



October 18, 2017

Via email: CorpsRegulatoryReview@usace.army.mil

Headquarters
U.S. Army Corps of Engineers
Attn: CECW-CO-N (Ms. Mary Coulombe)
441 G Street N.W.
Washington, DC 20314-1000

Re: Comments on Docket No. COE-2017-004—U.S. Army, Corps of Engineers Subgroup to the DoD Regulatory Reform Task Force, Review of Existing Rules

Dear U.S. Army, Corps of Engineers Subgroup to the DoD Regulatory Reform Task Force:

Pursuant to the notice issued by the United States (“U.S.”) Army, Corps of Engineers (“Corps”), 82 Fed. Reg. 33,470 (July 20, 2017) (“Federal Notice”), the American Petroleum Institute (“API”) and the Association of Oil Pipe Lines (“AOPL”) hereinafter “the Associations,” respectfully submit these comments¹ to the Subgroup to the Department of Defense (“DoD”) Regulatory Reform Task Force on existing regulations that may be appropriate for repeal, replacement, or modification to alleviate unnecessary regulatory burdens as specified under Executive Order 13777.²

The Associations support the Corps’ regulatory reform efforts, and recommend that the Corps focus on efforts to streamline its regulatory requirements in ways that protect the environment and promote transparency while increasing the clarity, certainty, and timely decision-making needed for effective investment decisions. As part of the overall regulatory reform effort, we also support the Corps and the U.S. Environmental Protection Agency’s (“EPA”) effort to rescind and replace the 2015 rulemaking on the Waters of the U.S.³ We will be providing separate comments on that rulemaking also.

¹ 82 Fed. Reg. 43,314, Sept. 15, 2017 (Comment period extended to Oct. 18, 2017).

² Executive Order on Enforcing the Regulatory Reform Agenda, Feb. 24, 2017.

³ 82 Fed. Reg. 34,899, July 27, 2017. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,053, June 29, 2015 (“2015 Waters of the U.S. Rule”); and API comments on the proposed Waters of the

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers. Many of these development projects which help our industry domestically produce and deliver oil, natural gas, and natural gas resources depend on permits issued by the Corps. Furthermore, as you know, API and its members have been constructive participants in the EPA and the Corps' development of key Clean Water Act ("CWA") regulations (including Nationwide Permits ("NWPs")) which affect the oil and natural gas industry.

AOPL is a nonprofit national trade association that represents owners and operators of oil pipelines across North America before state and federal agencies, legislative bodies, and the judiciary, and educates the public about the vital role oil pipelines serve in the daily lives of Americans. AOPL members bring crude oil to the nation's refineries and important petroleum products to our communities, including all grades of gasoline, diesel, jet fuel, home heating oil, kerosene, propane, and biofuels, through pipelines that extend approximately 211,150 miles across the United States. These pipelines safely, efficiently, and reliably deliver approximately 14.9 billion barrels of crude oil and petroleum products each year. AOPL strives to ensure that the public and all branches of government understand the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable, and cost-effective method of serving energy consumption demand.

I. RECOMMENDATIONS

We applaud the Corps' efforts to undertake a much-needed hard look at regulatory reform throughout its extensive program areas. We have taken a careful review of the Corps' regulations and processes as it affects the oil and natural gas industry, and we have compiled a comprehensive list of recommendations with in-depth discussion and helpful examples for your consideration.

Overall, the Corps and the EPA's focused efforts on regulatory reform efforts to rescind and potentially replace the 2015 Waters of the U.S. Rule is a shared priority for us. Also, for the oil and natural gas industry, the NWP program serves the important purpose of creating a streamlined process for authorizing pre-approved categories of activities that result in minimal environmental impacts. It is imperative that the NWP program applies rules and permit conditions consistently, operates efficiently, and issues authorizations for activities in a timely

U.S. Rule filed November 14, 2014. Available at: <http://www.api.org/news-policy-and-issues/letters-or-comments/2015/02/05/letter-claff-emmert-to-epa-regarding-us>.

manner. Similarly, we include several recommendations for 33 CFR Part 320 as relating to the general regulatory policies including the need for improved coordination among the Corps Districts, greater timeliness of decisions, and more effective cross-agency coordination during project review and approval process. We also recommend that the Corps clarify in its rules and guidance that the National Environmental Policy Act (“NEPA”) should not be expanded beyond the authority and jurisdiction of the Corps.

We also provide several common sense types of recommendations that can be implemented without regulatory changes but would reduce Corps workload, and provide consistency and certainty to the permitting process. Of note, we recommend that the Corps create a comprehensive database of Corps real estate interests, develop a national and/or regional in-lieu fee mitigation program, and develop a shortened authorization process for “minor 408s.”⁴

Our recommendations are outlined in the table below, which also provides the page number where each item is addressed. Detailed discussion of each recommendation is provided in the text following the table.

Table: Comprehensive List of Recommendations for Corps’ Regulatory Reforms

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	3. Reviews (including cross-agency consultations) should be streamlined in ways that are effective and continue to ensure safe resource development.	p. 11
	4. Practical issues relating to implementation of any regulatory reform should be fully evaluated and	p. 12

⁴ Section 14 of the Rivers and Harbors Act of 1899 authorizes the Corps to grant permissions to other entities for the permanent or temporary alteration or use of certain public works. 33 U.S.C. Section 408. This program is referred to as “Section 408.” See further discussion on “minor 408s” below.

	enhanced as needed.	
	5. Corps regulations should be issued or modified without any reference to the stayed 2015 Waters of the U.S. Rule and should rely on the pre-2015 Waters of the U.S. Rule. ⁵	p. 12
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33 CFR part 207—Navigation Regulations	1. Update language to remedy concerns with rivers and locks.	p. 14
33 CFR Part 230—Procedures for Implementing NEPA	1. Revise language to adopt appropriate categorical exclusions utilized by other agencies for NEPA.	p. 14
	2. Clearly define the scope of Environmental Impact Statement (“EIS”), if required, for an Environmental Assessment (“EA”).	p.14
	3. Revise to clarify that NEPA should not be expanded beyond the authority and jurisdiction of the Corps.	p. 15
	4. Increase staff training concerning categorical exclusions for uses in flowage easements.	p. 16
33 CFR Part 279—Resource Use: Establishment of Objectives	1. Modify language to also include input from mineral owners and the private sector to facilitate multiple-use management on Corps property.	p. 16

⁵ 51 Fed. Reg. 41,250, Nov. 13, 1986, as amended at 58 Fed. Reg. 45,036, Aug. 25, 1993 (applicable to 33 CFR Part 328) is referenced in this document as “Pre-2015 Waters of the U.S. Rule.”

33 CFR Part 320— General Regulatory Policies	1. Improve coordination among Corps' districts.	p. 17
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	4. Take steps to facilitate parallel processing of permits, permissions, and other authorizations.	p. 19
	5. Consider options to use limited human resources more effectively.	p. 19
	6. Consider specifying a minimum size for jurisdictional wetlands.	p. 20
	7. Improve consistency among the Corps Districts on interpretation and implementation of mitigation requirements.	p. 20
	8. Streamline Section 408 permitting by placing the permit directly under Section 408 review if warranted.	p. 21
	9. Expedite processing of “minor 408” permits within a 30-45 days time frame.	p. 21
	10. Institute a decision-making timeline for funded projects.	p. 22
33 CFR Part 322— Permits for Structures or Work In or Affecting Navigable Waters of the United	1. Revise the rule to exclude permitting for features that are not reasonably expected to affect navigable waters.	p. 22

States		
33 CFR Part 323—Permits for Discharges of Dredged or Fill Material into Waters of the United States	1. Add language to clearly demarcate minor discharges.	p. 23
33 CFR Part 325—Processing of Department of the Army Permits	1. Authorize work to proceed for Regional General Permits (“RGPs”) and Programmatic General Permits (“PGPs”) if the Corps has not issued an authorization within 120 days of receipt of a completed application, provided certain criteria are met.	p. 23
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	5. Clarify requirements on what constitutes a complete application for a Section 404 permit.	p. 25
	6. Update current regulations at 33 CFR Part 325, Appendix C to incorporate guidance previously issued by the Corps in 2005 and 2007.	p. 25
33 CFR Part 327—Public Hearings	1. Consider appropriate ways to streamline the notice and public comment periods without overly extending hearing times.	p. 26

33 CFR Part 328— Definition of Waters of the United State	1. Add language to the tributary definition clarifying that short-term flow after precipitation-related events does not constitute a tributary.	p. 27
33 CFR Part 330— Nationwide Permit Program	1. Establish an initial 15-day completeness review window for PCNs, within which the Corps would notify applicants whether their application was complete or incomplete.	p. 27
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	7. Specify that the definition of “isolated waters” in 33 CFR Section 330.2(e) will be consistent with any future rulemaking related to Waters of the U.S.	p. 30
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	9. Amend GC 18 to provide for a more streamlined Section 7 consultation process.	p. 31
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	13. Remove the 2017 NWPs language in GC 32 relating to Pre-Construction Notification (“PCN”) submittal requirement for linear projects and revert back to the 2012 language. ⁶	p. 34
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	15. Modify NWPs 12 and 14 to provide consistency in the treatment of pipeline abandonment.	p. 35
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⁶ 82 Fed. Reg., 1,860, 1,876, Jan. 6, 2017 (“2017 NWPs”).

	acre limits for NWP 39.	
	20. Modify 33 CFR Section 325.2(b)(ii) and other applicable regulations to clearly reflect statutory requirements relating to review periods for states to issue Section 401 water quality certifications. ⁷	p. 38
	21. Revise 33 CFR Part 330 to include additional explanations and examples on the intended uses for the NWP program.	p. 39
33 CFR Part 331—Administrative Appeal Process	1. Amend 33 CFR part 331, Appendix C and related guidance to lengthen the time frame upon which approved jurisdictional determinations (“AJDs”) can be relied.	p. 39
	2. Require the Corps and the EPA to process requests for all jurisdictional determinations (“JDs”) within prescribed time frames.	p. 40
	3. Require the Corps to accept information obtained remotely for wetland delineations and JDs—particularly if there is a lack of site access.	p. 41
33 CFR Part 332—Compensatory Mitigation for Losses of Aquatic Resources	1. Develop a national or regional in-lieu fee mitigation program to remedy the lack of mitigation banks or in-lieu fee programs in certain service areas.	p. 41
Other Reforms	1. Create a publicly accessible database of Corps’ real estate interests.	p. 42

⁷ See also 33 CFR Section 336.1(b)(8) for procedures relating to water quality certifications.

II. GENERAL COMMENTS

The oil and natural gas industry remains committed to regulatory structures that promote safety, environmental protection, and responsible operations, and it continues to look for ways to facilitate efficient regulatory processes. In particular, we appreciate the recent efforts by Congress to pass the Fixing America's Surface Transportation ("FAST") Act⁸ and the President's executive orders to streamline review of pipeline projects and regulatory reform. We look forward to working with Congress and the Administration as details of these initiatives develop. There are many other opportunities for regulatory reform and we welcome the opportunity to comment on efforts by the Corps to advance this initiative to alleviate unnecessary regulatory burdens.

1. Sound permitting processes are essential to U.S. energy security.

Sound permitting practices are not only in the best interest of the environment, but also U.S. energy security. As historian Daniel Yergin posits, "[p]olicies related to access to energy and its production can have major impact on the timeliness of investment and the availability of supply—and thus on energy security."⁹ From past experience, the Corps understands this link well. Effective measures to enhance energy security in particular include efficient and timely permitting processes. Undue delays and burdensome permitting processes create uncertainty and further obstacles to attracting investment for needed energy infrastructure. Ultimately, the added cost and delay harms not only the project sponsor, but also hinders access to affordable energy for everyday consumers and businesses.

2. Certainty and clarity are both essential to investment.

More than anything else, for producing oil and natural gas and for planning the construction and/or expansion of energy infrastructure projects, our members need certainty and consistency in the regulatory and permitting processes. When it comes to long-term investment, pipeline operators, for example, typically look at 10-year, 20-year, or 30-year planning horizons.

Clarity regarding permit terms is essential because ambiguity can result in unintended consequences. For example, if the 2015 Waters of the U.S. Rule had not been placed under nationwide stay, the rule's lack of clarity would have resulted in longer and more expensive consulting evaluations to determine which projects qualify for expedited permitting. This has the potential to adversely impact upstream oil and natural gas development projects, linear projects

⁸ Pub. L. No. 114-94.

⁹ Yergin, D, "The Quest: Energy, Security, and the Remaking of the Modern World," New York: Penguin Press, 2011, p. 329.

like midstream pipelines, and downstream facilities. Furthermore, this causes an increase in staff time and expenditures for Corps staff charged with making the necessary determinations.

In terms of prioritizing permitting reforms, we encourage the Corps to consider those policies which give companies the confidence to invest in infrastructure projects and to be able to bring these vital projects to completion in a timely manner.

3. Reviews (including cross-agency consultations) should be streamlined in ways that are effective and continue to ensure safe resource development.

It is paramount that federal and state agencies continue to streamline and synchronize their separate reviews and permitting processes and decisions, while being held accountable for following established permitting activities and deadlines. The reforms that facilitate and expedite the interagency review process will help improve investor confidence. Too often this process is a roadblock to building needed infrastructure, potentially requiring numerous permits and approvals at the federal level to construct or repair a pipeline – and each of these decisions can be subject to bureaucratic delay. This obviously impedes the ability of the industry to get oil and natural gas to market, which ultimately harms U.S. consumers and businesses. Streamlining the entire federal permitting process is imperative to our domestic energy security.

While cross-agency consultations are a part of statutory requirements, they can also be another cause for unreasonable delays and further review and modifications of the underlying processes can help alleviate unwarranted regulatory burdens. A key source of concern to the oil and natural gas industry is the consultation process under Section 7 of the Endangered Species Act (“ESA”) as required for the issuance of certain dredge and fill permits (“Section 404 permits”) by the Corps.¹⁰ While we understand there are legal requirements for agency consultation under the ESA, delays are caused by Section 7 consultation due to a number of factors including ineffective coordination between the two agencies, the protracted pace of the U.S. Fish and Wildlife Service’s (“FWS”) analysis on critical habitat designations as related to listed threatened and/or endangered species, and litigation and court decisions limiting review of projects in their entirety.

Based on our experience, we also believe that in many cases, FWS is provided all necessary information to conduct the required analysis and yet, the consultation process is far too prolonged. Further, Section 7 consultation can cause delays because FWS often seeks to require the permit applicant to commit to unreasonable mitigation requirements without regard to separate and potentially conflicting requirements under state law, or to mitigation requirements beyond the footprint of the project being proposed. Often this approach persists even though the

¹⁰ 16 U.S.C. Section 1536 (“Section 7 consultation”). Section 7 consultation process can also include the National Marine Fisheries Service (“NMFS”) for marine species where similar concerns exist.

permit applicant has volunteered to implement alternative and more feasible approaches to mitigation. The Section 7 consultation process cannot be sustained in its current state and urgently needs to be improved.

Although we recognize there are key concerns primarily with the FWS' consultation process, we recommend that the Corps evaluate alternatives to help reach a resolution. For example, the Corps should consider advancing a permit if FWS does not provide its consultation within a pre-determined timeline (e.g., 60 days).

4. Practical issues relating to the implementation of any regulatory reform should be fully evaluated and enhanced as needed.

While evaluating regulatory reforms, the Corps should consider appropriate staffing and funding levels to make sure the regulations are carried out in the manner intended. Streamlining of permit processes in the rules will lead to greater efficiency. However, in order to meet specific time limits for review and processing times, adequate staffing and funding need to be provided.

The lack of funding in certain programs also leads to ineffective regulation. The Corps must ensure that the nation's ports are maintained adequately and shipping channels are sustained at authorized depth 365 days a year. Furthermore, there must be safeguards in place to protect the taxes paid into the Harbor Maintenance Trust Fund so that the money is used to support the nation's maritime infrastructure.

5. Corps regulations should be issued or modified without any reference to the stayed 2015 Waters of the U.S. Rule and should rely on the pre-2015 Waters of the U.S. Rule.

Critical definitions in various Corps regulations rely on the term "waters of the United States" and related concepts are raised numerous times by the regulations outlined in the Corps' regulatory reform effort.

However, the term "waters of the United States" is far from clear. The 2015 Waters of the U.S. Rule is currently the subject of a nationwide stay, pending litigation.¹¹ Subsequently, the EPA and the Corps, under the previous Administration, issued a Litigation Statement stating that "[i]n response to this decision, the EPA and the Department of Army ("DA") resumed nationwide use

¹¹ As stated in the U.S. Court of Appeals for the Sixth Circuit decision that stayed the 2015 Waters of the U.S. Rule nationwide, "*the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being.*" [emphasis added.] State of Ohio, et al v. United States Army Corps of Engineers, et al, Nos. 15-3799/3822/3853/3887, Oct. 9, 2015.

of the agencies' prior regulations defining the term "waters of the United States."¹² In 2017, following an executive order,¹³ the EPA and the Corps are attempting to rescind the 2015 Waters of the U.S. Rule.¹⁴ A series of outreach meetings are scheduled for stakeholders to express their views on a potential replacement. Under the current hearing schedule, it is also highly unlikely that any final legal determinations of the 2015 Waters of the U.S. Rule will be made at the outset of the Corps' regulatory reform efforts.

Therefore, beyond the aforementioned rescission and potential replacement effort that the Corps is conducting jointly with the EPA, the Corps should not include any prescriptive conditions, concepts, or procedures associated with Waters of the U.S. in its regulatory reform efforts.

Regulated entities need certainty in being able to utilize these permits for their public and commercial activities, and efforts toward streamlining permitting processes will be useful while the term "waters of the United States" is under evaluation through parallel rescission and replacement efforts.

II. COMMENTS ON SPECIFIC REGULATIONS

The following comments and recommendations as related to certain Corps regulations and processes are of specific interest to the oil and natural gas industry.

A. 32 CFR Part 644—Real Estate Handbook

1. Revise language in the Real Estate Handbook to clarify the Corps' authority over minerals.

The existing language in 32 CFR Part 644 appears to override state authority to regulate fee minerals. This can result in the inability to economically develop some minerals and could be construed as a "taking."

We recommend modifying the language in the Real Estate Handbook to state that the Corps' regulatory authority is only present on minerals where it has ownership of a formal or subsurface easement.

¹² Clean Water Rule Litigation Statement, available in the EPA web archive at <https://archive.epa.gov/epa/cleanwaterrule/clean-water-rule-litigation-statement.html>.

¹³ Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, Feb. 28, 2017.

¹⁴ 82 Fed. Reg. 34,899, July 27, 2017.

B. 33 CFR Part 207—Navigation Regulations

1. Update language to remedy concerns with rivers and locks.

Corps regulations pertaining to river and lock systems and the Mississippi River systems do not address difficulties in maneuvering a ship in the lower regions due to changes in the direction of the river. 33 CFR Section 207.300 discusses operations during high water and floods; however, specific direction is not provided, especially for the lower regions of the Mississippi River.

We recommend the following modifications: a) additional language addressing traffic conditions at river bends as ships approach the lock systems for this section; and b) additional language addressing the operations of the river and lock systems in the Gulf of Mexico region during hurricane season.

While we recommend that the Corps refrain from any regulatory changes prior to the completion of the Administration’s rescission and potential replacement efforts, we also recommend that with any potential redefinition of the Waters of the U.S., 33 CFR Section 207.800’s references to the “Navigable Waters of the United States” and “high water mark” should be updated and aligned.

C. 33 CFR Part 230—Procedures for Implementing NEPA

1. Revise language to adopt appropriate categorical exclusions utilized by other agencies for NEPA.

The existing categorical exclusions provide limited exclusion from NEPA and result in unduly burdensome requirements for routine actions. Lack of appropriate NEPA categorical exclusions slows projects down and increases cost to develop oil and natural gas.

We recommend revising the Corps language to adopt the categorical utilized by other agencies such as the U.S. Department of Agriculture Forest Service or the U.S. Department of Interior.¹⁵

2. Clearly define the scope of EIS, if required, for an EA.

Existing guidance on EAs provides documentation for determining whether to prepare an EIS or a Finding of No Significant Impact (“FONSI”). As soon as the decision is made to prepare an EIS, the Corps District as the lead agency initiates a scoping process but there is no intermediate step where a well-defined scope document is released in the process. A clearly specified scope

¹⁵ See for example 43 CFR Section 46.210 and 36 CFR Section 220.6(d) and (e).

document would provide a concrete timeline for the review and would help the permittee plan for the project in terms of estimating costs and use of resources.

We recommend that the Corps modify the guidance to provide for an additional step where a scope document is released when the Corps is the lead agency for a NEPA review and ensure that the EIS that is being generated does not undergo changes in scope as the study progresses. Once consensus is reached and the scope document is finalized, the Corps-led NEPA review should follow the defined scope and timeline without a mechanism for change during the review except for narrowly-defined extenuating circumstances.

3. Revise to clarify that NEPA should not be expanded beyond the authority and jurisdiction of the Corps.

By rule, the Corps limits its NEPA review to areas over which the Corps itself has “sufficient control and responsibility.”¹⁶ Unfortunately, the Corps has not applied this rule consistently to the question of whether the Corps must analyze upstream or downstream greenhouse gases (“GHG”) emissions from proposed projects. Now, the federal agencies have received clear direction from the Administration with the issuance of an executive order that amongst other things, directed the Council on Environmental Quality (“CEQ”) to rescind its guidance for federal departments and agencies on the consideration of GHG emissions in NEPA reviews.¹⁷ The CEQ in turn withdrew its final guidance on GHGs and the effects of climate change in NEPA reviews.¹⁸ The Corps should make clear that its NEPA reviews comply with the presidential directives and also, that the Corps will apply NEPA reviews consistently across its Corps Districts. At the very least, the Corps must not assess upstream or downstream GHG emissions from activities that are not part of the permitted project and are outside of the Corps’ control and responsibility. The Corps should make this clarification through rulemaking (e.g., adding another example in this section and/or to the Corps’ NEPA rules located in 33 CFR Part 325 Appendix B, NEPA Implementation Procedures for the Regulatory Program) and through any applicable official agency guidance.

We recommend that the Corps revise these sections and/or 33 CFR Part 325, Appendix B, to clarify that NEPA should not be expanded beyond the authority and jurisdiction of the Corps, and similar changes should be made to any applicable guidance. That is, NEPA review should

¹⁶ 33 CFR Part 325 App. B Section 7(b)(1) states: “The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.” 33 CFR Part 325 App. B Section 7(b)(2) states: “The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.”

¹⁷ Executive Order on Promoting Energy Independence and Economic Growth, Mar. 28, 2017.

¹⁸ 82 Fed. Reg. 16,576 (Apr. 5, 2017).

not be expanded to areas such as climate change, fossil fuel production and usage, and inclusion of entire project area or project length for NEPA analysis.

4. Increase staff training concerning categorical exclusions for uses in flowage easements.

Existing categorical exclusions allow for certain uses in flowage easements. However, based on our experience, the Corps Districts do not appear to consistently apply categorical exclusions. Applying categorical exclusions as appropriate decreases the Corps time required for easement approval, as well as overall costs. Denial of an easement can substantially increase costs or strand a project.

We recommend that the Corps provide increased training of staff on these topics.

Existing categorical exclusions allow for utility lines in flowage easement, but based on our experience, the Corps Districts do not appear to apply this exclusion to pipelines. The regulatory burden increases the time required for easement approval, as well as costs.

We recommend the Corps modify language to clearly exclude pipelines in flowage easements from NEPA requirements.

D. 33 CFR Part 279—Resource Use: Establishment of Objectives

1. Modify language to also include input from mineral owners and the private sector to facilitate multiple-use management on Corps property.

The current Corps policy provides for input from the residents of a region, but does not provide for input from mineral owners, who may reside outside the region. This can result in land use management plans and other decisions that do not take into account the perspectives of mineral owners.

We recommend the Corps modify language in the rule to include input from mineral interest owners, and the private sector when establishing resource use objectives. This will ensure that multiple-use management is applied on Corps property.

E. 33 CFR Part 320—General Regulatory Policies

This section applies to several key programs including Section 404 permitting and Sections 9 and 10 of the Rivers and Harbor Act of 1899. We provide the following comments of specific interest to the oil and natural gas industry.

1. Improve coordination among Corps Districts.

We propose that the Corps consider measures to improve coordination among the Corps Districts and Divisions. While the Corps' is a decentralized organization, the Associations believe this has resulted in too much variability among the Corps Districts. Changes in Corps policy are implemented at the Corps District level with variability in timing and details, which interferes with project timeline planning. Inconsistencies in regulatory interpretation and application among the Corps Districts is of particular concern on projects that cross multiple Districts, such as linear projects.

Moreover, the NWP program is not being administered uniformly among the Corps Divisions and Districts. In the case of extensive linear projects like pipelines, multiple divisions within one Corps District may manage administrative programs that may apply to pipeline construction and operation activities. For example, a utility line construction project may require a Section 404 permit related to impacts on Waters of the U.S., a Section 408 permit resulting from potential impacts to a Corps civil works project, and a Corps Real Estate Outgrant, if the project impacts Corps real estate interests. It is our experience that the Corps Divisions within certain Corps Districts manage these programs independently, with little coordination, even though the permit applications for each program seek the same or similar information, and involve similar environmental impact assessments. Further, each program has its own procedures and time frames for processing the applications under its jurisdiction. The overlap in administrative processes can create a significant burden on utility project proponents.

Notwithstanding certain Corps Districts with unique physiographical characteristics, we recommend that the permitting process be streamlined for individual permits, general permits, regional standard permits, and for NWPs, as appropriate.¹⁹ Further, the Corps should consider identifying a division level or headquarters permitting coordinator that could coordinate processing and permits for projects that cross multiple districts or divisions, as well as implement a single form of application managed by a central permit coordinator. The Corps can also promote greater efficiencies by encouraging the use of general and multi-sector permits wherever possible and look for opportunities to expand the use of these permitting processes, as this is the quickest and most logical way of streamlining consistent permitting. The Corps should also develop a more systematic process that eliminates redundant steps and facilitates cross-agency communication and agreements where appropriate.

We recommend that the Corps improve consistency by revising 33 CFR Section 320.1(a) to include a provision stating that in changed policies enacted through Engineering Circulars (ECs) or other guidance, the Corps will publish notice and, to the extent consistent with law,

¹⁹ See specific discussion below regarding Alaska Corps District and parallel permit processing.

incorporate reasonable timelines for implementation that will: a) support greater consistency in the implementation across the Corps Districts; and b) reasonably allow the regulated community to incorporate such changes in project planning.

2. Consider ways to improve cross-agency coordination during project review and approval.

As discussed above, the Corps cannot solve this issue of effective cross-agency coordination alone under its regulations, but given that relevant agencies are currently undertaking regulatory reform initiatives, there is an opportunity for collaboration and for improving existing coordination processes.

We recommend that the Corps includes in its regulatory reform agenda, cross agency coordination with other relevant agencies and rule modifications that will support the Corps' streamlining objectives. As discussed further in this letter, we also recommend providing specific time frames for coordinating with other commenting agencies (EPA, FWS, NMFS, tribal governments, state governments etc.).

3. Improve the timeliness of decisions.

33 CFR Section 320.1(a)(4) provides that “applicants are due a timely decision” and that “[r]educing unnecessary paperwork and delays is a continuing Corps goal.”²⁰ The Corps plays a substantial role in infrastructure development because linear projects commonly implicate one or more Corps programs. While the Associations recognize that the Corps’ resources are spread thin, we emphasize the importance of implementing steps to facilitate the timeliness of decisions. Taking such measures as creating a critical path timeline upfront, and setting mandatory permittee and Corps coordination, would help structure processes and avoid delays.

One notable example where timeliness can be improved is with regard to the inefficiency of the consultation process and the Corps’ failure to conclude the Section 106 consultation with tribal governments in the time period stipulated in the Corps’ regulations and guidance.²¹ The current consultation process adds time, uncertainty, and inefficiency to the permitting process.

The Associations recommend that the Corps consider allowing the permittee to attend the Corps/tribal government consultations, to allow the permittee to better understand tribal concerns and perhaps address them during agency consultations, which would help to eliminate much delay and inefficiency in the process that results from the long back and forth correspondence between the Corps, tribal governments, and the permittee.

²⁰ 33 CFR Section 320.1(a)(4).

²¹ See discussion above on Section 7 consultation process also.

4. Take steps to facilitate parallel processing of permits, permissions, and other authorizations.

As discussed above, multiple Corps authorizations can be required for a single project with staff from entirely different sections of the Corps working on separate approvals with little coordination. For example, a project that includes oil or gas pipelines to cross Corps land and non-Corps land with a Corps real estate interest (e.g. with some type of easement) may require a Corps permission to alter a Corps civil works project and a Corps easement to cross Corps land or some form of consent for the non-Corps lands. And all this has to occur prior to the Corps reviewing any Section 10/Section 404 applications that may also be needed for planned activities. This can almost double the time it takes to get through the Corps processes. *To help improve timely action, the Associations also recommend that the Corps implement parallel processing of applications in all Corps Districts. For example, where Section 404/Section 10 permitting and Section 408 and/or real estate authorizations are needed, applications should be processed concurrently. Accordingly, the Associations recommend that 33 CFR Section 320.1(a)(4) be modified to expressly provide that the Corps Districts will process applications for Corps permits, permissions, and easements through parallel processing.*

5. Consider options to use limited human resources more effectively.

As noted above, we recognize that the Corps has limited resources and that it strives to use its resources efficiently. Some agencies take steps to further improve productivity and accountability through workplace incentives and accountability programs. An appropriate metric used by some permitting entities is the length of time it takes to review and approve permit submittals. This incentivizes the agency to: a) provide clear, concise and consistent instruction for meeting permitting requirements; and b) work with applicants to submit complete application packages to facilitate an expedited review.

In terms of implementation measures, the permitting process would benefit from having experienced leaders serving as DEs and/or Division Commanders (“DCs”) over longer periods. Increasing the time DEs/DCs spend deployed in specific commands and promoting Deputy Commanders to DEs would provide greater continuity in leadership and in turn, more consistent guidance to staff in properly applying Corps regulations and guidance.

In addition to taking such steps, we recommend that the Corps modify its regulations to allow for the use of contract resources, funded by applicants, to work on permitting issues, as is done at

other regulatory agencies.²² Allowing for contract resources would help to alleviate the permit backlog and reduce the timeline to receive a final permit.

6. Consider specifying a minimum size for jurisdictional wetlands.

“Most wetlands constitute a productive and valuable public resource” as noted under 33 CFR Section 320.4(b).²³ However, to ease regulatory burdens in areas where there is uncertainty and inconsistency of application, we suggest creating more bright line requirements to determine jurisdictional wetlands.

We recommend that the Corps set minimum size requirements for wetlands where they would not be considered jurisdictional. We suggest 1/10-acre similar to NWP requirements.

Recognizing de minimis impacts over wetlands developed in storm water management facilities, we recommend that the Corps refrain from establishing jurisdiction over wetlands that have been developed in storm water management facilities (such as detention basins, infiltration basins, and conveyance channels.).

7. Improve consistency among the Corps Districts on interpretation and implementation of mitigation requirements.

Mitigation is an integral part of the review and balancing process throughout the permit application process. Based on our experience, however, we find substantial inconsistency in the types and amounts of mitigations that are required across the Corps Districts. This creates an undue burden and uncertainty on the regulated community.

Notwithstanding the Corps Districts with unique physiographical characteristics, we recommend creating consistency among the Corps Districts on interpretation and implementation of mitigation required to offset approved impacts.²⁴

²² For example, Federal Energy Regulatory Commission (“FERC”) allows applicants to voluntarily use a third-party in connection with environmental review of natural gas pipeline certificate applications. See “Handbook for Using Third-Party Contractors to Prepare Environmental Documents for Natural Gas Facilities and Hydropower Projects,” FERC, Aug. 2016 (rev); and CEQ Memorandum to Agencies, Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, Mar. 23. 1981.

²³ 33 CFR Section 320.4(b)(1).

²⁴ See recommendations regarding compensatory mitigation in Alaska below.

8. Streamline Section 408 permitting by placing the permit directly under Section 408 review if warranted.

The current Section 408 process is overly burdensome to both the Corps and permit applicants. The length of the review process has negatively impacted critical construction projects for applicants. Streamlining the process would help expedite permit issuance.

We recommend that the Corps streamline the Section 408 permit process by removing the formal request requirement by the applicant and placing the permit directly under Section 408 review, if warranted.

9. Expedite processing of “minor 408” permits within a 30-45 days time frame.

The Corps must decide whether to issue a Section 408 authorization before the Corps issues a Section 10/Section 404 permit. In September 2015, the Corps issued EC 1165-2-216, which appeared to substantially alter the framework for conducting Section 408 reviews when projects use or occupy Corps federally-authorized civil works projects. The EC appeared to either remove the “minor 408” concept entirely or modify it with new terminology.²⁵ Based on our members’ experience, “minor 408” permits which generally took 30-45 days for approval and could be approved by the DC, appeared to take at least 90 days or more from the Corps’ receipt of a completed approval request. As a result of this change in policy, it appears to take significantly longer to obtain Section 408 approvals, resulting in major project delays. Now, the EC has expired on September 30, 2017; and there is an opportunity to modify this process.

In addition, historically, “minor 408s” included Programmatic Environmental Assessments (“PEAs”) to address NEPA compliance in a manner that expedited federal review and approval. It is both appropriate and within the Corps’ authority under Section 408 to continue to treat as minor these basic projects that do not injure the public interest or impair the usefulness of a Corps public works project. This kind of streamlining would benefit the Corps, the public, and applicants. This includes certain horizontal directional drilling projects that meet specified technical standards that could be deemed, categorically and by rule, not to injure the public interest or impair the usefulness of the Corps project, without the need for lengthy analysis.

²⁵ See for example, Corps presentation on Section 408 Overview provides that the terminology for “Minor/Major” changed to “District/HQUSACE” and expected time frames from return request to issuance of permission are provided as 6-8 months at district level, and 2-3 years at headquarters decision levels. “[USACE] Section 408 Overview,” Regulatory Workshop, Leonard, K. and Lee, K., Corps District Sacramento District, July 22, 2016. Available at: http://www.spk.usace.army.mil/Portals/12/documents/regulatory/Reg_workshop/2016-07-22/408-Overview-Regulatory-Workshop-7-19-16.pdf?ver=2016-08-02-134604-830.

We recommend that EC 1165-2-1216 revert to the pre-September 2015 revision and/or guidance be developed that provides a more streamlined Section 408 approval process, including “minor 408s” being issued in 30-45 days time frames, and PEAs being continued to be processed as “minor 408s.”

10. Institute a decision-making timeline for funded projects.

Major alterations (and, possibly, expedited requests for Section 408 approvals) may require additional funding from outside the agency. The December 2016 Water Infrastructure Improvements for the Nation (“WIIN”) Act modified the Water Resources Development Act (“WRDA”) Section 1156 to authorize the Corps to accept and expend funds received from non-federal public or private entities to evaluate Section 408 requests.²⁶

While the Corps has not yet revised its overall Section 408 guidance since the funding provision in 33 U.S.C. Section 408(b)(3) became law, the Corps has issued implementation guidance for parties to use when contributing funds to the Corps to evaluate requests for Section 408 approvals.²⁷

We recommend that in order to make the contributed funds process as useful and effective as possible, the Corps should implement a decision-making timeline for funded projects. For instance, within a certain number of days of receiving contributed funds, the Corps should undertake at least a certain portion of the Section 408 application review. The Corps could formalize this timeline as part of: a)) revised contributed fund implementation guidance, b) revised overall Section 408 guidance (or a revised EC); or c) a new rulemaking that implements Section 408(b)(3).

F. 33 CFR Part 322—Permits for Structures or Work in or Affecting Navigable Waters of the United States

1. Revise the rule to exclude permitting for features that are not reasonably expected to affect navigable waters.

Certain Corps Districts require permits for actions, such as deep oil and gas wells, which underlay navigable waters of the U.S. The physical presence of the well bore deep under the soil and rock layers is highly unlikely to affect navigable waters. Based on members’ experience, certain Corps Districts are requiring permits for wells that are 10,000+ foot beneath the bottom

²⁶ 33 U.S.C. Section 408(b)(3).

²⁷ Memorandum on “Implementation Guidance for Section 1156(a)(2) of the [WRDA], Contributed Funds.” Corps, June 27, 2017. Available at: <http://cdm16021.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/1650/filename/1657.pdf>.

of navigable waters, meaning that there appears to be substantial inconsistency among the Corps Districts with implementing this rule.

We recommend revising the rule to specifically exclude permitting for features that do not result in disturbance to the bottom of navigable waters, or which are not reasonably expected to affect navigable waters. Similar language in 33 CFR Section 322.3 referencing tunnels or other structures should also be modified.

G. 33 CFR Part 323—Permits for Discharges of Dredged or Fill Material into Waters of the United States

1. Add language to clearly demarcate minor discharges.

33 CFR Part 323 allows the Corps to claim jurisdiction over minor discharges, which appear to influence the chemical, physical or biological integrity of waters of the U.S. The rule allows for certain exclusions for minor discharges but it is not applied consistently and it does not provide clear bright line exclusions. Based on our experience, some Corps Districts and other agencies attempt to regulate very minor discharges which only speculatively impact Waters of the U.S. This results in project delays and unnecessary expense.

We recommend adding language clearly exempting fill of less than 10 cubic yards in wetlands, less than 25 cubic yards in other waters, discharges less than 1/10-acre in Waters of the U.S. and placement of fill or structures below the soil or geological depth which is normally in direct contact with the surface waters.

H. 33 CFR Part 325—Processing of Department of the Army Permits

1. Authorize work to proceed for RGPs and PGPs if the Corps has not issued an authorization within 120 days of receipt of a completed application, provided certain criteria are met.

While these activities are more substantial than those authorized under NWPs, these activities are less impactful than individual Section 404 permits. Yet, no minimum time frame currently exists for the review and approval of RGPs or PGPs. Slow permitting of fairly routine work can result in delay of projects, lost opportunities due to changing market conditions, and added expense.

We recommend adding language in 33 CFR Part 325 authorizing work to proceed if the Corps has not issued an authorization within 120 days of receipt of a completed application as related to RGPs and PGPs, provided the project will not affect: a) listed threatened or endangered

species;²⁸ and/or b) cultural or historic resources potentially eligible for or on the National Register of Historic Places (“NRHP”) and other National Historic Preservation Act (“NHPA”) related issues.

2. Consider increasing linear feet thresholds in PGPs.

The Louisiana Coastal Zone PGP as issued by the New Orleans Corps District imposes certain requirements on projects located within the Louisiana Coastal Zone, and imposes more stringent Category II conditions for pipelines that extend more than 25,000 linear feet or pipelines within special aquatic sites.²⁹ This limitation in turn triggers individual permits and substantial delays for infrastructure development. The Louisiana Coastal Zone PGP also includes exclusions for activities not covered under the state’s Coastal Resources Program.

We recommend extending the threshold from 25,000 linear feet to a higher limit such as 40,000 linear feet, which could help alleviate some delays. We also encourage cooperation and communication between the Corps and state authorities.

3. Work with other agencies and internal Corps programs to address permitting time frames for compliance with 33 CFR Section 325.2(d)(3).

Individual permitting, when triggered, is a long and burdensome process. Although 33 CFR Section 325.2(d)(3) states that permits should be issued within 60 days of a complete application, the exceptions thereunder, including references to NEPA, ESA and other cross-cutting statutes, have effectively swallowed the rule. Also, as discussed above, multiple authorizations required within the Corps for a single project with separate processing times also slow down the process.

We recommend codifying a reasonable time limit within which individual permits are issued while taking into account and setting deadlines for coordination with other agencies and internal Corps programs.

4. Consider whether unique criteria or expedited permitting procedures should apply to projects serving national economic or security interests.

It may be beneficial for the Corps to create unique permitting criteria to evaluate projects that are deemed to be in the national interest, including both economic and security. Where these criteria apply, the Corps should have the authority to consider expedited permitting processes. If

²⁸ This recommendation is in conjunction with other recommendations in this letter relating to the need for streamlining the overall Section 7 consultation process with emphasis on setting deadlines for consultation reviews.

²⁹ A Programmatic General Permit for Use in the New Orleans District within the Boundaries of the Louisiana Coastal Zone, Issued May 1, 1998, Expiration Date May 31, 2022.

projects of national interest are identified, the Corps should assign personnel to assist in facilitating the permittee through an expedited permit review and decision process.

We recommend considering unique permitting criteria to evaluate projects serving national economic and security interests. Where these criteria apply, the Corps shall have the authority to consider expedited permit processes. If projects of national interests are identified, the Corps should assign personnel to assist in facilitating the permittee through an expedited permit review and decision process.

5. Clarify requirements on what constitutes a complete application for a Section 404 permit.

Upon submittal of an application, the Corps is required under its rules to either determine that the application is complete and issue a public notice or notify the applicant that it is deemed incomplete and to require additional information.³⁰ In practice, there is considerable variability in the Corps Districts' interpretations of a "complete application." For example, based on our members' experiences, ground surveys may be required to be completed along a majority of or the entire proposed right-of-way. On-the-ground field surveys can be difficult to attain at the beginning of projects where applicants are in the process of securing access to properties. Given advances in technology, accurate and reliable desktop materials such as aerial surveys, Geographic Information Systems ("GIS") and Light Imaging, Detection, and Ranging ("LIDAR") should be able to suffice to deem an application complete and for the Corps to process and issue the permit without delay.

We recommend that the Corps clarify requirements on what constitutes a complete application for a Section 404 permit. Similar to the PCN submittal requirement for projects to be "sufficiently detailed," the Corps should allow for the use of desktop materials as appropriate.

6. Update current regulations at 33 CFR Part 325, Appendix C to incorporate guidance previously issued by the Corps in 2005 and 2007.

Current Corps regulations at 33 CFR Part 325 Appendix C implement certain requirements of the NHPA. In 2005 and 2007, the Corps issued regulatory guidance to guide implementation of the Appendix C Regulations.³¹

³⁰ 33 CFR Section 325.2(a)(2) which states that, "[w]ithin 15 days of receipt of an application the district engineer will either determine that the application is complete...or that it is incomplete and notify the applicant of the information necessary for a complete application."

³¹ Those guidance documents are available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/techbio/InterimGuidance_25apr05.pdf and http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/inter_guide2007.pdf.

We recommend that the content of those guidance documents be incorporated into the Appendix C regulations to provide more regulatory certainty for the oil and natural gas industry.

I. 33 CFR Part 327—Public Hearings

1. Consider appropriate ways to streamline the notice and public comment periods without overly extending hearing times.

33 CFR Section 327.4(a) states in part that any person may submit a request during the 30-day comment period for a public hearing.³² 33 CFR Section 327.4(b) also states that the Corps shall grant the hearing unless “the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing.”³³ However, if a hearing is granted, the timeline for the public comment period typically more than doubles. 33 CFR Section 327.11(a) also states that, additional notice “normally provide[s] for a period of not less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing.”³⁴ Finally, 33 CFR Section 327.4(d) states that in fixing the time and place for a hearing, the Corps will duly consider “the convenience and necessity of the interested public.”³⁵

Section 404(a) of the CWA only states that “[t]he Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”³⁶ We recognize that the Corps must consider holding a hearing if one is requested, and that it may be impracticable to hold hearings to fit within the original 30-day comment period. However, we recommend that the timelines be tightened in those cases where a hearing is held.

We recommend that the Corps requires that a hearing request be submitted no later than 20 days into the original 30-day public comment period (33 CFR Section 325.3(a)(15)) and/or provide only 15 days’ notice of the public hearing under 33 CFR Section 327.11, to improve the timeliness of the hearing process.

³² 33 CFR Section 327.4(b).

³³ Id. at Section 327.4(b).

³⁴ Id. at 327.11(a).

³⁵ Id. at Section 327.4(d).

³⁶ 33 U.S.C. Section 1344(a).

J. 33 CFR Part 328—Definition of Waters of the United States

1. Add language to the tributary definition clarifying that short-term flow after precipitation-related events does not constitute a tributary.

Our experience indicates that many Corps Districts and other federal agencies exert jurisdiction on tributary features that have any form of ordinary high water mark, and which may or may not have a bed and bank. Many projects are rerouted, delayed, or modified at great expense to avoid features that are more properly classified as gullies, rills, or ephemeral features.

We recommend adding clear language to the tributary definition noting that the mere presence of ephemeral flow, lasting no longer than 7 days after the cessation of a precipitation event or completion of snow melt, and/or an associated water mark does not constitute a tributary.

K. 33 CFR Part 330—Nationwide Permit Program

General permits are important tools for: a) providing a streamlined process for certain activities having no more than minimal adverse effects to waters of the U.S.; and b) managing the Corps' regulatory program and allowing the Corps to focus its limited resources on more extensive evaluations of individual permits that have the potential for causing more adverse impacts to the waters of the U.S.

1. Establish an initial 15-day completeness review window for PCNs, within which the Corps would notify applicants whether their application was complete or incomplete.

There are currently no time frames for the Corps to declare a PCN incomplete for an NWP, aside from the overall 45-day time frame for the Corps to review a PCN. This is three times as long as the Corps has to determine whether an individual permit application is incomplete.³⁷

We recommend that to avoid situations in which the applicant is notified at the end of 45 days that a PCN is incomplete, the Corps should revise 33 CFR Section 330.1(e) to set a 15-day initial completeness review window for PCNs, mirroring requirements for individual permits, and provide notice to the applicant that the application is considered complete or incomplete. Any subsequent submissions in response to a notice that the application is incomplete should also be subject to a 15-day review timeline and notice that the application is complete or incomplete.

³⁷ See for example 33 CFR Section 325.2(a)(2). See also 33 U.S.C. Section 1344(e)(1) (authorizing NWP program); and 33 CFR Part 330.

2. Review acreage thresholds in the NWPs, as well as associated district and regional conditions, and increase where warranted.

A number of NWPs critical to the oil and natural gas industry (e.g. NWPs 3, 12, 13, 14, 18, and 33) include threshold limits for certain activities which trigger further PCN review and in turn, result in more delays. (An example where streamlining these threshold requirements would help is with the permitting of Trans-Atlantic Pipeline Systems (“TAPS”) repair/maintenance and flood control projects, particularly where expedited work is needed).

We recommend increasing threshold limits in NWPs 3, 12, 13, 14, 18, and 33. We also recommend eliminating requirements for NWPs such as NWP 33 to submit additional and unnecessary paperwork (i.e. PCNs) prior to commencing an activity.

We request PCN requirements to be removed for certain NWPs; however, for those NWPs that the Corps chooses to require PCNs, we also recommend a reasonable time-certain review period of PCNs in-lieu of the current open-ended review period if GCs 18 and 20 are triggered.³⁸

In addition, regional conditions which are a part of the NWP program should be reviewed and streamlined. The DEs utilize discretionary authority to provide these regional conditions and there does not appear to be robust mechanisms currently in place to ensure that regional conditions are based on scientific and factual evidence of adverse effects on the environment.

We recommend review of regional conditions by the Chief Engineer’s office for scientific accuracy on adverse effects on the environment and factual evidence of concerns relating to public interest. We also recommend that the regulation incorporate specific criteria on the ability of the DEs to utilize their discretionary authority.

3. Re-examine notification requirements to DEs for certain activities.

In most cases, permittees authorized by NWPs can proceed without notifying the DE. But 33 CFR Section 330.1(e) provides additional conditions under which the permittee must notify the DE. Notification adds additional delays to the processing times and can be unduly burdensome.

We recommend that the notification requirements to the DE should be carefully reviewed and streamlined where warranted. 33 CFR Section 330.1(e) should clarify specific conditions where the DE must be notified and specific processing time frames must be provided.

³⁸ See discussion above relating to agency consultation.

4. Review and modify the DE's discretionary authority to suspend, modify, or revoke NWPs.

In addition, 33 CFR Part 330.1(d) delegates discretionary authority to the DE to suspend, modify, or revoke permit approvals under an NWP. DEs are best able to consider case-by-case scenarios where waivers may be appropriate and reasonable. We support the continued use of waivers for activities authorized under NWPs because without the ability of DEs to issue waivers, more individual permits would be required that would unnecessarily burden Corps' staff and resources.

We recommend maintaining the DEs' flexibility to consider waivers on case-by-case basis. We also recommend setting certain limits to ensure consistency and predictability in the DE's discretionary authority to be able to suspend or revoke permit approvals. Specifically, we recommend that the DE cannot, on a discretionary basis, lower the thresholds at which a PCN is required; limit the use of NWP that are appropriate to the type project, or modify other PCN triggers, without allowing for public comment.

5. Develop a user-friendly display of NWPs and all related documents including regional conditions and Section 401 water quality certifications at a central Corps online repository.

NWPs are reissued every five years, concurrent with the public comment process that is conducted for the NWPs, and every Corps District also solicits comments concerning proposed regional conditions for the NWPs. In addition, this public process includes Section 401 water quality certifications for the NWPs which are conducted by the EPA, state governments, or tribal governments (depending on jurisdiction). Yet, there is no central repository for all these documents that are available for public comment.

The proposed and final NWPs are published in the Federal Register but the regional conditions and water quality certifications are not so easily available. The regional conditions, for example, are posted at individual Corps Districts' websites and in order to locate regional conditions for particular areas, it requires knowledge of the Corps Districts' jurisdictional boundaries which can transect multiple states.

As such, with relatively short public comment periods and no central repository for public documents, our members find it onerous to meaningfully participate in the NWP reissuance process.

We recommend that the Corps create a central online repository for all public documents related to NWPs including but not limited to regional conditions, state water quality certifications,

coastal management zone determinations, and decision documents as well as public comments received on these documents.

6. Examine ways to promote consistency among Corps Districts.

As mentioned above, there is a need for consistency among the Corps Districts in the interpretation of NWPs and in processing NWPs. Recognizing the need for regional specific conditions, fundamental conditions as well as processing timelines can be applied consistently across the board. Our experience indicates that certain Corps Districts are much more cumbersome than others in terms of processes and procedures that are in place for implementing NWPs. Issues relating to staffing and resources available for review should not penalize permittees who rely on the ease of NWP approvals for their projects.

Overall, we recommend the Corps Districts to be more consistent in applying NWPs and that there should be consistency in processing times for reviewing NWPs.

7. Specify that the definition of “isolated waters” in 33 CFR Section 330.2(e) will be consistent with any future rulemaking related to the Waters of the U.S.

Generally, “isolated waters” is a term that is subject to much legal interpretation under case law and subject to change by ongoing rulemaking efforts. This rule also uses this explicit term and there should be consistency in how this term is interpreted across the Corps regulations.

We recommend that 33 CFR 330.2(e) incorporate by reference applicable definitions in any rulemaking related to Waters of the U.S. to ensure consistency in the Corps’ regulations.

The following are comments on certain GCs and NWPs of specific interest to oil and natural gas industry.

8. Provide additional clarity on GC 17; and remove 2017 NWPs language in GC 17 and revert back to the 2012 language.

While the preamble to the 2017 NWPs states that “the revised general condition will not change the number of activities that qualify for NWP authorization,” there is great uncertainty with the revised language in the 2017 NWPs. It is unclear what would be considered “minimal” and what would be considered the full suite of tribal rights especially as it is left to the discretion of the DE. There is potential for inconsistency in the application of this GC 17 across the Corps Districts.

We recommend that the Corps issue a clarification that no substantive change was intended by the revised language to GC 17 and nor will there be any changes in implementation of NWPs. We also recommend that in the next reissuance of NWPs, GC 17 be reverted to its 2012 NWPs language.

9. Amend GC 18 to provide for a more streamlined Section 7 consultation process.

GC 18 provides a 45-day review time for the DE to make a determination; however, it also includes language for cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity and has notified the Corps. In these scenarios, the applicant cannot begin work even if the 45-day review time has passed, until the Corps has provided notification that the proposed activity will have “no effect” on listed species or critical habitat, or until ESA Section 7 consultation is completed. The last provision releases the Corps from any deadline for notifying and/or approving a project. The congressional intent for a streamlined NWP process is lost and the applicant can be left with its project in limbo. Project applicants need regulatory certainty with reasonable review and notification requirements provided in the NWPs. Otherwise, this directly impacts schedule and cost for proposed projects.

The Corps should amend GC 18 of the 2017 NWPs. Specifically, a biological opinion with a no jeopardy determination must be treated like an incidental take permit and not require any additional consultation with other federal agencies. In the interim, if a project proponent has a biological opinion with a no jeopardy finding, federal agencies should complete any required ESA consultation within 45 days.

We agreed with the Corps that federal agencies should follow their own procedures for complying with the requirements of the ESA; and that the respective federal agency should be responsible for fulfilling its obligations under Section 7 of the ESA. We agree that GC 18 suffices without the need for any ESA-specific conditions added to any NWPs.

Within this framework, we recommend that the Corps recognize and encourage its own authority under GC 18(c) whereby the DE can determine whether the proposed activity for non-federal permittees “may affect” or will have “no effect” to listed species and designated critical habitat within 45-days of receipt of a completed PCN. The Corps should work with the FWS to review project impacts to threatened and/or endangered species through a Section 7 consultation process on a programmatic level through preparation of biological opinions that address multiple projects. For example, the programmatic biological opinion for activities on the North Slope makes a no jeopardy determination for all threatened and/or endangered species in the

region, therefore additional consultation is not warranted.³⁹ Language to that effect should be included in GC 18.

We recommend that the Corps adhere to the 45-day review time from receipt of a completed PCN for the DE to make a determination; or as alternative, rewrite it with a not-to-exceed 90-day review requirement for PCN verification in the event this provision is triggered.

10. Amend GC 20 to provide for a more streamlined Section 106 consultation process.

We agreed with the change in the 2017 NWP rulemaking similar to GC 18 that for federal projects, the respective federal agency and not the Corps is responsible for fulfilling its obligations to comply with NHPA Section 106. In these cases of other federal lead agencies (e.g. FERC), the Corps should be able to issue its Section 404 permit contingent upon that lead agency completing its Section 106 consultation.

In addition, under GC 32, if 45 calendar days have passed from the DE's receipt of the completed PCN and the applicant has not received notification from the Corps, the prospective permittee can begin work. In cases where the non-Federal applicant has identified historic properties on which the activity may have the potential to cause effects, and has notified the Corps, the applicant cannot begin work even if the 45-day review time has passed, until the Corps has provided notification or until the NHPA Section 106 consultation is completed. Again, this in essence releases the Corps from any deadline for approving a project. The congressional intent for a streamlined NWP process is lost and the applicant is left with its project in limbo. This directly impacts schedule and cost for proposed projects.

We recommend that the Corps adheres to the 45-day review time from receipt of a completed PCN or as an alternative, rewrite it with a not-to-exceed 90-day review requirement for PCN verification in the event this provision is triggered.

11. Modify GC 23 to provide more flexibility for compensatory mitigation requirements.

Compensatory mitigation requirements are rigidly drafted under GC 23 and any changes here will first require redrafting of the applicable rules as discussed below.

As discussed in this comment letter, inconsistent application of requirements and lack of flexibility at the Corps District level on permit processing can lead to the imposition of

³⁹ See “Programmatic Biological Opinion for 2016-2017 Wetland Impacts on the North Slope,” FWS, Mar., 2016. Available at: [https://www.fws.gov/alaska/fisheries/endangered/pdf/Programmatic BO for NS Wetland Impacts 2016-2017.pdf](https://www.fws.gov/alaska/fisheries/endangered/pdf/Programmatic%20BO%20for%20NS%20Wetland%20Impacts%202016-2017.pdf).

unnecessary compensatory mitigation requirements. This is especially burdensome given that operators often take additional measures to implement robust stream/wetland protective provisions as part of the project.

We recommend that separate from rulemaking, the Corps should focus on consistency between regions and within regions regarding criteria for when mitigation is required and in what form. Also, with language relating to the prioritization of compensatory mitigation instruments, we recommend that the language regarding “where practicable” should be included.

Notwithstanding the above comment, we recognize that there needs to be a careful balance between maintaining consistency amongst regions while recognizing that what may hold true for much of the Corps Districts may not apply to Alaska because of its unique physical environment. The Corps, for example, stated in the preamble to the proposed NWPs that there is “increased availability of mitigation banks and in-lieu fee program credits in much of the country;” however, that is not universally true, especially for certain locations such as the North Slope of Alaska, where there are no mitigation bank or in-lieu fee credits available.⁴⁰

We recommend that for Alaska-specific projects, the Corps should utilize the guidance and policies found in the 1994 Alaska Wetlands Initiative Summary Report and Memorandum which recognizes the need for regulatory flexibility given the physiographical conditions in Alaska where opportunities for compensatory mitigation may not be available given high portion of wetlands in a watershed or region, and “where the technology for restoration, enhancement, or creation of wetlands is not available or is otherwise impracticable.”⁴¹

12. Extend the time period in GC 30 to deliver the completed certification document to the DE from 30 to 90 days.

This GC requires that the completed compliance certification document must be submitted to the DE within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation.

Given internal review times for permittees and the need to carefully certify the compliance certification document per the GC, 30 days is not adequate and we recommend that it be extended to 90 days.

⁴⁰ 81 Fed. Reg. 35,186, June 1, 2016 at p. 35,210.

⁴¹ “Alaska Wetlands Initiative Summary Report,” EPA, DA, FWS, and NMFS; and Memorandum on “Statements on the Mitigation Sequence and No Net Loss of Wetlands in Alaska.” EPA and DA, Wayland, R. and Davis, M. May 13, 1994. Note: While discussed in the context of NWPs, this recommendation applies to individual permits also.

We also recommend that the Corps clarify and provide examples of the types of activities that would trigger the “implementation” requirement.

13. Remove the 2017 NWPs language in GC 32 relating to PCN submittal requirements for linear projects and revert back to the 2012 language.

New language added in the 2017 NWPs for activities related to linear projects should be deleted and language should be reverted back to the 2012 NWPs language. The Corps now requires the PCN to include “the quantity of anticipated losses of wetlands” for single and complete linear projects.⁴² [emphasis added.] This is more stringent than the provision in the same section relating to proposed activity which states, “including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters.”⁴³ [emphasis added.] With existing language applicable to a proposed activity generally, there is no practical utility for the additional confusing language specific to linear crossings.

We recommend that the new language relating to the quantity of anticipated losses be deleted and revert back to the 2012 language.

New 2017 NWPs language also preemptively requires “a description of any proposed mitigation measures intended to reduce the adverse environmental effects causing by the proposed activity.”⁴⁴ Moreover, it requires the proposed mitigation measures to be sufficiently detailed to allow the DE to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures.⁴⁵ This additional language relating to mitigation measures is unnecessary, burdensome, and is also duplicative since the information required for a proposed activity encompasses mitigation measures. This type of language is appropriate for individual permits where there are impacts beyond the negligible ones contemplated under the NWPs. In addition, the DE also has the latitude to ask for a statement separately if regional conditions and the situation warrants it.

This new 2017 language in GC 32 is unnecessary and we recommend that it should be removed.

14. Revise PCN submittal requirements for certain NWPS relating to wetland delineations.

NWPs are intended to streamline the permitting process for activities that may cause only minimal individual and cumulative environmental impacts. As such, the Corps requirements

⁴² GC 32(b)(4).

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

include a built-in 45-day time period for the Corps to process the NWP applications and if the 45-day deadline has passed from the DE's receipt of a completed PCN and the applicant has not received written notice from the DE, the permittee can begin the proposed activity.

Yet, there are significant impediments in place that prevent the 45-day time frame from being triggered. For certain NWPs such as NWP 12, GC 32(b)(5) which require PCNs, an applicant must submit a complete wetland delineation which entails conducting completed field surveys to delineate wetlands, other special aquatic sites and other waters such as lakes and ponds, and perennial, intermittent, and ephemeral streams boundaries in accordance with the current method required by the Corps. Given backlogs at the Corps, this frequently requires permittees to expend their own funds and hire consultants to complete these surveys. And the 45-day period is not started until a wetland delineation is deemed complete by the Corps. Thus, the process for issuing authorizations for activities with minor environmental impact under NWPs such as NWP 12, is lengthened significantly and creates enormous uncertainty for permittees. Similar to requirements of "sufficiently detailed" information for projects under GC 32(b)(4), wetland delineations should not require completed field studies to trigger the NWP timeline or for approval. Instead, as discussed in Section L relating to 33 CFR Part 331, other desktop review materials should also be allowed.

Notwithstanding overall comments relating to PCN thresholds requirements for certain NWPs, we recommend similar to GC 32(b)(4) requirement for project description, applicants should be able to provide "sufficiently detailed" information which would deem the PCN complete and trigger the 45-day requirement. Using desktop materials where appropriate, final approval of these NWPs should not be based solely on completed wetland delineations per Corps methods.

15. Modify NWPs 12 and 14 to provide consistency in the treatment of pipeline abandonment.

Pipeline abandonment issues are currently addressed by Corps guidance and the approach appears to vary by the Corps Districts. Based on our experience, some Corps Districts manage pipeline abandonments under existing NWPs while other Corps Districts address pipeline abandonments through individual permits or letters of permission. This uncertainty significantly impacts project planning. In addition, the inconsistency between the Corps Districts results in a significant cost burden.

We therefore recommend that the Corps modify Corps regulations, as well as NWPs 12 and 14, to provide consistency in the treatment of pipeline abandonment. For pipeline activities authorized under an NWP, the same NWP should address the conditions of abandonment under typical circumstances while leaving individual permit evaluation for more complex conditions.

16. Increase threshold requirements for activities that qualify under NWP 12 and 14 and raise acreage requirements of PCN triggers.

NWPs issued by the Corps are generally less onerous and easier to secure than individual Section 404 permits for discharges of dredged or fill material to Waters of the U.S. However, NWP 12, which applies to activities for the construction, maintenance, repair, and removal of utility lines (including oil and gas pipelines) and associated facilities in Waters of the U.S., is applicable only where a “single and complete project” (which, for pipelines, is typically defined to include each crossing of a wetland, stream or other Waters of the U.S.) will result in the loss of 1/2-acre or less.⁴⁶ Similar language applies to linear transportation projects under NWP 14. There are also certain activities that require submittal of additional paperwork in form of PCNs when there are discharges from activities that result in losses greater than 1/10-acre of Waters of the U.S. and when certain permanent roads and utility lines in the Waters of the U.S. exceed 500 feet.

Section 404(e) of the CWA authorizes the issuance of NWPs for categories of activities that will cause no more than minimal adverse environmental effects, both individually and cumulatively.⁴⁷ Because “minimal adverse environmental effects” is not defined in the CWA, application of this term is left to the Corps’ expertise and judgment.⁴⁸ The Corps has latitude to reconsider NWP provisions through rulemaking and generally does so every five years. The Corps balances public interest factors, economics, and environmental benefits in determining whether a category of activities would result in “minimal adverse environmental effects.” To this end, we note that the Corps took comments on changing thresholds as part of the 2017 NWP reissuance but did not ultimately make any changes.

We recommend that the Corps increase threshold requirements for activities that qualify under NWP 12 and 14 and raise acreage requirements for PCN triggers, as appropriate and subject to public notice and comment.

17. Modify emergency permitting regulations and guidance to facilitate emergency work under NWP 12.

Current Corps regulations authorize DEs to approve special processing procedures in emergency situations.⁴⁹ The Corps’ emergency permitting procedures need to address pipeline operators’ concerns to efficiently and effectively respond to potential pipeline integrity issues while maintaining compliance with the Pipeline Hazardous Materials Safety Administration (“PHMSA”) regulations.

⁴⁶ NWP 12.

⁴⁷ 33 U.S.C. Section 1344(e)(1).

⁴⁸ *Id.*

⁴⁹ 33 CFR Section 325.2(e)(4).

Pipeline operators use monitoring tools to detect potential anomalies in pipeline infrastructure that may create a safety hazard and/or result in environmental damage. For high consequence areas, for example, PHMSA rules require pipeline operators to take prompt action to address all anomalous conditions the operator discovers through the integrity assessment or information analysis.⁵⁰ Certain anomalies may be construed as “immediate repair conditions” which would require pipeline operators to act very quickly.⁵¹ Prompt action may include performing integrity digs which typically involve a segment of pipe being excavated and inspected using non-destructive examination methods.⁵² However, in situations where the location of the anomalous reading occurs in a portion of a pipe that runs beneath a jurisdictional Water of the U.S., pipeline operators may be required to obtain authorizations under NWP 12 before performing the integrity dig to investigate the anomaly and/or repair the pipe. With time being of the essence and given the importance to act promptly when notified of anomalous conditions in high consequence areas, it would be appropriate for the “emergency” definition under 33 CFR Section 325.2(e)(4) to include time-sensitive maintenance and emergency work such as pipeline integrity digs being performed as a result of anomalous readings.

We recommend that the Corps modify its current emergency permitting regulations and/or guidance to address concerns and expedite permitting by authorizing critical maintenance and emergency work such as integrity digs under NWP 12 without triggering a PCN (e.g. digs that fall within defined conditions like disturbing less than 1/10-acre of jurisdictional water) and clarifying that pipeline integrity digs in certain circumstances qualify as an “emergency” as defined under 33 CFR Section 325.2(e)(4).

18. Remove the new 2017 NWPs requirement for dredged material from NWPs 19 and 35.

NWPs 19 and 35 add a requirement that dredged material be deposited and retained in an area that has no Waters of the U.S. unless approved by the DE under separate authorization. The 2017 NWPs requirement that mandates separate authorization for placement of minor dredged material in Waters of the U.S. is excessive and not necessary. It also is counter to the Corps’ objective of streamlined permitting. Approval of NWPs 19 and 35 should allow for deposition of minor dredged material into Waters of the U.S. and not require the applicant to file for multiple permits for the same proposed action. For example, dredged material is often used as erosion control or beneficial reuse in erosion prone areas that are directly adjacent to areas proposed for minor dredging.

⁵⁰ 49 CFR Sections 192.933 and 195.452(h).

⁵¹ Id. at Section 195.452(h).

⁵² Note: An integrity dig involves minimal soil disturbance in the area of the detection. The area is returned to pre-construction conditions at the completion of the dig.

We recommend that the new requirement included in the 2017 NWPs relating to dredged material for NWP 19 and 35 be deleted.

19. Remove the new 2017 NWP language relating to 1/2-acre limits for NWP 39.

This is a useful NWP for activities involving commercial and institutional building foundations, building pads and attendant features that are necessary for the use and maintenance of the structures. In order to qualify an activity under NWP 39, the 2017 NWP added new language that any losses of stream bed plus any other losses of jurisdictional wetlands and waters cannot exceed the 1/2-acre limit. This is an added burden to the oil and gas industry which appears to be unnecessary for activities contemplated to have minimal impact.

We recommend deleting the new language relating to 1/2-acre limits as currently required in NWP 39.

20. Modify 33 CFR Section 325.2(b)(ii) and other applicable regulations to clearly reflect statutory requirements relating to review periods for states to issue Section 401 water quality certifications.⁵³

Section 401(a) of the CWA states that, “[i]f the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.”⁵⁴ Yet, some states appear to abuse the statutory standard by demanding applicants withdraw and resubmit in order to avoid the one year deadline. This piecemeal approach where states have enormous latitude to misapply a statutory standard creates enormous uncertainty and is burdensome to the regulated community. The Corps needs to be clear in providing a consistent interpretation of the trigger for the state review period and then strictly and consistently enforcing it across the states.

We recommend that the Corps adhere to statutory requirements for state review time of Section 401 water quality certifications and provide clear direction in its regulations to states and applicable authorities as to conditions that trigger the review time (i.e. receipt of a written application).

⁵³ See also 33 CFR Section 336.1(b)(8) for procedures relating to state water quality certifications.

⁵⁴ 33 U.S.C. Section 1341(a)(1).

21. Revise 33 CFR Part 330 to include additional explanations and examples on the intended uses for the NWPs.

While the preamble to the 2017 NWPs is helpful in providing additional information on the intended uses for specific NWPs and GCs, it would be beneficial to have additional explanations and examples provided in this section since it provides overarching direction and scope to the NWP program. Additional clarifying language would provide guidance to the Corps Districts and permittees in terms of applying NWP requirements more consistently and it would allow for a higher degree of predictability every time that the NWPs undergo the reissuance process as well.

Based on overall comments provided in this letter (e.g. clarifying emergency permitting to include integrity digs conducted by pipeline operators in response to anomalous readings), we recommend additional explanations and examples on the intended uses for the NWPs. We are happy to engage in the public participation process with detailed suggestions and comments.

L. 33 CFR Part 331—Administrative Appeal Process

1. Amend 33 CFR Part 331, Appendix C and related guidance to lengthen the time frame upon which AJDs can be relied.

As stated in 33 CFR Section 331.2, a JD is “a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act...or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899.”⁵⁵ AJDs constitute judicially-reviewable official determinations, valid for five years, that specify the presence, absence, and extent of jurisdictional aquatic resources on a property.⁵⁶ In order to obtain an AJD, a party typically must provide a delineation of wetlands, streams and other water bodies on the project site. Similarly, a preliminary JD (“PJD”) may require a delineation of all aquatic resources on a parcel but may not determine the jurisdictional status of such aquatic resources.⁵⁷ JDs may be stand-alone determinations or associated with permit actions.⁵⁸ For example, JDs are useful to confirm thresholds under a NWP, particularly where a PCN is required.⁵⁹

An AJD provides a higher level of accuracy on what is actually considered jurisdictional than the conservative assumptions regarding jurisdictional reach that are used for regulatory approvals

⁵⁵ 33 CFR Section 331.2.

⁵⁶ Id. RGL 16-01, Oct. 2016.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ See GC 32(b)(5).

based on a PJDs.⁶⁰ But an AJD can be relied on for only five years (unless if new information warrants revision of the determination before the expiration date).⁶¹ RGL 05-02 explains that, because “local changes in jurisdictional boundaries” are expected, AJDs cannot remain valid for an indefinite period of time.⁶² In practice, local changes are not typically treated by the Corps Districts as new information that reopens a AJD during its term. We appreciate this policy; however, many projects take longer than 5 years to fully permit (let alone to construct), causing the AJD to have to be revisited.

We recommend that the Corps revise 33 CFR Part 331, Appendix C and related guidance to specify that AJDs can be relied on for a longer period, such as ten years. While ten years is longer than the current term, it is not “indefinite” and is more reflective of realistic timelines for large-scale projects.

2. Require the Corps and the EPA to process requests for all JDs within prescribed time frames.

Potential applicants may request JDs for determining Waters of the U.S. prior to triggering any permit process.⁶³ However, the Corps does not provide clear time frames within which it must review a request from the regulated community. In fact, Regulatory Guidance Letter (“RGL”) 16-01 states generally that every AJD and PJD should be completed “in light of the district’s workload, efficient processing of any related permit actions, and site and weather condition if a site visit is determined necessary.”⁶⁴ Therefore, projects in locations that may not be jurisdictional, or are plainly non-jurisdictional, may suffer either from extensive delays, or regulatory uncertainty. Due to the potential penalties for non-compliance, this presents a substantial burden to the regulated community.

We recommend that the Corps and the EPA be required to process requests for any AJDs and PJDs within 90 days. Also, if the applicant files documentation from a wetland land professional demonstrating that no jurisdictional features are present, then the Corps must issue a determination within 20 days that jurisdiction is not present and not subject to any further permitting requirements.

⁶⁰ See RGL 16-01.

⁶¹ Id.

⁶² RGL 05-02, June 2005.

⁶³ See discussion below in the NWP section.

⁶⁴ RGL 16-01. Note RGL 16-01 removed the prior 60-day time frames specified for JDs (which in practice were difficult to adhere to by the Corps). See RGL 08-02, June 2008 (superseded by RGL 16-01).

3. Require the Corps to accept information obtained remotely for wetlands delineations and JDs—particularly if there is a lack of site access.

Applicants involved in linear projects often do not have physical access to all properties along the length of their projects before applying for Corps authorizations. However, the Corps need to determine the extent of its jurisdiction over a project site before evaluating a permit application. This may pose a problem for applicants who cannot access the physical area of the proposed construction but who do have access to desktop review materials, i.e., GIS and remote-sensing images, and other means of demonstrating where jurisdictional waters are located on the property.

The Corps should affirm in its regulations—or, at a minimum, through a RGL—that the Corps Districts should accept information necessary to support a delineation for a JD that has been obtained remotely rather than through a site visit, particularly where access to a site is not currently available.

As the Corps has acknowledged, the information needed to support an AJD traditionally has been obtained through a site visit, but today reliable information can be obtained through highly sensitive technology and imaging.⁶⁵

We recommend the use of desktop review materials to justify AJDs in situations where applicants cannot access the physical area of proposed activity and where site visits are not viable. With changing technologies, the Corps should provide minimum standards for desktop review materials such as use of topographic maps and allowing for more advanced techniques such as LIDAR as additional non-mandatory options.

M. 33 CFR Part 332—Compensatory Mitigation for Losses of Aquatic Resources

1. Develop a national or regional in-lieu fee mitigation program to remedy the lack of mitigation banks or in-lieu fee programs in certain service areas.

Under Corps regulations, mitigation banks and in-lieu fee programs are the preferred methods of compensatory mitigation for impacts to Waters of the U.S., but these programs do not exist in all service areas or may not be available when needed to support permit issuance. Corps regulations state that the “fundamental objective of the compensatory mitigation is to offset losses resulting

⁶⁵ In response to question 7 regarding if site visits are necessary, the Corps responds: “The information used to support an AJD should be reliable and verifiable.” Questions and Answers for RGL 16-01. Available at: <http://www.mvr.usace.army.mil/LinkClick.aspx?fileticket=-qW2T50MBfo=&portalid=48>.

from unavoidable impacts to waters of the US associated with a project authorized by DA permits,” and that the DE “must determine the compensatory mitigation to be required in a DA permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity.”⁶⁶ The regulations provide that compensatory mitigation may take the form of purchase of credits from a mitigation bank or in-lieu fee program where the permitted impacts are located within the service area of the mitigation bank or approved in-lieu fee program.⁶⁷ Although the Corps prefers these forms of compensatory mitigation, not all areas of the country have approved mitigation banks or in-lieu fee programs. Permittee-responsible option is to be considered only where the other two preferred forms are not available.⁶⁸

To address the lack of mitigation banks or in-lieu fee programs in many regions of the country, we recommend that the Corps develop a national or regional in-lieu fee mitigation program. Under this framework, which other trade groups have advocated, sponsors of large projects could contribute funding, at mitigation market rates, to a national account when bank credits or regional in-lieu fee programs are unavailable at the time the Corps is in a position to issue the permit. Funding from the national account could be apportioned among the Corps Districts, based on where the impacts occurred, and applied toward preserving or improving aquatic ecosystems and promoting mitigation banking opportunities. The Corps Districts, in turn, would be authorized to provide the funds to states for the development of such programs. In addition, while such framework is taking shape and where there is a lack of mitigation banks or in-lieu fee programs, Corps DEs should be able to have the flexibility to determine appropriate mitigation ratios or credits to any other available in-lieu fee or mitigation banks outside the service area of a proposed project.

III. OTHER REFORMS TO ALLEVIATE REGULATORY BURDENS

1. Create a publicly accessible database of Corps’ real estate interests.

Various statutory schemes (e.g., Section 408) require applicants to obtain licenses or easements from the Corps prior to initiating construction on Corps-owned land and real estate interests such as navigational servitudes and dredged spoil disposal easements. It is currently difficult for project proponents to determine where and whether such interests exist because they are not clearly identified in a database or record. Consequently, project proponents are left to decide whether to make their own determination about potential permit applicability, or to seek Corp input. This process can be time- and resource-intensive for both the Corps and the prospective applicant.

⁶⁶ 33 CFR Section 332.3(a)(1).

⁶⁷ Id. at Section 332.3(b).

⁶⁸ Id. See also discussion in Section K(11) relating to 33 CFR Part 330.

To streamline the process, the Associations recommend that the Corps establish a time frame to develop and maintain a publicly-accessible online database of the Corps' real estate interests. The database could identify Corps interests by assessor's parcel number or other identifying number. This public database would alert potential applicants of the need to obtain special authorization in a given area and would relieve the Corps of the need to enumerate its real estate interests every time a prospective applicant requests this information. The database could be made part of the Corps' rules governing Section 408 authorizations or could be in the form of guidance.

IV. CONCLUSION

Given significant impacts of these regulations on the oil and natural gas industry, we appreciate the opportunity to provide input on existing regulations that may be appropriate for repeal, replacement, or modification. We applaud Executive Order 13777 and the Subgroup to the DoD Regulatory Reform Task Force's efforts to streamline permitting processes and to alleviate unnecessary regulatory burdens.

Thank you for your consideration of these comments. We look forward to working with you on this important issue.

Sincerely,



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