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November 16, 2020

U.S. Army Corps of Engineers  
Attn: CECW-CO-R  
441 G Street NW  
Washington, D.C. 20314-1000

Attn: Mr. David Olsen

**Re: AGA Comments on the Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57298 (Sept. 15, 2020)**

Dear Mr. Olsen:

The American Gas Association (AGA) appreciates the opportunity to comment on the U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits (Proposal).

The American Gas Association, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 75 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent — more than 71 million customers — receive their gas from AGA members. Today, natural gas meets more than 30 percent of the United States' energy needs.

## **Summary of AGA's Comments**

AGA supports the Corps' Nationwide Permit (NWP) program as an essential means for protecting the environment while reducing resource burdens on both the Corps and the regulated community. This frees up Corps resources to focus on individual permits under Clean Water Act (CWA) §404 for projects that could have more than minimal impacts.

In particular, AGA supports the existing NWP12 issued in 2017. Our members rely on NWP 12 to facilitate their repair, maintenance, replacement and construction of intra-state natural gas transmission pipelines and smaller local gas distribution utility lines as well as some interstate transmission pipelines. The proposed trifurcation of NWP 12 separates utilities -- not based on the nature of the construction activities impacting Waters of the United States (WOTUS) -- but based on the substances that will be transported in the lines when the construction work is done. This is inconsistent with CWA §404(e), which requires the Corps to issue general permits for categories of activities that are "similar in nature" -- not categories of utilities carrying similar substances. As discussed in these comments, we have concerns about the proposed division of NWP 12 and make suggestions to clarify the scope of natural gas pipeline and gas utility lines and better align them with other activities that are "similar in nature" consistent with Clean Water Act §404(e), such as other underground utility lines (e.g. water and sewer) that also use buried pipes and similar construction methods like trenching through or boring beneath a water feature. We believe it would make more sense and be less confusing to keep underground linear infrastructure with similar impacts together in one NWP.

While it would be more straightforward for the Corps to simply reissue NWP 12 in its 2017 structure, with all utility activities covered under one umbrella, and while we oppose the trifurcation of NWP 12 as proposed by the Corps, AGA does not object to a potential bifurcation of NWP 12 which would separate overhead utility lines, like electric and telecommunications lines, from underground utility lines based on discernable

differences in the nature of construction activities between the two. Aboveground electric and telecommunications lines require the construction of permanent foundations for poles and towers, and typically involve different construction methods than the trenching, boring or sleeving methods used for installing, repairing or replacing buried pipes. In contrast to the permanent impacts on waters from construction of foundations for aboveground wire-based utility poles and towers, the best management practices for minimizing sediments from this type of construction may be sufficiently dissimilar from those used in constructing underground utility lines to warrant splitting off aboveground wire-based utility lines in a separate NWP. We also note that for most of our members, impacts on waters from work on underground pipes are temporary. In addition, horizontal directional drilling (HDD) is being used more often to avoid impacts to waters of the U.S.

The Corps' proposed trifurcated NWP 12 structure would lead to confusion in the regulated community regarding which NWP would be applicable. The Corps has proposed to revise NWP 12 so it would apply to activities involving construction, maintenance repair or removal of pipes that will carry "oil or natural gas," and to create a new NWP D for such activities involving pipe that will carry "water or other substances" which according to the preamble would include "industrial products that are not petrochemicals."<sup>1</sup> Unfortunately, a division of NWP 12 on these grounds does not take into account the utility lines that may not neatly fall under one category. Which category would cover pipes carrying hydrogen or methane (CH<sub>4</sub>) derived from renewable sources in addition to natural gas produced from geologic formations? Creating this kind of ambiguity conflicts with the directive in Executive Order 13766, that federal decisions regarding infrastructure should be accomplished with maximum efficiency and effectiveness.<sup>2</sup>

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<sup>1</sup> See 85 Fed. Reg. at 57322 and 57347 (preamble explanation for proposed NWP 12 and D).

<sup>2</sup> Executive Order 13766, 82 Fed. Reg. 8657 (Jan. 30, 2017).

As our members take steps to reduce the carbon footprint of their product, natural gas transmission and local gas distribution utility lines increasingly will be leveraged to carry other clean fuels such as renewable natural gas (RNG), hydrogen, or methanated hydrogen (CH<sub>4</sub>) from power-to-gas,<sup>3</sup> either alone or blended with geologic natural gas which can be carbon negative, a critical feature to support carbon-neutrality goals. Conveying clean fuels to support all sectors in the economy is an important role many members are already involved with and this trend will continue accelerating for achieving net zero carbon goals with encouragement from the U.S. Environmental Protection Agency (EPA), some states and local jurisdictions. The Corps' proposal to split NWP 12 for pipe-based utility lines based on the product to be carried would undermine this important environmental goal, and cause confusion that would waste the time and resources of the Corps and the regulated community, while utterly failing to enhance protection for waters of the United States in any meaningful way. As the Corps concedes in the preamble, many of the activities to be authorized by proposed NWP 12 or D "apply to any utility line, *regardless of the substances it conveys.*" The product to be carried in an underground pipe-based utility line after work is complete – whether water or some combination of hydrogen, RNG, and geologic natural gas – does not change the methods for constructing, maintaining, repairing or replacing the pipe in a way that would noticeably alter the best practices needed to protect waters of the United States from such activities.

In addition, the environmentally-beneficial use of climate resilient underground linear infrastructure for high-voltage electric wires, biofuels, RNG, hydrogen, blends of hydrogen with natural gas and carbon dioxide for utilization or sequestration (CCUS) should be facilitated rather than undermined by the Corps' NWP program. It must be clear that construction, repair, and/or replacement of climate resilient underground

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<sup>3</sup> A renewable form of gaseous fuel can be produced using renewable electricity, such as wind or solar power. The electricity is used to power an electrolyzer, which splits water into hydrogen and oxygen. The hydrogen can be captured, stored and used, or combined with a source of carbon to produce renewable methane, or methanated hydrogen – both of which are types of RNG. See <https://www.aga.org/natural-gas/renewable/>. Storing this power-to-gas in underground storage and line pack also provides a viable method for long term, seasonal storage of wind and solar energy.

linear infrastructure to support climate adaptative and resilient energy systems can qualify for a streamlined 404(e) under an NWP. Further, the same NWP should cover all needed above and below ground infrastructure that facilitates or conveys flexible and easily stored clean biofuels, zero, low to negative carbon gases as mentioned above to avoid confusion or the need to obtain both NWP 12 and NWP C for work on the same pipeline or utility line.

#### **I. The Corps Should Clarify and Revise the Proposed Split of NWP 12**

NWP 12 is critically important to AGA member gas utilities to serve their residential and commercial customers safely, reliably and affordably. We have concerns that the Corps' proposal to split NWP 12 is not well thought out and could lead to confusion and delays in critical work or members need to perform to serve their utility customers. The revisions we request below should help improve and clarify the final 2021 NWP 12.

##### **A. Impacts from Work on Natural Gas Pipelines and Gas Utility Lines are Minimal and Temporary, and Best Management Practices under the Existing NWP 12 Protect Waters of the United States**

Since the Corps promulgated NWP 12 in 1977,<sup>4</sup> AGA's member local gas distribution utility companies across the country have relied on NWP 12 for streamlined permitting under Clean Water Act section 404 for minor stream and wetland crossings for intra-state gas utility line projects where a crossing affects no more than ½ acre of a water feature subject to federal jurisdiction. Natural gas utilities construct and maintain natural gas distribution lines and intra-state pipelines in communities across the United States. Such projects are essential for providing safe, reliable transportation of cleaner burning natural gas to 75 million industrial, commercial and residential customers across the country.

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<sup>4</sup> 42 Fed. Reg. 37146.

Gas distribution lines can be short and local, or they can cover many miles and often must cross streams, wetlands, or other waters of the United States. Gas utilities take steps to avoid such stream and wetland crossings where feasible. However, it is not always feasible. When a new pipe must be laid to serve a community or power plant or commercial customer, there may be limited routes available to reach that community or customer. Projects to replace existing pipelines with new pipe must follow the existing route and utility rights-of-way.

When gas utility line projects must cross a stream or wetland, the impact is typically limited and temporary because these linear, narrow projects affect a work area only a few yards wide, each stream or wetland crossing is usually completed within a short time measured in a few days, and the area is restored to preexisting contours and re-vegetated leaving no permanent aboveground structures.

**B. The Corps Should Keep All Buried, Underground Utility Lines in NWP 12, Rather Than Create a New NWP D, Because Best Management Practices for Protecting Waters from Trenching or Boring for Pipe Are Similar in Nature Regardless of the Product to be Carried in the Pipe**

There are basically three methods for constructing or doing other work on an underground pipeline or pipe-based utility line: (1) open trenching and backfilling; (2) trenchless methods such as boring or horizontal directional drilling (HDD); and (3) inserting new smaller diameter pipe or a lining into an existing pipe through small excavations spaced out across the route. Inserting new pipe into existing pipe is sometimes referred to pipe “sleeving.” Gas utilities often use sleeving to upgrade their distribution system and replace older pipe with newer pipe. This helps both to improve pipeline safety and to reduce emissions of methane, a greenhouse gas. When sleeving a line, the utility crew clears the existing line, excavates a series of small holes typically about 12 feet in length about one quarter mile apart along the route of the utility line, cuts a small section of the existing pipe, and inserts a section of flexible modern high or medium density polyethylene (PE) plastic distribution main into the existing cast iron or

unprotected steel pipe (which then serves as a protective conduit for the new PE pipe), uses a device to heat and fuse the sections of PE pipe together into one continuous new pipe which they push through the existing pipe to the next small access hole. Then the crew fills the hole and restores the area.

Where the route of a pipe must cross a water feature, the methods for protecting the water from sediments during construction of a new pipe or work on an existing pipe are straight forward. HDD borings deep under a water feature can be used to avoid impacts altogether, in situations where it is possible to locate the surface entry and exit points (bore holes) outside the water feature. Where the water feature is too large or the work takes place on a steep slope or in areas of karst geology, it may not be possible to locate the bore holes outside that feature. In that case, the following BMPs are used to protect the water feature from work on the bore holes.

Best management practices for protecting waters from excavations at bore holes, as well as for trenching or sleeving include for example: (1) using cofferdams and partial stream diversion to work temporarily in the dry stream bed; (2) turbidity monitoring; (3) side casting HDD material onto uplands or onto filter cloth, mats or some other type of semi-permeable surface in vegetated wetlands; (4) establishing stockpiling and work areas outside of surface waters; (5) installing timber mats prior to placing or driving equipment over wetlands or streams; (6) monitoring effectiveness of protective measures taken during and after construction; and (7) training company crews as well as contractors.

The construction techniques described above are similar in nature to those used to install, repair, or replace other pipelines and pipe-based utility lines that carry water, wastewater, sewage or stormwater. For example, the sewage pipeline construction methods described on the public website for the wastewater utility in Portland, Oregon,<sup>5</sup>

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<sup>5</sup> See <https://www.portlandoregon.gov/bes/64780> (listing construction methods).

describe construction techniques that fall into the same three categories of methods used by gas utilities: (1) trench and backfill; (2) boring or HDD; and (3) sleeving new pipe into old pipe or inserting a lining. The only noticeable exception is that water and sewer line sleeving apparently can also include “pipe bursting” – where the new line is as large or larger in diameter than the existing line, so that when it is inserted, the new line bursts the old line. Pipe bursting is not used for gas line construction or replacement projects for pipeline safety reasons.

In addition, best management practices that are similar in nature can and are used to limit impacts on stream or wetland crossings for pipelines and utility lines whether they carry oil, natural gas, water, sewage, or stormwater. For example, before placing a newly constructed pipeline into service the structural integrity of the pipeline is pressurized using a method called hydrostatic testing. This ensures that the system will not leak the contents of the pipe (i.e. sewer water or natural gas) when it is operational. Specific permits and best practices are employed to control, and sometimes discharge, the clean water used for testing.

The product that will travel in the pipe after construction work is completed is not relevant to the Corps’ jurisdiction under Clean Water Act §404 or 404(e), because the contents of the operating pipeline or utility line do not change the methods for laying the pipe or the best practices for protecting species or limiting discharge of dredge or fill material due to construction work – from either the trenching and backfill construction process or from bore holes or pipe sleeving access holes that cannot be located outside the water feature. For the Corps’ purposes, it does not matter whether the pipe will carry oil, natural gas, RNG, hydrogen, water sewage, wastewater or stormwater.

Other state and federal environmental regulatory programs, such as the federal National Pollution Discharge Elimination System (NPDES) permit program under Clean Water Act §401, protect waters from incidents during operation of the pipe that could result in a



discharge of oil or other regulated water pollutants. If there are differences relevant to the Corps' jurisdiction under Clean Water Act §404(e) and the protection of federal water features from construction dredge and fill, those differences mainly relate to the diameter of the pipe involved rather than what will be transported in the pipe once it is in operation. This is because larger diameter pipe may require a wider work area on either side of the trench to facilitate the use of heavier equipment needed to install or work on the larger pipe. In this way, construction methods and impacts for smaller diameter natural gas distribution utility lines are more similar to their other small utility cousins that carry water, stormwater, wastewater, or sewage for residential and commercial customers.

There are some differences in the regulatory framework for construction and repair of pipelines and pipe-based utility lines that carry different products, but this does not appear to make a significant difference in the BMPs for protecting waters from dredge and fill impacts of installing or maintaining the pipes.

Interstate natural gas transmission pipelines are regulated by the Federal Energy Regulatory Commission (FERC). That agency has a detailed regulatory framework, including consultation under section 7 of the Endangered Species Act, to require and monitor the use of best practices for environmental protection during pipeline construction and to coordinate permit decisions by other federal and state agencies relating to construction and maintenance of interstate natural gas pipelines.

State utility commissions regulate natural gas utility companies in their respective states, including rates, capital expenditures for intra-state gas utility line construction, and operational expenditures for utility line maintenance.

The U.S. Department of Transportation (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) Office of Pipeline Safety imposes stringent pipeline safety

regulations under 49 C.F.R. Part 192 on natural gas interstate transmission pipelines and gas utility intra-state natural gas transmission and distribution utility lines. The requirements vary to some degree for transmission pipelines (defined based on pressure levels) and gas utility distribution mains and service lines. PHMSA's pipeline safety regulations impose more stringent requirements for gas pipe materials, construction, welding, fusion, inspection, maintenance and repairs and for maintaining safe types of vegetation to prevent pipe damage or erosion on rights-of-way than the requirements typical for pipes carrying water, sewage, wastewater or stormwater.

Oil and other petrochemical pipelines are not regulated by FERC or by state utility commissions, but they are regulated by PHMSA under a different set of stringent pipeline safety regulations in 49 C.F.R. Part 195 for pipelines carrying "hazardous liquids." The Part 195 hazardous liquid pipeline safety regulations include robust requirements governing pipe materials, design, construction, maintenance and repairs for pipe that will transport oil, other hazardous liquids, and carbon dioxide.

While natural gas transmission pipelines and distribution utility lines are subject to more rigorous pipeline safety and other regulations than pipes carrying water or sewage, these regulatory differences should not significantly alter the basic construction methods in a manner that would change the related BMPs needed to protect waters from sedimentation during utility line construction, replacement, or repairs. The basic pipe construction techniques and BMPs are similar in nature for any kind of pipeline or pipe-based utility line, regardless of what flows through the pipe once it is in operation.

As the Corps notes in the Proposal preamble, under section 404(e) of the Clean Water Act, the NWP's authorize categories of activities that are "similar in nature," but this does not require the activities to be identical.<sup>6</sup> The Corps explained that it is proposing to split NWP 12, reasoning that there "may be" national best management practices for oil

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<sup>6</sup> 58 Fed. Reg. at 57356.

and gas pipelines (and gas utility lines) that differ from those for pipelines that will carry potable water, wastewater, sewage, stormwater or “other industrial products that are not petrochemicals.”<sup>7</sup> The Corps has asked for comments and suggestions for national standards or best management practices for oil and natural gas pipelines under the revised NWP 12 and for other pipelines under a new NWP D. Our members are not aware of any such differences in BMPs. The best practices for protecting water features during trenching, boring or sleeving construction methods for installing, replacing or maintaining pipes at stream or wetland crossings are similar in nature, regardless of what product will travel in the pipe once the work is done.

Therefore, we ask the Corps to keep all pipelines and pipe-based utility lines within NWP 12, as we can see no rational basis for distinguishing them for purposes of Clean Water Act section 403(e).

**C. The Corps Should Clarify that NWP 12 Is Available for Underground Pipelines and Utility Lines Whether They Carry Only Geologic Natural Gas or a Blend with Lower-Carbon Gaseous Fuels**

The proposed trifurcation of NWP 12 would cause unnecessary ambiguity regarding which utilities fall into which category. This could be avoided by instead bifurcating NWP 12 based on construction methods and BMPs that are similar in nature for buried underground utility lines as distinguished from aerial, aboveground utility lines. Here, we highlight one troubling example of the confusion the Corps would create by dividing utility lines by the product they transport rather than by construction methods and BMPs that are similar in nature, as required by CWA §404(e).

An ever-increasing number of natural gas interstate pipeline and distribution companies are injecting pipeline quality renewable natural gas (RNG) into their pipes and transporting the RNG blended with geologic natural gas. Renewable natural gas is any

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<sup>7</sup> 58 Fed. Reg. at 57310 and 57323.

pipeline compatible gaseous fuel derived from biogenic or other renewable sources that has lower lifecycle CO<sub>2</sub>e emissions than geological natural gas and in some cases can be carbon negative.<sup>8</sup> The majority of the RNG produced today comes from capturing emissions from existing waste streams found in landfills, wastewater treatment plants and animal manure. This gas must be treated and cleaned, raising it to a standard that allows it to be safely injected into existing natural gas pipelines for delivery to and use by industrial, commercial and residential customers.

RNG can also be produced using renewable electricity, such as wind or solar power in a process called “Power-to-Gas.” In this process, the wind, solar or other renewable electricity is used to power an electrolyzer, which splits water into hydrogen and oxygen. Hydrogen can be captured, stored and used, or combined with a source of carbon to produce renewable methane (or methanated hydrogen). Power-to-gas also offers a long-term, seasonal energy storage solution for renewable electricity.

RNG combines low- to negative life-cycle carbon emissions with the high-energy density, storage capability and transportability of natural gas. Thus, RNG is highly valued in the transportation sector, but its attributes are equally valued in the residential, commercial and industrial sectors to meet heating needs.

Many AGA members have set ambitious goals to reduce the carbon intensity of their pipelines and gas utility lines. A growing number of our member companies have set a goal to achieve net zero carbon by 2050. In planning to achieve those goals, natural gas pipeline companies and local distribution companies are adopting a variety of strategies, including for example replacing cast iron and cathodically unprotected steel pipe to reduce methane emissions. Their plans also include carrying an increasing

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<sup>8</sup> This is the consensus definition of RNG developed by AGA members in consultation with other stakeholders. Note that it is sufficiently broad to include hydrogen and power-to-gas methanated hydrogen, and not just gas derived capturing methane from landfills, gasification of wood waste, or anaerobic digestion of animal manure, food waste, sewage or other organic waste.

percentage of lower carbon gaseous fuels in the gaseous fuel they deliver to customers. These lower carbon gaseous fuels can include renewable natural gas (RNG), hydrogen, and methanated hydrogen from “power-to-gas” projects.

Going forward, this means many of the “natural gas” pipe construction and repair projects that will need NWP authorization for stream on or wetland crossings will involve pipe that will be used to transport *both geologic natural gas and increasing percentage of other lower carbon gaseous fuels* such as RNG, hydrogen, and power-to-gas methanated hydrogen. To avoid confusion and streamline the process for these projects, the Corps should not split off any buried pipe-based utility lines in a new NWP D, and the Corps should state explicitly in the revised final 2021 NWP12 that NWP12 can authorize underground pipeline or pipe-based utility line WOTUS crossings for construction, maintenance and repair projects regardless of the type of product the pipes will convey during operation – whether oil, natural gas, another gaseous fuel such as RNG or hydrogen, or another type of liquid fuel, water, or other substances. The activities authorized should include related electrical work, such as wires used for cathodic protection or monitoring of buried pipes. To reflect this coverage, AGA requests that the Corps revise NWP12 to apply to “Underground Pipeline or Utility Line Related Activities.”

AGA is concerned that by proposing to caption the revised NWP12 to refer only to “Pipeline” activities and not to “Utility Line” activities, that this may make NWP12 more vulnerable to attack from those who oppose all “pipelines” but do not realize that NWP12 is not only used for interstate pipelines that traverse many miles, but is also necessary for construction and maintenance of local gas utility intra-state transmission lines, mains and customer service lines for transporting safe, reliable, affordable energy to homes and businesses. To avoid this misapprehension by the public, courts and others, we request that the Corps include the phrase “Utility Line” in the heading of revised and reissued NWP12.

**D. AGA Does Not Object to New NWP C for Constructing Overhead Electric & Telecommunication Wire-Based Utility Lines; But the Corps should Make Clarifying Revisions to the Scope of Activities Authorized under NWP12**

The case for putting overhead wires into a new NWP C and split them off from the underground pipes and utility lines in NWP 12 makes sense. Most wires are installed overhead on permanent above-ground structures – poles or towers -- whereas most oil pipelines and nearly all natural gas pipelines and utility lines as well as water and sewer utility lines are installed underground. The impacts of above-ground electric pole and wire construction methods and BMPs for reducing related impacts on water features they cross would necessarily be different than methods for protecting waters from temporary trenching or bore holes for installing or working on underground pipe. Therefore, while we believe it would be simpler to reissue NWP 12 as is, without any split, AGA does not object to the Corps' proposal to separate aboveground electric and communications wires into a new NWP C.

In the process of trifurcating NWP 12 -- splitting wires from pipes and splitting pipes that carry water "or other substances" from those that carry oil or natural gas, the Corps inadvertently retained some references in NWP12 to equipment and activities that are only relevant for aboveground electric utility lines and related equipment. There are also some other revisions the Corps could make that would clarify what remains in NWP 12.

First, if the Corps finalizes the split of aboveground electric utility activities into a new NWP C, then the references to "substations" should be removed and replaced with boosting or compressor stations and natural gas metering and pressure regulating stations. Electric "substations" are used in electric utility systems to decrease power levels from a higher-level kV line to a lower level electric line. Substations are not a feature of natural gas pipeline or natural gas distribution systems. Oil pipeline systems use boosting stations to move oil through the pipeline, and natural gas pipeline systems

use compressor stations to move natural gas (or other gaseous fuels) through the transmission pipeline. Natural gas distribution systems typically do not include compressor stations, except to transport gas across a large state. Instead, they use pressure regulating stations to reduce pressure from a higher-pressure incoming line to a lower pressure outgoing line, for example from a high-pressure transmission or distribution main to a lower pressure distribution main. These regulating stations may also have metering equipment as well as regulating equipment, and they are often referred to as metering and regulating (M&R) stations. A facility where natural gas or other gaseous fuel is accepted from an upstream supplier or producer to an interstate pipeline or gas distribution utility is called a “custody transfer station” and it contains metering and often pressure regulating equipment. Oil pipelines similarly have custody transfer stations.

Accordingly, the fourth paragraph in proposed NWP 12 should be revised to state that it authorizes construction, maintenance, replacement or expansion work in a non-tidal water for an oil or natural gas or gaseous fuel custody transfer station, boosting station, compression station or metering and/or pressure regulating station.

Second, the Corps should also delete the phrase “including outfall and intake structures” if it proceeds with finalizing both NWP C for wire-based utility lines and NWP D for pipelines that carry water, wastewater, sewage, stormwater or other substances, because oil and natural gas pipelines and distribution systems do not contain water outfall or water intake pipe structures. These structures are used by some types of electric power stations to obtain water from adjacent water bodies to cool steam generated by certain types of electric power generators and to discharge treated wastewater, including cooling water, to adjacent water bodies. Water utilities that provide potable water to customers also use intake pipes to obtain water from adjacent water bodies, and sewage treatment plants discharge treated wastewater through outfall pipes to adjacent water bodies. However, natural gas pipelines and gas distribution systems have no need for water outfall or intake structures. If the Corps

finalizes the split of both NWP C for electric utilities and NWP D for other pipelines including water, sewer and stormwater pipelines, then the reference to outfall and intake structures in the second paragraph of NWP 12 should be deleted.

Third, there are a few additional revisions that would help clarify NWP 12 so the regulated community and Corps District personnel can clearly understand what is covered. In the first line of NWP 12, describing covered “Activities,” we request that you add the words “replacement, “gas utility line,” and “gaseous fuel,” so the first line states:

*“Activities required for the construction, replacement, maintenance, repair and removal of oil, natural gas and gaseous fuel pipelines and utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than ½ acre of waters of the United states for each single and complete project.”*

It is important to include the word “replacement” in order to avoid confusion regarding whether installing a new pipe inside of or in place of an existing pipe to be abandoned is covered by NWP 12. Replacing older leak-prone pipe or pipe approaching the point of no longer being fit for its purpose is especially important both for improving pipeline safety and for reducing methane emissions, which has climate benefits. While these pipe replacement projects have generally been understood to fit within the meaning of “construction,” our members would prefer to have the word “replacement” clearly and explicitly included in the list of authorized activities. We have explained earlier in these comments why it is important also to include the words “gaseous fuel” and “utility lines.” Conforming changes should be made in the remainder of NWP 12.



## **E. The Corps Should Finalize the Revised Pre-Construction Notification (PCN) Thresholds under NWP 12**

The Corps proposes to remove five of the existing PCN thresholds, retain two of the existing thresholds, and add a third new threshold applicable to construction of new oil and natural gas pipelines where the overall pipeline project is longer than 250 miles. AGA generally supports the Corps proposal to replace the confusing and overlapping seven PCN thresholds with a shorter list of PCN thresholds for the 2021 NWP 12, except that we oppose the third situation requiring a PCN, because it is based on the product to be contained in the pipe after work is complete, rather than considerations relevant to protecting waters of the United States pursuant to Clean Water Act section 404 from dredge and fill sediments during pipe construction activities.

More specifically, the Corps proposes to require a PCN to the district engineer in three situations under NWP 12, where (1) a Corps permit is required under section 10 of the Rivers and Harbors Act and the Corps regulations under 33 C.F.R. §408 for activities that affect a navigable water or public works in a navigable water such as a dam, levee or bridge; (2) the discharge will result in the loss of greater than 1/10 acre of a jurisdictional water; “or (3) the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline (vs. conduct repair or maintenance activities) along the majority of the distance of the overall project length.” This third situation is not likely to apply to gas utility distribution system projects, since any discrete projects are typically much shorter than 250 miles. However, our member gas utilities operate some intra-state transmission pipelines that could reach that length. They also have a strong interest in the ability of interstate natural gas pipelines to be built in a timely fashion so that the gas utilities can obtain the supply needed to serve their customers reliably and affordably, including during the coldest weeks of winter when heating demand is at its peak. It is not clear to us why the Corps chose 250 miles as the relevant metric. We suggest that the Corps should explain the rationale for the mileage metric it selects. In addition, the PCN should apply regardless of the product the finished pipeline would contain, since

this factor is not relevant to the Corps' jurisdiction over dredge and fill impacts under CWA §404.

AGA supports the Corps' proposal to remove five other PCN thresholds from NWP 12. We believe the first two PCN thresholds described above, with our requested revision, will address the adverse environmental impacts that the other five PCNs would cover, eliminating redundancy and simplifying and clarifying the PCN requirements for NWP 12. In particular, the Corps is proposing to retain the requirement for a PCN for a stream or wetland crossing that would result in the loss of greater than 1/10 acre of a water of the United States. That should cover the five other situations described in the PCNs the Corps proposes to remove, which include: (1) utility line activities involving mechanized land clearing in a forested wetland to remove trees that threaten the integrity of a gas or other utility line; (2) utility line activities (other than an overhead line) in a water of the United States that exceed 500 feet; (3) placement of a utility line in a water of the United States that runs parallel to or along a jurisdictional stream bed; (4) permanent access roads of made of any material that are constructed in a jurisdictional area for a distance of more than 500 feet; and (5) permanent access roads of any length made of impervious materials and constructed in waters of the United States.<sup>9</sup>

In addition, the Corps should also clarify that matting should not be counted as part of the dredged and filled area for purposes of the 1/10-acre threshold under NWP 12 and General Condition 32. Matting consist of large temporary panels or mats that our member gas utilities use for moving heavy machinery during work on gas utility mains and intra-state transmission pipelines. This matting is one of the BMPs discussed earlier. It serves to protect the wetlands during construction and to preserve the seed bank for future wetland regrowth, allowing the preserved seed banks to regenerate the native wetland features. Since matting does not permanently affect the jurisdictional

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<sup>9</sup> See 85 Fed. Reg. at 57324-27.

water and in fact has a beneficial protective effect, matting should not be counted as part of the dredged and filled area for purposes of the PCN threshold.

## **II. AGA Supports Updates and Clarification of NWP 3 for Maintenance Projects**

The Corps proposed two revisions for NWP 3, which authorizes certain maintenance projects that will have minimal impacts on waters of the United States. First, the Corps proposes to revise paragraph (a) of NWP 3 to authorize the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require District authorization at the time it was constructed. We agree this change makes sense to provide consistency with NWP 31, which also authorizes maintenance activities. It is also a reasonable revision to restore a provision that was removed *without explanation* in 1991.<sup>10</sup>

Second, the Corps proposes to modify NWP 3 paragraph (a) to authorize the placement of riprap to protect a structure, which could include a natural gas pipeline or gas utility line, as long as the permittee uses the minimum amount of riprap necessary to protect or ensure the safety of the structure. AGA supports this change.

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<sup>10</sup> See Proposal Preamble, 85 Fed. Reg. at 57321.

### **III. AGA Supports the Corps' Determination that Reissuance/Issuance of the NWP's Has "No Effect" on Listed Species or Designated Critical Habitat.**

AGA agrees with the comments of the Interstate Natural Gas Association of America (INGAA) that the Corps correctly determined that the reissuance/issuance of the NWP's has "no effect" on listed species or designated critical habitat, which are restated here for the Corps' convenience.

In the proposal, the Corps explains that reissuance/issuance of the NWP's "results in 'no effect' to listed species or critical habitat, and therefore the reissuance/issuance action itself does not require ESA section 7 consultation" because the "only activities that are immediately authorized by NWP's are 'no effect' activities under Section 7 of the ESA and its implementing regulations." 85 Fed. Reg. at 57,357. This determination is consistent with the requirements of the Endangered Species Act (ESA), supported by the proposal and decision documents, and based on the numerous limitations in the NWP's that confine the scope of actions actually authorized by the proposal to those activities that have "no effect" on listed species or designated critical habitat. AGA agrees that consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Services (collectively, the Services) is not required. 11

ESA § 7 requires each federal agency to ensure, through consultation with the Services, that "any action authorized, funded, or carried out" by that agency is not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). Based on the action agency's review of its authorized action, it may be required to consult. But where the action agency

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<sup>11</sup> Earlier this year, a Montana District Court disregarded the Corps' "no effect" determination for the 2017 NWP's and held that the Corps was required to consult with the Services when it reissued NWP 12 in 2017. *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-00044-BMM (D. Mont. May 13, 2020); appeal filed No. 20-35414 (9th Cir. May 13, 2020). AGA, like INGAA, is a member of the Defendant-Intervenor Coalition participating in this case to defend NWP 12 against Plaintiffs' ESA claim. AGA strongly disagrees with the District Court's decision and has appealed to the Ninth Circuit. AGA also supported the government's application for stay pending appeal, which was granted by the Supreme Court. In so doing, the Supreme Court impliedly recognized the District Court's errors.

determines that its proposed action has “no effect” on listed species or designated critical habitat, its obligations under § 7 of the ESA are complete and “consultation requirements are not triggered.” See *Friends of the Santa Clara River v. U.S. Army Corps of Eng’rs*, 887 F.3d 906, 913 (9th Cir. 2018).

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

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

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

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

authorization under any NWP of any activity that is likely to jeopardize the continued existence of a threatened or endangered species, or adversely modify the critical habitat of such species. *Id.*

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

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

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

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

An action agency is not required to undertake programmatic consultation where it has appropriately determined the action has “no effect” on listed species or habitat. Consultation, whether programmatic or otherwise, need occur only if the action agency finds its authorized action “may affect” species or habitat. Here, the Corps has determined that programmatic consultation is not required for the NWP proposal, 85 Fed. Reg. at 57,357, and INGAA supports that conclusion.<sup>12</sup>

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

The Services’ 2019 regulations further confirm that “while federal action agencies have an obligation to consult on programs that are considered agency actions that may affect listed species or critical habitat, ‘many types of programmatic consultation would be

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<sup>12</sup> The Corps notes in the preamble that, despite its “no effect” determination and conclusion that consultation is not required for NWP reissuance, it previously conducted “voluntary” national programmatic consultations for the NWP program. *Id.* The Corps’ prior voluntary consultations were fully consistent with its “no effect” determination. *See, e.g.*, 82 Fed. Reg. at 1873 (recognizing that, although Corps engaged in consultation during 2012 reissuance, it did so *voluntarily* and did not believe consultation was legally required).

considered an optional form of section 7 compliance to, for example, address a collection of agency actions that would otherwise be subject to individual consultation.” 85 Fed. Reg. at 57,358 (quoting 84 Fed. Reg. at 44,996) (emphases added).

The NWP program is structured, through GC 18, to focus ESA § 7 compliance at the activity-specific and regional levels. Because the action being “authorized” at the Headquarters level—the issuance or reissuance of the NWPs—has “no effect” on listed species or critical habitat, INGAA agrees with the Corps’ conclusion that “there is no requirement that the Corps undertake programmatic consultation for the NWP program.” *Id.* at 37,360.

#### **IV. The Corps’ NWP Proposal Complies with the Requirements of the CWA and NEPA**

AGA also agrees with INGAA’s comments with respect to the Corps’ compliance with the requirements of CWA and NEPA.

The Corps’ proposed reissuance / issuance of the NWPs complies with the requirements of the CWA and NEPA, as well as the regulations and case law. 85 Fed. Reg. at 57,355 (NEPA compliance), *id.* at 57,356 (CWA § 404(e) compliance). The CWA authorizes the Corps to issue NWPs for categories of activities that “are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” 33 U.S.C. § 1344(e)(1). The Corps appropriately recognizes that the scope of its NEPA review is limited to the effects of the activities authorized by an NWP, i.e., the discharge of dredged or fill material into WOTUS.

Courts have consistently confirmed that NEPA does not expand the scope of an agency’s authority. *CBD*, 941 F.3d 1288; see also *U.S. Dep’t of Transp. v. Public Citizen*, 541 U.S. 752 (2004) (“Public Citizen”) (scope of NEPA review is limited to the effect of activities subject to the agency’s jurisdiction and control). If the agency has “no



ability to prevent a certain effect due to its limited statutory authority over the relevant actions ... the agency need not consider these effects” under NEPA. *Public Citizen*, 541 U.S. at 770. This principle was recently affirmed by CEQ, which modified its NEPA regulations to codify that “[e]ffects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.” 85 Fed. Reg. 43,304, 43,321 (July 16, 2020) (codified at 40 C.F.R. § 1508.1(g)(2)).

The Corps’ NEPA analysis of a CWA permit is properly limited to the impacts caused by authorizations of discharge of dredged or fill material into jurisdictional waters because the Corps lacks authority or control over aspects of projects beyond the location of the discharge of dredged or fill material. See 33 C.F.R. pt. 325, App. B § 7(b) (limiting the scope of the Corps’ NEPA analysis to “the impacts of the specific activity” over which the Corps “has sufficient control and responsibility”);<sup>13</sup> *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1116-17 (9th Cir. 2000) (NEPA review of section 404 permit need not address overall development); *Ohio Valley Env’tl. Coal. v. Aracoma Coal Co.*, 556 F.3d 117 (4th Cir. 2009) (Corps’ NEPA analysis properly limited to stream fill and need not consider upland components).

In its analysis of effects for the proposed reissuance of the NWPs, the Corps appropriately focused its environmental assessment on the effects or impacts that are likely to be caused by activities authorized by an NWP (i.e., the discharge of dredged or fill material), and not the environmental effects of overall projects that will use a particular NWP. 85 Fed. Reg. at 57,356-57. INGAA supports this approach, which has been upheld by the courts. *Sierra Club, Inc. v. Bostick*, No. CIV-12-742, 2013 WL 6858685, at \*9 (W.D. Okla. Dec. 30, 2013), *aff’d*, 787 F.3d 1043 (10th Cir. 2015); *Sierra Club v. U.S. Army Corps of Eng’rs*, 990 F. Supp. 2d 9, 28-29 (D.D.C. 2013).

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<sup>13</sup> The Corps’ NEPA regulations were approved by CEQ, 52 Fed. Reg. 22,517 22,518 (June 12, 1987), and upheld by the Ninth Circuit. See *Sylvester v. U.S. Army Corps of Eng’rs*, 884 F.2d 394, 399 (9th Cir. 1989).

AGA appreciates the opportunity to comment. If you have any questions, please do not hesitate to contact me or Tim Parr, AGA Deputy General Counsel, at [tparr@aga.org](mailto:tparr@aga.org).

Respectfully Submitted,

A handwritten signature in black ink that reads "Pamela A. Lacey". The signature is written in a cursive, flowing style.

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