



November 16, 2020

Submitted via federalregister.gov

U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314-1000.
nationwidepermits2020@usace.army.mil

Re: Docket Number COE-2020-0002 and RIN 0710-AA84

Western Energy Alliance (the Alliance) appreciates the opportunity to comment on the U.S. Army Corps of Engineers (Army Corps) proposed *Re-Issuance and Modification of Nationwide Permits*, 85 Fed. Reg. 57298 (Sept. 15, 2020), Docket Number: COE-2020-0002, RIN 0710-AA84.

Western Energy Alliance represents 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

Alliance members routinely utilize nationwide permits (NWP), and have a strong interest in ensuring that re-issuance and modification of these permits are conducted in a manner that is durable, legally defensible, and will provide long-term regulatory certainty, which in turn provides long-term business certainty to facilitate planning and development.

1. Endangered Species Act Section 7 Consultation

A. Key Legal Issue for this Rulemaking to Address in Light of the Montana Federal Court Decision

Based upon the U.S. District Court, District of Montana's ruling in *Northern Plains Resource Council, et al. v. U.S. Army Corps of Engineers, et al.*, CV-19-44-GF-BMM (D. Montana) (Judge Morris), a critical issue that needs to be addressed in this rulemaking is the parameters of Section 7 Consultation under the Endangered Species Act (ESA), and to what extent, if any, such consultation is required for a programmatic rulemaking. The NWP rules and procedures ensure that any necessary site-specific consultation would be conducted before issuance of a NWP, as required under General Condition 18, and the ESA itself.

As reflected in the history of NWP re-issuances, this programmatic consultation issue has been a source of debate and contention between the Army Corps, the National Marine Fisheries Service (NMFS), and U.S. Fish and Wildlife Service (FWS), extending back

at least to 2012. Given this long-standing dispute, and more recent court decision, the Army Corps should consider a more pragmatic and defensible path forward to address consultation.

The core of Judge Morris' decision overturning NWP-12 is his finding that the U.S. Army Corps failed to consult under Section 7 of the Endangered Species Act with the FWS and NMFS regarding the programmatic rulemaking to re-authorize the Nationwide Permit program in 2017 for a five-year term. Judge Morris focused on the cumulative impacts of the program as a whole, and given NWP-12's widespread use, from his perspective there needs to be an analysis and consultation at the programmatic level on the aggregate impacts that could result from streamlined permit authorizations during the five-year timeframe of the program.

B. Comment 1

While the Army Corps appropriately justifies its rationale for not needing to consult under Section 7 of the ESA in its proposed rulemaking, there is a short-form consultation option that may be utilized to bolster the legal defensibility of the NWP program without attempting to consult speculatively on hundreds of species. Judge Morris's decision did not require a specific level of detail for the consultation – just that consultation of some sort occur.

Short form informal consultation under Section 7 of the ESA would be entirely appropriate for consultation for a programmatic rulemaking, as expressly provided for in the Section 7 implementing regulations:

If during informal consultation it is determined by the federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

50 C.F.R. § 402.13(c) (emphasis added).

This approach could further bolster the legal defensibility of the Army Corp's rulemaking and would be responsive to Judge Morris (and the inevitable legal challenge upon reissuance). The Army Corps could also include as documentation in the administrative record for the new rule, the statistics it provided to Judge Morris during the stay briefing (U.S. Army Corps Declaration of Jennifer Moyer, attached here) that demonstrate that potential impacts under NWP-12 are indeed very minimal.

C. Comment 2

For legal defensibility, it is important for the rulemaking to explain in detail that it would not likely adversely affect a listed species or habitat because the rule is programmatic

The rule does not authorize any activities that “might affect listed species or designated critical habitat” without further Army Corps evaluation and ESA Section 7 consultation as necessary. 85 Fed. Reg. 57,298, 57357. The NWP program contains safety net procedures to avoid any potential to adversely affect. Indeed, if any listed species or critical habitat “might be affected” or is even “in the vicinity” of the proposed activity, site-specific ESA Section 7 consultation is required.

In addition, NWPs can be used only when an action is not likely to adversely affect listed species or critical habitat. Thus, at the rulemaking stage, in depth, nationwide species level consultation would be entirely speculative, and not aid in agency decision-making on the program itself.

By documenting this reasoning via short form consultation and written concurrence by USFWS and NMFS, combined with the data provided in the attached declaration, the NWP rule should be able to be finalized efficiently, and it would significantly increase legal defensibility because the Army Corps in fact did engage in consultation under Section 7 of the ESA.

This process would be efficient and straight-forward:

(1) The Army Corps would submit a letter and supporting materials to FWS and NMFS with an explanation of the NWP process and General Condition 18, including emphasis that the program is designed to be used only when an action is not likely to adversely affect listed species or critical habitat, and that program reissuance is a paperwork exercise that would have no potential to impact any species.

The Corps should also explain that species level consultation at the programmatic reissuance and modification level would be entirely speculative, and not aid in agency decision-making on the program itself. The NWP program contains safety net procedures to avoid potential to adversely affect. Any potential to adversely affect automatically triggers site-specific ESA Section 7 consultation.

This letter should also explain that based upon implementation of NWP program from 2017-2020, no additional process improvements were identified or needed. It should also provide statistics on usage of NWPs for prior year implementation (e.g. more detailed information contained in Corps’ Moyer Declaration).

(2) Written concurrence from FWS and NMFS to Army Corps that NWP program will not affect any listed species or critical habitat.

2. Proposed Trifurcation of NWP 12

A. Overview

Section 404 of the Clean Water Act grants the Secretary authority to issue permits on a nationwide basis for categories of activities, involving discharges of dredged or fill material into Waters of the United States, that are similar in nature. 33 U.S.C. § 1344(e)(1). The Army Corps historically authorized a variety of utility line activities under NWP 12, including the construction, maintenance, and repair of such lines in navigable waters, because they are similar in nature. *See, e.g., Issuance and Reissuance of Nationwide Permits*, 82 Fed. Reg. 1860, 1883 (Jan. 6, 2017).

In a fundamental and unjustified departure from its longstanding practice, the Army Corps now proposes to modify the existing NWP 12 to authorize oil and gas pipeline activities only and proposes to issue two new NWPs to authorize electric utility line and telecommunications and activities for other types of utility lines that are not covered by the modified NWP 12 or the proposed new NWPs for electric utility line and telecommunications activities. This proposed trifurcation of NWP 12 is contrary to Section 404 of the Clean Water Act, and is not supported in the record to be legally defensible.

Rather than focus on on-the-ground impacts from linear crossings, the Army Corps now proposes to delineate by the type of operation and facility. This is a dramatic shift that focuses the Army Corps on regulating based upon facility operations rather than potential impacts from linear crossings. The Army Corps attempts to justify this departure by noting that there are some differences in utility lines such as variability of line diameter and length, including within a specific type of utility line. It also suggests there may be different best management practices (BMPs) that are unique based on the type of utility line. The BMPs relevant to the nationwide permit program are those related to installation, construction, maintenance, repair, and removal.

The Army Corps does not have jurisdiction to regulate pipeline operation. Significantly, the Army Corps failed to identify a single example of a BMP for a linear utility line that is unique based on the utility line type.

B. Comment

The proposed modification to NWP 12 to limit its use to authorize discharges of dredged and fill material into Waters of the United States from oil and gas pipeline activities and proposal to issue two new NWPs for electric utility line, telecommunications, and other utility line activities is arbitrary and represents a fundamental and unjustified departure from the agency's long-standing practice of authorizing discharges of dredged and fill material from a variety of linear utility line activities under NWP 12.

There is no factual or legal basis for these proposed changes. The Army Corps suggests that the variable length and diameter of these lines justifies unique BMPs based on the utility type, but these variabilities are present within in each type of utility. The Army Corps fails to identify a single example of a utility type-specific BMP relevant to the nationwide permit program, *i.e.*, the installation, construction, maintenance, repair, or removal of that portion of a utility line that crosses waters of the United States. Moreover, the Army Corps fails to identify any BMPs for proposed NWP 12, C, or D. In sum, the Army Corps' proposal is arbitrary and is not legally defensible.

B. Requested Revision

The Army Corps must maintain the historical coverage of NWP 12 including "Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States..." The Army Corps should reissue the 2017 NWP 12, following the consultation procedure described above.

3. Proposed 250 Mile Threshold for Pre-Construction Notice (PCN)

A. Overview

The Army Corps proposes a new 250-mile preconstruction notification (PCN) requirement for NWP 12 for proposed oil or natural gas pipeline activities that are associated with an overall project that is greater than 250 miles in length, and the purpose of the overall project is to install new pipeline. The prospective permittee would be required to include the locations of the proposed losses of waters of the United States for all crossings of waters that require authorization, including crossings that would not require PCN, *e.g.*, those that would result in the loss of less than 1/10 acre of waters of the United States, etc.

B. Comment 1

The proposed 250-mile PCN requirement for NWP 12 is arbitrary, not necessary or otherwise justified, and entirely inconsistent with the purpose of the nationwide permit program. Under this proposal, PCN would be required solely based on pipeline length even if no other PCN requirements apply.

In other words, this proposed requirement would arbitrarily pigeon-hole large pipeline projects to pursue an individual permit rather than be able to utilize the PCN process where appropriate.

This proposed PCN does not add value to the nationwide permit program, nor does it make the program more legally defensible. To the extent that PCN is required for any utility line crossing, General Condition 32(b) requires that the prospective permittee provide information on all NWP authorizations required, including separate and distant crossings

even if those crossings do not require PCN. Thus, the existing PCN requirements for NWP 12 are sufficient.

The proposed 250-mile PCN requirement for NWP 12 will significantly increase the agency's and prospective permittees' administrative burden and time required to submit and process NWP 12 PCNs without adding meaningful benefit.

C. Requested Revision

The Army Corps should remove the proposed 250-mile PCN requirement for NWP 12 because it is unnecessary, not substantiated or rooted in any environmental basis, and does not provide any additional legal defensibility or regulatory certainty for the NWP-12 program.

D. Requested Revisions in the Alternative – for 250 Mile PCN

While the Alliance urges the Army Corps not to finalize the proposed 250-mile PCN, the Alliance offers the following revisions in the event the Army Corps decides to maintain the 250 mile threshold:

1. Revision and Clarification of Threshold

To provide clarity and regulatory certainty, the threshold condition should be revised and clarified to read:

“the proposed oil and natural gas pipelines that are associated with an overall project that is greater than 250 miles in linear length and with construction in more than one USACE Division.”

Additionally, the phrase, *“to include those crossings that would not require PCN notifications,”* should be removed if this PCN threshold is being met by the permittee.

2. PCN Criteria - Revision and Limitation Based on Depth

The PCN criteria for activities that require a section 10 permit was added to ensure the navigable capacity of navigable waters (Section 10 waters) will not be adversely affected by the utility activities that require a Section 10 authorization. 85 Fed. Reg. 57,298, 57,324.

With the advent of horizontal directional drilling used in oil and natural gas pipelines at a depth well beneath the mudline of the waterway, the agency should revise this PCN to indicate:

“Oil and gas pipelines routed in or under Section 10 waters without a discharge of dredge and fill material that satisfy the following requirements should not require a PCN notification: They are installed at sufficient depth below projected scour line and offset from the projected channel migration line.”

To ensure continuity and clarity, the following clarification should also be added:

“All oil and gas pipelines routed across section 10 waters with a Section 408 component shall require a PCN.”

In sum, these proposed revisions and clarifications would provide appropriate parameters for PCN criteria, and recognize existing technologies that enable oil and gas pipelines to minimize or entirely avoid potential impacts by routing pipelines beneath the mudline of a waterway.

4. Best Management Practices for NWP-12

A. Comment

The Alliance supports the use of BMPs for NWP activities but does not support their inclusion in NWPs as justification for limiting NWP 12 to oil and gas pipeline activities.

B. Requested Revision

The Army Corps should retain its longstanding practice of including all types of utility lines under NWP 12.

The Army Corps should consider including the following BMPs into NWP 12:

1. Use of low ground pressure equipment and matting when constructing in wetlands. Mats can include timber, synthetics, and metal.
2. Horizontal Directional Drilling (HDD), particularly under Section 10 waters and larger perennial streams.
3. Cross streams and wetlands at right angles, to the extent practical.
4. Placement of staging areas, extra workspace, and similar footprints in uplands, where practical.
5. Follow existing corridors, where practical.
6. Sediment and erosion controls consistent with the local terrain and weather.

7. Return right of way to approximate original contour.

V. Additional Comments

A. General Condition 17 — Tribal Rights

The Alliance supports the agency in going back to the 2012 definition for this general condition.

The Alliance requests that the agency also remove unnecessary definitions such as “protected tribal resources” to avoid confusion and improve clarity in the definition.

B. 300 Foot Linear Limits Removal and New Hybrid Approach for Calculations

The Alliance supports the agency removing the 300 foot linear limit for stream bed calculations, however, we believe that assigning width of impact based on stream order would be arbitrary and the agency should rely on direct measurements of stream width (OHWM) for this PCN.

VI. Conclusion

Thank you for the opportunity to submit these comments. Please do not hesitate to contact me with any questions.

Sincerely,



Tripp Parks
Vice President of Government Affairs
Western Energy Alliance

Enclosure: U.S. Army Corps Declaration of Jennifer Moyer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

Northern Plains Resource Council, et al.,

Plaintiffs,

v.

U.S. Army Corps of Engineers, et al.,

Defendants,

and

TransCanada Keystone Pipeline, LP, et al.,

Defendant-Intervenors.

Case No. 4:19-cv-44-BMM

Declaration of Jennifer Moyer in Support of Federal Defendants' Motion for Partial Stay Pending Appeal

I, Jennifer Moyer, hereby declare as follows:

1. I am currently employed as the Chief of the Regulatory Program at the U.S. Army Corps of Engineers (Corps), Headquarters, Directorate of Civil Works, Operations Division in Washington, D.C. I have been employed by the Corps since 1994, and have served in this capacity since 2014. In this capacity, I am

responsible for providing leadership, direction and oversight for the Corps Regulatory Program including developing rules, guidance, and initiatives to enhance effective program implementation, taking necessary and appropriate actions to promote consistency, and providing authoritative advice on interpretation of regulations to Corps and Department of the Army senior leadership and regulatory staff across the country.

2. On January 6, 2017 the Corps issued the final rule that reissued 50 existing Nationwide Permits (NWP), their general conditions, and definitions in the Federal Register, 82 Fed. Reg. 1,860. That final rule reissued NWP 12 for utility line activities. Covered utility line activities could include construction, maintenance or repair of water intake structures for drinking water, aerial transmission lines for electric power, telephone and telegraph lines and cables, the infrastructure for internet, radio, and television communications such as optic cables, utility substations, utility line access roads, and oil and natural gas pipelines.

3. In the 2017 NWP 12 Decision Document, the Corps estimated that NWP 12 would be used approximately 14,000 times per year on a national basis, resulting in impacts to approximately 1,750 acres of waters of the United States, including jurisdictional wetlands. NWP005331. Of those 14,000, approximately 11,500 are submitted to the Corps as part of written requests for NWP 12 verifications. *Id.* Approximately 2,500 of non-reporting NWP 12 activities are authorized without

any additional Corps review, per year, because those activities fall below the reporting requirements in NWP 12. *Id.*

4. Since NWP 12 went into effect on March 19, 2017 and up until the April 15, 2020 Order, the Corps had verified more than 38,000 NWP 12 pre-construction notifications.

5. Since NWP 12 went into effect on March 19, 2017 and up until the April 15, 2020 Order, the total permanent and temporary impacts to waters of the United States from all utility line activities authorized in the State of Montana using NWP 12 was approximately 13.8 acres included in 107 verifications. For example, as part of a Fiber optic cable upgrade project in Valley County, Montana, on March 19, 2020 the Corps verified that the project's crossing of the Missouri River met the terms and conditions of NWP 12. Another example is the Corps' authorization of improvements to a wastewater system in Chouteau County, Montana, under NWP 12 on February 13, 2020.

6. Of the 38,000 verifications nationwide, 3,400 of the pre-construction notifications were triggered wholly, or in part by, General Condition 18. This condition does not authorize any activity that might affect listed species or designated critical habitat until the Corps determines that the requirements of the Endangered Species Act have been satisfied. 82 Fed. Reg. 1999. Of NWP 12 pre-construction notifications submitted to the Corps since March 19, 2017, 1,846

notifications complied with General Condition 18 through regional programmatic consultations, 1,436 activity-specific informal consultations, and 164 activity-specific formal consultations. Moreover, this total may under-represent the number of consultations due to the fact that one ESA consultation may assess the impacts of multiple NWP verifications for separate and distant water crossings along the same project alignment, versus tracking one ESA consultation for each individual NWP verification.

7. As of April 26, 2020, after a thorough survey of all Corps Districts, I estimate that the Corps has 5,500 pending NWP 12 pre-construction notifications awaiting a written verification determination.

8. As the Corps reads the text of the court's order as it currently stands, thousands of routine utility line project activities that otherwise could proceed under NWP 12 (some without any advance notice to the Corps), will now only be able to proceed after receiving Clean Water Act and/or Rivers and Harbors Act of 1899 authorization through the time and labor intensive standard individual permit process. Individual permits require a resource-intensive, case-by-case review, including extensive, site-specific documentation, public comment, and a formal determination on the permit application.

9. Requiring routine utility line projects with minimal impacts to obtain individual permits will be a major change in how the full span of utility industries

operate. General permits for utility line activities have been approved in nearly the same form under NWP 12 since 1977. 47 Fed. Reg. 31,833; 65 Fed. Reg. 12,887. Industry has relied on having their routine utility projects that require Clean Water Act or Rivers and Harbors Act of 1899 authorization receiving permits with little delay or paperwork because the regulated activity associated with their projects have only minimal effect on the aquatic environment.

10. Given the longstanding availability of NWP 12, industry and state and local governments have factored in the faster processing times associated with NWP 12 into their project planning and timelines for critical infrastructure projects. Activities covered by NWP 12 are also used as links to connect other projects to the power grid, and without a streamlined tool, those other projects will slow down, too.

11. Projects authorized by NWP 12 also include internet communications infrastructure (e.g. broadband lines connecting rural areas to the larger national grid) and that infrastructure is necessary to adapt to increases in internet traffic. The sudden absence of NWP 12 as an expedient permitting tool with which to permit minimally impacting projects will introduce unanticipated uncertainty into these essential projects.

12. One of the core economic benefits of NWP 12 is that it is less costly to obtain an NWP verification than a standard individual permit. Based on the

Regulatory Impact Analysis for the 2017 NWP, the Corps estimates a project proponent's average cost of obtaining an NWP verification is approximately \$9,000, whereas the average cost of obtaining a standard individual permit is approximately \$26,000. NWP001941. A 2002 article in the *Natural Resources Journal*, found that once project costs were appropriately controlled for size, complexity, and other factors, permit preparation costs would double when switching from NWP to an individual permit. *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 *NATURAL RESOURCES J.* 59, 75 (2002). While we disagree with the figures and have not validated the data supporting them, one public comment to the docket on the 2017 NWP stated that the median cost to obtain NWP authorization was \$16,700 and median cost to obtain an individual permit was \$220,000. NWP042996.

13. An NWP verification can also be obtained in less time than obtaining a standard individual permit. In 2018, the average time to receive an NWP verification from the Corps was 45 days, while the average time to receive a standard individual permit from the Corps was 264 days.

14. On average, the Corps receives 3,000 standard individual permit applications annually. Requiring individual permit review for routine utility line activities with minimal impacts will reduce the Corps' ability to devote appropriate resources to

evaluating activities that have greater adverse environmental effects. The Corps assigns its resources based on its decades-long experience in using the NWP program. Inability to use that program, without additional budgetary resources and/or workforce augmentations will greatly affect the Corps' ability to process permit applications for utility-line work, or any other project. Currently, there are approximately 1,250 regulatory project managers across the nation assigned to, and familiar with, processing NWP 12 verifications. On average, the workload for Corps project managers embraces the need for each to carry a portfolio of around 60 in-process permitting and permit-related actions, covering all activities regulated by the Department of the Army nationwide. This workload includes the review of other NWPs and Individual Permits. The Corps could require additional Congressional appropriations to hire new personnel to process the necessary increase in individual permit applications if the estimated 14,000 annual uses of NWP 12 have to be processed as standard individual permits. Whether the Corps could get those additional appropriated dollars is uncertain.

15. As a result of the court's order, I estimate that the Corps will have to process around 2,800 additional standard individual permits per year to cover the 14,000 actions that could have been authorized by NWP 12. Note that some of the 14,000 NWP actions would be part of the same individual permit review. Assuming the number of Corps employees remains constant, it will take the current Corps

workforce one and half years to process all of these additional permits if they focused on only those permit applications and nothing else.

16. Impacts to government entities related to processing these routine utility activities are not limited to the Corps. Federal, Tribal, and state resource agencies will be required to review and comment on the large number of public notices for these activities. State agencies and tribal offices assigned responsibility to evaluate and provide decisions on Clean Water Act section 401 water quality certification requests will also experience a surge in workload associated with the increased number of individual permits. In coastal states, state coastal zone management programs will receive a surge in workload to process requests for Coastal Zone Management Act consistency concurrences for standard individual permits authorizing utility lines in coastal zones. In making these statements about increased workload on other government entities, I am relying on personal experience in interacting with those other government entities.

17. The activities authorized by NWP 12 have positive impacts to local and regional economies and to the national economy as a whole. During construction, these activities support jobs and generate revenue for employers. Also, these benefits extend to businesses that provide supplies to the projects and services to these employees. These economic benefits are especially critical now because of the economic impacts from COVID-19. *See e.g.* U.S. Department of Homeland

Security Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response Ver. 3.0 at 9 (April 17, 2020). NWP 12 could authorize work for COVID-related infrastructure expansions. Further, utility activities authorized by NWP 12 provide energy, drinking water, telecommunications, internet and radio communications and other services to the public, governments, hospitals, schools, and other business. For example, a prior version of NWP 12 was relied upon for work associated with laying fiber-optic cable to serve the Butte, Montana, school district, and for work associated with removal of a tree from an exposed and leaking water line along the Tongue River.

18. As NWP 12 also provides authorization under Section 10 of the Rivers and Harbors Act of 1899, vacating the permit also introduces uncertainty for NWP 12-authorized utility lines in or over navigable waters, such as community-serving electric transmission lines, because owners of these structures require ongoing authorization to maintain these structures in navigable waters. Without NWP 12, maintaining these structures may be considered unauthorized activities in violation of law. Owners, who currently may not have any notice, will likely now need to apply for individual Section 10 permits to maintain those structures.

19. Without NWP 12, the Corps also loses its ability to enforce what would otherwise be noncompliance with the environmental protections contained in

special conditions of the verification for a given activity, even for activities where the discharge of fill has been completed. NWP 12 verifications may include conditions concerning historic properties, water quality, safety, and even endangered species in particular. Without NWP 12, the Corps may not have the ability to ensure compliance with permit requirements which have been specially tailored to the particular activity.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to best of my knowledge.

Executed on April 27, 2020 at Baltimore County, Maryland.

Jennifer Moyer