



**American Fuel &
Petrochemical
Manufacturers**

1800 M Street, NW
Suite 900, North
Washington, DC
20036

202.457.0480 office
202.457.0486 fax
afpm.org

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS' COMMENTS ON

**THE DEPARTMENT OF ARMY AND THE U.S. ARMY CORPS OF
ENGINEERS**

**“NOTICE OF VIRTUAL PUBLIC AND TRIBAL MEETINGS REGARDING
THE REVIEW OF NATIONWIDE PERMIT 12; ESTABLISHMENT OF A
PUBLIC DOCKET; REQUEST FOR INPUT”**

DOCKET ID No. COE-2022-0003

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Rob Benedict
American Fuel & Petrochemical Manufacturers
1800 M Street, NW, Suite 900
Washington, DC 20036

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I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) welcomes the opportunity to comment on the Department of the Army and the U.S. Army Corps of Engineers (“Corps”) announcement of virtual public and tribal meeting dates and solicitation of input. (the “Notice”).¹ This notice announces the Corps’ formal review of Nationwide Permit (“NWP”) 12 for Oil or Natural Gas Pipeline Activities.

NWPs were first issued by the Corps in 1977 to authorize categories of construction and maintenance activities that have minimal adverse effects on the aquatic environment, and to streamline the authorization of those activities.² Under § 404(e) of the Clean Water Act (“CWA”), the Corps has the authority to issue general permits to authorize activities that have only minimal individual and cumulative adverse environmental impacts.

CWA 404(e) refers to “activities involving discharges of dredged or fill material.” Pipeline construction and maintenance activities may involve discharges of dredge or fill material, but oil and gas transportation through pipelines does not. Thus, the former, not the latter, are the “activities” that need to be analyzed to determine whether they will cause minimal adverse environmental effects. Separate statutes and their implementing regulations govern air emissions and the safety of the material transported. Therefore, any discussion of NWP renewal should focus solely on construction and maintenance activities and their related waters of the U.S. (“WOTUS”) impacts and be limited to areas clearly under the Corps’ statutory authority.

An NWP is a general permit that authorizes activities across the country unless a district or division commander revokes the NWP in a state or other geographic region. General permits can be issued for a period of no more than five years. The NWP program also streamlines CWA implementation for linear infrastructure projects with minimal adverse impacts to WOTUS that may traverse multiple jurisdictions.

NWPs allow the Corps to focus resources more effectively on projects with greater potential environmental impacts while providing timely and cost-effective permitting for lower-impact projects. Through the NWP program, the Corps recognizes minimal and often ephemeral impacts to WOTUS associated with linear utility projects. The NWP program provides a regulatory framework in which the Corps may evaluate a linear pipeline project to determine if unique project impacts are more than minimal and require alternative permitting.

AFPM supports the continued use of the CWA § 404 general permit system to authorize minimal WOTUS impacts associated with linear utility projects and related infrastructure. Recognizing the recent renewal of the NWP program that the Corps completed just last year in January 2021 and December 2021, AFPM believes that a premature review of NWP 12 is

¹ See [87 Fed. Reg. 17281](#) “Notice of Virtual Public and Tribal Meetings Regarding the Review of Nationwide Permit 12; Establishment of a Public Docket; Request for Input”, Docket No. COE-2022-0003, published March 28, 2022.

² See [42 Fed. Reg. 37122](#), “Permits for Discharges of Dredged or Fill Material into Waters of the United States”, published July 19, 1977.



unnecessary and a misallocation of the Corps' resources.³ Impacted stakeholders were provided ample opportunity through the notice and comment rulemaking process to comment on potential updates to the NWP program just last year.

II. AFPM'S INTEREST IN THE CORPS' NOTICE

AFPM is the leading trade association representing the makers of the fuels that keep us moving, the petrochemicals that are the essential building blocks for modern life, and the midstream companies that get our feedstocks and products where they need to go. We make the products that make life better, safer, and more sustainable. AFPM members strengthen economic and national security while supporting more than 3 million jobs nationwide.

To produce these essential goods, AFPM members depend on all modes of transportation to move their products to and from refineries and petrochemical facilities. Pipelines provide a safe, reliable, efficient, and cost-effective way to move bulk liquids, particularly over long distances, and are the primary mode for transporting feedstocks to refiners and petrochemical facilities and refined products from those same facilities to market. AFPM includes member companies that own and operate their own pipelines as well as member companies that rely on pipelines to ship feedstocks and their products.

III. THE CORPS' PROPOSED SUPPLEMENTAL REVIEW OF NWP 12 IS PREMATURE AND UNNECESSARY

The NWP Program, and NWP 12 specifically, provides an efficient mechanism for authorizing low-impact oil and gas pipeline construction activities that are essential and are widely used by AFPM members. According to the Corps, the goal in developing, renewing, and authorizing NWPs every five years is to update them and provide clarity and certainty for permittees while protecting wetlands, streams, and other aquatic resources.

On January 20, 2021, President Biden signed an Executive Order directing “all executive departments and agencies (agencies) to immediately review . . . the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.”⁴ The Biden Administration also developed a “Fact Sheet: List of Agency Actions for Review”, which included the January 2021 “Reissuance and Modification of Nationwide Permits” in the “list of agency actions that heads of the relevant agencies will review in accordance with the Executive Order.”⁵

³ On January 13, 2021, the Corps published a final rule ([86 FR 2744](#)) reissuing and modifying 12 existing NWPs and issuing four new NWPs, as well as the NWP general conditions and definitions. In addition, the Corps published another final rule ([86 FR 73522](#)) reissuing 40 NWPs and issuing one new NWP on December 27, 2021.

⁴ See “Executive Order on Tackling the Climate Crisis at Home and Abroad” ([EO 14008](#)) published on January 27, 2021.

⁵ See “Fact Sheet: List of Agency Actions for Review” published January 20, 2021, [Fact Sheet: List of Agency Actions for Review | The White House](#)



AFPM supports improving the NWP program but cautions the Corps that a new review is premature and unnecessary given the program was renewed just last year. The 2021 review was consistent with years of precedent in modifying and reissuing NWPs. The Corps extensively reviewed the environmental issues related to NWP 12 within the Corps statutory authority, specifically CWA § 404(e). Further, climate impacts of any individual category of NWPs are already appropriately considered in the National Environmental Policy Act (“NEPA”) analysis accompanying the renewed suite of NWPs as a whole.

The Federal notice and comment rulemaking process provides ample opportunity to address stakeholder concerns. Federal agencies, including the Corps, depend on relevant, substantive information from a wide variety of parties to assist them in developing and updating federal regulations. The most recent review of NWP provided extensive opportunities to comment on the program and its impacts to all stakeholders including impacted communities. Further, the NWP program already includes an additional opportunity to consider specific communities’ unique issues. Under the NWP program, District Engineers (“DEs”) have the authority and discretion regarding individual project verifications and how a project would impact specific communities.

Put simply, this new proposed review is unnecessary and a waste of the Corps’ limited resources. The NWP program is mature, and the process of NWP review and renewal has worked effectively over many years and across many different administrations. The most recent review adequately considered and resolved environmental issues under the Corps’ statutory authority. A supplemental review would undermine the NWP program’s goals of “timely and cost-effective” permitting and “clarity and certainty” for permittees that the five-year review cycle is designed to promote.

IV. THE CORPS EARLY REVIEW OF NWP 12 CREATES REGULATORY UNCERTAINTY AND COULD STIFLE INFRASTRUCTURE DEVELOPMENT

Pipelines are the safest, most reliable, efficient, and cost-effective way to move bulk liquids over long distances and are the primary mode for transporting feedstocks to refiners and petrochemical facilities and refined products from those same facilities to market. These same pipelines also connect U.S. energy markets to export terminals and subsequently global markets. Given the extensive resources needed to build a pipeline and potential litigation associated with pipeline permitting, a reliable and predictable regulatory environment fosters essential investment in critical linear infrastructure projects such as oil and gas pipelines.

This investment is needed now more than ever as Russia’s invasion of Ukraine has had extensive geopolitical ramifications including impacts to the global energy markets. While there is no near-term, silver-bullet policy to blunt the impact of geopolitical disruptions of the market, pursuing policies that allow domestic production to return to pre-pandemic levels will help to provide market stability and insulate not only the U.S. but the world from major disruptions. Policymakers must carefully tailor policies so that they do not increase the cost of producing refined product and policies that make it uneconomic to transport crude oil and petroleum products domestically. The current geopolitical crisis related to the Ukraine invasion



underscores the need for expeditiously maintaining, augmenting, and upgrading our domestic energy production and transportation infrastructure and the NWP program does just this.

NWP 12 plays a critical role in the supply chains for fuels, petrochemicals, and the numerous products made from petrochemicals. Changing this program now would be detrimental to the refining and petrochemical industries who are supporting the global economy. The NWP Program provides an efficient mechanism for authorizing low-impact oil and gas pipeline construction activities that are essential and are widely utilized by U.S. refiners and petrochemical manufacturers. NWP 12 allows AFPM members to efficiently meet consumer needs for fuels and petrochemicals, respond to rapidly changing market forces including those we are facing now. If the Corps were to conduct an extremely early review of the NWP 12 program, the Corps would create unneeded regulatory uncertainty and potentially stifle investment in essential critical infrastructure—specifically oil and gas pipelines—at a time when increased energy production is essential to national security and to combat raising inflation.

The Corps' consideration of “potential off-ramps” to the NWP 12 program that would require heightened agency review are unwarranted and could have a chilling effect on needed infrastructure investments. Such changes to the NWP program could potentially render a proposed project ineligible for NWP 12 coverage, thus requiring proponents to acquire individual permits. This could cause substantial delays, thereby increasing costs, time, energy, and mitigation needed for project approval and lead project proponents to abandon needed projects.

V. AFPM'S RESPONSE TO THE CORP'S STAKEHOLDER INPUT REQUEST

A. As part of any future action the Corps may take with respect to NWP 12, should the Corps consider utilization of the procedures in 33 CFR 330.5 in advance of the current cycle for nationwide permit review?

33 C.F.R. § 330.5 sets forth the provisions on how the Corps can modify, suspend, or revoke nationwide permits. The Corps should not utilize these procedures as this would drastically depart from the Corps' long-standing and consistent view of NWP 12 (over the last four plus decades), it would create administrative complications for the regulated community and regulators, and most importantly the Corps has not articulated a rationale supporting a new review.

NWPs were first issued by the Corps in 1977 to authorize categories of construction and maintenance activities that have minimal adverse effects on the aquatic environment and streamline the authorization of those activities (emphasis added). Typically, the Corps reviews the program every five years to update NWPs and provide clarity and certainty for permittees while protecting wetlands, streams, and other aquatic resources. In fact, just in November 2020, in a notice of proposed rulemaking the Corps noted that 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.”⁶

Given the consistency and recency of these reviews and the fact that extensive notice and comment and associated environmental analysis required by NEPA were completed just over a year ago, utilization of 33 C.F.R. § 330.5, would be inappropriate. There has been no precipitating event that would necessitate a new review. Such a review would undermine the goal of providing clarity and certainty for permittees and question the sound judgment of Corps staff in ensuring minimal adverse impacts associated with the program.

To provide certainty and predictability to stakeholders, we strongly suggest the Corps retain its 5-year cycle of review/reissuance. Conducting off-cycle reviews would create unnecessary confusion as permittees would be required to navigate off-cycle changes and address multiple sets of general conditions in place at one time for select permits renewed or modified off-cycle. Finally, the questions included in this Notice also suggest a desire to increase the scope of the Corps activities beyond those that are statutorily mandated, which is concerning.

B. Should modifications be considered to further ensure NWP 12 has no more than minimal individual and cumulative adverse environmental effects under Section 404(e) of the Clean Water Act?

The Corps treats each separate and distant crossing of jurisdictional waters and wetlands as a separate use of NWP 12, and thus the Corps must ensure that multiple uses of NWP 12 for constructing or maintaining a longer linear project do not result in significant cumulative effects directly associated with dredge and fill activities under the Corps’ authority.⁷ This is important to satisfy Section 404(e) of the CWA, but it is also necessary to satisfy agency review of major federal actions significantly affecting the human environment under the NEPA. The Corps’ environmental assessment for NWP 12 already analyzed cumulative effects under both statutes and allows the Corps’ DE to condition NWP 12, or disallow its use, when cumulative effects may be more than minimal.

C. Should modifications to NWP 12 be considered to provide notice to and an opportunity to be heard by potentially impacted communities, particularly with regard to environmental justice communities?

In the Notice the Corps points to claims made against one particular pipeline and suggests through “an opportunity for notice to the community, a written comment period or a public hearing prior to the Corps providing authorization for the pipeline,” the Corps could have more extensively considered environmental justice, climate change impacts, and drinking water

⁶ See [85 Fed. Reg. 57298](#) “Proposal to Reissue and Modify Nationwide Permits,” Docket No. COE-2020-0002, published September 15, 2020.

⁷ It must be emphasized that the Corps’ authority is limited to impacts under their statutory authority, and it would be inappropriate for the Corps to consider cumulative impacts beyond their authority, such as air emissions.



impacts.⁸ This claim ignores the consultation already included in the NWP as well as the statutory scope of the Corps and the NWP program.

NWP 12's criteria already ensure higher impact activities would have to seek an alternate means of authorization such as an individual permit, where a public notice is part of the review process. No further modifications to the notice and comment process related to NWP 12 are necessary or warranted. Adding a public notice requirement to NWP 12 is a disincentive to applicants to reduce impacts to aquatic resources if the process for authorization is not substantially different than that of an individual permit, reserved for potentially' greater impacts.

Further, forcing all NWP through a more extensive consultation process frustrates the point of the program. This defies common sense and the intent of the law. Requiring additional rounds of public notice and comment for each individual use of NWP 12 would defeat Congress's intent in providing the CWA 404(e) pathway for streamlined approvals when effects would be no more than minimal.

D. *Would it be prudent for the Corps to consider further limits on the NWP 12, Pre-Construction Notification (PCN) requirements, general conditions, and the ability of division and DEs to modify, suspend, and revoke NWP authorizations to further ensure that the NWP 12 causes no more than minimal cumulative adverse environmental effects at the national, regional, and site scales?*

As previously stated, just over a year ago the Corps completed a review of NWP 12, PCNs and general conditions. Through an extensive notice and comment rulemaking process the Corps already determined and reaffirmed that the existing limits on NWP 12, its PCN requirements, the general conditions, and the additional reviews from the DE adequately ensure activities are not approved with more than minimal cumulative impacts. Furthermore, the DEs already have considerable discretion to consider cumulative impacts within their statutory purview. There is no compelling reason for the Corps to consider further limits.

E. *Should distinctions be drawn between new construction of oil and natural gas pipelines and maintenance of existing oil and natural gas pipelines?*

NWP 12 authorizations should be available for both types of qualifying activities without adding additional burdensome requirements requiring new and lengthy permitting. Both activities involve dredge and fill and no distinction is necessary. Both activities have the same acreage thresholds (*e.g.*, ½ acre threshold) and a requirement prohibiting change in pre-construction contours of WOTUS. Both construction and maintenance of pipelines can be only authorized for activities with minimal impact and if there are adverse environmental impacts, that would fall within the DE's discretionary authority.

F. *Should distinctions be drawn between oil pipelines and natural gas pipelines, especially in consideration of differences in overall Federal regulation of different types of pipelines?*

⁸ See 87 Fed. Reg. 17282



Distinguishing between pipelines based on differences in federal regulation would exceed the Corps' authority. The dredge and fill activities associated with construction of both types of pipelines under NWP 12 are not different and do not necessitate distinction. Construction impacts typically do not vary between oil and gas pipelines. And for CWA Section 404 authorization for the placement of dredged or fill material, the Corps lacks jurisdiction over the pipelines' subsequent operation once the construction activities are complete.

G. *Does the NWP 12 verification process ensure that environmental justice and climate change factors are adequately considered?*

While climate change and environmental justice are more appropriate to be considered under other statutes by other regulatory agencies, the Corps has recently considered these issues, related to Corps' statutory authority, when it renewed the NWP last year. The Corps itself confirmed this in their January 2021 final rule that updated NWP 12. Specifically, when discussing climate change the Corps stated:

“The Corps has considered climate change during the reissuance of the NWPs, and each of the national decision documents includes a discussion of climate change. Although some activities authorized by various NWPs may be associated with energy production, distribution, and use, the Corps does not have the authority to regulate or control the production, distribution, or combustion of hydrocarbons and other materials are sources of carbon dioxide and other greenhouse gases that contribute to global climate change.”⁹

Regarding environmental justice the Corps' own recent assessment finds that environmental justice issues were adequately considered under EO 12898 during the 2021 NWP reissuance process.¹⁰ Specifically, the Corps noted in their January 2021 final rule:

“The NWPs are not expected to have any discriminatory effect or disproportionate negative impact on any community or group, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.”¹¹

Based on the Corps' own statements environmental justice and climate change factors are adequately considered, to the limited extent the Corps has authority over these matters which generally have been committed to other agencies. The Corps has not presented any compelling justification for expanding its mission and unlawfully encroaching on other agencies' jurisdictions.

⁹ See [86 FR 2755](#) “Reissuance and Modification of Nationwide Permits” Docket Number: COE-2020-0002 published January 13, 2021,

¹⁰ See 59 FR 7629; Summary of Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations February 16, 1994; <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice>

¹¹ See [86 FR 2859](#) “Reissuance and Modification of Nationwide Permits” Docket Number: COE-2020-0002 published January 13, 2021.



H. *Are the PCN requirements for the current NWP 12 adequate?*

In the January 2021 final rule that updated NWP 12 the Corps revised PCN requirements associated with five out of the seven activities that required notice in the previous version and added one new notice requirement. Furthermore, under NWP 12, general and regional conditions are closely adhered to. During the 2021 rulemaking, the Corps extensively addressed all comments and reaffirmed that the PCNs were adequate. Given this recent and extensive review and modification AFPM believes the PCN are adequate. Additional changes to the PCNs would create regulatory uncertainty.

I. *Should there be new triggers for oil or natural gas pipeline activities in jurisdictional waters that mandate review under an individual permit?*

New triggers would be unprecedented and contrary to goals of the NWP program. As frequently noted in these comments, the January 2021 final rule recently addressed this issue along with PCNs. Changes to the triggers would exceed the scope of NWP 12 and could affect other aspects of the Corps' regulatory program. Lastly, DEs already have considerable discretion to trigger review under an individual permit.

VI. CONCLUSION

AFPM thanks the Corps for its time and consideration of our comments. The NWP program is intended to provide timely authorizations for infrastructure projects while protecting the nation's environment and aquatic resources. AFPM members depend on this program to support their operations. AFPM supports the Corps' implementation of the NWP program. However, we strongly oppose the early review of NWP 12 just a year after its' most recent renewal cycle. This review is premature and unnecessary. Further, the Corps early review of NWP 12 creates regulatory uncertainty in a time when energy infrastructure development and maintenance is essential. AFPM shares the Corps' goal of strengthening the program and as such we appreciate the considerations of the concerns relayed in these comments. Please contact me at (202) 457-0480 or rbenedict@afpm.org if you wish to discuss these issues further

Sincerely,

Rob Benedict,
Vice President, Petrochemicals & Midstream
American Fuel & Petrochemical Manufacturers