



August 1, 2016

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

**Re: INGAA Comments on Proposal to Reissue and Modify Nationwide Permits, 81 Fed. Reg. 35,186 (June 1, 2016); Docket No. COE-2015-0017**

Dear Sir or Madam:

On June 1, 2016, the U.S. Army Corps of Engineers (“Corps”) proposed to reissue the existing nationwide permits (“NWP”), general conditions, and definitions with some modifications. *See* Proposal to Reissue and Modify Nationwide Permits, 81 Fed. Reg. 35,186 (June 1, 2016). The Interstate Natural Gas Association of America (“INGAA”) appreciates the opportunity to submit the following comments in response to the proposal.

INGAA is a trade association comprised of 25 members, representing the vast majority of the interstate natural gas transmission pipeline companies in the U.S. and comparable companies in Canada. INGAA’s members operate approximately 200,000 miles of pipelines, and serve as an indispensable link between natural gas producers and consumers.

Congress authorized the use of NWPs, which are a type of general permit, in section 404(e)(1) of the Clean Water Act (“CWA”):

In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary [of the Army, acting through the Corps] may, after notice and opportunity for public hearing, issue *general permits* on a State, regional, or nationwide basis *for any category of activities* involving discharges of dredged or fill material if the Secretary determines that the activities in such category are *similar in nature*, will *cause only minimal adverse environmental effects* when performed separately, and will have only *minimal cumulative adverse effect on the environment*.<sup>1</sup>

INGAA members regularly make use of NWPs whenever and wherever possible to streamline permitting for their construction and maintenance projects.<sup>2</sup> Interstate and natural gas pipeline construction and maintenance activities are typically conducted on tight schedules designed to ensure the safety, security, and reliability of the natural gas pipeline network and to

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<sup>1</sup> 33 U.S.C. § 1344(e)(1) (emphases added); *see also* *Sierra Club, Inc. v. Bostick*, 539 F. App’x 885 (10th Cir. 2013) (upholding the Corps’ authorization of a pipeline construction project through NWPs).

<sup>2</sup> The number of NWPs that INGAA members use varies depending on the scope, location, and nature of those projects.

meet the growing demands of natural gas consumers. Pipeline construction and maintenance operations often unavoidably occur in areas containing wetlands and thus require permitting and mitigation under section 404 of the CWA and/or section 10 of the Rivers and Harbors Act (“RHA”). The impacts created by these linear facilities are usually only temporary, do not generally result in a loss of waters of the United States, and involve only minor impacts to the aquatic environment. INGAA members are usually able to rely on NWP 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 pipeline infrastructure to ensure pipeline safety. Increased demand for natural gas is not purely market-driven. Federal policies—in particular, the Obama Administration’s Clean Power Plan—expressly favor the development and use of natural gas. The Environmental Protection Agency’s (“EPA’s”) rules for new, modified, and existing electric generating units under Clean Air Act sections 111(b) and (d)<sup>3</sup> would steer the source of most electric generating in the United States from coal to natural gas. EPA has predicted that “[n]atural gas use for electricity generation will increase by as much as 1.2 trillion cubic feet (TCF) in 2020 relative to the base case.”<sup>4</sup> Other national policy initiatives, like a focus on improving energy independence, will also lead to a significant increased demand for natural gas and the interstate pipelines and related infrastructure needed to deliver that natural gas to market. The INGAA Foundation estimates that North America will need over 338,000 miles of new natural gas pipeline from 2014-2035.<sup>5</sup>

INGAA supports the continued use of NWPs to allow for efficient authorization of activities that have minimal impacts to waters of the United States and shares the Corps’ objective of streamlining and simplifying review processes while maintaining environmental protection. The Corps would face a crippling burden if NWPs 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 six to 24 months onto a project.

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<sup>3</sup> See 80 Fed. Reg. 64,510 (Oct. 23, 2015); 80 Fed. Reg. 64,662 (Oct. 23, 2015).

<sup>4</sup> EPA, Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emissions Standards for Modified and Reconstructed Power Plants at ES-24, EPA-452/R-14-002 (June 2014), EPA-HQ-OAR-2013-0603-0004.

<sup>5</sup> See The INGAA Foundation, Inc., North American Midstream Infrastructure through 2035: Capitalizing on Our Energy Abundance at 8-19 (Mar. 18, 2014), <http://www.ingaa.org/File.aspx?id=21498>.

One study concluded that, on average, it takes an extra 475 days to obtain an individual permit versus an NWP.<sup>6</sup> That same study concluded that the average cost to prepare an 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”).<sup>7</sup> 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 \$9285 for each acre of waters of the United States impacted.”<sup>8</sup> Thus, the study concluded that “preparation costs for these projects that would switch from NWP to [an individual permit] would roughly double (from \$28,915 to \$59,719, a difference of \$30,804).”<sup>9</sup>

Eliminating the use of NWPs would be contrary to congressional intent, *see* 33 U.S.C. § 1344(e)(1), and would add additional unnecessary expenses to projects with minimal individual and cumulative adverse environmental effects.

To further advance the goals of the NWP program, INGAA recommends that the Corps should:

- Maintain current acreage limits and pre-construction notification (“PCN”) thresholds for NWPs 3 and 12.
- Clarify that NWP 3 does not require the removal of structures.
- Clarify that NWP authorization includes use of temporary mats.
- Clarify that activities to remediate inadvertent returns of directional drilling muds minimize environmental impacts.
- Revise and clarify NWP 12 Proposed Note 2 to avoid confusion of two distinct concepts.
- Eliminate the use of the term “waterbody” and clarify that it is not changing its interpretation of the “separate and distant” concept.

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<sup>6</sup> David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to Wetland Permitting Process*, 42 Nat. Resources J. 59, 76 (2002) (reporting that it took on average 313 days to prepare and obtain an NWP versus 788 days for an individual permit).

<sup>7</sup> *Id.* at 74.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 75 (excluding the cost of mitigation, design changes and the cost of carrying capital).

- Avoid changes to PCN requirements that would result in further delays in the NWP verification process.
- Improve the PCN process by limiting information requests to a single request for required information.
- Expedite permitting review and approvals for time-sensitive maintenance and emergency work.

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

**I. The Corps Should Maintain Current Acreage Limits and PCN Thresholds in NWPs 3 and 12.**

Although sometimes requiring multiple crossings of waters and wetlands, INGAA members' interstate natural gas pipeline projects typically impact relatively small areas and create only temporary construction impacts and no permanent fill of waters of the United States. This is due in part to the minimal nature of the crossing (which is buried underground) and because INGAA members must comply with the Federal Energy Regulatory Commission ("FERC") regulations<sup>10</sup> for construction and restoration in wetlands and waterbodies. Following pipeline construction, the ground surface of waters and wetlands is restored to preconstruction contours and elevation, so no loss of waters of the United States typically occurs with pipeline construction or operation. As such, to the extent section 404 authorization is required, it is appropriate to authorize construction, maintenance, and repair of interstate natural gas pipeline systems through an NWP.

INGAA members rely heavily on NWP 3 for pipeline maintenance and NWP 12 for new pipeline construction. In light of the expanded scope of waterbodies that would be regulated if EPA's and the Corps' 2015 Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015), were to be implemented, the Corps should maintain the current acreage limits and PCN thresholds in NWPs 3 and 12. The Corps seeks public comment on "how the 2015 revisions to the definition of 'waters of the United States' might affect the applicability and efficiency of the proposed NWPs," including comments on "changes in acreage and linear foot limits . . . , PCN thresholds, and the use of other tools for complying with the no more than minimal adverse environmental effects requirement for NWPs . . . ." 81 Fed. Reg. at 35,190-91. The revised "waters of the United States" definition would increase the scope of waterbodies that are regulated under the CWA by extending jurisdiction to many types of features that previously have not been treated as jurisdictional, such as ditches and other industrial and man-made conveyances, small streams, and isolated wetlands and ponds. As a result, the rule would increase the scope of permitting and

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<sup>10</sup> See FERC Office of Energy Projects, Wetland and Waterbody Construction and Mitigation Procedures (May 2013), <http://www.ferc.gov/industries/gas/enviro/procedures.pdf>.

could limit INGAA members' ability to rely on NWP authorizations for critical maintenance and expansion activities.

NWPs 3 and 12 have certain limits, PCN thresholds, and other conditions to ensure compliance with the "no more than minimal adverse environmental effects" requirement for NWPs. For example, to qualify for NWP 12, the total loss of waters of the United States cannot exceed ½ acre, and a PCN is required in certain circumstances, such as for discharges that result in a loss of greater than 1/10 acre of waters of the United States. *Id.* at 35,219-20. The current acreage of impact limits and PCN thresholds were developed and refined over decades of successive public notice and comment to meet the NWP program's statutory objective to provide a streamlined authorization process for activities with only minimal adverse environmental impacts. The established thresholds are appropriate, well supported by the record, and fully ensure that activities authorized by those NWPs will result in no more than minimal individual and cumulative adverse effects, as required by section 404(e).

Therefore, INGAA urges the Corps to maintain the current acreage caps and thresholds for NWPs 3 and 12.<sup>11</sup> Any changes to or limits on the interstate natural gas pipeline industry's ability to use NWPs 3 and 12 could have severe consequences for the industry. Pipeline expansion could slow to such an extent from permitting delays that pipeline companies would be unable to meet America's growing demand for natural gas. Pipeline maintenance could slow to the extent that pipeline companies are unable to meet repair and maintenance deadlines set by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). In order to avoid these negative results, and to ensure that interstate natural gas pipeline projects—which typically have only minor or temporary impacts to waters of the United States—can still be permitted through NWPs, the Corps should maintain current acreage limits and PCN thresholds in NWPs 3 and 12.

## **II. INGAA Supports the Proposed Changes to NWP 3, With Some Clarification.**

NWP 3 authorizes the "repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill." *Id.* at 35,218. INGAA members routinely rely on NWP 3 to proceed with required repair and maintenance projects to meet deadlines mandated by PHMSA and ensure safe and reliable pipeline operations. Interstate natural gas pipeline maintenance activities, by their nature, have limited and essentially temporary impacts on wetlands or water bodies. These impacts, including any necessary staging and access activities, are in almost all cases limited to the pipeline right-of-way, an area previously disturbed during construction of the original pipeline. Following these activities, all water resources temporarily disturbed by the excavation or by any associated soil storage, equipment access, or other related activities are fully restored, per the requirements of the NWP and other

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<sup>11</sup> If the Clean Water Rule is implemented at some point, the Corps should increase the acreage thresholds to account for the increased scope of "waters of the United States."

applicable regulations. Thus, there are only minimal and temporary impacts from the pipeline maintenance activities, and they should be appropriately authorized by an NWP.

The Corps proposes several modifications to NWP 3. INGAA generally supports these proposed changes, but recommends that the Corps make certain clarifications, discussed in more detail in this section.

**A. The Corps Should Clarify that NWP 3 Does Not Require Removal of Structures.**

The Corps proposes to modify NWP 3 to authorize regulated activities associated with the *removal* of structures or fills (in addition to the repair, rehabilitation, and replacement of structure or fills previously authorized under NWP 3). *Id.* at 35,198. This modification to include “removal” is consistent with the existing NWP 3 because the removal of fill material or structures such as pipelines and related appurtenances will typically result in only minor or temporary impacts (if any) and does not necessitate separate verification. The Corps should note, however, that in certain circumstances, abandonment in place is a preferable practice with less environmental impacts and that removal of fill material or structures such as pipelines is not required by NWP 3. Indeed, when a natural gas pipeline is no longer in service, in certain circumstances, FERC authorizes abandonment in place for the pipeline and related facilities. *See* 15 U.S.C. § 717f(b).

As such, INGAA supports this modification, but requests that the Corps clarify that removal is *not required* under the proposed NWP 3.

**B. INGAA Supports the Clarification that NWP 3 Authorization Includes Use of Temporary Mats.**

The Corps proposes to revise NWP 3 to clarify that the “use of temporary mats in jurisdictional waters and wetlands, is also authorized by [NWP 3], if those mats are used to minimize impacts during regulated maintenance activities.” 81 Fed. Reg. at 35,198. INGAA agrees that the use of temporary mats helps avoid environmental impacts<sup>12</sup> and supports this proposed clarification.

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<sup>12</sup> *See, e.g.*, FERC Wetland and Waterbody Construction and Mitigation Procedures at 14, 16 (requiring use of appropriate stabilization measures, including temporary mats, where necessary to avoid rutting); U.S. Army Corps of Engineers, New England District, Department of the Army Programmatic General Permit, State of New Hampshire, at 11 (Aug. 3, 2012) (requiring use of mats for heavy equipment in wetlands to “minimize disturbance of wetland soil and vegetation”), <http://www.nae.usace.army.mil/Portals/74/docs/regulatory/StateGeneralPermits/NHPGPAug2013.pdf>; Wisconsin Department of Natural Resources, Draft Wetland Compensatory Mitigation Guidance for Utility Project Impacts to Wetlands (undated) (noting that placement of mats for construction access through wetlands is “considered a protective measure”), <http://dnr.wi.gov/news/input/documents/guidance/wetlandutilityprojectsguidance.pdf>.

### **III. INGAA Supports the Proposed Changes to NWP 12, with some Clarification.**

NWP 12 authorizes “activities required for the construction, maintenance, repair and removal of utility lines and associated facilities in waters of the United States, provided the activities that do not result in the loss of greater than ½ acre of waters of the United States for each single and complete project.” *Id.* at 35,219. INGAA members rely on NWP 12 for certain interstate natural gas pipeline system expansion projects. As explained above, although sometimes requiring multiple crossings of waters and wetlands, pipeline system expansion projects typically impact relatively small areas and create only temporary construction impacts and no permanent waters or wetlands fill. This is due in part to the minimal nature of the crossing (which is buried underground) and because INGAA members must comply with the FERC regulations for construction and restoration in wetlands and waterbodies. As such, to the extent section 404 authorization is required, it is appropriate to authorize construction, maintenance, and repair of interstate natural gas pipeline systems through an NWP.

The Corps proposes several modifications to NWP 12. INGAA generally supports these proposed changes, but recommends that the Corps make certain clarifications, discussed in more detail in this section.

#### **A. The Corps Should Clarify that Activities to Remediate Inadvertent Returns Minimize Environmental Impacts.**

The Corps proposes to add a paragraph to NWP 12 to authorize, to the extent that Corps authorization is required, discharges necessary “to remediate inadvertent returns of drilling muds . . . that can occur during directional drilling operations to install utility lines below jurisdictional waters and wetlands.” *Id.* at 35,198.<sup>13</sup> The Corps is adding this provision, in part, to resolve inconsistencies in how inadvertent returns have been managed across Corps Districts. *See id.*

Where technically feasible, directional drilling is used to avoid direct impacts to surface waters and wetlands, and is beneficial to the environment. INGAA agrees that utility line activities authorized by NWP 12 that involve inadvertent returns have no more than minimal adverse environmental effects. The Corps correctly notes that the water-bentonite slurry used for directional drilling operations is not considered a toxic or hazardous substance, nor is it a material that can be considered “fill material” under 33 C.F.R. § 323.2(e). *Id.* at 35,198. Indeed, bentonite-based drilling mud is a non-toxic, non-hazardous material that is also used to construct potable water wells throughout the United States. As such, “inadvertent returns of these drilling muds is not regulated under section 404 of the Clean Water Act.” *Id.*

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<sup>13</sup> To avoid confusion with the separate concept of hydraulic fracturing (or “fracking”), INGAA recommends that the Corps avoid using the term “frac-out” to describe inadvertent returns of drilling muds.

INGAA supports the modification of NWP 12 to cover activities to address remediation of inadvertent returns with the clarification that such activities minimize environmental impacts.

**B. INGAA Supports the Clarification that NWP 12 Authorization Includes Use of Temporary Mats.**

As with NWP 3, the Corps proposes to revise NWP 12 to clarify that NWP 12 “authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity.” *Id.* at 35,220. As explained above, INGAA agrees that the use of temporary mats helps avoid environmental impacts, and supports this proposed clarification.

**C. INGAA Supports the Corps’ Longstanding Definition of “Single and Complete Linear Project,” But Recommends the Corps Revise and Clarify Proposed Note 2.**

INGAA continues to support the Corps’ definition of “single and complete linear project,” which includes all crossings of a single waterbody at a specific location, allowing for crossings of separate waterways along a linear project to be authorized via separate NWPs. *See id.* at 35,239. As with the 2012 NWPs, the proposed definition of “single and complete linear project” provides that “[f]or 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.” *Id.* at 35,221. This longstanding Corps definition is justified by the diffuse impact of linear facilities and their minor impact on individual waterbodies.

The Corps proposes to add a new Note 2, the first part of which would clarify that crossings of waterbodies at “separate and distant locations” may qualify for separate NWP authorizations. *Id.* at 35,220. INGAA supports this clarification. This is consistent with past practices and the Corps’ interpretation of “single and complete linear project” to allow for the use of separate NWPs by a linear project for crossings of separate waterways.

Whereas the first sentence of the proposed Note 2 addresses treatment of crossings at separate and distant locations as a “single and complete project” for NWP authorization, which does not require a finding of “independent utility,” the second sentence involves a separate concept, stating, “Utility lines with independent utility must comply with 33 CFR 330.6(d).” *Id.* Under section 330.6(d), portions of a larger project may proceed under the authority of NWPs while the Corps evaluates an individual permit application for other portions of the same project where the portions qualifying for NWP authorization have “independent utility and are able to function or meet their purpose independent of the total project.” The preamble further explains that a “stand-alone utility line is a utility line that has independent utility and can be operated on its own to transport materials or energy from a point of origin to a terminal point.” 81 Fed. Reg. at 35,198.



It is confusing for the Corps to combine these two distinct concepts—(1) crossings that qualify as single and complete projects (which do not require an “independent utility” showing), and (2) NWP authorization for portions of a larger project requiring an individual permit (which require an “independent utility” showing)—in the proposed Note 2. INGAA recommends that the Corps eliminate the second sentence of Note 2 (“Utility lines with independent utility must comply with 33 CFR 330.6(d)”) because it merely restates the existing regulations and does not add anything else. At a minimum, in order to avoid conflation of the two distinct concepts, INGAA recommends that the Corps remove the second sentence from Note 2 and create a separate Note for that language. Moreover, the preamble’s introduction of a new “stand-alone utility line” concept is confusing and does not help inform the determination under section 330.6(d) of whether portions of a larger project have “independent utility” and can proceed separate from the portions requiring an individual permit. To avoid confusion, the Corps should remove the concept of a “stand-alone utility line” from the preamble discussion in the final rule.

**D. The Corps Should Eliminate the Use of “Waterbody” and Clarify it Is Not Changing its Interpretation of the “Separate and Distant” Concept.**

Under NWP 12, utility line crossings are treated as a “single and complete” project for purposes of NWP authorization where “crossing a single *waterbody* more than one time at *separate and distant* locations, or multiple *waterbodies* at *separate and distant* locations.” 81 Fed. Reg. at 35,220 (emphases added). In order to ensure that the proposed rule’s definition of “waterbody” does not alter the principles that apply and have traditionally applied to the analysis of “separate and distant” crossings and “single and complete linear projects,” INGAA recommends that the Corps eliminate the “waterbody” definition and clarify that it is not changing its interpretation of the “separate and distant” concept.

The proposed rule defines “waterbody” as a “jurisdictional water of the United States.” *Id.* at 35,340. The definition states that a wetland adjacent to a waterbody determined to be a “water of the United States under 33 CFR 328.2(a)(1) through (5)” is considered a “single aquatic unit” with that waterbody. *Id.* Given this second provision of the definition, it is unclear whether the “waterbody” definition means something different than “water of the United States.” In addition, the proposed rule would remove the clause of the 2012 “waterbody” definition that provided that “adjacent” means “bordering, contiguous, or neighboring.” *Compare* 77 Fed. Reg. 10,184, 10,290 (Feb. 21, 2012) *with* 81 Fed. Reg. at 35,240. Although the Corps does not treat the revised “waterbody” definition as a “[s]ubstantive change” or discuss the change in the preamble, *see* 81 Fed. Reg. at 35,197, INGAA is concerned that removing the clause defining “adjacent” for purposes of the “waterbody” definition could be misinterpreted to result in broader areas being considered a “single aquatic unit,” thereby resulting in fewer crossings qualifying as “separate and distant” locations.

To avoid such a misinterpretation, and consistent with the first sentence of the proposed “waterbody” definition, the Corps should simply eliminate the “waterbody” concept and make it

clear that the relevant concept is “water of the United States.”<sup>14</sup> Moreover, the Corps should clarify that it is not changing its interpretation of the “separate and distant” concept.

#### **IV. The Corps Should Avoid Changes to PCN Requirements that Would Result in Further Delays.**

INGAA supports a PCN process that will allow adequate time for project-specific review, but minimize unnecessary project delays. INGAA’s members regularly rely on NWP 3 and 12, both of which have PCN requirements under certain circumstances. NWP 3, for example, requires PCN for “removal of accumulated sediments and debris in the vicinity of existing structures . . . and/or the placement of new or additional riprap to protect the structure.” *Id.* at 35,218. And NWP 12, for example, requires PCN for “mechanized land clearing in a forested wetland” or those “that result in the loss of greater than 1/10 acre of waters of the United States.” *Id.* at 35,220.

In INGAA members’ experience, the PCN process can cause significant delays in obtaining NWP verification. The imposition of substantial delays in the permitting process creates additional expense and burdens planning. For example, INGAA’s members estimate that the need to engage in the PCN process can add an additional 2 to 9 months onto the project to prepare the application, implement avoidance measures and address site-specific conditions, and obtain verification from the District Engineer. The cost of these PCN requirements is not insignificant, generally ranging from \$5,000 up to \$40,000 or more, depending on the scope and nature of the project. These costs cover expenses such as preparing wetland studies, preparing additional reports, obtaining a jurisdictional determination, compensatory mitigation, and attending pre-application meetings. The Corps and the Districts should avoid imposition of additional PCN requirements that would cause further delay.

##### **A. The Corps’ PCN Process Should Be Improved by Limiting Information Requests to a Single Request for Required Information.**

Moreover, PCN could be improved by streamlining the review process. Under proposed General Condition (“GC”) 32, where a prospective permittee is required to submit a PCN, the activity may not begin until a prospective permittee is notified in writing by the District Engineer that the activity may proceed under the NWP, or 45 calendar days pass without the prospective permittee receiving written notice from the District or Division Engineer. *Id.* at 35,235. The 45-

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<sup>14</sup> Consistent with EPA’s and the Army’s November 2015 joint memorandum responding to the Sixth Circuit’s nationwide stay of the Clean Water Rule, the final NWPs should apply the current regulatory definition of “waters of the United States” (codified in the 1986 regulations and the 2008 *Rapanos* Guidance). See EPA and Dep’t of the Army Memorandum, *Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule; Improving Transparency and Strengthening Coordination* (Nov. 16, 2015), [https://www.epa.gov/sites/production/files/2015-11/documents/2015-11-16\\_signed\\_cwr\\_post-stay\\_coordination\\_memo.pdf](https://www.epa.gov/sites/production/files/2015-11/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf).

day time frame does not commence until the District Engineer receives the “complete” PCN. *Id.* Under the proposed GC 32, the District Engineer has 30 days to determine whether the PCN is complete and may request additional information in order to render the PCN complete. *Id.* In practice, there is often more than one request for additional information from the prospective permittee before the District Engineer will determine the PCN application is complete. If the applicant satisfies the District Engineer that its PCN application is complete, the District Engineer then has an additional 45 days in which to determine whether the applicant qualifies for the NWP authorization. Thus, there is no certainty as to the length of the process to receive verification under an NWP with a PCN requirement.

To improve the PCN process, INGAA suggests that the Corps specify in the final rule that Districts are limited to a single information request. Additional requests delay the commencement of the 45-day time limit for PCNs and create uncertainty as to the schedule for the PCN application. Once the Corps receives the prospective permittee’s response, the 45-day period should commence. Then, within those 45 days, the District Engineer should decide whether the activity may proceed under the NWP. If no response is received from the Corps within 45 days, the prospective permittee should be able to proceed with the proposed discharge.

**B. The Corps Should Expedite Permitting Review and Approvals for Time-Sensitive Maintenance and Emergency Work.**

As discussed above, much of INGAA members’ maintenance, inspection, and emergency work must be conducted under short time frames set by PHMSA. 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, with potentially severe environmental and economic consequences as customers must use alternative supplies, if available, or even curtail their operations. Thus, 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 has wide-ranging and serious consequences.

Accordingly, the Corps should expedite permitting review and any approvals that require PCNs for such time-sensitive maintenance and inspection work. To that end, the Corps should instruct the Districts to expedite review of applications for time-sensitive maintenance and inspection work for completeness and to obtain any critical additional information and make a decision all within 30 days of the filing of the PCN. Further, the Corps should allow any emergency projects to proceed immediately and conduct and approve any necessary permitting review and PCN approvals after the fact. This would allow emergency projects to proceed without delay and ensure that public safety and health are paramount. The applicants would be required to apply for approvals immediately after the required work was completed for the Corps’ review and approval. This change would further the goals of the Corps’ NWP program by reducing the burdens associated with the section 404 program and improving efficiency.

## **V. The Corps Uses the Appropriate Scope for its Cumulative Effects Analysis.**

The Corps' cumulative effects analysis is consistent with both the CWA and the National Environmental Policy Act ("NEPA"), as well as the regulations and case law. *See* 81 Fed. Reg. at 35,186-89. The Corps appropriately recognizes that the scope of its cumulative effects analysis is limited to the activities authorized by an NWP, *i.e.*, the discharge of dredged or fill material.

The CWA authorizes the Corps to issue nationwide general permits for categories of activities that "are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). The Corps' NEPA analysis of a CWA permit is properly limited to the authorized discharge because the Corps lacks authority or control over aspects of projects beyond the location of the discharge of dredged or fill material. *See* 33 C.F.R. pt. 325, App. B § 7(b) (limiting the scope of the Corps' NEPA analysis to "the impacts of the specific activity" over which the Corps "has sufficient control and responsibility"); *see also, e.g., Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116-17 (9th Cir. 2000) (NEPA review of section 404 permit need not address overall development); *Sierra Club, Inc. v. Bostick*, No. CIV-12-742, 2013 WL 6858685, at \*9 (W.D. Okla. Dec. 30, 2013), *aff'd*, 787 F.3d 1043 (10th Cir. 2015) (holding proper scope of NEPA review for NWP 12 was "cumulative impact of discharging dredged or fill material authorized"); *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 28-29 (D.D.C. 2013).

In its analysis of cumulative effects for the proposed reissuance of NWPs, the Corps properly recognizes that its scope of analysis is limited to the activities authorized by an NWP (*i.e.*, the discharge of dredged or fill material), and not the environmental effects of overall projects that will use a particular NWP. The preamble provides that the NEPA cumulative effects analysis prepared by the Corps for an NWP examines the environmental impact resulting from the "incremental impact of its action (*i.e.*, the activities that will be authorized by the NWP) and adds that incremental impact to 'other past, present, and reasonably foreseeable future actions.'" 81 Fed. Reg. at 35,187. INGAA supports this approach.

## **VI. The Corps' "No Effect" Determination Is Consistent with the ESA and GC 18.**

In its proposal, the Corps properly determines that the NWP regulations (33 C.F.R. § 330.4(f)) and NWP GC 18 (Endangered Species) "ensure that all activities authorized by NWPs comply with section 7 of the Endangered Species Act (ESA)." 81 Fed. Reg. at 35,192. In light of this determination, the Corps appropriately determines that the issuance or reissuance of the NWPs "results in 'no effect' to listed species or critical habitat, and therefore the reissuance/issuance action itself does not require ESA section 7 consultation." *Id.* at 35,193.

ESA section 7 requires each federal agency to ensure, through consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (together, "the Services"), that

“any action authorized, funded, or carried out” by that agency is not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). Here, the action being “authorized” by the Corps is the re-issuance of the NWP. The Corps determined that the NWP reissuance has “no effect” and therefore does not require ESA section 7 consultation because no NWP can or does authorize an activity that may affect a listed species or critical habitat absent an activity-specific ESA section 7 consultation. 81 Fed. Reg. at 35,193.

Under GC 18, any activity that may affect a listed species or critical habitat must undergo an activity-specific consultation before the District Engineer can verify the activity is authorized by the NWP. *Id.* at 35,232. 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,” non-federal permittees must submit a PCN. *Id.* Whenever such a PCN has been filed, the District Engineer is responsible for reviewing specific projects and imposing additional conditions and consultation requirements, where appropriate. Thus, activities under the NWPs are not “authorized” until the Corps evaluates whether consultation is required and, if so, completes consultation. *See id.* As a result of formal or informal consultation with the Services, the Corps may add project-specific or species-specific permit conditions to the NWPs. *Id.* And, where the District Engineer finds that the proposed activity would have more than minimal environmental impacts, he or she will require an individual permit. *Id.*

Moreover, Corps Districts may also impose more restrictive regional conditions, where necessary, to protect listed species and designated critical habitat. 33 C.F.R. §§ 330.1(d); 330.4(e). As the preamble notes, Corps Districts coordinate with the Services in developing regional conditions and can promulgate conditions that provide additional assurance of compliance with NWP regulations and GC 18 (*e.g.*, addition of PCN requirements to certain NWPs in areas inhabited by listed species or where designated critical habitat occurs). 81 Fed. Reg. at 35,194. To qualify for NWP authorization, a permittee must comply with GC 18, as well as any regional or project-specific conditions or consultation requirements.

In sum, NWPs do not authorize any activity that “may affect” a listed species or critical habitat (absent a project-specific ESA section 7 consultation). Any activity that “may affect” a listed species must undergo project-specific consultation and verification at the district level. And Corps Districts may impose additional regional or project-specific protections. As such, INGAA agrees with the Corps that the issuance of the NWPs does not necessitate consultation under ESA section 7 because promulgation of the rule itself—the federal action at issue—has “no effect” on listed species.

## **VII. Conclusion**

INGAA appreciates the opportunity to comment on the Corps’ proposed NWPs. INGAA’s members rely on NWPs to obtain streamlined authorization for their projects involving minimal adverse effects on the environment. INGAA supports the overall purpose of the

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program to provide timely authorizations for the regulated public, and to reduce administrative burdens on the Corps and the regulated public by efficiently authorizing such activities.

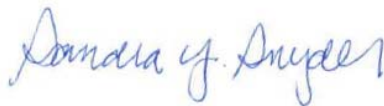
INGAA respectfully requests that the Corps reissue the existing NWP program with the modifications and clarifications described above.

We would welcome the opportunity to further discuss any of these proposed changes with the Corps.

Sincerely,



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