Interstate Natural Gas Association of America

November 16, 2020

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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, 85 Fed. Reg. 57,298 (Sept. 15, 2020); Docket No. COE-2020-0002

Dear Sir or Madam:

On September 15, 2020, the U.S. Army Corps of Engineers (Corps) proposed to reissue the existing Nationwide Permits (NWPs), General Conditions (GCs), and definitions with some modifications, and to issue five new NWPs. *See* Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57,298 (Sept. 15, 2020). The Interstate Natural Gas Association of America (INGAA) generally supports the Corps' reissuance and modifications of the NWPs, and recommends that the Corps make certain important revisions and clarifications, as further explained below.

INGAA is a non-profit trade association representing interstate natural gas transmission pipelines operating in the United States. INGAA is comprised of 26 members that operate approximately 200,000 miles of pipelines that serve as an indispensable link between natural gas producers and consumers. 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 economy by powering domestic industry and providing jobs. INGAA advocates regulatory and legislative positions of importance to the interstate pipeline industry.

I. Background

Clean Water Act (CWA) § 404 authorizes the Corps to issue permits for discharges of dredged or fill material into the waters of the United States (WOTUS). Congress amended § 404 of the CWA in 1977 to authorize the Corps 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. 33 U.S.C. § 1344(e). Consistent with Congress' direction, for over four decades, the Corps has issued NWPs to authorize minor discharges of dredged or fill material into WOTUS for specific categories of activities with no more than "minimal adverse environmental effects." *Id.*

Interstate 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 meet the growing demands of natural gas consumers. Pipeline construction and maintenance operations often unavoidably occur in areas containing WOTUS and thus require permitting and mitigation under § 404 of the CWA and/or § 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 WOTUS, and involve only minor impacts to the aquatic environment. INGAA members make regular use of NWP 3 (Maintenance) and NWP 12 (Utility Line Activities), as well as other NWPs, for the timely authorization of pipeline projects across the country.

NWPs provide an efficient permitting mechanism that helps to administratively streamline the review and approval process for INGAA members' pipeline projects, without precluding or compromising the consideration of any project-specific conditions when and where appropriate. The continued availability of NWPs is critical for the construction of both 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 and reliability. As documented by the Federal Energy Regulatory Commission (FERC)—the agency tasked with regulating INGAA members' rates, services, and facilities—INGAA members construct hundreds of miles of new interstate pipeline each year. The INGAA Foundation estimates that North America will need 26,000 miles of new natural gas pipeline from 2018-2035 and a total of 7 million horsepower of

compression over the course of the projection.[1] In addition, maintenance, repair, and/or integrity-related activities require excavating and inspecting thousands of locations along the existing 200,000 mile network of interstate pipelines annually, as required by regulations under the Pipeline Safety Act.

INGAA supports the continued use of NWPs and shares the Corps' objective of streamlining and simplifying review processes while maintaining appropriate environmental protections. The Corps would face a crippling burden if NWPs were not available or if their use were severely restricted. In the absence of NWPs, 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 onto a project schedule[2] and substantially increasing costs.[3]

Due to the importance of NWPs for INGAA members, INGAA has filed comments and participated in numerous administrative rulemakings involving NWPs generally and NWP 12, in particular. *See, e.g.*, INGAA, Comments on Department of the Army, Corps of Engineers, Proposal to Reissue and Modify Nationwide Permits, 81 Fed. Reg. 35,186 (June 1, 2016), COE-2015-0017-0457; INGAA, Comments on Department of the Army, Corps of Engineers, Proposal to Reissue and Modify Nationwide Permits, 76 Fed. Reg. 9174 (Feb. 16, 2011), COE-2010-0035-0124. INGAA has also invested significant time and resources to join with the NWP 12 Coalition as Defendant-Intervenors in *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, No. 4:19-cv-00044-BMM (D. Mont. May 13, 2020); appeal filed No. 20-35414 (9th Cir. May 13, 2020), and *Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015), defending against challenges to NWP 12.

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[1] *See* The INGAA Foundation, Inc., North American Midstream Infrastructure through 2035: Significant Development Continues (June18, 2018), https://www.ingaa.org/Foundation/FDNreports/Midstream2035.aspx.

[2] One study concluded that, on average, it takes an extra 475 days to obtain an individual permit versus an NWP. *See* 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).

[3] The Sunding study also calculated the average cost to prepare an NWP application as $28,915 versus an individual permit application, which, on average, costs over $271,596. *Id.* at 74. "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)." *Id.* at 75 (excluding the cost of mitigation, design changes and the cost of carrying capital).

II. Key Recommendations

INGAA supports the continued use and timely reissuance of the NWPs. The Corps has flexibility in timing to reissue the NWPs, as the 2017 suite of NWPs will remain in effect until March 18, 2022. The Corps' planned schedule for reissuance would provide sufficient time for States and EPA to issue § 401 water quality certifications and Coastal Zone Management Act consistency determinations, and for Corps Districts to provide any regional conditions to further tailor the use of the NWPs based on region-specific resources and considerations.

To advance the goals of the NWP program:

- The Corps should reissue NWP 12, as issued in final form on January 6, 2017 (hereafter referred to as "the 2017 NWP 12"), with its existing preconstruction notification (PCN) requirements and a new effective date. INGAA opposes the Corps' proposed trifurcation of NWP 12.
- *If* the Corps does not adopt INGAA's recommendation to reissue the 2017 NWP 12, in order to move forward with a final rule in a timely and effective manner, INGAA suggests any final NWP 12 maintain the existing PCN requirements for the 2017 NWP 12.
    - INGAA opposes the Corps' proposal to add a new PCN threshold for NWP 12 for activities associated with proposed oil and gas pipeline projects that are greater than 250 miles in length.
    - INGAA further recommends the Corps maintain the existing PCN thresholds for the 2017 NWP 12, rather than eliminate the five PCN thresholds, as proposed.
- INGAA supports maintaining the current definition of "single and complete linear project" and the current acreage limit for NWP 12.
- INGAA supports the Corps' proposed changes to NWP 3, which are consistent with prior iterations of NWP 3 and beneficial.
- INGAA agrees with the Corps' determination that the activities authorized by the reissuance/issuance of the NWPs would have "no effect" on listed species or designated critical habitat and that consultation is not required for issuance or reissuance of the NWPs.
- The Corps' analysis for the NWPs complies with and meets the requirements of the National Environmental Policy Act (NEPA) and CWA, applicable regulations, and case law.

These recommendations are discussed in more detail below.

III. INGAA's Comments on NWPs 12 and 3

A. The Corps Should Reissue the 2017 NWP 12 Without Changes in Lieu of Adopting Its Proposal to Trifurcate NWP 12.

The 2017 NWP 12 is particularly important to INGAA members. NWP 12 provides efficient authorization of minor "utility line" discharges into WOTUS that have only minimal environmental effects. Many of INGAA members' construction, maintenance, and safety activities involve "utility line crossings," and INGAA members have routinely relied on and made regular use of NWP 12 for the timely authorization of a wide-range of activities that are essential to the reliable, safe and affordable supply of energy to U.S. consumers. For example, INGAA members have used NWP 12 for large pipeline expansions, where applicable, and also for smaller projects, such as pipeline replacement projects driven by highway replacements, ingress and egress to project workspace, and valve replacements. NWP 12 is also used extensively for maintenance, inspection, and repair activities to comply with pipeline integrity requirements mandated by the Pipeline & Hazardous Materials Safety Administration (PHMSA) pursuant to the Pipeline Safety Act, and to ensure the continued safety and reliability of the pipelines. INGAA members also rely on NWP 12 for modernization projects, such as replacing pipeline facilities with newer, more efficient facilities, and installing alternative power sources to reduce greenhouse gas emissions from compressor stations.

The Corps has proposed revising NWP 12, by limiting the scope of NWP 12 to just cover oil and natural gas pipelines with minimal impacts to the environment.[4] The Corps also has proposed issuing a separate proposed NWP C for electric utility lines and telecommunication lines, and a separate proposed NWP D for utility lines that convey water and other substances.[5] INGAA does not support this proposal to separate the current NWP 12 into multiple permits. Rather, INGAA recommends that the Corps reissue the 2017 NWP 12, with no additional modifications (*i.e.*, including the same PCN requirements from the 2017 NWP 12), and a new effective date.[6]

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[4] 85 Fed. Reg. at 57,310.

[5] *Id.*

[6] As the D.C. Circuit has noted, "[o]ne logical outgrowth of a proposal is surely … to refrain from taking the proposed step." *Am. Iron Streel Inst. v. EPA*, 886 F.2d 390, 400 (D.C. Cir. 1989). Thus, the D.C. Circuit held that "a simple retreat to the status quo ante can properly be viewed as a 'logical outgrowth' of the proposed rule." *Id.; see also Stringfellow Mem'l Hosp. v. Azar*, 317 F. Supp. 3d 168 (D.D.C. 2018) (upholding final rule that adopted current policy, rather than the proposed policy); *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir.

1. The Corps' Proposal to Trifurcate NWP 12 is an arbitrary, abrupt, and unjustified departure from its long-standing view that utility lines are activities that are similar in nature.

Since 1977, the Corps has issued a "utility line" NWP to authorize minor discharges of dredged or fill material associated with "the construction, maintenance, repair and removal of utility lines and associated facilities." 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017). NWP 12 has defined covered "utility lines" to include water, gas, oil or sewer pipelines and electric or communication lines for over four decades. Over the years, NWP 12 has been refined to ensure that authorized discharges from utility lines meet the minimal adverse environmental effects standard. Thus, there is a long history and record, as well as case law, supporting the utility line NWP.

The Corps has not provided any basis (let alone a rational basis) in the administrative record to support issuing separate permits for these utility line activities – likely because these activities are, in fact, similar in nature. The Corps has historically interpreted the "similar in nature" requirement broadly and has previously concluded that the utility line activities 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 original to a terminal point."[7]

Moreover, the Corps has previously considered and rejected arguments that these activities are not similar in nature and should not be categorized together in the same permit. In response to the 2016 proposed NWPs, the Corps received multiple comments arguing that oil pipelines are different from water and sewage pipelines and that pipelines are different than utility lines that carry electricity; the commenters argued that these utilities are "not similar in

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2019) (upholding EPA rule that did not take proposed step); *Miami-Dade Cty. v. EPA*, 529 F.3d 1049, 1059-60 (11th Cir. 2008) (holding that EPA's decision not to finalize an aspect of the proposal did not violate the Administrative Procedure Act, because "an agency is not restricted to adopting the position it proposed and on which it sought comment," rather, the "ultimate outcome of … rulemaking might be no rule, or only partial adoption of the proposed comprehensive rule."). An agency is entitled to request comment on an aspect of a proposal and reasonably conclude from the comments not to include that aspect of the proposal in a final rule. *See Miami-Dade Cty.*, 529 F.3d at 1059-60.

[7] 82 Fed. Reg. at 1883 (emphasis added). Executive Order 13,783 required federal agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources and to implement the recommendations in their reports as soon as possible. *See* 82 Fed. Reg. at 16,094. In response, the Corps issued a report that reviewed twelve NWPs that authorize activities associated with the development or use of domestically produced energy resources, and recommended changes to nine NWPs. *See* 82 Fed. Reg. 56,192 (Oct. 28, 2017). The Corps' proposal would implement these recommendations. *See* 85 Fed. Reg. at 57,302.

nature."[8] The Corps responded to these comments by explaining 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."[9] This same response still applies.

The preamble to the proposed rule undercuts any argument to trifurcate NWP 12 because, rather than propose three distinctly different NWPs, the Corps has proposed three different NWPs with key requirements that are nearly the same. The Corps 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 that substances it conveys."[10] For example, the permits 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. Furthermore, activities related to substations, foundations, and access roads are all substantially similar. Aside from the proposed 250 mile PCN threshold which INGAA opposes adding to the new NWP 12 (see further below), there are very few differences distinguishing the three proposed NWPs. Rather than justifying the need for the trifurcation, these similarities show that Corps has not established a need to address "potential differences in how the different linear projects are constructed, the substances they convey, and different standards and best management practices . . . ."[11]

Overall, the administrative record contains broad generalizations that do not support the conclusion that these activities are "not similar in nature" and should be covered by different permits. In fact, the preamble to the proposed rule acknowledges that electric power line activities can involve overhead transmission lines, as well as installations "in the ground through trenching and backfilling, and through horizontal boring"[12] – activities that are similar to those used to construct pipelines, which the record acknowledges may be constructed either "in-ground or above ground."[13] Another similarity is that utility line activities, whether for transmission lines or pipelines, are generally constructed and operated within maintained utility rights-of-way.

[8] 82 Fed. Reg. at 1868.

[9] *Id.* (emphasis added).

[10] 85 Fed. Reg. at 57,347.

[11] *Id.* at 57,298.

[12] *Id.* at 57,323.

[13] *Id.* at 57,322.

The information in the record about diameter and pipeline length is based upon incomplete generalizations that do not withstand scrutiny, such that they do not provide a rational basis for trifurcating NWP 12. Notably, the Corps "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."[14]

As to proposed NWP D, which would apply to non-oil and gas pipelines with minimal impacts, the Corps generally notes that these pipeline diameters tend to vary between 3 inches to 24 inches.[15] The preamble also notes that oil and gas pipeline diameters can range from 2 inches to 48 inches.[16] However, the Corps failed to acknowledge that the diameters of water mains (which would be covered by NWP D) may be 6 feet or wider.[17] Similarly, the administrative record fails to provide a robust analysis of lengths of these various utility lines. While the Corps did provide approximations as to the *total national* mileage of oil and natural gas pipelines and electric power lines,[18] the total national mileage has no bearing on the actual mileage for *individual projects*. The Corps also did not provide the total national mileage for utility lines covering non-oil and gas pipelines. Although utility lines cover a broad category of activities,[19] and they do not have national reach,[20] they can still be quite long, with the same or similar types of ground impacts as oil or gas pipelines. For example, the Metropolitan Water District of Southern California's distribution system "consists of 830 miles of large diameter pipelines, including approximately 400 connections"[21] and its Colorado River Aqueduct "is a 242-mile

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[14] CRS, The Army Corps of Engineer's Nationwide Permit Program: Issues and Regulatory Developments (Jan. 12, 2017), at 9, *available at* https://crsreports.congress.gov/product/pdf/RL/97-223/26.

[15] 85 Fed. Reg. at 57,323.

[16] *Id.* at 57,322.

[17] *See, e.g.*, https://www.lvvwd.com/water-system/how-water-gets-to-you/index.html (noting that the Las Vegas Valley District's water pipes vary between more than 8 feet in diameter to less than an inch in diameter); https://denverwatertap.org/2018/02/16/big-dig-under-i-70-clears-path-for-future-water-delivery/ (noting that Denver Water's pipes are over 5 feet in diameter in a 50 feet long section).

[18] *See* 85 Fed. Reg. at 57,322-23.

[19] *Id.* at 57,323 (noting that utility lines convey "potable water, water, sewage, stormwater, wastewater, brine, irrigation water, and industrial water products that are not petrochemicals").

[20] *Id.* (noting that utility lines "are often limited to specific areas, where they serve cities, towns, and other communities, residential developments, commercial developments.").

[21] The Metropolitan Water District of Southern California, Pipelines & Tunnels, http://www.mwdh2o.com/AboutYourWater/Storage-And-Delivery/Pipelines-and-Tunnels.

system of aqueduct, tunnels, and siphons."[22] Many natural gas pipeline projects relying on NWP 12 are much shorter than these lengths.

Moreover, the *number* of oil and natural gas pipeline NWP 12 requests[23] has no relevancy in comparing the impacts from oil and gas pipelines to the impacts from other types of utility line activities. Rather than focusing on the number of NWP 12 requests by each type of utility activity, to support this radical change, the Corps should have conducted an assessment of the differences between the ground disturbances caused by different types of utility activities, along with comparisons of the anticipated impacts to wetlands and other waters. The record that the Corps has presented fails to provide such details. The record does not include, for example, a comparison of the dredge and fill impacts of constructing a 12-inch natural gas pipeline versus the dredge and fill impacts of constructing a 12-inch water pipeline. Nor does the Corps discuss the broad right-of-way (often in excess of 100 feet) required for overhead electric transmission lines, instead focusing only the "fairly small" footprints of the transmission tower footings.[24] These are merely two examples of the multiple areas where the Corps has failed to do the analysis necessary to justify its proposed changes.

Without more detailed information to support this change, the Corps has failed to show that these utility line activities have different impacts on the environment that necessitate such a significant administrative change; therefore, this proposal to trifurcate NWP 12 should be abandoned.

2. The Corps' authority is limited to discharges of dredge and fill material into jurisdictional waters.

The proposed trifurcation of NWP 12 would dismantle a longstanding general permit not based on the nature of the utility activities, but on the substances flowing through the utility lines themselves. The scope of the Corps' jurisdiction is limited to regulation of discharges or dredged or fill material into WOTUS. *See Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1296 (11th Cir. 2019) ("*CBD*"). NWP 12 must continue to be authorized in the same manner for all industries – according to CWA § 404 impacts and RHA § 10 – and without regard to the substances being transported through the utility line. While the Corps has

[22] *Id.*

[23] 85 Fed. Reg. at 57,322.

[24] *Id.* at 57,323.

jurisdiction over discharges of dredged or fill material into WOTUS, the Corps does not have authority to regulate the substances transported through the utilities.

Nor does the Corp have jurisdiction to regulate the operation of or releases from utility lines that make use of NWP 12. The Corps acknowledges that it "does not regulate oil and gas pipelines, or other utility lines, per se; [the Corps] only regulate[s] those components of oil pipelines or other utility lines, that involve activities regulated under our authorities (*i.e.*, section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899)."[25] As the Corps noted in the preamble to the 2017 NWP 12, it does "not have the authority to regulate the operation of oil or gas pipelines, and [the Corps does] not have the authority to address spills or leaks from oil and gas pipelines."[26]

Indeed, numerous other federal frameworks address the transportation of those substances. For example, the Environmental Protection Agency and the Coast Guard address oil spills through the Oil Pollution Act. The 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 FERC under the Natural Gas Act. *Id.* Specific to oil pipelines, DOT regulates pipeline transportation of hazardous liquids, including crude oil and petroleum products, and PHMSA reviews oil spill response plans for, and comprehensively regulates the integrity of, onshore oil pipelines, among other things. *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). These other regulatory frameworks impose numerous enforceable measures to ensure that pipelines and other utilities are appropriately sited and to minimize the risk and impacts of any potential releases.

The Corps' proposal to trifurcate NWP 12 appears to be based solely on the substances flowing inside the utility lines (which the Corps does not have jurisdiction to regulate) and not on any discernable distinction in the activities needed for line construction, maintenance, repair and relocation among utilities. This is an overreach of the Corps' regulatory authority.

[25] 82 Fed. Reg. at 1889; 85 Fed. Reg. at 57,323.

[26] 82 Fed. Reg. at 1884.

3. The Corps' proposed definition of "oil and natural gas pipeline" is inadequate.

The Corps has proposed to define "oil and natural gas pipeline," for purposes of NWP 12 as "any pipe or pipeline for the transportation of any form of oil or natural gas, including petrochemical products." 85 Fed. Reg. at 57,323. But this definition is vague and fails to sufficiently articulate the types of activities that may qualify for NWP 12. "Gas" and "natural gas" can have many meanings. For example, from an oil and gas field, following the separation of crude oil and produced water, the produced gas is a mixture of methane, ethane, propane, butanes, many more light hydrocarbons, hydrogen sulfide, helium and many other gases. Once the produced gas is processed by a gas plant, the resulting "natural gas" (typically 95 to 100% methane) is transported into commerce by pipeline and many other gas products are transported by pipeline, railroad tank car or truck. Renewable natural gas and synthetic natural gas are not addressed in the proposed definition.

Proposed NWP 12 refers to "natural gas," but pipelines can transport other types of gases, such as liquefied petroleum gas (LPG) or carbon dioxide. LPG is a gas that is not a natural gas so it is unclear whether pipelines transporting LPG would qualify for NWP 12 or a different NWP.

The definition also refers to "petrochemical products." The term "petrochemicals" is a very broad and ambiguous term referring to chemicals manufactured at or from the products of refineries. Petrochemicals include many organic commodity chemicals and can also include a wide variety of common materials such as solvents, polymers, and detergents. It is not clear whether the Corps' definition of "oil and natural gas pipeline" would extend to inorganic commodity chemicals such as ammonia, sulfuric acid, and carbon dioxide.

In addition, the terms "oil" and "natural gas" have various meanings under different regulatory frameworks. Incorporating those regulatory definitions into the NWPs is inadvisable because the terms are meant to address complexities in other contexts. PHMSA, for example, regulates pipelines and has specific terms such as hazardous materials and petroleum products tailored for the program it regulates (and subject to stakeholder input). By contrast, the Corps appears to have simply combined wide-ranging pipelines (gathering pipelines, transmission pipelines, local gas distribution pipelines) into one proposed bucket for all oil and natural gas pipes, regardless of potential overlap and commonalities with other utility pipelines.

Similarly, the term "utility lines" in proposed NWP D is confusing. Lines contemplated under NWP 12 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). Further, new natural gas pipeline projects often include the installation of a separate conduit for telecommunication cables and other purposes. And pipeline gathering systems that support crude oil and natural gas production often entail development of dual pipelines (one for transportation of crude oil or unprocessed natural gas and one for transportation of produced water) that are constructed at the same time, and even installed within a common trench. In such scenarios, what version of NWP 12 or the new proposed NWPs C and D would be appropriate? Would an applicant be required to utilize both NWP 12 and NWP D to install pipelines across the same WOTUS?[27] The inclusion of "other substances" in proposed NWP D creates another potential conflict between NWP 12 and NWP D. Wastewater, storm water, irrigation water, and industrial products that are not petrochemicals are examples of activities covered under proposed NWP D, but those waters/activities can also include some oil, gas, or petrochemicals. To further complicate the issue, many underground electric transmission cables contain oil as an insulator. Would this push them out of NWP C?

The Corps' proposal fails to sufficiently define "oil and natural gas pipeline" for purposes of NWP 12, and fails to distinguish between the types of pipelines and activities that may qualify for NWP 12 and utility line activities that are covered by another NWP. The Corps does not have the expertise to define this term and this responsibility should be left to the many regulatory agencies with jurisdiction over these types of activities under their organic statutes. Therefore, INGAA strongly discourages the Corps from attempting to fix this problem by adopting a final definition that does not go through public review and comment. Rather, given the importance of this inadequately defined term to the overall proposed NWP 12, any proposed changes to these definitions should be subject to stakeholder input through notice and comment rulemaking so that the public has an opportunity to provide feedback. This issue alone warrants the Corps returning to the 2017 NWP 12.

[27] GC 28 provides restrictions on the use of multiple NWPs for a single and complete project. 85 Fed. Reg. at 57,389-90.

4. Trifurcation of NWP 12 will create unnecessary burdens, confusion and delay for regulators and the regulated community.

The regulated community and the Corps are familiar with the current terms and conditions of the 2017 NWP 12. INGAA members have long relied on NWP 12 for interstate natural gas pipeline system construction, maintenance, repair, and expansion projects, and schedule and design their projects to meet the terms and conditions of NWP 12. The Corps District Engineers have decades of experience working with the utility line general permit, including any applicable regional conditions. This familiarity and experience allows for efficient processing of permit applications and encourages consistent compliance.

The Corps' proposal to trifurcate NWP 12 would introduce unnecessary confusion and complexities that will burden both the Corps and applicants. In particular, as discussed above, the lack of clarity about key terms such as "natural gas" and distinction between the three proposed permits (NWP 12, NWP C, and NWP D) would, if adopted, present significant permitting, compliance, and enforcement challenges. Trifurcating NWP 12 would introduce significant regulatory uncertainty and inefficiency into the permitting process.[28] Congress wanted to avoid precisely these issues when it amended the CWA to authorize the Corps to issue NWPs for routine projects with no more than minimal adverse effects.[29]

5. Natural gas pipeline activities authorized by NWP 12 comply with industry standards that are protective of the environment and public safety.

INGAA members' activities that meet the terms and conditions of NWP 12 are typically temporary, impact relatively small areas and do not generally result in a permanent loss of WOTUS. This is due in part to the minimal nature of the crossing (which consists of a pipeline buried underground) and because INGAA members must comply with multiple federal regimes,

[28] Trifurcating NWP 12 is also contrary to Executive Order 13766, which notes that "[f]ederal infrastructure decisions should be accomplished with maximum efficiency and effectiveness" and emphasizes that it is the executive branch's policy "to streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects. . . ." Exec. Order No. 13766, Executive Order Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects (Jan. 24, 2017).

[29] NWPs "are intended to reduce administrative burdens on the Corps 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." 85 Fed. Reg. at 57,356.

which detail procedures for construction and restoration in wetlands and waterbodies to ensure minimal impacts to the environment throughout construction and operation.[30]

The overarching objective of pipeline construction is to implement final restoration as quickly as practicable to minimize the time disturbed soils are exposed to reduce the risk of erosion, sedimentation, and other impacts. FERC's *Wetland and Waterbody Construction and Mitigation Procedures* ("FERC Plan and Procedures") are a set of construction and mitigation best management practices (BMPs) that were developed in collaboration with other federal and state agencies, as well as the interstate natural gas pipeline industry, to avoid, minimize, and mitigate the potential environmental effects resulting from construction and operation of interstate natural gas pipeline projects.[31] Among other things, FERC requirements are designed to ensure that interstate natural gas pipeline crossings result in only temporary construction impacts, do not result in permanent fill of jurisdictional waters, are restored to pre-construction contours and elevations immediately after construction, and are mitigated to the greatest extent possible.

The Corps has solicited comments and suggestions on BMPs for oil and natural gas pipeline activities that would be appropriate to add to NWP 12. 85 Fed. Reg. at 57,323. It would be contrary to fundamental requirements of APA notice and comment rulemaking for the Corps to add BMPs or national standards that have not been subject to public notice and comment to a final permit. Thus, INGAA is not suggesting that the FERC Plan and Procedures be incorporated as BMPs or national standards (because, as applicable, INGAA members already follow these requirements), but provides this as an example of the existing regulatory requirements and industry standards that ensure safety and environmental protection. Compliance with the FERC Plan and Procedures, as applied to individual projects, reinforces the Corps' determination that interstate natural gas pipeline activities that meet the terms and conditions of NWP 12 will result in no more than minimal adverse environmental effects, consistent with CWA § 404(e). However, to the extent the Corps decides to impose any BMPs

[30] Natural gas pipelines are subject to unified federal versus state siting authority, the extensive public participation requirements of the FERC, including mandatory public meetings, communications and notices, rights to intervene and appeal, NEPA review of the entire project by FERC, mandatory review of BMPs according to FERC's Plan and Procedures, right of way designations, and the ability to conduct maintenance in wetlands.

[31] *See* FERC, Wetland and Waterbody Construction and Mitigation Procedures (May 2013), *available at* https://www.ferc.gov/industries/gas/enviro/guidelines/wetland-pocket-guide.pdf.

on interstate natural gas pipelines in a final permit, they must not conflict with the FERC Plan and Procedures.

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INGAA strongly recommends that the Corps not trifurcate NWP 12 and instead reissue the 2017 NWP 12, with no additional modifications (*i.e.*, including the same PCN requirements from the 2017 NWP 12), and a new effective date. Maintaining the status quo with NWP 12 will ensure that the Corps can reauthorize the permits in a timely fashion.

B. Pre-Construction Notification for NWP 12.

The Corps has proposed to revise the PCN thresholds for NWP 12 to add a new PCN requirement for oil and natural gas pipeline projects greater than 250 miles in length and eliminate five existing PCN requirements from the 2017 NWP 12. 85 Fed. Reg. at 57,324-27. If adopted as final, PCN would be required for any NWP 12 activities where: (1) a § 10 RHA permit is required; (2) the discharge will result in the loss of greater than 1/10th acre of WOTUS; or (3) the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline along the majority of the distance of the overall project length. *Id.*

In addition to any PCN requirements for NWP 12, other NWP terms and conditions ensure that the Corps will conduct a careful review, where appropriate. For example, under GC 18, a PCN is required where listed species or designated critical habitat might be affected or are in the vicinity of the activity. *Id.* at 57,386. Under GC 20, a PCN is required where the NWP activity might have the potential to cause effects to historic properties. *Id.* at 57,387. Under GCs 23 and 32, if the proposed activity will result in the loss of greater than 1/10th acre of wetlands or streams and a PCN is required, the permittee must describe how mitigation requirements will be satisfied or explain why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required; then, the district engineer must evaluate whether the proposed mitigation is appropriate and practicable to ensure that the individual and cumulative environmental effects are no more than minimal. *Id.* at 57,388, 57,391. These examples, in addition to NWP 12's PCN requirements and any regional conditions, help ensure that the activities that proceed under NWP 12 meet the § 404(e) standard.

As discussed above, INGAA supports a return to the 2017 NWP 12. If the Corps adopts that position, which we urge it to do, the 2017 NWP 12 PCN requirements would be retained.

Even if the Corps moves forward with its proposal to trifurcate NWP 12, INGAA encourages the Corps to simply maintain the PCN requirements from the 2017 NWP 12, rather than move forward with changes to the PCN thresholds for NWP 12, as proposed.

1. INGAA opposes the Corps' proposal to add a new PCN threshold for activities associated with pipeline projects that are greater than 250 miles in length.

If the Corps does not return to the 2017 NWP 12, INGAA opposes the Corps' proposal to add a new PCN threshold for NWP 12 for activities associated with proposed oil and natural gas pipeline projects that are greater than 250 miles in length where the purpose of the project is to install new pipeline along the majority of the distance of the overall project length.

The Corps has not provided any explanation or rationale for its proposed 250-mile threshold. *See* 85 Fed. Reg. at 57,327. The Administrative Procedure Act requires, among other things, that an agency decision not be arbitrary and capricious. *See* 5 U.S.C. § 706. "Fundamental principles of administrative law require that agency action be 'based on a reasonable consideration of the relevant factors,' and rest on reasoned decisionmaking." *United States Telecom Ass'n v. FCC*, 277 F.3d 450, 461 (D.C. Cir. 2000) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). "Reasoned 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.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

But the Corps' proposal lacks any explanation for its proposed 250-mile threshold, much less a rational basis. There is no correlation between impacts to the aquatic environment from a pipeline that is 250 miles versus a shorter (or longer) pipeline. Aquatic impacts are as much or more heavily influenced by geography than by length. For example, pipelines in Maine or Minnesota are going to cross many more wetland and waterbodies than pipelines built in Texas or Oklahoma. INGAA strongly encourages the Corps to not move forward with the proposal to adopt a 250-mile PCN as it is arbitrary and lacks any reasoned basis.

2. INGAA suggests the Corps maintain the five PCN thresholds from the 2017 NWP 12.

The Corps has proposed removing five PCN triggers from the 2017 NWP 12. 85 Fed. Reg. at 57,324. The PCN thresholds that are proposed for removal are: (a) utility line activities involving mechanized land clearing in a forested wetland for the utility line right-of-way; (b) the

utility line in WOTUS, excluding overhead lines, exceeds 500 feet; (c) the utility line is placed within a jurisdictional area (*i.e.*, WOTUS) and it runs parallel to or along a stream bed within that jurisdictional area; (d) permanent access roads are constructed above grade in WOTUS for a distance of more than 500 feet; and (e) permanent access roads constructed in WOTUS with impervious materials. *Id.* As the Corps details in the history of NWP 12, certain of these PCN thresholds date back to 1996, while others were added in 2000 or 2007. *Id.* The PCN thresholds were maintained in the 2012 and 2017 reissuances of NWP 12. *Id.*

In general, INGAA supports the Corps' efforts to simplify PCN requirements for the NWPs and reduce burdens on the regulated public. However, because the proposed changes to NWP 12 are so significant and raise so many concerns, INGAA suggests—to the extent the Corps moves forward with a trifurcation approach—it maintain the current PCN thresholds under the 2017 NWP 12, rather than make any additional changes.

NWP 12 is a critical permit for interstate natural gas pipeline activities, and the current PCN thresholds have been in place for over a decade. While improvements could be made in a future rulemaking, the regulated public and regulators are familiar with, and have operated pursuant to, the current PCN thresholds for NWP 12 for many years. As such, INGAA members believe that the Corps' removal of these five PCN thresholds would not substantially alter burdens on the industry. Additionally, removal of the five PCN thresholds might result in imposition of additional and/or disparate regional conditions across various Corps Districts that might lead to increased confusion, regulatory uncertainty, and/or inefficiencies. In order to ensure the Corps can efficiently and effectively issue a new permit in a timely and defensible manner, INGAA suggests the Corps maintain these PCN triggers, rather than attempt to issue a final NWP 12 that makes substantial changes to the PCN requirements. Further, these provisions are consistent with the versions of NWP 12 previously upheld by the courts and found to meet the minimal adverse environmental effects standard.

C. INGAA Supports the Corps' Longstanding Definition of "Single and Complete Linear Project" and Maintaining the Current Acreage Limit in NWP 12.

INGAA members rely on NWP 12 for new pipeline construction and other pipeline related activities. Any changes to or limits on the interstate natural gas pipeline industry's ability to use NWP 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.

INGAA continues to support the Corps' longstanding practice in which each "separate and distant" crossing of a waterbody is considered a "single and complete" project for purposes of NWP authorization. The Corps' definition is justified by the diffuse impact of linear facilities and their minor impact on individual waterbodies. The Corps has proposed to maintain the ½ acre limit for each "single and complete project" for NWP 12, and INGAA supports this position. 85 Fed. Reg. at 57,370.

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." 85 Fed. Reg. at 57,394. Since 1988, the Corps has "calculate[d] the ½-acre threshold 'separately for each separate and distant crossing.'" *Sierra Club v. Bostick*, 787 F.3d at 1056;[32] *see also* 33 C.F.R. § 330.2(i). When the District Engineer evaluates the PCN for a linear project, he 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 Corps authorization. This definition is consistent with the Corps' regulations and practice, and case law confirms this is an appropriate definition that should be maintained.

INGAA further supports the Corps' position of maintaining the current ½ acre limit for each single and complete project in NWP 12. This limit was 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 acreage limit for NWP 12 is appropriate, well supported by the record, and in conjunction with the other NWP limits, conditions, and PCN thresholds, ensures that activities authorized by NWP 12 will result in no more than minimal individual and cumulative adverse effects, as required by § 404(e). In order to ensure that interstate natural gas

[32] In *Sierra Club, Inc. v. Bostick*, No. CIV-12-742-R, 2013 WL 6858685 (W.D. Okla. Dec. 30, 2013), 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.

pipeline projects—which typically have only minor or temporary impacts to WOTUS—can still be permitted through NWPs, the Corps should maintain the ½ acre limit for each single and complete project.

D. INGAA Supports the Proposed Changes to NWP 3.

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

The Corps proposes to modify NWP 3 to authorize "the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require [Corps] authorization at the time it was constructed." 85 Fed. Reg. at 57,321. This proposed modification is intended to provide consistency with NWP 31, which authorizes the maintenance of existing flood control facilities. *Id.* The Corps explains that prior versions of NWP 3 included a similar provision. *See, e.g.*, 47 Fed. Reg. at 31,832; 51 Fed. Reg. at 41,255. But, it was removed without explanation in the 1991 NWPs reissuance. 85 Fed. Reg. at 57,321 (citing 56 Fed. Reg. at 59,141).

INGAA supports this proposed modification to NWP 3. The clarification is consistent with prior iterations of NWP 3 and would avoid the need for an individual permit or authorization under another NWP or regional general permit for these minor repair activities on structures and fills that have been in place for many years, prior to the adoption of permit requirements under § 404 of the CWA and/or § 10 of the RHA. Incorporating this language will serve the purposes of the NWPs and allow Corps staff to focus their limited resources on activities with greater environmental impacts. As the Corps recognizes, the terms of NWP 3 ensure that the adverse environmental effects of any activities that qualify for NWP 3 are no

more than minimal. 85 Fed. Reg. at 57,322. Specifically, NWP 3 requires that structures or fills be currently serviceable and allows only minor deviations in the configuration of structures or fill. *Id.* The proposed reinstatement of the provision authorizing maintenance and reconstruction of these existing structures and fills would be a helpful clarification.

The Corps also proposes to modify NWP 3 to authorize the placement of new or additional riprap to protect structures undergoing maintenance authorized by the NWP, provided the placement of riprap is the minimum necessary to protect the structure or to ensure the safety of the structure. *Id.* at 57,322. The Corps explains that this provision was in the 2007 version of NWP 3, but removed when the NWP was reissued in 2012. *Id.* The Corps properly recognizes that the addition of riprap to protect existing structures in most circumstances will result in no more than minimal adverse environmental effects because the riprap will protect structures from erosive forces that can cause damage and move pieces of structures into waterways. INGAA supports this modification to NWP 3, which will ensure that NWP 3 is available for necessary repairs to ensure the safety and reliability of pipeline infrastructure.

E. The Corps Should Expedite Permitting Reviews and Approvals for Time-Sensitive Maintenance and Emergency Work.

Much of INGAA members' maintenance, inspection, and emergency work must be conducted under short time frames set by PHMSA. In fact, PHMSA is expected to issue new regulations in the near future that will expand the scope of pipeline conditions that require repair under short time frames.[33] If repairs cannot be accomplished within required time frames, the affected portions of the system may be required to shut down, or operate 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 potentially wide-ranging and serious consequences.

[33] *See Pipeline Safety: Safety of Gas Transmission Pipelines, Repair Criteria, Integrity Management Improvements, Cathodic Protection, Management of Change, and Other Related Amendments*, DEPARTMENT OF TRANSPORTATION AGENCY RULE LIST – SPRING 2020, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=2137-AF39 (last visited Nov. 10, 2020).

Accordingly, the Corps should expedite permitting review and any approvals that require PCN 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 § 404 program and improving efficiency for time-sensitive maintenance and emergency work.

IV. INGAA Supports the Corps' Determination that Reissuance/Issuance of the NWPs Has "No Effect" on Listed Species or Designated Critical Habitat.

In the proposal, the Corps explains that reissuance/issuance 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" because the "only activities that are immediately authorized by NWPs are 'no effect' activities under Section 7 of the ESA and its implementing regulations." 85 Fed. Reg. at 57,357. This determination is consistent with the requirements of the Endangered Species Act (ESA), supported by the proposal and decision documents, and based on the numerous limitations in the NWPs that confine the scope of actions actually authorized by the proposal to those activities that have "no effect" on listed species or designated critical habitat. INGAA agrees that consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Services (collectively, the Services) is not required. [34]

ESA § 7 requires each federal agency to ensure, through consultation with the Services, that "any action authorized, funded, or carried out" by that agency is not likely to jeopardize the

[34] Earlier this year, a Montana District Court disregarded the Corps' "no effect" determination for the 2017 NWPs and held that the Corps was required to consult with the Services when it reissued the 2017 NWP 12. *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-00044-BMM (D. Mont. May 13, 2020); appeal filed No. 20-35414 (9th Cir. May 13, 2020). INGAA is a member of the Defendant-Intervenor Coalition participating in this case to defend the 2017 NWP 12 against Plaintiffs' ESA claim. INGAA strongly disagrees with the District Court's decision and has appealed to the Ninth Circuit. INGAA also supported the government's application for stay pending appeal, which was granted by the Supreme Court. In so doing, the Supreme Court impliedly recognized the District Court's errors.

continued existence of listed species or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). Based on the action agency's review of its authorized action, it may be required to consult. But where the action agency determines that its proposed action has "no effect" on listed species or designated critical habitat, its obligations under § 7 of the ESA are complete and "consultation requirements are not triggered." *See Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 913 (9th Cir. 2018).

Here, the action being authorized by the Corps is the Headquarters reissuance of the NWPs. The Corps properly determined that the Headquarters reissuance has "no effect" and therefore does not require ESA § 7 consultation because the NWPs do not authorize any activity that may affect a listed species or designated critical habitat, absent activity-specific ESA § 7 consultation.

A. The terms and conditions of the NWPs ensure that ESA consultation will take place when appropriate.

The activities actually authorized by the Corps' proposed reissuance/issuance of the NWPs are closely restricted in scope. As the Corps explains, "the terms and conditions of the NWPs, including general condition 18, and 33 CFR 330.4(f) ensure that ESA consultation will take place on an activity-specific basis wherever appropriate at the field level of the Corps, FWS, and NMFS." 85 Fed. Reg. at 57,357. Under GC 18, any activity that "may affect" a listed species or critical habitat must undergo an activity-specific consultation or be in compliance with a regional programmatic ESA § 7 consultation before the district engineer can verify that the activity is authorized by NWP. Through GC 18, the Corps has exercised its discretion to decide which activities to authorize now and which to defer to future authorization, subject then to ESA review and consultation, if appropriate.

GC 18 excludes from authorization and requires submission of PCN by a non-federal permittee if any listed species "might be affected or is in the vicinity of the activity." 85 Fed. Reg. at 57,386 (GC 18(c)). The "might affect" and "in the vicinity of" standards are more stringent and protective than the "may affect" threshold in the Services' consultation regulations. *Id*. at 57,357. GC 18 makes clear that no activity is "authorized" by the Headquarters reissuance that even "might affect" listed species or critical habitat absent appropriate review. Moreover, GC 18 expressly prohibits authorization under any NWP of any activity that is likely to

jeopardize the continued existence of a threatened or endangered species, or adversely modify the critical habitat of such species. *Id.*

Each submission of a PCN under GC 18 is a *new* potential authorization that the Corps must evaluate, at that time, for its effect on listed species or critical habitat for purposes of ESA § 7 consultation. When a PCN is submitted, the District Engineer is responsible for reviewing the project, imposing additional conditions and consultation requirements, where appropriate, and activities are not authorized until the Corps evaluates whether consultation is required and, if so, completes consultation. *Id.* Where consultation is required, the Corps will engage in consultation, pursuant to the applicable ESA regulations. 50 C.F.R. § 402.02 (2019). GC 18 makes clear that "[n]o activity is authorized under any NWP which 'may affect' a listed species or critical habitat" until § 7 "consultation … has been completed," and the applicant "shall not begin work … until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized." 85 Fed. Reg. 57,386 (GC 18(a), (c)).

The Corps also identifies, in the proposal, other protective aspects of the NWP program, including regional conditions and requirements and programmatic regional consultations. 85 Fed. Reg. at 57,357, 57,359-60.

Consistent with its obligations, the Corps assessed its proposed action – Headquarters reissuance/issuance of the NWPs – and determined that the NWP activities authorized by that action have "no effect" on listed species or designated critical habitat based on the numerous limitations and protections incorporated in the NWPs, including GC 18. INGAA supports this determination and the Corps' approach.

B. Programmatic consultation is not required for a program with "no effect" on listed species or designated critical habitat.

An action agency is not required to undertake programmatic consultation where it has appropriately determined the action has "no effect" on listed species or habitat. Consultation, whether programmatic or otherwise, need occur *only if* the action agency finds its authorized action "may affect" species or habitat. Here, the Corps has determined that programmatic consultation is not required for the NWP proposal, 85 Fed. Reg. at 57,357, and INGAA supports that conclusion.[35]

[35] The Corps notes in the preamble that, despite its "no effect" determination and conclusion that consultation is not required for NWP reissuance, it previously conducted "voluntary" national programmatic consultations for the NWP program. *Id.* The Corps' prior voluntary consultations were fully consistent with its "no

The Services' final rule amending the incidental take statement provisions of the § 7 implementing regulations confirms that § 7 consultation is not required for programmatic action that has "no effect" on listed species or habitat. 80 Fed. Reg. 26,832 (May 11, 2015). The Services' regulations define framework programmatic action as "a collection of activities of a similar nature, . . . or an action adopting a framework for the development of future actions." *Id.* at 26,835. Such frameworks for future actions "may be developed at the local, statewide, or national scale, and are authorized, funded or carried out and *subject to section 7 consultation requirements at a later time as appropriate*." *Id.* (emphasis added). The Services' rule cites the NWPs as an example of a federal program that provides a framework programmatic action, but confirms that "this [rule] does not imply that section 7 consultation is required for a framework programmatic action that has *no effect* on listed species or critical habitat." *Id.; see also* 85 Fed. Reg. at 57,357-58.

The Services' 2019 regulations further confirm that "while federal action agencies have an obligation to consult on programs that are considered agency actions that *may affect* listed species or critical habitat, 'many types of programmatic consultation would be considered an *optional form of section 7 compliance to, for example, address a collection of agency actions that would otherwise be subject to individual consultation*.'" 85 Fed. Reg. at 57,358 (quoting 84 Fed. Reg. at 44,996) (emphases added).

The NWP program is structured, through GC 18, to focus ESA § 7 compliance at the activity-specific and regional levels. Because the action being "authorized" at the Headquarters level— the issuance or reissuance of the NWPs—has "no effect" on listed species or critical habitat, INGAA agrees with the Corps' conclusion that "there is no requirement that the Corps undertake programmatic consultation for the NWP program." *Id.* at 57,360.

V. The Corps' NWP Proposal Complies with the Requirements of the CWA and NEPA.

The Corps' proposed reissuance/issuance of the NWPs complies with the requirements of the CWA and NEPA, as well as the regulations and case law. *Id*. at 57,355 (NEPA compliance); *id.* at 57,356 (CWA § 404(e) compliance). The CWA authorizes the Corps to issue NWPs for categories of activities that "are similar in nature, will cause only minimal adverse environmental

effect" determination. *See, e.g.*, 82 Fed. Reg. at 1873 (recognizing that, although Corps engaged in consultation during 2012 reissuance, it did so *voluntarily* and did not believe consultation was legally required).

effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). The Corps appropriately recognizes that the scope of its NEPA review is limited to the effects of the activities authorized by an NWP, *i.e.*, the discharge of dredged or fill material into WOTUS.

Courts have consistently confirmed that NEPA does not expand the scope of an agency's authority. *CBD*, 941 F.3d 1288; *see also U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004) ("*Public Citizen*") (scope of NEPA review is limited to the effect of activities subject to the agency's jurisdiction and control). If the agency has "no ability to prevent a certain effect due to its limited statutory authority over the relevant actions . . . the agency need not consider these effects" under NEPA. *Public Citizen*, 541 U.S. at 770. This principle was recently affirmed by CEQ, which modified its NEPA regulations to codify 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, 43,321 (July 16, 2020) (codified at 40 C.F.R. § 1508.1(g)(2)).

The Corps' NEPA analysis of a CWA permit is properly limited to the impacts caused by authorizations of discharge of dredged or fill material into jurisdictional waters 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");[36] *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); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co*., 556 F.3d 117 (4th Cir. 2009) (Corps' NEPA analysis properly limited to stream fill and need not consider upland components).

In its analysis of effects for the proposed reissuance of the NWPs, the Corps appropriately focused its environmental assessment on the effects or impacts that are likely to be caused by 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. 85 Fed. Reg. at 57,356-57. INGAA supports this approach, which has been upheld by the courts. *Bostick*, No.

[36] The Corps' NEPA regulations were approved by CEQ, 52 Fed. Reg. 22,517 22,518 (June 12, 1987), and upheld by the Ninth Circuit. *See Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 399 (9th Cir. 1989).

CIV-12-742, 2013 WL 6858685, at *9, *aff'd*, 787 F.3d 1043 (10th Cir. 2015); *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 28-29 (D.D.C. 2013).

VI. 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 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 issue a final rule consistent with the comments described above. We would welcome the opportunity to further discuss any of these issues with the Corps.

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