



May 27, 2022

Via Regulations.gov

U.S. Army Corps of Engineers
Regulatory Program, Headquarters
441 G Street, N.W.
Washington, D.C. 20314-1000

Re: Comments on Request for Input Regarding the Review of Nationwide Permit 12, 87 Fed. Reg. 17,281 (March 28, 2022) Docket COE-2022-0003

Dear Sir or Madam,

The GPA Midstream Association (“GPA Midstream”) appreciates the opportunity to provide comments in response to the U.S. Army Corps of Engineers (“Corps”) notice regarding the review of Nationwide Permit 12 (“Notice”).

GPA Midstream has served the U.S. energy industry since 1921 and has over 60 corporate members that directly employ more than 60,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids (“NGLs”), refined products and crude oil from production areas to markets across the United States, commonly referred to as “midstream activities.” The work of our members indirectly creates or impacts an additional 320,000 jobs across the U.S. economy. GPA Midstream members recover more than 80% of the NGLs such as ethane, propane, butane, and natural gasoline produced in the United States from more than 380 natural gas processing facilities. In the 2018-2020 period, GPA Midstream members spent over \$90 billion in capital improvements to serve the country’s needs for reliable and affordable energy.

Summary

GPA Midstream acknowledges Executive Order 13990 and thanks the Corps for requesting public input and stakeholder engagement on these important considerations related to any potential future actions on Nationwide Permit (NWP) 12. Our members include companies that frequently use NWP 12 among other general permits, to construct and maintain vital energy infrastructure. These projects are often small in scale and must be constructed quickly to maintain the integrity

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of the nation's infrastructure and to avoid interrupting the nation's supply of natural gas, crude oil, and NGLs and essential products derived therefrom. Midstream companies rely on NWP 12 to keep pace with market needs for natural gas, crude oil, and NGLs, which are now more critical than ever given that the nation's reliable energy supply is threatened by destabilizing effects from global events. These pipelines are also used to transport refined products, and to move raw materials and feedstock used to manufacture materials used in nearly every sector of the U.S. economy. Therefore, the ability to use NWP 12, which eliminates unnecessary delay, costs, and burdens, to cross streams, construct access roads, and maintain infrastructure for pipeline projects is imperative to the mission of GPA Midstream members and to critical supply chains nationwide.

As explained in more detail below, GPA Midstream offers the following comments on the Notice:

- The current five-year cycle for review of Nationwide Permits, including NWP 12, is adequate. NWPs were first issued by the Corps in 1977 (42 Fed. Reg. 37,122) to authorize categories of activities that have minimal adverse effects on the aquatic environment, and are designed for the purpose of streamlining the authorization process for minor activities. GPA Midstream strongly opposes reconsideration of NWP 12 outside of the established five-year Nationwide Permit review cycle. There exists no valid ground within the Corps' jurisdiction to single out for immediate reconsideration NWP 12 among the many NWPs contemporaneously issued in 2021.
- GPA Midstream strongly recommends maintaining NWP 12 in its current form, as the built in protections for its use ensure no more than minimal individual and cumulative adverse environmental effects.
- The Corps sufficiently analyzed environmental impacts prior to reissuing NWP 12 just two years ago. Each NWP includes terms that define limitations of the NWP, and incorporates conditions that place restrictions or limitations on all of the NWPs. A prospective permittee must satisfy all terms and conditions of an NWP. Thus, there is no need to reopen the notice-and-comment process for NWP 12 in such short order. In fact, altering the NWP 12 prior to its five-year expiration would diminish the regulatory certainty that is the foundation for the permit and could establish a precedent reverberating to the detriment of other Nationwide Permits.
- At a minimum, NWP 12 should be maintained for maintenance and repair projects.

Responses to Questions in the Notice

GPA Midstream provides the following comments in response to the Corps' questions in the Notice.

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

No, because the current five-year review cycle for NWP 12 is adequate. No legal reason exists for singling out NWP 12 from the Nationwide Permit program to reconsider it apart from the established review cycle for all Nationwide Permits. GPA strongly opposes any reconsideration of NWP in advance of the current schedule.

The Corps issued the current version of NWP 12 less than two years ago by final rule published on January 13, 2021. This issuance followed a public notice-and-comment process, which addressed the reissuance of Nationwide Permits including NWP 12. 86 Fed. Reg. 2744. During this process, the Corps afforded the public the very same opportunity for public comment that it now seeks through its current notice, as detailed in the 2021 Decision Document for NWP 12. See Decision Document, Nationwide Permit 12 (2021), available at <https://www.regulations.gov/document/COE-2020-0002-0494>. Furthermore, the 2021 Decision Document details factors considered for compliance with applicable laws, responds to public comments, and includes alternatives analysis and assessment of individual and cumulative effects, including potential effects on each of the public interest factors specified at 33 CFR 320.4(a). Reopening the permit reissuance process such a short time later and focused entirely on NWP 12 is not likely to result in meaningful additional feedback, yet doing so carries various risks related to the vitality of the Nationwide Permit program.

Reconsidering NWP 12 shortly after its reissuance would reduce certainty for regulated industries, including for GPA Midstream's members. Project planning and infrastructure development already is time intensive and requires project timelines that rely on existing permitting regimes such as NWP 12. Actions that may reduce the availability of NWP 12 could add a year or more to project timelines. This reduced certainty surrounding general permit usage undercuts Congress' key conclusion in establishing the Nationwide Permit program: that requiring individual permits for routine activities imposes unnecessary delay and administrative burden on the public and the Corps. See 33 U.S.C. § 1344(e); H.R. Rep. No. 830, 95th Cong., 1st Sess. (1977) at 38, 98, 100; 86 Fed. Reg. 2843. And these burdens could increase even further going forward, as the precedent of prematurely reopening NWP 12 could be cited to similarly reopen the public process for other general permits.

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

No, modifications to NWP 12 are not necessary to ensure NWP 12 has no more than minimal adverse environmental effects. The existing process, which applies likewise to the entire

Nationwide Permit program, incorporates appropriate safeguards which protect against projects from having more than minimal individual and cumulative adverse environmental effects.

Considering the use limitations contained in NWP 12, Regional Conditions (RCs) issued for NWP 12, the ability to issue Regional General Permits (RGPs), and the pre-construction notification (PCN) process, the current construction of NWP 12 ensures no more than minimal individual and cumulative adverse environmental effects result from its use.

As a foundational matter, the Corps' general permit authority is limited to the issuance of general permits for discharges of dredged or fill material into the navigable waters, for specific categories of activities with no more than minimal adverse environmental effect. 33 U.S.C. § 1344(e). Typically, pipeline construction utilizes Nationwide Permits for temporary construction activities in jurisdictional areas – at a water crossing, where the pipelines themselves are typically placed below grade with a Corps-specified depth of cover and are not placed within a wetland or waterbody. In addition, the majority of the pipeline construction occurs outside of jurisdictional waters. Thus, generally speaking, the Corps focuses its analysis of environmental impacts on temporary construction activities occurring in jurisdictional waters. This focus is appropriate given the Corps' jurisdiction over such projects and it prevents unduly duplicative analysis of project impacts performed by the appropriate federal or state authority. The Corps does not consider the wisdom of constructing a broader pipeline. A broader analysis of potential impacts from pipeline projects is best conducted by federal or state siting authorities, such as the Federal Energy Regulatory Commission (FERC), or pipeline regulatory authorities, such as PHMSA, and not the Corps. Expanding the review process for NWP 12 would deviate from the Corps' longstanding interpretation of its jurisdiction, which has been that Corps jurisdiction is limited in the Corps' ability to control the siting of a pipeline.

Enlarging the review process would also impose burdens on the public and the Corps that are contrary to the purposes of the Nationwide Permit program as enacted by Congress. The Nationwide Permit program already accounts for circumstances when heightened review may be needed to ensure the use of a Nationwide Permit causes no more than minimal environmental impacts.

- First, each Nationwide Permit, including NWP 12, contains conditions for use which place strict limitations to ensure no more than minimal individual and cumulative adverse environmental effects occur from each use of the permit.
- Second, the Regional General Permit program allows additional, localized conditions to be placed on each use of the permit.
- Third, in circumstances when the Corps has determined a project has the potential to cause more than minimal individual and cumulative adverse environmental effects, pre-

construction notification provides the procedure for heightened review. When an applicant submits a required pre-construction notice under NWP 12, Note 6 requires the applicant to submit a list of all other associated non-PCN crossings. This ensures the District Engineer evaluates whether a particular project might have more than minimal cumulative impacts. The District Engineer may set special conditions or deny the general permit and require an individual permit. See 33 C.F.R. § 325.4(a).

In posing this second question in the Notice, the Corps cites one example of a situation when environmental justice concerns arose and were not addressed by public comment: the now defunct Byhalia pipeline project. This single example of a general permit use is not representative of what GPA Midstream understands to be the overwhelming majority of NWP 12 uses. Indeed, the Corps has previously estimated that over 82% of potential uses of NWP 12, and 97% of potentially impacted acreage, would be subject to pre-construction notification. See Decision Document, Nationwide Permit 12 (2021) at p. 108. These longstanding safeguards have proved sufficient in balancing the statutory purposes of the Nationwide Permit program – reducing the regulatory burden for actions with minimal environmental impacts – with the need to identify and evaluate situations when more than minimal individual and cumulative adverse environmental effects might occur.

The sole example of the Byhalia pipeline project should not dictate the Nationwide Permit process in a manner contrary to Congress’ intent in creating the general permit program. Opening the door for likening the general permit process to the individual permit process would strip the Nationwide Permit program of its required purpose. Nothing per se distinguishes NWP 12 from other Nationwide Permits when it comes to the process for soliciting public comment.

Additionally, in the case of the Byhalia pipeline project, the State was the primary siting authority with the responsibility to determine whether to authorize the project. The state’s regulatory agencies, including the Tennessee Department of Environment and Conservation, should be the primary authorities tasked with conducting the level of review required under state law.

For these reasons, the existing process is sufficient to ensure that uses of NWP 12 have no more than minimal individual and cumulative adverse environmental effects.

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

When the Corps noticed its proposed reissuance of NWP 12 two years ago, it provided the public an opportunity to comment on its proposal prior to adopting the final NWP 12 that is currently in place. Providing public notice and comment at this stage (i.e. notice of proposed

rulemaking) is appropriate and in accordance with the Clean Water Act and Administrative Procedure Act. Once the Corps finalizes NWPs, however, there is no need to solicit public comment prior to its usage. Congress did not envision public notice and comment within the NWP or PCN process for using a general permit. See 33 U.S.C. § 1344(e). Therefore, the Corps should not consider modifications to the NWPs that provide for a public notice and comment prior to their use.

Introducing a process for public notice and comment into the NWP 12 permit process (apart from the five-year review) would upset the statutory purposes of the general permit program as discussed above in Response 1. Congress intended that projects with minimal individual and cumulative adverse environmental effects proceed on an expedited timeframe to reduce the burden on the applicant and the Corps. Notably, the public notice and comment process does not fit within the PCN approval timeline of 45 days. Also, as discussed above in Response 2, the Nationwide Permit program already has safeguards for ensuring projects that might have more than minimal individual and cumulative adverse environmental effects are identified and reviewed by the District Engineer.

More broadly, the current five-year review process for Nationwide Permits provides sufficient opportunities for environmental justice communities as well as other members of the public, to engage with the Corps on important issues by participating in each iteration of the public notice and comment process. This cycle has allowed the Corps to receive input on all types of potential environmental impacts over many iterations of the process. Introducing public notice and comment into the NWP 12 process for using a permit would open the door to requiring this public process for all Nationwide Permits, eviscerating the general permit program.

Moreover, and in particular for maintenance activities that use a general permit, opening the Nationwide Permit process to public input could hamper activities occurring in areas that have changed or developed since the project was originally constructed, where issues might be raised if the project were newly constructed in that same area today. Population growth, social and other changes in some areas could result in objections that would have no impact on the proposed activity, including the existence of an already constructed pipeline in a particular area; however, the reopened public process could hamper the use of a permit for vital maintenance activities on that pipeline. The Corps should not depart from its well-established cycle.

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

Sufficient limits are already in place as discussed above in Response 2, and these limits have proven overwhelmingly effective. There is no need for further changes to the process to

authorize activities with no more than minimal individual and cumulative adverse environmental effects under Section 404 of the Clean Water Act. GPA Midstream's recommendation is that further limits on NWP 12 should not be considered because any additional limits could frustrate the statutory purpose of the Nationwide Permit program as already discussed.

The existing NWP 12 requirements account for both the minimal impacts of projects using this permit and the critical importance of the activities covered by the permit. Additional limitations on the use of NWP 12 would be especially imprudent at this time when the permit is used to bring much-needed energy safely, reliably, and economically to market. For example, in a report issued on May 18, 2022, the North American Electric Reliability Corporation (NERC) warned of potential forced power outages this summer, in part due to supply chain issues. See NERC Announcement, Extreme Weather Heightens Reliability Risks this Summer, *available at* <https://www.nerc.com/news/Headlines%20DL/May%202018%202022%20SRA%20Announcement.pdf>. These supply chain issues are, so far as is relevant to the Notice, due to difficulties with producing and transporting natural gas to end users for power generation. Limitations such as those suggested in the Notice would further impede bringing energy to market at a time when supply is already substantially constrained.

(5) Should distinctions be drawn between new construction of oil and natural gas pipelines and maintenance of existing oil and natural gas pipelines?

No. NWP 12 should remain intact for all activities that may currently be authorized using this permit. The terms of NWP 12 ensure minimal individual and cumulative adverse environmental effects on jurisdictional waters from initial construction or maintenance of a pipeline. The Corps' legal authority and relevant considerations under NWP 12 do not change based on whether the pipeline already exists or extends elsewhere. Overall siting decisions for new construction instead appropriately rest with FERC, pipeline regulatory authorities such as PHMSA, or the state(s) in which the project is located. Notably, NWP 12 also does not and should not specify standards governing pipeline operation and maintenance.

It would be especially unnecessary to require additional review for pipeline maintenance projects beyond the current PCN requirements and RCs, as maintenance projects typically cannot be performed expeditiously or economically using an individual permit. Additional limitations on maintenance activities in this context would hamstring vital work to preserve existing infrastructure, including work necessary to *avoid* operational issues that could impact the environment.

(6) Should distinctions be drawn between oil pipelines and natural gas pipelines, especially in consideration of differences in overall Federal regulation of different types of pipelines?

No, these types of distinctions should not be drawn. In the context of the effects of pipeline construction crossing jurisdictional waters, there is no meaningful difference between oil pipelines and natural gas pipelines to justify drawing a distinction between these activities for NWP 12. Please also refer to GPA Midstream's response in Response 5, above.

In addition to the reasons discussed in Response 5, different regulatory approaches by state and other federal agencies merit against the Corps focusing on differences between types of pipelines. The Corps has limited jurisdiction over these projects, moreover this jurisdiction typically covers only a very small segment of each project – typically construction activities in jurisdictional waters and areas where Section 408 permission may be required. The appropriate regulatory body with authority over project siting or safety standards is better positioned to draw this type of distinction. As mentioned, siting authority generally rests with states, pipeline regulatory authorities such as PHMSA, or FERC. Consistently, Corps regulations provide, at 33 CFR 320.1(a):

- (3) The Corps seeks to avoid unnecessary regulatory controls. The general permit program described in 33 CFR parts 325 and 330 is the primary method of eliminating unnecessary federal control over activities which do not justify individual control or which are adequately regulated by another agency.

...

- (5) The Corps believes that state and federal regulatory programs should complement rather than duplicate one another. The Corps uses general permits, joint processing procedures, interagency review, coordination, and authority transfers (where authorized by law) to reduce duplication.

(7) Does the NWP 12 verification process ensure that environmental justice and climate change factors are adequately considered?

Yes, the NWP verification process ensures these factors are adequately considered. As discussed in Response 3, the current five-year cycle allows for public interest review as specified at 33 CFR 320.4(a). This review includes more than 20 public interest review factors as detailed in the 2021 Decision Document for NWP 12 and appropriately considers environmental justice factors and climate change factors. Projects that use NWP 12, by definition do not have quantifiable adverse impacts on jurisdictional waters, which is the reason these projects may qualify to use NWP 12. The PCN process allows projects with more than minimal individual and cumulative adverse environmental effects – i.e., projects that may involve more than minimal environmental justice or climate change impacts – to be identified and further evaluated. General Condition 23, NWP 12 Note 6, and the Decision Document for NWP 12 also allow for compensatory mitigation where warranted.

(8) Are the PCN requirements for the current NWP 12 adequate?

Yes, the current PCN requirements are adequate. The current “minimal impacts” threshold for PCN under NWP 12 is already a conservative approach to regulation under the Nationwide Permit program. See Decision Document, Nationwide Permit 12 (2021) at p. 108 (estimating that approximately 1,450 out of 8,110 – 82% – of NWP 12 uses will require PCN and that non-PCN uses will impact only 17 acres of jurisdictional waters). These low thresholds require most projects to go through a PCN review; therefore, PCN requirements provide district engineers the opportunity to review proposed activities on a case-by-case basis and determine whether the activities will result in no more than minimal individual and cumulative adverse environmental effects. As detailed in the 2021 Decision Document for NWP 12, the use of this NWP is meant to encourage applicants to design their projects within the scope of the NWP, including its limits, thereby ensuring minimization of adverse impacts to the aquatic environment. Division and district engineers may restrict or prohibit use of this NWP on a regional or case-specific basis if they determine that these activities will result in more than minimal individual and cumulative adverse effects on the aquatic environment. The PCN process has proven effective in identifying and requiring additional review for projects that could have more than minimal individual and cumulative adverse environmental effects (as discussed above in Response 2). Also, the requirements already include an additional PCN trigger for pipelines greater than 250 miles in length (which is an arbitrary trigger insofar as it is based on mileage rather than environmental impacts).

(9) Should there be new triggers for oil or natural gas pipeline activities in jurisdictional waters that mandate review under an individual permit?

No, there should not be any new triggers. Existing limitations serve to identify activities having more than minimal individual and cumulative adverse environmental effects, as discussed above in Response 2. Overwhelmingly, there is no history of incidences involving activities authorized by NWP 12 that could make the application of NWP 12 inappropriate as a general matter.

The Corps lacks resources to review requests in the form of individual permits. Deviating from the current approach to implementing the Nationwide Permit program could have a drastic effect on the Corps’ ability to implement the program in relation to these projects and others. This would run contrary to the statutory purpose of the general permit program to reduce strain on agency resources (discussed above in Response 1). Individual review would also result in the approval process taking multiple times longer. As noted above, the PCN approval timeline is designed to be 45 days or less. In practice, it often takes longer, which means that changes to NWP 12 would place additional burden on each Corps district office in meeting this timeline. The experience of GPA’s members is that the individual permitting process takes over a year, and often much longer. If the Corps is required to devote its resources to individual review of all pipeline

projects, the authorization process would just get longer and delay construction of important energy infrastructure.

Furthermore, under the bipartisan Infrastructure Investment and Jobs Act (IIJ), the United States will be undertaking to timely deliver much-needed infrastructure improvements. This effort will likely require substantial resources across numerous federal agencies and programs, including the Corps regulatory program. In fact, the Permitting Action Plan recently issued by the Administration expressly highlights the need for “[d]eveloping programmatic approaches to permitting and environmental review,” which is the core principle of the Nationwide Permit program. That core principle should be maintained, especially in view of the fact that the burden on the Corps regulatory program may increase rapidly as the bipartisan IIJ is implemented. See The Biden-Harris Permitting Action Plan, at p. 4, *available at* <https://www.whitehouse.gov/wp-content/uploads/2022/05/Biden-Harris-Permitting-Action-Plan.pdf>. As the Corps considers public and stakeholder comments on this Notice, the statutory purposes of the Nationwide Permit program to reduce the burden on the Corps and prospective permittees should feature prominently in the Corps’ analysis, as should the need for accomplishing critical energy projects nationwide.

GPA Midstream appreciates the opportunity to submit these comments in response to the Corps’ Notice to reconsider issues related to NWP 12 and is standing by to answer any questions that the agency may have.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matt Hite".

Matt Hite
Vice President of Government Affairs
GPA Midstream Association