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AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS' COMMENTS ON

**THE ARMY CORPS OF ENGINEERS
NOTICE OF PROPOSED RULEMAKING
"PROPOSAL TO REISSUE AND MODIFY
NATIONWIDE PERMITS"**

**DOCKET NO. COE-2020-0002
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I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) welcomes the opportunity to comment on the United States Army Corps of Engineers (“USACE” or the “Corps”) Notice of Proposed Rulemaking entitled, “Proposal to Reissue and Modify Nationwide Permits” (“NPRM” or “the proposal”).¹ The USACE issues Nationwide Permits (NWP) which authorize certain activities under Section 404 of the Clean Water Act (“CWA”)² and Section 10 of the Rivers and Harbors Act of 1899.³ On September 15, 2020, USACE issued this NPRM soliciting comment on the reissuance of all existing NWPs and associated general conditions and definitions, with some modifications. The NPRM proposes to divide the current NWP that authorizes utility line activities including oil and natural gas pipeline activities (“NWP 12”) into three separate NWPs and update Preconstruction Notifications (“PCNs”) for oil and natural gas pipeline activities.⁴

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.⁵ Under § 404(e) of the CWA, USACE has the authority to issue general permits to authorize activities that have only minimal individual and cumulative adverse environmental impacts. It is important to emphasize that the NWP program is specific to construction and maintenance activities and does not, and should not, consider the material or product transported. Separate statutes, laws and regulations govern the safety of the material or product transported and as such this proposal should focus on construction and maintenance activities and their impacts.

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. According to USACE, 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. The NWP program also serves to streamline CWA implementation for linear infrastructure projects with minimal adverse impacts to waters of the U.S. (“WOTUS”) that may traverse multiple jurisdictions.⁶

¹ See 85 Fed. Reg. 57298 “Proposal to Reissue and Modify Nationwide Permits,” Docket No. COE-2020-0002, published September 15, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-09-15/pdf/2020-17116.pdf>.

² See § 404 of the Clean Water Act <https://www.epa.gov/cwa-404/clean-water-act-section-404>.

³ See § 10 of the Rivers and Harbors Appropriation Act of 1899 <https://www.epa.gov/cwa-404/section-10-rivers-and-harbors-appropriation-act-1899>

⁴ Certain NWPs require project proponents to notify Corps district engineers of their proposed activities prior to conducting the activities authorized by those NWPs, so that the district engineers can make case-specific determinations of NWP eligibility. The notification is considered a pre-construction notification or PCN.

⁵ See 42 Fed. Reg. 37122, “Permits for Discharges of Dredged or Fill Material into Waters of the United States”, published July 19, 1977, https://s3.amazonaws.com/archives.federalregister.gov/issue_slice/1977/7/19/37088-37142.pdf#page=35

⁶ The definition of WOTUS delineates the jurisdictional scope of the CWA to “navigable waters.” This is important because all CWA programs including those under USACE authority apply only to WOTUS. The CWA grants discretion to the implementing agencies, including USACE, to define this term in regulations, and this has been further interpreted by the courts. See 85 Fed. Reg. 22250 “The Navigable Waters Protection Rule: Definition of

NWPs allow the Corps to focus its resources more effectively on projects with greater environmental impacts while providing timely and cost-effective permitting for lower risk projects. Through the NWP program, USACE recognizes that minimal and often temporary impacts to WOTUS are associated with linear utility projects. The NWP program provides a regulatory framework in which USACE 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. We appreciate the timely renewal of the NWP program that the USACE has begun with this proposal and support renewal of all 54 NWPs together ahead of the March 2022 deadline. Logical groupings of similar activities covered under the NWP program (e.g., NWP 6 for survey activities, NWP 12 for utility lines, and NWP 44 for mining activities) are integral to the ensure program efficiencies. Regarding NWP 12, we support reissuance of NWP 12 as single permit for the covered construction activities as described in 2017 and the preceding decades. We oppose the splitting of NWP 12 into three separate permits (NWP 12, NWP C, and NWP D) for the reasons detailed in this response. Further, AFPM members believe there are opportunities to strengthen the existing program related to oil and gas pipelines activities and discuss those opportunities in these comments.

II. AFPM'S INTEREST IN THE NWP PROGRAM

AFPM is a national trade association representing most U.S. refining and petrochemical manufacturing capacity. AFPM's member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the petrochemical building blocks that are used to make the millions of products that make modern life possible—from clothing to life-saving medical equipment and smartphones. As such, AFPM members strengthen economic and national security while supporting nearly 4 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 and have made significant infrastructure investments to support and improve the safety and efficiency of the transportation system. AFPM member companies depend upon on an uninterrupted, affordable supply of crude oil and natural gas as feedstocks for the transportation fuels and petrochemicals they manufacture. Pipelines are the primary mode for transporting crude oil and natural gas to refiners and petrochemical facilities and refined products from those same facilities to distribution terminals serving consumer markets.

Pipelines provide a safe, reliable, efficient, and cost-effective way to move bulk liquids, particularly over long distances. The U.S. Department of Transportation's Pipeline & Hazardous Materials Safety Administration concurs, "pipelines are the most feasible, most reliable and

"Waters of the United States" EPA-HQ-OW-2018-0149 / FRL-10004-88-OW, published June 22, 2020, <https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definition-of-waters-of-the-united-states>.

safest way to transport our country's total energy consumption."⁷ AFPM member companies own, operate, and rely on pipeline transportation as part of their daily operations. In 2018, U.S. refineries received over 4.2 billion barrels of crude oil via pipeline, an increase in refinery pipeline receipts of more than 28 percent since 2013.⁸ In recent years, the pipeline system that transports petrochemicals and fuel feedstocks and refined products has grown to meet increased demand. Since 2010, mileage for these pipelines has increased by approximately 24 percent and now the US has a total of over 224,000 miles of these types of pipeline.⁹

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. NWP 12 allows AFPM members to meet consumer needs for fuels and petrochemicals, respond to rapidly changing market forces, and play a critical role in the supply chains for fuels, petrochemicals, and the numerous products made from petrochemicals. AFPM supports this program and efforts to improve the NWP program, but cautions the USACE to avoid changes that could introduce inefficiencies.

III. AFPM'S COMMENTS ON THE TIMELY UPDATE OF THE ENTIRE NWP PROGRAM

This NPRM starts the process of a timely renewal of the NWP and makes potential improvements to the NWP program. Through the notice and comment rulemaking process, the Corps has typically renewed the NWP program at least every five years, with the last update to the NWP taking place in 2017.¹⁰ The timely renewal of the NWP program incorporates needed reforms and provides regulatory certainty needed for infrastructure permitting for project proponents, including AFPM members.

AFPM supports the timely and concurrent update and renewal the full NWP program. Renewal of all permits will ensure all NWPs remain on the same 5-year permit renewal cycle. While AFPM members rely heavily on NWP 12, it is not the only permit our members utilize. Keeping all permits on the same cycle fosters the efficiencies the NWP program is designed to promote. We strongly urge the Corps to complete this renewal well in advance of the March 18, 2022, five-year deadline.

Timely reissuance with uniform effective and expiration dates of all NWPs is critical for maintaining continuity, providing certainty and predictability in the NWP permitting process, minimizing unnecessary disruptions for the regulated community, and limiting unnecessary costs for consumers and additional burdens for the Corps. Given the interplay between NWPs, general

⁷ See Pipeline and Hazardous materials Safety Administration, "Pipeline Basics" accessed November 16, 2020, <https://primis.phmsa.dot.gov/comm/PipelineBasics.htm>

⁸ See U.S. Energy Information Agency, Refinery Receipts of Crude Oil by Method of Transportation Pipeline Mileage and Facilities, accessed March 5, 2020, https://www.eia.gov/dnav/pet/pet_pnp_caprec_dcunus_a.htm.

⁹ See Pipeline and Hazardous Materials Safety Administration, "2010+ PIPELINE MILES AND FACILITIES" Accessed November 16, 2020.

https://portal.phmsa.dot.gov/PDMPublicReport/?url=https://portal.phmsa.dot.gov/analytics/saw.dll?Portalpages&PortalPath=%2Fshared%2FPDM%20Public%20Website%2F_portal%2FPublic%20Reports&Page=Infrastructure

¹⁰ See 82 Fed. Reg. 1860 "Issuance and Reissuance of Nationwide Permits," Docket No. COE-2015-0017, published January 6, 2017, <https://www.govinfo.gov/content/pkg/FR-2017-01-06/pdf/2016-31355.pdf>

conditions, and PCNs, as well as the numerous Corps districts across the nation who implement the program, early action on NWP renewal is not only good practice, but essential for successful operation of the program.

AFPM members support reissuing the NWPs with no unnecessary and burdensome requirements added, in accordance with the overall Congressional intent to streamline permits for projects with comparatively minor environmental impacts. The final framework for the NWP program should serve that intent without unreasonably obstructing, delaying, or otherwise imposing significant costs on the siting, permitting, production, utilization, transmission, or delivery of any project, including those related to energy infrastructure development and maintenance. While we support the timely renewal of all NWPs concurrently, we strongly urge the Corps to keep NWP 12 intact and the covered activities consistent. Splitting NWP 12 into three separate permits is greatly concerns our members as it would create unnecessary and burdensome requirements and undermine the congressional intent of the NWP program.

IV. AFPM'S COMMENTS ON PROPOSED REVISIONS TO NWP 12

In this NPRM, the USACE is proposing to subdivide NWP 12 into three separate NWPs covering different types of utility line activities. The new version of NWP 12 separates oil and gas (including petrochemical products) pipeline activities from other utility construction projects by creating subcategories, NWP C for electric utility and telecommunication line activities and NWP D for other utility line activities, such as water, sewer, and non-petrochemical industrial product pipelines. According to the USACE, the intent of this proposal is to tailor NWP 12 to address potential differences more effectively regarding how the different types of utility lines are constructed, maintained, and removed. Further, USACE states that this split will facilitate additional industry-specific standards or best management practices (“BMPs”) that would be appropriate to add as national terms to the applicable NWP to help ensure that the NWP authorizes only those activities that will result in no more than minimal individual and cumulative adverse environmental effects. As we show below, this rationale is arbitrary and unsupported by the differences in the potential environmental harm incident to construction of these utility projects and will not withstand judicial scrutiny.

The Corps is specifically seeking comments and suggestions on “such national standards and BMPs for each of the various types of utility lines in response to the proposal.” The USACE did not specifically seek comment on the viability of the trifurcation of the NWP 12 prior to proposing it. Regardless, this subdivision of NWP12 injures AFPM members who have significant concerns on the split and the unintended negative consequences that would follow. AFPM urges the Corps to maintain the current activities covered under NWP 12 and forgo the proposed splitting of NWP 12 into NWP 12, NWP C, and NWP D. Continuing current practice regarding covered activities would clearly be a “logical outgrowth” of this NPRM and satisfy the notice and comment requirements of the Administrative Procedure Act.

A. NWP 12 Should Authorize Similar Types of Construction Activities that are Based on the Environmental Impacts of the Permitted Construction Activity Rather than the Products that may be Transported Following Construction

Broadly, the NWP program focuses on the environmental impacts of construction on WOTUS, so similar activities are grouped together when they have similar impacts. The Corps' legal authority is limited to regulating discharges of dredged or fill material into WOTUS and structures or work in navigable WOTUS. Regarding NWP 12, just five years ago, the Corps affirmed that the "discharges of dredged or fill material" associated with utility lines, sewers, water piping, and oil and gas pipelines are similar and thus rightly covered under same NWP 12.¹¹ In the current proposal, the USACE has completely reversed its previous interpretation and now contends that splitting the NWP 12 permit is designed to delineate how the different types of utility lines are constructed, maintained, and removed. Yet the Corps cites no intervening actions that justify its change in position nor does it provide defensible supporting rationale for a change in policy.

Under U.S.C. 33 the NWP program, specifically NWP 12, is focused on evaluating the impacts on the environment of given construction projects and ensuring that projects return the contours of land (or wetlands impacted) back to its original state. Projects under NWP 12 were grouped together because of the considerable overlap between the construction, maintenance, and repair of these utility lines and resulting impact from dredge and fill activities. Even the current proposal states that the USACE is proposing "to retain the basic structure of the 2017 NWP 12 since many of the activities authorized by the 2017 NWP 12 could apply to any utility line, regardless of that substances it conveys."¹²

More specifically, construction activities for the three types of construction covered under NWP 12 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. Indeed, the NPRM does not explain any differences between these materials that justify the specification of the NWP 12. In addition, above-ground activities related to substations, foundations, and rights-of-ways also are substantially similar. In fact, the only possible difference between the three activities is introduced by the Corps with the newly proposed 250-mile PCN threshold, which AFPM opposes (see section V).

The Corps proposal to split NWP 12 is solely based on the utility line carriers and the Corps' perception that oil and gas lines tend to be longer and with a wider diameter than water or sewer line, which is not the case.¹³ For example, while the Corps argues that utility lines for conveying potable water, water, sewage, stormwater, wastewater, brine, irrigation water, and industrial water products are different than oil and gas pipelines based on length and diameter, no conclusive data is provided to delineate the currently covered utilities, based on their approximate mileage, diameter or scope.¹⁴ While some water and utility lines may not have the national reach of an oil and gas pipeline, their expanse within their areas can be extensive and with same or similar consideration to ground disturbances. One needs to look no further than

¹¹ *Ibid* pg.1883-1892.

¹² See 85 Fed. Reg. 57323 "Proposal to Reissue and Modify Nationwide Permits," Docket No. COE-2020-0002, published September 15, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-09-15/pdf/2020-17116.pdf>.

¹³ *Ibid* pg. 57322.

¹⁴ *Ibid* pg. 57323.

large metropolitan water districts or regional electric utilities throughout the country that include distributive system comprised of hundreds of miles of large diameter pipes, to realize the impacts are similar in nature.

Analysis under the NWP program is, and should continue to be, about the impacts of similar types of construction activity and not the materials transported by the completed infrastructure. As extensively discussed in the 2017 renewal, the USACE does not have authority to regulate the material being transported, rather USACE authorities under the NWP Program relate to analysis of dredge and fill construction activities and their impacts on the WOTUS.¹⁵ Dividing the NWP 12 analysis based on commodity or material transported by the completed infrastructure contradicts the statutory designs of the program.

B. USACE’s Rationale for the NWP 12 Split is Inadequate, Flawed and Based on Immaterial Elements.

While the USACE provided extensive justification for keeping utility lines, sewers, water piping, and oil and gas pipelines under the same NWP 12 in 2017, the same level of justification for their separation is not included in this NPRM. As we explain below, the rationale provided is lacking and the examples used appear immaterial to the stated purpose of the NWP program, which is analyzing the impacts to the environment of potential construction. Further, a review of the newly proposed NWP 12, NWP C and NWP D shows there are no substantive differences between the three permits in terms of permit conditions and therefore a split overly complicates permitting and appears unnecessary.¹⁶

Cost and Benefits

A fundamental tenet of a standard Regulatory Impact Analysis (“RIA”) is, first and foremost, the demonstration of a need for a proposed change. The RIA for this rulemaking fails to demonstrate a need for the proposed NWP 12 split and fails to fully consider impacts to permittees. That said, even the cursory assessment of the proposed split of NWP 12 highlights the unnecessary nature of the proposed action.

On the cost side, in totality the Corps estimates this NPRM will result in an increase of 255 activities eligible for NWP authorizations per year. These new activities will afford permittees the option to utilize the expedited process instead of the standard individual permit process. This will undoubtedly provide overall cost savings but none of these savings are attributed to the proposed split of NWP 12. The Corps noted that the division of NWP 12 will have “[n]o change in number of NWP authorizations” and thus no cost savings. In the RIA the Corps attempts to suggest best management practices may provide cost savings but subsequently the Corps refutes its own argument on cost savings noting:

“there could be an increase in the number of activities that require standard individual permits because a proposed oil or natural gas pipeline, an electric line or

¹⁵ See 82 Fed. Reg. 1883-1892 “Issuance and Reissuance of Nationwide Permits,” Docket No. COE-2015-0017, published January 6, 2017, <https://www.govinfo.gov/content/pkg/FR-2017-01-06/pdf/2016-31355.pdf>

¹⁶ One exception would be the additional 250-mile PCN threshold condition for newly proposed NWP 12 which AFPM members oppose.

*telecommunications lines, or a utility line for water or other substances cannot comply with one or more of the national performance standards or best management practices, or it would be impractical to comply with those national performance standards or best management practices.*¹⁷

This statement is problematic on several levels. First, it introduces enormous regulatory uncertainty to all industries that rely on long-term planning for infrastructure projects related to utility lines. Second, it suggests an increase in the number of individual permits filed which would result in added cost, not savings. Lastly, and most importantly, this runs counter to the intent of the NWP program to efficiently analyze low risk projects.

The Corps was largely silent on the benefits associated with NWP 12 split. In fact, while discussions of other NWPs in the RIA include a specific “benefit” and “disbenefit” sections, the NWP 12 discussion does not. The Corps also failed to discuss the issues and added burdens to AFPM members that flow from a decision to subdivide the NWP 12.

The Corps clearly did not demonstrate a need for such a change to NWP 12. The Corps also did not fully consider the impacts of this change, a change that would clearly not be cost beneficial. Retaining a single NWP 12 and not splitting the permit, as we recommend, would retain a status quo that benefits all parties and meets the stated intent of the NWP program. Should the Corps proceed with the NWP split, the RIA does not provide a legally defensible justification.

Length and Width

The Corps cites diameter width and length of pipeline projects as a key factor in rationalizing their effort to split NWP 12, but they fail to show how these factors have any bearing on impacts of construction or returning the contours of impacted land to its original state.

The Corps’ focus on diameter is related to its stated position that potential sizes of trenches and associated ground disturbance “likely varies” with the size of the pipeline. There is no correlation between pipe diameter and the division of utility line construction that the USACE is proposing. While other utility lines have varying sizes, the construction techniques as well as dredge and fill activities and other actions to return the contours of the land are similar in nature to pipelines that ultimately transport oil and gas. Typically, oil and gas pipelines follow standard construction techniques that vary only slightly based on size. For example, for 12-inch diameter and smaller lines, a 5-foot deep and 42-inch wide trench is used and for pipelines larger than 12-inch diameter, a 6-foot deep and 44-inch wide trench are used. These construction techniques and the efforts that would be used to return the contours of the land are similar to those used in water, sewer and utility lines. Given the NWP is focused on construction and maintenance activities and returning the contours of the land lines to the previous state, and oil and gas pipelines, water, sewer and utility share construction and remediation techniques, NWP should not be split based on the material or product transported. Further, as stated above while oil and gas pipelines can have larger national footprint, in totality they demonstrate similar construction

¹⁷ See “Regulatory Impact Analysis for the Proposed 2020 Nationwide Permits”, Docket Number COE-2020-0002-61, posted September 15, 2020, <https://www.regulations.gov/document?D=COE-2020-0002-0061>

impacts when compared to large metropolitan water districts or regional electric utilities which also constitute considerable milage of large and small diameter piping.

The Corps also focuses on length of utility lines as an argument for splitting NWP 12, but these arguments are incomplete and do not support the decision to subdivide NWP 12 into three separate permit categories. The Corps correctly cites mileage for some oil and gas pipelines but does not account for shorter oil and gas lines that are also permitted under NWP 12 and other utility lines. In addition, when discussing non-oil and gas utility lines, the Corps downplays the scope and coverage of these lines. For example, the Corps states that “utility lines for conveying potable water, water, sewage, stormwater, wastewater, brine, irrigation water, and industrial water products that are not petrochemicals, are often limited to specific areas, where they serve cities, towns, and other communities, residential developments, commercial developments.” The Corps has provided very limited data on each of the covered utilities, their approximate mileage, and their scope. Ultimately, the Corps fails to make a persuasive case that length of a utility line would be a determining factor when considering ground disturbances.

Permits Granted Under NWP

The Corps also cites the number and percentage of NWP 12 permits granted to the three covered activities as a rationale for the change. It states that a majority of the activities permitted under NWP12 (58%) are associated with oil and natural gas pipelines. These data are immaterial, as splitting NWP into three separate permits will not change the number of permits granted and fails to demonstrate how a split will achieve efficiencies.¹⁸ Also, the USACE evaluated only a two-year period, so this percentage may not actually be representative of the overall distribution.¹⁹

C. The Proposed Changes to NWP 12 Will Introduce Confusion and Slow the Evaluation Process

The covered activities under NWP 12 have remained relatively consistent over the years. Despite the Corps’ historical position on NWP 12, one that it reiterated as recently as the 2017 NWP program renewal, it now argues for major changes to NWP 12. Citing differences in the relative amounts of ground disturbance and other related activities, the Corps seems to believe there is potential for adding different terms to each of these three proposed NWPs to include national standards and BMPs, to help ensure that each of these NWPs authorizes only those activities that have no more than minimal adverse environmental effects. Justification for speciation should be based on clear differences in environmental impact related to construction and remediation activities. Instead of relying on clear differences, the Corps now attempts to rely on “likely” variances attributed to diameters and lengths of pipes. These “likely” variances are based on an improper assumption that utility lines, water lines, and oil and gas pipelines have diameters and lengths that vary greatly and are not supported by any data provided by the Corps.

¹⁸ Even the Corps noted that the division of NWP 12 will have no change in number of NWP authorizations. *See* “Regulatory Impact Analysis for the Proposed 2020 Nationwide Permits”, Docket Number COE-2020-0002-61, Posted September 15, 2020, <https://www.regulations.gov/document?D=COE-2020-0002-0061>

¹⁹ *See* 85 Fed. Reg. 57322 “Proposal to Reissue and Modify Nationwide Permits,” Docket No. COE-2020-0002, published September 15, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-09-15/pdf/2020-17116.pdf>.

There are no substantive differences between the newly proposed NWP 12, NWP C and NWP D, therefore a split unnecessarily complicates permitting. Many of the terms USACE wishes to define and BMPs it wishes to codify would be the same or very similar and deal mainly with right of way issues. In addition, AFPM believes introduction of new terms and multiple sets of BMPs could confuse project proponents and Corps' staff instead of clarifying. In line with the existing NWP permitting process, BMPs are most appropriately integrated into NWPs by regional Corps considering the variability in soil types, hydrology, topography, and other region-specific environmental conditions.

While a split is unnecessary, the way it is split is also problematic. The new NWP 12, NWP C and NWP D permit categories and other associated terms are ambiguous, unclear, and highly likely to create confusion and thus hinder implementation of the NWP program, as explained below. Pairing unclear definitions with multiple USACE Districts' interpretation of those definitions is likely to cause uneven and inconsistent handling of projects that fall into the grey areas between each category. This inconsistency would lead to uncertainty in the project planning process for industry and undermines the desired efficiency gains of the NWP program.

The Corps' attempts to draw a clear delineation between "any form of oil or natural gas," including petroleum products "for any purpose," and all other utility line activities. The Corps fails here on two fronts. First, it disregards that the Corps' legal authority is limited to regulating discharges of dredged or fill material into WOTUS and structures or work in navigable WOTUS. The Corps is again improperly attempting to define NWPs based on the product or material transported, which are unrelated to the relevant construction, maintenance, and removal activities, while ignoring its limited authority related to impacts to the WOTUS, which are limited to dredge and fill activities. Second, the Corps' attempts to define terms only introduces confusion and ignores commonalities that exist as well as the enormous potential for overlap of activities. In fact, the Corps' inability to clearly to define terms related to the split of NWP 12 only highlights how similar these activities are and how they are rightfully grouped together currently.

AFPM is not advocating that the Corps attempt to clarify these definitions in a subsequent rulemaking action. AFPM strongly urges the Corps to abandon the split and renew NWP 12 as is. As previously stated, there has been no demonstration of need for this split, so the proposed definitions for the new permit are unnecessary. Any definitions should include clear terms and conditions that are directly connected to minimizing impacts to aquatic resources in jurisdictional waters regarding the construction and maintenance of the authorized activities, and not the substances being conveyed. The Corps could easily avoid unintended damage to the NWP program and loss of efficiencies related to NWP 12 by abandoning the split.

NWP 12 is a mature permit, and the implementation of the NWP program and NWP 12 has proven to be an example of good governance. Data from the Corps show that, in 2018, the average time that it took to process a standard individual permit was 264 days. In contrast, average NWP processing time was 45 days.²⁰ While this metric encompasses the entire NWP program AFPM fears large scale changes to NWP 12 could introduce confusion amongst Corps staff, complicate analysis and result in loss of efficiency in the program. Further, the current

²⁰ *Ibid* pg. 57300.

program and staff implementing the program have more than three decades of experience with current process and a largescale change could hinder the program.

D. The Proposed Revisions to NWP 12 Run Counter to The Corps Historic Interpretation of the NWP Program

In the past the Corps has addressed the groupings of various similar permits under the NWP program. Most recently during the 2017 renewal of the NWP program, the Corps stated that NWPs are issued in accordance with § 404(e) of the CWA and 33 CFR part 330, and as such § 404(e)(1) allows the Corps to issue NWPs for “categories of activities that are similar in nature.” The Corps also noted that they interpret the “categories of activities that are similar in nature” requirement broadly to keep the NWP program manageable in terms of the number of NWPs. The Corps further noted that they “interpret the ‘similar in nature’ requirement to be applied in a broad manner, as a general category, rather than as a requirement that NWP activities must be identical to each other” and that “this approach is consistent with implementing this general permit program in a practical, efficient manner.”²¹

The USACE even applied this interpretation to NWP 12 specifically in 2017 when they strongly asserted that all “utility line construction activities are similar in nature” and it rightfully continued to group them under the same NWP. Explaining further, the Corps stated:

“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 origin to a terminal point. For the purposes of this NWP, the term ‘crossing’ refers to regulated activities. However, it should be noted that installing utility lines under a navigable water of the United States subject to section 10 of the Rivers and Harbors Act of 1899 via horizontal directional drilling, as well as aerial crossings of those navigable waters, require authorization under section 10 of the Rivers and Harbors Act of 1899.”²²

In arguing against a split of the NWP 12 program in 2017, the Corps clarified their authority does not relate to the material or type of energy transported. The Corps “does not regulate oil and gas pipelines, or other types of pipelines, per se”; rather, “[f]or utility lines, including oil and gas pipelines, our legal authority is limited to regulating discharges of dredged or fill material into WOTUS and structures or work in navigable waters of the United States, under § 404 of the Clean Water Act and § 10 of the Rivers and Harbors Act of 1899, respectively.”²³ There are no substantive differences in the “discharges of dredged or fill material” associated with all project construction activities currently covered under NWP 12. The dredged material from the construction of an oil and gas pipeline under the Hudson River would be identical to the material excavated during the construction of a water pipe under that same river. This interpretation of “similar in nature” was also confirmed by the Corps in 2006.²⁴

²¹ See 82 Fed. Reg. 1868 “Issuance and Reissuance of Nationwide Permits,” Docket No. COE-2015-0017, published January 6, 2017, <https://www.govinfo.gov/content/pkg/FR-2017-01-06/pdf/2016-31355.pdf>

²² *Ibid* pg.1883.

²³ *Ibid* pg.1883.

²⁴ See 71 Fed. Reg. 56259- 56260 “Proposal to Reissue and Modify Nationwide Permits,” published September 26, 2006 <https://www.govinfo.gov/content/pkg/FR-2006-09-26/pdf/06-7986.pdf>

Given the Corps' past statements, it comes as a surprise that the Corps has completely reversed its position and now proposes to split up utility line construction activities for NWP purposes. The proposed division of NWP 12 departs from longstanding USACE NWPs as first promulgated in 1977, and positions reinforced in the 2006 and 2017 renewals of the program. The Corps' previous assertions raise questions about the basis of the split, especially between the newly proposed exclusive NWP 12 for oil and gas pipelines and NWP D (water, sewer, and other industrial pipelines). Nothing since the 2017 renewal justifies USACE's new interpretation of "activities similar in nature." The USACE fails to sufficiently explain the reasoning behind proposing splitting of the NWP 12, hampering our ability to provide informed comment on this aspect of the proposal and rendering it arbitrary and capricious. USACE contradicts its own policy by interpreting this provision narrowly and creating arbitrary subgroups for simple utility line activities. These new complexities will make the NWP program less manageable.

E. The Proposed Revisions to NWP 12 are not consistent with Congressional Intent and Administration Policy

The proposal to split NWP 12 into three separate permits is clearly at odds with Congress's intended purpose for NWPs: to reduce administrative burdens for lower risk infrastructure projects while maintaining environmental protections. In addition, the proposed revision to NWP 12 is misaligned with current administration policy on infrastructure development and maintenance.

Congressional Intent

In the NPRM, the Corps notes that NWPs "are intended to reduce administrative burdens on the [USACE] and the regulated public while maintaining environmental protection, by efficiently authorizing activities that have no more than minimal adverse environmental effects, consistent with Congressional intent in the 1977 amendments to the Federal Water Pollution Control Act." Part of the effort to reduce administrative burdens should involve logically grouping permits with similar impacts together and avoiding unnecessarily complicating the NWP program.

Creating additional permits which are virtually identical (*i.e.*, the proposed NWP 12, NWP C, and NWP D) is not streamlining, particularly when the permits authorize sufficiently similar activities that will result in minimal impacts to WOTUS under the CWA. The three proposed NWPs will either need to be separately maintained as an identical set with inevitable inconsistencies in administration or will end up differing substantially in a way not justified by the similarity of their environmental impacts under CWA § 404.

Administration Policy

The current NWP renewal introduced in this NPRM is closely related to recent executive orders and administration guidance issued on infrastructure development and maintenance, including Executive Order 13777 ("EO 13777"), "Enforcing the Regulatory Reform Agenda" (February 24, 2017), Executive Order 13783 ("EO 13783"), "Promoting Energy Independence

and Economic Growth” (March 28, 2017), and the “Legislative Outline for Rebuilding Infrastructure in America.”²⁵

EO 13783 notes “it is in the national interest to promote the clean and safe development of our Nation’s vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.” The timely renewal of the NWP program ensures there are no regulatory burdens that would stifle needed energy infrastructure development. However, splitting NWP 12 into three permits (NWP 12, NWP C and NWP D), subjects proponents of low risk projects to uncertainty in permitting, invites frivolous lawsuits, and adds further obstacles to attracting investment in energy infrastructure. These delays can lead to increased costs that harm not only the project sponsor, but impact everyday consumers’ and businesses’ access to affordable energy and petrochemical products.

EO 13777 requires that agencies must attempt to identify regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; or meet other criteria identified in that EO. Separating NWP 12 as proposed runs counter to the intent of EO 13777 for several reasons. First, a division of NWP is likely to introduce additional burdens on the development or use of domestically produced energy resources. Secondly, the creation of three effectively identical permits for similar activities could “create a serious inconsistency” that EO 13777 wishes to avoid. Third, the division of NWP 12 has the potential to impose costs on the oil and gas industry while providing no environmental or other benefits, as noted in the RIA for this proposal.

In addition to the referenced EOs, the split of NWP is misaligned with the “Legislative Outline for Rebuilding Infrastructure in America” which serves as a roadmap for potential infrastructure legislation. This document recommends reforms to eliminate redundancy, duplication, and inconsistency in the application of CWA provisions. Splitting NWP 12 in the manner proposed is inconsistent with this legislative outline in that it adds unnecessary redundancy given that the construction impacts from oil and gas pipelines, sewer lines, water lines, etc. are similar in nature. Splitting NWP 12 would create inconsistent regulation of construction projects with the same or similar impacts.

V. AFPM COMMENTS ON PRE-CONSTRUCTION NOTIFICATION REQUIREMENTS

To help simplify and expedite the NWP process, the Corps is also proposing changes to the PCN requirements associated with NWP 12. Under the current NWP 12 program the permittee must submit a PCN to the district engineer prior to commencing the activity if any of the following criteria are met:

²⁵ See Executive Order 13777 (“EO 13777”), “Enforcing the Regulatory Reform Agenda” <https://www.govinfo.gov/content/pkg/FR-2017-03-01/pdf/2017-04107.pdf>, Published on February 24, 2017, Executive Order 13783 (“EO 13783”), “Promoting Energy Independence and Economic Growth” <https://www.govinfo.gov/content/pkg/FR-2017-03-31/pdf/2017-06576.pdf>, Published on March 28, 2017, and the “Legislative Outline for Rebuilding Infrastructure in America” <https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf>.

- 1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way;
- 2) A section 10 permit is required;
- 3) The utility line in WOTUS, excluding overhead lines, exceeds 500 feet;
- 4) The utility line is placed within a jurisdictional area (i.e., WOTUS), and it runs parallel to or along a stream bed that is within that jurisdictional area;
- 5) Discharges that result in the loss of greater than 1/10-acre of WOTUS;
- 6) Permanent access roads are constructed above grade in WOTUS for a distance of more than 500 feet; or
- 7) Permanent access roads are constructed in WOTUS with impervious materials

In the NPRM the USACE proposes to reduce the number of triggers for PCN under NWP 12. Specifically, the proposal would eliminate 5 of the current 7 triggers and add a new trigger for PCN consultation. Under the Corps' proposal, oil and gas pipeline permittees would be required to provide PCN only for utility line activities that:

- 1) Require authorization under section 10 of the Rivers and Harbors Act of 1899;
- 2) Will result in a loss of greater than 1/10-acre of WOTUS; or
- 3) Are associated with an overall project of more than 250 miles in length, where the project purpose is the installation of new pipeline (rather than repair or maintenance) along the majority of the distance of the overall project length.

This third threshold is new. It would require the permittee to identify in the PCN the locations and proposed losses of WOTUS for all crossings of waters of the United States that require Corps authorization, including crossings that would not require PCN.

The Corps invited comment on the removal of existing thresholds and the addition of the new threshold, specifically on whether 250 miles is the appropriate threshold. The Corps believes that removing several of the thresholds for PCN in NWP 12 will "reduce burdens on the regulated public, simplify the NWP, and eliminate redundancy." Notwithstanding the lower PCN thresholds under the revised NWP 12, regional district engineers would continue to have the authority to lower PCN thresholds under NWP 12.

A. The USACE Should Maintain the Pre-Construction Notification Requirements related to NWP 12

In the NPRM, the Corps correctly notes that "[t]he paperwork burden associated with the NWP relates exclusively to the preparation of the PCN" and that "[t]he reduction of the number of PCN thresholds in NWP 12 will reduce burdens on the regulated public, simplify the NWP, and eliminate redundancy." To this end, and consistent with the Paperwork Reduction Act, AFPM members generally believe PCNs should be maintained or removed where duplicative or burdensome and no additional PCN requirements should be added to NWPs unnecessarily. We caution the USACE against adding any more restrictive and unnecessary PCN threshold requirements into any new NWPs.

While AFPM would typically support the NWP 12 PCN reductions, in this case we support the clean reissuance of the current NWP 12 PCNs with no revisions. Reductions in PCNs for NWP 12 and the arguments raised in the proposal need to be further reflected and bolstered in the decision documents, otherwise eliminating these PCNs could be challenged for the lack of supporting data. AFPM strongly opposes the additional 250-mile PCN threshold and discusses that rationale further below. These concerns paired with AFPM members' familiarity with the current NWP 12 PCNs, which have proved largely workable, lead us to request the USACE to simply reissue NWP 12 with the status quo 2017 language.

AFPM welcomes future consideration reduction of PCNs for NWP 12 provided they are supported by data. At this time, we recommend that the USACE focus on the most significant matter, which is to reissue and restore NWP 12 as one NWP for all utility line activities.

B. The 250-Mile Pre-Construction Notification Requirement has no Scientific, Technical or Regulatory Basis and should not be adopted.

The USACE is proposing an arbitrary PCN trigger for a proposed oil or natural gas pipeline activity associated with an overall project that is greater than 250 miles in length and where the project proposes to install new pipeline (not repair or maintenance activities).²⁶ The 250-mile threshold lacks any scientific or technical basis and is not supported by data. The Corps' rationale for this change is "to provide the district engineer the opportunity to review all crossings of [WOTUS] for long-distance oil or natural gas pipelines to ensure that the activities authorized by NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects."²⁷ For these oil or natural gas pipeline activities, the USACE would require the prospective permittee to include in the PCN the locations and proposed losses of WOTUS for all crossings of WOTUS that require District of Army authorization, including those crossings that would not require PCN.

AFPM opposes the new PCN 250-mile threshold and strongly supports renewal of the PCNs as listed in the 2017 NWP 12. The Corps seemingly acknowledges this by soliciting comments on the appropriateness of the threshold without any substantiation of the threshold. Importantly, impacts on the environment are often independent from the length of a project. Each crossing should be evaluated on its own merits and the 1/10th acre that is currently in the PCNs is a sufficiently low threshold for adequate protection of the environment. This proposed NWP 12-specific PCN contradicts the basic principles of the current NWP 12 as well as the proposed NWPs 12, C, and D, namely is that each crossing is considered a single and complete project for the purpose of NWP authorization. If adopted, this provision would significantly slow the ability to start construction on a new long-haul pipeline even if there are no significant impacts relevant to the Corps' permitting authority. Further, AFPM opposes the 250-mile threshold as it untethers the PCNs from the CWA and Rivers and Harbors Act of 1899 which are basis for Corps permitting jurisdiction. If the Corps were to move forward this untethering could lead to project challenges and delays.

²⁶ See 85 Fed. Reg. 57371 "Proposal to Reissue and Modify Nationwide Permits," Docket No. COE-2020-0002, published September 15, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-09-15/pdf/2020-17116.pdf>.

²⁷ *Id* at pg. 57327.

VI. CONCLUSION

AFPM thanks USACE for its time and consideration of our comments related to this important proposal. 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 USACE's implementation of the NWP program and appreciates effort to timely update and streamline the program. However, we strongly oppose the proposed revisions to NWP 12, primarily the splitting of NWP 12 into three permits, and strongly urge the Corps to instead re-issue the 2017 NWP 12. AFPM shares USACE's goal of strengthening the program and as such we appreciate the considerations of the concerns relayed in these comments. We look forward to the opportunity to work together on this issue. Please contact me at (202) 457-0480 or rbenedict@afpm.org if you wish to discuss these issues further.

Sincerely,

A handwritten signature in blue ink that reads "Rob Benedict". The signature is written in a cursive, slightly slanted style.

Rob Benedict,
Senior Director Petrochemicals,
Transportation, and Infrastructure