Contained Disposal Areas)**
 - **NWP 17 (Hydropower Projects)**
 - **NWP 18 (Minor Discharges)** **NWP 19 (Minor Dredging)**
 - **NWP 20 (Response Operations for Oil or Hazardous Substances)**
 - **NWP 21 (Surface Coal Mining Activities)**
 - **NWP 22 (Removal of Vessels)**
 - **NWP 23 (Approved Categorical Exclusions)**
 - **NWP 25 (Structural Discharges)**
 - **NWP 27 (Aquatic Habitat Restoration, Establishment, and Enhancement Activities)**
 - NWP 29 (Residential Developments)
 - **NWP 30 (Moist Soil Management for Wildlife)**
 - **NWP 31 (Maintenance of Existing Flood Control Facilities)**
 - **NWP 32 (Completed Enforcement Actions)**
 - **NWP 33 (Temporary Construction, Access, and Dewatering)**
 - **NWP 34 (Cranberry Production Activities)**
 - **NWP 36 (Boat Ramps)**
 - **NWP 37 (Emergency Watershed Protection and Rehabilitation)**
 - **NWP 38 (Cleanup of Hazardous and Toxic Waste)**
 - NWP 39 (Commercial and Institutional Developments)
 - NWP 40 (Agricultural Activities)
 - NWP 41 (Reshaping Existing Drainage Ditches)



- NWP 42 (Recreational Facilities)
 - NWP 43 (Stormwater Management Facilities)
 - NWP 44 (Mining Activities)
 - **NWP 45 (Repair of Uplands Damaged by Discrete Events)**
 - **NWP 46 (Discharges in Ditches)**
 - **NWP 48 (Commercial Shellfish Aquaculture Activities)**
 - **NWP 49 (Coal Remining Activities)**
 - **NWP 50 (Underground Coal Mining Activities)**
 - NWP 51 (Land-Based Renewable Energy Generation Facilities)
 - NWP 52 (Water-Based Renewable Energy Generation Pilot Projects)
 - **NWP C (Electric Utility Line and Telecommunications Activities)**
 - **NWP D (Utility Line Activities for Water and Other Substances)**
 - **NWP E (Water Reclamation and Reuse Facilities)**
- In addition to the notification and agency coordination requirements in the NWPs, for impacts greater than 0.25 acres in all “waters of the U.S.” for the NWPs listed below, a PCN will be required to the Corps. The Corps will coordinate with the appropriate resource agencies (see attached list) on these NWPs:
 - We respectfully note that the national NWPs also appropriately include PCN acreage triggers such as for the proposed NWP 12, C and D. Generally, a PCN required for 1/10 acre losses for all WOTUS as well as if a section 10 permit is required. There is no need for additional 0.25 acres. NWP 14 also has similar granular PCN thresholds if losses of WOTUS exceed 1/10 acre or if there is a discharge to a special aquatic site, including wetlands. NWP 39 requires PCN for all activities.
 - As this condition previously applied to NWP 12, we support the extension to proposed NWP C and proposed NWP D. While our federal comments do not endorse the division of NWP 12, we respectfully reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 but not equally extended to NWP C and NWP D without clear environmental justification.

NWP 14 Linear Transportation Projects.

- We support the deletion of the special PCN applicable to activities in Section 10 navigable waters.
- We note that the word "public" was deleted and that therefore this now applies more broadly. We respectfully request for the word "public" to be reinserted.
- In addition to the notification requirements contained in NWP 14, the permittee must submit a PCN to the district engineer prior to commencing the activity for the permanent loss of greater than 300 feet of intermittent and perennial stream of all “waters of the U.S.” (See General Condition 32 and the definition of "loss of waters of the United States" in the Nationwide Permits for further information.)
 - We support the proposed streamlining of this condition from 2017, and the proposed deletion of duplicative requirements relating to mitigation. At the federal level, GC 32 and GC 22 already provide adequate provisions for PCN submittal requirements as well as mitigation. We support the

removal. As for the proposed additional language for a PCN trigger relating to 300 feet of intermittent and perennial stream, we would respectfully request deference to PCN triggers in the national NWP's to govern.

Notification in accordance with Condition 32 is required to the Corps for all activities which are subject to jurisdiction under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). We respectfully note that this section applied previously to only NWP 14, but now requires a PCN for ALL Section 10 waters. This is contrary to the national NWP's which require PCNs for certain NWP's while appropriately promoting streamlining within the intent of this program to provide little or no paperwork for activities with minimal impacts. We do not support this addition that broadly applies to all activities.

All applications and requests should be submitted electronically. This is a new condition, and we encourage the addition of qualifying language such as "to the extent feasible."

III. Conclusion

We appreciate your ongoing commitment to administering the NWP's in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP's as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

/s/ David McGowan

David McGowan



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American Petroleum Institute
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November 16, 2020

US Army Corps of Engineers,
New Orleans District,
ATTN: Brenda Archer, CEMVN-ODR
7400 Leake Avenue
New Orleans, Louisiana 70118

Via email to: Brenda.A.Archer@usace.army.mil

Dear Ms. Archer:

The Louisiana Mid-Continent Oil and Gas Association ("LMOGA"), American Petroleum Institute ("API"), Association of Oil Pipe Lines ("AOPL") (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") New Orleans District for the state of Louisiana seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWP) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWP allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWP. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWP through the regional conditioning process as well as district-specific

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, October 1, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWP"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).

conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

regional conditions as authorized by the DEs may be added to NWP to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

Louisiana Mid-Continent Oil and Gas Association, 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. LMOGA's mission is to promote and represent the oil and gas industry operating in Louisiana and the Gulf of Mexico by extending representation of our members in the Louisiana Legislature, state and federal regulatory agencies, the Louisiana congressional delegation, the media and the general public.

⁶ 85 Fed. Reg. at 57,309.



API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services.. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP), which affect the oil and natural gas industry.

AOPL is a nonprofit national trade association that represents the interests of oil pipeline owners and operators before regulatory agencies, the judiciary, and the United States Congress. AOPL's members operate pipelines that carry approximately 97% of the crude oil and petroleum products moved by pipeline in the United States, extending over 218,000 miles in total length. These pipelines safely, efficiently, and reliably deliver more than 21 billion barrels of crude oil and petroleum products each year. AOPL members bring crude oil to the nation's refineries, natural gas liquids such as ethane, butane, propane and carbon dioxide to manufacturers and industrial users, jet fuel to airports, and petroleum products to our communities, including all grades of gasoline, diesel, home heating oil, kerosene, propane and biofuels. AOPL members routinely rely on NWPs, particularly NWP 12, for the construction, maintenance, and repair of their pipelines and related infrastructure. NWPs are crucial for the ability of oil pipelines to efficiently develop new pipelines as well as maintain the safe and efficient operation of pipeline systems.

II. General Comments on Regional Conditions to Louisiana

The Associations have reviewed the regional conditions proposed for activities in Louisiana, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (consistent with legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

The Associations' specific comments to regional conditions applicable to specific NWP are limited to certain NWPs of interest to the oil and gas industry.

A. Regional Conditions for all NWPs in Louisiana

Regional Condition 1. No regulated activity may cause the permanent loss or the conversion of greater than ½ acre of cypress swamp and/or cypress-tupelo swamp. We respectfully note that this is the same as 2016, and we reiterate our comment from 2016. The use of the language, "or conversion" is unnecessarily restrictive given that NWPs are to regulate activities with minimal environmental impacts, and therefore should be removed. Similarly, we also re-request that the Corps District clarify that this condition only applies to cypress swamps and/or cypress-tupelo swamps and not to other Palustrine forested wetlands.

Regional Condition 2. No regulated activity may cause the permanent loss or the conversion of greater than ½ acre of coastal prairie, pine savanna, and/or pitcher plant bogs. We respectfully note that this is the same as 2016, and we reiterate our comment from 2016. The use of the language, "or conversion" is unnecessarily restrictive given that NWPs are to regulate activities with minimal environmental impacts, and therefore should be removed.

Previous RC 4 is removed. We support this change relating to Louisiana Black Bear which was delisted and therefore no longer requires Section 7 consultation.

Regional Condition 4. Dredged and/or fill material placed within wetlands and other waters must be free of contaminants, to the best of the applicant's knowledge. We respectfully suggest that the term "actual knowledge" be used for clarity. Unfortunately, the existing language can have different meanings unless defined (in some cases, can mean constructive knowledge/due diligence undertaken, or just actual knowledge with no further inquiries/investigations).

Regional Condition 6. A pre-construction notification, as defined under nationwide general condition 32, will be provided for all regulated activities

- Excluding Nationwide 20. We support the continued exclusion of NWP 20. NWP 20 applies to activities conducted in response to a discharge or release of oil or hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan, including containment, cleanup, and mitigation efforts. There is no PCN requirement in NWP 20; however, if not expressly excluded, Regional Condition 6 would trigger a PCN requirement for this NWP 20 if its activities will adversely impact greater than 1/10 acre of wetlands. In scenarios where there may be unintended and unplanned releases of oil or hazardous substance into the aquatic environment, swift emergency action would be required to minimize environmental impacts. Taking the time to

prepare and submit a PCN, and then having to wait for 45 days or longer for approval of a NWP would not be a prudent option. Thus, we support the district excluding NWP 20 from this PCN requirement.

- Adversely affects greater than 1/10 acre of wetlands, and/or. The Associations respectfully request that 'adversely affects' be changed to 'adversely impacts,' which has more clear implications in the context of the NWP program. Additionally, the Associations request that the language be changed to, "A permanent loss of jurisdictional wetlands greater than 1/10 acres, and/or...." We also request that the 1/10 threshold for PCN requirements should be limited to activities in the coastal areas of Louisiana and the PCN triggers should revert to the thresholds in the applicable NWPs. Finally, we request this condition be limited to jurisdictional wetlands only.

Regional Condition 7, Supplement to General Condition 2 – Aquatic Life Movement. We support the lack of additional proposed changes in this condition.

B. Regional Conditions for Specific NWPs

We appreciate with the district's review of 2017 RCs and identifying certain provisions for removal that are no longer necessary (e.g. with deleted provisions, there are no regional conditions imposed in 2020 for NWPs 29, 30, 39, 41, 42).

We do have comments for the district to consider on the need for further streamlining that is needed for NWPs such as additional PCN requirements for all NWP 12 activities in tidal waters. See below.

NWP 7. Outfall Structures and Associated Intake Structures. We support that no further conditions were proposed for NWP 7.

NWP 8. Oil and Gas Structures on the Outer Continental Shelf. We support that no further conditions were proposed for NWP 8.

NWP 12. Oil or Natural Gas Pipeline Activities.

- We understand that this proposed condition reflects the federal proposal for NWP 12 to apply only to oil or natural gas pipelines. Our federal comments respectfully oppose that division; however, we believe that even with the division, the same requirements should apply to all utilities because impacts should not be based on substances conveyed but the CWA impacts associated with construction/maintenance activities. We respectfully note that this condition has been revised to apply only to oil or natural gas pipelines and not proposed NWP C and D. We respectfully request that if maintained, it should apply equally to NWP 12, NWP C, and NWP D and note that, in the absence of clear environmental justification, we reserve the right to challenge any condition applied to NWP 12 but not equally applied to NWP C or NWP D.

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Pre-Construction Notification, as defined under nationwide general condition 32, is required for regulated pipeline activities within tidal waters regardless of impact acreage. The U.S. Environmental Protection Agency and National Marine Fisheries Service will be forwarded a copy of the Pre-Construction Notification. We support the narrowing of this condition to pipeline activities within tidal waters. However, this Regional Condition remains contrary to the position of USACE headquarters to reduce from 7 PCNs to 2 PCNs. We respectfully urge the district to remove this PCN and defer to the proposed PCN in the 2020 NWP (PCNs for losses of greater than 1/10 acre), which the proposal finds environmentally protective along with the ½ acre threshold limitations and additional protective conditions.

NWP 13 Bank Stabilization. We support the proposed no further changes to NWP 13.

NWP 14 Linear Transportation Projects. NWP 14 already provides a narrower acreage limit of 1/3-acre for tidal waters (versus ½-acre for non-tidal waters) and therefore we respectfully recommend that this regional condition should be removed.

NWP 30. Moist Soil Management for Wildlife: We support the removal of the PCN here out of deference to the appropriateness of the federal proposal.

NWP 39. Commercial and Institutional Developments. We support that no regional conditions are proposed for this NWP, out of deference to the appropriateness of the federal proposal.

NWP 41. Reshaping Existing Drainage Ditches. We support that no regional conditions are proposed for this NWP, out of deference to the appropriateness of the federal proposal.

NWP 42. Recreational Facilities. No regional conditions are proposed.

NWP 43 Stormwater Management Facilities. We support that no further changes have been proposed to this NWP.

III. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,



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President and General Counsel
LMOGA
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Gifford Briggs
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API
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Amy Emmert



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A handwritten signature in black ink that reads "Steven M. Kramer".

Steven M. Kramer
Senior Vice President, General Counsel
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November 13, 2020

Attn: Ms. Amy Elliott
U.S. Army Corps of Engineers,
Baltimore District, State College Field Office,
1631 South Atherton Street, Suite 101,
State College, Pennsylvania, 16801
via email at amy.h.elliott@usace.army.mil

Dear Ms. Elliott:

The American Petroleum Institute (API) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit comments in response to the U.S. Army Corps of Engineers (USACE) Baltimore District for the State of Maryland seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits (NWP) under the Clean Water Act (proposal).²

We fully support the renewal of the 52 NWPs and 32 General Conditions (GC) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the United States (WOTUS), NWPs allow the USACE to focus resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's (DE) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or no delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 29, 2020.

² 85 Fed. Reg. 57,298 (September 15, 2020). Comments due November 16, 2020.

³ Executive Order (EO) 13771, Reducing Regulation and Controlling Regulatory Costs, January 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, February 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, September 25, 2017. (2017 Review of Energy-Related NWPS). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (September 15, 2017).

API's unequivocal position is that the USACE should reissue 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (CWA) Section 404 impacts and Rivers and Harbors Act of 1899 (RHA) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has previously stated previously: “[i]t would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵ For additional context, we provide the Executive Summary of our federal comments for your consideration below and Annex I contains a detailed outline of our federal recommendations concerning specific NWPs, conditions, and definitions.⁶

API appreciates the Baltimore District's efforts in reviewing and updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (January 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (January 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at 44-45.

⁶ For a complete set of comments, please see API comments that will be timely filed in www.regulations.gov.

We are supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b)). Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁷

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency (EPA) and the USACE's development of CWA regulations including NWPs, which affect the oil and natural gas industry.

⁷ 85 Fed. Reg. at 57,309.

II. General Comments on Regional Conditions to Maryland

API has reviewed the regional conditions proposed for activities in Maryland and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

III. Regional Conditions applicable to specific NWPs within Maryland

Nationwide Permit #3 Maintenance: Pre-construction Notification (PCN) applicability is “to the repair, rehabilitation, or replacement in-kind of any previously authorized currently serviceable structure or fill destroyed or damaged by storms, floods, fires, or discrete events.” The term 'discrete events' lacks specificity. The term should be defined. We support the provision concerning replacement one-way tide gates, as it is more targeted and clearer than in the previous permit.

A. Regional General Conditions (GCs) Applicable to all NWPs within Maryland

Nationwide Permit Regional General Condition #2 Aquatic Life Movement: We support the proposed removal of Nationwide Permits #3b, #12, #39, and several others from this Regional Condition. We support the proposed increase to 36 inches for the culvert diameter threshold triggering depression below stream bottom.

Nationwide Permit Regional General Condition #18 Endangered Species:

- Conditions for Pile Driving Activities Applicable Within Tidal Waters of the Chesapeake Bay in Maryland: We support the proposed increase to 12 inches or less for timber pile diameter threshold when a vibratory hammer is used.



Nationwide Permit Regional General Condition #32 Pre-Construction Notification:

- Conditions for Waters Containing Submerged Aquatic Vegetation (SAV) Beds: We support the clarity provided by the proposed PCN provisions for the Regional Condition.
 - Since a 45-day timeline is not triggered until a PCN is complete, clear Instructions to permittees as to what constitutes a PCN are essential. “All activities that the applicant plans to undertake that are reasonably related” is vague and needs clarification.
 - We support the “... within anadromous fish use areas” language as it appropriately narrows a Regional Condition.

IV. Conclusion

We appreciate your ongoing commitment to administering the NWP in a manner appropriately protective of your jurisdiction’s environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. As noted above, we support regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE’s guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes. If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

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November 13, 2020

Mr. Charles Simon
Chief, Regulatory Office,
U.S. Army Corps of Engineers, Detroit District,
477 Michigan Avenue,
Detroit, Michigan 48226-2550
Via email to Robert Morningstar at Robert.L.Morningstar@usace.army.mil.

Dear Mr. Simon and Mr. Morningstar,

The American Petroleum Institute ("API") represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Detroit District of the state of Michigan seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWPs"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that the USACE should simply REISSUE 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

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We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

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To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

The American Petroleum Institute (API) is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you

⁶ 85 Fed. Reg. at 57,309.

know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to Michigan

API has reviewed the regional conditions proposed for activities in Michigan, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

III. Regional Conditions applicable to specific NWPs within Michigan

Our specific comments to regional conditions applicable are listed below. Where a provision has remained unchanged from 2017 and we have not commented, we support the proposal's decision to continue the provisions without changes. However, where there were changes and we did not comment, that should be read neutrally - In many cases, the permits were not critical to our Industry and we chose not to comment.

A. Proposed Detroit District Regional Conditions in Michigan:

NWP 5 (Scientific Measurement Devices). We request that the Corps should clarify the specific requirements that each device must be marked with and also refrain from requirements that may be difficult or impractical for compliance.

NWP 7 (Outfall Structures and Other Associated Regional Conditions). For condition (a), the Associations support the deletion of the language, "The face of the outfall structure shall not extend into the receiving water to impair navigation."

NWP 12 (Oil or Natural Gas Pipeline Activities). The Associations appreciate the measured approach to NWP 12, an the consistency between NWP 12, NWP C, and NWP D. To the extent possible, we would also recommend consistency between NWP 14 and NWP 12. With that In mind, In this case, although we note the 1/4 acre limit is only for wetlands, we ask Michigan to revert to the NWP 14 acreage limits of 1/2 acre in non-tidal waters. We support the deletion of the language, "applicants must demonstrate that upland alternatives are not practicable."

NWP 14 (Linear Transportation Projects). We support the deletion of 2017 provisions b and c, which respectively stated, "b.For private road projects, impacts are limited to 1/10 acre and c. The selected route must be the least damaging practicable alternative."

NWP 18 (Minor Discharges). We support the deletion of 2017 provisions a and b.

NWP 39 (Commercial and Institutional Developments). Although this provision is being reissued unchanged from the 2017 version, we respectfully update our comments from 2016. In 2017, the new language in section (a) added a restriction to particular areas such as areas below the Ordinary High Water Mark (OHWM), areas subject to inundation by the adjacent water body, and areas which otherwise provide fish habitat functions of any kind. NWPs are limited to activities with minimal environmental impacts and API believes that NWP 39 provides adequate protections. API recommends removing these additional conditions, or in the alternative removing areas below the OHWM and allow for District Engineer consideration on a case-by-case basis. Prior to 2017, Section (b) stated that the discharge must not cause the loss of greater than ¼ acre of non-tidal waters of the U.S. The proposed language was revised to loss of greater than 1/4 acre of wetlands adjacent to navigable waters of the U.S. API was supportive of the change removing the limitations on non-tidal waters and making it more granular. However, NWP 39 already includes a ½ acre threshold limitation which provides adequate protections without the need for these additional regional conditions.

NWP 41 (Reshaping Drainage Ditches). The 2017 version of this condition contained the caveat, "unless specifically authorized," and we respectfully request that essential flexibility be reinstated.

NWP 43 (Stormwater Management Facilities). We request re-Inclusion of the deleted requirement, " Maintenance activities are limited to 1/2 acre, in facilities which were designed for the primary purpose of stormwater detention, retention, and/or treatment." It offers essential granularity for this provision which would otherwise apply to all new

facilities.

NWP C (Electric Utility Lines and Telecommunications Activities). We are pleased to see this permit as consistent with NWP 12, and, In the absence of environmental justification, we respectfully reserve the right to challenge as arbitrary and capricious any condition applied to NWP 12 that is not equally applied NWP C and NWP D.

NWP D (Utility Line Activities for Water and Other Substances). We are pleased to see this permit as consistent with NWP 12, and, In the absence of environmental justification, we respectfully reserve the right to challenge as arbitrary and capricious any condition applied to NWP 12 that is not equally applied NWP C and NWP D.

IV. Regional General Conditions (GCs) Applicable to all NWPs within Michigan

The condition relating to a joint processing agreement requires the application including PCN components for any work in Michigan. We believe that is a considerable expansion of application / PCN requirements - particularly when compared to national streamlining efforts, and as compared to the intent established in the national NWPs for little or no paperwork. We respectfully suggest this could be more granular and less burdensome on applicants.

Subpart (1) requires that "Prior to the authorization of work under any NWP, the Corps shall determine whether the proposed structure or discharge adversely impact or fragment the hydrologic and ecologic connection to an aquatic resource. If there is an adverse impact then the Corps shall evaluate the potential secondary impacts that could result, and if the expected secondary impacts are more than minimal, then the Corps may discuss with the applicant possible modifications to the project which would retain the connection." This is a significant condition which effectively adds a supplemental USACE review to all NWPs. We believe this is overly expansive and will considerably increase processing times with primary and secondary reviews and additional modifications. Additionally, we note that it is unclear how detailed the USACE determination will be, which offers the possibility for considerable inconsistencies in application. We respectfully request additional granularity.

V. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity.



American Petroleum Institute
Ohio

Chris Zeigler
Executive Director
API Ohio
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Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

A handwritten signature in blue ink that reads 'Chris B. Zeigler'.

Chris Zeigler
Executive Director
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(614) 221-5439
Zeiglerc@api.org

A handwritten signature in black ink that reads 'Amy Emmert'.

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November 2, 2020

St. Paul District, Regulatory Division
180 East 5th Street, Suite 700
St. Paul, Minnesota 55101
Via email to CEMVP-NWP-Comments@usace.army.mil

To Whom It May Concern:

The American Petroleum Institute (“API”) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers (“USACE”) St. Paul District for the states of Minnesota and Wisconsin seeking comments on the proposed regional conditions as well as consideration of any additional regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE’s overall proposal to reissue and modify the Nationwide Permits (“NWP”) under the Clean Water Act (“proposal”).²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions (“GC”) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE’s comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Minnesota and Wisconsin Regional Conditions (September 18, 2020) available at <https://www.mvp.usace.army.mil/Missions/Regulatory/Public-Notices/Article/2352875/proposed-2020-nationwide-permits-and-regional-conditions-in-minnesota-and-wisco/>

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order (“EO”) 13771, Reducing Regulation and Controlling Regulatory Costs,” Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. (“2017 Review of Energy-Related NWPs”). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



Our unequivocal position is that it is in the best interest of stakeholders for the USACE to simply REISSUE 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPs [best management practices] 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.”⁵

At the district level, we appreciate the St. Paul District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..



Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWP, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

⁶ 85 Fed. Reg. at 57,309.



II. General Comments on Regional Conditions to Minnesota and Wisconsin

The Associations have reviewed the regional conditions proposed for activities in Minnesota and Wisconsin, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

The Associations' specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

III. Regional Conditions applicable to specific NWPs within Minnesota and Wisconsin:

API's specific comments to regional conditions applicable to specific NWPs or districts are as follows:

NWP 12 and 14 (Linear Transportation Projects) are proposed to be revoked (meaning that these NWPs cannot be used to authorize projects in Wisconsin) because they are similarly covered by regional permits. For Minnesota and Wisconsin, this is the status quo given that these permits were also revoked in the 2017 NWP renewal. In light of the overall Congressional intent of using NWPs to streamline authorization of activities with relatively low environmental impacts, the Associations vehemently oppose individual jurisdictions declining to allow access to NWPs 1) without clear and compelling environmental documentation, and 2) also as a part of one of the fastest, most voluminous, and least centralized renewal processes within the federal government. The St. Paul District has or proposes to revoke NWP 8, 12, 14, 15, 21, 23, 24, 34, 49, 50, A, B, C, and D - in total, encompassing 14 or slightly under one-third of the approximately 50 NWPs. Despite the list of other permits available for use in the St. Paul District (available at <https://www.mvp.usace.army.mil/Missions/Regulatory/Permitting-Process-Procedures/>), we cannot endorse this



methodology. We do, however, appreciate the USACE treating all linear permits equally and extending the proposed revocation to linear projects covered by proposed NWP 14, NWP B, NWP C, and NWP D.

Regional Conditions applicable to NWP 3, 33, and 41 (Aquatic Resource Impacts) features the proposed addition of a pre-construction notification (PCN) trigger if the regulatory activity involves “(1) A permanent loss of greater than 1/10 acre of waters of the U.S. for NWP 3 and 41; or (2) over 1/2 acre of temporary impacts to waters of the U.S. which includes areas temporarily filled, flooded, excavated, or drained for NWP 3, 33, and 41.” In contrast, the national NWP 3 only requires PCN for discharges associated with removal of accumulated sediments and debris in the vicinity of existing structures, including intake and outfall structures and associated canals. Moreover “temporary impacts” is defined separately with its own PCN trigger, so it is unclear whether that definition would in effect apply a third PCN trigger to NWP 3, 33, and 41. The Associations oppose these additional PCN requirements because they are overly broad, onerous in comparison to other Regional Conditions for the same permits, and do not appear to have a clear environmental justification in water-abundant states like Minnesota and Wisconsin.

IV. Regional General Conditions (GCs) Applicable to all NWP within Minnesota and Wisconsin

Regional Conditions Concerning Temporary Impacts. The USACE proposes to add an additional PCN requirement concerning “temporary impacts, “which are defined as: “If the temporary impacts in waters of the U.S., including wetlands, occur as a result of the regulated activity would remain in place for longer than 90 days between May 15 and November 15, a PCN is required. When a PCN is required for temporary impacts, the PCN must specify how long the temporary impact will remain and include a restoration plan showing how all temporary fills and structures will be removed and the area restored to preconstruction contours and elevations. Native, non- invasive vegetation must be used unless otherwise authorized by a Corps NWP verification.” It is unclear what NWPs this definition would apply to, and the condition seems duplicative and unnecessary particularly when viewed in light of the additional PCNs proposed for NWP 3, 33, and 41. The Associations therefore oppose this addition.

Regional Concerning Calcareous Fens. For Wisconsin, the USACE proposes that “ No work in a calcareous fen is authorized by a NWP unless the Wisconsin Department of Natural Resources (WI DNR) has approved a permit for the proposed regulated activity. Project proponents must provide evidence of an approved permit to the District.” The Regional Condition proposed for Minnesota differs, noting that, “No work in a calcareous fen is authorized by a NWP unless the Minnesota Department of Natural Resources (MN DNR) has approved a calcareous fen management plan specific to a project that otherwise qualifies for authorization by a NWP. Project proponents must provide evidence of an approved fen management plan to the District. A list of known Minnesota calcareous fens can be found at: http://files.dnr.state.mn.us/eco/wetlands/calcareous_fen_list.pdf.” For clarity, the Associations suggest defining calcareous fens similar to other regions that are including definitions of other types of fens such as the term peatlands being based on the U.S. Department of Agriculture's Natural Resources Conservation Services (e.g., Colorado's 2020



Proposed NRCS (e.g., the state of Colorado's 2020 Proposed Regional Conditions). Additionally, for regional consistency, the fen requirements in Wisconsin and Minnesota should be similar (which they are currently not) unless that is a direct function of their regulatory requirements (e.g., Wisconsin using a permit while Minnesota requires an approved plan). Finally, the Associations note that Minnesota provides a list of known areas and Wisconsin does not - that sort of list and clarity could be enormously helpful to permittees, and we encourage the USACE and state regulators to collaborate accordingly.

Wisconsin's Special Aquatic Resources are proposed to be protected by an additional PCN if a regulated activity would occur in any of the following aquatic resources: 1) state-designated wild rice waters; 2) bog wetland plant communities; 3) fens; 4) coastal plain marshes; 5) intertidal wetlands; 6) Great Lakes ridge and swale complexes; 7) aquatic resources within Lake Superior Estuarine Research Reserve; 8) Ramsar wetland sites including the Horicon Marsh, Upper Mississippi River Floodplain Wetland, Kakagon and Bad River Slough, Door Peninsula Coastal Wetlands, Chwauke Illinois Beach Lake Plain. The complete Ramsar list is available at <https://rsis.ramsar.org>. At first blush, these appear to be the types of Regional Conditions that the NWP's contemplate as appropriate for region-specific conditions at the discretion of the District Engineer pursuant to the General Conditions contained in the overall NWP regime. However, the Associations note respectfully that for the conditions to be appropriate, these would need to be jurisdictional waters - i.e., "waters of the United States" or WOTUS. We encourage the St. Paul District to review the status of these waters carefully before finalizing this regional condition.

V. Conclusion

We appreciate your ongoing commitment to administering the NWP's in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP's as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.



American Petroleum Institute
Midwest Region

Elizabeth Van Holt
Midwest Region Director
API
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Sincerely,

/s/ Elizabeth Van Holt

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/s/ Amy Emmert

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October 30, 2020

USACE, Vicksburg District,
ATTN: Regulatory Division,
4155 Clay Street,
Vicksburg, Mississippi 39183-3435
Via email to GeneralPermitReissuance@usace.army.mil

To Whom It May Concern:

The Mississippi Energy Institute, American Petroleum Institute ("API"), and the Southeast Oil and Gas Association ("SOGA"), (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Vicksburg District for the state of Mississippi seeking comments on the proposed regional conditions as well as consideration of any additional regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWP) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWP allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWP. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWP through the regional conditioning process as well as district-specific

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Mississippi Regional Conditions, (September 15, 2020), available at https://www.mvk.usace.army.mil/Portals/58/docs/regulatory/publicnotices/MS%20RCs%20PN_signed.pdf?ver=Gld_LkDfM_8EhtM3GHvuaQ%3d%3d

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWP"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).

conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that the USACE should simply REISSUE 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPs [best management practices] 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.”⁵ For additional context, the Associations provide the Executive Summary of our federal comments for your consideration below and Annex I contains a detailed outline of our federal recommendations concerning specific NWPs, conditions, and definitions.⁶

At the district level, we appreciate the Vicksburg District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

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⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

⁶ For a complete set of comments, we refer you to our comments that will be timely filed in www.regulations.gov.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁷

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and

⁷ 85 Fed. Reg. at 57,309.



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its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

The Mississippi Energy Institute's mission is to conduct research and develop coordinated state level policies that support a reliable and expanding energy portfolio that is environmentally responsible; to understand and engage in the national energy debate; and to take advantage of the market opportunities ensuring Mississippi's economic development competitiveness. The Institute is a private organization, and its membership includes companies in oil and gas production, electric power, natural gas transportation/distribution, and manufacturing.

The Southeast Oil and Gas Association exists to represent the public policy interests towards the furtherance and success of the oil and gas exploration/production industry in Mississippi due to its substantial local economic impact. Association members are engaged in oil and gas production or in providing other services into the industry. Sound public policy outcomes are a primary goal of the Association and its work.

II. General Comments on Regional Conditions to Mississippi

The Associations have reviewed the Vicksburg District's request for comment on the appropriateness of regional conditions for Mississippi, noting that no regional conditions are currently proposed - which is essentially a continuation of the status quo given that no regional conditions were proposed in 2017 as well. The Associations generally support regional conditions that are appropriate and narrowly-tailored; however, we also concur with the Vicksburg District's carefully considered position and support the no further regional conditions for Mississippi.

Should any regional conditions be proposed, we would suggest that modification be done through a notice-and-comment rulemaking appropriate to the Administrative Procedure Act ("APA"), which would allow all stakeholders sufficient time to review and provide constructive comments to the proposal.

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is



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considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

III. Conclusion

We appreciate your ongoing commitment to administering the NWP in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

A handwritten signature in blue ink that reads "Patrick Sullivan".

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November 16, 2020

Kansas City District, Missouri State Regulatory Office,
515 East High Street, Suite 202,
Jefferson City, Missouri 65101,
Via email to james.s.reenan@usace.army.mil.

Dear Mr. Reenan:

The American Petroleum Institute (“API”) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers (“USACE”) Kansas City District for the state of Missouri seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE’s overall proposal to reissue and modify the Nationwide Permits (“NWP”) under the Clean Water Act (“proposal”).²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions (“GC”) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE’s comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary

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regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the Kansas City District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

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Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

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To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

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II. General Comments on Regional Conditions in Missouri

API has reviewed the regional conditions proposed for activities in Missouri, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular,

⁶ 85 Fed. Reg. at 57,309.



is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

A. Proposed Missouri Regional Conditions Applicable to All NWPs.

Overall, the 5 districts have reviewed and identified RCs for revisions/removal per the regulatory reform efforts undertaken by the USACE. We support these efforts, including the reduction from 7 RCs to 4 RCs, due to the sufficiency of the NWPs at the national level.

Stream Crossing Previously there was a weblink to the guidelines and we appreciate the transparency and clarity the Districts provide to permittees by having the guidelines specifically included in the RCs for compliance purposes. Housing critical compliance information in a website subject to change without notice and not necessarily preserved in its historical form does not provide the necessary certainty to stakeholders.

2017 RCs 2 and 3 are deleted and we appreciate districts reviewing and identifying RCs for removal that are no longer necessary.

We support the deletion of 2017 RC 6 relating to Special Aquatic Resources.

We support the deletion of 2017 RCs 8-13 due to the sufficiency of the national NWPs. In particular, we support the deletion of RC-8, relating to NWP 12.

Lake of the Ozarks: The applicant must provide a preconstruction notification to the District Engineer for any regulated activity associated with Nationwide Permits 3, 7, 12, 14, 15, 18, 22, 27, 33 and 45 within Lake of the Ozarks. A copy of this notification must also concurrently be sent to Ameren Missouri. Nationwide Permits 2, 13, 16, 19, 25, 29, 31, 35, 36, 39, 41



and 44 are revoked in the Lake of the Ozarks. NWP 1, 9, 10, 11 and 28 are only valid when both Ameren Missouri and the Missouri State Water Patrol have approved the activity. The Corps and Ameren Missouri, regardless of the request to use any Nationwide Permit, may verify the activity under the provisions of Regional General Permit 38M <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/7726>. Additional information on Ameren Missouri and Lake of the Ozarks permit requirements can be found at the following webpage: <https://www.ameren.com/missouri/lake-of-the-ozarks/forms-requirements>. At the national level, we are opposing the division of NWP 12 because we believe NWP 12, NWP C, and NWP D have virtually indistinguishable Impacts under Clean Water Act Section 404 and Rivers and Harbors Act Section 10. However, If the permits are divided, we respectfully reserve the right to challenge as arbitrary and capricious any condition, which without clear environmental justification, is applied to NWP 12 without being equally applied to NWP C and NWP D.

III. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

/s/ Elizabeth Van Holt

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Montana Petroleum Association



November 16, 2020.

Omaha District Regulatory Office in Montana
via email at Montana.Reg@usace.army.mil.

Re: NWP Reissuance

To Whom It May Concern:

The American Petroleum Institute ("API"), Montana Petroleum Association ("MPA"), and Treasure State Resources Association ("TSRA") (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry, heavy construction, and organized labor and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Omaha District for the state of Montana seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 15, 2020, available at

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs," Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWPS"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



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Our position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPs [best management practices] 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.”⁵

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..



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and wetlands with the focus being to ensure that environmental effects of activities authorized by NWP's are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWP's, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWP's authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWP's in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

The Associations and their Interests

MPA represents over 150-member companies involved in all aspects of the oil and natural gas industry. MPA's members include producers, refiners, suppliers, pipeline operators, and transporters, as well as service and supply companies that support all segments of the industry and employ a great number of people in our great state. MPA works with elected officials, business groups, regulatory boards and agencies to promote policies which incentivize revenue generating resource production and opposes rules and regulations which hamper opportunities for future oil and gas opportunities in Montana.

TSRA represents a broad coalition of business and industry, members of organized labor, as well as over twenty other membership organizations who support the responsible use and development of our natural resources.

⁶ 85 Fed. Reg. at 57,309.



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API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP), which affect the oil and natural gas industry.

TSRA represents a broad coalition of business and industry, members of organized labor, as well as over twenty other membership organizations who support the responsible use and development of our natural resources.

General Comments on Regional Conditions to Montana

API, MPA, and TSRA have reviewed the regional conditions proposed for activities in Montana and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

The Associations' specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

Conditions Applicable to NWPs

Wetlands Classified as Peatlands. As part of overall regulatory consistency efforts, we respectfully note suggest using the proposed Colorado definition of 'peatlands,' which is based on the Natural Resources



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Conservation Services: "For the purposes of this requirement, a ~~fen~~-peatland is defined as a ~~ground-water~~ ~~fed~~ wetland with saturated organic soil (greater than or equal to 16 inches in thickness) that is classified as a histosol in the Natural Resources Conservation Service (NRCS) Field Indicators of Hydric Soils in the United States (Version 8.0, 2016). A copy of the document can be obtained from the NRCS at [http://www.nrcs.usda.gov/Internet/ DOCUMENTS/nrcs142p2_053171.pdf](http://www.nrcs.usda.gov/Internet/DOCUMENTS/nrcs142p2_053171.pdf)."

Waters Adjacent to Natural Springs. The last sentence, "Springs do not include drain tile outlets," is new language that has been added but is not consistent across the district. We suggest following North Dakota's example and omitting it, given that the entire provision is also slated for removal in Colorado.

Bank Stabilization Activities.

- This RC previously applied only to NWP 13 but now is moved to this general PCN section for bank stabilization activities. We request clarification that this change only applies to NWP 13 as before and is a reorganizational rather than substantive change. If it is a substantive change, we request environmental justification or explanation of a specific regional need for extending it to all NWPs.
- The national NWP 13 relating to bank stabilization does not include PCNs based on acreage triggers. It is 500 feet or more along the bank, 1 cubic yard or more per running foot as measured along the OHWM or HTL and discharges into special aquatic sites. We believe that acreage is not appropriate for these types of bank stabilization activities that run more linearly and that the 300 linear feet limit should be restored, that both sets of measurements should be provided (per our national comments).
- We also note that Colorado is removing its PCN trigger for bank stabilization and encourage the District to consider whether the PCNs in the national NWPs are sufficient.

Stream Channelization and Relocation Projects

- This is a new modified RC found in Montana but not in North Dakota and South Dakota. We request consistency within a district in terms of stream channelization, or environmental justification for the divergences.

Best Management Practices

While we appreciate the helpful link to a website, we respectfully note that the required enforceable BMPs should be included in a list within the conditions. Websites are subject to change without notice, and records of past content are often not available. Permittees need clear records and certainty.

Similarly, we believe that enforceable BMPs be included here as they apply to Montana specifically rather than providing BMPs for all states without jurisdiction. Again, permittees need clear records and certainty.



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BMPs for all States

With respect to culvert countersink depth, we note that the 'Intermittent' definition is proposed for removal in the national NWP, and we respectfully request it be omitted here and using more general terminology such as jurisdictional streams.

BMPs Specific to Montana

NWP 3 (Maintenance) and NWP 45 (Repair of Uplands Damaged by Discrete Events).

- We recommend a definition of uplands based on the 2020 Navigable Waters Protection Rule.

NWP C (Utility Line and Telecommunications Activities) and NWP D (Utility Line Activities for Water and Other Substances). We support the addition of the trench excavation and backfill provision to NWP C and D. Again, we note that, in the absence of environmental justification, we reserve the right to challenge as arbitrary and capricious any condition which is applied to NWP 12 but not equally extended to NWP C or NWP D.

Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,



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November 14, 2020

Omaha District Regulatory Office
Attn: Matt Wray
Via email at Matt.T.Wray@usace.army.mil

Re: Proposed Regional Conditions for Nebraska Accompanying the NWP Renewal

Dear Mr. Wray:

The American Petroleum Institute (“API”) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers (“USACE”) Omaha District for the state of Nebraska seeking comments on the regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE’s overall proposal to reissue and modify the Nationwide Permits (“NWPs”) under the Clean Water Act (“proposal”).²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions (“GC”) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE’s comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 30, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order (“EO”) 13771, Reducing Regulation and Controlling Regulatory Costs,” Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. (“2017 Review of Energy-Related NWPs”). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



Our unequivocal position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵ For additional context, we provide the Executive Summary of our federal comments for your consideration below and Annex I contains a detailed outline of our federal recommendations concerning specific NWPs, conditions, and definitions.⁶

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

⁶ For a complete set of comments, we refer you to our comments that will be timely filed in www.regulations.gov.



unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWP are no more than minimal.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁷

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to Nebraska

⁷ 85 Fed. Reg. at 57,309.



API has reviewed the regional conditions proposed for activities in Nebraska and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

III. Regional General Conditions (GCs) Applicable to all NWPs within Nebraska

General Condition 32 Pre-Construction Notification Requirements. Regarding point 2, waters adjacent to natural springs, we respectfully note that “Springs do not include drain title outlets” is new language In addition to language found In the proposed North Dakota or Montana regional conditions. We recommend It be deleted to provide consistency with North Dakota.

We support the proposed removal of the PCN requirements relating to NWP 13 (Bank Stabilization) and NWP 16 (Return Water from Upland Contained Disposal Areas).

As indications of streamlining and removing unnecessary requirements, we support the removal of various PCN requirements relating to:

- Taylor Creek (and Its tributaries), Big and Brush Creeks (and tributaries), and Union Creek (and tributaries);
- wild and scenic rivers;
- riffle and pool complexes;



Regarding Best Management Practices (BMPs), we respectfully note that all applicable BMPs should be clearly provided in the USACE's regional conditions for Nebraska. The weblink is a general page, which is subject to change regularly and without notice; therefore, it does not provide clarity to permittees in terms of the required BMPs within Nebraska.

IV. Regional Conditions for the Omaha District required in Montana, Nebraska, North Dakota, South Dakota and Wyoming

A. Nebraska Required Best Management Practices

Like Wyoming, Nebraska should only include the Nebraska specific provisions here, and not include the other state-specific Recommended Conditions. NE only include NE specific comments here and not all the other state-specific RCs.

V. Conclusion

We appreciate your ongoing commitment to administering the NWP in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

/s/ Elizabeth Van Holt

Elizabeth Van Holt
Midwest Region Director
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November 8, 2020

Philadelphia District
U.S. Army Corps of Engineers
Via email to Philadelphiadistrictregulatory@usace.army.mil.

To Whom It May Concern:

The American Petroleum Institute (API) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit comments in response to the U.S. Army Corps of Engineers (USACE) Philadelphia District for the State of New Jersey seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits (NWP) under the Clean Water Act (proposal).²

We fully support the renewal of the 52 NWP and 32 General Conditions (GC) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the United States (WOTUS), NWP allow the USACE to focus resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWP. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's (DE) role in tailoring the NWP through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or no delay.

API's unequivocal position is that the USACE should reissue 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 24, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order (EO) 13771, Reducing Regulation and Controlling Regulatory Costs, January 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, February 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, September 25, 2017. (2017 Review of Energy-Related NWP). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (September 15, 2017).

regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (RHA) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has previously stated previously: “[i]t would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵ For additional context, we provide the Executive Summary of our federal comments for your consideration below and Annex I contains a detailed outline of our federal recommendations concerning specific NWPs, conditions, and definitions.⁶

API appreciates the Philadelphia District's efforts in reviewing and updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (January 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (January 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at 44-45.

⁶ For a complete set of comments, please see API comments that will be timely filed in www.regulations.gov.

regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWP are no more than minimal.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b)). Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁷

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency (EPA) and the USACE's development of CWA regulations including NWPs, which affect the oil and natural gas industry.

⁷ 85 Fed. Reg. at 57,309.

II. General Comments on Regional Conditions to New Jersey

API has reviewed the regional conditions proposed for activities in New Jersey, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive pre-construction notice (PCN) or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

III. Regional Conditions applicable to all NWPs within New Jersey

With respect to Regional General Condition G-1, API is pleased to see the condition is relatively unchanged. However, API respectfully notes that the USACE may be missing an opportunity to delete extra PCN submittal requirements as part of the USACE's overall streamlining efforts, and encourage the Philadelphia District to consider whether opportunities for the additional removal of PCN requirements exist here.

We support as proposed the renewal of the following Regional General Conditions, which reflect only few changes or minor clarifications: G-2; G-3; and G-4.

With respect to G-5 Endangered Species and NMFS, we note that new language is being applied in New Jersey, whereas Delaware has chosen to retain language similar to the "no effect" language from the 2017 New Jersey permits. In the absence of a compelling environmental argument resulting in truly different impacts in New Jersey than in Delaware, we encourage the Philadelphia District to revert to the 2017 language for the current permits, at least until the USACE clarifies their national approach to Endangered Species protection within the NWP framework.

We support as proposed the renewal of the following Regional General Conditions, which reflect only few changes or minor clarifications: G-6 Essential Fish Habitat and G-7 Fish & Wildlife Coordination Act.

Regarding Regional Condition G-8 Designated Critical Resource Waters, we respectfully note that we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without being equally applied to NWP C and NWP D, unless a clear environmental reason for the diversion is articulated.

IV. Regional Conditions applicable to specific NWPs within New Jersey

API supports as proposed the renewal of the regional conditions that reflect only few changes or minor clarifications associated with the following Nationwide Permits: NWP 5 Scientific Measurement Devices; NWP 6 Survey Activities; NWP 7 Outfall Structures and Associated Intake Structures; NWP 10 Mooring Buoys; and NWP 11 for Temporary Recreational Structures.

NWP 12 for Oil and Natural Gas Pipeline Requirements:

- We respectfully note that we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without being equally applied to NWP C and NWP D, unless a clear environmental rationale for the diversion is articulated.
- We take no issue with the revised language in condition (a) as it is consistent with the 2017 requirements; however, we respectfully note that the PCN requirements at the national level should be sufficient. For the USACE to require all activities associated with oil or natural gas pipelines to have PCNs when there are only two PCN triggers in the national framework seems glaringly inconsistent and we strongly encourage the District to streamline condition (a) with the national proposal.
- Regarding condition (b) and the language that "[t]his NWP does not authorize the discharge of any drilling muds that may be generated through such methods as directional boring or drilling." We encourage the USACE to clarify its requirements and provide the full context within the National NWP 12 language (which allows for the remediation of inadvertent returns from drilling fluids, etc). We respectfully note that the proposed language for NWP 12 states, "[t]his NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines." Similarly, the national preamble states, "[f]or 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. 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 United States, then a section 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 requirement for a section 404 permit because it is below the surface and does not involve a discharge of dredged or fill material."

- We support the conditions (c) through (g) as articulated and note that any additional requirements should be open to public comment as required by the Administrative Procedures Act.
- With respect to condition (h), we respectfully note that this condition is more appropriately moved to NWP C.
- We support the conditions (l) and (m) as articulated and note that any additional requirements should be open to public comment as required by the APA.

We support the conditions articulated (which reflect no or only minor substantive changes) and note that any additional requirements should be open to public comment as required by the APA for the following NWPs: NWP 13 Bank Stabilization; NWP 14 Linear Transportation Crossings; NWP 18 Minor Discharges; NWP 23 Categorical Exclusions; NWP 27 Aquatic Habitat Restoration, Enhancement, and Establishment Activities; and NWP 28 Modifications of Existing Marinas;

We support the minor revision of NWP 29 relating to residential developments for consistency with the national proposal.

We support the conditions articulated (which reflect no or only minor substantive changes) and note that any additional requirements should be open to public comment as required by the APA for the following NWPs: NWP 33 Temporary Construction, Access, and Dewatering; NWP 35 Maintenance Dredging of Existing Basins; and NWP 36 Boat Ramps.

Regarding Condition (a) for NWP 39 for Commercial and Institutional Developments, we believe the "any wetland" is too broad and that "jurisdictional wetlands" should be substituted.

We generally support the minor adjustment of NWP 41 Reshaping Existing Drainage and Irrigation Ditches, and respectfully note that any additional requirements should be open to public comment as required by the APA. Additionally, we feel that the qualification "any activity" is overly broad and contrary to USACE's goal of streamlining both NWPs and PCNs. In the absence of environmental justification, we believe the PCNs in the federal NWP should suffice.

Regarding NWP 43 Stormwater Management Facilities, we note that the Philadelphia District is proposing to delete the definition of 'Intermittent' and add a new definition of 'perennial stream' per the Navigable Waters Protection Rule. Should they adopt a new definition of "Intermittent," we encourage it to be based on the final NWP rule.



Regarding NWP C for Electric or Utility Lines, we respectfully note that we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without being equally applied to NWP C and NWP D, unless a clear environmental rationale for the diversion is articulated. With respect to condition (b) and the language that "[t]his NWP does not authorize the discharge of any drilling muds that may be generated through such methods as directional boring or drilling." We encourage the USACE to clarify its requirements and provide the full context within the National NWP 12 language (which allows for the remediation of inadvertent returns from drilling fluids, etc). We respectfully note that the proposed language for NWP 12 states, "[t]his NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines." Similarly, the national preamble states, "[f]or 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. 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 United States, then a section 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 requirement for a section 404 permit because it is below the surface and does not involve a discharge of dredged or fill material."

Regarding NWP D for Utility Line Activities for Water and Other Substances, we respectfully note that we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without being equally applied to NWP C and NWP D, unless a clear environmental rationale for the diversion is articulated. With respect to condition (b) and the language that "[t]his NWP does not authorize the discharge of any drilling muds that may be generated through such methods as directional boring or drilling." We encourage the USACE to clarify its requirements and provide the full context within the National NWP 12 language (which allows for the remediation of inadvertent returns from drilling fluids, etc). We respectfully note that the proposed language for NWP 12 states, "[t]his NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines." Similarly, the national preamble states, "[f]or 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. 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 United States, then a section 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 requirement for a section 404 permit because it is below the surface and does not involve a discharge of dredged or fill material." Additionally, we note that any additional requirements should be open to public comment as required by the APA.

Regarding Regional Conditions for NWP E Water Reclamation and Reuse Facilities, we note that any additional requirements should be open to public comment as required by the APA. Moreover, we note respectfully that the NWP says that the "Corps of Engineers will be soliciting comments to be entered as regional conditions for this NWP as applicable." We note that the purpose of the regional conditions is for the districts to be tailoring the national permits to their unique hydrological conditions and encourage both the Philadelphia District and the USACE headquarters to be cognizant of their roles moving forward.

V. Conclusion

We appreciate your ongoing commitment to administering the NWP in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. As noted above, we support regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes. If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

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November 8, 2020

U.S. Army Corps of Engineers,
Albuquerque District,
ATTN: Stephen Roethle Regulatory Division,
4101 Jefferson Plz NE,
Albuquerque, NM 87109.
E-mail: stephen.r.roethle@usace.army.mil.

Dear Mr. Roethle:

The Western States Petroleum Alliance, the American Petroleum Institute ("API"), and the Western Energy Alliance ("WEA"), (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Albuquerque District for the state of New Mexico seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWPs through the regional conditioning process as well as district-specific

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWPs"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



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conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that it is in the best interest of stakeholders for the USACE to reissue 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act ("CWA") Section 404 impacts and Rivers and Harbors Act of 1899 ("RHA") Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: "It would be more appropriate to have district engineers determine which BMPS [best management practices] 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."⁵

At the district level, we appreciate the Albuquerque District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

⁴ Note that the term "utility line," unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A "utility line" is defined as any 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 message, and internet, radio, and television communication." 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, "internet" added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term "internet" was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..



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We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

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

⁶ 85 Fed. Reg. at 57,309.



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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.

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

Western Energy Alliance represents 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

II. General Comments on Regional Conditions to New Mexico

The Associations have reviewed the regional conditions proposed for activities in New Mexico and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.



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The Associations' specific comments to regional conditions applicable to specific NWP's are limited to certain NWP's of interest to the oil and gas industry.

III. Regional Conditions applicable to all NWP's within New Mexico

Dredge and Fill Activities in Lakes, Intermittent and Perennial Streams, and Special Aquatic Sites. We recommend changing the title to "Lakes, Intermittent and Perennial Streams, and Special Aquatic Sites" to "jurisdictional waters" given that "Intermittent" is proposed for deletion in the federal NWP's and ephemeral waters are exempt under the 2020 Navigable Waters Protection Rule ("NWPR"), and to amending parts (a) and (b) accordingly for consistency.

Individual Water Quality Certification and Pre-Construction Notification. We support leaving this condition unchanged.

Deleted Regional Conditions: We support the deletion of previous Regional Conditions 4 through 7 as part of the USACE's overall streamlining measures.

Fens, Bogs, and Other Peatlands. The substantive provisions for the PCN trigger now refer to peatlands; consequently, references to "fens" and "bogs" should be deleted. We would also request the Albuquerque District consider adopting language similar to that proposed by the Omaha District in Colorado. Their proposed language is as follows: "For the purposes of this requirement, a ~~fen~~ **peatland** is defined as a ~~ground-water-fed~~ wetland with saturated organic soil (greater than or equal to 16 inches in thickness) that is classified as a histosol in the Natural Resources Conservation Service (NRCS) Field Indicators of Hydric Soils in the United States (Version 8.0, 2016). A copy of the document can be obtained from the NRCS at http://www.nrcs.usda.gov/Internet/DOCUMENTS/nrcs142p2_053171.pdf." Finally, the revocation language included in South Dakota is not included in Wyoming, Nebraska, and Colorado. We respectfully suggest deleting it for consistency.

Temporary Fills and Impacts. This newly proposed condition provides a qualified term of "temporary" not to exceed six months unless otherwise approved by the District Engineer. Additionally, Subsection (b) relating to site restoration offers additional best management practices (BMP)-type requirements for site restoration. We offer qualified support for the use of native, noninvasive vegetation but respectfully suggest the addition of "where practicable" or "unless otherwise approved by the District Engineer" to permit flexibility in restoration, and possibly subject to the approval of the District Engineer. Additionally, we believe six months is as short as this term should possibly be, and the opportunity for extension with District Engineer approval is critical to our support.



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Timing and Dewatering: Unless determined to be not practicable by the Corps, no dredged and/or fill material shall be discharged within standing or flowing waters. For perennial or intermittent drainages (e.g. natural or relocated streams, creeks, rivers), this may be accomplished through construction during periods of low flow (winter months) or during the dry season. After "dry season" we respectfully suggest the addition of the following new language "to the extent reasonable. For instance, if long term precipitation forecasts indicate no expected precipitation will occur within the next 14 days, dredge or fill activities could be completed in standing water during that period." We also respectfully suggest the addition of language to note that, "The Corps will take project timing from the permittee also into considerations while making these determinations and provide a mechanism for the permittee to appeal those decisions if necessary.

IV. Regional General Conditions (GCs) applicable to specific NWP within New Mexico

8. Nationwide Permit No. 13 - Bank Stabilization: The proposal adds a PCN trigger beyond the national version of NWP 13, without sufficient environmental explanation for us to offer support in light of overall efforts toward streamlining and consistency. It also offers the possibility of a waiver by the District Engineer upon his conclusion of minimal adverse effects, and we do support the option of a waiver should this condition be maintained. Please note that note 'a' under Additional Information should be renumbered according to the final NWPs - note 'a' regarding suitable fill as a 2017 reference.

V. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.



Western
States
Petroleum
Association



American
Petroleum
Institute



If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

A handwritten signature in blue ink, reading "Catherine Reheis-Boyd".

Catherine Reheis-Boyd
President
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A handwritten signature in black ink, appearing to read "R. Parks III".

Tripp Parks
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Western Energy Alliance
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Denver, CO, 80203
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November 13, 2020

United States Army Corps of Engineers ATTN: CELRB-R
1776 Niagara Street
Buffalo, NY 14207
Via email to: cenan.publicnotice@usace.army.mil

To Whom It May Concern:

The American Petroleum Institute (API) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit comments in response to the U.S. Army Corps of Engineers (USACE) Buffalo District for the State of New York seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits (NWP) under the Clean Water Act (proposal).²

We fully support the renewal of the 52 NWPs and 32 General Conditions (GC) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the United States (WOTUS), NWPs allow the USACE to focus resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's (DE) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or no delay.

API's unequivocal position is that the USACE should reissue 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 29, 2020.

² 85 Fed. Reg. 57,298 (September 15, 2020). Comments due November 16, 2020.

³ Executive Order (EO) 13771, Reducing Regulation and Controlling Regulatory Costs, January 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, February 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, September 25, 2017. (2017 Review of Energy-Related NWPs). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (September 15, 2017).

regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (CWA) Section 404 impacts and Rivers and Harbors Act of 1899 (RHA) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has previously stated previously: “[i]t would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵ For additional context, we provide the Executive Summary of our federal comments for your consideration below and Annex I contains a detailed outline of our federal recommendations concerning specific NWPs, conditions, and definitions.⁶

API appreciates the Buffalo District's efforts in reviewing and updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (January 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (January 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at 44-45.

⁶ For a complete set of comments, please see API comments that will be timely filed in www.regulations.gov.

regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWP are no more than minimal.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b)). Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁷

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency (EPA) and the USACE's development of CWA regulations including NWPs, which affect the oil and natural gas industry.

⁷ 85 Fed. Reg. at 57,309.

II. General Comments on Regional Conditions to New York

API has reviewed the regional conditions proposed for activities in New York, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive pre-construction notice (PCN) or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

Notably, the Buffalo District provided their changes in the form of a very helpful redline document, and we hope other entities will do the same in the future.

Unfortunately, however, the Buffalo District did not seem to take the same active streamlining approach as many other districts. While we find it appropriate they did not make the regional conditions more cumbersome, we find it unfortunate that they did not take advantage of the opportunity to remove unnecessary regional conditions in conjunction with the USACE's mandate for regulatory review, including reducing PCNs where appropriate. We note that the New York District in particular has a number of additional conditions which could have offered ample streamlining opportunities.

Additionally, we appreciate the relative parity in proposed NWP 12, C, and D - although we note that in some places in NWP C and D, the term 'pipeline' has been used where another term now may be more appropriate. Finally, we respectfully note that, in the absence of clear environmental justification, we reserve the right to challenge any condition applied to NWP 12 but not also equally applied to NWP C and NWP D.

III. Regional Conditions applicable to specific NWP

API's specific comments to regional conditions applicable to specific NWPs are as follows:

A. NWP 3 – Maintenance

1. Permit-specific conditions for Buffalo and New York

Regional Condition a - The new PCN for activities proposed under 3.b requires evidence of depths which may not be readily accessible, and therefore should be caveated by "to the extent feasible."

Regional Condition b - This condition uses the broad term "every effort" which we respectfully suggest should be changed to "every reasonable effort" (suggested additional word is underlined for clarity).

B. NWP 5 – Scientific Measurement Devices

Regional Condition c for the New York District includes the addition of a PCN which is not required by the Buffalo District or the federal permit. We request appropriate environmental justification for this condition, or respectfully suggest it be deleted.

C. NWP 6 – Survey Activities

Regional Conditions a and b for the New York District are not required by either the Buffalo District or the Federal NWP System. These should either include appropriate environmental justification or be deleted.

D. NWP 8 – Oil and Gas Structures on the Outer Continental Shelf

We appreciate that the Buffalo and New York Districts did not add further conditions to this permit. We believe this was a very reasonable approach.

IV. Regional Conditions applicable to all NWP's in the Buffalo and New York Districts

A. Condition G-B Culverts

Regarding the Pre-Construction Notification Requirements, we believe GC 32 should suffice for the informational submittal requirements. The list provided seems overly expansive and introduces unnecessary and burdensome paperwork requirements contrary to the overall national approach to streamlining.

Similarly, regarding All Culvert Rehabilitation Requirements, we believe GC 32 should suffice for the informational submittal requirements. The list provided seems overly expansive and introduces unnecessary and burdensome paperwork requirements contrary to the overall national approach to streamlining.

B. GC-C

GC-C is a stringent condition, which notes, "No regulated activity authorized by a Nationwide Permit can cause the loss of areas classified as a bog of fen in the State of New York, as determined by the Buffalo or the New York District Corps of Engineers, due to the scarcity of this habitat in New York State and the difficulty of in-kind mitigation. The Districts will utilize the following document in the classification." We respectfully note that some definitions are defining the various categories of peatlands specifically and believe such clarification is important given the outright prohibition contained in that condition.

C. GC-E

GC-E includes a long list of additional information required for all proposals requiring a PCN beyond the requirements of GC 32. Respectfully, we believe the GC-32 information submittal requirements should suffice without the need for this additional and quite long list of requirements (some of which are unclear and open-ended such as the written narrative under section 4 and details relating to mitigation). GC 32 and GC 23 already include very specific provisions on mitigation which are sufficient and should govern, given the overall national approach to streamlining.

Regarding subcondition 7 on Historic or Cultural Resources and its substantial lists of sub-parts, we respectfully note that other states like Ohio and West Virginia are making the types of information provided a part of helpful information and not mandatory. The requirements in GC 32 and GC 20 should suffice, given the overall national approach to streamlining.

Subcondition 8 on Endangered Species and Essential Fish Habitat and its substantial lists of sub-parts, we respectfully note that the PCN requirements are onerous and contrary to the overall USACE directive to streamline where appropriate. In this case, we believe GC 18 and GC 32 requirements should suffice.



Regarding subcondition 10 concerning the submittal of multiple PCN requirements, we respectfully appreciate the removal of the requirement to provide an additional copy of the application drawing to NOAA. However, we note with concern that five copies of the PCN package submitted for agency coordination seems a bit excessive, particularly in an electronic age. Additionally, this GC seems to relate to GC 31 concerning 408 permissions, and at the federal level, we are recommending no PCNs should be required for GC 31 unless the activity has an underlying PCN trigger. No clear justification has been provided for the PCN here, and it seems contrary to the overall national directive to streamline efforts. Finally, we note that, where previously this condition applied only to a very small set of NWP, it now applies to the entirety of NWPs. In the absence of clear environmental justification, we believe this expansion is unnecessary and contrary to the national USACE directive to streamline.

V. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. As noted above, we support regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes. If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael S. Giaino'.

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A handwritten signature in black ink, appearing to read 'Amy Emmert'.

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November 16, 2020

Mr. Henry Wicker
69 Darlington Avenue
Wilmington, North Carolina 28403,
Via email to: henry.m.wicker.@usace.army.mil.

Dear Mr. Wicker:

The American Petroleum Institute ("API"), represents a broad spectrum of the oil and natural gas industry and we are contethe state of North Carolina seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 29, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs," Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWPS"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).

regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWP, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to North Carolina

API has reviewed the regional conditions proposed for activities in North Carolina, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular,

⁶ 85 Fed. Reg. at 57,309.

is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

North Carolina has taken efforts to review the 2017 RCs and look for ways to removal unnecessary requirements, modify, and consolidate where appropriate.

We appreciate that all activities relating to utility lines are under one section in an easy to find set of provisions but the new proposed NWP 12 only applies to oil and natural gas pipelines not utility lines so this does add confusion in terminology proposed at national level. Clearly the regions (and same with Idaho – still see all of it as utility lines) It also shows how there is no reason for a division when the same requirements can all be kept together under one section. We appreciate the streamlining associated with this RC and others.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

A. Excluded Waters and/or Areas

Sturgeon Spawning Areas. We appreciate the new language which adds additional granularity to this provision.

Limitation of Loss of Stream Bed. We note that this provision is revised by the removal of 300 linear feet by the proposal and the waiver language. We respectfully recommend that the USACE defer to threshold limits set out in specific NWPs rather than a blanket threshold limit for all activities.

Pre-Construction Notification for Loss of Stream Bed Exceeding 0.02 acres. Although this is substantively the same as 2017, the district needs to clarify to which specific NWPs this condition applies. Additionally, this entire condition should be removed from this section applying to all NWPs because it states that if a NWP has specific notification requirements, the requirements of the NWP shall be followed.

Mitigation for Loss of Stream Bed. We appreciate the addition of acreage equivalents. We also respectfully note the helpful addition of the following language, " unless the District Engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse effects of the proposed activity are minimal." We respectfully request the district to defer to the GC 23 mitigation requirements which are sufficient as GC 32 that already requires permittees to include information about proposed mitigation measures. Therefore, without a compelling environmental reason, we do not believe additional conditions are necessary.

Riprap

- Regarding filter cloth, we appreciate the additional flexibility concerning the waiver provision.
- Regarding the placement of riprap on stream banks, we appreciate the deletion of the following provisions as clarifying measures, "3.5.3. The placement of riprap shall be limited to the areas depicted on submitted work plan drawings. 3.5.4. The riprap material shall be clean and free from loose dirt or any pollutant except in trace quantities that would not have an adverse environmental effect. 3.5.5. It shall be of a size sufficient to prevent its movement from the authorized alignment by natural forces under normal conditions. 3.5.6. The riprap material shall consist of clean rock or masonry material such as, but not limited to, granite, marl, or broken concrete."

Culvert Placement. Generally, we appreciate the deletion of certain provisions In this section as streamlining measures.

- For all NWP's that involve the construction/installation of culverts, measures shall be included in the construction/installation that will promote the safe passage of fish and other aquatic organisms. As a streamlining and clarifying measure, we appreciate the deletion of this language: "The dimension, pattern, and profile of the stream above and below a pipe or culvert should not be modified by altering the width or depth of the stream profile in connection with the construction activity. The width, height, and gradient of a proposed culvert should be sufficient to pass the average historical low flow and spring flow without adversely altering flow velocity. Spring flow is the seasonal sustained high flow that typically occurs in the spring. Spring flows should be determined from gage data, if available. In the absence of such data, bank-full flow can be used as a comparable indicator." We believe the new language is sufficient.
- The width of the culvert shall be comparable to the width of the stream channel. If the width of the culvert is wider than the stream channel, the culvert shall include multiple culvert boxes/pipes, baffles, benches and/or sills to maintain the width of the stream channel. A waiver from this condition may be requested in writing; this request must be specific as to the reason(s) for the request. The waiver will be issued if it can be demonstrated that it is not practicable or necessary to include baffles, benches or sills and the design would result in less impacts to the aquatic environment. We appreciate the deletion of the unnecessary provisions, and also appreciate the addition of the helpful diagrams.

Utility Lines. We appreciate the removal of the unnecessary provision, which streamlined this provision from 14 subsections to only 5.

- Any permanently maintained corridor along the utility right of way within forested wetlands shall be



considered a loss of aquatic function. A compensatory mitigation plan will be required for all such impacts associated with the requested activity if the activity requires a PCN and the cumulative total of permanent conversion of forested wetlands exceeds 1/10-acre, unless the District Engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse effects of the proposed activity are minimal. In the first sentence, we appreciate the change to "loss of aquatic function" from the previous language. However, even loss of aquatic function is contrary to the proposal that makes the argument of temporary impacts and conversion to other types of wetlands (e.g., scrub-shrub wetlands) is not permanent impact. We respectfully ask the District to reconcile this provision with the Corps Headquarters' proposal and decision documents regarding impacts of forested wetlands along right of way corridor. In terms of the second sentence and in the absence of compelling environmental justification, we respectfully request the district to defer to the GC 23 requirements. We respectfully note that GC 32 already requires information to be submitted regarding proposed mitigation measures and believe those vectors are sufficient.

- When directional boring or horizontal directional drilling (HDD) under waters of the United States, including wetlands, permittees shall closely monitor the project for hydraulic fracturing or "fracking." **Any discharge from hydraulic fracturing or "fracking" into waters of the United States, including wetlands, shall be reported to the appropriate Corps Regulatory Field Office within 48 hours. Restoration and/or compensatory mitigation may be required as a result of any unintended discharges.** (emphasis added). The highlighted language is overbroad and needs to follow the federal proposal language that the Corps does not regulate the discharge from any hydraulic fracturing into WOTUS but the remediation of inadvertent returns of drilling fluids to WOTUS through sub-soil fissures or fractures. The federal proposal at p. 57,384 states: "This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines." Similarly, the federal proposal at p. 57,325 also states, "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. 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 United States, then a section 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 requirement for a section 404 permit because it is below the surface and does not involve a discharge of dredged or fill material. The entry and exit points for the horizontal directional drilled utility line would have to be restored after construction is completed because of the other provisions of NWP 12."
- Temporary Access Fills. The permittee shall submit a PCN to the District Engineer prior to commencing the activity if the activity will involve the discharge of dredged or fill material into more than 1/10-acre of wetlands or 0.02 acres of stream channel for the construction of temporary access fills and/or temporary road crossings. The PCN must include a restoration plan that thoroughly describes how all temporary fills will be removed, how pre-

project conditions will be restored, and include a timetable for all restoration activities. In the past, this provision was specific to NWP 12 and now seems to apply to all activities relating to temporary road crossings/temporary access fills. We respectfully request that the specific activities to which this applies should be specified. Additionally, we respectfully note that, in the absence of specific environmental justification, we reserve the right to challenge as arbitrary and capricious any condition applied to NWP 12 but not equally applied to NWP C and NWP D. Additionally, we appreciate the clarification of 0.02 acres but respectfully request that Impacts should be expressed in both linear feet and acreage, and encourage both numbers to be listed here.

Federal Navigation Channel Setbacks. We appreciate the removal of 2017 RC 3.12.2 as part of an overall streamlining effort.

B. Regional Conditions Applicable to Specific NWPs.

As part of an overall streamlining effort, we respectfully note that 23 RCs for specific NWPs have been reduced to 11, which generally add clarity. We appreciate that the district has taken the effort to assess and identify specific RCs for removal, which we appreciate. Of note, we appreciate the removal of the NWP 12 specific RC 4.5, which contained 14 subparts.

NWP 3. In designated trout watersheds, a PCN is not required for impacts to a maximum of 0.02 acres for temporary dewatering) of streams and waterbodies when conducting maintenance activities. Minor deviations in an existing structure's configuration, temporary structures and temporary fills are authorized as part of the maintenance activity. In designated trout watersheds, the permittee shall submit a PCN (see Regional Condition C.3 above and General Condition 32) to the District Engineer prior to commencing the activity if; 1) impacts (other than temporary dewatering to work in dry conditions) to streams or waterbodies exceed 0.008 acres; 2) temporary impacts to streams or waterbodies associated with dewatering to work in dry conditions exceeds 0.02 acres; 3) the project will involve impacts to wetlands; 4) the project involves the replacement of a bridge or spanning structure with a culvert or non-spanning structure in waters of the United States; or 5) the activity will be constructed during the trout waters moratorium (October 15 through April 15)

- The first sentence is new and appears to now limit this RC to designated trout watersheds and we appreciate this level of granularity.
- We would respectfully request that, consistent with our federal comments, measurements should be provided in both linear feet and acreage.
- We appreciate the removal of the additional PCN triggers under RC 4.2.2 and RC 4.2.3.

NWP 5. We appreciate the addition of the new PCN requirement in lieu of the prohibition against weirs and flumes from the 2017 Regional Conditions.

NWP 13. We appreciate the significant reduction in conditions for this NWP, and appreciate the removal of of the general restoration plan requirement. However, we notice that references to linear feet have been changed to acreage. Per our federal comments, we respectfully request measurements In both linear feet and acreage be provided.

with dewatering to work in dry conditions exceed 0.02 acres; or 3) the activity will be constructed during the trout waters moratorium (October 15 through April 15).

NWP 14. We support the deletion of the additional PCN requirement in previous condition 4.8.5. Additionally, however, we respectfully note that Instead of 60 linear feet and 150 linear feet for temporary dewatering, acres have been replaced and we request both measurements be listed for permittee convenience.

NWP 18. We appreciate the removal of 4.9.1 and support this change.

III. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

/s/ David McGowan

David McGowan



American
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November 16, 2020

Omaha District Regulatory Office in North Dakota
Via email to: CENWO-ODR-ND@usace.army.mil.

To Whom It May Concern:

The North Dakota Petroleum Council, the American Petroleum Institute (“API”), and the Western Energy Alliance (collectively, “The Associations”) together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers (“USACE”) Omaha District for the state of North Dakota seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE’s overall proposal to reissue and modify the Nationwide Permits (“NWPs”) under the Clean Water Act (“proposal”).²

The Associations fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions (“GC”) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE’s comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 30, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order (“EO”) 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. (“2017 Review of Energy-Related NWPs”). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



Our position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..



regional conditions as authorized by the DEs may be added to NWP to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWP are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been

⁶ 85 Fed. Reg. at 57,309.



constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP's), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to North Dakota

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. API has reviewed the regional conditions proposed for activities in North Dakota, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWP's are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

The Associations' specific comments to regional conditions applicable to specific NWP's are limited to certain NWP's of interest to the oil and gas industry.

A. Regional Conditions applicable to all NWP's in North Dakota

Pre-Construction Notification Requirements Applicable to All NWP's:

- Wetlands Classified as Peatlands:
 - We support the combining of 2017 RC 1 and 2017 RC 2.
 - However, as part of regulatory consistency, we note that this definition of peatlands is different from the 2017 NWP's and the one proposed in Colorado (which is also partly in Omaha District). We encourage the use of the Colorado definition, which is also based on the Natural Resources Conservation Series (NRCS): "For the purposes of this requirement, a peatland is defined as a wetland with saturated organic soil



(greater than or equal to 16 inches in thickness) that is classified as a histosol in the Natural Resources Conservation Service (NRCS) Field Indicators of Hydric Soils in the United States (Version 8.0, 2016). A copy of the document can be obtained from the NRCS at [http://www.nrcs.usda.gov/Internet/ DOCUMENTS/nrcs142p2_053171.pdf](http://www.nrcs.usda.gov/Internet/DOCUMENTS/nrcs142p2_053171.pdf)."

- Across the Omaha district, we respectfully note that revocation language is not included for Wyoming, Nebraska, and Colorado while included for North Dakota, South Dakota, and Montana. We respectfully suggest that out of consistency, the Wyoming/Nebraska/Colorado model be followed.
- **Bank Stabilization Activities:**
 - We note that this RC originally applied only to NWP 13, but is now moved into the general PCN section for bank stabilization. We request clarification that this only applies to NWP 13 as before, or environmental justification for extending it to all NWPs.
 - The national NWP 13 relating to bank stabilization does not include PCNs based on acreage triggers. It is 500 feet or more along the bank, 1 cubic yard or more per running foot as measured along the OHWM or HTL, and discharges into special aquatic sites. We believe that acreage is not an appropriate measurement for bank stabilization activities that run more linearly, and request that both acreage and linear feet measurements be provided.
 - Finally, we believe that the current PCN triggers suffice unless a specific regional need is identified. These seem to be more general requirements without clear justification.
 - We also appreciate that while we believe additional PCN is not necessary, we support the district further streamlining the RC to make it more granular for specific activities.

B. Best Management Practices

Best Management Practices is new section. Since these practices are required and enforceable conditions, we request that the district clearly provide all RCs applicable to North Dakota in one document rather than merely link to general website that is subject to change at any time without notice or record of past content. Permittees need regulatory certainty with terms that apply.

C. Omaha District Regional Conditions Best Management Practices for North Dakota

We respectfully believe that North Dakota is over inclusive in providing RCs for all applicable states. It would be clearer if like Wyoming, the only included enforceable conditions were those applicable to the states in question.



We also respectfully encourage the Omaha District to work with the Albuquerque District regarding regional consistency, particularly as highlighted below.

Minimum Culvert Width

- In stream channels the culvert opening width of a stream crossing shall not be less than the mean bank to bank width as measured from the ordinary high water mark in the affected stream reach. In stable stream channels, the ordinary high water mark (OHWM) is often found at the point where over-bank flow begins during a flood event. In incised stream channels that do not frequently access a floodplain or upper terrace, the OHWM is generally located within the entrenched channel. The OHWM may be identified by observing indicators such as a distinct change in slope, a change in vegetation characteristics, or a change in sediment characteristics, see 33 CFR 328.3(e).
 - This is a new requirement for North Dakota for minimum culvert widths. This is identical language from 2017 South Dakota RC but, interestingly, South Dakota has chosen not to include it in its 2020 proposal. We therefore respectfully request it be omitted from the final conditions for North Dakota.
 - Additionally, the CFR citation references the pre-2020 WOTUS rule provision related to the definition of OHWM. There is no 328.3(e) in 2020 WOTUS rule. To keep it neutral, we should recommend this reference be deleted. If a general reference is needed, a simple citation to the OHWM in 33 CFR Part 328 should suffice.

Spawning Areas. We note the similarity of this condition to the 2017 RC, and support the proposed removal of the specific prohibitions on the Red River of the North.

III. Conclusion

We appreciate your ongoing commitment to administering the NWP in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.



We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

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American Petroleum Institute
Ohio



November 14, 2020

U.S. Army Corps of Engineers, Huntington District
Attn: CELRH-RD (Teresa Spagna)
502 Eighth Street
Huntington, West Virginia 25701-2079
Via email to: Teresa.d.spagna@usace.army.mil

RE: Comment Request on Regional Conditions for the State of Ohio.

Dear Ms. Spagna:

The American Petroleum Institute ("API"), and the Ohio Oil and Gas Association (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Huntington District working in concert with the Buffalo, Louisville, and Pittsburgh Districts ("Districts") for the state of Ohio seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits ("NWP") and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 30, 2020, available at <https://www.lrh.usace.army.mil/Missions/Regulatory/Public-Notices/Article/2367033/2020-nationwide-permits-ohio/>

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.F

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs," Jan. 20, 2017 ("EO 13771"). EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017 ("EO 13777"). EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017 ("EO 13783"). Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017 ("2017 Review of Energy-Related NWPS"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 33,470 (July 20, 2017), 82 Fed. Reg. 43,314 (Sept. 15, 2017) (extension of the comment period) ("DOD Regulatory Reform Task Force").



district engineer's ("DE") role in tailoring the NWP through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act ("CWA") Section 404 impacts and Rivers and Harbors Act of 1899 ("RHA") Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: "It would be more appropriate to have district engineers determine which BMPS [best management practices] 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."⁵ For additional context, the Associations provide the Executive Summary of our federal comments for your consideration below and Annex I contains a detailed outline of our federal recommendations concerning specific NWPs, conditions, and definitions.⁶

At the district level, we appreciate the Districts' efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

⁴ Note that the term "utility line," unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A "utility line" is defined as any 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 message, and internet, radio, and television communication." 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and the USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, "internet" added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term "internet" was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45.

⁶ For a complete set of comments, we refer you to our comments that will be timely filed in www.regulations.gov.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁷

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

The American Petroleum Institute (API) is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. In Ohio, API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you

⁷ 85 Fed. Reg. at 57,309.



know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP's), which affect the oil and natural gas industry.

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.

II. General Comments on Regional Conditions within Ohio

The Associations have reviewed the regional conditions proposed for activities in Ohio, and, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of the Districts' efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. At the same time, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWP's are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

The Associations' specific comments to regional conditions applicable to specific NWP's are limited to certain NWP's of interest to the oil and gas industry.

A. Regional Conditions applicable to specific NWP's within Ohio

Overall, we appreciate the narrower list of NWP-specific RCs that the Districts are proposing as well as the proactive steps the Districts have taken to review, identify, modify, add, and/or removal regional conditions as appropriate. The Associations' specific comments to regional conditions applicable to specific NWP's are as follows:

Regional Condition applying to NWP 2 (Structures in Artificial Canals), Regional Condition applying to NWP 23 (Approved Categorical Exclusions), Regional Condition applying to NWP 29 (Residential Developments), Regional Condition applying to NWP 39 (Commercial and Institutional Developments), Regional Condition applying to NWP 43 (Stormwater

Management Facilities), Regional Condition applying to NWP 53 (Removal of Low-Head Dams), and NWP 54 (Living Shorelines) are revised from 2017 regional conditions and are now proposed with no regional conditions. Previous PCN requirements are removed in entirety. We are supportive of the Districts' careful review and removal of terms with unnecessary paperwork requirements for NWPs designed for activities with minimal impacts.

Regional Conditions applying NWP 3 (Maintenance) are proposed with some revisions to the 2017 language. Overall, this regional condition proposes to delete a PCN requirement for certain Section 10 waters with an additional requirement for a restoration plan as well as a PCN requirement for all activities in the Ohio River and the Muskingum River. We appreciate the removal of these requirements and the Districts' efforts to reduce unnecessary paperwork for activities with minimal impacts. Regional conditioning is an important part of the NWP process and adding appropriate conditions for protecting region-specific aquatic resources is a function delegated to the DEs. To that end, the Districts also propose to add a new PCN requirement for activities in the navigation channels of Section 10 navigable waters and federal harbors in Lake Erie.

The Districts also include five activities for PCN triggers in addition to the national NWP 3 requirements and we ask the Districts to review these requirements and look for opportunities to further streamline these PCN requirements where appropriate. Notwithstanding this general comment, we have the following specific comments: 1) the first provision relating to stream channel modification should incorporate by reference jurisdictional waters or general references to WOTUS regarding tributaries and ditches; 2) with the second provision, we appreciate the clarification with the change of the word "structure" to "crossing" in the second activity and we also ask for the 2017 waiver language for this section to be restored: "unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environment effects;" and 3) with the fourth provision, the discharge metric has been changed from 10 cubic yards to 25 cubic yards and we appreciate this revision that will remove PCN triggers for minor smaller discharges with minimal impacts.

Regional Conditions applying to the proposed NWPs 12, C, and D are proposed with the same PCN required for all permanent conversion of scrub/shrub and forested wetlands greater than 1/10 acre per single and complete project. Additional 2017 requirements are also streamlined with the removal of 3 provisions. We also appreciate the additional clarifying language limiting this PCN trigger "per single and complete project." This same PCN language is added to the proposed NWPs C and D which again shows that there is not much of a difference between the 3 NWPs and that NWP 12 relating to utility line activities should remain as is (note the proposed NWP 12 regional condition's title still states utility line activities and not oil and natural gas pipelines). However, the regional condition for proposed NWP 12 also includes a provision prohibiting the placement of manholes in wetlands but this same CWA-type requirement that is appropriate for all utility line activities is left out for proposed NWPs C and D where it should be required.⁸

⁸ Note the regional conditions are developed by Portland District for the state of Oregon states: "Manholes placed in streams or other waterways require specific approval by the District Engineer."

Regional Condition applying to NWP 13 (Bank Stabilization) is proposed with PCNs for four activities including two new activities and one provision applying to all activities in the Ohio River and the Muskingum River is revised. We appreciate the revision of one PCN requirement from applying broadly to all activities on the Ohio River to more specific activities within 2,000 feet of designated arrival points of locks and dams on the Ohio River.

Two provisions relating to Lake Erie, Sandusky Bay, and Maumee Bay require additional verification and documentation to be submitted to the DE. We find that these are additional unnecessary requirements for NWPs that are intended to have minimal environmental impacts. Given limited agency resources, such conditions are better suited for individual permits. The Associations however, appreciate that the DE can waive the second provision with a written determination and we would request the same requirement to be added to the first provision also.

Regional Condition applying to NWP 14 (Linear Transportation Projects) is proposed with a revised PCN condition that provides more granularity than the previous regional condition that broadly apply to all activities in Section 10 waters. We appreciate the Districts' efforts toward revising overly broad conditions and instead proposing a condition that is closely aligned with the needs of regional-specific aquatic resources. One additional unnecessary requirement is removed which we appreciate and we simply identify an additional leftover "and" that needs to be removed as a result of this change.

Regional Condition applying to NWP 18 (Minor Discharges) includes verification and documentation requirements similar to NWP 13 and we again find that these are additional unnecessary requirements for NWPs that are intended to have minor environmental effects. Given limited agency resources, such conditions are better suited for individual permits. We ask for similar DE waiver language to be added here.

B. Regional General Conditions ("Regional GCs") Applicable to all NWPs within Ohio

The Districts have reviewed the regional general conditions applying to all NWPs and we appreciate efforts to clarify and streamline language where appropriate.

Regional GC 5(a) (Waters of Special Concern) includes a streamlined paragraph on removal of trees related to habitats for 2 federally listed bats and language such as removal of definitions for "roosting, foraging, and traveling habitat" is removed. The Districts should further modify this provision to clarify that the removal-of-trees PCN trigger applies to habitats as related to the 2 federally listed species of concern. Otherwise, on its own, the first sentence appears to suggest that a PCN is required for removal of trees that are 3 inches or over in diameter at breast height for any regulated activity in Ohio regardless of any connection to the threatened or endangered species in question.

Regional GC 6 (PCN submittals) has been significantly revised with certain information submittal requirements moved to the "Helpful Information for Compliance with the NWP General Conditions" section and language in Sections 6(a) and 6(b) provide that "all relevant information must be submitted with the information. We appreciate the "Helpful Information"



Section and we believe having all this information in one place will aid permittees with preparation of the NWP documents. However, it is important to note that the permittees need clear direction in understanding the components of a PCN that are needed to deem a PCN complete. Open-ended terms in Regional GC 6 such as “all relevant information” will add inconsistencies in the PCN review process with USACE staff having wide discretion in determining when a PCN is deemed completed. This is contrary to the direction set out by the USACE and we ask the Districts to have the USACE-approved Form ENG 6082 (which was developed to provide complete information needed for NWP PCNs and assist the USACE with timely and streamlined evaluations of permittees’ PNCs) to serve as the relevant requirements necessary for PCN submittals with other provisions being optional.

We also request that the Districts are clear that the provisions under the “Helpful Information” section are intended to provide helpful contact information and that other submittal recommendations are strictly optional and will not be enforceable regional conditions for compliance or used as a basis for declaring PCNs as incomplete.

Regional GC 7 (Invasive Species) is a new requirement and includes the language “where practicable.” We recognize the value in precluding the establishment of non-native invasive species relating to the restoration of disturbed areas but conditions that can occur outside of a permittee’s control, we appreciate the flexibility provided with the phrase “where practicable.”

III. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction’s environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE’s guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.



American Petroleum Institute
Ohio



Sincerely,

A handwritten signature in blue ink that reads 'Chris Zeigler'.

Chris Zeigler
Executive Director
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A handwritten signature in black ink that reads 'Amy Emmert'.

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November 13, 2020

U.S. Army Corps of Engineers CESWT-RO
2488 E. 81st Street
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Via Email: ceswt-ro@usace.army.mil

To Whom It May Concern:

The Petroleum Alliance of Oklahoma, American Petroleum Institute (“API”), and the Association of Oil Pipe Lines (collectively, “The Associations”) together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers (“USACE”) Tulsa District for the state of Oklahoma seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE’s overall proposal to reissue and modify the Nationwide Permits (“NWP”) under the Clean Water Act (“proposal”).²

The Associations fully support the renewal of the 52 Nationwide Permits (NWP) and 32 General Conditions (“GC”) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE’s comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWP allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWP. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWP through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order (“EO”) 13771, Reducing Regulation and Controlling Regulatory Costs,” Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. (“2017 Review of Energy-Related NWP”). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



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Our unequivocal position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the Oklahoma District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..



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unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWP are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

The Petroleum Alliance of Oklahoma is the only trade association in Oklahoma to represent all sectors of the state's oil and natural gas industry. Representing more than 1,300 companies and 1,700 individual members, the Petroleum Alliance membership includes oil and natural gas producers, service providers to the oil and natural gas industry, midstream companies, refiners and other associated businesses. Our members include companies of all sizes, ranging from small, family-owned companies to large, publicly traded corporations.

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that

⁶ 85 Fed. Reg. at 57,309.



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support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP's), which affect the oil and natural gas industry.

The Association of Oil Pipe Lines is a nonprofit national trade association that represents the interests of oil pipeline owners and operators before regulatory agencies, the judiciary, and the United States Congress. AOPL's members operate pipelines that carry approximately 97% of the crude oil and petroleum products moved by pipeline in the United States, extending over 218,000 miles in total length. These pipelines safely, efficiently, and reliably deliver more than 21 billion barrels of crude oil and petroleum products each year. AOPL members bring crude oil to the nation's refineries, natural gas liquids such as ethane, butane, propane and carbon dioxide to manufacturers and industrial users, jet fuel to airports, and petroleum products to our communities, including all grades of gasoline, diesel, home heating oil, kerosene, propane and biofuels. AOPL members routinely rely on NWP's, particularly NWP 12, for the construction, maintenance, and repair of their pipelines and related infrastructure. NWP's are crucial for the ability of oil pipelines to efficiently develop new pipelines as well as maintain the safe and efficient operation of pipeline systems.

II. Oklahoma Regional Conditions

The Associations have reviewed the public notice issued by the Tulsa District inviting comments on the need for regional conditions. The Associations support the Tulsa District office proposing no further regional conditions. It is important to note that, to the extent any commenters propose the addition of regional conditions, the Associations believe that the 52 NWP's and 32 General Conditions provide sufficient protection to ensure there will be minimal impacts, and therefore, no additional regional conditions are needed.

NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWP's are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.



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III. Conclusion

We appreciate your ongoing commitment to administering the NWP's in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP's as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. As stated, the Associations support the Tulsa District's proposal not to add regional conditions. If new conditions are nevertheless considered, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

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November 16, 2020

U.S. Army Corps of Engineers
Regulatory Branch
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Dear Ms. White

The Western States Petroleum Alliance ("WSPA"), and the American Petroleum Institute ("API") (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Portland District for the state of Oregon seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 15, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWPs"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).

district engineer's ("DE") role in tailoring the NWP's through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act ("CWA") Section 404 impacts and Rivers and Harbors Act of 1899 ("RHA") Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ The USACE has no jurisdiction over the substance conveyed within the utility line because its CWA jurisdiction over NWP's is confined to authorizing the activities related to the discharge of dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: "It would be more appropriate to have district engineers determine which BMPs [best management practices] 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."⁵

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWP's on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

⁴ Note that the term "utility line," unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A "utility line" is defined as any 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 message, and internet, radio, and television communication." 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, "internet" added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term "internet" was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related wNWP's Review at pp. 44-45..

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

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.

⁶ 85 Fed. Reg. at 57,309.

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to Oregon

The Associations have reviewed the regional conditions proposed for activities in Oregon and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

The Associations' specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

A. Regional Conditions for all 2020 NWPs

Aquatic Resources of Special Concern. Pre-construction notification to the District Engineer is required for all activities proposed in waters of the U.S. within an aquatic resource of special concern. Aquatic resources of special concern are resources that are difficult to replace, unique, and/or have high ecological function. For the purpose of this regional condition, aquatic resources of special concern are native eel grass (*Zostera marina*) beds, mature forested wetlands, bogs, fens, vernal pools, alkali

wetlands, wetlands in dunal systems along the Oregon coast, estuarine wetlands, Willamette Valley wet prairie wetlands, marine gardens, marine reserves, kelp beds, and rocky substrate in tidal waters.

- The terms in this provision are overly broad and do not provide any definitions or assistance to permittees in determining which aquatic resources qualify in this region. For example, states like Colorado provide specific definitions of wetlands. Others provide maps to identify areas where this would apply.
- Rectifying this is particularly important since PCNs are required for all of these aquatic resources and this appears to apply to all activities.
- The District should consider whether there are some NWP (like NWP 20, which is often used in emergency scenarios) where time is of the essence and the additional PCN would cost critical time.

Cultural Resources and Human Burials-Inadvertent Discovery Plan: In addition to the requirements in NWP GCs 20 and 21, the permittee shall immediately notify the District Engineer if, at any time during the course of the work authorized, human burials, cultural items, or historic properties, as defined by the National Historic Preservation Act and Native American Graves Protection and Repatriation Act, are discovered. The permittee shall implement the following procedures as outlined on the Inadvertent Discovery Plan to be posted on the Portland District Regulatory website. Failure to stop work immediately and until such time as the District Engineer has coordinated with all appropriate agencies and Native American tribes, and complied with the provisions of 33 CFR 325 (Appendix C), the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, and other pertinent regulations could result in violation of state and federal laws. Violators may be subject to civil and criminal penalties.

- This is new language and to provide clear direction and fair notice to permittees, this plan should be included in this RC document if these are required enforceable terms with criminal penalties.

We support the deletion of 2017 RCS 4 and 5 (in-water work and EFH).

We also support the deletion of the second note from 2017, regarding the removal of materials placed in an upland site.

Mechanized Equipment: In addition to the requirements in NWP GC 11, permittee shall implement the following practices to prevent or minimize impacts to the aquatic environment from mechanized equipment:

- We support the deletion of the requirements regarding using existing roads, paths, and construction pads, the limitations concerning temporary mats, and the staging of equipment.

We support the deletion of the 2017 RC 11 on stormwater management.

Erosion Control: During construction and until the site is stabilized, the permittee shall ensure all practicable measures are implemented and maintained to prevent erosion and runoff. Temporary stockpiles of excavated or dredged material shall be stabilized to prevent erosion. Once soils or slopes have been stabilized, permittee shall completely remove and properly dispose of or re-use all non-biodegradable components of installed control measures.

- We support the deletion of the note concerning the DEQ erosion and sediment control measures, as well as best practices. Generally, we do not believe enforceable terms should be placed on a website, which is subject to change without notice and where historic content is not readily available. We encourage the district to clearly spell out any enforceable terms in the RCs themselves.

B. Regional Conditions for Specific NWPs

NWP # 6: 2. Permittee shall isolate all in-stream exploratory trenching from flowing water.

- We support the deletion of the provision concerning explosives.

NWP #12: We support the deletion of the 2017 conditions relating to utility lines.

NWP # 29: Pre-construction notification must identify if the project is for the construction or expansion of a single residence, a multiple unit/subdivision residential development, or a phased residential development. For proposed projects within or associated with multiple unit/subdivision residential development or a phased residential development, the pre-construction notification must identify any known previous Department of the Army authorizations received for the multiple unit/subdivision residential development or a phased residential development.

- We support the deletion of the following language: "The loss of waters of the U.S. associated with the construction or expansion of a single residence including attendant features (e.g., utility lines, roads, yards, etc) shall not exceed one-fourth (1/4) acre."

NWP # 33: Pre-construction notification to the District Engineer is required prior to commencing all activities conducted in waters of the U.S. (i.e. Section 10 and 404 waters).

- We support the deletion of the additional language concerning restoration plans.

We support the deletion of the 2017 conditions relating to NWP 52.

NWP D (Utility Line Activities for Water and Other Substances): Manholes placed in streams or other waterways require specific approval by the District Engineer.

III. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse

environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,



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November 13, 2020

U.S. Army Corps of Engineers, Baltimore District
Attn: Mrs. Amy E. Elliott
State College Field Office
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State College, PA 16801

Submitted by email to: amy.h.elliott@usace.army.mil

RE: Comment Request on Regional Conditions for the Commonwealth of Pennsylvania.

Dear Mrs. Elliott:

The American Petroleum Institute ("API") and the Pennsylvania Independent Oil and Gas Association ("PIOGA"), collectively "The Associations," together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Baltimore, Pittsburgh, and Philadelphia Districts ("Districts") for the Commonwealth of Pennsylvania seeking comments on the proposed regional conditions and the need for additional regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act and Rivers and Harbors Act of 1899 ("proposal").²

We fully support the renewal of the 52 Nationwide Permits ("NWP") and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWP allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 30, 2020, available at <https://www.nap.usace.army.mil/Portals/39/docs/regulatory/publicnotices/SPN-20-62-20200930.pdf>

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017 ("EO 13771"). EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017 ("EO 13777"). EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017 ("EO 13783"). Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017 ("2017 Review of Energy-Related NWP"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 33,470 (July 20, 2017), 82 Fed. Reg. 43,314 (Sept. 15, 2017) (extension of the comment period) ("DOD Regulatory Reform Task Force").



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We appreciate the USACE's regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWP. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that the USACE should reissue 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act ("CWA") Section 404 impacts and Rivers and Harbors Act of 1899 ("RHA") Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: "It would be more appropriate to have district engineers determine which BMPS [best management practices] 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."⁵

At the district level, we appreciate the Districts' efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory

⁴ Note that the term "utility line," unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A "utility line" is defined as any 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 message, and internet, radio, and television communication." 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and the USACE have steadfastly come to rely on this definition, which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, "internet" added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term "internet" was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45.

consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

⁶ 85 Fed. Reg. at 57,309.



I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP), which affect the oil and natural gas industry.

The Pennsylvania Independent Oil & Gas Association ("PIOGA") is the largest and oldest association representing oil and natural gas interests in Pennsylvania. PIOGA's nearly 400 members include independent oil and natural gas producers engaged in producing oil and natural gas from both conventional and unconventional (organic shale) formations as well as pipeline owners and operators subject to the Clean Water Act (CWA) and its implementing regulations. Accordingly, PIOGA and its members have direct and substantial interests in USACE's overall proposal to reissue and modify the NWPs under the Clean Water Act and particularly in USACE's proposals concerning regional conditions and the need for additional regional conditions.

II. General Comments on Regional Conditions to Commonwealth of Pennsylvania

We have reviewed the regional conditions proposed for activities in Pennsylvania, and we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines activities and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the regional-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of the USACE (notwithstanding legal requirements).

Generally, we are supportive of the Districts' efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. At the same time, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage

threshold triggers. NWP's are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWP's are limited to certain NWP's of interest to the oil and gas industry.

Enclosure 1 includes new language under Section 1(B)(a) stating that the suspension of the NWP's listed in Part 1.A. is not applicable within the Commonwealth of Pennsylvania geographic boundaries for "[a]reas within Pittsburgh District's area of responsibility in the Commonwealth of Pennsylvania." PA-SPGC-5 is applicable within the Commonwealth of Pennsylvania, for specifically identified activities and it continues to be in effect with the expiration date of June 30, 2021. PA-SPGC-5 has been successful and resulted in state oversight of general permits that result in minimal to no impacts to streams and wetlands and it is not clear why this new language with a carve-out for Pittsburgh is being added. We ask for clarification and also, for the district to revert to the 2017 language relating to the suspensions without this additional language.

A. Regional Conditions applicable to specific NWP's within the Commonwealth of Pennsylvania

Overall, we appreciate the narrower list of NWP-specific RCs that the Districts are proposing as well as the proactive steps the Districts have taken to review, identify, modify, add, and/or removal regional conditions as appropriate. Our specific comments to regional conditions applicable to specific NWP's are as follows:

Regional Condition applying NWP 3 (Maintenance) is proposed with a removal of a PCN requirement. The Districts propose to delete a PCN requirement for activities when the regulated discharge of dredged and/or fill material involves the use of equipment to remove material from or move material across a stream channel as part of the proposed activity for repair, rehabilitation, or replacement. We appreciate the Districts' efforts to reduce unnecessary paperwork for activities with minimal impacts.

Regional Condition applying to NWP 5 (Scientific Measurement Devices) is proposed with one PCN removed for any activity proposing the discharge of greater than 10 cubic yards of dredged and/or fill material for the construction of small weirs and flumes. NWP 5 does not include any PCN requirements and this was an additional district-specific requirement. We support the removal of this unnecessary PCN.

Regional Conditions applying to the proposed NWP 12 (Oil or Natural Gas Pipelines Activities)/NWP C/NWP D are substantively the same for all three NWP's. References to utility lines are changed for proposed NWP 12 to "pipelines." The 2017 language includes requirements for "buried cable, encasement, or pipeline" as well as "submerged utility lines"

which are now changed to buried or submerged pipelines for the proposed NWP 12. Proposed NWP C uses terms such as “submerged cables,” “utility lines,” and “buried cables,” while proposed NWP D uses terms such as “submerged utility lines” or “buried utility lines.”

Aside from these varying terms, it is important to note that there are no differences to be found between the regional conditions for each of the three NWPs. The substantive conditions relate to CWA-type requirements such as burial depths, and standards relating to stockpiling or side-casing, and dredged or excavated material while no specific standards are deemed necessary for a particular sector of industry. And note that even with a proposed NWP C for electric utility lines, the Districts are keeping NWP Regional General Conditions A (Section II.E.1.) for certain activities in navigable waters relating to aerial electric power transmission lines as separate conditions. And notification requirements to National Oceanic and Atmospheric Administration for activities involving “an aerial transmission line, submerged cable, or submerged pipeline” are also left unchanged. All this simply shows numerous permutations that can emerge from the three divisions that will lead to enormous regulatory inconsistencies.

Substantively, the Districts are proposing to require non-federal permittees to submit a PCN for all activities related to the proposed NWP 12, C, or D within the state. Aside from the reference to non-federal permittees, this language is unchanged from 2017. Regardless, this is an overly broad PCN trigger without any specific region-needs identified. This action is also contrary to the USACE directive for regulatory reform efforts to reduce unnecessary PCN thresholds.

Regional Condition G.1. includes new language stating that, “[w]herever practicable, excavated material shall be placed on an upland site.” We appreciate the flexibility provided with the language, “wherever practicable.” We also appreciate the removal of two provisions prohibiting activities related to the permanent loss of more than 300-feet stream bed unless waived (supporting provisions relating to waiver submittals under Section II.D.5 in 2017 are also deleted) and manholes in wetlands unless demonstrated to the satisfaction of the DE that the placement is unavoidable. The proposed NWP 12, NWP C, and NWP D provisions have sufficient environmental protections in place for these types of activities with minimal impact. In this regional condition, the USACE is also stating: “All suitable....shall be disposed of in an upland area and shall be stabilized with straw bales, silt fence or other methods acceptable by the Corps.” We respectfully request adding Compost Filter Sock to this list as an acceptable method. The addition would provide valuable clarity, as It is one of the most viable alternatives in the region.

Region Condition G.2. includes revised language relating to additional PCN submittal requirements including drawings and maps for submerged pipelines/cables/utility lines across navigational waters, and plans to address the prevention, containment, and cleanup of sediment or other materials caused by inadvertent returns of drilling fluids through sub-soil fissures or fractures. Remediation plans are also required if an advertent return occurs. Proposed NWP 12, C, and D allow DEs to add special conditions to require a remediation plan but there are no other requirements for an additional



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preemptive plan as contemplated here. Spill prevention is governed by other statutes and is outside the jurisdiction of the USACE. We believe the DE's Intent behind this language would be met by Instead requiring a remediation plan.

Region Condition G.3. provides some flexibility with language such as “selection of an alignment shall avoid and minimize wetland and stream impacts to the maximum extent practicable.” Also, the previous 2017 language required additional narrative if horizontal drilling method was not proposed to be used. Horizontal directional drilling is now required to be reviewed as an option “where feasible” and that is appropriate given factors that are out of prospective permittees’ control such as site geology.

There are some additional streamlining measures with the removal of 2017 regional condition I.G.3. including 5 subparts on technical standards related to the installation of utility lines as well as 2017. We appreciate the Districts’ efforts to review and identify for removal unnecessary provisions for activities designed to have minimal impacts. Regional condition 1.G.4. is also proposed to be deleted and it includes provisions for no stockpiling or double handling of any excavated/dredged materials with any waterway unless reviewed and approved by the DE as part of any PCN. We request for this language allowing for case-by-case review by the DE to be added back into the proposed 2020 RCs for the added flexibility to permittees, where appropriate.

Specific burial depths provisions are proposed to apply to the Philadelphia District’s Area of Responsibility similar to 2017 with various federal navigational channels. There are identical provisions added now for all three proposed NWP (except for references to terms as discussed above).

Regional Condition applying to NWP 14 (Linear Transportation Projects) is proposed with PCNs for all activities by non-federal permittees in Section 10 waters. NWP 14 only requires PCNs for losses of waters exceeding 1/10 acre and discharges in special aquatic sites. This requirement is overly broad and should be reviewed and modified based on regional-specific needs.

Regional Condition applying to NWP 35 (Maintenance of Existing Basins) is proposed with a PCN requirement for all activities; however, 2 provisions relating to additional drawings/plans for PCN submittals (similar requirements for NWP 52 are also removed), and limitations on maintenance dredging limited to the dimensions of previously authorized dredging are removed which we appreciate.

B. Regional General Conditions (“Regional GCs”) Applicable to all NWPs within the Commonwealth of Pennsylvania

The Districts have reviewed the regional general conditions applying to all NWPs and we appreciate efforts to clarify and streamline language where appropriate.



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Regional GC II.D.2. (PCNs) relating to waters containing submerged aquatic vegetation (SAV) Beds is revised to apply to a more specific group of NWP activity including proposed NWP 12, C, and D but previously it applied broadly to any NWP activity. Regional GC II.D.2 from 2017 is also proposed to be deleted and it required PCNs for certain construction/modification of docks, piers, or other structures within 150 feet of the horizontal limits of a federally authorized channel as well as for replacement of previously authorized channels that are destroyed by an act of nature or sudden event. We appreciate the Districts taking the time to identify opportunities for revising requirements that are overly broad or ambiguous.

Regional GC II.D.3. (PCNs) states that “all PCNs shall be completed using the established District Engineer permit application procedures for that locality (e.g. Section II.D.1, above).” The cited section refers to nationally approved Form ENG 6082 but appears to serve only as an example. It is important to note that the permittees need clear direction in understanding the components of a PCN that are needed to deem a PCN complete. Additional procedures for that locality are not provided. These types of procedures can also add inconsistencies in the PCN review process with USACE staff having wide discretion in determining when a PCN is deemed completed. This is contrary to the direction set out by the USACE and we ask the Districts to be clear in requiring USACE-approved Form ENG 6082 (which was developed to provide complete information needed for NWP PCNs and assist the USACE with timely and streamlined evaluations of permittees’ PCNs) to serve as the relevant requirements necessary for PCN submittals.

Otherwise, we appreciate the streamlining efforts to remove 8 detailed PCN submittal requirements that were included under 2017 Regional GC II.D.3.a-h. as well as compensatory mitigation provisions required by specific conditions of NWP verifications under 2017 Regional GC II.D.6. The 2017 GC II.D.4 is also proposed for deletion and it did not allow the permittee to begin activity unless notified in writing by the DE that the activity may proceed with any special conditions imposed, if applicable. We support this change because GC 32 already lays out the process including the option to begin work after 45 calendar days have passed from the DE’s receipt of the completed PCN and the prospective permittee has not received written notification from the DE.

III. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction’s environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align



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with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

A handwritten signature in black ink that reads 'Stephanie Catarino Wissman'.

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November 13, 2020

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Re: South Carolina NWP Conditions

To Whom It May Concern:

The American Petroleum Institute (“API”) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers (“USACE”) Charleston District for the state of South Carolina seeking comments on the proposed regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE’s overall proposal to reissue and modify the Nationwide Permits (“NWPs”) under the Clean Water Act (“proposal”).²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions (“GC”) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE’s comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 30, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order (“EO”) 13771, Reducing Regulation and Controlling Regulatory Costs,” Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. (“2017 Review of Energy-Related NWPs”). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



Our unequivocal position is that the USACE should REISSUE the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act ("CWA") Section 404 impacts and Rivers and Harbors Act of 1899 ("RHA") Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: "It would be more appropriate to have district engineers determine which BMPs [best management practices] 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."⁵

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable because 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on

⁴ Note that the term "utility line," unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A "utility line" is defined as any 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 message, and internet, radio, and television communication." 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, "internet" added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term "internet" was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWP are no more than minimal.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

⁶ 85 Fed. Reg. at 57,309.

II. General Comments on Regional Conditions to South Carolina

API has reviewed the regional conditions proposed for activities in South Carolina, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

A. Regional Conditions applicable to all NWPs within South Carolina

API's specific comments to regional conditions applicable to all NWPs within South Carolina are as follows:

No NWP activities are authorized in areas known or suspected to have sediment contamination, with the exception of activities authorized by NWP 38, activities authorized by NWP 53 when used in combination with NWP 38, and sediment sampling for dredging projects authorized by NWP 6. We respectfully suggest adding NWP 20 to the NWPs excepted from this requirement, as NWP 20 is often used in emergency conditions where time is of the essence.

We support Regional Condition 3 as articulated, with no additional changes.

Regarding Regional Conditions 4 and 5, we note that the changes together include a number of additional submittal requirements for Regional Condition 4 as well as an additional PCN requirement in Regional Condition 5. We note that the list of NWPs this is applicable to has grown substantially (from only NWPs 1, 3, 5, 7, 8, 10, 11, 12, 13, 14, 15, 19 and 36, but now covering all NWPs) and that the list of federal projects is significantly longer as well. While we appreciate the challenges of permitting in or adjacent to a federal project, we question whether multiple additional submittal

requirements for all NWP's near so many federal projects are necessary. As such, we request that regional conditions 4 and 5 revert back to how they were written in the 2017 permits.

B. Regional Conditions applicable to specific NWP's within South Carolina

We appreciate the streamlining of Regional Conditions compared to 2017, which corresponds to the USACE's overall approach to consistency among districts.

We commend the Charleston District for its consistency in applying those conditions to NWP 12 also to NWP C and D. In the absence of sufficient environmental justification, we respectfully reserve the right to challenge as arbitrary and capricious any condition only applied to NWP 12 but not also applied to NWP C and D.

In particular, we welcome the removal of NWP 22, which prohibited certain permits from being used together with each other in single and complete project situations.

We respectfully request that any terminology should not encompass new definitions but instead refer to jurisdictional waters.

Regarding Regional Condition 1 we appreciate the clarification and reduction of both Regional Conditions applicable to NWP 3, and the reduction of PCNs as related to Regional Conditions 28 and 30, although we do not agree with the PCN for utility line activities. In 2017, NWP 3 activities had RCs that were more broad but are now removed and modified to 2 RCs and we appreciate the cleanup and reducing of PCNs as related to 2017 RC 28 and 30. We also appreciate in Regional Condition 2 the clarification limiting PCNs to maintenance activities relating to storm water management in tidal waters.

For Regional Condition 3, we note that this is considerably revised and appreciate the removal of the 90 day requirement from the 2017 NWP's. We believe the 180 day approach subject to extension by USACE approval is more appropriate given the time necessary to accomplish certain larger projects.

Regarding Regional Condition 4, the definition of temporary mats is helpful and should be maintained, "Temporary mats include timber mats, metal, synthetic and/or artificial mats." However, we note that additional language was added from previous RC 37: "and include the specifications of how pre-construction contours will be re-established and verified after construction. We do not believe this additional language is necessary and request the USACE revert back to the previous Regional Condition 20 language.

Regarding Regional Condition 5, we support the combination of 2017 RC 16 and RC 17 into a single regional condition.

Regarding Regional Condition 8, we support the combination of 2017 Regional Condition 24 and 38, but respectfully request that the USACE revert to the language from 207 Regional Condition 38 regarding “maintained utility crossings” rather than applying this to all crossings.

Regarding Regional Condition 9, and 10, we respectfully suggest that GC 32 and GC 23 are sufficient and no further RC 9 and 10 are needed.

- Although Regional Condition 9 is much more prescriptive than the existing requirements for PCN thresholds in NWP 12 and 14, we believe this is warranted based on the change in limitation from 24 linear feet of streambed to 100 linear feet of streambed (which we support).
- Regarding Regional Condition 10, we respectfully note that this substantially expands the requirement for a compensatory mitigation plan to losses of more than 0.005 acre/100 linear feet. Again, even for wetlands, the threshold currently is 1/10 acre under GC 32 and the proposed streams section (which we are opposing) also relies on 1/10 acre.

We believe that the Regional Condition 11 is contrary to the USACE’s federal proposal and specific conditions laid out in national NWPs and GCs, and would need to be revised based on any changes at the national level. Although the 500 linear feet or .5 acres of intermittent/perennial streams is preferable to the 2017 300 linear feet, we note that the previous 300 linear feet was subject to district engineer waiver (which is now proposed for deletion). Without any additional rationale, these seem arbitrary. We respectfully ask the district to provide the opportunity to waive this requirement.

Regarding Regional Condition 13, we support the addition of the .1 acre threshold applicable to NWP 33.

III. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction’s environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE’s guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

/s/ David McGowan

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American Petroleum Institute
Midwest Region



November 9, 2020

Omaha District Regulatory Office in South Dakota
Nathan.M.Morey@usace.army.mil

Dear Mr. Morey

The American Petroleum Institute ("API") and the Western Energy Alliance ("WEA"), collectively "The Associations," represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Omaha District for the state of South Dakota seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

We fully support the renewal of the 52 Nationwide Permits (NWP) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWP allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWP. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWP through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 30, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWP"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵ For additional context, we provide the Executive Summary of our federal comments for your consideration below and Annex I contains a detailed outline of our federal recommendations concerning specific NWPs, conditions, and definitions.⁶

At the district level, we appreciate the Omaha District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

⁶ For a complete set of comments, we refer you to our comments that will be timely filed in www.regulations.gov.



unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁷

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

⁷ 85 Fed. Reg. at 57,309.



Western Energy Alliance represents 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

II. General Comments on Regional Conditions to South Dakota

The Associations have reviewed the regional conditions proposed for activities in South Dakota, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

III. Regional Conditions applicable to NWPs within South Dakota

A. PRECONSTRUCTION NOTIFICATION REQUIREMENTS APPLICABLE TO ALL NWPs

For all NWPs, permittees must notify the Corps in accordance with General Condition 32 Preconstruction Notification (PCN) requirements for regulated activities located within or comprised of the following:

1. Wetlands Classified as Peatlands. This proposed Regional Condition combines two pre-existing regional conditions with a revised definition for peatlands. As part of an effort toward regulatory consistency within the Omaha District, we respectfully recommend using the proposed language in Colorado, which is also based on the Natural Resources Conservation Service Field Indicators of Hydric Soils in the United States and has been listed as the new definition for the other states in the Omaha District. Their proposed definition is as follows, with proposed additions in bold and deletions in strikethrough: "**For the purposes of this requirement, a fen-peatland** is defined as a ~~ground-water fed~~ wetland with saturated organic soil (greater than or equal to 16 inches in thickness) that is classified as a histosol in the Natural Resources Conservation Service (NRCS) Field Indicators of Hydric Soils in the United States (Version 8.0, 2016). A copy of the document can be obtained from the NRCS at



[http://www.nrcs.usda.gov/Internet/ DOCUMENTS/nrcs142p2_053171.pdf](http://www.nrcs.usda.gov/Internet/DOCUMENTS/nrcs142p2_053171.pdf)." Finally, the revocation language Included In South Dakota Is not Included In Wyoming, Nebraska, and Colorado. We respectfully suggest deleting It for consistency.

2. Waters Adjacent to Natural Springs. 'PCN required for any regulated activity located within 100 feet of the water source in natural spring areas. For the purpose of this condition, a spring water source is defined as any location where there is flow emanating from a distinct point at any time during the growing season. Springs do not include seeps and other groundwater discharge areas where there is no distinct point source of waters. Springs do not include drain tile outlets.' It Is unclear why this condition was changed from "wetlands" to waters. We would like a better understanding of why this change occurred. Additionally, "springs do not Include drain tile outlets" Is new language In addition to the language proposed In North Dakota and the previous South Dakota Regional Condition. We believe It should not be Included to maintain consistency among regional conditions.

B. BEST MANAGMENT PRACTICES

In addition to Regional Conditions 1 through 2, additional best management practices apply to NWP's within the Omaha District. These are available at: <https://www.nwo.usace.army.mil/Missions/Regulatory-Program/Nation-Wide-Permit-Information/> In the future, we respectfully recommend that the USACE includes the actual applicable language in their RCs and rather than merely reference a website which is subject to change at any time. These are required and enforceable BMPs; consequently, permittees need fair notice on which RCs they are required to comply with thus all the conditions should be clearly laid out in one place.

From the website listed above, we address the following points:

- With respect to suitable materials, we support the continued use of the 2013 list of suitable materials.
- With respect to culvert countersink depth, we suggest using the term "jurisdictional streams" rather than specifying Intermittent or perennial flow - mainly because the "Intermittent" definition Is proposed for removal in the national NWP's.

IV. Conclusion

We appreciate your ongoing commitment to administering the NWP's in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP's as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align



American Petroleum Institute
Midwest Region



with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

Sincerely,

/s/ Elizabeth Van Holt

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A handwritten signature in black ink, appearing to read 'R. Parks'.

Tripp Parks
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American
Petroleum
Institute

November 2, 2020

Nashville District – U.S. Army Corps of Engineers,
Regulatory Division (Attn: Mr. Aric Payne),
3701 Bell Road,
Nashville, TN 37214;
Via email to aric.j.payne@usace.army.mil

Dear Mr. Payne:

The American Petroleum Institute (“API”) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers (“USACE”) Nashville and Memphis Districts for the state of Tennessee seeking comments on the proposed regional conditions as well as consideration of any additional regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE’s overall proposal to reissue and modify the Nationwide Permits (“NWPs”) under the Clean Water Act (“proposal”).²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions (“GC”) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE’s comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Tennessee Regional Conditions, (September 17, 2020), available at <https://www.lrn.usace.army.mil/Media/Public-Notices/Article/2352411/public-notice-20-54/>

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order (“EO”) 13771, Reducing Regulation and Controlling Regulatory Costs,” Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. (“2017 Review of Energy-Related NWPs”). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



Our unequivocal position is that it is in the best interest of stakeholders for the USACE to simply REISSUE 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPs [best management practices] 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.”⁵

At the district level, we appreciate the Nashville and Memphis Districts' efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWP are no more than minimal.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

⁶ 85 Fed. Reg. at 57,309.

II. General Comments on Regional Conditions to Tennessee

The Associations have reviewed the regional conditions proposed for activities in Tennessee and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

The Associations' specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

III. Regional Conditions applicable to specific NWPs within Tennessee

All NWPs except NWP 3 (Maintenance). The USACE is recommending a pre-construction notification (PCN) for all proposed activities in Exceptional Tennessee Waters and/or Outstanding National Resource Waters. A list of known Exceptional Tennessee Waters and Outstanding National Resource Waters can be obtained from the Tennessee Department of Environment and Conservation's website: <https://tn.gov/environment/article/wr-water-resources-data-viewer>. A map of known Exceptional Tennessee Waters and Outstanding National Resource Waters can be obtained from the Tennessee Department of Environment and Conservation's website: <http://tdeconline.tn.gov/dwr/>. At first blush, these appear to be the types of Regional Conditions that the NWPs contemplate as appropriate for region-specific conditions at the discretion of the District Engineer pursuant to the General Conditions contained in the overall NWP regime. However, the Associations note respectfully that for the conditions to be appropriate, these would need to be jurisdictional waters - i.e., "waters of the United States" or WOTUS. We encourage the Nashville and Memphis Districts to review the status of these waters carefully before finalizing this regional condition.

NWP 12 Oil or Natural Gas Pipeline Activities. The USACE proposes to add an additional PCN for blasting within waters of the U.S., in accordance with General Condition 32. If added, we would support it only if applied consistently in NWP 12,



NWP C, and NWP D. While our general position is not to overburden the NWPs within unnecessary PCNs, we support the discretion of the District Engineers to tailor the NWPs as they see fit. It is difficult to conceptualize why blasting within the waters of the U.S. in Tennessee would create different environmental consequences than blasting in the WOTUS of any other state, and we therefore urge caution in determining whether this is a necessary regional condition at the state level versus as a factor that should be considered at the federal level.

NWP 18 (Minor Discharges). The USACE suggested deleting language nothing that “1) This NWP does not authorize stream relocations, channelization, or impoundment; 2) PCN in accordance with NWP General Condition 32 is required for the loss of waters of the U.S. (ephemeral, intermittent, and/or perennial) exceeding 300 linear feet of stream bed.” We support this deletion because it appears consistent with the overall USACE philosophy on streamlining and removing unnecessary PCN triggers.

NWP 35 (Maintenance and Dredging of Existing Basins). Consistent with the 2017 conditions for Tennessee, the USACE proposes to a PCN in accordance with General Condition 32, required for regulated activities in Section 10 waters. This NWP applies only to Section 10 waters, and there is no similar PCN required in the national NWPs. While we generally support the discretion of the District Engineers, it is difficult to endorse this condition without any additional granularity or identified region-specific need.

NWP 36 (Boat Ramps). Consistent with the 2017 conditions for Tennessee, a PCN in accordance with General Condition 32 is required for any boat ramp proposed to be located PCN in accordance with NWP General Condition 32 is required for any boat ramp proposed to be located within the area between the upstream and downstream arrival points of any Corps of Engineers lock and dam, or within 1,500 feet of any emergency-mooring cell at any lock. We support this additional condition, which we believe is working well in practice to address the limited space available within many waterways.

NWP C (Electric Utility Lines and Telecommunications Activities). The USACE proposes to add an additional PCN for blasting within waters of the U.S., in accordance with General Condition 32. If added, we would support it only if applied consistently in NWP 12, NWP C, and NWP D. While our general position is not to overburden the NWPs within unnecessary PCNs, we support the discretion of the District Engineers to tailor the NWPs as they see fit. It is difficult to conceptualize why blasting within the waters of the U.S. in Tennessee would create different environmental consequences than blasting in the WOTUS of any other state, and we therefore urge caution in determining whether this is a necessary regional condition at the state level versus as a factor that should be considered at the federal level.

NWP D (Utility Line Activities for Water and Other Substances). The USACE proposes to add an additional PCN for blasting within waters of the U.S., in accordance with General Condition 32. If added, we would support it only if applied consistently in NWP 12, NWP C, and NWP D. While our general position is not to overburden the NWPs within unnecessary PCNs, we support the discretion of the District Engineers to tailor the NWPs as they see fit. It is difficult to conceptualize why blasting within the waters of the U.S. in Tennessee would create different environmental consequences than blasting

in the WOTUS of any other state, and we therefore urge caution in determining whether this is a necessary regional condition at the state level versus as factor that should be considered at the federal level.

IV. Regional General Conditions (GCs) Applicable to all NWP within (Name of State)

The new regional condition requiring the use of only non-invasive plant species for planting or re-vegetation activities should be modified to align with the proposed change in the NWPs at the federal level, which we support for the flexibility it provides relating to planting vegetation. The USACE proposes: “If restoring or enhancing riparian areas involves planting vegetation, only native species should be planted.”¹ The proposal is requiring native species for initial actions to restore or enhance riparian areas; however, it recognizes that initial plantings can die and non-native plants may colonize the areas. While we recognize the importance of planting native species but appreciate the USACE’s assessment that “[n]on-native riparian plant species can provide important contributions to the ecological structure and functions of riparian areas” as well as the associated flexibility that the proposed language provides.

Stream impacts and calculations. We oppose the proposed deletion of the Regional condition requiring that “All impacts to wetlands/open waters shall be calculated and reported in acres. Stream impacts shall be calculated separately and reported in both linear feet and acres.” We encourage this item to be re-included, as stream calculation should be allowed to be calculated using both linear feet and acres depending on the environmental specifics of the scenario.

V. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction’s environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE’s guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

/s/ David McGowan

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November 13, 2020

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Albuquerque District,
ATTN: Justin Riggs Regulatory Division
200 E Griggs St Las Cruces
NM 88001.
Via e-mail to justin.c.riggs@usace.army.mil.

U.S. Army Corps of Engineers
Galveston District Regulatory Division
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Attn: Ms. Kristi McMillan
Via email to swg_public_notice@usace.army.mil

RE: Comment Request regarding Regional Conditions for Texas applicable within the Albuquerque District, the Fort Worth District, the Fort Worth and Galveston District, and the Galveston District

Dear Mr. Riggs and Ms. McMillan:

The Texas Oil and Gas Association, Texas Independent Producers and Royalty Owners, the Association of Oil Pipe Lines, and the American Petroleum Institute ("API"), (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the public notice issued by the U.S. Army Corps of Engineers ("USACE") Albuquerque, Fort Worth, and Galveston Districts for the state of Texas seeking comments on the proposed regional conditions as well as consideration of any additional regional conditions.¹ This request for comments on regional conditions was concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal") and Rivers and Harbors Act of 1899 ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Texas Regional Conditions.

² 85 *Fed. Reg.* 57,298 (Sept. 15, 2020). Comments due November 16, 2020.



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environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWP allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that the USACE should reissue 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE’s division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States

³ Executive Order (“EO”) 13771, Reducing Regulation and Controlling Regulatory Costs,” Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. (“2017 Review of Energy-Related NWPS”). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the longstanding definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.



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as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the Albuquerque, Fort Worth, and Galveston Districts efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs’ discretionary authority to modify, suspend or revoke specific NWP on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters’ guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps’ regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to “regulate with little, if any, delay or paperwork certain activities having minimal impacts.” (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45.



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agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWP's in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

The Texas Oil & Gas Association (TXOGA) is a statewide trade association representing every facet of the Texas oil and gas industry including small independents and major producers. Collectively, the membership of TXOGA produces in excess of 80 percent of Texas' crude oil and natural gas, operates over 80 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. In fiscal year 2019, the oil and natural gas industry supported more than 428,000 direct jobs and paid more than \$16 billion in state and local taxes and state royalties – the highest total in Texas history – funding our state's schools, roads and first responders.

TIPRO is one of the largest statewide trade associations in Texas representing the oil and natural gas industry. Our members include the largest producers of oil and gas in the state, as well as hundreds of small to mid-sized independent operators and royalty owners. Collectively, TIPRO members produce approximately 90 percent of the oil and natural gas in Texas and own mineral interests in millions of acres across the state. Our organization's mission, since its inception, is to preserve the ability of independent operators to explore for and produce oil and natural gas.

The Association of Oil Pipe Lines is a nonprofit national trade association that represents the interests of oil pipeline owners and operators before regulatory agencies, the judiciary, and the United States Congress. AOPL's members operate pipelines that carry approximately 97% of the crude oil and petroleum products moved by pipeline in the United States, extending over 218,000 miles in total length. These pipelines safely, efficiently, and reliably deliver more than 21 billion barrels of crude oil and petroleum products each year. AOPL members bring crude oil to the nation's refineries, natural gas liquids such as ethane, butane, propane and carbon dioxide to manufacturers and industrial users, jet fuel to airports, and petroleum products to our communities, including all grades of gasoline, diesel, home heating oil, kerosene, propane and biofuels. AOPL members routinely rely on NWP's, particularly NWP 12, for the construction, maintenance, and repair

⁶ 85 Fed. Reg. at 57,309.



of their pipelines and related infrastructure. NWP's are crucial for the ability of oil pipelines to efficiently develop new pipelines as well as maintain the safe and efficient operation of pipeline systems.

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP's), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to Texas

The Associations have reviewed the regional conditions proposed for activities in Texas, and with the exceptions explained below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP program and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities, with other pipelines being subject to newly created NWP's. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the regional level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (to the extent consistent with legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWP's are specifically intended for streamlining activities with minimal environmental impact and, as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

In the future, we suggest that there be better coordination of the regional conditions applicable in Texas. We request that all applicable districts for a state have the same comment deadline and suggest that only one submittal be required to be sent to the lead district.



III. Regional Conditions applicable only within the Albuquerque District

We appreciate the reduction in PCNs from 6 Regional Conditions to 3 Regional Conditions. However, we suggest removal of Regional Condition 1 which requires a PCN for all activities subject to regulation under CWA 404 in intermittent and perennial streams and special aquatic sites. Although this is not a change from the existing Regional Conditions, now that ephemeral streams are not subject to regulation under the CWA, this effectively means that most activities in the Albuquerque District will require a PCN. Given the situation specific PCN triggers for the various NWPs, we submit that this requirement is unnecessary and redundant and is inconsistent with the overall effort to simplify permitting and shorten delay related to infrastructure development. We recommend removing this requirement.

IV. Regional Conditions applicable only within the Fort Worth District

Regarding Regional Condition 4, we respectfully note that the Galveston District had included a condition similar to this in 2017, but now has proposed to delete it. We respectfully request that the Fort Worth District delete this condition as well. If the condition is not deleted, then we respectfully ask that the 2012 language be included, “unless the appropriate District Engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement.” The ability to seek a waiver from the District Engineer is significant because this Regional Condition as revised lacks clarity. It appears to not explicitly require compensatory mitigation but that a PCN is required which must include submitting a compensatory mitigation plan. That seems to indicate that compensatory mitigation would be required, but it is unclear how the District would proceed after submission of the plan. It should be noted that for General Condition 32(b)(4), new language added in 2017 already requires permittees to submit “sufficiently detailed” descriptions of any proposed mitigation measures. If a PCN is triggered, the GC 32 information submittal requirements should apply.

Additionally, regarding Regional Condition 4, we note that the 2017 language stated “all losses of WOTUS” that exceed 1/10 acre, and now the language relates to wetlands, other special aquatic sites and/or other waters and does not contain any express limits to jurisdictional waters. We respectfully request that a “other waters” be clarified as “other jurisdictional waters” be included, as the proposal unnecessarily broadens this provision to potentially include local waters typically outside of the NWP program.



Again, regarding Regional Condition 4, the 2017 version of this note required compensatory mitigation but did not require a “plan,” which is ambiguous and lacks necessary regulatory certainty. We respectfully request that either the term “plan” be deleted or clarified.

In 2017, there was a separate Regional Condition 13 specific to NWP 12, 14, and 33, that involved "temporary discharges of fill material" into ½ acre or more of emergent or 1/10th acre of scrub-shrub/forested wetlands, and is now involving a "temporary impact," a new term with broader applications to all activities. The Associations would not support this addition for several reasons, including it being overly broad. It is also contrary to USACE’s overall objective for streamlining and removing unnecessary PCN thresholds including the proposed removal of the PCN threshold in NWP 12 for “activity involving mechanized land clearing in a forested wetland for the utility line right-of-way.” It is unclear how “temporary impact” is defined or would be implemented consistently in practice.

In Regional Condition 4, the “restoration plan” is also a new requirement and is ambiguous. It is undefined and the one place where there is a reference to restoration plan is in NWP 33 (*Temporary Construction, Access, and Dewatering*) and it is specific to that NWP. It states, “The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions.”

Regional Condition 7 - Seismic testing activities (i.e., explosive detonations) within perennial streams and rivers are not authorized by NWP. We recommend re-drafting Regional Condition 7 to clarify that it applies only to perennial streams and rivers to the extent they are subject to jurisdiction under the Clean Water Act or Rivers and Harbors Act. In addition, we recommend that, instead of precluding the use of NWPs in the described circumstances, the Corps instead require a PCN to allow applicants to demonstrate that use of Best Management Practices and other considerations warrant verification under an NWP rather than the time consuming review required in the individual permit process.

V. Regional Conditions applicable within Fort Worth District and Galveston District

We have two comments on Regional Condition 8. First, we respectfully note that in 2017 this Regional Condition applied only to NWP 3, 6, 7, 12, 14, 18, 19, 21, 23, 25, 27, 29, 40-44, 49, 51, 53, and now applies for all NWPs, which is an expansion from the prior Regional Condition. Without appropriate environmental justification, we respectfully request it apply only to the previously listed NWPs, as well as NWP C and NWP D. We respectfully note that we reserve the right to challenge any condition applied to NWP 12 but not applied to NWP C and NWP D unless appropriate environmental justification is provided.



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Second, we object to the addition of a PCN requirement for all activity proposed for authorization in Karst Zones 1 and 2 located in Bexar, Travis, and Williamson Counties. There is no justification provided for this addition. This requirement has no tie to resources regulated by the Corps or is redundant of nationwide PCN requirements for linear projects. Karst features are not necessarily associated with any waters subject to the jurisdiction of the Corps under either the Clean Water Act or Rivers and Harbors Act. Even where a linear project crosses through an area containing karst features, there may be no karst features within the project footprint or within the jurisdictional footprint of the Corps. Further, and most importantly, karst features are subterranean and not subject to the reach of the Corps' permitting authority. Regional Conditions should only pertain to features within the legal jurisdiction of the Corps. This is consistent with the Corps' oft-stated position that its permitting authority is restricted to its narrow jurisdiction under the CWA— and does not stray into regulation of the overall project related to the activity for which the Corps permit may be used or sought. To the extent the proposed Regional Condition is meant to address the possibility of karst features being encountered under a Section 10 water resulting in an impact to navigable capacity of the waterway, the Corps already requires a PCN for any Section 10 crossings under a navigable waterway.

Regional Condition 9 triggers a PCN for activities within approved compensatory mitigation sites. We respectfully recommend its removal as this could result in unintended consequences including requiring a PCN for projects with minimal environmental impacts and adequate mitigation measures. The provisions of the national NWP are sufficient and removing this requirement would be consistent with the USACE directive favoring streamlining.

VI. Regional Conditions applicable only within the Galveston District

We have the following comments on the Regional Conditions applicable in the Galveston District:

Regional Condition 10: In the interest of streamlining, we recommend that this Regional Condition be modified to require a PCN for discharges into the areas described rather than outright barring the use of NWPs. Applicants should be given the opportunity to demonstrate that such activities can be done consistently with the terms and intent of the NWPs. As written, this would likely require an applicant to seek an individual permit for a linear project, for example, that may have very small impacts in the listed areas even if no other jurisdictional activity along the project would fall outside of proper authorization under the NWPs.



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Regional Condition 12: This proposed Regional Condition is inconsistent with the Corps' goal of facilitating the use of the NWP program to reduce unnecessary delays and paperwork and inconsistent with the recommendations of the review required by EO 13783 which recommended fewer burdens on the use of NWP 12 – not more. The Corps has not explained why this Regional Condition is necessary to ensure minimal adverse environmental effects within the Corps' jurisdiction. We recommend that, instead of precluding the use of NWPs in the described circumstances, the Corps instead require a PCN to allow applicants to demonstrate that use of Best Management Practices and other considerations warrant verification under an NWP rather than the time consuming review required in the individual permit process.

Regional Condition 13: We recommend revising the proposed Regional Condition to clarify that it applies only where the utility line is placed via trenching or other activity within the regulatory jurisdiction of the Corp and that it applies to non-navigable tributaries within the jurisdiction of the Corps as opposed to any tributary.

VII. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.



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November 16, 2020

Norfolk District, Regulatory Branch ATTN: Melissa Nash
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Via email to: melissa.a.nash@usace.army.mil

Dear Ms. Nash:

The American Petroleum Institute (“API”) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers (“USACE”) District for the state of Virginia seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE’s overall proposal to reissue and modify the Nationwide Permits (“NWP”) under the Clean Water Act (“proposal”).²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions (“GC”) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE’s comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 15, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order (“EO”) 13771, Reducing Regulation and Controlling Regulatory Costs,” Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. (“2017 Review of Energy-Related NWPs”). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).

regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWP, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to Virginia

API has reviewed the regional conditions proposed for activities in Virginia, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a

⁶ 85 Fed. Reg. at 57,309.

key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

A. Regional Conditions Applicable to All NWPs Unless Otherwise Stated

Waters Containing Submerged Aquatic Vegetation (SAV) Beds: Although we oppose the division of NWP 12 at the national level, we support the addition of NWP C and NWP D to this list. We generally believe that, since the Clean Water Act Section 404 and Section 10 Rivers and Harbors Act Impacts are largely Indistinguishable among the permits, that any condition applied to one should apply to all. In the absence of clear environmental justification, we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without equally being applied to NWP C and NWP D.

Anadromous Fish Use Areas: We support the revised, streamlined language as proposed.

Designated Critical Resource Waters, which include National Estuarine Research Reserves.

- NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 cannot be used to authorize the discharge of dredged or fill material in the Chesapeake Bay National Estuarine Research Reserve in Virginia. If this condition is applied to NWP 12, we believe it should also be extended to NWP C and NWP D. We oppose the division of NWP 12 at the national level. We generally believe that, since the Clean Water Act Section 404 and Section 10 Rivers and Harbors Act Impacts are largely Indistinguishable among the permits, that any condition applied to one should apply to all. In the absence of clear environmental justification, we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without equally being applied to NWP C and NWP D.

Conditions for Designated Trout Waters. In 2017, this condition had a specific list of NWP and we recommend that level of granularity again. Additionally, we believe NWP 20 should be excluded from a PCN trigger because it often pertains to time sensitive response actions.

Invasive Species. We propose this provision be qualified with additional language such as "to the maximum extent practicable."

Impacts Requiring a Compensatory Mitigation Plan. Although this is the same as 2017, we respectfully suggest removal of compensatory mitigation plan requirement and ask the district to defer to GC 32 and GC 23 requirements. For example, GC 32 already requires submission of any proposed mitigation measures.

B. Regional Conditions Applicable To Specific NWPs

NWP 12 - Oil or Natural Gas Pipeline Activities Conditions Specific to NWP 12.

- In the absence of clear environmental justification, we reserve the right to challenge as arbitrary and capricious any condition that is applied to NWP 12 without equally being applied to NWP C and NWP D.
- PCN is required when the activity involves greater than 0.10 acre of mechanized land clearing in a forested wetland for the utility line right-of-way The PCN and additional submittal requirements are over and above the requirements in NWP 12 and GC 32, and the PCN requirements at the national level should be sufficient.

III. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

/s/ David McGowan

David McGowan
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/s/ Amy Emmert

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November 16, 2020

ATTN: Melissa Nash
Norfolk District, Regulatory Branch
803 Front Street
Norfolk, VA 23510
Via email to melissa.a.nash@usace.army.mil

Re: Comments on Regional Conditions Concerning the NWP Renewal

Dear Ms. Nash:

The American Petroleum Institute (“API”) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers (“USACE”) Norfolk District seeking comments on regional conditions concerning the District of Columbia and Virginia.¹ This request for comments on regional conditions is concurrently issued with the USACE’s overall proposal to reissue and modify the Nationwide Permits (“NWPs”) under the Clean Water Act (“proposal”).²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions (“GC”) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE’s comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 30, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order (“EO”) 13771, Reducing Regulation and Controlling Regulatory Costs,” Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. (“2017 Review of Energy-Related NWPs”). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



Our unequivocal position is that the USACE should reissue the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

We do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPs [best management practices] 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.”⁵

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45.

unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWP are no more than minimal.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

⁶ 85 Fed. Reg. at 57,309.

II. General Comments on Regional Conditions to the District of Columbia and Virginia

API has reviewed the regional conditions proposed for activities in the District of Columbia and Virginia, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

III. Regional Conditions applicable to specific NWPs within the District of Columbia and Virginia

API's specific comments to regional conditions accompanying the NWPs listed below are as follows:

NWP 3 (Maintenance). we support the proposed removal of several of the 2017 PCN requirements under Regional Conditions 1(a), (b), and (c).

NWP 6 (Surveys). We agree with the removal of the PCN trigger.

NWP 7 (Outfall Structures). For the first condition, we support the new language, Including the removable of the past feasibility language. For the second condition, we also support the new language which provides additional flexibility.

NWP 12 (Oil or Natural Gas Pipeline Activities). For condition 1, we support the new language that adds additional flexibility. For condition 2 (a), we support the new streamlined language. For condition 3, we support the new language with offers additional flexibility. We also support the deletion of the unlisted conditions from the 2017 version of Regional Condition 3 and Regional Condition 4.

NWP 14 (Linear Transportation Structures). We support the proposed removal a PCN from this condition.

NWP 18 Minor Discharges). We support the proposed version, which substantially streamlines this condition.

NWP 28 (Modifications of Existing Marinas). We support the simplification of this condition as proposed.

NWP 33 (Temporary Construction, Access, and Dewatering). We support the proposed deletion of the additional requirements relating to causeways, cofferdams, and restoration plans.

NWP 35 (Maintenance Dredging of Existing Basins). We support the proposed deletion of the additional technical requirements and plan submittal requirements.

NWP 51 (Land-Based Renewable Energy Generation Facilities). We support the deletion of the previous section 2 on the Installation of utility lines and section 3 on additional PCN requirements.

NWP 52 (Water-Based Renewable Energy Generation Pilot Projects). We support the deletion of the previous section 2 on the Installation of utility lines and section 3 on additional PCN requirements.

IV. Regional Conditions applicable to Multiple and/or All NWPs within the District of Columbia and for NWP 14 and NWP 29 at Fort Belvoir, Fort Myer

NWP Regional General Condition #32 (Pre-Construction Notification). Regarding point 3, we have some concerns about the district-specific permit process and consistency In processing across districts. Regarding the PCN notification also in point 3,

All PCNs to the District Engineer shall be completed using the established District Engineer permit application procedures for that locality. Preferably all PCN information can be submitted electronically or alternatively a hard copy may be sent to the Corps. The PCN shall include all activities that the applicant plans to undertake that are reasonably related to the same project. The first sentence, "All...locality" raises concerns about consistency among local and district specific processes In application permitting. Additionally, the 45-day timeframe is only triggered if PCN is deemed complete and this seems to add uncertainty with all the components required for a completed PCN. We respectfully suggest that it should be deleted.

V. Conclusion

We appreciate your ongoing commitment to administering the NWP's in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP's as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

/s/ David McGowan

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/s/ Amy Emmert

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November 15, 2020

NWP Seattle Team
U.S. Army Corps of Engineers
4735 E. Marginal Way South
Seattle, Washington, 98124

Via email to: NWP-SeattleTeam@usace.army.mil

Re: Proposed Regional Conditions for Washington State accompanying the NWP Renewal

To Whom It May Concern:

The Western States Petroleum Alliance ("WSPA") and the American Petroleum Institute ("API") (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Seattle District for the state of Washington seeking comments on the proposed regional conditions as well as consideration of any additional regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Washington Regional Conditions, (September 30, 2020).

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order ("EO") 13771, Reducing Regulation and Controlling Regulatory Costs, Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. ("2017 Review of Energy-Related NWPs"). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).

district engineer's ("DE") role in tailoring the NWP through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

Our unequivocal position is that the USACE should reissue 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act ("CWA") Section 404 impacts and Rivers and Harbors Act of 1899 ("RHA") Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: "It would be more appropriate to have district engineers determine which BMPS [best management practices] 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."⁵

At the district level, we appreciate the Seattle District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

⁴ Note that the term "utility line," unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A "utility line" is defined as any 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 message, and internet, radio, and television communication." 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, "internet" added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term "internet" was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

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.

⁶ 85 Fed. Reg. at 57,309.

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP's), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions for Washington

We have reviewed the regional conditions proposed for activities in Washington, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWP's are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

The Washington District has reviewed the 2017 RCs. We appreciate the clarifications made to certain RCs, and we also the removal several removals of several RCs, which we support (e.g., 2017 RCs 7-11). We also support the removal of certain PCN triggers for certain NWP's (e.g., NWP 33). Additionally, we support the proposed removal of all RCs for NWP 12 and not proposing any new ones for NWP C or D either. We respectfully note that, In the absence of sufficient environmental justification, we reserve the right to challenge as arbitrary and capricious any condition applied to NWP 12 without being equally applied to NWP C or D.

The Associations' specific comments to regional conditions applicable to specific NWP's are limited to certain NWP's of interest to the oil and gas industry.

A. Conditions Applicable to all NWP's for the Seattle District in Washington State

Aquatic Resources Requiring Special Protection (2017 RC 2): We support the proposed deletion of 2017 RC 2.

Commencement Bay. We respectfully note that this condition is made considerably more expansive to all activities, instead of the specific list of NWP's that this provision applied to in 2017. We respectfully request that this activity remain qualified to certain NWP's, which included: NWP 12 (substations) ; NWP 13; NWP 14; NWP 23; NWP 29; NWP 39; NWP 40; NWP 41; NWP 42; and NWP 43. We request that that list be extended to include NWP C and D. Additionally, we respectfully note that, in the absence of sufficient environmental justification, we reserve the right to challenge as arbitrary and capricious any condition applied to NWP 12 without being equally applied to NWP C or D.

Bank Stabilization. We appreciate the addition of the qualifying language, "salmonid species are present or could be present, which provides greater clarity in terms of applicability.

Crossings of Waters of the U.S.

- Any project including installing, replacing, or modifying crossings of waters of the U.S., such as culverts or bridges, requires submittal of a PCN to the U.S. Army Corps of Engineers (see NWP general condition 32). Design criteria and requirements relating to culverts vary across the districts and we respectfully ask for greater coordination in between districts for regional consistency.
- Culverts installed under emergency authorization that do not meet the above design criteria will be required to meet the above design criteria to receive an after-the-fact nationwide permit verification. We support the proposed deletion of 2017 RCs 7-11, and we appreciate this streamlining.

We support the proposed deletion of 2017 RC 13 relating to temporary impacts and site restoration.

B. Regional Conditions for Specific NWP's

NWP 5. Scientific Measurement Devices. We support the proposed deletion of 2017 RCs 1 and 2, as well as the removal of unnecessary PCN trigger in RC 4 - 1.

NWP 12 Utility Lines. We support the proposed deletion of the regional conditions pertaining to 2017 NWP 12, and the lack of additional conditions for proposed NWP 12, C, or D. We support this removal, which is grounded in the finding that NWP 12, C and D and GCs at national level provide sufficient protection. We believe this also supports the philosophy of the USACE at the federal, in terms of streamlining and removing unnecessary conditions or PCNs which are not necessary.

NWP 14 Linear Transportation Projects. We support the proposed deletion of the regional condition relating to, "Private residential driveways in waters of the U.S. with footprints wider than 22 feet or longer than 200 feet are not authorized by this NWP. For this requirement, "footprint" refers to the bottom width of the roadway fill prism."

NWP 19 Minor Dredging. We believe that any conditions should be limited to Include federal jurisdictional waters only.

NWP 20 Residential Developments. We support the proposed deletion of the regional condition relating to, "Private residential driveways in waters of the U.S. with footprints wider than 22 feet or longer than 200 feet are not authorized by this NWP. For this requirement, "footprint" refers to the bottom width of the roadway fill prism."

NWP 33. We support the proposed deletion of the PCN requirements from 2017 relating to this NWP and appreciate that no new PCN requirements were proposed.

NWP 35. We support the proposed deletion of the PCN requirement relating to sediment testing.

NWP 39 and 41. We support the proposed streamlining of these provisions.

NWP C and D. We support the District's parallel treatment NWP 12, NWP C, and NWP D.

III. Conclusion

We appreciate your ongoing commitment to administering the NWPs in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWPs as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,



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November 14, 2020

U.S. Army Corps of Engineers, Huntington District
ATTN: CELRH-RD (Teresa Spagna)
502 Eighth Street
Huntington, West Virginia 25701-2070
Teresa.d.spagna@usace.army.mil.

Re: Proposed West Virginia Conditions Accompanying NWP Renewal

Dear Ms. Spagna:

The American Petroleum Institute (“API”) represents a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers (“USACE”) Huntington District for the state of West Virginia seeking comments on the proposed regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE’s overall proposal to reissue and modify the Nationwide Permits (“NWPs”) under the Clean Water Act (“proposal”).²

We fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions (“GC”) in 2020 as a logical next step to enact and implement the reforms recommended by the USACE’s comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. (“WOTUS”), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE’s regulatory reform efforts and carefully-considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, we find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer’s (“DE”) role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

¹ Public Notice, Nationwide Permit Reissuance Request for Comments and Comment Request on Regional Conditions, September 30, 2020.

² 85 Fed. Reg. 57,298 (Sept. 15, 2020). Comments due November 16, 2020.

³ Executive Order (“EO”) 13771, Reducing Regulation and Controlling Regulatory Costs,” Jan. 20, 2017; EO 13777, Enforcing the Regulatory Reform Agenda, Feb. 24, 2017; EO 13783, Promoting Energy Independence and Economic Growth, March 28, 2017. Review of 12 Nationwide Permits Pursuant to EO 13783, USACE, Sept. 25, 2017. (“2017 Review of Energy-Related NWPs”). Review of Existing Rules, Corps Subgroup to the DoD Regulatory Reform Task Force, 82 Fed. Reg. 43,314 (Sept. 15, 2017).



Our unequivocal position is that the USACE should REISSUE the 2017 NWP 12 for utility lines activities with a new effective date. Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on

⁴ Note that the term “utility line,” unless otherwise specified or within the context of its use, is applied in this document per the long standing definition of utility line in the 2017 NWP 12 which states: A “utility line” is defined as any 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 message, and internet, radio, and television communication.” 82 Fed. Reg. 1,850 (Jan. 6, 2017). The regulated industry and USACE has steadfastly come to rely on this definition which has remained unchanged from the time when it was first introduced in 1977 except for the one word addition, “internet” added in 2017. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977); 82 Fed. Reg. 1,860, 1,883 (Jan. 6 2017). In 2017, the term “internet” was added simply to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. 82 Fed. Reg. at p. 1,883.

⁵ 2017 NWP comments as summarized in 2017 Energy-Related NWPs Review at pp. 44-45..

unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWP are no more than minimal.

Within these parameters, we believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. API and Its Interests

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services in West Virginia. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to West Virginia

⁶ 85 Fed. Reg. at 57,309.

API has reviewed the regional conditions proposed for activities in West Virginia and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

Our specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.

III. Regional Conditions applicable to specific NWPs within West Virginia

NWP 3 (Maintenance). We support the additional proposed PCN for Section 10 waters in navigation channels. We appreciate the proposed deletion of the two other PCN requirements, which our 2016 comments indicated would increase the burdens for the permittees and USACE staff. At the federal level, NWP 3 already includes adequate PCN requirements for activities with minimal environmental effects.

NWP 8 (Oil and Gas Structure on the Outer Continental Shelf). We support this condition as proposed, including the removal of the PCN trigger, which we believe is in line with overall permitting efforts.

NWP 12 (Utility Line Activities). We note that this NWP is currently inconsistent with the federal proposal and believe that the Regional efforts should reflect the overall USACE conditions on NWP 12, C, and D. We believe the inconsistent designation could create confusion. Additionally, in the absence of a clear environmental justification, we respectfully note that we may challenge as arbitrary and capricious any condition applied to NWP 12 but not also to NWP C and NWP D.

Regarding the condition proposing a PCN in accordance with NWP General Condition 32 is required for all permanent conversion of scrub/shrub and forested wetlands of greater than 1/10 of an acre per each single and complete project, we

appreciate the updated language which reflects the single and complete project language. However, we submit that the PCN submittal provisions in the proposed GC 32 already requires detailed submittals and is sufficient.

NWP 14 (Linear Transportation Projects). We support the proposed reduction in PCNs as part of the overall USACE efforts to streamline the NWPs and provide consistency across districts.

NWP 18 (Minor Discharges). We support this provision as proposed, including the deletion of the Regional Condition, which we support, as the federal version of NWP 18 provides sufficient coverage.

NWP 20 (Response Operations for Oil and Hazardous Substances). We support this provision as proposed, including the deletion of the Regional Condition, which we support, as the federal version of NWP 20 provides sufficient coverage.

NWP 23 (Approved Categorical Exclusions). We support this provision as proposed, including the deletion of the Regional Condition, which we support, as the federal version of NWP 23 provides sufficient coverage.

NWP 27 (Aquatic Habitat Restoration, Establishment, and Enhancement Activities). We support this provision as proposed, including the deletion of the Regional Condition, which we support, as the federal version of NWP 27 provides sufficient coverage.

NWP 35 (Maintenance Dredging of Existing Basins). Regional Condition applying to NWP 35 (Maintenance Dredging of Existing Basins) includes a PCN requirement for activities under this NWP. API asks the Corps Districts to refrain from adding this additional PCN provision. This additional PCN requirement imposes undue burden on permittees.

NWP 52 (Water-Based Renewable Energy Generation Pilot Projects). We support this provision as proposed, including the deletion of the Regional Condition, which we support, as the federal version of NWP 52 provides sufficient coverage.

NWP 53 (Removal of Low-Head Dams). We support this provision as proposed, including the deletion of the Regional Condition, which we support, as the federal version of NWP 53 provides sufficient coverage.

NWP C (Electric Utility Lines and Telecommunications Activities). Please see our comments for NWP 12.

NWP D (Utility Line Activities for Water and Other Substances). Please see our comments for NWP 12.

IV. Regional Conditions applicable to all NWPs within West Virginia



Regional Condition 4 (Historic Properties). We support this section as proposed, noting that It has been significantly streamlined In a way consistent with the overall USACE policy goal of consistency among regions.

Helpful Information – We appreciate the USACE’s efforts to provide such a comprehensive list of helpful information in one place, and hope this can serve as a model for other districts.

V. Conclusion

We appreciate your ongoing commitment to administering the NWP’s in a manner appropriately protective of your jurisdiction’s environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP’s as proposed, we are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE’s guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.

Sincerely,

A handwritten signature in black ink that reads 'Stephanie Catarino Wissman'. The signature is written in a cursive, flowing style.

Stephanie Catarino Wissman
Executive Director
API Pennsylvania
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A handwritten signature in cursive script that reads 'Amy Emmert'.

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November 14, 2020

Omaha District Regulatory Office in Wyoming, Attn: Kevin Little
Via email at Kevin.C.Little@usace.army.mil

Dear Mr. Little:

The Western Energy Alliance ("WEA") and the American Petroleum Institute ("API") (collectively, "The Associations") together represent a broad spectrum of the oil and natural gas industry and we are pleased to submit timely comments in response to the U.S. Army Corps of Engineers ("USACE") Omaha District for the state of Wyoming seeking comments on the need for regional conditions.¹ This request for comments on regional conditions is concurrently issued with the USACE's overall proposal to reissue and modify the Nationwide Permits ("NWP") under the Clean Water Act ("proposal").²

The Associations fully support the renewal of the 52 Nationwide Permits (NWPs) and 32 General Conditions ("GC") in 2020 as a logical next step to enact and implement the reforms recommended by the USACE's comprehensive review of environmental permitting.³ By streamlining the approval of activities with minimal adverse impacts to waters of the U.S. ("WOTUS"), NWPs allow the USACE to focus its limited resources on reviewing projects with greater environmental impacts while providing timely and cost-effective permitting for the regulated community.

We appreciate the USACE's regulatory reform efforts and carefully considered recommendations in its 2017 Review of Energy-Related NWPs. Yet, the Associations find that the proposal overextends in key areas including unnecessarily dividing the NWP 12, and potentially requiring additional burdensome national standards while failing to recognize the district engineer's ("DE") role in tailoring the NWPs through the regional conditioning process as well as district-specific conditions, as appropriate. All of this introduces enormous regulatory inconsistencies and strain on agency resources in a permitting process that is designed to regulate minimal-impact types of activities with little, or any delay.

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Our unequivocal position is that the USACE should reissue NWP 12 for utility lines activities with a new effective date.

Simply reissuing 2017 NWP with a new effective date and no additional encumbrances will provide the necessary regulatory certainty to permittees, including aiding essential energy infrastructure projects that are planned long in advance.

The Associations do not support the USACE's division because NWP 12 must continue to be authorized in the same manner for all industries – according to Clean Water Act (“CWA”) Section 404 impacts and Rivers and Harbors Act of 1899 (“RHA”) Section 10 – and without regard to the contents being transported in the authorized dredge and fill utility line activity.⁴ 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 dredge and fill material into waters of the United States as related to the construction, maintenance, and repair of utility lines. And as the USACE has stated previously: “It would be more appropriate to have district engineers determine which BMPS [best management practices] 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.”⁵

At the district level, we appreciate the Omaha District's efforts in reviewing and/or updating state-wide regional conditions. We are supportive of the DEs' discretionary authority to modify, suspend or revoke specific NWPs on a regional basis or to consider case-by-case scenarios where waivers are appropriate, and the USACE should continue to promote regulatory consistency across districts in the use of this discretionary authority. We agree that DEs are best positioned to consider case-by-case scenarios where waivers may be appropriate and reasonable 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.

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We are generally supportive of removing burdensome and unnecessary regional conditions as well as making any non-substantive changes for providing greater clarity and consistency in applying the NWP requirements. We understand that regional conditions as authorized by the DEs may be added to NWPs to reflect any case-by-case circumstances based on unique regional issues relating to jurisdictional waters and wetlands with the focus being to ensure that environmental effects of activities authorized by NWPs are no more than minimal.

Within these parameters, the Associations believe that the regional conditions should similarly reflect congressional intent and priorities of USACE to streamline the overall permitting processes and to alleviate unnecessary regulatory burdens. The USACE Headquarters' guidance in the proposal is as follows:

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.⁶

To that end, we request that any proposed regional conditions remain aligned with the overall USACE guidance where possible.

I. The Associations and their Interests

Western Energy Alliance represents 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

⁶ 85 Fed. Reg. at 57,309.



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API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry, including crucial exploration, production, transportation, and ancillary services. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the USACE's development of CWA regulations (including NWP), which affect the oil and natural gas industry.

II. General Comments on Regional Conditions to Wyoming

We has reviewed the regional conditions proposed for activities in Wyoming, and notwithstanding specific comments below, we find the regional conditions as proposed are generally appropriate and narrowly tailored. NWP 12, in particular, is a key NWP that is sufficiently evaluated in the overall NWP and must be reissued as a NWP for utility lines and not limited to oil and natural gas pipeline activities. Given the appropriate review and assessment that has been undertaken, no further modification or revision is required at the state-level, and if any new regional conditioning is considered, any additional requirements should be aligned with the overall streamlining goals of USACE (notwithstanding legal requirements).

Generally, we are supportive of any efforts to streamline the regional conditions, including deleting unnecessary or duplicative regional conditions, and reducing ambiguity in the application of the regional conditions through non-substantive clarifying changes and/or revising conditions that are unduly broad and without qualification. Particularly, we caution against any additional onerous regional conditions, particularly new or more expansive PCN or acreage threshold triggers. NWPs are specifically intended for streamlining activities with minimal environmental impact and as such, should not require onerous paperwork akin to individual Section 404 permitting requirements.

The Associations' specific comments to regional conditions applicable to specific NWPs are limited to certain NWPs of interest to the oil and gas industry.



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III. Regional Conditions applicable to Wyoming

A. Preconstruction Notification Requirements Applicable to All NWP

Wetlands Classified as Peatlands. As part of regulatory consistency, we would prefer a consistent definition of peatland throughout the Omaha District, and suggest using the proposed Colorado definition: "For the purposes of this requirement, a peatland is defined as a wetland with saturated organic soil (greater than or equal to 16 inches in thickness) that is classified as a histosol in the Natural Resources Conservation Service (NRCS) Field Indicators of Hydric Soils in the United States (Version 8.0, 2016). A copy of the document can be obtained from the NRCS at http://www.nrcs.usda.gov/Internet/_DOCUMENTS/nrcs142p2_053171.pdf."

Waters Adjacent to Natural Springs. The language, "Springs do not include drain tile outlets." Is Included here but not in North Dakota. We encourage the District to follow the North Dakota example to be consistent.

Stream Channelization and Relocation Projects: PCN required for any regulated activity that involves stream channelization or relocation of an existing perennial stream channel. For the purpose of this condition, stream channelization is defined as "The manipulation of a stream's course, condition, capacity or location that causes more than minimal interruption of normal stream processes." Examples of stream channelization include, but are not limited to straightening, relocating, shifting, tubing (i.e. placement of a culvert in an open channel for construction purposes), etc. We respectfully note that "tubing" a stream for "construction purposes" does not always require straightening, relocated, shifting, etc. nor are they always permanent. Culverting a stream for a simple temporary bypass during an open cut pipeline installation or temporary construction access would require a PCN based on this definition. These impacts are temporary and should be considered a "minimal interruption of normal stream processes." We respectfully recommend that this condition should be reworded indicating that the condition only applies to permanent impacts to the stream that have the stated result. In addition, the header of the condition is confusing. The installation of a pipeline does not relate to a "Stream Channelization and Relocation Project" but the construction of one seems to meet the definition of one. Temporary short duration impacts should be excluded.

NWP 23 Approved Categorical Exclusions. We appreciate the addition of granularity that comes from limiting this NWP to areas greater than 1/2 acre.



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B. Best Management Practices

Overall, we appreciate Wyoming's presentation of BMPs, which clearly provides the enforceable conditions in writing for this state. We hope it will be a model for other states within the Omaha District.

1. Required Best Management Practices Applicable to States

Culvert Countersink Depth. We respectfully suggest that "Intermittent and perennial" be changed to "jurisdictional streams considered to be waters of the U.S."

IV. Conclusion

We appreciate your ongoing commitment to administering the NWP in a manner appropriately protective of your jurisdiction's environmental resources, while striving to streamline permitting for projects with relatively minimal adverse environmental impacts. Generally, as noted in our letter above, where regional revisions and additions are deemed necessary to the comprehensive NWP as proposed, the Associations are supportive of regional conditions that either remove unnecessary burdensome requirements or further clarify or clean up existing language to remove ambiguity. Where new conditions are proposed, we ask that the regional conditions are narrowly tailored to specific documented needs, align with the USACE's guidance, and aid rather than hinder in providing clarity, certainty, and consistency in timely decision-making needed in the permitting process.

We thank you for considering our comments. We look forward to working with you more throughout the finalization, state water quality certification, and implementation processes.

If you have any questions concerning this submission, please do not hesitate to contact the lead signatory below at any time.



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Sincerely,

A handwritten signature in black ink that reads 'Tripp Parks'.

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A handwritten signature in black ink that reads 'Lynn Granger'.

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