AUSTIN KNUDSEN

STATE OF MONTANA

May 27, 2022

Michael L. Connor
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

ELECTRONIC FILING

Re: Comment of 21 Attorneys General Regarding *Review of Nationwide Permit 12*, 87 Fed. Reg. 17,281 (March 28, 2022) [Docket ID No. COE-2022-0003]

Dear Mr. Connor:

The undersigned Attorneys General of Montana, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming oppose the Corps' proposed review of Nationwide Permit 12 ("NWP 12"). This so-called review won't address the real concerns facing our citizens—prominently, historically high energy prices. It will instead inject unnecessary, duplicative, and inequitable red tape into an already bureaucratically laden process. Far from alleviating our current crisis, the Corps appears poised to take measures that will undermine NWP 12's purpose and further jeopardize the Nation's energy security and prosperity. Rather than re-review NWP 12 for the second time in two years, the Corps should instead return to issuing individual and general permits in accordance with its statutory duty. 33 U.S.C. § 1344.

NWP 12 serves critical energy and infrastructure needs. Within our States, this permit allows entities to perform time-sensitive activities, including construction of new projects and maintenance and repair of existing projects. Altering NWP 12—especially along the lines the Notice suggests—will harm these activities and threaten the delivery of reliable energy, existing pipeline safety, and the ability to comply with other federal laws and regulations.

On March 28, 2022, the Corps requested public comments on a series of nine questions. This Comment addresses each in turn.

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(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.

Reconsidering NWP 12 at this time undermines its very purpose and threatens the continuity of projects operating under it. Congress made clear that NWPs—like NWP 12—should issue for five-year terms. 33 U.S.C. §1344(e). Even the Corps disfavors repeated, frequent reviews of nationwide permits *precisely because* it inflicts regulatory uncertainty upon those conducting activities authorized by the permits. 33 CFR § 330.6(b). NWP 12 streamlines the approval processes for new and existing projects. Its five-year duration directly advances those goals.

The Corps' authority to issue nationwide permits comes from the Clean Water Act (CWA), which prohibits discharge of dredged or fill material into "waters of the United States" without a Corps permit. 33 U.S.C. § 1344(a). While the CWA originally only authorized the Corps to grant individual permits, Congress later created a general permit program to avoid unnecessary delays and alleviate administrative burdens. *See* 33 U.S.C. §1344(e). Both the Corps and the public benefit from the nationwide permit program because it eliminates the requirement of case-by-case review for routine activities with minimal adverse effects—the projects for which individualized review would be a purposeless waste of time. 33 U.S.C. § 1344(e)(1). Nationwide permits advance Congress's goal to regulate these projects with minimal "duplication, needless paperwork, and delays." 33 U.S.C. § 1344(q); *see also* 33 CFR § 330.1(b).

The Corps revisited NWP 12 in 2021. 86 Fed. Reg. 2744. The Corps engaged in public notice and comment, and it considered an Environmental Assessment, a public interest review, and an analysis under Section 404(b)(1)—ultimately concluding in a decision to reissue NWP 12 on January 13, 2021. 86 Fed. Reg. 2841. There are no new circumstances that justify revisiting this permit only a year later. As the Corps has consistently demonstrated, it already complied with the CWA and National Environmental Policy Act (NEPA) in reissuing NWP 12. Another premature review frustrates its purpose and the activities it authorizes.

33 CFR § 330.5 sets forth procedures for "modifying, suspending, or revoking NWPs and authorizations under NWPs." It allows the Chief of Engineers to reconsider NWPs at the request of outside parties. 33 CFR § 330.5(b)(1). It allows division engineers to modify NWPs as to specific regions or waterways. 33 CFR § 330.5(c). And it allows district engineers to modify specific projects. 33 CFR § 330.5(d). But this notice doesn't indicate that outside parties have requested reconsideration, nor does it mention division or district engineers' concerns with specific NWP

authorizations or projects. Instead, it appears to invite both so that it can act quickly to remake NWP 12 according to its policy druthers. Because the Corps provides no explanation for why it seeks these unlimited comments on NWP 12, we are left to conclude that the Administration is once again shopping around for pretextual problems to which it may apply its preordained "solutions." Whatever the motivation, the unrestrained breadth of the comments leaves most commenters unable to meaningfully engage.

Congress intended the nationwide permits to last five years. This proposed rapid-fire *re*-review of NWP 12—barely a year after its most recent reissuance—will destroy the strong reliance interests States and others have justifiably placed on what's supposed to remain operable for several more years.

(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.

When the Corps reissued NWP 12, it was required to—and indeed it did—consider the individual and cumulative adverse environmental effects of the permit under Section 404(e) of the CWA. 86 Fed. Reg. at 2750–51. At the time of the Corps' January 2021 decision, it found that NWP 12 complied with the CWA. *See* Decision Document Nationwide Permit 12, U.S. Army Corps of Eng'rs (Jan 4, 2021). The Corps noted that the NWPs, including NWP 12, "authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects." 86 Fed. Reg. at 2750. And one year later, the Corps maintains this same position, arguing in federal court that it did, in fact, consider the cumulative effects of NWP 12 under Section 404(e), NEPA, and the Endangered Species Act. *See Center for Biological Diversity v. Spellmon*, No. 4:21-cv-47-BMM, Dkt. 60 (D. Mont. Mar. 25, 2022). The Corps' 2021 decision and its present litigation position shows that reconsideration of NWP 12 is unnecessary and duplicative of last year's efforts.

This question also incorrectly suggests that the Corps acts alone in preventing adverse environmental effects under the CWA. States, among others, play vitally important roles in protecting water quality. In fact, States and local agencies undertake rigorous review of projects authorized by NWP 12, providing a crucial environmental safeguard independent of any federal agency. A couple examples suffice to illustrate this point.

Montana

Montana has both constitutional and statutory safeguards in place. Montana's

constitution incudes the right to a clean and healthful environment. MONT. CONST. art. II § 3, art. IX § 1. Its drafters intended it "to be the strongest environmental protection provision found in any state constitution." *Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999). This serves as the guiding principle behind Montana's regulation of oil and natural gas pipelines.

Under Montana's Major Facility Siting Act ("MFSA"), the Montana Department of Environmental Quality must "find and determine … the nature of the probable environmental impact" and confirm "that the facility minimizes adverse environmental impact." Mont. Code Ann. ("MCA") § 75-20-301(1)(b). Prior to that finding, the Department must additionally issue "any necessary air or water quality decision, opinion, order, certification, or permit," *id.* at (1)(g), which in turn requires the Department to consider other relevant environmental laws such as the Montana Water Quality Act. *Id.* § 75-20-216(3); *see also id.* §§ 75-5-101 to -327 (water quality statutes). Montana's administrative rules also govern the Department's siting of facilities. *See* Admin. R. Mont. ("ARM") 17.20.

And then there's the Montana Environmental Policy Act ("MEPA"). *See* 1971 Mont. Laws 238, §§ 1-7. MEPA directs state agencies to "conduct an environmental review of any contemplated agency action that may have an impact on the human environment." *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 401 P.3d 712, 719 (Mont. 2017); *see also* MCA § 75-1-102(1). Much like NEPA, MEPA requires the State to consider a proposed action's adverse environmental effects and reasonable alternatives to the proposed action. *Id.* § 75-1-201. Finally, the Montana Land Board and the Department of Natural Resources and Conservation must approve right of ways on state lands and over navigable rivers. *Id.* §§ 77-2-101 to -107 (easements), 77-1-1109 to -1117 (navigable rivers).

The Corps relies on States like Montana to set their own standards and conditions for projects operating under the nationwide permits. In Montana, the Department of Environmental Quality establishes its own procedures and criteria for state water quality certification applications. ARM 17.30.101. For any federal permit issued in Montana that *might* affect water quality, the Department must issue a Section 401 determination. *See* 33 U.S.C. § 1341; ARM 17.30.103. After review, the Department can deny certification, issue certification, issue conditional certification, or waive certification. *See* 33 U.S.C. § 1341(a); ARM 17.30.105. The State, therefore, conducts a water quality review independent from the Corps', which provides additional layers of oversight for NWP 12 projects.

West Virginia

West Virginia, for example, requires every person to obtain a state-issued permit before that person can "allow sewage, industrial wastes or other wastes, or the

effluent therefrom, produced by or emanating from any point source, to flow into the waters of this state." W. Va. Code § 22-11-8(b)(1). In line with that requirement, West Virginia has a construction general permit specifically applicable to oil and gas projects; that general permit requires compliance with West Virginia's water-quality standards. *See* Va. Dept' of Env't Prot., Oil and Gas Construction General Permit (May 13, 2013), *available at* https://bit.ly/3wLmPwW. While the permit is in place, the State employs a system of continuous monitoring and inspection that confirms a project is not producing environmental harm. *See, e.g.*, *id.* § C.10.

And, like Montana, West Virginia has established its own criteria and procedures for state water quality certification applications. *See* W. Va. Code R. §§ 47-2-1 to -9; W. Va. Code R. §§ 60-5-1 to -8. For all federal permits issued in West Virginia, the federal applicant must apply to the State of West Virginia for certification that the project will comply with these standards and procedures. Just as in Montana, West Virginia can then deny certification, certify the project without conditions, certify the project with conditions, or waive certification. *See* 33 U.S.C. § 1341(a). West Virginia has made aggressive use of its power to ensure that the waters of the State are protected. *See, e.g.*, W. Va. Dept' of Env't Prot., State § 401 Water Quality Certification [as to Mountain Valley Pipeline, LLC] (Dec. 30, 2021), *available at* https://bit.ly/3PD1mid (imposing 31 special conditions on certification of natural-gas pipeline).

All this does not even mention the many other state and local authorities that review oil and gas pipelines in West Virginia for safety and environmental soundness. For instance, the Department of Transportation also imposes permitting requirements on pipelines of the kind subject to NWP 12. *See, e.g.*, W. Va. Dep't of Transp., Memorandum: Oil and Gas Pipeline Requirements (Oct. 1, 2018), *available at* https://bit.ly/38KM8He (describing pipeline permitting requirements, which include specific restrictions on crossing methods and casings). Local authorities all typically require development or improvement permits for pipelines crossing their jurisdictions.

The States (and often other federal agencies) already take a "second look" at NWP 12 projects. Adding an additional layer of review to the Corps' process would be duplicative and further slow the authorization process. Given the fact the Administration suggests these unnecessary changes so soon after its last modification to NWP 12, perhaps that's the point.

(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?

No.

The Corps does not define nor explain what it means by "potentially impacted communities" or "environmental justice communities." *See also* Environmental Protection Agency, "Environmental Justice" (Mar. 23, 2022), https://www.epa.gov/environmentaljustice (explaining generally that environmental justice "is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income"). By way of example, the Corps only observes "that disadvantaged communities in Memphis, Tennessee expressed environmental justice concerns" about a now-defunct pipeline. 87 Fed. Reg. at 17282. But there's nothing preventing those—or any—communities from participating in the normal course, like all other interested citizens, groups, and entities. The Corps also doesn't explain *how* it will provide "notice to and an opportunity to be heard" to these communities. *See also* 86 Fed. Reg. at 2769 (noting that district engineers consider public interest factors). In short, we lack needed context to comment more meaningfully. What's left is the reasonable inference that this special notice-and-comment mechanism would further slow the authorization process and give elevated voice to communities who seek to express anti-authorization viewpoints.

And there's no apparent reason this special notice and comment opportunity for "potentially impacted communities" or "environmental justice communities," should apply only to NWP 12. Are these communities—whatever they are—only affected by NWP 12 but not the other general permits? All individuals and groups may already participate in agency review of oil and natural pipelines. In fact, they routinely participate at the State and local levels through notice and comment as well as litigation. Providing additional opportunities for comment elevates these vague, undefined communities above other individuals, communities, and stakeholders.

(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?

No.

The Corps addressed these very issues when it reissued NWP 12 *last year*. 86 Fed. Reg. at 2769–2773. It determined that "the PCN requirements, general conditions, and the ability of division and district engineers to modify, suspend, and revoke NWP authorizations all help to ensure that this NWP causes no more than minimal cumulative adverse environmental effects at the national, regional, and site scales." *Id.* To the extent there are specific regional concerns, division and district engineers already have the authority to modify, suspend, or revoke NWP authorizations. *Id.*; 86 Fed. Reg. at 2758; *see also* Response to Question 2 (discussing the numerous ways

States are involved in this process).

The Corps determined one year ago that NWP 12 complied with CWA and NEPA, and it maintains this position in litigation to this day. The Corps identifies no changed circumstances or factors that would justify changing this position. Given that, the Corps now seeks to outsource the job of identifying a sufficient rationale to make wholesale changes to NWP 12. Such pantomimist means-shopping appears to be "founded on prejudice or preference rather than on reason or fact." *See Arbitrary*, Black's Law Dictionary (11th ed. 2019).

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

No.

No *principled* reason exists to differentiate between construction and maintenance of oil and natural gas pipelines. The CWA prohibits the discharge of all dredged or fill material into the waters of the United States except where the Corps authorizes such activity. 33 U.S.C. § 1344(a). The CWA, which grants the Corps authority over these projects, does not distinguish between discharge caused by construction and discharge caused by maintenance. Either type of discharge has the same aquatic impact. We can only guess, then, that this artificial distinction comes from this Administration's hostility to new pipelines—the very types of projects the current energy crisis shows us we need.

Distinguishing between construction and maintenance projects would untether NWP 12 from its statutory basis. The CWA treats construction and maintenance projects the same—it gives the Corps authority to issue permits for both. *See* 33 U.S.C. § 1344 (b), (f). The Corps is tasked with establishing guidelines for discharge into Waters of the United States that are similar to the guidelines for discharge into oceans. 33 U.S.C. § 1344(e). Importantly, the ocean discharge guidelines do not distinguish between types of projects but instead focus on the *effects* of those projects. 33 U.S.C. § 1343(c). Similarly, the existing guidelines for nationwide permits focus on the *effects*—not the types—of projects. *See* Decision Document Nationwide Permit 12, U.S. Army Corps of Eng'rs (Jan 4, 2021). The Corps has never distinguished between construction and maintenance projects, and there is no basis to introduce this distinction now.

And without a reasoned explanation for the dramatic shift in regulation, distinguishing between construction and maintenance for purposes of NWP 12 is impermissible. *See FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency "must show there are good reasons for the new policy"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (a policy change requires "a

reasoned analysis"). The Corps fails to explain why the distinction between construction and maintenance projects matters or how it will determine what constitutes each type of project. The Corps previously rejected similar arbitrary distinctions like small versus large streams, 86 Fed. Reg. at 2765, overhead versus underground utility lines, 86 Fed. Reg. 2779, and shellfish seeding activities versus other restoration efforts, 86 Fed. Reg. at 2796. The Corps should similarly reject this arbitrary distinction between construction and maintenance.

(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.

The Corps already distinguishes between different types of utility line activities. Just last year, the Corps split NWP 12, which previously covered all utility line activities, into three permits. 86 Fed. Reg. at 2769. NWP 12 covers oil and natural gas pipeline activities. NWP 57 covers electric utility line and telecommunications activities. And NWP 58 covers utility line activities for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. *See generally* 86 Fed. Reg. 2744. The Corps noted that this trifurcation was necessary to minimize the regulatory burden and "fulfill the objective of the NWP program." *Id.*

To the extent there are differences in oil and natural gas pipelines, these differences are based on the substances flowing *inside* them. But the Corps' substantive authority only covers the discharge of dredged or fill material into Waters of the United States. 33 U.S.C. § 1344. This means that when a party wants to discharge certain materials into waters of the United States or otherwise work or build structures in these waters, the Corps must first grant permission. But the Corps does not get to micromanage the projects—it only gets to consider the effects of the projects on the waters of the United States. *Id.* Thus, the Corps lacks the authority to regulate the substances flowing inside the pipelines. *See id.*; 86 Fed. Reg. at 2780 (explaining the Corps lacks "authority to regulate the substances being conveyed by th[e] utility lines"). To the extent this question suggests that the Corps may differentiate between oil and natural gas pipelines, such an exertion would likely exceed the authority provisioned by Congress, in violation of the Administrative Procedure Act. 5 U.S.C. §706(2)(C).

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

To the extent environmental justice and climate change factors are within the Corps' statutory jurisdiction and control, the Corps already considers them at the appropriate time. The Corps may already suspend, modify, or revoke authorizations for the public interest. 33 CFR § 330.1(d); *see also* 33 CFR § 320.4(a)(1) (discussing public interest factors). It is not a general regulator of all climate issues, and considering these issues during the verification process goes beyond the Corps' statutory authority. *Cf. Wyoming v. U.S. Dept' of* Interior, 493 F. Supp. 3d 1046, 1071 (D. Wyo. 2020) ("Minimizing greenhouse gas emissions to combat global climate change, no matter how noble, is not a reasonable interpretation of BLM's statutory authority."); *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 460 (D.C. Cir. 2017) ("Congress's failure to enact general climate change legislation does not authorize EPA to act" or "fill that legislative void"). Because the Corps doesn't define what it means by "environmental justice" and "climate change" factors, and hasn't provided any examples or explanations, this question precludes meaningful comment. But to the extent the Corps is seeking broad authority over climate change issues, this falls outside the scope of its statutory authority, which only permits the Corps to regulate the discharge of dredged or fill material into Waters of the United States. 33 U.S.C. § 1344.

If the Corps actually possessed the authority it suggests it might have, it already adequately considers environmental justice and climate change factors at the appropriate time. In fact, it did so in 2021, when the Corps considered both climate change and environmental justice. 86 Fed. Reg at 2755, 2859. The Corps concluded that the NWPs—including NWP 12—"are not expected to have any discriminatory effect or disproportionate negative impact on any community or group, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities." 86 Fed. Reg. at 2859. It curiously appears that the Corps was displeased with the conclusion derived from all the relevant evidence just last year. Jonesing to revisit that conclusion only one year later by soliciting new "evidence" that might change the result this time around is inappropriate. And it suggests that any future alteration of NWP 12 along the lines suggested in this question would be patently pretextual.

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

Yes. *See* Response to Question 4. As the Corps noted one year ago, the PCN requirements are sufficient, and State and local processes provide additional safeguards. *See* Response to Question 2.

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

No.

A trigger requirement will skew incentives and frustrate Congress's intent. Congress established programs for both individual and general permits. 33 U.S.C. § 1344. Individual permits require a resource-intensive, case-by-case review, and they require both site- and permit-specific documentation and public comment. *Id.* By comparison, the general permits allow certain projects to move forward without these administrative encumbrances. Creating a new trigger system would blur the statutory distinctions between the two classes of permits and contradict the statutory provisions covering general permits.

Categorically forcing certain oil or natural gas pipeline projects into the individual permit process by category is an unnecessary additional burden, delaying important projects for the sake of delay—not the environment. The Corps approved NWP 12 in 2021. Since this approval, neither the law nor the relevant facts have changed. The Corps should stay the course and allow the general permit program to work for the duration of its five-year term.

CONCLUSION

As the Corps has repeatedly stated, NWP 12 complies fully with the dictates of the CWA and NEPA. The only changed circumstances have been a worsening economy and rising energy costs. But rather than address those concerns by easing regulatory burdens, the Biden Administration again seeks to make it harder to construct and maintain minimal impact projects. The reality is that energy prices are high. Inflation is on the rise. And our citizens are struggling to make ends meet. More regulatory obstacles for new and existing energy projects—and modifications to NWP 12—are unnecessary at this time. And any modifications along the lines suggested by the Corps' articulated questions would be disastrous for our States and residents. This Notice seeks to solve problems that do not exist, alter a regulatory scheme that is working well, and upend projects upon which our citizens rely.

The Corps should not initiate a review of NWP 12.

Sincerely,

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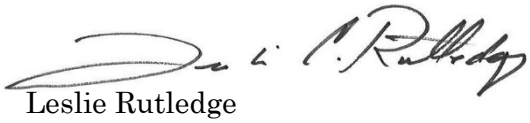

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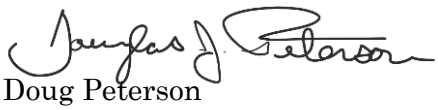

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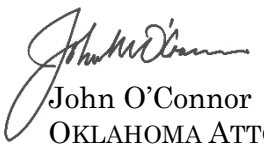

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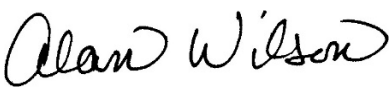

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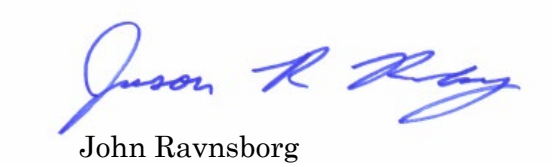

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