



Interstate Natural Gas Association of America

Submitted via www.regulations.gov

October 18, 2017

Headquarters, U.S. Army Corps of Engineers
Attn: CECW-CO-N (Ms. Mary Coulombe)
441 G St., N.W.
Washington, D.C. 20314-1000

Re: INGAA Comments on United States Army Corps of Engineers; Subgroup of the Department of Defense Regulatory Reform Task Force, Review of Existing Rules, 82 Fed. Reg. 33,470 (July 20, 2017); Docket ID No. COE-2017-0004

Dear Ms. Coulombe,

The Interstate Natural Gas Association of America (“INGAA”) respectfully submits these comments in response to the United States Army Corps of Engineers’ (the “Corps”) request for input on existing regulations that should be repealed, replaced or modified. 82 Fed. Reg. 33,470 (July 20, 2017). Specifically, the Corps seeks public assistance in identifying existing policies and regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; and create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies. 82 Fed. Reg. at 33,470-71.

INGAA is a non-profit trade association whose member companies transport over 95% of the nation’s natural gas through a network of 200,000 miles of pipelines. Ensuring the safety, security, and reliability of this natural gas pipeline network is crucial to meeting the energy needs of the United States and contributes directly to the U.S. economy by powering domestic industry and providing jobs.

The siting, construction, and operation of interstate natural gas pipelines is governed by the Federal Energy Regulatory Commission (“FERC”) under the Natural Gas Act (“NGA”), 15 U.S.C. §§ 717, *et seq.* Where new pipelines and maintenance activities will affect waters of the United States, the Corps administers permit programs under section 404 of the Clean Water Act (“CWA”) and/or section 10 of the Rivers and Harbors Act.

INGAA believes that the Corps’ regulatory reform initiative, and the adoption of the recommendations included herein, is critical to achieving the Trump Administration’s goals of expediting environmental reviews and approvals for infrastructure projects.¹ Our members have

¹ See Exec. Order No. 13,766 (Jan. 24, 2017), Exec. Order No. 13,783 (Mar. 28, 2017), and Exec. Order No. 13,807 (Aug. 15, 2017).

gained substantial experience with these programs, and they appreciate the Corps' renewed effort to improve the programs' effectiveness and efficiency so that pipeline infrastructure is not needlessly delayed or restricted while protecting the nation's waters. To that end, INGAA provides the following comments and recommends that the Corps should:

- Increase collaboration with FERC and defer to FERC's review process to the maximum extent allowed by law.
- Clarify that the CWA section 401 review process starts upon the state's receipt of the original written request for a CWA section 401 water quality certification.
- Enforce current regulations stating a waiver of CWA section 401 water quality certification will occur if the certifying agency fails to act on a request for certification within 60 days.
- Clarify that applicants need to provide reasonably reliable and accurate information about the resources along the right-of-way, but 100% ground surveys do not need to be conducted before an application can be processed.
- Simplify the nationwide permit ("NWP") review process to ensure the efficient authorization of activities that have minimal impacts to waters of the United States by providing greater uniformity in regional conditions and consistent availability of NWPs across all districts.
- Create a permitting process or implement a new policy that expedites review and approval of both time-sensitive maintenance and inspection activities and emergency work.
- Amend the mitigation rule or issue guidance clarifying that permittee-responsible mitigation is not the only option for linear projects when impacts extend beyond the service area of a mitigation bank.
- Issue CWA section 404 permits contingent upon FERC's successful compliance with the National Historic Preservation Act ("NHPA") when FERC is the lead agency.
- Continue efforts to repeal the 2015 waters of the United States rule and promulgate a new rule to resolve inconsistencies and confusion surrounding CWA jurisdiction.
- Establish standard operating procedures and incorporate CWA section 408 personnel earlier in the permit review process to streamline section 408 approvals.
- Train Corps staff to ensure consistency between Corps district offices.

These recommendations are discussed in more detail in the following comments.

I. The Corps Should Increase Collaboration with FERC and Defer to FERC's Review Process to the Maximum Extent Allowed by Law.

Congress designated FERC as the lead agency for the purpose of expediting federal review and approval of interstate natural gas pipelines. At times, however, the Corps has failed to adhere to FERC deadlines and/or process permit applications before FERC issues its final order. The Corps' inaction and delay is contrary to governing statutes, Corps guidance, the Corps' 2005 Memorandum of Understanding ("MOU") with FERC, and recent Executive Orders ("EOs"). Accordingly, the Corps should improve its collaboration with FERC during the permit review process, and to the greatest extent allowed by law, defer to FERC's analysis to accelerate Corps authorizations.

Under the NGA, proponents of interstate natural gas pipeline projects must secure a Certificate of Public Convenience and Necessity ("Certificate") from FERC authorizing the construction of the pipeline. Congress, recognizing that a project proponent will have to secure permits from numerous other agencies, including the Corps, sought to streamline the entire process. Pursuant to section 313 of the Energy Policy Act of 2005 ("EPA Act"),² FERC is designated as the lead agency for the purposes of coordinating all applicable federal authorizations, including review under the National Environmental Policy Act ("NEPA"), associated with the overall project. 15 U.S.C. § 717n(b)(1). FERC is further required to establish a schedule for all federal authorizations for the project, and other federal agencies exercising authority over the project, to ensure an expeditious review process. *Id.* § 717n(c).

In addition to FERC's statutory authority, Corps guidance and the Corps' 2005 MOU with FERC set forth procedures for the Corps to coordinate its processing of CWA section 404 permits with FERC. The MOU states that the Corps will "use the FERC record to the maximum extent practicable and as allowed by law," and that "the Corps will give deference, to the maximum extent allowed by law, to the project purpose, project need, and project alternatives that FERC determines to be appropriate for the project."³ Likewise, Corps guidance directs staff to issue permit authorizations no later than 90 days after FERC issues its final NEPA document.⁴ As mentioned above, recent EOs issued by the White House also seek to "streamline and expedite" the environmental review and permit approval process for infrastructure projects, including natural gas pipelines.

The current statute, MOU, and guidance document provide procedures to maximize efficiency and expedite the environmental review process when adhered to by all parties. In the past, the Corps has not consistently adhered to FERC deadlines and has failed to process applications within the designated timeframes. For example, six months after FERC issued a Certificate for a pipeline project sponsored by an INGAA member, the Corps raised an issue

² Pub. L. 109-58, 119 Stat. 594 (2005).

³ MOU Supplementing the Interagency Agreement on Early Coordination (June 30, 2005); *see also Delaware Riverkeeper Network v. United States Army Corps of Engineers*, No. 17-1506, 2017 WL 3611780, at *6 (3d Cir. Aug. 23, 2017) ("Under the regulatory scheme, FERC defines the project's basic and overall purposes. Then, pursuant to the [MOU], 'the Corps will give deference, to the maximum extent allowed by law, to the project purpose.'").

⁴ Regulatory Guidance Letter ("RGL") 07-03, Department of the Army Permit Processing for Proposed Natural Gas Projects (Sept. 19, 2007).

with FERC's alternatives analysis. The Corps then proceeded to take three months to conduct its own alternatives analysis, significantly delaying the issuance of the Corps permits and the start of construction. Similarly, despite submitting a permit application to the Corps around the same time it submitted a project application to FERC, a project sponsor of an interstate natural gas pipeline did not receive Corps authorization until ten months after FERC issued a Certificate (and up to eleven months after the final Environmental Assessment was issued). Moreover, sometimes Corps field staff do not actively participate in the FERC review process, even when listed as a cooperating agency, including during the review of environmental documents and providing comments for inclusion in those documents. This conduct is in line with statements made during meetings with Corps field staff suggesting that the Corps may diverge from FERC's schedule. With FERC conducting its own evaluation and environmental review, delays in Corps permit approval impose significant costs that exceed environmental benefits. As outlined above, this approach is contrary to Corps policy and the law.

To avoid delays in permit authorization and the associated costs, the Corps should increase collaboration and participate earlier in the FERC process (such as engaging at the pre-filing stage), rely to the fullest extent permissible under the law on FERC's review process, and meet FERC's deadlines. This would allow the agencies to process permit applications concurrently, and resolve issues or discrepancies (e.g., alternate routes) during the NEPA review process and before FERC issues a Certificate. This approach would also be consistent with the EPAct. To better document this process, the Corps should consider developing a new or revised MOU with FERC.

As discussed further in Sections III and IV.B, *infra*, the Corps' districts do not have consistent approaches to permitting, which leads to further delays. Therefore, INGAA strongly encourages Corps to align its policies and practices among the various district offices to avoid inconsistent interpretations and ensure that its streamlining obligations are achieved.

II. The Corps Should Clarify That the CWA Section 401 Review Process Starts Upon the State's Receipt of the Original Written Request for a CWA Section 401 Water Quality Certification and Enforce Existing Regulations That State Waiver Will Occur Unless the Certifying Agency Acts Within 60 Days.

CWA section 401 certification requirements create enormous regulatory and commercial burdens for pipeline projects when misused by States for reasons other than protecting water quality. The Corps can take active measures to reduce these burdens.

If a pipeline project may result in a discharge into navigable waters, the project requires a permit from the Corps and the permit applicant must provide a certification from the state where the discharge originates confirming that the discharge will not violate state water quality standards. 33 U.S.C. § 1341(a)(1). The state's certification may set conditions on the discharge, which become conditions in the federal permit. 33 U.S.C. § 1341(d). A certification is not required if the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year). . . ." *Id.* at § 1341(a)(1). While the CWA is clear that states are required to act within a "reasonable period of time" from receipt of a request for certification, which in no event can exceed one year from receipt, many states routinely delay issuance of section 401 certification for a variety of political, administrative, or other reasons.

Such delays, however, can and should be avoided. The Corps, to reduce the heavy burdens on pipeline and other infrastructure projects, should clarify what triggers the statutory and regulatory review period, rather than allowing individual states to create a patchwork of inconsistent and potentially self-serving interpretations of the trigger. Specifically, INGAA requests that the Corps modify 33 C.F.R. § 325.2(b)(ii) to clarify that the review period is triggered when the certifying agency receives the original⁵ written request describing the project and informing the agency of the need for section 401 certification.⁶ The U.S. Environmental Protection Agency's ("EPA's") regulation governing the certification of federally-issued CWA section 402 NPDES permits is a good example for the Corps to follow. It makes clear the certification request is made, and the clock for waiver begins, "from the date the draft [federal] permit is mailed to the certifying State agency." 40 C.F.R. § 124.53(c)(3).

The Corps' existing regulations⁷ establish a "reasonable period of time" for the certifying agency to review. Therefore, INGAA requests that the Corps enforce the 60-day regulatory review period, unless the District Engineer provides a written extension of such review period based on a request from the certifying agency describing in sufficient detail the need for an extension, which in no event shall extend beyond one year from the certifying agency's receipt of the certification request.

III. The Corps Should Clarify That Applicants Need to Provide Reasonably Reliable and Accurate Information About the Resources Along the Right-of-Way, but 100% Ground Surveys Are Not Required Before a CWA Section 404 Application Can Be Processed.

Corps districts tend to have different interpretations as to what constitutes a complete application. Interstate natural gas pipeline projects are often delayed because the Corps district or regional offices deem an application incomplete and request additional information from the applicant before processing the application. Some districts require concurrence from the State Historic Preservation Officer and/or the U.S. Fish and Wildlife Service; others require the applicant to conduct ground surveys along most or all of the proposed right-of-way in order to process the application (as opposed to before issuing the permit or issuing a conditional permit). Such inconsistent and unnecessary requirements create unreasonable delays in the permit review process. The Corps should clarify through guidance or by modifying its regulations that applicants need only provide reasonably reliable and accurate information about the resources along the right-of-way for the Corps to deem the application complete.

The regulations lack the specificity necessary to lead to efficient processing and consistent determinations regarding application completeness. 33 C.F.R. § 325.2(a)(2) states that "Within 15 days of receipt of an application the district engineer will either determine that the application is complete . . . and issue a public notice . . . or that it is incomplete and notify the

⁵ The Corps should emphasize that the review period is triggered by the *original* written request to prevent state certifying agencies from engaging in practices intended to prolong the certification process, such as requiring an applicant to withdraw and re-submit a certification application in order to reset the statutory clock.

⁶ This requirement would be consistent with a recent FERC order stating that the Commission "interpret[s] the triggering date for the waiver provision to be the date a certification application is filed with the relevant agency." *Millennium Pipeline Company, L.L.C.*, 160 FERC ¶ 61,065 (Sept. 15, 2017).

⁷ See 33 C.F.R. §§ 325.2(b)(ii), 330.4(c)(6).

applicant of the information necessary for a complete application.” The application will be deemed complete when sufficient information is received “to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.” *Id.* §§ 325.1(d)(10), 325.3(a). The equivocal language in § 325.3(a) provides a flexible standard leading to inconsistent requests from District Engineers for additional information and delays in processing Corps permits.

For example, some districts have demanded a project sponsor perform ground surveys on most or all of the right-of-way before deeming an application complete. Project proponents at the application stage, however, often do not have access to all of the properties along the route to conduct ground surveys. Therefore, Corps headquarters should clarify that applicants may provide information from other surveys such as geographic information systems, Lidar data, aerial surveys, etc. as long as it is reliable and reasonably accurate. Once access to the properties is obtained, project sponsors will perform all required on the ground surveys prior to construction.

Also, it is not uncommon for interstate natural gas pipeline projects to span multiple Corps districts. Where multiple districts are involved, project sponsors often receive inconsistent advice and guidance from district staff creating confusion as to what is required of the applicant. This, in turn, can lead to significant delays. Under such circumstances, INGAA urges Corps headquarters to designate or appoint a lead district at the start of the review process which will have authority to issue permits for all districts that have jurisdiction, funneling communication to one central point of contact. Whether districts are responding to applicant questions about how to comply with regulatory requirements or making determinations as to what constitutes a complete application, Corps headquarters should provide sufficient oversight – including regulatory modifications or guidance – to ensure permitting requirements are implemented consistently.

IV. The Corps Should Simplify the NWP Review Process to Ensure the Efficient Authorization of Activities That Have Minimal Impacts to Waters of the United States.

A. NWPs Are Essential to Maintaining and Operating Natural Gas Infrastructure.

INGAA members regularly make use of NWPs whenever and wherever possible to streamline permitting for their construction and maintenance projects. The impacts created by these linear facilities are usually only temporary and involve minor impacts to the aquatic environment. INGAA members are usually able to rely on NWPs 3 (Maintenance) and 12 (Utility Line Activities) to perform their routine pipeline maintenance and other activities associated with pipeline expansion and construction.

The continued use of NWPs is critical for the construction of new projects to keep up with the Nation’s growing demand for natural gas and for maintenance of existing critical pipeline infrastructure to ensure pipeline reliability and safety. National policy initiatives, like a focus on improving energy independence, will also lead to a significant increase in demand for natural gas and the critical interstate pipelines and related infrastructure needed to deliver natural gas to market. INGAA thus supports the continued use of NWPs to expedite authorization of

activities that have minimal impacts to “waters of the United States” and shares the Corps’ objective of streamlining and simplifying the review processes while maintaining environmental protection.

The Corps would face a crippling burden if NWP’s were not available or if their use were severely restricted. The Corps would need to significantly increase the size of its staff to review and approve a substantial number of individual permits. The result would be a massive regulatory log jam with significant delays to obtain permits, potentially adding anywhere from 6 to 24 months to a project timeline. One study concluded that, on average, it takes an extra 475 days to obtain an individual permit versus a NWP.⁸ That same study concluded that the average cost to prepare a NWP application is \$28,915 versus an individual permit application which on average costs over \$271,596 (excluding “the cost of mitigation, design changes, costs of carrying capital, and other costs”).⁹ Even when accounting for differences between project sizes, the study concluded the difference in cost was substantial. “For individual permits, application costs were measured as \$43,687 plus \$11,797 for each acre of impact. For nationwide permits, costs were measured as \$16,869 plus \$9,285 for each acre of waters of the United States impacted.”¹⁰ Thus, if projects were forced to obtain an individual permit instead of a NWP for the preparation costs would increase substantially.

B. The Corps Should Provide Greater Uniformity in Regional Conditions and Consistent Availability of NWP’s Across All Districts.

The Corps understandably allows District Engineers to add regional conditions to NWP’s to restrict some types of activities authorized by NWP’s based on local environmental conditions. However, in proposing regional conditions, some districts have gone beyond the protection of specific resource types and or geographic areas and have instead cast broad or blanket regional conditions that seem to deviate from the intent of the NWP program, namely “to provide timely authorizations for the regulated public while protecting the Nation’s aquatic resources.”¹¹ For example, blanket regional conditions that require pre-construction notification (“PCN”) submittal for any use of NWP 12¹² unnecessarily delay numerous pipeline construction projects, at significant cost, while awaiting permit verification by District Engineers. INGAA urges the Corps to provide guidance that requires greater uniformity in Regional Conditions and consistent availability of NWP’s across the district offices.

⁸ David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to Wetland Permitting Process*, 42 *Natural Res. J.* 59, 76 (2002) (reporting that it took on average 313 days to prepare and obtain a NWP versus 788 days for an individual permit).

⁹ *Id.* at 74.

¹⁰ *Id.*

¹¹ Issuance and Reissuance of Nationwide Permits, 82 *Fed. Reg.* 1,860 (Jan. 6, 2017).

¹² NWP 12 only requires a PCN where “(1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials.” 82 *Fed. Reg.* at 1,986.

Some district offices have stated that INGAA members cannot use NWP 3 and must use NWP 12 even though the project is a maintenance activity that represents “repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure.”¹³ This may force the applicant to provide a PCN and engage in a public comment process, thereby delaying the start of the project by at least 30 days. Other examples include:

- The Chicago District recently revoked several NWPs, including NWPs 3 and 12.¹⁴
- In the State of Louisiana, which includes areas within the regulatory jurisdiction of the New Orleans, Tulsa, and Ft. Worth Districts, a PCN is required for any use of NWP 12 regardless of impact acreage, but no support or rationale has been provided to support this approach.¹⁵
- The New York and Buffalo Districts implement regional conditions that significantly narrow the applicability of NWP 12.¹⁶
- The Kansas City District’s regional conditions for Missouri require a PCN for use of NWP 12 that would impact a “special aquatic site.”¹⁷ The term “special aquatic site” is defined broadly and includes wetlands.¹⁸ The PCN must include a revegetation plan for impacted wetlands and riparian areas, and must include site-specific plans for the stabilization of disturbed channel bed and bank areas, if activity is within a stream.

The Corps should seek uniformity and consistency in regional conditions by requiring districts to justify standard regional conditions to headquarters and approving only those conditions that headquarters agrees are necessary to protect the jurisdictional resource (e.g., protected species, high quality or critical resource water, etc.). The Corps may wish to provide guidance and limit the scope of regional conditions that may be imposed by District Engineers. If there is a specific local resource that needs to be protected by regional conditions, then that basis needs to be clearly articulated as the reason for the NWP being unavailable or requiring a PCN. Non-standard, case-by-case conditions should also be well-documented in the record, in accordance with headquarters policy. Once regional conditions are approved or finalized, the Corps should maintain an online database of the regional conditions for each district. This would allow applicants to more easily access regional conditions and track any changes as projects develop.

C. The Corps Should Provide a Blanket NWP Authorization Similar to FERC’s Blanket Certificate Program.

The Corps should consider developing a blanket program for PCNs, similar to FERC’s blanket certificate program,¹⁹ which would allow qualifying applicants to submit annual, after-

¹³ 82 Fed. Reg. at 1,984.

¹⁴ See Chicago District, Public Notice, Announcing the Final Decision on the Revocation of Select NWPs (Mar. 17, 2017).

¹⁵ State of Louisiana, NWP Regional Conditions at 4 (Feb. 2017).

¹⁶ See Buffalo & New York Districts Final Regional Conditions, Water Quality Certification and Coastal Zone Concurrence for the 2017 Nationwide Permits for New York State at 13-16 (Mar. 21, 2017).

¹⁷ Kansas City District, Missouri NWP Regional Conditions at 2 (2017).

¹⁸ See 40 C.F.R. §§ 230.3(m), Subpart E.

¹⁹ 18 C.F.R. §§ 157.201, *et seq.*

the-fact reports verifying compliance with applicable NWP's general and regional conditions at the end of each year, rather than pre-construction submittals and reviews.

Under FERC's blanket certificate program, issued pursuant to NGA section 7(c), a natural gas company may undertake a restricted number of routine activities without the need to obtain a case-specific certificate for each individual project, yet the project sponsor is required to comply with requisite environmental reviews and obtain necessary permits and approvals. The blanket certificate program provides an efficient means to authorize a company to construct or modify natural gas facilities provided the activity complies with restrictions on cost and environmental impacts set forth in FERC's regulations. Although there are two types of blanket certificates (automatic and prior notice), the automatic blanket certificate program provides an efficient process for smaller projects. Under the automatic blanket certificate, the project sponsor must notify potentially affected landowners at least 45 days in advance, describing the project and how a landowner can contact the project sponsor and FERC. FERC and the public, other than the affected landowners, do not receive notification of the projects that qualify under this type of blanket certificate authority, but the company must file an annual report that identifies all relevant projects constructed in the previous year.

The Corps should consider incorporating a comparable automatic blanket authorization into the NWP program. Under a similar NWP program, an applicant with a project that satisfies certain criteria (e.g., limitations on size, cost, or acreage impacts) would be authorized to proceed with the activity as long as it notifies affected landowners in advance and files an annual report detailing the activities it undertook pursuant to the program. The PCN process is unnecessary for a subset of smaller projects, imposing administrative costs and costs for applicants that exceed environmental benefits. Therefore, the Corps should implement a blanket authorization for these projects to reduce the unnecessary regulatory burden caused by the PCN.

V. The Corps Should Create a Permitting Process or Implement a New Policy That Expedites Permit Review and Approval of Time-Sensitive Maintenance, Inspection and Emergency Work.

Nowhere would the blanket authorization be more appropriate than in authorizing emergency or time-sensitive public safety activities. Much of INGAA members' maintenance, inspection, and emergency work must be conducted under short time frames set by Pipeline and Hazardous Materials Safety Administration ("PHMSA") and may be in areas requiring federal agency consultation under the Endangered Species Act ("ESA"). For example, PHMSA's regulations require operators to conduct integrity assessments of certain pipelines in "High Consequence Areas" at least every seven years. 49 C.F.R. § 192.939. A pipeline operator may meet this requirement by running an inline inspection tool through the pipeline. If the inline inspection indicates certain anomalous pipe conditions, an operator must respond within the time period specified in PHMSA's regulations, which could be as short as five days from discovery. 49 C.F.R. § 192.933. The operator's response might include excavating the pipe to conduct further evaluation of the pipe's condition and then either repairing or replacing the pipe. If repairs cannot be accomplished within required time frames, the affected portions of the system may be required to shut down or operated at reduced pressure, possibly resulting in customers using alternative energy supplies (if available) with potentially greater environmental consequences, or curtailing operations, with negative economic consequences. Given the breadth of customers served by INGAA members, including electric generators, local gas

distribution companies serving the public, and critical service facilities, such as hospitals, failure to make timely repairs as a result of regulatory hurdles has wide-ranging and serious consequences.

Accordingly, the Corps should create a permitting process that expedites permit review and any approvals that require PCNs for both time-sensitive maintenance and inspection activities and emergency work. The new general permitting process would allow such projects to proceed immediately and conduct and approve any necessary permitting review and PCN approvals after the fact. The general permit would not authorize any activity which is likely to jeopardize the continued existence of a threatened or endangered species or destroy or adversely modify designated critical habitat. Nor would the permit authorize any “take” of federally-listed species.²⁰ This would allow important maintenance projects to proceed without delay and ensure that public safety and health are paramount. The applicants would still be required to apply for approvals immediately after the required work was completed for the Corps’ review and approval. This change would be consistent with the ESA’s consultation requirements in emergency circumstances, which allow for informal consultation until such time as the emergency is under control, 50 C.F.R. § 402.05, and would further the goals of the Corps’ NWP program by reducing the burdens associated with the section 404 program and improving efficiency.

VI. The Corps Should Clarify that Permittee-Responsible Mitigation Is Not the Only Option When Impacts Extend Beyond a Mitigation Bank’s Service Area.

The Corps should amend the mitigation rule or issue guidance clarifying that project sponsors of linear projects have more flexibility when it comes to compensating for permitted impacts that may extend beyond the service area of a particular mitigation bank. In other words, the Corps should make clear that a company constructing a natural gas pipeline is not required to conduct permittee-responsible mitigation for permitted impacts that may, at times, occur outside a bank’s service area, and may comply with Corps regulations by purchasing credits from a mitigation bank to mitigate for such impacts.

The current regulatory prescription is unreasonable and should be amended. Under 33 C.F.R. § 332.3(b)(4), “[w]here permitted impacts are not in the service area of an approved mitigation bank or in-lieu fee program that has the appropriate number and resource type of credits available, permittee-responsible mitigation is the only option.” A linear project, such as a natural gas pipeline, may stretch for hundreds of miles. Thus, it is ineffective and unreasonable to mandate permittee-responsible mitigation for minor impacts along the route simply because no single mitigation bank covers the entire territory. In the aggregate, it would be more cost-effective, and efficient, and environmentally beneficial to mitigate for impacts caused by a linear project by purchasing credits at one (or a few) mitigation bank(s) along the route. Thus, the regulation should be amended to provide project sponsors of linear projects with more flexibility to compensate for permitted impacts that may extend beyond the service area of a particular mitigation bank.

²⁰ California’s Regional General Permit for emergency activities provides a good model. *See* Los Angeles District, Department of the Army Regional General Permit No. 63 for Repair and Protection Activities in Emergency Situations (Nov. 29, 2013) (allowing emergency maintenance work to proceed expeditiously).

VII. The Corps Should Issue CWA Section 404 Permits Contingent Upon FERC's Successful Compliance With the National Historic Preservation Act.

The Corps should issue CWA section 404 permits contingent upon FERC's successful compliance with NHPA, rather than postponing its authorization until FERC provides notification that NHPA consultation is complete.

NHPA section 106 requires federal agencies issuing a permit, license, or approval to take into account the effect of the proposed project on any historic properties and afford the Advisory Council on Historic Preservation ("ACHP") and the public a reasonable opportunity to comment on the proposal. FERC and the Corps both have responsibilities under NHPA, but the ACHP's regulations permit the Corps to "designate a lead Federal agency . . . fulfilling their collective responsibilities under section 106." 36 C.F.R. § 800.2(a)(2). Accordingly, the Corps has in the past issued CWA section 404 permits contingent on FERC's compliance with the NHPA. Recently, however, the Corps has delayed issuing its CWA section 404 permit until FERC determines the NHPA section 106 consultation is complete.²¹ The delay does not improve protection for cultural resources but can significantly interfere with construction schedules. Thus, the Corps should resume issuing CWA section 404 permit authorizations contingent upon FERC's successful compliance with the NHPA.

The Corps' NHPA regulations support this practice. FERC, as the designated lead agency and the agency with jurisdiction over the entire length of the pipeline, is ultimately responsible for fulfilling the federal obligations under the NHPA. For purposes of assessing a linear project's effect on historic properties, the Corps' authority is limited to discrete portions of the right-of-way, while FERC's jurisdiction extends the entire length of the proposed pipeline.²² Vast sections of the right-of-way are beyond the Corps' NHPA responsibilities.²³ As a result, Corps regulations encourage the agency to defer to FERC.²⁴ Corps guidance states the same,²⁵ but goes further to suggest that "[i]f general permit time frames cannot be met because of the amount of time necessary to resolve issues concerning historic properties, [the Corps may]

²¹ NHPA section 106 consultation is "complete" when the agency has made a "reasonable and good faith effort" to identify historic properties and found that the project will cause no adverse effects. 36 C.F.R. § 800.4(b)(1). A reasonable and good faith identification effort, however, does not require (i) identification of every historic property within the area of potential effects ("APE") and (ii) ground verification of the entire APE. ACHP Guidance, *Meeting the "Reasonable and Good Faith" Identification Standard in Section 106 Review*, at 3.

²² See *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 205 F. Supp. 3d 4, 31 (D.D.C. 2016) ("[O]nly construction activity in the federally regulated waterways – the direct effect of the undertaking – and in uplands around the federally regulated waterways – the indirect effect of the undertaking – requires [Corps] analysis.").

²³ See 33 C.F.R. § 325, App. C, § 1(g).

²⁴ See 33 C.F.R. § 325, App. C, § 2(c) ("[i]n processing a permit application, the district engineer will generally accept . . . [the] lead agency's compliance with the requirements of the NHPA.").

²⁵ Corps Directorate of Civil Works, Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800, § 6(n) (Apr. 25, 2005) ("2005 Guidance") ("[d]istricts should not be undertaking section 106 compliance for other Federal agencies with greater jurisdiction," and "[d]istricts should make sure they are the lead agency before undertaking the section 106 process.").

condition[] the general permit verification to prohibit commencement of construction until the section 106 process is completed.”²⁶

Corps officials, however, have suggested that later guidance²⁷ prevents the Corps from conditioning a CWA section 404 permit. The guidance document, however, does not address the situation where the Corps is not the lead federal agency and does not supersede the NGA or the applicable regulations discussed above. Moreover, courts have held that federal agencies may authorize an activity contingent upon completion of the NHPA section 106 consultation process.²⁸

The Corps also points to a decision by the U.S. Court of Appeals for the Eighth Circuit²⁹ to justify its position. The unique facts in *Mid States*, however, can be easily distinguished from circumstances where the Corps would condition a CWA section 404 permit on FERC’s completion of NHPA section 106 consultation. In *Mid States*, the Surface Transportation Board (“the Board”) was reviewing a proposal to construct a new rail line. Although the Board identified some potentially affected sites and the ACHP expressed concerns about potential adverse effects, the Board did not adopt specific measures to avoid or mitigate any adverse effects before it granted final authorization. Instead, it deferred development of mitigation measures until after the license was approved. In contrast, it would be permissible under *Mid States* for the Corps to issue a permit contingent upon FERC’s completion of section 106 consultation because mitigation measures would be agreed upon before FERC’s authorization.

Given the authorities described above, Corps headquarters should clarify for the districts that they may condition a permit on FERC’s fulfillment of NHPA section 106 obligations. If, however, the Corps concludes that the 2007 guidance prevents this process, then the Corps should modify or repeal the guidance document.

VIII. INGAA Supports the Corps’ Efforts to Repeal and Replace the 2015 Rule Defining Waters of the United States.

In 2015, the Obama Administration promulgated a new definition of the term “waters of the United States.” 80 Fed. Reg. 37,054 (June 29, 2015) (“2015 WOTUS Rule”). The 2015 WOTUS Rule has created considerable confusion and would significantly expand the extent of land and water subject to regulation under the CWA. As a result, many environmental and industrial organizations, as well as 31 States, have filed legal challenges to the rule’s validity. Unless the traditional scope of WOTUS is restored, INGAA members’ will need to obtain CWA

²⁶ 2005 Guidance § 6(n).

²⁷ Corps Directorate of Civil Works, Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800 dated 25 April 2005, § 4 (Jan. 31, 2007) (“Provisional permits are not appropriate for activities that may affect historic properties.”).

²⁸ See, e.g., *City of Grapevine, Tex. v. Dep’t of Transp.*, 17 F.3d 1502, 1509 (D.C. Cir. 1994) (holding Federal Aviation Administration’s approval of runway was lawful because it was “expressly conditioned upon completion of the § 106 process”); *S. Utah Wilderness All. v. Norton*, 277 F. Supp. 2d 1169, 1195 (D. Utah 2003), vacated on other grounds, No. 2:02-CV-01118PGC, 2004 WL 2827894 (D. Utah Nov. 30, 2004) (holding Bureau of Land Management’s decision to approve seismic exploration for oil and gas was without fault because it was “specifically conditional upon Section 106 compliance”).

²⁹ *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003) (“*Mid States*”).

section 404 permits for discharges in areas only tenuously – if at all – linked to traditional jurisdictional waters, and they would be subject to additional mitigation requirements. These burdens directly affect the timing, cost and potential viability of interstate natural gas pipeline projects. For all these reasons, INGAA supports efforts by the Corps and the EPA to repeal the 2015 WOTUS Rule and support the agencies’ proposal to restore the pre-existing regulations. 82 Fed. Reg. 34,899 (July 27, 2017). In addition, INGAA looks forward to participating in efforts to clarify the definition of WOTUS, because it is important that the agencies resolve the inconsistency and confusion surrounding CWA jurisdiction.

IX. The Corps Should Establish Consistent Procedures and Engage Section 408 Personnel Earlier in the Permit Review Process to Streamline Section 408 Approvals.

Pursuant to section 14 of the Rivers and Harbors Act (“RHA”) (section 408 of the U.S. Code), the Corps may grant permission to private entities for the permanent or temporary alteration or use of Corps civil works projects as long as the alteration “will not be injurious to the public interest and will not impair the usefulness of such work.” 33 U.S.C. § 408(a). INGAA members often must obtain section 408 authorizations when a pipeline project crosses Corps public works projects (e.g., levees, dams, bridges, and dredged channels), but the Corps has not defined a clear process for applicants to follow. Instead, Corps guidance documents have adopted a non-prescriptive policy confusing implementation in the various districts. This approach leads to miscommunication and unnecessary delays in permitting.

The Corps has announced plans to update and improve the section 408 process,³⁰ and INGAA understands that the Corps is now working on revisions to Engineer Circular EC 1165-2-216 which provides the requirements and procedures for processing requests. While INGAA looks forward to participating in the development of a uniform, predictable, and consistent section 408 approval process, it also provides the following recommendations below for the Corps’ consideration.

The vast majority of pipeline projects requiring section 408 approval will also require authorization pursuant to RHA section 10 or CWA section 404, but the Corps will not issue a section 10 or section 404 permit until a determination has been made regarding the section 408 request. However, the grant or denial of the section 408 request is not a permit action managed by the Corps’ regulatory staff. Rather, a separate office within the Corps’ Civil Works Program administers section 408 approvals. Therefore, it is important to notify section 408 personnel as early as possible and incorporate them into the pre-project coordination and authorization process to determine, first, if section 408 review is required. Often Corps public works projects were constructed years, decades, or even a century ago. The records associated with the civil works project may not be readily available, and INGAA is not aware of an existing database that can be used to obtain information about civil works projects for applicants in their project planning. While the Corps should develop a civil works database and make it available to the public so it can be used for desktop identification in project planning, in the meantime, it is important for section 408 personnel to be involved in early project discussions to help identify the location of civil works projects and potential avoidance. In addition, to avoid any delays in

³⁰ See <http://www.usace.army.mil/Missions/Civil-Works/Section408/>.

processing, the Corps should assure adequate funding for section 408 personnel for the entire fiscal year.

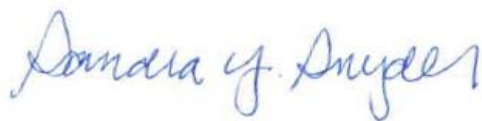
If a pipeline project will permanently or temporarily alter a civil works project, then section 408 approval is required. The Corps should process the section 408 approval and the section 404 permit review concurrently with FERC's authorization and coordinate the associated procedural requirements and data requests for both the regulatory component and the section 408 approval (e.g., public notice requirements, requests for additional information). Likewise, while we understand that civil works personnel must also comply with NEPA and the NHPA in granting section 408 requests, these processes should defer to and be incorporated under the umbrella of FERC's review process. To oversee this process and facilitate cooperation between Corps regulatory and civil works personnel and FERC, the Corps should designate an agency lead to coordinate with FERC and shepherd the project through the multiple authorizations.

For proposed activities with relatively minor alterations to civil works projects, INGAA supports the implementation of categorical permissions. The Sacramento District recently proposed³¹ to implement a categorical permission for a number of potential alterations that are similar in nature with similar and minor impacts, including the installation or modification of pressurized and non-pressurized pipes. This proposed categorical permission, however, excludes "requests for new, long distance pipelines crossing multiple USACE navigation and flood risk reduction projects."³² To obtain a categorical permission, a section 408 request would need to incorporate standard mitigation measures and best management practices into the project. INGAA encourages the Corps to continue to develop this type of streamlined approach for section 408 approvals, and to include categorical permissions for interstate pipelines.

Conclusion

INGAA appreciates your consideration of these comments and welcomes additional dialogue. Please contact me at 202-216-5955 or ssnyder@ingaa.org if you have any questions. Thank you.

Sincerely,



Sandra Y. Snyder
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³¹ See Corps, Sacramento District, Public Notice, Categorical Permission for Section 408 Requests (Sept. 18, 2017).

³² *Id.*