

November 16, 2020

Docket ID No. COE-2020-0002  
Army Corps of Engineers  
Department of Defense  
441 G Street NW, Washington, DC 20314  
(submitted via regulations.gov)

Re: Comments on Proposal to Reissue and Modify Nationwide Permits, COE-2020-0002

To Whom it May Concern:

On September 15, 2020, the U.S. Army Corps of Engineers (Corps) published the *Proposal to Reissue and Modify Nationwide Permits* (Proposed Reissuance) to reissue its existing nationwide permits (NWP), with some modifications, as well as issue five new NWPs, including one specific to electric utility line and telecommunications activities. The MJB&A Permitting and Infrastructure Coalition<sup>1</sup> (Coalition) appreciates the opportunity to comment on the Proposed Reissuance.

Coalition member companies collectively engage the Administration and agencies on potential permitting modernization as well as regulatory and legislative opportunities to ensure energy infrastructure projects can proceed in a timely and cost-effective manner. The member companies design, permit, and operate fossil fuel-fired and nuclear power plants; electric and natural gas transmission and distribution systems; and solar, wind, and other renewable generation projects. Many of these projects rely on NWPs in approval and initiation of construction as well as ongoing operation. The Corps utilizes the NWP program to regulate activities related to our nation's aquatic resources with little, if any, delay or paperwork for certain projects that have no more than minimal adverse environmental impacts. The program provides timely authorizations for the regulated activity while protecting the nation's aquatic resources. Energy projects developed by member companies have benefitted from the streamlined NWP program, and member companies support the continuation of the program in order to ensure that construction and operation of projects with minimal adverse environmental impacts can proceed in a timely and cost effective manner.

Additionally, as the energy sector works to implement strategies to support clean energy infrastructure deployment and climate initiatives, activities authorized by NWPs, such as the construction of renewable generation and transmission and distribution system upgrades, will play a critical role in achieving greenhouse gas (GHG) emission reductions and electric system efficiency improvements. Deployment of clean energy infrastructure at the frequency and pace necessary to replace carbon intensive generation and meet company, state, regional, and other climate goals will depend greatly on the ability of companies to utilize NWPs to provide timely authorization of activities with some level of certainty, while also ensuring no more than minimal impacts to the environment.

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<sup>1</sup> The MJB&A Permitting and Infrastructure Coalition member companies include Entergy Corporation, NextEra Energy, and PG&E Corporation.

Given the important role NWP's play in energy sector infrastructure projects and operations, the Coalition has consistently engaged with the Corps to ensure that NWP's can be utilized by the electric sector to facilitate needed infrastructure projects, most recently submitting comments on the 2017 Reissuance of Nationwide Permits (2017 NWP's).<sup>2</sup>

The following comments are in response to specific revisions in the Proposed Reissuance.

**I. Modifying NWP 12 to apply to oil or natural gas pipeline activities only and creating new NWP's C and D for electric utility line activities and other pipeline activities, respectively, is warranted, and the Corps should finalize NWP's 12, C, and D with certain modifications.**

The Corps proposes several modifications to NWP 12, including limiting the use of NWP 12 to oil and natural gas pipeline activities only and creating two new NWP's to authorize electric utility line and telecommunications activities (proposed new NWP C) and other utility line activities that convey other substances, such as water (proposed new NWP D). We generally support these changes and recommend additional modifications, as outlined below.

**A. New NWP C for electric utility line and telecommunication activities**

The Coalition supports the creation of new NWP C, titled "Electric utility line and telecommunications activities," which is proposed to include activities associated with the construction, maintenance, repair, and removal of electric utility lines. The Corps has the discretion to issue new NWP's at any time and correctly notes that splitting out these activities from NWP 12 will "more effectively address potential differences in how the different types of utility lines are constructed, maintained, and removed." The discussion in the Proposed Reissuance appropriately recognizes that electric utility lines vary in size and length, how they are constructed, and whether they are overhead or underground. Specifically, the Corps notes "the footprints of the structures that support overhead electric lines, and the impacts of installing those structures, are fairly small, with the ground disturbance generally limited to the immediate vicinity of the structure." The Corps also notes that electric utility lines can be installed underground through trenching and backfilling, and through horizontal directional drilling. We agree with the Corps' assessment of the differences between electric utility lines and pipelines and, therefore, support the Corps' proposal to include electric utility line activities in a separate NWP that can be tailored to address these unique activities more effectively and efficiently.

To further support the creation of new NWP C, the Corps notes in the Proposed Reissuance that, "to the extent that the scale of electrical energy generation from renewable energy sources...increases, there will also be a need for additional electric transmission facilities to convey the electricity from the generation facilities to the end users," and "utility line and telecommunications activities in waters of the [U.S.] that would be authorized by proposed new NWP C could be used to authorize activities associated with these new electric production facilities." As leaders in the clean energy industry, our member companies are actively engaged in the construction and operation of renewable generation and other technologies that support both infrastructure deployment and company, state, regional, and other climate initiatives. The ability to efficiently and effectively deploy electric transmission infrastructure associated with these facilities, as well as improve the operation of the electric grid to facilitate integration and operation of these facilities, will be well-supported by the creation of NWP C.

In the Proposed Reissuance, the Corps requests comments on best management practices (BMP's) that could be added as terms to NWP C to "help ensure that a particular type of utility line results in no more than minimal

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<sup>2</sup> Previously referred to as the "MJB&A Waters Initiative" in comments submitted on the 2017 Reissuance of the NWP's.

individual and cumulative adverse environmental effects.” Thus, we offer the following BMPs that could be incorporated into NWP C:

- Locating poles and tower foundations outside of surface waters to the extent practicable;
- Marking waters of the U.S. near work areas;
- Locating stockpile and work areas outside of surface waters;
- Deploying mats prior to driving over or placing heavy equipment on wetlands;
- Installing stormwater BMPs to prevent erosion of hillsides adjacent to construction areas;
- Placing trench material onto uplands or semi-permeable surfaces in vegetated woodlands; and
- Monitoring during and after construction to avoid unauthorized discharges to surface waters.

We agree that inclusion of BMPs will help the Corps’ stated goal of ensuring that activities authorized under this NWP will have no more than minimal adverse environmental effects.

B. New NWP D for utility line activities for water and other substances

The Coalition supports the creation of NWP D, titled “Utility line activities for water and other substances” with certain modifications to covered activities. We first recommend that the Corps consider adding natural gas pipelines within a local distribution company (LDC) to NWP D. These pipelines generally serve residential areas and are more similar in size to water and wastewater pipelines than to midstream oil and natural gas pipelines. LDC natural gas pipelines are also generally constructed with the same material (e.g., polyethylene) as water and wastewater pipes. Given the similarities in size, materials, and location, construction and operation of these pipelines more closely resembles that of water and wastewater pipelines, which NWP D is intended to cover. In the Proposed Reissuance, the Corps is proposing to group activities under certain NWPs based on differences in how utility lines are constructed, maintained, and removed, and this reasoning would support moving LDC natural gas pipelines out of NWP 12 and into NWP D.

Additionally, as the electric sector continues to develop and deploy clean energy solutions, certain activities, for example the transport of hydrogen, would benefit from application of NWPs, and creation of new NWP D would be necessary to support those activities. Hydrogen has the potential to play a prominent role in a clean energy future, not only as a source of combustion for power plants, but also as an energy carrier with significant storage potential in an increasingly intermittent energy future. The ability to transport hydrogen via pipelines will be critical to the development of hydrogen energy solutions, and the ability to utilize NWPs for pipeline infrastructure will ensure projects with minimal adverse environmental effects can proceed in a timely and cost effective manner. While the definition of “utility line” for the purposes of NWP D as proposed would cover hydrogen, we recommend that the term “hydrogen” be specifically added for further clarification.

To capture the recommendations above, we urge the Corps to revise the proposed definition of “utility line” for the purposes of NWP D as follows: “any pipe or pipeline for the transportation of natural gas at the local distribution level, as well as the transportation of any gaseous, liquid, liquescent, or slurry substance, including hydrogen, for any purpose, that is not oil or natural gas.”

C. NWP 12 for oil and natural gas pipeline activities

The Coalition supports the reissuance of NWP 12 for oil and natural gas pipeline activities only “to more effectively address” how these types of utility lines are constructed, maintained, and removed, which differs from electric utility

lines, as outlined in Section A above. In line with our recommendation above to have natural gas LDC pipelines included under NWP D, we suggest that language carving these pipelines out of NWP 12 (and into NWP D) be included in the final reissuance.

Regarding PCN requirements under NWP 12, the Corps proposes to retain only two of the seven existing PCN thresholds for NWP 12 (i.e., PCNs for all activities needing authorization under section 10 of the Rivers and Harbors Act of 1899, and PCNs for activities that result in the loss of greater than 1/10-acre of Waters of the U.S.) in order to simplify and focus PCN requirements on activities that have a “substantive potential” to result in more than minimal adverse environmental effects. We support removal of the five PCN thresholds<sup>3</sup> under NWP 12 for the reasons outlined by the Corps in the Proposed Reissuance, including that this revision will “reduce burdens on the regulated public, simplify the NWP, and eliminate redundancy.” The Corps also notes that since the original adoption of these five PCN thresholds, there have been requirements added to NWP 12 that are applicable to all NWP 12 activities to address the potential adverse environmental impacts the PCN thresholds were intended to address. Thus, we agree that the five PCN thresholds do not provide any additional protection against adverse environmental impacts and can, therefore, be removed.

Lastly, the Proposed Reissuance would add a new PCN threshold for NWP 12 for the installation of new pipelines greater than 250 miles in length. It is unclear in the Proposed Reissuance how the Corps arrived at this threshold and how it would help ensure that impacts to the environment are no more than minimal. We believe the acreage threshold in NWP 12 for triggering a PCN is sufficient to ensure no more than minimal impacts to the environment. The newly proposed 250 mile threshold would, therefore, be redundant and should not be included in the final reissuance. However, if the Corps does finalize the addition of a mileage PCN threshold, we recommend that language be included to allow project proponents to demonstrate and/or validate the information in the PCN with desktop data, as it may not be possible to access all areas necessary for field surveying to prepare the PCN if the project is in the development stage.

## **II. The proposed removal of the 300 linear foot limit for losses of stream bed is warranted, and the Corps should finalize this change for the specified NWPs, including NWPs 51 and 52.**

The Corps proposes to remove the 300 linear foot limit for losses of stream bed from several NWPs, including 51 (Land-Based Renewable Energy Generation Facilities) and 52 (Water-Based Renewable Energy Generation Pilot Projects). We agree with the Corps’ conclusion that “quantitative limits” (such as an acre limit) “are the only practicable, national-scale option for drawing a clear line between the activities that potentially qualify for NWP authorization and the activities that will require individual permits.” We also agree with the Corps that reliance on an acreage limit and PCN requirements is sufficient to ensure activities result in no more than minimal adverse environmental effects, as the use of acres/square feet in quantifying losses is a more accurate approach and better surrogate for impacts to stream functions. Providing equivalent quantitative limits for wetlands, streams, and other types of non-tidal waters will provide consistency and support the objectives of the NWP program to “authorize with little, if any, delay or paperwork certain activities having minimal impacts.”

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<sup>3</sup> The five PCNs proposed for removal: (1) utility line activities involving mechanized land clearing in a forested wetland for the utility line right-of-way (ROW); (2) utility lines in Waters of the U.S., excluding overhead lines, exceeding 500 feet; (3) utility lines placed within a jurisdictional area and running parallel to or along a stream bed that is within that jurisdictional area; (4) permanent access roads constructed above grade in Waters of the U.S. for a distance of more than 500 feet; and (5) permanent access roads constructed in Waters of the U.S. with impervious materials.

### **III. Additional Comments**

The Corps proposes additional revisions to NWPs, General Conditions (GC), and other aspects of the reissuance, and we offer the following additional comments. The Coalition also supports the Corps' continued use of the definition of "single and complete project" in the Proposed Reissuance, as our member companies have relied on this longstanding Corps practice and definition. As part of the Proposed Reissuance, we urge the Corps to ensure that any language and/or provisions in the final reissuance be consistent with language in the final Navigable Waters Protection Rule so that the rules are able to work together effectively.

#### **A. GC 32 Pre-Construction Notices**

The Corps proposes to modify this GC by adding language to clarify that "[a] PCN must identify non-PCN NWPs that are used to authorize any part of the proposed project or related activity, including separate and distant crossings of waters and wetlands for linear projects." The Corps further proposes to include a specific clarification that for linear projects, where one or more single and complete crossings require a PCN, the PCN must include the required information for each single and complete crossing, including those single and complete crossings that do not require PCNs. The Proposal states this information will be used by the district engineer for information purposes only to evaluate the cumulative adverse environmental effects of the proposed linear project "and does not change those non-PCN NWP activities into NWP PCNs." If finalized as proposed, the Coalition recommends that the Corps include language clarifying that the inclusion of non-PCN activities in a PCN that is required would not impact the schedule for the non-PCN activities. In other words, non-PCN activities should be allowed to proceed as scheduled ahead of any authorization of crossings that do require a PCN, even if those non-PCN activities are included.

#### **B. NWP 52 Water-Based Renewable Energy Projects**

Consistent with our comments on the 2017 NWPs, we urge the Corps to remove the pilot limitation for NWP 52 projects so that all qualifying projects can utilize this NWP. The restriction of NWP 52 to pilot projects limits the ability of NWP 52 to facilitate the development of offshore wind generation projects and is unnecessary to ensure that projects have no more than minimal adverse environmental effects, regardless if they are pilot projects or full commercial development projects.

#### **C. Acreage Thresholds for NWP Applicability and PCNs**

To the extent there are changes that may expand the federal jurisdiction of the Waters of the U.S., it is essential that the NWP program continue to operate and provide the level of certainty for project proponents consistent with the proposed revisions. Consistent with our comments on the 2017 NWPs, we would encourage the Corps to consider appropriate acreage thresholds (e.g., NWP applicability thresholds and PCN thresholds) for NWPs in light of any future Waters of the U.S. rulemaking or litigation implications. Sizing acreage thresholds appropriately depending on the scope of federal jurisdiction would ensure that additional activities supporting clean energy projects that result in no more than minimal adverse environmental effects can continue to utilize NWPs. For companies looking to invest in such projects, utilization of NWPs remains the preferred approach over individual permitting, given the time and expense savings associated with the NWP program. If permitting delays and additional associated obstacles slow the timeline of these projects or render these projects economically infeasible, the ability to deliver clean energy and efficient investments consistent with infrastructure deployment and company, state, regional, and other climate initiatives will be at risk.

#### D. Timeline and Grandfathering

Because of the off-cycle nature of the Proposed Reissuance, the Corps includes a discussion in the preamble of the applicability of the Proposed Reissuance, should it be finalized. The existing 2017 NWP's are effective through March 18, 2022. The Corps notes that, for the 2017 NWP's, if the previously verified activity continues to qualify for authorization under the reissued or modified NWP, that verification letter is effective until March 18, 2022, unless the district engineer specified a different expiration date. If the project would no longer qualify for authorization under the reissued or modified NWP, the applicant would have 12 months to complete the activity as long as the activity has commenced construction or is under contract to commence before the reissued or modified NWP goes into effect. The Corp also notes that the expiration date of the 2017 NWP's may be changed (i.e., to the day before the 2020 NWP's would go into effect) if the Proposed Reissuance is finalized "to avoid having two sets of NWP's in effect at the same time." The Coalition requests that the Corps make clear in the final reissuance that projects previously verified under the 2017 NWP's will continue to qualify for authorization under the reissued or modified NWP through the original expiration date, regardless if the expiration date of the 2017 NWP's is changed by this rulemaking.

Overall, we support the Corps' NWP program and its intention to allow for the development of projects with minimal adverse environmental effects. We appreciate the opportunity to submit our comments on the Proposed Reissuance and recommended changes. If you have any questions, please do not hesitate to contact me at [cjenks@mjbradley.com](mailto:cjenks@mjbradley.com) or (978) 369-5533.

Sincerely,

A handwritten signature in black ink, appearing to read "Carrie Jenks". The signature is fluid and cursive, with the first name "Carrie" and last name "Jenks" clearly distinguishable.

Carrie Jenks  
Executive Vice President  
MJB&A Permitting and Infrastructure Coalition