Sierra Club * Appalachian Mountain Advocates * Bold Alliance
Center for Biological Diversity * Citizens for Water
Clean Up the River Environment (CURE) * Corporate Ethics International
Damascus Citizens for Sustainability * Delaware Riverkeeper Network
Dominion Pipeline Monitoring Coalition * Elgin Green Groups 350 * Forest City 350
For Love of Water (FLOW) * Great Old Broads for Wilderness * Honor the Earth
Minnesota Public Interest Research Group * MN350 * Mobile Bay Group Sierra Club
National Wildlife Federation * Preserve Craig * Riverkeeper, Inc.
Southern Environmental Law Center * WildEarth Guardians
Wisconsin Safe Energy Alliance * 350Kishwaukee * 350 Madison

August 1, 2016

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

Submitted via the Federal eRulemaking Portal and Email to NWP2017@usace.army.mil

Re: Comments on the U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permit 12, Docket No. COE-2015-0017

On behalf of Sierra Club, Appalachian Mountain Advocates, Bold Alliance, Center for Biological Diversity, Citizens for Water, Clean Up the River Environment (CURE), Corporate Ethics International, Damascus Citizens for Sustainability, Delaware Riverkeeper Network, Dominion Pipeline Monitoring Coalition, Elgin Green Groups 350, Forest City 350, For Love of Water (FLOW), Great Old Broads for Wilderness, Honor the Earth, Minnesota Public Interest Research Group, MN350, Mobile Bay Group Sierra Club, National Wildlife Federation, Preserve Craig, Riverkeeper, Inc., Southern Environmental Law Center, WildEarth Guardians, Wisconsin Safe Energy Alliance, 350Kishwaukee, and 350 Madison, we submit these comments in response to the U.S. Army Corps of Engineers' Notice of Proposed Rulemaking to Reissue and Modify Nationwide Permits, published at 81 Federal Register 35185 (June 1, 2016). Our comments below focus on the U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permit 12 for Utility Line Activities ("NWP 12").[1]

Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, the U.S. Army Corps of Engineers ("the Corps") issues nationwide permits ("NWPs") to authorize any category of activities involving discharges of dredged or fill material into waters of the U.S. that will result in no more than minimal individual and cumulative adverse environmental effects.[2] There are currently 50 NWPs, which were published on February 21,

[1] *Id.* at 35198-99.
[2] *Id.* at 35185.

2012[3] and expire on March 18, 2017. The Corps is now proposing to modify and reissue the 50 NWPs as well as issue two new NWPs and one new general condition. The Corps' Notice specifies that it is soliciting comments on all aspects of these proposed NWPs.[4]

NWP 12 authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States for crossings of those waters associated with the construction, maintenance, or repair of utility lines and associated facilities, provided the activity does not result in the loss of greater than 1/2-acre of waters for each single and complete project.[5] The proposed modifications to NWP 12, which are detailed at 81 Federal Register 35198-99, will not change NWP 12 in any substantive way from the version promulgated in 2012. The Corps is primarily proposing to add clarifying language to the text of NWP 12.

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[3] 77 Fed. Reg. 10184.
[4] 81 Fed. Reg. 35185.
[5] Draft Decision Document for NWP 12 ("DDD"), at 1.

TABLE OF CONTENTS

EXHIBIT LIST

Number	Exhibit
1	*Sierra Club v. Bostick*, Plaintiffs' Motion for Summary Judgment
2	*Sierra Club v. Bostick*, Appellants' Opening Brief
3	Gulf Coast Pipeline, Galveston District PCN Excerpt
4	*Sierra Club v. U.S. Army Corps of Eng'rs*, Defendants' Cross-Motion for Summary Judgment
5	*Sierra Club v. U.S. Army Corps of Eng'rs*, Appellees' Response Brief
6	*Sierra Club v. U.S. Army Corps of Eng'rs*, Defendants' Opposition to Motion for Preliminary Injunction
7	Schmid & Company, Inc. Consulting Ecologists, *The Effects of Converting Forest or Scrub Wetlands to Herbaceous Wetlands in Pennsylvania* (2014)
8	*Sierra Club v. Bostick*, Plaintiffs' Reply on Motion for Summary Judgment
9	*Sierra Club v. Bostick*, Plaintiffs' Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction
10	*Sierra Club v. Bostick*, Defendants' Response to Motion for Summary Judgment
11	Scott Haggett, et al., *Oil Spills in Montana's Yellowstone River After Pipeline Leak*, Reuters, Jan. 19, 2015
12	EPA, *Fact Sheet: Water Issues, Enbridge Oil Spill, Marshall, Michigan* 1 (2010)
13	Kira Millage, *Timeline of Bellingham Pipeline Explosion*, Bellingham Herald, June 7, 2009
14	NOAA, *Whatcom Creek* (July 11, 2016; 9:54 AM)
15	Suzanne Guldimann, *Charges filed in 2015 Santa Barbara oil spill incident*, Malibu Surfside News (May 24, 2016, 2:14 PM)
16	Alison Snyder, *Plains All American Pipeline, Employee Face Charges in 2015 Oil Spill*, Wall Street Journal (updated May 17, 2016, 7:33 PM)
17	Casi Callaway & Keith Johnston, *California spill shows risk to Mobile water from Plains Pipeline*, AL.com (July 1, 2015, 10:12 AM)
18	Ellen M. Gilmer, *Regulators levy $1.5M fine on pipeline builder*, E&E, July 19, 2016.
19	*Mobile Baykeeper, Inc. v. U.S. Army Corps of Eng'rs*, No. 14-0032-WS-M, at 3–4 (S.D. Ala. Oct. 16, 2014)
20	*Mobile Baykeeper, Inc. v. U.S. Army Corps of Eng'rs*, No. 14-0032-WS-M (S.D. Ala. June 9, 2014) (order granting plaintiff's motion to supplement the record)
21	Motion to Supplement the Record, Exhibit A, *Mobile Baykeeper, Inc. v. U.S. Army Corps of Eng'rs*, No. 14-0032-WS-M (S.D. Ala. May 15, 2014)
22	Michael Dumas, *Would oil spill equal Mobile evacuation? Judge, Plains Southcap challenge MAWSS expert's analysis*, AL.com (Dec. 19, 2013)
23	*Sierra Club v. U.S. Army Corps of Eng'rs*, Plaintiffs' Motion for Summary Judgment
24	Oil spill excerpts from U.S. Department of State, 2011 FEIS for the Keystone XL Pipeline
25	Oil spill excerpts from U.S. Department of State, 2014 FSEIS for the Keystone XL Pipeline
26	EPA, Comments on the Environmental Assessment for the Proposed Issuance of

	Easements for the Flanagan South Pipeline Crossing of the Mississippi River (December 23, 2013)
27	National Transportation Safety Board, Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release (July 25, 2010),
28	Kiefner & Associates, Inc., *Final Report on Leak Detection Study to U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration* (December 10, 2012)
29	Cumulative impact excerpts from U.S. Department of State, 2011 FEIS for the Keystone XL Pipeline
30	Cumulative impact excerpts from U.S. Department of State, 2014 FSEIS for the Keystone XL Pipeline
31	Declaration of Dr. Thomas David Hayes
32	Delaware Riverkeeper Network Comments on the Proposed State Water Quality Certification for the PennEast Gas Pipeline (June 10, 2016)
33	Princeton Hydro, LLC, *The Short and Long-Term Consequences of the Construction of the PennEast Pipeline* (July 2015)
34	New York State Department of Environmental Conservation Notice of Denial Addressed to Constitution Pipeline Company, LLC (April 22, 2016)
35	Consent Order issued by the West Virginia Department of Environmental Protection
36	Geotechnical analysis of root causes as prepared by Dominion Transmission, Inc.
37	An Expert Report On Geologic Hazards in the Karst Regions of Virginia and West Virginia: Investigations and Analysis Concerning the Proposed Mountain Valley Gas Pipeline

I. INTRODUCTION AND SUMMARY

Nationwide Permit 12 is a general §404(e) permit that the Corps uses to permit pipelines and other utility projects that would have up to 1/2-acre of "loss of waters of the US." On its face, NWP 12 would appear to permit only small pipeline projects with truly minimal environmental impacts, a category of activities to which 404(e) was intended. However, the Corps applies NWP 12 separately to each water crossing along a pipeline route, which allows it to approve massive, controversial oil and gas pipelines projects by artificially treating them as thousands of "single and complete" projects that each qualify under NWP 12. The Corps has used NWP 12 increasingly in recent years to approve pipelines that are hundreds and even thousands of miles long without any public notice or transparent environmental review process.

While the Corps' use of NWP 12 is not new— it has used various iterations of NWP 12 for the last few decades— it is only since 2012 that the Corps began using NWP 12 to approve massive pipeline projects with no project-specific CWA or NEPA review. For example, in *Stop the Pipeline v. White*, 233 F. Supp. 2d 957, 961-63 (S.D. Ohio 2002), a 149-mile oil pipeline was proposed primarily on private lands. The applicant sought verification from the Corps under NWP 12 for the pipeline's 408 water crossings spread along the length of the pipeline.[6] There, the Corps district engineers correctly determined that the impacts of the overall project would be more than minimal and declined to verify the project under NWP 12, requiring instead an individual §404 permit and a NEPA analysis that covered the entire pipeline.[7]

To the best of our knowledge, prior to 2012, the Corps had never before used NWP 12 to permit hundreds or thousands of water crossings to approve a major pipeline project without an individual §404 permit or without any project-specific NEPA review conducted by the Corps or any other federal agency.[8]

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[6] *Id*. at 961.

[7] *Id*. at 963.

[8] S*ee, e.g. Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1028 (D. Minn. 2010) (the Corps and DOS prepared an EIS for a 326-mile crude oil pipeline); *Hammond v. Norton*, 370 F. Supp. 2d 226, 253 (D.D.C. 2005) (requiring BLM to analyze a domestic oil pipeline that under NEPA, including the portions on private land); *Wilderness Soc. v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) (Department of the Interior prepared an EIS for an 789-mile oil pipeline); *City of Los Angeles v. U.S. Dep't of Agric.*, 950 F. Supp. 1005 (C.D. Cal. 1996) (Forest Service prepared an EIS for a 171-mile oil pipeline); *Spiller v. Walker*, A-98-CA-255-SS, 2002 WL 1609722 (W.D. Tex. July 19, 2002) *aff'd sub nom Spiller v. White*, 352 F.3d 235 (5th Cir. 2003) (requiring the Corps and other agencies to analyze oil pipeline under NEPA); *No Oilport! v. Carter*, 520 F. Supp. 334 (W.D. Wash. 1981) (agencies prepared an EIS for an 1,500 mile oil pipeline from Washington to Minnesota); *Bucks Cnty. Bd. of Comm'rs v. Interstate Energy Co.*, 403 F. Supp. 805 (E.D. Pa.1975) (agency prepared an EIS for an 83-mile oil pipeline in Pennsylvania); *Sohio Transp. Co. v. United States*, 5 Cl. Ct. 620, 622 (1984) aff'd, 766 F.2d 499 (Fed. Cir. 1985) (BLM prepared an EIS for an oil pipeline from the California coast to Midland, Texas).

However, following the rejection of the first application for the controversial Keystone XL, President Obama issued a Presidential Memorandum on March 22, 2012 that directed federal agencies to expedite their reviews of pipeline infrastructure projects.[9] Shortly thereafter, TransCanada separated Keystone XL pipeline project into two segments, and the Corps verified the 2,227 water crossings of the southern segment, now called the Gulf Coast Pipeline, under NWP 12 without an individual permit and without any project-level NEPA analysis. This marked the first time the Corps had approved a major project in this way using NWP 12.

Since using NWP 12 to permit the Gulf Coast Pipeline in 2012, the Corps has verified several other major pipelines in the same way. For example, four Corps district offices verified the 600-mile Flanagan South crude oil pipeline through 1,950 waterways in four states under NWP 12, without any public notice or project-specific NEPA or CWA review.[10] Recently, the Corps verified the 1,168-mile Dakota Access Pipeline through North Dakota, South Dakota, Iowa, and Illinois using NWP 12.[11]

As set forth in detail below, these major oil and gas pipeline projects have significant impacts on US waters and on the overall environment, including but not limited to the impacts of crude oil spills and ruptures of other types of pipelines, the conversion of forested wetlands to scrub-shrub wetlands necessary to construct and maintain the pipeline rights-of-way, the cumulative impacts associated with forest fragmentation, habitat loss, sedimentation and water quality degradation, and the climate impacts associated with a massive buildout of fossil fuel infrastructure.[12]

Simply put, the Congress did not intend the NWP program to be used to streamline major infrastructure projects like the Gulf Coast Pipeline, the Flanagan South Pipeline, and the Dakota Access Pipeline. Pipeline projects like these should undergo an individual §404 permit review.

For the reasons explained herein, we strongly oppose the reissuance of NWP 12 and its provisions that allow segmented approval of major pipelines without any project-specific environmental review or public review process. We urge the Corps to allow NWP 12 to expire without reissuance, and require individual §404 permits for pipelines going forward. Alternatively, the Corps should amend NWP 12 to address violations of the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA) highlighted in these comments, and

[9] Presidential Memorandum -- Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects (March 22, 2012), available at https://www.whitehouse.gov/the-press-office/2012/03/22/presidential-memorandum-expediting-review-pipeline-projects-cushing-okla.
[10] *Sierra Club v. Bostick*, Plaintiffs' Motion for Summary Judgment, attached as Exhibit 1.
[11] See http://www.thedickinsonpress.com/energy/bakken/4082041-us-army-corps-engineers-approves-dakota-access-river-crossing-permits.
[12] *See* section IV for an additional discussion of pipeline impacts.

to ensure that pipelines permitted by NWP 12 have only minimal environmental impacts and that those impacts are properly considered prior to issuance of NWP 12.

II. PUBLIC PARTICIPATION ISSUES

Public participation plays an important role in both the CWA and NEPA. *See, e.g.,* 33 U.S.C. § 1251(e) ("public participation in the development . . . of any . . . program established by the Administrator. . . under this chapter shall be provided for, encouraged, and assisted by the Administrator . . ."; *Id.* §§ 1500.1(b) (2010) ("public scrutiny [is] essential"), § 1500.2(d) (2010) (the agency must "encourage and facilitate public involvement"), § 1506.6 (2010) (the agency must "[m]ake diligent efforts to involve the public" in preparing environmental documents, give "public notice of ... the availability of environmental documents so as to inform those persons ... who may be interested or affected," and "solicit appropriate information from the public.").

Rather than requiring individual §404 permits and NEPA analyses for specific pipelines constructed in the US and allowing the public to weigh in on the proposal, the Corps is violating these requirements be creating multiple levels of review at various times and by various Corps offices that the public cannot possibly abide by. At the project-verification level, district engineers prohibit any public involvement by claiming the only opportunity for involvement was upon issuance of the NWP that already occurred. To member of the public without previous knowledge of Corps permitting procedures who may have just learned that a crude oil pipeline will cross their property, that amounts to having no opportunity at all. To make matters worse, the Corps appears to now add another regional level of review that is all form and no substance. The reality is that at each stage of review, the Corps claims the analysis is conducted at a different level of review. However, as demonstrated by the Gulf Coast Pipeline and Flanagan South Pipeline, the reality is the review never occurs at all. No Corps official at any level ever evaluated the environmental and safety risks posed by those pipelines or invited the public to be involved.

The Corps' June 1 Federal Register notice states: "Shortly after the publication of this Federal Register document, each Corps district will publish a public notice to solicit comments on its proposed regional conditions for these NWPs."[13] Similarly, the notice states:

> At approximately the same time as the publication of this **Federal Register** notice, each Corps district will issue an initial public notice. The public comment period for these district public notices will be 45 days. Those initial public notices will include proposed Corps regional conditions developed by our district offices, and will also request comments or suggestions for additional Corps regional conditions or modifications to the proposed Corps regional conditions.[14]

[13] 81 Fed. Reg. 35186.
[14] *Id.* at 35195.

Indeed, several Corps district offices appear to have already conducted the 45-day comment period on proposed regional conditions, ending prior to the August 1, 2016 comment period for the NWPs.[15] This approach runs afoul of the public participation requirements of the CWA and NEPA.

Corps regulations require division engineers to publish regional conditions, but they do not specify the short 45-day duration for a comment period:

> (ii) Concurrent with the Chief of Engineers' notification of proposed, modified, reissued, or revoked NWPs, DEs will notify the known interested public by a notice issued at the district level. The notice will include proposed regional conditions or proposed revocations of NWP authorizations for specific geographic areas, classes of activities, or classes of waters, if any, developed by the division engineer.[16]

It makes little sense for the division engineers to propose regional conditions, and conclude the public comment period on those conditions, prior to the Corps finalizing the NWPs on a nationwide basis, let alone prior to the Corps concluding its public comment period at the or regional scales. As the Corps explains, regional conditions are meant to be developed in conjunction with a regional cumulative effects analysis to inform division engineers' determinations about whether the NWPs combined with regional conditions would result in only minimal impacts to the environment:

> When the Corps issues or reissues NWPs, Corps divisions are required to prepare supplemental decision documents to provide regional analyses of the environmental effects of those NWPs. The supplemental decision documents also support the division engineer's decision on modifying, suspending, or revoking one or more NWPs in a particular region. Nationwide permits are modified on a regional basis through the addition of regional conditions, which restricts the use of the NWPs in those regions that are subject to those regional conditions.[17]

Division engineers cannot possibly develop those conditions and hold a public comment period before it understands what changes, if any, will be made to the NWPs at the national level, and before it has an opportunity to actually evaluate the cumulative effects at a regional level. Although it is not entirely clear, it appears that the Corps will prepare further regional

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[15] *See, e.g.*, Galveston District Notice, available at http://www.swg.usace.army.mil/Media/Public-Notices/Article/792864/nationwide-permit-reissuance-and-texas-regional-conditions-for-comment/; Rock Island District Notice, available at http://www.mvr.usace.army.mil/Portals/48/docs/regulatory/publicnotices/2017%20NATIONWIDE%20PERMIT%20REISSUANCE.pdf?ver=2016-06-14-161339-400.

[16] 33 C.F.R. § 330.5(2)(ii).

[17] 81 Fed. Reg. at 35189.

NEPA analysis (including a cumulative effects analysis) at the district/division engineer level sometime in the future:

On JuneThe US Army Corps of Engineers recently proposed to reissue

> For the NWPs, the assessment of cumulative effects occurs at three levels: National, regional, and the verification stage. Each national NWP decision document includes a national-scale NEPA cumulative effects analysis. Each supplemental decision document has a NEPA cumulative effects analysis conducted for a region, which is usually a state or Corps district.[18]
>
> Corps divisions are required to prepare supplemental decision documents to provide regional analyses of the environmental effects of those NWPs. The supplemental decision documents also support the division engineer's decision on modifying, suspending, or revoking one or more NWPs in a particular region. Nationwide permits are modified on a regional basis through the addition of regional conditions, which restricts the use of the NWPs in those regions that are subject to those regional conditions. Supplemental decision documents include regional cumulative effects analyses conducted under the NEPA definition, and for those NWPs that authorize discharges of dredged or fill material into waters of the United States, regional cumulative effects analyses conducted in accordance with the 404(b)(1) guidelines approach at 40 CFR 230.7(b). The geographic regions considered in a supplemental decision document may be of cumulative adverse environmental effects are made at different geographic scales. In their supplemental decision documents, division engineers will evaluate cumulative effects of each NWP at the scale of a Corps district, state, or other geographic area, such as a watershed or ecoregion.[19]
>
> Within this 90-day period [90 days before the planned effective date of March 19, 2017], Corps districts will prepare supplemental decision documents and proposed regional conditions for approval by division engineers before the final NWPs go into effect. Supplemental decision documents address the environmental considerations related to the use of NWPs in a Corps district, state, or other geographic region. The supplemental decision documents will certify that the NWPs, with any regional conditions or geographic suspensions or revocations, will authorize only those activities that result in no more than minimal individual and cumulative adverse effects on the environment or any relevant public interest review factor.
>
> …
>
> Supplemental decision documents include regional cumulative effects analyses conducted under the NEPA definition, and for those NWPs that authorize

[18] *Id*. at 35190.
[19] *Id.* at 35187.

> discharges of dredged or fill material into waters of the United States, regional cumulative effects analyses conducted in accordance with the 404(b)(1) guidelines approach at 40 CFR 230.7(b). The geographic regions considered in a supplemental decision document may be of cumulative adverse environmental effects are made at different geographic scales. In their supplemental decision documents, division engineers will evaluate cumulative effects of each NWP at the scale of a Corps district, state, or other geographic area, such as a watershed or ecoregion. If the division engineer is not suspending or revoking an NWP in a particular region, a supplemental decision document for an NWP includes a statement finding that the use of that NWP in the region will cause only minimal individual and cumulative adverse environmental effects.[20]
>
> In response to the district's public notice, interested parties may suggest additional Corps regional conditions or changes to Corps regional conditions. They may also suggest suspension or revocation of NWPs in certain geographic areas, such as specific watersheds or waterbodies. Such comments should include data to support the need for the suggested modifications, suspensions, or revocations of NWPs. After the NWPs are issued or reissued, the division engineer will issue supplemental decision documents for each NWP in a specific region (*e.g.,* a state or Corps district). Each supplemental decision document will evaluate the NWP on a regional basis (*e.g.,* by Corps district geographic area of responsibility or by state) and discuss the need for NWP regional conditions for that NWP. Each supplemental decision document will also include a statement by the division engineer, which will certify that the NWP, with approved regional conditions, will authorize only those activities that will have no more than minimal individual and cumulative adverse environmental effects.[21]

This suggests that each division engineer will supplement the national-scale NEPA analysis (*i.e.,* the NWP 12 DDD) with additional NEPA processes that analyze the cumulative impacts of NWP 12 at a regional level, but the Corps has not made that explicitly clear. In fact, the Corps has failed to prepare additional region-level NEPA analyses in the past, and in fact has argued repeatedly that the Decision Document is intended to constitute its sole NEPA document:

> the Corps performs the required NEPA analysis for the relevant class of activities at the time that it issues the general permit, and NEPA compliance is accomplished through decision documents prepared by the Corps for each NWP. … No further NEPA evaluation is required the Corps issues a verification decision that the stream crossings associated with the project are authorized under the NWP. … The Corps, however, fully discharged its duties under NEPA when it reissued NWP 12 in 2012. Informed by extensive feedback from the public and

[20] *Id.* at 35189-90.
[21] *Id.* at 35195-96.

> key stakeholders, the Corps complied with NEPA when it issued its EA and Finding of No Significant Impact for NWP 12.[22]

Finally, the development of regional conditions and the regional-level supplemental decision document violates the CWA and NEPA in a number of additional ways:

1. As explained above, the regional comment periods were conducted prematurely and failed the provide the public with an adequate opportunity for involvement, since the comment period for the NWPs is ongoing at the national level and the results of that process are unknown.

2. The Federal Register notice states and/or implies that regional conditions and regional NEPA analysis are required by law. However, Corps regulations indicate that these processes are not mandatory:

> (1) A division engineer ***may*** use his discretionary authority to modify, suspend, or revoke NWP authorizations for any specific geographic area, class of activities, or class of waters within his division, including on a statewide basis, by issuing a public notice or notifying the individuals involved.[23]

Thus, there is no guarantee that the regional modification of the NWPs will occur, which reinforces the need for the Corps to make a final determination upon issuance of a NWP without reliance on future processes that may not occur (as explained throughout these comments).

3. It is unclear whether the Corps district/division engineers will invite public comment on the supplemental NEPA analyses prepared at the regional level. The 45-day public comment period already conducted do not contain any regional analysis of cumulative effects, do not contain a draft supplemental NEPA document, and do not refer to NEPA at all.[24] The public comment period for these and other districts appear to be related only to the proposed regional conditions rather than any environmental analysis. If the Corps fails to do so, it would constitute a violation of CWA and NEPA regulations. Commenters hereby request notification of any additional public comment period conducted in relation to NWP 12 at any level.

4. To the extent that the Corps ultimately declines to address the CWA and NEPA deficiencies described herein following its opportunity to do so, Commenters request that these

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[22] Exhibit 4, at 28.

[23] 33 C.F.R. § 330.5(c)(1).

[24] *See, e.g.*, Galveston District Notice, available at http://www.swg.usace.army.mil/Media/Public-Notices/Article/792864/nationwide-permit-reissuance-and-texas-regional-conditions-for-comment/; Rock Island District Notice, available at http://www.mvr.usace.army.mil/Portals/48/docs/regulatory/publicnotices/2017%20NATIONWIDE%20PERMIT%20REISSUANCE.pdf?ver=2016-06-14-161339-400.

comments be shared with district/division engineers and urge them to decline the reauthorization of NWP 12 in their respective regions or make the recommended changes.

III. NWP 12 IS ARBITRARY AND CAPRICIOUS AND VIOLATES THE CWA §404(E)

A. The Clean Water Act - Legal Background

The CWA was enacted by Congress in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[25] To achieve this goal, section 404 of the CWA prohibits the discharge of any pollutant, including dredged spoil or other fill material, into navigable waters unless authorized by a permit.[26]

Section 404 of the CWA gives the Corps primary responsibility for permitting construction activities that involve dredge and fill of U.S. waters.[27] The Corps oversees the 404 permit process and must comply with guidelines promulgated by the U.S. Environmental Protection Agency ("EPA"), which are incorporated into the Corps' own regulations.[28] The underlying intent behind the guidelines, known as the 404(b)(1) guidelines and set forth at 40 C.F.R. Part 230 subparts B through J, is that dredged or fill material should not be discharged if it will result in an unacceptable impact on the aquatic ecosystem.[29]

The guidelines provide that no discharge of dredged or fill material shall be permitted for an individual project: (1) if there is a practicable alternative to the proposed discharge; (2) if the discharge causes or contributes to violations of applicable state water quality standards; (3) if the discharge will cause or contribute to significant degradation of the environment; and (4) unless all appropriate steps have been taken to minimize potential adverse impacts.[30] "Practicable alternatives" include "not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences."[31] The Corps' regulations also require that destruction of wetlands is to be avoided to the extent practicable.[32]

Public participation plays an important role in CWA permitting decisions. The CWA provides in its general policy section that "public participation in the development . . . of any . . .

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[25] 33 U.S.C. § 1251(a).
[26] *Id*. § 1344.
[27] *Id.* § 1344.
[28] *Id*. § 1344(b)(1); 33 C.F.R. §§ 320.4(b)(4) (2010), 325.2(a)(6) (2010).
[29] 40 C.F.R. § 230.1(c) (2010).
[30] *Id*. § 230.10 (2010).
[31] *Id*. §§ 230.5(c) (2010), 230.10(a) (2010).
[32] 33 C.F.R. § 320.4(r) (2010).

program established by the Administrator. . . under this chapter shall be provided for, encouraged, and assisted by the Administrator . . ."[33] Section 404 states: "The 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."[34] The applicable Corps regulations state: "[A]ny person may request, in writing, ... that a public hearing be held .... Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing."[35] When issuing an individual 404 permit for a specific project, the Corps must comply with the requirements of the National Environmental Policy Act (NEPA).

An alternative to the individual permit process is the nationwide permit program. Section 404(e) allows the Corps to, "after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment."[36]

Projects authorized by NWPs do not need individual section 404 permits and do not go through the public and more comprehensive, site-specific environmental and public interest review individual 404 permits require.[37]

NWPs can last up to five years, at which point they must be reissued or left to expire.[38] The previous NWPs were published in the February 21, 2012, issue of the Federal Register (77 FR 10184) and expire on March 18, 2017.[39] The Corps now proposes to reissue 50 NWPs, add two new NWPs, and add one General Condition.[40] The Final Rule also contains a set of definitions and general conditions that apply to all NWPs.[41] These comments discuss the definitions and general conditions as they relate to NWP 12, but the critiques should not be read so as to be limited to NWP 12; rather, they apply to all NWPs.

B. Request for Public Hearing

[33] 33 U.S.C. § 1251(e).
[34] *Id*. § 1344(a).
[35] 33 C.F.R. § 327.4(b) (2010).
[36] 33 U.S.C. § 1344(e)(1).
[37] 33 C.F.R. § 323.3(a).
[38] 33 U.S.C. § 1344(e)(2); *see also* 33 C.F.R. § 330.5.
[39] 81 Fed. Reg. 35186.
[40] *Id*.
[41] *Id*.

The applicable Corps regulations state: "[A]ny person may request, in writing, ... that a public hearing be held .... Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing."[42] Based on the significant range of issues associated with permitting oil and gas pipelines nationwide with no further opportunity for public involvement, as described in detail throughout these comments, the undersigned groups hereby request public hearings on the reissuance of the NWPs.

C. NWP 12 Violates §404(e) by Permitting Massive Crude Oil and Natural Gas Pipelines with more than Minimal Environmental Impacts, often with no Further Project-Specific Environmental Review

NWP 12 permits the construction of utility lines and associated facilities that do not result in the loss of greater than 1/2-acre of waters of the United States "for each single and complete project."[43] However, the Corps defines "single and complete linear project" as "that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States *(i.e., a single waterbody) at a specific location*."[44]

The effect of this definition is to allow each water crossing along a proposed linear utility project to be authorized under NWP 12 separately as so many "single and complete projects." In other words, the Corps allows pipeline proponents to "stack" NWP 12 thousands of times along a single pipeline to avoid the requisite individual permit and project-specific NEPA analysis. There is no limit to the number of times that a single pipeline or other linear utility project can use NWP 12, nor is there a maximum number of acres of waters of the U.S. that a linear project can destroy or adversely impact while still being authorized under NWP 12. In addition, there is no maximum limit to the level of broader environmental damage pipelines permitted by NWP 12 can cause.

By permitting massive crude oil, fracked gas, and other hazardous pipelines with *unlimited* environmental impacts, NWP 12 violates §404(e)'s requirement that the Corps may issue NWPs only for categories of projects that the Secretary determines "are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment."[45]

The Corps should allow the current version of NWP 12 to expire without reissuance, and/or take steps to ensure that major pipelines with more than minimal environmental impacts are not permitted by NWP 12. Those include, but are not limited to, limiting the use of NWP 12

[42] 33 C.F.R. § 327.4(b).
[43] *Id.* at 35219.
[44] *Id*. at 35239 (emphasis added).
[45] 33 U.S.C. §1344(e)(1).

to a single water crossing along an overall pipeline project, applying the 1/2-acre limit to overall pipeline projects rather than each water crossing, and including forested wetland "conversion" within the Corps' definition of "loss of waters of the US."

D. NWP 12 Arbitrarily Allows the Piecemealing of Pipeline Projects

The proposed reissuance of NWP 12 is arbitrary and capricious and in violation of the CWA because it allows the "piecemealing" of large pipelines and other linear projects to avoid individual §404 permit review.

Several provisions in the Corps regulations and the Corps regulations prohibit the "piecemeal" approval of large pipelines through the use of multiple NWPs. For example, Corps regulations provide that two or more different NWPs can sometimes be combined to authorize a project, but that "the same NWP cannot be used more than once for a single and complete project."[46] Similarly, General Condition 15 (of the proposed NWP reissuance) provides that "[t]he same NWP cannot be used more than once for the same single and complete project."[47] General condition 28 further states: "The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit."[48]

These regulations are consistent with NEPA's prohibition on segmentation, or piecemeal approval of large projects. *See* 40 C.F.R. § 1508.25(a)(requiring connected and cumulative actions to be analyzed together unless they would have independent utility). "The justification for the rule against segmentation is obvious: it 'prevent[s] agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'"[49]

In fact, the Corps regulations and the NWPs' definitions mirror NEPA's segmentation doctrine by applying the independent utility. For example, Corps regulations provide:

> [P]ortions of a larger project may proceed under the authority of the NWPs while the DE evaluates an individual permit application for other portions of the same

[46] 33 C.F.R. § 330.6.
[47] 81 Fed. Reg. 35232.
[48] *Id.* at 35235.
[49] *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1314 (D.C. Cir. 2014) (quoting *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988)); *see also Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298-99 (D.C. Cir. 1987) (the segmentation doctrine "was developed to insure that interrelated projects the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.").

> project, but ***only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project.*** When the functioning or usefulness of a portion of the total project qualifying for an NWP is dependent on the remainder of the project, such that its construction and use would not be fully justified even if the Corps were to deny the individual permit, the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process.[50]

Furthermore, the definition of "single and complete non-linear project" reads "[T]he total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of 'independent utility'). ***Single and complete non-linear projects may not be 'piecemealed' to avoid the limits in an NWP authorization***."[51]

A project has independent utility only "if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility."[52]

Despite applying these multiple safeguards to prevent the piecemealing of large "non-linear" projects, the Corps arbitrarily allows the piecemealing of massive pipeline projects to avoid individual permit review in NWP 12. The definition of "single and complete linear project" reads:

> [T]hat portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (*i.e.*, a single waterbody) *at a specific location*.[53]

NWP 12 thus allows linear utility projects to use NWP 12 separately for each individual water crossing, and there is no "independent utility" requirement for "single and complete linear projects." There is no limit to the number of times a single linear utility line can use NWP 12, nor is there a limit to the number of acres of U.S. waters that can be lost.

This approach is arbitrary and capricious in several ways. First, the definition of "single and complete linear project" is contradicts the ordinary meaning of the phrase. A small section

[50] 33 C.F.R. § 330.6 (emphasis added).
[51] 81 Fed. Reg. 35239 (emphasis added).
[52] *Id.* at 35238.
[53] *Id.* at 35239 (emphasis added).

of pipeline that has no independent utility and could not function on its own is, by definition, neither "single" nor "complete"; rather, it is an incomplete part of a larger project and is wholly dependent on every other part of the pipeline. The Corps artificially treats each pipeline water crossing as a "single and complete" project only to avoid the limits of the NWP regulations.[54]

Second, by containing no limit to the number of acres a utility project as a whole can destroy, its definition of "single and complete linear project" robs NWP 12's ½ acre threshold of any meaning and, in effect, permits linear pipeline projects of *any* size and *any* amount of environmental impact.

Finally, neither the DDD nor the Federal Register announcement provide any rational basis for allowing piecemealing of linear projects while not allowing the same for non-linear projects (unless the non-linear projects have independent utility). The only resemblance of an explanation is contained in the following definition:

> *Single and complete linear project:* A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which ***often involves multiple crossings of one or more waterbodies at separate and distant locations….***
>
> For linear projects crossing a single or multiple waterbodies several times ***at separate and distant locations***, each crossing is considered a single and complete project for purposes of NWP authorization.[55]

Thus, the Corps' is apparently attempting to justify the piecemeal approval of large pipelines by claiming that multiple water crossings will only be approved if/when the crossings are "separate and distant" from each other, thus limiting the cumulative environmental impacts to specific waterways or waterways. However, that explanation does not withstand scrutiny.

Neither the Corps regulations nor the NWP definitions define the phrase "separate and distant" or require that district engineers enforce that undefined phrase. The Corps does use that phrase in several other instances with the *implication* that NWP 12 can only be used multiple times if/when the crossings are separate and distant from each other.[56]

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[54] *See, e.g*, 33 C.F.R. § 330.6 ("the same NWP cannot be used more than once for a single and complete project").
[55] 81 Fed. Reg. 35239.
[56] *See, e.g.*, 81 Fed Reg. 35188 ("If an NWP verification includes multiple authorizations using a single NWP (*e.g.,* linear projects with crossings of separate and distant waters of the United States authorized by NWPs 12 or 14) …the district engineer will evaluate the cumulative effects of the applicable NWPs within the appropriate geographic area."); *Id*. at 35198 ("The new proposed Note 2 explains that separate and distant crossings of waters of the United States may qualify for separate NWP authorization, consistent with past practices…").

NWP 12 requires project proponents to include in PCNs: "[A] description of the proposed activity... [and] any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects…";[57] and requires district engineers to "include an evaluation of the individual crossings to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP.[58]

NWP 12 does not define "separate and distant" or actually impose any "separate and distant" requirement that district or division engineers can enforce. It is a term without any meaning or substance. Furthermore, as set forth in section III.E below, in practice, the district engineers do not actually conduct any meaningful cumulative effects analysis at the project verification level, let alone ensure that the water crossings are truly "separate and distant" from each other (by any measure).

The Corps' verification of the Gulf Coast Pipeline illustrates the emptiness of the phrase "separate and distant." For that project, three separate Corps offices were presented with PCNs for 2,227 water crossings in two states for a single connected pipeline. The PCNs demonstrated that many of water crossings were not located on "separate and distant" waterways. Rather, many of the crossings were within 1/10 of a mile of each other, there were as many as six water crossings per mile in some locations, and some watersheds had numerous water crossings and significant crossings. For example, the pipeline crossed a total of 41 waterways in Texas' Pine Island Bayou alone, which resulted in the permanent clearing of 72 acres of forested wetlands in that particular bayou.[59] The PCNs demonstrated other locations along the pipeline with many crossings that were close in proximity.[60]

Nonetheless, the district engineers failed to make any determination as to whether the water crossings were separate and distant enough so as to qualify for NWP 12 or require an individual permit (nor did they evaluate the cumulative effects of these numerous water crossings, as explained below). That is because no definition of the term "distant" exists and no actual requirement that crossings be "distant" to qualify for NWP 12 verification.

Therefore, the Corps' only possible justification for applying the independent utility requirement to non-linear projects but not for linear projects fails. Indeed, there would be no need for a distinction between linear and non-linear projects at all if the Corps simply imposed the "independent utility" requirement on *all projects*, with a caveat that individual water

[57] 81 Fed. Reg. at 35236.
[58] *Id*. at 35237.
[59] *Sierra Club v. Bostick*, Appellants' Opening Brief, attached as Exhibit 2 at 51-52.
[60] See Exhibit 3.

crossings could be verified separately under NWP 12 if they were truly "separate and distant"—only if water crossings were located in separate watersheds or located several miles from the nearest water crossing along the same project.

NWP 12 is arbitrary and capricious and in violation of the CWA and the APA due its use of the "independent utility" test for non-linear projects but not for linear projects; its allowance the piecemealing permitting/approval of large pipeline projects; and its lack of any definition of "separate and distant" or requirement that the provision be enforced.

E. The Corps' Project-Level Cumulative Impacts Review is Insufficient and Cannot be used to Justify Unlimited use of NWP 12 on a Pipeline

As set forth above, NWP 12 violates §404(e) by permitting pipeline projects with more than minimal environmental impacts; in fact, unlimited environmental impacts. That is due to the practice of allowing unlimited use of NWP 12 for individual water crossings along an overall pipeline. These overall pipeline projects can stretch across multiple states and impacts thousands of waterways and other non-aquatic resources, and can have enormous cumulative impacts on the environment.

The Corps attempts to square the open-ended nature of this permit with the requirements of §404(e) on the basis that district engineers evaluate the cumulative impacts of overall pipeline projects at the project verification level and ensure that pipelines with more than minimal impacts are not verified under NWP 12. *See, e.g*, 81 Fed Reg. 35187-88 ("the district engineer reviews the PCN and determines whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects."); *Id*. ("Nationwide permits also allow Corps district engineers to exercise, on a case-by-case basis, discretionary authority to require individual permits for proposed activities that may result in more than minimal individual and cumulative adverse environmental effects.").

Thus, the Corps justifies the unlimited usage of NWP 12 to permit massive pipeline projects solely on the basis of the district engineers' discretionary project-level cumulative effects review. The problem with this approach is that the project-level review definitely does not occur in *all* situations, and the administrative record for several major pipeline verifications suggest that it *never occurs at all*.

NWP 12 is a final permit authorizing pipeline construction in US waters, usually with no further action by the Corps. It is only if certain criteria are met that project proponents even need to notify the Corps by submitting preconstruction notification.[61] As the Corps itself has argued: "For the vast majority of actions permitted by NWP 12, the action can proceed with no further

[61] 81 Fed. Reg. 35220.

review or verification by the Corps, it is only when the action reaches the threshold for a pre-construction notification that verification occurs…"[62] Thus, a project-level cumulative effects analysis (either on a pipeline, region-wide, or watershed-wide scale) will never occur in the vast majority of cases.

In addition, even where PCNs are required, district engineers *do not* evaluate cumulative impacts of overall pipelines at the project verification level. For example, the Corps verified the Gulf Coast Pipeline's 2,227 water crossings separately under NWP 12. In the thousands of pages of the administrative record for *Sierra Club v. Bostick*, which recounted email and phone conversations between Corps district staff and other federal and state agencies, there *was not a single mention of any discussion of cumulative effects or impacts* of the pipeline projects or of the multiple water crossings (either on a pipeline-wide, regional, or watershed scale).[63]

The Galveston, Tulsa, and Fort Worth district offices each issued verification letters, but none contained a single reference to "cumulative impacts" or "cumulative effects," let alone made a determination as to whether they would be minimal or explain that determination. There was no evidence of any discussion or evaluation of the cumulative effects of the overall project, nor is there any discussion of whether the project's water crossings are distant enough to be verified separately. The Corps never discussed whether permanently clearing 72 acres of forested wetlands in Texas' Pine Island Bayou alone—or 136 acres along the entire pipeline— would constitute more than minimal cumulative effects. Nor was there any consideration or discussion of any cumulative effects across the boundaries of each of the three districts (*i.e.*, on a pipeline-wide scale), or the cumulative effects associated with other federal and non-federal projects in the vicinity of the pipeline.[64]

None of the verification letters even acknowledge the pipeline's existence in the other districts- each simply states that the project meets the terms and conditions of NWP 12 and can therefore proceed within the respective Corps districts. Furthermore, the Galveston district issued their final verifications well before the Fort Worth District even received the information it requested on the pipeline's impacts to wetlands, so it would not have been possible for the districts to coordinated on cumulative impacts.[65]

In the entirety of the administrative record, the only use of the words "cumulative effects" or "cumulative impacts" was a single boilerplate conclusory sentence that recited the legal test, and which was pre-printed on the "memorandum of decision" for each project: "The

[62] *Sierra Club v. U.S. Army Corps of Eng'rs*, Defendants' Cross-Motion for Summary Judgment, attached as Exhibit 4, at 33.
[63] Exhibit 2, at 49-53.
[64] Exhibit 1, at 36-37.
[65] Exhibit 2, at 51-52.

proposed activity, with proposed mitigation would result in no more than minimal individual and cumulative adverse environmental effects and would not be contrary to the public interest."[66] As the Corps conceded in litigation, these conclusions were pre-written on the template forms the Corps used, which was obvious because each district mistakenly referred to the General Condition 27(e), which is a general condition from the 2007 version of the NWP 12 that no longer existed when these verifications were issued.

General Condition 27(e) required only: "In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest."[67] In 2012, the Corps eliminated General Condition 27(e) and added the new section D, which expressly states that when reviewing linear projects, the district engineers' decision "will include an evaluation of …the cumulative effects caused by all of the crossings authorized by NWP. …" and that the evaluation "will consider the direct and indirect effects…"[68] Thus, the 2012 version of NWP 12 contained new, specific requirements for evaluating the cumulative effects of pipelines. In approving the Gulf Coast Pipeline, the district engineers ignored these new requirements and simply used the old forms that came with the cumulative effects conclusion rubber-stamped on them. They did not "include an evaluation of …the cumulative effects caused by all of the crossings authorized by NWP. …" as Section D requires.

In *Sierra Club v. Bostick* involving the Gulf Coast Pipeline, Sierra Club appealed the denial of their motion for preliminary injunction to the 10th Circuit Court of Appeals The majority declined to discuss the merits of Sierra Club's claims at all, finding instead that the balancing of the equities weighed against a preliminary injunction.[69] However, Judge Martinez did address the merits in his dissent, and found a lack of any cumulative effects evaluation:

> The letters of approval prepared by each district do not provide a reasoned basis for *any* cumulative impacts analysis. Despite the Corps' contention to the contrary, the law is clear that the agency cannot simply state the legal standard and then recite that it made a "determination" that such criteria were satisfied.
>
> …
>
> In this case, the Corps failed to sufficiently articulate its reasoning for concluding that the authorization of 2,227 uses of NWP 12 to construct the Gulf Coast Pipeline would cause only minimal cumulative impact. There is no mention in the administrative record of any collaboration between the Districts with regard to the

[66] *Id.* at 49-53.
[67] 72 Fed. Reg. 11195 (March 12, 2007).
[68] 77 Fed. Reg. 10287.
[69] 539 Fed.Appx. 885, 889-890 (10th Cir. 2013).

> cumulative impact of the entire length of the Gulf Coast Pipeline. There are also no specific findings in support of the Corps' conclusion that the Gulf Coast Pipeline, as a whole, would have minimal cumulative impact.[70]

Moreover, the Corps' own litigation positions demonstrate the lack of any meaningful cumulative effects analysis at the project level. After approving the 600-mile Flanagan South crude oil pipeline in the same manner as the Gulf Coast Pipeline—without any discussion of cumulative effects at the project verification level—the Corps argued that "the Corps' regulations do not require consideration of the cumulative adverse environmental effects of the crossings for the entire Pipeline."[71] Instead, the Corps argued that it could evaluate the cumulative effects of NWP 12 permitted pipelines on a "regional basis… or by using a different type of geographic area, such as an ecoregion."[72] *See also* Exhibit 4, at 41:

> Plaintiffs are correct in asserting that the Corps districts did not consider the cumulative impact of all of the 1,950 crossings under NWP 12 along the full 600 mile route of the Pipeline before verifying the applicability of NWP 12 for any individual crossing. Plaintiffs are mistaken, however, in arguing the Corps's regulations required consideration of the cumulative adverse environmental effects of the *entire* Pipeline. Instead, each district made a determination that addressed the cumulative effects with respect to the authorized crossings within that one district…

If the Corps' position is correct, NWP 12 violates §404(e) by failing to require any evaluation of the cumulative effects of entire pipelines permitted by NWP 12 (*i.e.*, by allowing district engineers to focus only on the section of pipeline within their district without consideration of the rest of the pipeline).

Even if the "regional" focus of the analysis were allowed, the administrative records for both the Gulf Coast Pipeline and the Flanagan South Pipeline neglected to contain any discussion whatsoever of cumulative effects at any scale—pipeline-wide, regional, or by ecoregion. Incredibly, the Corps has argued repeatedly at the project level that it need not actually "include" any evaluation of cumulative effects in its record, as Section D plainly requires. *See, e.g.*, Exhibit 5, at 55 ("Sierra Club assumes that the verification letters themselves were required to explicitly address cumulative impacts and evaluate potential impacts…But no statute or regulation dictates the content of verification letters, and courts cannot dictate that the Corps present its verification decisions in a particular form.")

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[70] *Id.* at 900-901.
[71] *Sierra Club v. U.S. Army Corps of Eng'rs*, Appellees' Response Brief, attached as Exhibit 5, at 53.
[72] *Id.* at 54.

In addition, the Corps all but concedes the absence of any meaningful cumulative effects analysis by characterizing the district level verification as a mere "check- in" or "confirmation" that individual discharges meet NWP 12's terms.[73] The Corps cannot defer its cumulative effects analysis to the project level, arguing the district engineers have enormous discretion to require an individual permit if cumulative impacts are more than minimal; and then argue at the project level that there's no discretionary decision for the districts to make.

To summarize: at the NWP 12-issuance level, the Corps touts the enormous amount of discretion afforded to district engineers at the project-verification level and their extensive analysis of cumulative effects that ensures NWP 12 does not permit pipelines with more than minimal environmental effects. But at the project-verification level, the Corps districts separately verify thousands of water crossings along a pipeline without any discussion of cumulative effects, either within their respective districts or pipeline or region-wide, and argue that they are not required to do so. The Corps cannot have it both ways.

F. NWP 12 Violates §404(e) by Failing to make a Final Minimal Effects Determination until after the Opportunity for Public Participation has Passed

Public participation plays an important role in CWA permitting decisions. The CWA provides in its general policy section that "public participation in the development . . . of any . . . program established by the Administrator. . . under this chapter shall be provided for, encouraged, and assisted by the Administrator . . ."[74] Section 404 states: "The 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."[75]

Section 404(e), in particular, allows the Corps to, "***after*** notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment."[76] Corps' NWP regulations further provide that "[t]he notice will include all applicable information necessary to provide a clear understanding of the proposal."[77]

Thus, Section §404(e) sets forth a clear order that the Corps must follow: first, it must define a category of activities and determine whether that category will have only minimal

[73] *See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, Defendants' Opposition to Motion for Preliminary Injunction, *attached* as Exhibit 6, at 32.
[74] 33 U.S.C. § 1251(e).
[75] *Id.* § 1344(a).
[76] 33 U.S.C. § 1344(e)(1).
[77] 33 C.F.R. §325.3(b).

effects; second the Corps must allow public comment on that determination; third, after the Corps has made its determination and allowed public comment, the Corps may issue the NWP.

Rather than make a final determination that a category of activities will have only minimal individual and cumulative effects on the environment, as §404(e) requires, the NWP 12 relies on the discretion of "division and district engineers" to ensure, on a project-by-project basis, that the activities will have no more than minimal effects. *See* section III.E, supra.

The DDD and the Federal Register announcement make dozens of similar claims, demonstrating that the Final Rule unduly relies on the discretion of division and district engineers to make the minimal effects determination on a project-by-project basis, after the opportunity for public notice and comment has passed.

The minimal effects determination is the linchpin of the Corps' §404(e) analysis and the essential pre-condition for the issuance of a NWP, so the public must be notified of the basis of that determination at that time in order to have a meaningful opportunity to comment.[78] The public's only opportunity to comment comes at the NWP-issuance stage, since there is no public notice or opportunity at the verification stage. Thus, the Corps' deferral of the minimal effects determination until the verification stage violates §404(e) by preventing the public's ability to meaningfully participate.

The Final Rule is arbitrary and capricious and violates 404(e), which requires the Secretary to make a final determination that the activities will have only minimal cumulative adverse environmental effects *before* it issues a general nationwide permit, and only *after* notice and opportunity for public hearing.

G. NWP 12 Contains an Arbitrary and Capricious Definition of "Loss of Waters of the US" and Fails to Include Conversion of Forested Wetlands

The Corps' definition of "loss of waters of the US" is arbitrary and capricious, as well as NWP 12 that implements that definition, violates the CWA and the APA. The definition reads, in pertinent part:

> *Loss of waters of the United States:* Waters of the United States that are ***permanently adversely affected*** by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions

[78] *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009).

> and services. The loss of stream bed includes the acres or linear feet of stream bed that is filled or excavated as a result of the regulated activity. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.[79]

According to this broad definition, a "loss" of US waters would include a wide variety of activities that cause permanent adverse effects to waters. In the pipeline context, that would include the conversion of high-quality forested wetland to scrub shrub wetlands for the construction and permanent maintenance of pipeline rights-of-way. The DDD explains this practice of forested wetland conversion to lesser quality wetland types:

> The construction, maintenance, repair, or removal of utility lines and associated facilities may result in the loss or alteration of wetlands. For the construction or maintenance of utility lines impacts to wetlands will be temporary, unless the site contains forested wetlands. … Wetlands may also be converted to other uses and habitat types. Forested wetlands will not be allowed to grow back in the utility line right-of-way so that the utility line will not be damaged and can be easily maintained. Only shrubs and herbaceous plants will be allowed to grow in the right-of-way.[80]

As set forth in section IV.I, the removal of high-quality forested wetland and permanent conversion to lesser quality scrub shrub wetlands results in "permanent adverse effects" and a "change of use" of the waterbody, thus meeting the Corps' own definition of loss. For example, the effects of conversion include decreased structural and species diversity; decreased soil and streambank stabilization; decreased erosion and sedimentation control; loss of forest interior habitat and species; decreased nutrient storage; loss of visual and aural screening.[81]

In fact, the Corps explicitly recognizes elsewhere in the Federal Register announcement that forested wetlands conversion results in permanent adverse effects:

> Where certain functions and services of waters of the United States are ***permanently adversely affected*** by a regulated activity, ***such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently***

[79] 81 Fed. Reg. 35238-39.
[80] DDD, at 36.
[81] Schmid & Company, Inc. Consulting Ecologists, *The Effects of Converting Forest or Scrub Wetlands to Herbaceous Wetlands in Pennsylvania* (2014), attached as Exhibit 7, at 29-30.

maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.[82]

Therefore, there is no dispute that the permanent conversion of forested wetlands to lesser quality wetlands results in permanent adverse effects, thus meeting the Corps' own definition of "loss of waters of the US."

Nonetheless, the Corps routinely fails to consider forested wetlands conversion when calculating "loss" for purposes of NWP 12 qualification. For example, the Corps verified over 60 individual crossings along the Gulf Coast Pipeline that would each exceed the 1/2-acre loss threshold and would not qualify for NWP 12 authorization if forested wetland conversion were counted.[83] Had any of these individual crossings required an individual 404 permit, the entire pipeline would require an individual permit.[84] Nonetheless, the Corps verified the entire pipeline under NWP 12, which resulted in a total of 130 acres of forested wetland conversion.[85]

In subsequent litigation, the Corps argued : "when a wetland is converted, there is no *loss* of waters of the United States; the wetland and its waters still exist, they just become a different type."[86] However, this argument wrongly suggested that "loss" only occurs if waters are eliminated altogether, which is far more stringent than the "*permanently adversely affected"* definition, which the Corps admits is met with forested wetland conversion.

The Corps' position is arbitrary and capricious and contradicts the plain meaning of its own definition. It also means that NWP 12 violates §404(e) by permitting projects with more than minimal environmental impacts, measured both individually and cumulatively (*e.g.*, NWP 12 permits pipelines that can destroy an unlimited amount of forested wetlands without triggering individual permit review).

Therefore, NWP 12 must clarify that the conversion of forested wetlands fits within the Corps' own definition of "loss" and must count toward the ½-acre threshold for NWP 12.

H. The Corps Fails to Articulate a Rational Basis for the 1/2–Acre Loss Threshold

[82] 81 Fed. Reg. 35234 (emphasis added).
[83] *Sierra Club v. Bostick*, Plaintiffs' Reply on Motion for Summary Judgment, attached as Exhibit 8, at 8.
[84] 33 C.F.R. § 330.6(d).
[85] *Sierra Club v. Bostick*, Plaintiffs' Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction, attached as Exhibit 9, at 15.
[86] *Sierra Club v. Bostick*, Defendants' Response to Motion for Summary Judgment, attached as Exhibit 10, at 16.

The Draft Decision Document contains no analysis to support its conclusion that all losses of U.S. waters under 1/2 -acre are minimal. In *Alaska Ctr. for Env't v. West*, 31 F. Supp. 2d 714, 722 (D. Alaska 1998), the court held that the Corps' issuance of a NWP for single-family houses violated NEPA because there was no meaningful discussion of why the 1/2-acre loss threshold could not be smaller. The same is true here. The Corps failed to explain how it arrived at the 1/2-acre loss threshold; how different types of U.S. waters could be impacted by fills of up to 1/2-acre; and why the lower thresholds used in other NWPs (*e.g.*, 1/3 acre or 1/10 acre) could not be used with respect to NWP 12. The Corps' use of the 1/2-acre threshold is arbitrary and capricious and a violation of the APA because the Corps failed to articulate a satisfactory explanation for that limit. *Colorado Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213-14 (10th Cir. 2006).

I. Violates 404(b)(1) Guidelines

The DDD contains a 10-page section intended to comply with the Corps' 404(b)(1) guidelines, particularly the criteria specified at 40 C.F.R. § 230.7. DDD, at 46-57. Each section addresses the criteria in short paragraphs, mainly speaking in generalities and/or deferring any meaningful discussion of the criteria to be conducted at other levels of review. *See, e.g.*, DDD, at 46 ("Reviews of pre-construction notifications, regional conditions, and local operating procedures for endangered species will ensure compliance with the Endangered Species Act. Refer to general condition 18 and to 33 CFR 330.4(f) for information and procedures."); DDD, at 48 ("If a situation arises in which the activity requires further review, or is more appropriately reviewed under the individual permit process, provisions of the NWPs allow division and/or district engineers to take such action."). As explained elsewhere in these comments, this cursory review is insufficient given that NWP 12 is a final permit authorizing pipelines nationwide without any further review by the Corps.

The DDD fails to satisfy its 404(b)(1) obligations. First, as explained elsewhere in these comments, the Corps has provide no basis for its conclusion that "(1) The activities in such category are similar in nature and similar in their impact upon water quality and the aquatic environment; (2) The activities in such category will have only minimal adverse effects when performed separately; and (3) The activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment.[87] On the contrary, NWP 12 would permit a wide range of utility projects such as crude oil and fracked gas pipelines and related infrastructure; their impacts on the environment, including but not limited to spills and leaks of various transported substances into aquatic environment, would be significant both individually and cumulatively; and the Corps has failed to adequately discuss the cumulative impacts of projects permitted by NWP 12 and/or require a meaningful cumulative impacts analysis at later stages.

[87] 40 C.F.R. § 230.7(a).

To the extent that other sections of these comments discuss issues related to the 404(b)(1) regulations (e.g., cumulative impacts, impacts to endangered species), those critiques are incorporated herein insofar as they overlap. In addition, the DDD fails to comply with the requirements of 40 C.F.R. §§ 230.1, 230.7, 230.10, 230.1. For example, the Corps has not demonstrated that there is no "practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."[88] The "no action" alternative (*i.e.*, requiring an individual 404 permit for pipelines) would have less adverse impacts. For the reasons set forth throughout these comments, the Corps has failed to comply with its 404(b) guidelines and failed to demonstrate that reissuance of NWP 12 is in the public interest.

J. Comments on Definitions

1. ***"Independent utility:*** A test to determine what constitutes a single and complete non-linear project in the Corps Regulatory Program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility."[89]

As explained above, the Corps should change the definition of "independent utility" to clarify that this test applies to linear projects as well as non-linear projects.

2. ***Loss of waters of the United States:*** Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody.[90]

As explained above, the Corps should amend this definition to clarify that the conversion of forested wetlands to lesser-quality wetland types constitutes a "loss of waters of the US," since the practice causes permanent adverse effects.

3. ***Single and complete linear project:*** A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more

[88] *Id.* § 230.10.
[89] 81 Fed. Reg. 35238.
[90] *Id.* at 35238.

> waterbodies at separate and distant locations. The term ‘‘single and complete project’’ is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (*i.e.,* a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.[91]

As explained above, the Corps should amend this definition to mirror the definition of single and complete non-linear project:

> *Single and complete non-linear project:* For non-linear projects, the term ‘‘single and complete project’’ is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of ‘‘independent utility’’). Single and complete non-linear projects may not be ‘‘piecemealed’’ to avoid the limits in an NWP authorization.[92]

There is no rational basis for treating linear and non-linear projects differently. The Corps should combine the two definitions and not distinguish between linear and non-linear projects; and apply the independent utility test to all projects permitted by NWP 12.

K. Comments on General Conditions

All NWPs are subject to general conditions, which are published in conjunction with the NWPs. These general conditions “are additional provisions which place restrictions or limitations on all of the NWPs”[93] and they provide an important backstop to abuse of the nationwide permitting program.

1. General Condition 7

To protect our public water supply and intakes, the Corps must clarify and amend the requirements under general condition 7 and define proximity to public water supply intakes.

a. Background

[91] *Id.* at 35239.
[92] *Id.* at 35239.
[93] 33 C.F.R. § 330.2(h).

The general conditions include general condition 7, which prohibits the use of NWPs when the activity is within proximity of a public water supply intake.[94] If an activity is in proximity to a public water supply intake, and therefore does not comply with general condition 7, it cannot be verified under a nationwide permit; instead, the activity may be approved under an individual permit.[95]

The prohibition against using nationwide permits in proximity to public water supply intakes has been a part of the nationwide permitting program since its inception. In 1977, a condition on discharges to waters under nationwide permits stated that the "discharge will not be located in the proximity of a public water supply intake."[96] The language has changed little over that past 39 years. The Corps has also expressly stated the importance of public water supply intakes. In its 2007 response to comments, the Corps noted that "[t]his general condition is not too restrictive, given the importance of water supply intakes for public, commercial and industrial use."[97]

Under NWP 12, the Corps requires a pre-construction notification (PCN) to be submitted to the agency if the project meets one of seven factors.[98] When no PCN is required, the permittee is responsible for complying with the general conditions, with no oversight from the Corps.[99] When a PCN is required, the responsibility falls on the Corps to verify that the proposed activity complies with the terms and conditions of the NWP.[100] In theory, when a utility line activity is proposed under NWP 12 and a PCN is required, the district engineer should analyze the project to determine whether it is in proximity to a public water supply intake.

NWP 12 authorizes the discharges of dredged or fill material into waters of the U.S. from construction, maintenance and repair of utility lines, including crude oil pipelines. The Corps' cumulative effects analysis for utility line activities "must include environmental effects caused by reasonably foreseeable actions that may take place after the permitted activity is

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[94] Proposal to Reissue and Modify Nationwide Permits, 81 Fed. Reg. 35,186, 35,231 (June 1, 2016) ("*Water Supply Intakes.* No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.").

[95] 33 C.F.R. § 330.1(c).

[96] Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977).

[97] Reissuance of Nationwide Permits, 72 Fed. Reg. 11092, 11156 (Mar. 12, 2007).

[98] 81 Fed. Reg. at 35220.

[99] *See* 33 C.F.R. §§ 330.1(c) ("An activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions."); 330.4(a) ("A prospective permittee must satisfy all terms and conditions of an NWP for a valid authorization to occur.").

[100] *See, e.g.*, 33 C.F.R. § 330.4(b)(1) ("DEs have authority to determine if an activity complies with the terms and conditions of an NWP."); 81 Fed. Reg. at 35237 ("In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest.").

completed."[101] For oil pipelines, this analysis includes activities associated with the operation and maintenance of oil pipelines, including the risk of leaks and spills into surrounding areas, including waterbodies and wetlands.[102]

Leaks, spills and unpermitted discharges from the operation and construction of pipelines occur all too frequently. In addition to risks of explosion, property damage, injury and death, pipelines create a substantial risk to groundwater and surface water contamination. In a number of instances, pipeline leaks have caused oil to spread over significant areas and travel substantial distances, reaching and contaminating water in several cases. If a spill occurs in proximity to a public water supply intake, it may have catastrophic consequences on the communities who depend on drinking water from that source. For instance, in 2015, the Bridger pipeline spilled as much as 50,400 gallons of oil into Yellowstone River, nine miles upstream of the town of Glendive. An oil sheen was detected as far as 25 miles downstream of the spill. The municipal water system for Glendive was tested and found to have elevated levels of hydrocarbons in the water, and the city was forced to close the water intakes.[103] In 2010 in Marshall, Michigan, an Enbridge pipeline spilled over 800,000 gallons of oil into the Kalamazoo River.[104] Up to 30 miles of the Kalamazoo River were affected.[105] In 1999, the Olympic pipeline in Washington spilled 237,000 gallons of gasoline into Whatcom Creek, causing fisheries on the creek to be closed for 120 days.[106]

Plains All American Pipeline (Plains), the company whose subsidiary recently constructed an oil pipeline less than a mile from the drinking water source for the entire Mobile, Alabama area, also has a history of pipeline breaks. In May 2015, a Plains pipeline near Santa Barbara, California broke and spilled as much as 123,000 gallons of oil onto a nearby beach and into the Pacific Ocean. The spilled oil created a ten square mile oil slick in the Pacific Ocean, closed multiple beaches, and killed hundreds of animals, including brown pelicans and dolphins.[107] In May 2016, a California grand jury indicted Plains and one of its workers on

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[101] U.S. Army Corps of Eng'rs, Nationwide Permit 12 Draft Decision Document 28 (2016).
[102] *Id.*
[103] Exhibit 11, Scott Haggett, et al., *Oil Spills in Montana's Yellowstone River After Pipeline Leak*, Reuters, Jan. 19, 2015, http://www.reuters.com/article/uk-bridgerpipeline-oilspill-idUSKBN0KT0BB20150120.
[104] Exhibit 12, EPA, *Fact Sheet: Water Issues, Enbridge Oil Spill, Marshall, Michigan* 1 (2010), https://www.epa.gov/sites/production/files/2016-06/documents/enbridge_fs_20100819wq.pdf.
[105] *Id.*
[106] Exhibit 13, Kira Millage, *Timeline of Bellingham Pipeline Explosion*, Bellingham Herald, June 7, 2009, http://www.bellinghamherald.com/news/local/article22200432.html; Exhibit 14, NOAA, *Whatcom Creek* (July 11, 2016; 9:54 AM), https://darrp.noaa.gov/oil-spills/whatcom-creek.
[107] Exhibit 15, Suzanne Guldimann, *Charges filed in 2015 Santa Barbara oil spill incident*, Malibu Surfside News (May 24, 2016, 2:14 PM), http://www.malibusurfsidenews.com/charges-filed-2015-santa-barbara-oil-spill-incident.

criminal charges related to the oil spill. These charges included 46 criminal charges and 4 felony charges.[108] In addition, Plains could face up to $2.8 million in fines. There are numerous other instances of Plains' pipelines spilling oil. In 2010, EPA and Plains settled an enforcement action concerning 10 spills, totaling over 237,000 gallons of crude oil spilled, between 2004 and 2007.[109]

Risks to the environment from pipelines do not come solely from leaks and spills. Pipeline construction can also result in environmental damage by discharging sediment into waters of the U.S. In Pennsylvania, during construction of an 18-mile pipeline, Stonehenge Appalachia LLC and its contractors "allowed 'uncontrolled and unpermitted sediment discharges into wetlands and caused a landslide" and discharged drilling fluids.[110] The Pennsylvania state environmental agency and the company entered into a consent order requiring Stonehenge to undertake restoration work.[111]

b. District engineers are not using their discretionary authority to prohibit the use of NWPs when they are in proximity to public water supply intakes, and it is not clear that the proximity determination is ever made.

District engineers have not been evaluating compliance with general conditions when they verify the use of NWP 12 and are not using their discretionary authority to modify, revoke or suspend NWP 12. Throughout the NWP permit regulations and federal register reissuance of NWPs, the Corps relies on district engineers to assert "discretionary authority to suspend, modify, or revoke authorizations under an NWP."[112] A district engineer has this discretionary authority over "a specific activity whenever he determines sufficient concerns for the environment or any other factor of the public interest so requires."[113] The Corps depends on district engineers using this discretionary authority to ensure that utilities lines authorized under NWP12 are in compliance with the NWP and its general conditions: "We believe that major

[108] Exhibit 16, Alison Snyder, *Plains All American Pipeline, Employee Face Charges in 2015 Oil Spill*, Wall Street Journal (updated May 17, 2016, 7:33 PM), http://www.wsj.com/articles/plains-all-american-pipeline-employee-face-charges-in-2015-pipeline-spill-1463500212.
[109] Exhibit 17, Casi Callaway & Keith Johnston, *California spill shows risk to Mobile water from Plains Pipeline*, AL.com (July 1, 2015, 10:12 AM), http://www.al.com/opinion/index.ssf/2015/07/california_spill_shows_risk_to.html.
[110] Exhibit 18, Ellen M. Gilmer, *Regulators levy $1.5M fine on pipeline builder*, E&E, July 19, 2016.
[111] *Id.*
[112] 33 C.F.R. § 330.1(d).
[113] *Id.* § 330.4(e)(2).

utility lines will have little opportunity to escape our notice and this fact will allow the DE to assert discretionary authority, where appropriate."[114]

Currently, district engineers are not using this discretionary authority, even though the Corps continually relies on this discretionary authority to support its position that NWPs will not result in more than minimal adverse environmental effects. For instance, the federal register notice states that "[n]ationwide permits also allow Corps district engineers to exercise, on a case-by-case basis, discretionary authority to require individual permits for proposed activities that may result in more than minimal individual and cumulative adverse environmental effects."[115] In practice, district engineers are not making these case-by-case decisions.

Not only are district engineers not asserting their discretionary authority to ensure that activities under NWP 12 are in compliance with general conditions, in many instances, the district engineers are not even considering the general conditions when they verify activities under NWP12. To provide an example, in January 2013, the Corps' Mobile District authorized Plains Southcap, a subsidiary of Plains All American Pipeline, to construct a 24-inch crude oil pipeline that would cut directly through the Big Creek Lake watershed, a watershed that supplies water for over 200,000 people in the Mobile, Alabama area.[116] The pipeline is routed less than a mile from Big Creek Lake and less than two miles from the Mobile Area Water and Sewer System (MAWSS) public water supply intake located on Big Creek Lake.[117] Big Creek Lake is the sole source of drinking water for the region. The pipeline also runs parallel to and crosses Hamilton Creek, a major tributary to Big Creek Lake, multiple times.[118]

The Mobile District verified the construction of the pipeline under NWP 12. However, in issuing the verifications, the Mobile District failed to consider general condition 7, which prohibits the use of nationwide permits in proximity to public water supply intakes. A non-profit water protection organization filed a lawsuit against the Corps of Engineers, arguing that the decision to authorize the pipeline was arbitrary and capricious, an abuse of discretion and contrary to law, in part because the Corps failed to evaluate whether the impacts were in proximity to the public water supply intake.

The federal district court for the Southern District of Alabama held that the Corps did not violate the law in issuing the verifications. However, the court made it very clear that the Corps never looked at the public water supply intake when it issued the verifications: "[T]he Corps simply did not examine the issue . . . . There is simply no record basis for the proposition that

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[114] Final Rule for Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits, 56 Fed. Reg. 59110, 59122 (Nov. 22, 1991).
[115] 81 Fed. Reg. at 35188.
[116] Exhibit 19, *Mobile Baykeeper, Inc. v. U.S. Army Corps of Eng'rs*, No. 14-0032-WS-M, at 3–4 (S.D. Ala. Oct. 16, 2014).
[117] *Id.* at 4.
[118] *Id.*

the Corps actually engaged in such a 'proximity' analysis here."[119] The impacts of this pipeline were less than one mile from the sole source drinking water supply and approximately two miles from the water intake. The court determined that "nothing in the text of the Corps' final rule for nationwide permits indicates that the Corps must perform an independent analysis of a project's risks to public water supply intakes and make a 'no proximity' finding under General Condition 7 before issuing verifications."[120] Allowing the Corps to issue verifications without considering General Condition 7—without even having the location of the public water supply intake listed on any pipeline map in the administrative record[121]—renders general condition 7 meaningless and useless.

Now, there is a crude oil pipeline that has the capacity to transport 8.4 million gallons of crude oil per day is routed through the Big Creek Lake watershed, less than one mile from Big Creek Lake, potentially endangering the Mobile area water supply and the health of the 200,000 who depend on Big Creek Lake for their water. Should the pipeline leak or break, MAWSS has stated that it will have to close off its intake structure, thereby requiring an alternative water supply for those citizens relying on water from Big Creek Lake.[122]

Similarly, the Corps verified both the Gulf Coast Pipeline and the Dakota Access Pipeline despite their close proximity to drinking water intakes. Neither verification discussed compliance with GC 7.

c. The Corps should amend the nationwide permitting program to ensure that future activities under NWP12 are in compliance with general condition 7.

As the Corps currently authorizes activities under NWP12, the general condition 7 is not being evaluated and the district engineers are not using their discretionary authority to ensure that activities are not authorized in proximity to public water supply intakes. To ensure that the general condition 7 is effective and used to protect our drinking water supply, Commenters request that the Corps make the following additions and clarifications to the nationwide permitting program.

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[119] *Id.* at 23 n.21.
[120] *Id.* at 27.
[121] Because there was no map or other information in the administrative record regarding the location of the public water supply intake and its proximity to the pipeline route, the plaintiff supplemented the record with a map showing the Big Creek Lake watershed, the public water supply intake and the pipeline route through the watershed. Exhibit 20, *Mobile Baykeeper, Inc. v. U.S. Army Corps of Eng'rs*, No. 14-0032-WS-M (S.D. Ala. June 9, 2014) (order granting plaintiff's motion to supplement the record); Exhibit 21, Motion to Supplement the Record, Exhibit A, *Mobile Baykeeper, Inc. v. U.S. Army Corps of Eng'rs*, No. 14-0032-WS-M (S.D. Ala. May 15, 2014).
[122] Exhibit 22, Michael Dumas, *Would oil spill equal Mobile evacuation? Judge, Plains Southcap challenge MAWSS expert's analysis*, AL.com (Dec. 19, 2013), http://blog.al.com/live/2013/12/would_oil_spill_equal_mobile_e.html.

i. The Corps must explicitly state the role of district engineers in determining compliance with all general conditions, including general condition 7.

It is unclear whether the district engineer or the permittee is responsible for determining whether a project satisfies the general conditions of the NWPs. While it is clear that the district engineer has discretionary authority to modify, suspend or revoke a NWP authorization, and to require a regional general permit or individual permit in place of an NWP, the district engineer's responsibility for determining compliance with the general conditions is unclear and has been confused in practice. District engineers are left with little guidance on when general conditions must be considered during the verification approval process.

It appears that if no PCN is required, it is the permittee's responsibility to satisfy the NWP's general conditions. The Corps regulations state: "An activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions."[123] Similarly, the regulations also state that "[a] prospective permittee must satisfy all terms and conditions of an NWP for a valid authorization to occur."[124] The regulations provide further insight by saying that a permittee may "request from a DE confirmation that an activity complies with the terms and conditions of an NWP," therefore saying that the obligation is on the permittee, but the permittee may ask for confirmation from the DE.[125] The federal register also notes that the permittee is responsible for complying with the general conditions.[126]

However, if a permittee is required to submit a PCN, the obligation of ensuring compliance with terms and conditions falls on the district engineer. The federal register notice states that "District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP" and that "in reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest."[127] For a linear project under NWP 12, "this determination will include an evaluation of the individual crossings to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP."[128]

Recent decisions highlight the confusion over the duties of the permittee and the district engineer when verifications are required. When a PCN is required, multiple courts have held that the district engineer is not required to evaluate whether the project complies with the general conditions. In *Snoqualmie Valley Preservation Alliance v. U.S. Army Corps of Engineers*, the

[123] 33 C.F.R. § 330.1(c).
[124] *Id.* § 330.4(a).
[125] *Id.* § 330.6(a).
[126] *See* 81 Fed. Reg. at 35231.
[127] *Id.* at 35237–38.
[128] *Id.* at 35237.

plaintiff challenged the authorization of NWPs for a hydroelectric project, in part "challeng[ing] the Corps' determination that the project would comply with all applicable general conditions . . . ."[129] The plaintiff argued that the Corps' statement that the project complied with the terms and conditions of the NWPs 3, 33 and 39 was insufficient.[130] The Ninth Circuit, however, held that when a permittee is required to submit a PCN, "a permittee is not required in most cases to supply the Corps with information about how the project will satisfy each general condition."[131] Therefore, if a permittee is not required to provide documentation, "it would be an absurd result to require the Corps to evaluate and explain how [the permittee] will comply with these conditions."[132] In sum, where a PCN was submitted, and therefore, according to the final rule on nationwide permits, the district engineer should ensure that the project complies with the general conditions, the Ninth Circuit held that it was not the Corps' responsibility to ensure that the project satisfied each general condition.

Similarly, in *Mobile Baykeeper v. U.S. Army Corps of Engineers*, the permittee submitted a PCN for NWP 12 for a pipeline.[133] The Corps did not evaluate whether the project complied with general condition 7:

> After all the dust settles, what remains in this: The Corps did not investigate whether Plains Southcap's pipeline would be routed in proximity to a public water supply intake. Nonetheless, that omission did not render the Corps' NWP 12 verifications for the pipeline in January 2013 arbitrary and capricious, an abuse of discretion, or contrary to law."[134]

The Court held that the Corps was not required to consider the general conditions, even though the permittee submitted a PCN and the federal register states that "District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP." [135]

The Corps must clarify the role of the district engineer and the permittee in determining compliance with the general condition 7. The same is true for all other General Conditions. When a PCN is required for a NWP 12 linear project, the district engineer "will include an evaluation of the individual crossings to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings

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[129] *Snoqualmie Valley Pres. Alliance v. U.S. Army Corps of Eng'rs*, 683 F.3d 1155, 1163 (9th Cir. 2012).
[130] *Id.*
[131] *Id.* at 1164.
[132] *Id.*
[133] Exhibit 19, at 2–3.
[134] *Id.* at 29.
[135] 81 Fed. Reg. at 35237.

authorized by NWP."[136] While this appears relatively straightforward, district engineers are not evaluating the general conditions when issuing nationwide permit authorizations, as seen by the holdings in recent cases.

At least one federal district court has explicitly stated the need for clarification on the role of general conditions and district engineers. In *Mobile Baykeeper*, the court noted that the NWP program may need further explanation or amendment:

> First, in finding that the nationwide permit process excuses the Corps from expressly determining compliance with General Condition 7 before issuing verification, the Court expresses no opinions about what the law should be, only what it is. The Eleventh Circuit has previously stated that it is "acutely aware of Appellants' legitimate concerns over abuse of the general permitting process . . . [to] gut the individual permitting process." *Sierra Club v. U.S. Army Corps of Engineers*, 508 F.3d 1332, 1336 (11th Cir. 2007). If Baykeeper is correct, then there may be important unanswered questions about whether the law should impose on the Corps additional oversight and investigative duties before issuing verifications under nationwide permit; however, those questions are legislative or *regulatory* in nature, and are not properly before the judiciary in cases such as this.[137]

Presently, district engineers are not considering general condition 7 when they verify the use of a nationwide permit. Oil pipelines in proximity to drinking water intakes put entire populations at risk, and district engineers and ignoring the general condition that prohibits the use of NWPs in proximity to those drinking water intakes. The Corps must include safeguards in the NWP program to ensure that the public and the environment are not adversely affected by NWPs.

ii. The Corps should require a pre-construction notification for all uses of NWP 12 in watersheds with one or more public water supply intakes.

Because of the potential adverse environmental effects of constructing and operating utility lines, the Corps should require a PCN for all uses of NWP 12 in watersheds with one or more public water supply intakes. As currently proposed, NWP 12 only requires a PCN to be submitted if the project meets one of seven factors.[138] Projects that do not meet into one of these seven factors are never considered or verified by the Corps of Engineers. That means that utility lines, such as oil pipelines, are constructed through the Corps' jurisdictional area without any notice to the Corps or evaluation by the Corps. Requiring a PCN for all uses of NWP 12 in drinking water watersheds will put the Corps on notice of the proposed utility line project, and will give the Corps the opportunity to evaluate the project, ensure that it complies with all terms and conditions of the NWP program, and that it will have only minimal adverse environmental

[136] *Id.*
[137] Exhibit 19, at 19 n.27 (emphasis added).
[138] 81 Fed. Reg. at 35220.

effects. If the project does not comply with these requirements, the district engineer may use its discretionary authority to require a regional general permit or an individual permit.

NWP 12 already requires PCNs for a variety of activities under NWP 12. Requiring PCNs for all NWP 12 projects in drinking water watersheds is a simple way to monitor activities potentially affecting water supplies and require a verification process for activities that are being constructed within crucial water resource areas.

iii. The PCN for NWP 12 should state the distance to and provide a map of public water supply intakes if the activity is in a watershed with one or more public water supply intakes.

When a proposed permittee submits a pre-construction notification for a NWP 12 project in a watershed with one or more public water supply intakes, the permittee should be required to state the distance to the public water supply intakes and include a map showing the intakes, the watershed and the proposed activity. Including this information in the PCN will put the permittee and the Corps on notice of any potential proximity issues and will help the Corps determine whether an additional evaluation of proximity should be done. General condition 32 lists the numerous contents for a PCN submission, which include items such as wetlands delineations, endangered species analysis, and historic property analysis.[139] Requiring the permittee to include the distance to public water supply intakes and attach a map of their locations will help ensure that proposed activities are not in proximity to intakes. If they are in proximity, the Corps can then use its discretionary authority to require a general permit or an individual permit instead of a nationwide permit. This requirement will only slightly increase the burden on a permittee, but will provide crucial information to the Corps when it determines whether the project should be verified under NWP 12.

When Plains Southcap, the permittee in the *Mobile Baykeeper* case, submitted its PCN in 2012, it included a general map of the pipeline route which included Big Creek Lake. Missing from the PCN and the administrative record, however, was the location of the MAWSS water intake and any information indicating that Big Creek Lake was a public water supply. In the Corps' administrative record for the verifications, there was no indication that the Corps ever knew there was a public water supply intake in the vicinity of the pipeline route.[140] Had Plains Southcap been required to include information on the public water supply intakes, it would have listed the MAWSS intake and the Corps may have evaluated the project for compliance with general condition 7 before it authorized the use of NWP 12.

Requiring information on distance to public water supply intakes and a map of public water supply intakes for NWP 12 activities that are in watersheds with one or more public water

[139] *Id.* at 35236.
[140] Exhibit 19, at 23 n.21, 29.

supply intakes may prevent of the type of oversight that occurred in the case of the Plains Southcap pipeline.

iv. To protect water supply intakes and the water supply, the Corps must define proximity to public water supply intakes.

As currently written, general condition 7 prohibits the use nationwide permits in proximity to public water supply intakes, but it does not define proximity or provide guidance on how a district engineer should examine whether a project is in proximity to a drinking water supply. It gives the district engineers, or the permittee, discretion, that is not used, to determine what activities or verifications are in proximity to a public water supply intake. To ensure that the NWPs "cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment,"[141] the Corps should define proximity in general condition 7. At the very least, the Corps should define proximity to public water supply intakes for NWP 12 authorizations for oil pipelines.

Over the past three decades, persons commenting on proposed nationwide permits and general conditions have repeatedly requested that the Corps define proximity. However, the Corps has chosen not to address the definition of proximity at the national level. In the 1991 issuance of the NWPs, three commenters requested a definition of the term proximity. The Corps chose not to define proximity, stating that "[w]e believe that it would not be prudent to place a specific restriction on the distance from a water supply intake on a national level."[142] In 2000, a commenter recommended that "the Corps require submission of a PCN when a proposed activity is within 1 mile upstream of a public water supply intake."[143] Corps responded to commenters: "District engineers will determine whether an activity is subject to this general condition. Imposing a notification requirement based on a distance from an intake structure is not appropriate for a national condition, but division engineers can regionally condition the NWPs to establish specific distances from public water supply intakes."[144] And, in 2007, a commenter requested that the Corps define proximity. The Corps responded:

> District engineers will determine on a case-by-case basis what is necessary to comply with this general condition. We believe the term "proximity" is flexible enough to allow district engineers to determine that activities that will not adversely impact a public water supply intake are not in proximity to the intake. The term 'proximity' should be defined on a case-by-case basis, after taking into account site characteristics and the nature of the waterbody and activity.[145]

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[141] Clean Water Act § 404(e), 33 U.S.C. § 1344(e).
[142] 56 Fed. Reg. at 59132.
[143] Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12818, 12868 (Mar. 9, 2000).
[144] *Id.*
[145] 72 Fed. Reg. at 11156 (Mar. 12, 2007).

As can be seen by the Corps' previous responses, the Corps has refused to define proximity at the national level. Unfortunately, in despite of repeated requests for the Corps to clarify the meaning of proximity, the Corps has punted to the district offices to determine proximity.

The Corps' assumption that proximity will be determined on a regional or case-specific basis is incorrect and has been misconstrued by the courts. While Corps districts have issued regional conditions covering a wide range of NWP issues,[146] none has defined proximity on a regional basis. In addition, district engineers are not determining "proximity" on a case-by-case basis. In fact, district engineers are not even considering whether an NWP verification is near a public water supply intake.[147] As discussed above, in *Mobile Baykeeper*, the Corps' administrative record for the verifications had no indication that the Corps ever knew there was a public water supply intake in the vicinity of the pipeline route.[148] Instead of determining proximity on a case-by-case basis, as the Corps headquarters assumed district engineers would do, the Mobile District simply ignored general condition 7.

The Corps should take into account the potential environmental impacts of a pipeline spill when determining the definition of proximity. The Corps is required to take the operation and maintenance of pipelines, including potential leaks, into account when it conducts its upfront NEPA analysis. In its NWP 12 draft decision document, the Corps acknowledges that "such [cumulative] effects may include direct and indirect environmental effects caused by the operation and maintenance of the facility constructed on the discharge of dredged or fill material into waters of the United States or the structures or work in navigable waters of the United States . . . . During the operation of utility lines, substances carried by those utility lines may leak into surrounding areas."[149] To ensure that water supply intakes are not adversely affected by activities conducted under NWP 12, the Corps should examine the cumulative effects of pipelines on public water supply intakes. Pipelines leak and spill, and the Corps must consider the potential for substances being carried in those pipelines being spilled into areas surrounding the pipeline. The definition of proximity should account for the potential contamination of water supply intakes by pipelines that are verified under NWP 12.

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[146] For instance, multiple Corps districts have prohibited the use of NWP 12 in specific waterbodies, or required additional PCN requirements for NWP 12 authorizations. *See, e.g.*, U.S. Army Corps of Eng'rs, Savannah District, *Savannah District 2012 Nationwide Permits Regional Conditions* (Mar. 30, 2012); U.S. Army Corps of Eng'rs, Sacramento District, *Final Sacramento District Nationwide Permit Regional Conditions for California, Excluding the Lake Tahoe Basin* (Mar. 18, 2012).

[147] *See, e.g.*, Exhibit 19, at 25 n.23.

[148] *Id.* at 23 n.21.

[149] U.S. Army Corps of Eng'rs, Nationwide Permit 12 Draft Decision Document 28 (2016).

Defining proximity at the national level will create consistency throughout the country and ensure that activities within a certain distance of public water supply intakes are not authorized or constructed under a nationwide permit. It will protect our public water supply from the risk of contamination from activities permitted under NWPs. It will also provide guidance for district engineers as they analyze proposed activities and determine whether they comply with the NWP's terms and conditions. This, in turn, will lessen the burden on district engineers, as they will not be required to determine proximity based on "site characteristics and the nature of the waterbody and activity."[150] Finally, it will ensure that projects within a certain distance of our water supplies will not be approved through a streamlined permitting process like the NWP process.

As the regulations currently require, a utility line activity that is in proximity to a public water supply intake cannot be authorized under an NWP; instead, it must go forward under an individual permit or a regional general permit. Individual permits require, among other things, site-specific documentation and analysis, public notice and opportunity for a hearing, a public interest review and a formal determination that the requirements of the law are met.

v. In the alternative, if the Corps chooses not to define proximity to public water supply intakes, it should prohibit the use of NWP 12 in watersheds with one or more public water supply intakes.

As discussed above, Commenters request that the Corps define proximity to public water supply intakes. However, if the Corps chooses not to define proximity, it should prohibit the use of NWP 12 in watersheds that include one or more public water supply intakes, and require the permittee to go through the individual permitting process. Currently, district engineers are not considering general condition 7 when authorizing the use of NWP 12, and they are not required to, according to recent case law. Therefore, the only way to protect these vital natural resources is for permittees to undergo the individual permitting process when activities impact drinking water supplies. Because of the importance of our public water supply intakes, if proximity is not defined and general condition 7 is not clarified on a national level, no NWP 12 authorization should occur in locations that could harm the public water supply and intakes.

vi. The Corps should require compliance documentation with general condition 7.

Because of the issues discussed above, that the district engineers are not evaluating compliance with general condition 7 prior to issuing NWP 12 verifications, the Corps should require compliance documentation with general condition 7 for all uses of NWP 12 in watersheds with one or more public water supply intakes. At least two NWP general conditions require case-by-case review by the district engineer. General condition 18 requires review of all

[150] 72 Fed. Reg. at 11156.

activities that may adversely affect Federally-listed endangered or threatened species and general condition 20 requires review for historic properties. Whether correct or not, courts have viewed the Corps' requirement for compliance documentation for those general conditions as meaning that other general conditions do not require any compliance documentation. For instance, in *Mobile Baykeeper*, after the Corps did not evaluate the PCN for compliance with general condition 7, the judge stated:

> The point is clear: When the Corps wanted to create a mandatory review process for items that the DE must consider before verifying a project, it included appropriate language in the text of that general condition. The Corps knew how to use such language in its final rule; however, it omitted such language from the text of General Condition 7. Such omission raises a strong inference that the Corps never intended to impose a specific, mandatory review process by the DE as to that general condition before a verification may issue.[151]

To ensure that general condition 7 is considered before a district engineer verifies an activity under NWP 12, and therefore ensures that the activity will not potentially have an adverse effect on public water supplies, the Corps should require a mandatory review process for general condition 7.

2. General Condition 15: Single and Complete Project

General condition 15 provides that "[t]he same NWP cannot be used more than once for the same single and complete project." 81 Fed. Reg. 35232. As explained in detail above, the Corps should change this general condition to prohibit the use of the same NWP more than once for the same inter-connected pipeline project rather than allowing the use of NWP 12 for each water crossing along a linear project.

3. General Condition 18: Endangered Species

General Condition 18, Endangered Species, is included in the NWP general conditions to ensure that activities authorized under the NWP program comply with the Endangered Species Act (ESA), and do not either jeopardize the continued existence of species identified under the ESA or adversely modify critical habitat of such species.[152] It also requires that any activity that "may affect" a species or critical habitat undergoes an ESA section 7 consultation prior to being authorized under an NWP.[153] To ensure that NWP activities comply with the ESA, Commenters request that the Corps amend the NWPs and general condition in the following ways.

a. Lack of compliance with the ESA at the national level

[151] Exhibit 19, at 27 n.24.
[152] 81 Fed. Reg. at 35232.
[153] *Id.*

Section 7 of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical."[154] Thus, prior to initiating any action that "may affect" listed species, an agency must satisfy the consultation requirements of Section 7. [155] The reissuance of 50 NWPs that permit a wide range of activities nationwide for a period of 5 year, including pipelines permitted by NWP 12, is an action that requires formal consultation.

The Corps' position is that the reissuance of these NWPs will have "no effect" on listed species because "any activity that may affect a listed species or critical habitat must undergo an activity-specific consultation before the district engineer can verify that the activity is authorized by NWP…" [156] This position is without merit. *National Wildlife Federation v. Brownlee*, 402 F. Supp. 2d 1 (D.C. 2005)("overall consultation for the NWPs is necessary to avoid piece-meal destruction of [] habitat through failure to make a cumulative analysis of the program as a whole."). Subsequent project-specific consultation under Section 7 does not relieve the Corps of its duty to consult on the overall issuance of the NWPs on a programmatic level, as activity-specific consultation fails to account for the cumulative impacts to species resulting from the program as a whole.

Thus, in addition to the specific recommendations on General Condition 18, the Corps must initiate a programmatic ESA consultation prior to reissuance of the NWP package.

b. Under NWP 12, construction of any segment of a linear project should be prohibited prior to receiving all NWP 12 verifications.

To ensure that NWP12 linear projects do not result in more harm to endangered species and critical habitat, construction of linear projects should not begin until the ESA section 7 consultation has been completed and the Corps has issued verifications for the project. General condition 18 requires:

> In 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 so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until section 7 consultation has been completed.[157]

Under the NWPs, "activity" refers to the discharge of dredged and fill materials into waters of the U.S. under Corps jurisdiction. For a "single and complete linear project," the project is

[154] 16 U.S.C. § 1536(a)(2).
[155] *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055-57 (9th Cir. 1994).
[156] 81 Fed. Reg. at 35193.
[157] *Id.*

broken down into separate verifications for "all crossings of a single water of the United States (*i.e.*, a single waterbody) at a *specific location*."[158] Therefore, one utility line project may receive hundreds or thousands of individual NWP 12 verifications, one for each crossing of a waterbody at separate locations. For instance, Enbridge's Flanagan South pipeline received verifications from four regional Corps offices for 1,950 crossings over the 593-mile pipeline route.[159]

As NWP 12 currently operates, project proponents can begin construction of pipeline segments before receiving verifications from the Corps. The Corps cannot issue verifications until it completes the section 7 consultation process with the FWS. While waiting on NWP verifications, project proponents will often build other parts of the pipeline, including in Corps jurisdictional waters that do not require PCNs, on either side of a crossing or wetland. However, this practice assumes and puts more pressure on a certain outcome—that the pipeline project will receive a "no jeopardy" biological opinion and that the Corps will approve the NWP verifications. It also results in environmental impacts and limits the choice among alternative routes or plans to be considered.

This results in two problems. First, the consultation will likely examine the "action area,"[160] which includes the entire project, or pipeline, not just parts of the pipeline under Corps jurisdiction. Therefore, the project is moving forward while consultation is ongoing, then the project proponent is constructing the pipeline without the safe harbor of a section 7 consultation. If there are listed species or critical habitat in Corps jurisdictional areas that may be affected by the activity, it is likely that there are listed species or critical habitat outside of the Corps boundaries that may also be affected by the activity.

Furthermore, constructing the pipeline while consultation is underway runs afoul of the FWS regulation regarding the irreversible or irretrievable commitment of resources, which states that "[a]fter initiation . . . of consultation required under section 7(a)(2) of the [ESA], the Federal agency and any applicant shall make no irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid violating section 7(a)(2)."[161] *See also* section IV.J.

The Corps must prohibit any piece or segment of an overall pipeline project from being constructed prior to receiving all NWP verifications from the Corps. The language of the general condition 18(c) should state that in the first sentence that non-federal permittees "shall not begin

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[158] *Id.* at 35239 (emphasis added).
[159] *Sierra Club v. U.S. Army Corps of Eng'rs*, Plaintiffs' Motion for Summary Judgment, attached as Exhibit 23, at 1.
[160] "Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02.
[161] *Id.* § 402.09.

work ***on the entire project*** until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized."[162] The last sentence of subsection (c) should also clarify that no part of the project may go forward until the project proponent has received its authorizations: "In 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 so notified the Corps, the applicant shall not begin work ***on any portion of the overall project*** until the Corps has provided the notification the proposed activities will have 'no effect' on listed species or critical habitat, or until section 7 consultation has been completed."[163] In addition, subsection (a) should clarify the requirements of a consultation, which will examine the entire "action area," not just the activities under Corps jurisdiction. Subsection (a) should state: "No project is authorized under any NWP which 'may affect' a listed species or critical habitat, unless section 8 consultation addressing the effects of the ***entire project, as required by 50 C.F.R. part 402***, has been completed."[164]

c. When the Corps implements an Incidental Take Statement as a condition in its NWP verification, it must undertake a project-specific NEPA analysis.

If an ESA section 7 consultation is completed by the FWS and the Corps, and results in the Corps implementing an Incidental Take Statement in an NWP verification, the Corps must undertake a project-specific NEPA analysis. The D.C. Circuit, in *Sierra Club v. U.S. Army Corps of Engineers* (hereinafter referred to as *Flanagan South*), held that "[t]he Corps-implemented ITS is the functional equivalent of a permit and thus constitutes federal action subject to NEPA." In this case, Enbridge proposed to build a 593-mile pipeline through the Midwest. The Corps consulted with FWS, and FWS issued a Biological Opinion that "examined the entire Flanagan South project"[165] and issued an Incidental Take Statement that included "measures to mitigate, monitor, and report take of endangered species incident to the project."[166] The Corps then incorporated the ITS through its NWP 12 verifications, which is the point at which NEPA was triggered.

"Authorizing take of endangered species in connection with pipeline construction and operation across jurisdictional waters, and doing so only on the conditions that Enbridge take mitigating conservation measures and monitor species impact for the anticipated useful life of the pipeline, was regulatory approval amounting to significant federal action requiring environmental review under NEPA."[167] General Condition 18 should therefore clarify that, in

[162] 81 Fed. Reg. at 35232 (suggested modification in bold and italics).
[163] *Id.* (suggested addition to quote in bold and italics).
[164] *Id.* (suggested modification in bold and italics).
[165] The ESA consultation requires the FWS to examine the "action area," which is defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02.
[166] *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 44 (D.C. Cir. 2015).
[167] *Id.* at 46.

cases where formal consultation is triggered and FWS or NMFS issues a Biological Opinion and ITS, the Corps must prepare a NEPA analysis before making the decision to verify the pipeline under NWP 12 and implement the ITS into its verification decisions.

In some instances, the Corps' NEPA obligations extend beyond the Corps jurisdictional boundaries. In *Flanagan South*, the FWS examined the entire pipeline project in the Biological Opinion, but the Corps only incorporated the ITS requirements on its CWA jurisdictional areas of the pipeline. However, under the Corps' NEPA regulations, when a Corps permit is merely one component of a larger project, such as a pipeline project that includes hundreds, or even thousands, of NWP 12 verifications, "[t]he 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 [Corps] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review."[168] The district engineer has "control and responsibility for portions of the project beyond the limits of Corps jurisdiction," which includes "cases where the environmental consequences of the larger project are essentially products of the Corps permit action."[169] Factors considered in determining "control and responsibility" include: "(i) Whether or not the regulated activity comprises 'merely a link' in a corridor type project . . .; (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity; (iii) The extent to which the entire project will be within Corps jurisdiction; and (iv) The extent of cumulative Federal control and responsibility."[170]

When the FWS issues a Biological Opinion and ITS for an entire project, the Corps has an obligation to do a project-specific NEPA review for the entire project, given the extent of Federal control and responsibility over the project as a whole, and because of the environmental consequences that result from the Corps issuing NWP 12 verifications at locations all along the pipeline route.

d. An Incidental Take Statement implemented in NWP verifications should cover the entire project.

An ITS that results from a section 7 consultation should cover an entire project, not only the Corps' jurisdictional areas. Implementing the ITS requirements over an entire project will ensure that the project does not result in violations of the ESA. In the Flanagan South case, the Corps and FWS conducted an ESA section 7 consultation, and the Biological Opinion and ITS considered the entire pipeline, as required by ESA regulations.[171] However, the Corps only implemented the ITS requirements into its jurisdictional areas. This decision conflicted with the views of both the FWS and the pipeline company, who both advocated for an ITS that is

[168] 33 C.F.R. Pt. 325, App. B.
[169] *Id.*
[170] *Id.*
[171] 50 C.F.R. § 402.02.

implemented over the entire pipeline.[172] Because the Corps only imposed the requirements of the ITS over specific areas of the pipeline, Enbridge did not have a safe harbor in areas outside of the Corps jurisdiction. Enbridge also failed to obtain a section 10 incidental take permit for those areas. To ensure that endangered species and critical habitat is protected when the Corps issues NWP verifications, it must implement an ITS over the entire pipeline.

In the alternative, a permittee must be required to receive a section 10 permit from the FWS prior to beginning work on a project. In *Flanagan South*, Enbridge would have to apply for an incidental take permit for those private and upland lands that are not subject to Corps jurisdiction. If the Corps refuses to incorporate ITS requirements for an entire project, or pipeline, then the permittee must still comply with the ESA and receive a section 10 permit prior to going forward with a project.

e. The Corps should provide guidance on the meaning of "in the vicinity."

General condition 18 requires permittees to submit a pre-construction notification "if any listed species or designated critical habitat might be affected or is in the **vicinity** of the activity . . . ."[173] Without any further guidance for proposed permittees, this term is vague, confusing, and could lead to violations of the ESA. The Corps addresses the issue of defining vicinity in the preamble of the proposed nationwide permits:

> The term 'in the vicinity' cannot be explicitly defined for the purposes of general condition 18 because the 'vicinity' is dependent on a variety of factors, such as species distribution, ecology, life history, mobility, and migratory patterns (if applicable), as well as habitat characteristics and species sensitivity to various environmental components and potential stressors. The vicinity is also dependent on the NWP activity and the types of direct and indirect effects that might be caused by that NWP activity.[174]

The Corps admits that this term cannot be easily or clearly defined. Because of the lack of clear guidance on the meaning of "in the vicinity," and because this GC leaves the interpretation of this term up to project proponents, proponents may not be submitting PCNs for projects that are in the vicinity of listed species or designated critical habitat. The Corps must address this issue to ensure that PCNs are being submitted when there are potential ESA impacts.

f. The Corps should continue to require project proponents to submit PCNs when an activity "might affect" a listed species or critical habitat.

Commenters support the requirement that "[n]on-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat

[172] *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d at 47.
[173] 81 Fed. Reg. 35208 (emphasis added).
[174] *Id.* at 35208.

might be affected or is in the vicinity of the activity . . . ."[175] The use of the word "might," as opposed to ESA requirement for formal consultation when listed species or designated critical habitat *may be* affected, will help ensure that permittees are submitting PCNs by creating a higher threshold for reporting information on listed species or designated critical habitat. It is a more stringent requirement that will allow district engineer the opportunity to examine potential effects and determine, in coordination with FWS, whether a formal consultation is needed.

However, requiring project proponents to submit a PCN when a listed species or critical habitat might be affected puts the responsibility on the permittee to make this determination. The Corps must not rely solely on permittees submitting PCNs to comply with its ESA obligations. Instead, the Corps should create a system to ensure that projects under NWPs are not affecting listed species or critical habitat, other than using vague terms such as "might be affected" and "in the vicinity," and ensure that it is undertaking ESA consultation when required.

Furthermore, the provision should include species that are proposed for listing. Currently, it only requires a PCN for listed species and designated critical habitat that might be affected by the activity. Under ESA § 7(a)(40, the Corps must have a conference with the FWS when a proposed species may be affected. Without requiring PCNs for species that are proposed for listing, the Corps is not fulfilling its ESA obligations.

4. General Condition 23: Mitigation

General condition 23 requires NWP activities that result in the loss of waters of the United States to do compensatory mitigation to offset the unavoidable impacts to waters. When there are unavoidable impacts to waters of the U.S., Commenters agree that a permittee must perform compensatory mitigation; however, mitigation should not be used to "buy down" impacts so as to comply with §404(e)'s minimal effects threshold, the requirement for compensatory mitigation should extend beyond the Corps' narrow definition of loss and should include mitigation requirements for the entire project, and mitigation determinations should involve public notice and participation.

a. Subsection (g) is a reasonable and Commenters support the continued use of this provision.

Subsection 23(g) states that "[c]ompensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs."[176] Compensatory mitigation is an important requirement of an NWP verification and offsets unavoidable impacts to waters of the U.S. However, compensatory mitigation should not be used to abuse the acreage limits of the nationwide permit program or to circumvent the individual permit requirement. Furthermore, compensatory mitigation should not be used to increase the acreage losses allowed by the NWP

[175] *Id.* at 35232 (emphasis added).
[176] *Id.* at 35234.

permit because it would undermine the intent and purpose of the NWP program, which limits acreage loss to help ensure that activities under nationwide permits do not result in more than minimal individual and cumulative environmental impacts. This provision is reasonable and should be a continued condition on the use of nationwide permits.

b. Compensatory mitigation should not be used to reduce a project's impacts to within the minimal threshold

The Corps should prohibit the use of compensatory mitigation to reduce a project's impacts to within the "minimal" threshold if/when that project would otherwise not qualify for verification under a NWP. If an overall project's impacts, including those to non-aquatic resources, would be more than minimal, it should not qualify under an NWP and the Corps should require an individual §404 permit. The use of compensatory mitigation to reduce a project's impacts so as to qualify for NWP authorization, particularly where the public has no opportunity to evaluate the proposed mitigation measures, is inappropriate and should be abandoned.

c. Mitigation should be required for all impacts to wetlands, not solely for losses of wetlands.

General condition 23 only requires the permittee to mitigate impacts to wetlands at a one-for-one ratio for losses of wetlands.[177] Under the Corps' narrow definition of loss, only those wetlands that are permanently adversely affected are required to be mitigated at a one-for-one ratio. Forested wetlands that are converted to lesser quality wetlands are not considered a "loss of US waters," and any temporary impacts to wetlands are not considered lost. Forested wetlands that are converted to scrub-shrub will never have the same functions as they once had, and wetlands that are temporarily impacted may never be returned to their pre-existing condition. The Corps should require that permittees mitigate all impacts to wetlands at a one-for-one ratio to offset any unavoidable impacts to waters.

Subsection (c) states that "[c]ompensatory mitigation at a minimum one-for-one ratio will be required for *all wetland losses* that exceed 1/10-acre and require pre-construction notification . . . ."[178] To effectively offset unavoidable impacts to waters, this language should be changed to *all wetland impacts*.

Subsection (i) states that "[w]here certain functions and services of waters of the United States are permanently adversely affected by a regulated activity . . . mitigation may be required."[179] This provision should require mitigation not only for functions and services that

[177] *Id.*
[178] *Id.*
[179] *Id.*

are permanently adversely affected, but also for functions and services that are temporarily adversely affected.

d. The entire project should be considered in determining mitigation requirements.

When determining mitigation requirements for a utility line project, the Corps should consider the entire project when determining the appropriate and practical mitigation necessary. Utility line projects such as pipelines receive hundreds of NWP 12 verifications for the pipeline route. Many of these individually have a small amount of temporary or permanent impacts to wetlands. For some individual NWP verifications, the amount of wetlands impacts may be less than the 1/10 acre threshold required for mitigation. When these small impacts are totaled, however, the amount of impacted acres can be much greater. Requiring compensatory mitigation for the total amount of temporary and permanent impacts for the entire pipeline will help ensure that individual and cumulative adverse environmental effects are no more than minimal.

e. The Corps should require public involvement in the approval process of mitigation plans.

The public should be involved in the mitigation planning process. For individual permits, the Corps regulations require a public notice to include a "statement explaining how impacts associated with proposed activity are to be avoided minimized, and compensated for."[180] The NWP program, to the contrary, does not require or allow any public involvement at the project-specific stage, even when mitigation is proposed. For NWP 12 verifications for a single pipeline, there may be hundreds of acres of mitigation required. There should a public notice and comment period for interested citizens to weigh in on a mitigation proposal, prior to verifications being issued by the Corps.

5. <u>General Condition 32: Pre-Construction Notification</u>

General condition 32 sets forth the PCN procedures that apply to all NWPs requiring submission of PCNs.[181] If a NWP requires a PCN, the permittee must submit a PCN to the Corps as early as possible, at which point the district engineer (DE) will then determine whether the PCN is complete and/or request any additional information from the permittee within 30 calendar days.[182] The permittee may commence with the activity when it either receives written notification from the DE or when "45 calendar days have passed from the district engineer's

[180] 33 C.F.R. § 332.4(b).
[181] 81 Fed. Reg. 35235.
[182] *Id*.

receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer."[183]

Commenters support strengthening the existing PCN requirements to require PCNs for more projects, and suggest clarifying GC 32 to clarify that when PCNs are for required for only some waterways along an overall pipeline, the permittee must discuss the impacts of all water crossings along a pipeline (not only those that require a PCN) and the permittee may not construct any portion of the pipeline in US waters prior to receiving verification on all water crossings under NWP 12 from the Corps. In addition, commenters suggest changing the PCN requirement to prohibit a permittee from commencing with an activity after 45 days absent written approval from the Corps.

General Condition 32(d) sets forth the requirements regarding agency coordination during the verification process:

> (2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) proposed NWP B activities in excess of 500 linear feet, that extend into the waterbody more than 30 feet from the mean high water line or ordinary high water mark, or involve discharges into special aquatic sites.[184]

The Corps' use of the word "activity" rather than "single and complete project indicates that the Corps is required to consult with other federal agencies when verifying a pipeline under NWP 12 if the overall pipeline would exceed 1/2-acre loss of waters of the U.S.

When inter-agency coordination is triggered, the district engineer must provide copies of the PCN to appropriate federal and state agencies and provide an opportunity to submit substantive comments on whether adverse environmental effects of an activity will be more than minimal. The district engineer is required to "fully consider" agency comments before making a decision and "indicate in the administrative record associated with each [PCN] that the resource agencies' concerns were considered." *Id*.

However, district engineers routinely verify major pipelines under NWP 12 without coordinating with other agencies. For example, the Corps not only declined to coordinate with EPA in verifying the Gulf Coast Pipeline—when EPA repeatedly requested information, the

[183] *Id*.
[184] 81 Fed. Reg. 35236-37.

Corps actively withheld all documents that were not available to the public through the Freedom of Information Act.[185]

6. "D. District Engineer's Decision"

This "General Condition" specifies the procedures district engineers must follow in issuing verification decisions, particularly when assessing the cumulative impacts of pipeline projects. As explained above, the Corps justifies the open-ended nature of NWP 12 (*i.e.*, the use of NWP 12 thousands of times to approve single large pipelines) by requiring that district engineers assess the cumulative effects of overall pipeline projects. Thus, the project-level cumulative effects analysis is crucial to ensuring compliance with §404(e)'s minimal effects limitation.

The section entitled "*D. District Engineer's Decision"* provides, in pertinent part:

> 1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. … ***For a linear project, this determination will include an evaluation of the individual crossings to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP.***
> …
> 2. When making minimal adverse environmental effects determinations the district engineer will consider the ***direct and indirect effects caused by the NWP activity.*** The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (*e.g.*, partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (*e.g.*, watershed or ecoregion), and mitigation required by the district engineer. …[186]

Thus, NWP 12 appears to require district engineers to carefully consider the cumulative impacts "cause by all of the crossings" along an overall pipeline route, including direct and

[185] Exhibit 1, at 40.
[186] 81 Fed Reg. 35237 (emphasis added).

indirect effects and site-specific factors, and explain how it reached its minimal effects determination as to the overall project.

However, as explained above on pages 15-19, district engineers have approved several major pipelines such as the Gulf Coast Pipeline (2,227 water crossings and 485 miles) and the Flanagan South Pipeline (1,950 water crossings and 600 miles) without any consideration of cumulative effects. Nowhere in the administrative records for either project was there any discussing of cumulative effects on any scale (i.e., pipeline-wide, district-wide, region-wide, or watershed-wide) or any indication that district engineers ever considered cumulative effects. The only reference to cumulative effects at all in both projects was a single verbatim sentence that Corps admitted was pre-printed at the end of template approval forms. In fact, the Corps argued in litigation that district engineers are not required to evaluate the cumulative effects of the entire pipeline- they can choose to perform that analysis at a regional or district level- and are not required to contain any discussion in their decisions or even indicate what they considered in reaching their determination. *See* section III.E, supra.

Since the project-level cumulative effects analysis is the single most important step in ensuring that pipelines will have only minimal environmental effects, the Corps must clarify that district engineers are required to evaluate overall pipelines and include a discussion of cumulative effects in their decisions. Furthermore, that analysis should be subject to a public notice and comment process.

L. Compliance with other Clean Water Act Provisions

1. Water quality impacts of utility line and pipeline construction, maintenance and operation

Utility lines and pipelines (jointly "pipelines") crossing waterbodies (including lakes, streams, rivers and wetlands) are not appropriate for a nationwide permit because strategies for the crossings depend on a number of site-specific factors, most importantly, the size and nature of the waterbody itself and the existing ecosystems. Nevertheless, the construction, maintenance and/or operation of pipelines, along with the connected and related actions such as staging areas, compressor stations and roads, have many significant impacts on waterbodies that are typical of pipeline crossings.[187]

Pipeline stream crossings can alter stream channels, introduce sediment to streams, impact water quality, impede movement of aquatic species, degrade habitat and affect other

[187] For a description of construction methods for stream crossings, including the open-cut wet (in-stream method, stream diversions and HDD, see _http://corridoreis.anl.gov/documents/docs/technical/apt_60928_evs_tm_08_1.pdf. (esp. 3.3.13.1 et. seq.), which is incorporated by reference herein.

important ecological functions.[188] Research on effects of pipeline crossings shows pipeline crossings can impact aquatic species and habitat by producing high levels of erosion and sedimentation during and shortly after construction, altering channels through excavation and backfilling, and damaging riparian vegetation. Although some effects can be relatively short-term, poor design and construction techniques can cause long-term channel instability. Transporting toxic materials via pipeline also increases the risk of spills at stream crossings. The impacts of both road and pipeline crossings vary depending upon the stream characteristics, type and size of crossing structures, method of installation, and quality of maintenance.[189]

Pipeline construction at stream crossings can introduce large volumes of sediment into streams, both during construction and over the long term if streambed and bank scour increases as the channels readjust. Poor installation techniques and inadequate soil stabilization can intensify scouring, erosion and downstream sedimentation, and increase the risk of crossing failure during storm events. The effects of construction can last from a few weeks to many years. Without proper crossing design and maintenance, what might have been short-term effects can cause long-term issues. Moreover, the removal of stream-side vegetation for the development of pipeline and road corridors can increase erosion and raise water temperatures. Effects of sedimentation include changes to physical stream characteristics; water quality; and the behavior, physiology, abundance, diversity, and community structure of aquatic and semi-aquatic species. The severity of effects on fish and other aquatic organisms vary with the amount of suspended sediment, duration and timing of exposure, location and volume of sediment deposited. Fish are sensitive to increased levels of sedimentation during all stages of life, but might be most sensitive to sedimentation during early development, when eggs and larvae are immobile. The accumulation of fine sediment can fill pool habitats and plug spawning gravels, which affects many species of fish by adversely affecting suitability of spawning sites, egg development and larval fish emergence.[190]

Based on these impacts, the following should, at a minimum, be incorporated into NWP 12: Consolidate infrastructure and use existing crossings to minimize the number of new stream crossings; when developing new crossings, maintain natural streambed substrate; crossings should provide comparable water depth and velocity conditions upstream and downstream; fords should be avoided, especially when sensitive species are present; when constructing pipeline crossings, use installation techniques that minimize the amount of sediment released into the

[188] This summary of impacts comes from the following, which is incorporated in full by reference:
http://www.nature.org/ourinitiatives/regions/northamerica/areas/centralappalachians/recommended-shale-practices-stream-crossings.pdf.
[189] *Id.*
[190] *Id.*

stream and maintain adequate flow to protect aquatic species; and inspect regularly to ensure that these conditions are maintained.[191]

Furthermore, fill over pipes must not be too high (or too low) to change flow in streams; fill must be of the same natural material present before construction; pipelines must be set directionally to not cause flow into stream banks (increasing erosion and sedimentation). Pipelines should not be placed so as to block or disrupt not only surface stream flow, but also groundwater, as that can de-water or inhibit recharge of wetlands as well as interfere with surface water and groundwater.

2. <u>NWP 12 is not based on or coordinated with all readily available water quality information.</u>

Clean Water Act §305(b) requires states to issue comprehensive reports on water quality. Clean Water Act §303(d) requires each state to develop a list of impaired waters (waters not meeting water quality standards), identify the pollutants causing the impairment, and develop total maximum daily loads for them. Clean Water Act §319 requires states report on and identify waters impaired by non-point source pollution; and states must develop non-point source management plans. These reports and lists are subject to EPA approval (or, if the states do not prepare them, the EPA must). These show that across the country countless waters are impaired due to pollutants that are typical of the construction, maintenance and/or operation of pipeline water crossings, such as sediment, turbidity and heat.[192]

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[191] *Id.*

[192] Lists of section 303(d) as well as 305(b) impaired waters for all states available through EPA's ATTAINS (Assessment and Total Maximum Daily Load Tracking and Implementation System): https://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T. Additionally, EPA's WATERS (Watershed Assessment, Tracking, and Environmental Results System) is a searchable database that includes data from ATTAINS and also has information about the causes and sources of impairment for all waters. These should be used by the Corps to identify all 303(d) and 319 waters not meeting water quality standards due to pollutants that are or may be discharged pursuant to the proposed NWP. See https://www.epa.gov/waterdata/waters-watershed-assessment-tracking-environmental-results-system. The state non-point source pollution reports and lists do not seem to be accessible through a single public website, however they are published on individual states' environmental agency websites. For example, Texas: http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/068_12.pdf; Virginia: http://www.deq.virginia.gov/Portals/0/DEQ/Water/NonpointSource/NPSPlan/VA2014NPS-EPA_Submitted09302014.pdf; Oregon: http://www.deq.state.or.us/wq/nonpoint/docs/npsplanF.pdf; Minnesota: https://www.pca.state.mn.us/sites/default/files/wq-cwp8-15.pdf. In addition, NWP 12 would enable crossing high quality waters, outstanding natural resource waters and others. The Corps should obtain each such report and list and evaluate it to ensure the proposed NWP is consistent with them.

However, it does not appear that the NWP takes into account these reports, lists, their pollutants, or the fact that certain waters that would be crossed by pipelines under the NWP are already not meeting water quality standards. Nor does the NWP appear to take into account that pipeline construction, maintenance or operation could cause or contribute to waters not meeting water quality standards. Simply put, NWP 12 potentially approves discharges of sediment into waters not meeting water quality standards due to sediment. The Corps simply cannot approve the addition of dredge or fill, or any other pollutant, to waters listed as impaired for sediment, turbidity or temperature, however this is what NWP 12 would do where pipelines cross waters impaired for those pollutants.

3. Coordination of NWP 12 with other CWA Permitting

Although discharges of dredge or fill material regulated under CWA §404 do not require NPDES permits (40 CFR §122.3(b)), the construction, maintenance and operation of pipelines in stream crossings, which is the effect of NWP 12, is not limited to the discharge of dredge and fill material. These activities may involve pumping dirty, sediment-laden water out of the pipeline ditch and discharging elsewhere as point sources. There are also discharges from many other point sources involved, such as sediment from the operation of heavy machinery, grading, reclamation, piling of dirt and waste materials, runoff from material deposits in the ditching and excavation process, creation of ditches, trenches, culverts, staging areas, compressors, access roads and HDD areas. These should be prohibited without NPDES permits, and to allow such discharges without a NPDES permit would violate CWA §301. To the extent the activities covered under NWP 12 would approve some or all such discharges it is not appropriate for a nationwide permit under CWA §404.

40 CFR 122.4(i) provides that no NPDES permit shall issue for a new source or discharger if construction or operation will cause or contribute to the violation of water quality standards (i.e. discharge to an impaired water); and any load allocation (for non-point source) must be taken into account. It does not appear that any dredge and fill from NWP 12-approved water crossings are taking into account in load allocations, nor are any load allocations taken into account in NWP 12. The relationship of these provisions of the CWA and the regulations needs to be addressed by the Corps.

In addition, obtaining CWA §401 certifications of water crossings at the specific project level is insufficient because it comes after the NWP and its significance determination. The Corps should obtain 401 certification from each state in advance of NWP 12. Otherwise, the Corps will not know whether it is causing or contributing to a violation of state water quality standards through this permit.

The NWP must also be coordinated with other general permits, not just those of the Corps but other agencies and the states as well. For instance, some or all states have general permits for the discharge of hydrostatic testing fluids associated with the pipelines. However,

since construction could not happen without NWP 12 (at least in the water crossings and wetlands) this testing discharge would not happen without the NWP, and the impacts of this should be considered as a connected or cumulative impact. In addition, EPA excluded FERC regulated interstate natural gas pipelines from certain numeric limitation and monitoring requirements in its NPDES general permit for stormwater discharge from construction activities. But to our knowledge it did not exclude them for intrastate natural gas pipelines, much less oil pipelines. Such discharges of stormwater require authorization under federal NPDES regulations which must be obtained from EPA.[193]

IV. THE CORPS' DRAFT DECISION DOCUMENT FOR NATIONWIDE PERMIT 12 VIOLATES NEPA

The Corps published a "Draft Decision Document" (hereinafter, "DDD") concurrently with its Federal Register announcement, which is available on its website at www.regulations.gov.[194]

As explained in detail below, the DDD fails to satisfy the requirements of NEPA in numerous ways. For example, the DDD lacks an analysis of cumulative impacts and oil spills from the pipelines permitted by NWP 12. Because there is no requirement for any further NEPA analysis at the project-level, the Corps must discharge all of its NEPA obligations upon issuance of NWP 12.

For the reasons set forth below, we urge the Corps to prepare an Environmental Impact Statement on its proposed reissuance of NWP 12 that analyzes the full range of impacts of all projects the NWP permits. If the Corps is unable to do so at the nationwide level, it must require further NEPA analysis when projects are verified under NWP 12.

A. NEPA Background

The National Environmental Policy Act (NEPA) is our "basic national charter for" environmental protection.[195] Among the statute's goals are to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken"; and to "help public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."[196]

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[193] Some oil and gas activities are exempt from CWA §402 permits for discharge of stormwater, but this has exceptions such as refined products pipelines, which could be covered by NWP 12.
[194] https://www.regulations.gov/document?D=COE-2015-0017-0015.
[195] 40 C.F.R. § 1500.1.
[196] *Id.* § 1500.1(b)-(c).

To achieve these objectives, NEPA requires all agencies of the federal government to prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment."[197] The EIS must describe, among other things: (1) the environmental impact of the proposed action, and (2) any adverse environmental effects that cannot be avoided should the proposal be implemented.[198] To determine whether a proposed action significantly affects the environment, and whether an EIS is required, the lead federal agency first prepares an environmental assessment ("EA").[199]

An EA must provide sufficient evidence and analysis to determine whether to prepare an EIS.[200] The lead agency must take a 'hard look' at the relevant environmental concerns and alternatives to the proposed action.[201] The agency must consider both the context and intensity of the proposed action, including whether the project will take place in "ecologically critical areas," and whether the project will affect endangered species.[202]

If the agency concludes in an EA that a project may have significant environmental impacts on the environment, then an EIS must be prepared.[203] If an EA concludes that there are no potentially significant impacts to the environment, the federal agency must provide a detailed statement of reasons why the project's impacts are insignificant and issue a "finding of no significant impact" (FONSI).[204] If the agency issues an EA/FONSI, it must make a convincing case for a finding of no significant impact on the environment.

Pursuant to CEQ regulations, an EIS must include, among other things: (1) a "full and fair discussion" of the significance of all "direct," "indirect," and "cumulative" effects of the action, 40 C.F.R. §§ 1502.1, 1502.16(a)-(b), 1508.25(c); and (2) a discussion of "means to mitigate adverse environmental impact."[205]

Agencies shall include in EISs "alternatives to the proposed action."[206] The NEPA regulations state that alternatives are "the heart of the environmental impact statement." An EIS must present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public.[207] The EIS must "rigorously explore and objectively evaluate all

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[197] 42 U.S.C. § 4332(2)(C).
[198] *Id.* § 4332(2)(C)(i), (ii).
[199] 40 C.F.R. § 1508.9 (2010).
[200] *Id.*
[201] *Id.*
[202] *Id.* § 1508.27 (a) and (b) (2010).
[203] *Id.* § 1501.4 (2010).
[204] *Id.* § 1508.13 (2010).
[205] *Id.* § 1502.16(h).
[206] 42 U.S.C. § 4332 (C) (iii); 42 U.S.C. § 4332 (E).
[207] 40 C.F.R. § 1502.14.

reasonable alternatives" to the proposed project.[208] In addition, "for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated…; [and] [d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits."[209]

The EIS must "provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."[210] This discussion must include an analysis of "direct effects," which are "caused by the action and occur at the same time and place," as well as "indirect effects which . . . are later in time or farther removed in distance, but are still reasonably foreseeable."[211]

NEPA also mandates that the lead agency consider "the degree to which the action is related to other actions . . . with cumulatively significant impacts . . ."[212] NEPA defines the "cumulative impact" of mining to mean "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[213] A federal action will significantly affect the environment "if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts."[214]

The CEQ regulations require a give and take between an agency and members of the public.[215] CEQ regulations require federal agencies to give the public as much information as is practicable, so that the public has a sufficient basis to address those areas that the agency must consider in preparing the Environmental Assessment.[216]

B. The Corps Must Prepare an EIS for NWP 12

The Corps' proposed reissuance of NWP 12 is a major federal action pursuant to NEPA regulations and the APA, as it constitutes a rulemaking and/or approval of specific projects by

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[208] *Id.* § 1502.14(a).
[209] *Id*.
[210] 40 C.F.R. § 1502.1.
[211] *Id.* § 1508.8.
[212] *Id*. § 1508.27(b)(7) (2003).
[213] *Id.* § 1508.7 (2010).
[214] *Id.* § 1508.27(b)(7) (2010).
[215] *See Id.* §§ 1500.1(b) (2010) ("public scrutiny [is] essential"), § 1500.2(d) (2010) (the agency must "encourage and facilitate public involvement"), § 1506.6 (2010) (the agency must "[m]ake diligent efforts to involve the public" in preparing environmental documents, give "public notice of ... the availability of environmental documents so as to inform those persons ... who may be interested or affected," and "solicit appropriate information from the public.").
[216] *Id.* § 1501.4 (2010).

permit.[217] The Draft Decision Document states that the Corps intends that document to fulfill the requirements of NEPA.[218]

In determining whether to prepare an EIS as opposed to an EA, the Corps must consider a range of factors to determine whether the impacts would be "significant" enough to warrant a full EIS.[219] Many of those factors are met here, indicating the need for a full EIS.

For example, as discussed throughout this comment letter, oil and gas pipelines permitted by NWP 12 routinely rupture and cause oil spill and gas explosions, thereby affecting "public health or safety."[220] Pipelines permitted under NWP 12 and their attendant impacts "on the quality of the human environment are likely to be highly controversial," 40 C.F.R. § 1508.27(b)(4), as evidenced by the over 50,000 comments submitted by Sierra Club members and supporters in opposition to this permit as well as litigation surrounding Corps approval of major pipelines under NWP 12 in recent years.

As discussed in detail below, the usage of NWP 12 to permit large pipeline projects with significant cumulative effects means "the action is related to other actions with individually insignificant but cumulatively significant impacts."[221] "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts."[222]

Pipelines permitted under NWP12 are routinely located in "proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas";[223] routinely have the potential to "adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources";[224] and routinely "adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973."[225]

For the reasons set forth herein, pipelines permitted under NWP 12 significantly affect the quality of the human environment and warrant the preparation of a full EIS.

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[217] *Id.* § 1508.18; 5 U.S.C. § 551.
[218] DDD, at 5.
[219] 40 C.F.R. § 1508.27.
[220] *Id.* § 1508.27(b)(2).
[221] *Id.* § 1508.27(b)(7).
[222] *Id*.
[223] *Id*. § 1508.27(b)(3)
[224] *Id*. § 1508.27(b)(8)
[225] *Id*. § 1508.27(9)

C. The Corps Must Analyze all Direct, Indirect, and Cumulative Impacts of all Pipelines upon Issuance of NWP 12; it Cannot Defer that Analysis to a Later Stage of Review

NWP 12 is a final permit that authorizes the construction and operation of hundreds or even thousands of hazardous pipelines in US waters throughout the country for a period of five years, often with no further environmental review or permitting process. Thus, the Corps must analyze the full host of direct, indirect, and cumulative impacts of projects permitted under NWP 12 at the point of NWP 12 reissuance, especially because there is no guarantee that the Corps or any other federal agency will prepare any further NEPA analysis for specific pipelines at the project level.

NEPA requires the Corps to analyze all potential environmental impacts that have "a reasonably close causal relationship" to the issuance of NWP 12.[226] While *Public Citizen* held that an agency need not analyze the environmental impacts of a decision where it had *no ability* to prevent those impacts, 541 U.S. at 768-770, the Corps *does* have the ability to prevent the environmental effects of pipelines. The Corps can only reissue NWP 12 if it determines that the category of projects it authorizes "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment."[227] That determination must be informed by a thorough NEPA analysis. If the Corps declines to reissue NWP 12, pipelines could not be constructed in US waters (absent an individual §404 permit and project-specific NEPA analysis).[228]

Because the Corps' issuance of NWP 12 is "essential to completion of [pipeline projects]," the Corps is responsible for analyzing pipelines' impacts pursuant to NEPA.[229]

The Corps cannot defer any portion of its NEPA review to a later stage, because there is no guarantee that the Corps (or any other agency) will conduct any further NEPA review for specific pipelines permitted by NWP 12. In *Defenders of Wildlife v. Ballard*, 73 F. Supp. 2d 1094 (D. Ariz. 1999), the Corps issued three NWPs but deferred its cumulative impacts analysis to be completed by Corps regional offices at a later date. The court rejected that approach, holding that the NEPA analysis must include sufficient analysis "to measure the impact of

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[226] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).
[227] 33 U.S.C. § 1344(e)(1).
[228] *Id.* § 1344(e)(2).
[229] *Wyoming Outdoor Council v. U.S. Corps of Engineers*, 351 F. Supp. 2d 1232, 1242 (D.Wyo. 2005); *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) ("if a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action and the federal agency involved must" comply with NEPA).

implementing the NWP program under which thousands of projects will be authorized."[230] *Ballard* was based on the fact that the further NEPA analysis never actually happened before projects were approved.[231]

The *Ballard* decision is applicable here. The Corps' NEPA analysis for NWP 12 must measure the impacts of thousands of pipelines permitted under NWP 12 on a nationwide basis, particularly because, as indicated by the Corps' use of the 2012 version of NWP 12, the Corps ***does not*** conduct any further NEPA analysis for specific projects.

In fact, the Corps has repeatedly argued that the EA / Decision Document it prepares for NWP 12 is intended to ***fully discharge all of its NEPA obligations for all projects permitted under NWP 12***. For example, the Corps explained in the Flanagan South case:

> With regard to NWPs, the Corps performs the required NEPA analysis for the relevant class of activities at the time that it issues the general permit, and NEPA compliance is accomplished through decision documents prepared by the Corps for each NWP. Final Notice, Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,093 (Mar. 12, 2007). ***No further NEPA evaluation is required the Corps issues a verification decision that the stream crossings associated with the project are authorized under the NWP***. *See Utah Council, Trout Unlimited v. U.S. Army Corps of Eng'rs*, 187 F. Supp. 2d 1334, 1341 (D. Utah 2002), *vacated*, No. 2:00-cv-623TC, 2003 WL 22220348 (D. Utah Aug. 27, 2003); *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 247 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993). Plaintiffs' NEPA claim against the Corps's verifications does not acknowledge the extensive administrative process that accompanied the NWPs' promulgation, including the EA produced during that process that examined the impacts of all crossings expected to be authorized by NWP 12. ***The Corps, however, fully discharged its duties under NEPA when it reissued NWP 12 in 2012. Informed by extensive feedback from the public and key stakeholders, the Corps complied with NEPA when it issued its EA and Finding of No Significant Impact for NWP 12.*** *See* COE-NWK-022251, *et seq.* (NWP 12 Decision Document); 77 Fed. Reg. at 10,184.[232]

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[230] *Id*. at 1113.

[231] *Id*. at 1112; s*ee also Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 409 (6th Cir. 2013) (holding the Corps' NEPA analysis for NWP 21 must satisfy NEPA *upon issuance* and cannot rely on additional reviews conditions that may or may not come later); *Wyoming Outdoor Council*, 351 F. Supp. 2d at 1243 (striking down the Corps' NEPA analysis of a general 404 permit for failing to assess cumulative impacts, noting: "Agencies are required to satisfy the NEPA 'before committing themselves irretrievably to a given course of action, so that the action can be shaped to account for environmental values.'"(quoting *Pennaco*, 377 F.3d at 1159)).

[232] Exhibit 4, at 28.

> As discussed above, ***the Corps fully discharged its NEPA duties by preparing an EA finding that the activities covered by NWP 12 do not significantly affect the environment***. Contrary to Plaintiffs' view, "[v]erifying that permittees may properly proceed under a nationwide permit does not require a full NEPA analysis at the time of the verification."*Snoqualmie Valley Pres. Alliance v. U.S. Army Corps of Eng'rs*, 683 F.3d 1155, 1164 (9th Cir. 2012). Courts have uniformly upheld this position in other NWP cases. *See, e.g.*, *Md. Native Plant Soc'y v. U.S. Army Corps of Eng'rs*, 332 F. Supp. 2d 845, 862 (D. Md. 2004) ("NEPA requirements no longer apply once a general permit has been issued by the Corps.").; *Bragg v. Robertson*, 54 F. Supp. 2d 635, 650 (S.D. W. Va. 1999) (holding that if a permit meets the terms of a NWP, the individual project would "not be subject to any NEPA analysis."). For the vast majority of actions permitted by NWP 12, the action can proceed with no further review or verification by the Corps, it is only when the action reaches the threshold for a pre-construction notification that verification occurs. *Id.* Plaintiffs' demand for additional NEPA review of this Project at the time of verification defeats the streamlining purpose of Section 404(e) and is not required by NEPA or the Corps's regulations.[233]

While the cases discussed above prohibit the Corps' deferral of its cumulative impacts analysis to a later stage, the holdings are not limited to cumulative effects. The Corps cannot defer any of its NEPA obligations to the regional or project level review, because there is no guarantee any further NEPA analysis will occur. For example, NEPA requires the Corps to consider mitigation for projects in its EAs or EISs, and the public must be afforded an opportunity to weigh in the mitigation measures and alternatives.[234] By deferring any discussion of project-specific mitigation measures to the project level, where there will be no public notice or opportunity for involvement, the Corps is violating 40 C.F.R. § 1506.6.

The Corps' Decision Document for the 2012 version of NWP 12 (2012 EA) narrowly focused on the impacts of up to 1/2 acre fills of wetlands for pipeline construction, but failed to analyze the full host of environmental impacts associated with the pipelines NWP 12 permits. For example, the 45-page 2012 EA never discussed the risks and impacts of crude oil spills into US waters, and in fact never once mentioned crude oil or any of the materials the pipelines would transport (e.g., heavy tar sands crude oil, or "dilbit," hazardous materials, refined petroleum products, natural gas); or the on-the-ground impacts of pipeline construction and maintenance including cumulative impacts.

The 2012 EA acknowledged that "NEPA requires consideration of all environmental impacts, not only those to aquatic resources, so there may well be situations where aquatic

[233] *Id*. at 29-30.

[234] 40 C.F.R. § 1502.14(f).

impacts are minimal even though environmental impacts more generally are not."[235] However, the Corps assumed that all other impacts "would be addressed by the lead agency preparing the environmental impact statement" for particular projects.[236] The Corps' assumption that some agency will analyze the impacts of specific projects is arbitrary and capricious because no agency necessarily prepares any additional NEPA analysis for specific projects. For example, the Corps approved the 485-mile Gulf Coast Pipeline with over 2,000 crossings, the 593-mile Flanagan South Pipeline with 1,950 crossings, and the 1,134-mile Dakota Access Pipeline with 209 crossings.

The Corps may contend that it is not practical to conduct a NEPA analysis that analyzes all pipelines permitted under NWP 12 nationwide for a period a five years, including all possible on-the-ground impacts from pipeline construction in various watersheds and ecosystems, impacts of oil spills or gas pipeline ruptures, or the host of other project-specific impacts that may occur. However, NEPA requires the Corps to do so if it continues to use NWP 12 to approve massive pipeline projects without any further NEPA analysis. Otherwise, the Corps must narrow the scope of NWP 12 or require further NEPA analysis at the project verification level. As Judge McHugh explained in her concurring opinion in *Sierra Club v. Bostick*:

> To be sure, accounting in advance for the broad range of possible impacts resulting from the wide variety of utility lines authorized under NWP 12 is a daunting task. But compliance with NEPA is not excused simply because compliance is difficult. And the problem was exacerbated by the Corps' decision to draft a nationwide permit that defines utility lines expansively. Reissuance of Nationwide Permits, 77 Fed. Reg. at 10,271–72 ("A 'utility line' is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication."). The Corps could have decreased the difficulty of its NEPA analysis by crafting a narrower set of permits, focusing on particular types of utility line projects. By issuing narrower permits focusing on particular industrial processes, the Corps could better assess all of the environmental impacts of the processes themselves, as required by NEPA. Accordingly, I would hold the Corps impermissibly restricted the scope of its NEPA analysis when it considered only the effects of the discharge of dredged and fill material when reissuing NWP 12.[237]

Thus, absent further NEPA analysis at the project-verification level, the Corps must discharge all of its NEPA obligations upon issuance of NWP 12.

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[235] 2012 EA at 10.
[236] *Id.*
[237] 787 F.3d at 1066-67.

D. The Decision Document Violates NEPA by Failing to Analyze the Risks and Impacts of Oil Spills (both in US Waters and on Uplands)

The Corps' Draft Decision Document for NWP 12 violates NEPA by failing to evaluate the risks and impacts of oil spills (as well as other pipeline accidents, including but not limited to gas pipeline ruptures and explosions) from projects permitted by NWP 12, including both spills and ruptures that occur within Corps jurisdictional waters and those that occur at connected non-jurisdictional (or "upland") sections of pipelines permitted by NWP 12. As set forth in detail below, there is a proven track record of oil pipeline spills in the U.S. and the impacts are serious and long-lasting. NEPA requires an analysis of these very real and well-known impacts that flow from the Corps' §404 permitting action. Because, as the Corps' verification of several major pipelines has demonstrated, neither the Corps nor any other agency will analyze those impacts at the project approval stage. Therefore, the Corps must complete an analysis of oil spills upon issuance of NWP 12 or require further NEPA analysis at the project verification level.

1. NEPA Requires an Evaluation of Oil Spills from Pipelines Permitted under NWP 12

The Corps' obligation under NEPA to analyze oil spills in issuing §404 permits is well-recognized. In *Stop the Pipeline v. White*, 233 F. Supp. 2d 957, 967 (S.D. Ohio 2002), the Corps was required to analyze oil spills in issuing a §404 permit for an oil pipeline. In *Sierra Club v. Sigler*, 695 F.2d 957, 962 (5th Cir. 1983), the court struck down a Corps EIS for a dredging project that would allow increased oil tanker access in a port because its oil spill analysis did not analyze the "worst case" scenario of an oil tanker spill.[238]

Similarly, *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 867 (9th Cir. 2005) held that the Corps was required to analyze risks of tanker oil spills before issuing a §404 permit for a dock extension. *Ocean Advocates* discussed *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), which held that an agency's NEPA analysis need not analyze impacts that the agency had no ability to prevent, and thus would occur regardless of the agency decision. By contrast, *Ocean Advocates* found that "a 'reasonably close causal relationship' exists between the Corps' issuance of the permit, the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills," and thus the Corps had to analyze oil spills in an EIS.[239]

In each of these cases, the Corps' §404 permits were only for the dredge/fill of U.S. waters, yet the Corps was required to analyze oil spill risks from the *activity* that the dredge/fill would allow (*i.e.*, oil tanker traffic and oil pipeline operation). Likewise here, the Corps' §404 action- the issuance of NWP 12- determines whether oil pipelines will be built and operate in

[238] *Id*. at 968-75.
[239] *Ocean Advocates*, 402 F.3d at 868 (quoting *Public Citizen*, 541 U.S. at 767).

U.S. waters. This causal connection remains the same whether the Corps is permitting a single project under an individual permit or 7,900 projects per year through NWP 12.

To be clear, the impacts from pipeline oil spills are not impacts that occur *outside* of the Corps' jurisdictional area. Pipelines that would be constructed in US waters pursuant to NWP 12 have the potential to spill into Corps' jurisdictional waterways. And as explained in detail below, they often do spill and have disastrous impacts on waterways. While NEPA does also require the Corps to evaluate the environmental impacts of pipelines to "uplands" areas (*i.e.*, non-jurisdictional areas), including oil spill impacts, that obligation is separate from, and in addition to, it is abundantly clear that it has an obligation to assess the impacts of pipeline oil spills *in Corps jurisdictional waters*.

The very purpose of NEPA is to foster public participation and informed agency decision-making, and the decision the Corps must make here is whether utility projects, including but not limited to crude oil pipelines, are a category of activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment."[240] That decision must be informed by a discussion of careful analysis of pipeline oil spills into waterways, and the Corps cannot avoid that analysis by citing PHMSA's general oversight of pipeline safety.

Thus, the Corps must analyze potential oil spills from pipelines transporting crude oil through U.S. waters, which the §404 permit will allow. The Corps' issuance of NWP 12 without doing so would constitute a clear NEPA violation.[241]

2. Previous Litigation over the Failure to Assess Oil Spills

In conjunction with its 2012 reissuance of NWP 12, the Corps neglected to mention the risks or impacts of oil spills in its decision document.[242] Sierra Club and other groups brought NEPA claims that challenged both the reissuance of NWP 12 on its face and the Corps' verification of the Gulf Coast Pipeline under NPW 12, alleging a failure to consider oil spills at either stage. The district court, while not disagreeing with the line of cases requiring the Corps to consider oil spills in its 404 permitting actions, held: (1) plaintiffs waived their oil spill claims for failing to raise the issue during the comment period for the 2012 NWP 12 reissuance; and (2) the Corps is not required to conduct further NEPA analysis at the project level because it discharges its NEPA obligations upon issuance of a NWP.[243]

[240] 33 U.S.C. § 1344(e)(1).
[241] 40 C.F.R. §§ 1508.8, 1508.9, 1508.11 and 1508.27.
[242] *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1048 (10th Cir. 2015).
[243] *Id.*at 1046-47.

The Tenth Circuit subsequently affirmed the district court, also finding that plaintiffs waived their oil spill claims against NWP 12 for failing to raise the issue in their comments. In doing so, the court acknowledged the decisions of the 6th and 9th Circuits requiring an analysis of oil spills as a result of §404 activities, but failed to address them.[244] The court disagreed with Sierra Club's argument that the claim was not waived because the issue of oil spills was "obvious" to the Corps.[245] Instead, the court held that the Corps could have reasonably believed (however mistakenly) that some other agency such as PHMSA would analyze those impacts.[246] The court used similar reasoning in rejecting Sierra Club's argument that the claim was not waived because the Corps had "independent knowledge" of the issue.[247] The court held that independent knowledge of oil spills did not necessarily mean that the Corps had independent knowledge that NEPA required it to analyze those impacts:

> We may assume, for the sake of argument, that the Corps knew that issuance of the nationwide permit could lead to installation of oil pipelines, which in turn could create environmental risks from oil spills. How would that knowledge have mattered to the Corps? It considered that risk to fall within another agency's responsibility. ***Regardless of whether that view was correct***, it went unchallenged in the public comments for the issuance of Nationwide Permit 12 and the State Department's consideration of the Keystone XL Pipeline. Thus, there would have been little reason for the Corps to consider oil spills in its environmental assessment.[248]

Thus, it is important to note that the 10th Circuit decision did nothing to contradict the holdings of other Circuits requiring the Corps to analyze oil spills in its §404 actions. Instead, the 10th Circuit holding was based entirely on the fact that the Corps was not put on notice that NEPA required it to analyze the risks and impacts of oil spills from pipelines it permits under NWP 12. These comments, as well as all filings from the *Sierra Club v. Bostick* litigation (which Sierra Club incorporates herein by reference), puts the Corps on notice that it is required to analyze oil spills pursuant to NEPA.

3. <u>The Decision Document Again Fails to Discuss Oil Spills</u>

The Corps' DDD for NWP 12 fails to satisfy the requirements of NEPA because it contains absolutely no analysis of the risk of oil spills from pipelines (nor any other types of spills or accidents, such as ruptures and explosions of natural gas pipelines or spills of other

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[244] *Id.* at 1049.
[245] *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 765, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004)
[246] *Sierra Club*, 787 F.3d at 1049-51.
[247] *See Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 (10th Cir. 2007); *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011).
[248] *Sierra Club*, 787 F.3d at 1050-51 (emphasis added).

hazardous or toxic materials). It does not analyze spill frequency, potential spill amounts, how different types of crude oil or refined petroleum products will impact various types of waterways, or the necessarily equipment, personal, training, and procedures necessary to respond to certain type of spills into waterways. In fact, the DDD does not mention crude oil *at all*. This omission is significant considering NWP 12 permits an estimated 11,500 pipelines and other utility lines in U.S. waters over per year (69,700 projects over five years),[249] often with no further involvement by the Corps or any other federal agency.

The only mentions of oil pipeline spills in the DDD are the following passages:

> During the operation of utility lines, substances carried by those utility lines may leak into surrounding areas. For oil pipelines, operators are required to comply with the Pipeline and Hazardous Materials Safety Administration's safety requirements, and have plans for addressing the risk of oil spills.[250]

> Operators of oil pipelines are required to comply with the Pipeline and Hazardous Materials Safety Administration's safety requirements, and have plans for addressing the risk of oil spills.[251]

However, the Corps' obligation to evaluate the environmental impacts of pipeline oil spills under NEPA is not alleviated in any way by the Pipeline and Hazardous Materials Safety Administration's (PHMSA's) oversight of pipeline safety. An agency is not relieved its obligation to analyze impacts resulting from its actions under NEPA simply because the impact is regulated by another agency. *Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971) (certifications under other laws do not satisfy NEPA); *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (argument that impacts analysis is not required where a facility operates pursuant to the Clean Air Act permit was without merit); *Colo. Envtl. Coalition v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193 (D. Colo. 2011) (NEPA requires consideration of impacts of related activities that another federal agency is in charge of approving) (citing *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1176-77 (10th Cir. 1999)).

Furthermore, while PHMSA regulates pipelines by prescribing general safety standards, it does not prepare any NEPA analysis prior to the construction or operation of specific pipelines in waterways, nor does it evaluate the worst-case scenario discharges of crude oil and other substances into various types of waterways. In fact, there is no federal agency that permits the

[249] *See* DDD, at 48-49. The Corps has increased the number of estimated uses of NWP 12, from 7,900 per year in 2012 to 11,500 per year in 2016.
[250] *Id.* at 28.
[251] *Id.* at 40.

construction and operation of oil pipelines, so the NWP 12 is often the only federal action that determines whether oil pipelines are constructed in US waters.

The same is true with ruptures of gas pipelines permitted by NWP 12. The only mention of gas ruptures in the DDD is the following passage:

> For natural gas pipelines, there may be gas leaks during the operation of those pipelines. Sewer lines may develop breaks or leaks that discharge sewage into nearby waters and wetlands. Pipelines carrying other types of substances must comply with other applicable federal and state laws and regulations during their operations. For example, the Federal Energy Regulatory Commission regulates the interstate transmission of electricity, natural gas, and oil, and issues licenses for interstate natural gas pipelines.[252]

However, the fact that interstate gas pipelines are permitted by the FERC does not relieve the Corps from analyzing the impacts of gas pipeline ruptures into US waters. Furthermore, the FERC only has jurisdiction over interstate gas pipelines, so intrastate gas pipelines permitted by NWP 12 have no further federal permitting or environmental review. Thus, the Corps must analyze the risks and impacts of gas pipeline ruptures upon issuance of NWP 12.

The Corps' silence on impacts from oil spills and gas pipeline ruptures from pipelines permitted under NWP 12 violates NEPA's hard look requirement and NEPA's purpose of informed agency decision making.[253] It also means that members of the public, including farmers, ranchers, and landowners whose private property the pipeline would cross, are precluded from any opportunity to evaluate the environmental and safety risks associated with these pipelines. The Corps "failed to consider an important aspect of the problem," which renders its action arbitrary and capricious.[254]

4. <u>The Risks and Impacts of Pipeline Oil Spills</u>

The Corps must take a hard look at the risks and impacts of oil spills from pipelines permitted under NWP 12 as required by NEPA, those occurring both in U.S. waters under its jurisdiction and those occurring in upland areas outside its jurisdiction. While not an exhaustive or complete list, the following discussion highlights some of the topics the Corps must consider as part of its oil spill analysis. The undersigned groups hereby request the Corps to publish a revised draft NEPA analysis that includes this analysis and allow for an additional public comment period.

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[252] *Id.* at 28.
[253] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Pennaco Energy Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1150-51 (10th Cir. 2004).
[254] *Olenhouse v. Commodity Credit Corp*, 42 F.3d 1560, 1574-75 (10th Cir. 1994).

As a starting point for its analysis, the Corps should revisit the multiple environmental impact statements released for the Keystone XL Pipeline.[255] As a listed cooperating agency on these documents, the Corps should already be familiar with the large scope of a proper evaluation of potential pipeline releases. The Corps' oil spill analysis for NWP 12 should include, but not be limited to, an assessment of historical pipeline incidents, potential spill impacts, differing characteristics and behaviors of different types of crude oil, the reliability of leak detection systems, and threats to pipeline integrity.

PHSMA has been collecting pipeline incident reports since 1970 and although reporting requirements have changed over the years, the Corps must review this data to determine whether crude oil pipelines permitted under NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects. Examining the last ten years of PHMSA data on significant pipeline incidents[256] for onshore pipelines carrying crude oil suggests NWP 12 will authorize activities with more than minimal adverse environmental effects. Furthermore, the PHMSA data on all pipeline incidents, including those that do not meet the "significant" threshold, indicates that smaller oil spills occur frequently. Their impacts must be considered alongside larger volume oil spills and their cumulative effects captured by the Corps' analysis.

PHMSA Significant Pipeline Incidents (2006-2015)
For Onshore, Crude Oil Pipelines[257]

Year	Number	Fatalities	Injuries	Total Cost	Barrels Spilled	Net Barrels Lost
2006	42	0	0	$14,119,240	83,032	4,606
2007	40	2	0	$20,973,629	19,205	3,363
2008	47	0	0	$32,822,504	58,732	36,472
2009	38	1	3	$32,189,080	23,437	8,238
2010	46	0	0	$1,116,763,433	52,313	6,798
2011	53	0	0	$190,118,945	34,841	16,188
2012	60	3	4	$45,913,301	14,450	4,293
2013	77	0	6	$195,870,868	42,505	17,649

[255] Excerpts from U.S. Department of State's 2011 FEIS and 2014 FSEIS for the Keystone XL Pipeline, attached as Exhibits 24 and 25.
[256] Significant incidents are those including any of the following conditions: 1) Fatality or injury requiring in-patient hospitalization, 2) $50,000 or more in total costs, measured in 1984 dollars, 3) Highly volatile liquid releases of 5 barrels or more or other liquid releases of 50 barrels or more, 4) Liquid releases resulting in an unintentional fire or explosion. *See* http://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends.
[257] Data available at http://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends.

2014	72	0	0	$52,965,742	16,666	1,827
2015	74	0	0	$190,519,773	19,779	4,507

PHMSA Pipeline Incidents (2006-2015)
For Onshore, Crude Oil Pipelines[258]

Year	Number	Barrels Spilled	Net Barrels Lost
2006	159	83,851	4,946
2007	160	19,787	3,530
2008	153	59,252	36,645
2009	154	24,183	8,555
2010	152	52,710	6,901
2011	144	35,279	16,318
2012	186	15,025	4,373
2013	204	43,048	17,830
2014	229	17,521	1,947
2015	248	20,668	4,632

In addition to looking at PHMSA data, the Corps should conduct an in-depth review of several crude oil pipeline spills that represented worst-case scenarios. These low-frequency but high-impact spills must be considered in the Corps' oil spill analysis as they form a part of the historical safety record for the same kinds of pipelines that may be permitted under NWP 12 as proposed.

Further, the Corps must acknowledge and address the potential for small leaks that are below the typical detection limits of 1.5-2% of the pipeline flow rate.[259] The EPA raised this concern, among others, in a comment letter to the Corps regarding the Flanagan South Pipeline, a tar sands pipeline that was permitted under NWP 12. It recommended that the Corps "consider requiring Enbridge to establish a network of sentinel or monitoring wells along the *entire length* of the pipeline, especially in sensitive or ecologically important areas, where water supply wells and intakes are located and at stream crossings."[260] The Corps should revisit the EPA's letter in its entirety and consider the additional prevention and mitigation measures outlined therein.

[258] *Id*.
[259] EPA, Comments on the Environmental Assessment for the Proposed Issuance of Easements for the Flanagan South Pipeline Crossing of the Mississippi River (December 23, 2013), attached as Exhibit 26, at 3.
[260] *Id.* (emphasis added).

a. 2010 Enbridge pipeline spill into the Kalamazoo River

The disastrous spill from 2010 that occurred on Enbridge's Line 6b Pipeline near Marshall, Michigan demonstrated the significant risks from large oil spills and highlighted the unique challenges of a diluted bitumen spill. The Line 6b rupture occurred in a wetland during a planned shutdown. Enbridge failed to discover or address the rupture for *over 17 hours*, during which time additional oil was pumped into the pipeline during two startups. The total release was estimated to be over 1.2 million gallons (over 28,571 barrels) of crude oil,[261] which saturated the surrounding wetlands and flowed into the Talmadge Creek and Kalamazoo River. Investigation by the National Transportation Safety Board (NTSB) showed that the oil flowed into a culvert, which led to Talmadge Creek, then followed the creek to the Kalamazoo River, ultimately contaminating 35 miles of the River before it was contained. After the spill, the river flooded and stranded oil on floodplains, wetlands, backwaters, and islands. Importantly, the spill threatened to flow all the way to Lake Michigan, thereby fouling many more miles of river, as well as the lake's shoreline.[262]

The resulting discharge severely damaged the environment and caused local residents to self-evacuate from their homes. Public health was also negatively affected by this accident, with about 320 people reporting symptoms consistent with crude oil exposure. The type of oil extracted from Canadian tar sands and transported on Line 6b as dilbit contains eleven times more sulfur, six times more nitrogen, eleven times more nickel, and five times more lead than conventional oil.[263] Additionally, approximately 4,000 animals were treated for injuries as a result of the spill and many required significant care before being released back into the environment.[264] Responders estimated that, "whatever the final tally of dead wildlife is, the real number will be almost three times higher because some oil in hard-to-get-to floodplain areas is being allowed to break down over time — oil that could potentially contaminate animals."[265] The Binder Zoo veterinarian who cared for many of the reptiles and amphibians harmed by the spill reported taking in 1,795 animals including eight varieties of turtles, two types of snakes, two frog varieties, and one toad species.[266] According to PHMSA, about 2,500 animals were treated, but

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[261] https://www.epa.gov/enbridge-spill-michigan

[262] National Transportation Safety Board, Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release (July 25, 2010), attached as Exhibit 27.

[263] Heavy Oil and Natural Bitumen Resources in Geological Basins of the World. 14, available at http://pubs.usgs.gov/of/2007/1084/OF2007-1084v1.pdf.

[264] Exhibit 27 at 63 (A wildlife response center was established with the cooperation of Enbridge, the U.S. Fish and Wildlife Service, and the Michigan Department of Natural Resources and the Environment. The response center cared for and released about 3,970 animals—of 196 birds treated, 52 were not released).

[265] http://www.mlive.com/news/kalamazoo/index.ssf/2010/10/wildlife_rehab_continues_after.html.

[266] http://www.binderparkzoo.org/kalamazooriver/.

the overwhelming impact was to turtles.[267] Some of these turtles were badly enough injured that they still required the full time care of a veterinarian 15 months later.[268]

According to Enbridge, total cleanup costs reached $1.21 billion.[269] Enbridge also agreed to a $75 million settlement with the Michigan Department of Environmental Quality[270] and a $4 million natural resource damage settlement.[271] Meanwhile, the Department of Transportation imposed a $3.7 million civil penalty on Enbridge and less than two weeks ago, the EPA and Enbridge agreed upon a $177 million settlement.[272] If finalized, the EPA settlement will include $62 million for civil penalties, $5 million for cleanup reimbursement, and $110 million for infrastructure and inspection improvements.[273]

In the aftermath of this catastrophic spill, the NTSB identified deficiencies in the existing regulatory framework, which must be factored in the Corps' NWP 12 analysis. The NTSB concluded "[p]ervasive organizational failures by a pipeline operator along with weak federal regulations led to a pipeline rupture and subsequent oil spill in 2010… This accident is a wake-up call to the industry, the regulator, and the public."[274] The current regulatory structure is the same as the structure in place during the Kalamazoo spill. This must also be factored into the analysis of spill impacts on the environment. As the NTSB recognized, "[c]ontributing to the severity of the environmental consequences were … PHMSA's lack of regulatory guidance for pipeline facility response planning, [and] PHMSA's limited oversight of pipeline emergency preparedness that led to the approval of a deficient facility response plan."[275]

The diluted bitumen ("dilbit") carried by Line 6b exacerbated the severity of this pipeline spill because of the unique challenges of containing and cleaning dilbit from waters and wetlands. The NTSB report noted, "[o]nce the crude oil mixture entered the water, weathering,

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[267] *See* www.pstrust.org/docs/Kilian.ppt.

[268] http://www.battlecreekenquirer.com/article/20111104/OILSPILL/111040320/Tainted-turtles-still-suffering-15-months-after-river-oil-spill?odyssey=tab%7Ctopnews%7Ctext%7CFrontpage&nclick_check=1.

[269] http://www.mlive.com/news/grand-rapids/index.ssf/2014/11/2010_oil_spill_cost_enbridge_1.html

[270] http://www.detroitnews.com/story/news/politics/2015/05/12/enbridge-settles-cleanup-michigan-oil-spill/27216339/

[271] http://www.mlive.com/news/kalamazoo/index.ssf/2015/06/enbridge_to_pay_additional_4_m.html

[272] http://wmuk.org/post/enbridge-pay-177-million-settlement-prevent-oil-spills

[273] http://www.freep.com/story/news/local/michigan/2016/07/20/enbridge-reaches-177m-settlement-oil-spills/87336380/

[274] Press Release, National Transportation Safety Board, Pipeline Rupture and Oil Spill Accident Caused by Organizational Failures and Weak Regulations (July 10, 2010), available at http://www.ntsb.gov/news/2012/120710.html.

[275] See *id.*

volatility, and physical agitation caused the denser oil fraction to sink and incorporate into river sediments and collect on the river bottom."[276] The report also concluded that "initial containment efforts and tactics proved ineffective in preventing substantial quantities of oil from spreading and traveling miles downstream of the rupture."[277] It was clear that Enbridge was ill-prepared to respond to a dilbit spill into flowing water and this lack of preparedness resulted in large-scale damage to the environment. Enbridge was directed to conduct multiple rounds of river dredging to remove submerged oil, the last of which concluded in 2013, more than three years after the spill.[278]

As the FSEIS for the Keystone XL Pipeline acknowledged:

> The dilbit-specific characteristics, water temperature, and particulate load in the water could result in oil being submerged in the water column. Submerged oil could be suspended in the water column, suspended just above the river bed, or intermixed with sediment and trapped in the river bed and shoreline. In flowing waters, the spreading of the oil in three dimensions creates many challenges for responders to minimize the impacts of the release. Consideration of submerged oil in a flowing water environment would require to a certain extent different response action planning and response equipment to contain and recover the submerged oil. Dilbit intermixed with sediment and trapped in the river bed and shoreline results in a persistent source of oil and has the potential to present additional response and recovery challenges.[279]

The Corps must address the lessons learned from the Marshall, Michigan incident and give due consideration to the additional risks and impacts posed by pipelines transporting dilbit.

b. 2013 Exxon pipeline spill into Lake Conway

Another spill on a pipeline carrying dilbit in 2013 reinforced the NTSB's conclusions that response planning is woefully inadequate. A 22-foot gash ruptured on Exxon's Pegasus Pipeline in suburban Mayflower, Arkansas, spilling approximately 5,000 barrels (210,000 gallons) of crude oil into streets, yards, wetlands, and waterways. As a result of the spill, 22 homes were evacuated[280] and many residents reported health problems. The *New Republic* reported:

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[276] Exhibit 27at 62-63.
[277] *Id.* at 105.
[278] https://www.epa.gov/enforcement/case-summary-epa-orders-enbridge-inc-perform-additional-dredging-remove-oil-kalamazoo
[279] Exhibit 25 at 4.13-88.
[280] http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/420135027_Final_Order_10012015.pdf

> Ever since Exxon Mobil's Pegasus pipeline burst in March and spilled an estimated 210,000 gallons of Canadian heavy crude oil two miles from [Jason Thompson's] house, he's had headaches of preternatural intensity, so bad they wake him up in the middle of the night. He has nosebleeds, and hemorrhoids even though he's only 36; there's a rash on his neck that has only gotten worse in the eight months since the spill; and some days he feels so weak that he can hardly get out of bed. He estimates that he has lost almost 35 pounds since the rupture, falling from a fit 220 down to 185. When he went to see a doctor in April, he was told he has a mysterious spot on one lung—but he hasn't been able to afford to go back.
>
> Hundreds of people in this working-class town of 2,200 have complained of symptoms like Thompson's. And their maladies—respiratory disorders, nausea, fatigue, nosebleeds, bowel issues, throbbing headaches—echo the ones that appeared in Marshall, Michigan, where an Enbridge Energy pipeline burst in 2010. The two pipelines were carrying the same kind of oil: a heavy crude, or bitumen[.][281]

After flowing through the neighborhood, the crude oil entered a nearby creek, wetlands, and a cove of Lake Conway, one of Arkansas' prized fishing lakes.[282] Additionally the spill impacted 509 animals, with 44 birds and 34 reptiles and amphibians found dead upon arrival, 27 animals dying at the rehabilitation facility, and over 200 animals, mostly snakes, euthanized.[283]

After the incident, PHMSA sent a letter of probable violations to Exxon, alleging nine probable violations by the pipeline operator.[284] This letter makes clear that a long-standing problem with a seam that caused the accident should have been apparent to Exxon for some time. PHMSA stated:

> The pipe manufacturing information, fracture toughness, and hydrostatic testing failure history of the Youngstown pre-1970 low frequency ERW pipe in the Patoka to Corsicana segments of the Pegasus Pipeline *provided more than adequate information for the pipe to be considered susceptible to seam failure*. Further, the operator did not present an acceptable engineering analysis to

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[281] Nora Caplan-Bricker, *This Is What Happens When a Pipeline Bursts in Your Town: Conflicted about Keystone? Consider the horrific impact of an oil spill in Arkansas,* New Republic, Nov. 18, 2013, *available at* http://www.newrepublic.com/article/115624/exxon-oil-spill-arkansas-2013-how-pipeline-burst-mayflower.

[282] https://yosemite.epa.gov/opa/admpress.nsf/0/9330c87e8d8e843e85257e2f0047fcd7

[283] *Mayflower Pipeline Incident Wildlife Status Report*, 4/25/13 (on file with author).

[284] U.S. Dep't of Transportation, Pipeline and Hazardous Materials Safety Administration, Notice of Probable Violation and Proposed Compliance Order from R.M. Seely, Director, Southwest Region, Pipeline and Hazardous Materials Safety Administration to Mr. Gary W. Pruessing, President, ExxonMobil Pipeline Company, LLC, Nov. 6, 2013, at 2, *available at* http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Enforcement%20Notices/420135027_NOPV%20&%20PCO_11062013.pdf.

PHMSA to demonstrate that the pre-1970 ERW pipe in the Pegasus Pipeline was not susceptible to seam failure.[285]

The letter detailed basic safety procedures Exxon failed to follow, many of which concern oversight of the seam that failed.[286] These failures were long-standing. Testing from as far back as 1991 demonstrated the existence of the defect that eventually led to the spill twenty-four years later. Thus, the problem was left unaddressed by Exxon for almost a quarter century until the line burst.

c. Study of diluted bitumen conducted by National Academies of Sciences, Engineering, and Medicine

The Marshall and Mayflower incidents have demonstrated that tar sands crude is even more dangerous and difficult to clean up than conventional oil and poses serious threats to communities, land, and water resources for the entire length of pipelines. In 2014, the Department of Transportation was directed by Congress to look into whether the unique spill properties of dilbit warrant modifications to the regulations governing spill response plans, preparedness, and cleanup. The National Academies of Science, Engineering, and Medicine were in turn asked by DOT to conduct a study to help answer this question. Their resulting study, *Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response*,[287] unequivocally concludes, "it is clear that the differences in the chemical and physical properties relevant to environmental impact warrant modifications to the regulations governing diluted bitumen spill response plans, preparedness, and cleanup."[288]

The National Academies found that the light natural-gas condensates used as diluent in dilbit are particularly volatile and tend to evaporate rapidly following a spill. As a result, "[t]he increase in density that occurs with evaporative loss of the diluent increases the likelihood that the residual oil will submerge beneath the water surface and potentially sink to the bottom."[289] Since nearly all oil spill response tactics, including the use of traditional booms, skimmers, vacuums, and sorbents, are designed to contain and recover floating oil, they are inadequate and ineffective actions for dilbit spills.[290] The study notes, "[t]here are no know, effective strategies

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[285] *Id*. at 2 (emphasis added).
[286] *Id.*
[287] National Academies of Sciences, Engineering, and Medicine. Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response. Washington, DC: The National Academies Press, 2016. doi:10.17226/21834, available at http://www.nap.edu/catalog/21834/spills-of-diluted-bitumen-from-pipelines-a-comparative-study-of.
[288] *Id.* at 4.
[289] *Id.* at 39.
[290] *Id.* at 85-86.

for recovery of crude oil that is suspended in the water column,"[291] so recovery of dilbit must occur either in the short time that it floats immediately after a spill or after it has settled to the bottom of waterbodies. In contrast, the tactics for recovering sunken oil include suction dredge, diver directed pumping and vacuuming, mechanical removal, manual removal, and agitation.

The study, which was released in late 2015, concluded that "regulations and agency practices do not take the unique properties of diluted bitumen into account, nor do they encourage effective planning for spills of diluted bitumen."[292] In addition to identifying deficiencies in the current regulatory structure, the study outlines seven recommendations to develop "a more comprehensive and focused approach to diluted bitumen across the oil industry and the relevant federal agencies."[293] The Corps must take a hard look at this important study and address and incorporate the Academies' findings and recommendations into its oil spill analysis for NWP 12.

d. Other notable crude oil pipeline spills

As the PHMSA incident data shows, spills from crude oil pipelines still occur with startling frequency despite advances in leak detection technology. We encourage the Corps to look into the details of individual spill events rather than just the broad overview of spill statistics.[294] The following is a list of recent crude oil spills that should be given particular attention:

- TransCanada's Keystone I Pipeline was described as a state-of-the-art pipeline that would "meet or exceed world class safety and environmental standards"[295] and operated in accordance with 51 special safety conditions. Yet it leaked 14 times in the U.S. and 21 times in Canada during its first year of operation beginning in 2010.[296] This includes a 20,000 gallon spill of dilbit in North Dakota that was first discovered by a rancher who observed a 60-foot geyser of oil coming from the pipeline.[297] An

[291] *Id.*
[292] *Id.*
[293] *Id.* at 6-8.
[294] A long list of other pipeline spills in the US is available at https://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#cite_note-phmsa.dot.gov-163.
[295] TransCanada, Keystone Pipeline Starts Deliveries to U.S. Midwest, June 30, 2010, http://www.transcanada.com/5407.html.
[296] State Department, Keystone XL FEIS, August 2011, 3.13-12-14; Mike De Souza, Feds recorded 100 pipeline spills and accidents in the last two years, Vancouver Sun, July 5, 2011, http://www.canada.com/business/Feds+recorded+pipeline+spills+accidents+last+years/5053005/story.html#ixzz2R64CUaXR.
[297] Elana Schor, *Who really discovered 2011 Keystone leak?*, E&E Publishing, LLC, August 9, 2013, available at

investigation of this 2011 spill by North Dakota authorities showed that while the SCADA system indicated a leak had occurred at 3:51 AM, the pipeline was not shut down until 4:35 AM – a response time of forty-four minutes.[298] This was after a third party called to provide visual confirmation of the spill as operators where validating leak detection data.[299] PHMSA subsequently issued a Corrective Action Order (CAO) temporarily shutting the pipeline down as an imminent threat to life, safety and the environment. This made Keystone I the newest pipeline in U.S. history to receive such an order.[300]

- July, 2011 - An ExxonMobil pipeline that runs under the Yellowstone River in Montana spilled 63,000 gallons of crude oil into the river and floodplain. The oil flowed 85 miles downstream and impacted 11,000 acres of shoreline with little of the oil recovered in the aftermath.[301] An investigation found that it took ExxonMobil 46 minutes to completely close the key valve after discovering the rupture on the Silvertip Pipeline.[302] ExxonMobil spent $135 million on cleanup efforts and was fined an additional $1 million by PHMSA for four violations.[303] Flooding conditions not only exacerbated the impacts of the spill but hindered response efforts and contributed to the pipeline failure.
- July 2012: more than 50,000 gallons (1200 barrels) of crude oil spilled from pipeline 14 (Enbridge Lakehead system) on farmland in Grand Marsh, Wisconsin.[304]
- September, 2013 – A farmer discovered oil gurgling up from his farm in North Dakota and reported the leak, which originated from a Tesoro Logistics pipeline. The spill released more than 865,000 gallons of crude oil over several days without being detected by the company.[305]
- May, 2014 - A pipeline operated by Belle Fourche Pipeline Co. (owned by True Oil) spilled 25,000 gallons of crude oil in the Powder River Basin in Montana. The oil

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http://www.eenews.net/stories/1059985826.

[298] *Id.*

[299] *Id.*

[300] Pipeline and Hazardous Safety Materials Administration, Corrective Action Order, June 3, 2011, http://blog.nwf.org/wildlifepromise/files/2011/06/320115006H_CAO_06032011.pdf; Anthony Swift, The Keystone tar sands pipeline becomes the newest hazardous liquid pipeline to be deemed an immediate threat to public safety by regulators, June 6, 2011, http://switchboard.nrdc.org/blogs/aswift/the_keystone_tar_sands_pipelin.html.

[301] https://dojmt.gov/lands/yellowstone-river-oil-spill/

[302] http://www.usatoday.com/story/news/nation/2013/01/02/montana-exxon-oil-spill/1804579/

[303] http://www.law360.com/articles/623871/exxon-fights-1m-oil-pipeline-spill-penalty

[304]http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Pipeline/Corrective_Action_Order_073012.pdf andhttps://insideclimatenews.org/news/20120801/enbridge-oil-pipeline-wisconsin-phmsa-epa-water-fine-kalamazoo-dilbit-diluted-bitumen-safety

[305] http://www.nytimes.com/2013/10/24/us/oil-spill-in-north-dakota-raises-detection-concerns.html?_r=0

flowed more than two miles down a gulley on BLM land and was burned as part of clean-up efforts.[306] It was later revealed that Belle Fourche did not have an active permit to operate on BLM land and was therefore trespassing on federal land.[307]

- January, 2015 - Another pipeline that runs under the Yellowstone River in Montana spilled approximately 50,000 gallons of crude oil into the frozen river.[308] The oil spilled from the Poplar Pipeline, operated by Bridger Pipeline Co. (owned by True Oil), ended up contaminating the drinking water intake system for the city of Glendive.[309] Additionally, the response and recovery operations were hindered by the ice covering the surface of the river.[310]
- May, 2015 - A pipeline owned by Plains All American Pipeline spilled 143,000 gallons of crude oil near Santa Barbara, California. The oil flowed down a culvert, onto Refugio State Beach, and into the Pacific Ocean.[311] Over 200 birds and 100 marine mammals died as a result. Plains All American Pipeline has subsequently been indicted on 46 criminal counts including failure to provide timely notice of the leak to emergency officials. Three and a half hours passed between the time Plains All American Pipeline shut down the line due to abnormalities and the time federal regulators were notified. [312]
- September, 2015 and May 2016 - Shell's San Pablo Bay Pipeline ruptured along the same stretch of pipeline near Tracy, California.[313] Both spills released about 20,000 gallons of crude oil each.
- April, 2016 - A passerby along the South Dakota section of the Keystone I Pipeline noticed a leak. TransCanada's spill detection system did not detect this leak and the company initially reported that only 187 gallons of tar sands crude had spilled. Almost a week later, TransCanada reported that in fact nearly 17,000 gallons of dilbit had spilled.[314]

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[306] http://www.washingtontimes.com/news/2014/jul/18/company-corrosion-caused-wyoming-oil-pipe-spill/
[307] http://www.buffalobulletin.com/news/article_baeb8420-d337-11e4-9959-334073001fd5.html
[308] http://www.cnn.com/2015/01/20/us/yellowstone-river-spill/
[309] https://www.epa.gov/region8/bridger-pipeline-release
[310] http://billingsgazette.com/news/state-and-regional/montana/crews-to-clean-up-oil-spilled-into-yellowstone-river-from/article_89bcd50d-60ed-5a98-9a3d-4cecffa020e4.html
[311] http://www.latimes.com/local/lanow/la-me-ln-refugio-oil-spill-projected-company-says-20150805-story.html
[312] http://www.latimes.com/local/lanow/la-me-ln-santa-barbara-county-oil-spill-20160517-snap-story.html
[313] http://ww2.kqed.org/news/2016/05/24/pipeline-at-center-of-altamont-pass-oil-spill-also-ruptured-last-september
[314] http://www.usnews.com/news/articles/2016-04-08/keystone-pipeline-leak-worse-than-thought.

- June, 2016 - A resident in the city of Ventura, California first noticed crude oil flowing in an arroyo outside his home and notified emergency responders as well as the responsible pipeline company, Crimson Pipeline.[315] Nearly 30,000 gallons of crude oil were spilled from the pipeline and flowed half a mile down the arroyo, coating the riverbed, rocks, and plants.[316]

In view of these and other recent oil pipeline spills, we want to emphasize to the Corps the importance of evaluating the full extent of safety risks associated with oil pipeline spills. Again, NWP 12 is a permit that authorizes the construction and operation of crude oil pipelines in US waters nationwide for a period of five years, usually with no further NEPA analysis or permitting performed by the Corps, PHMSA, or any other agency. Thus, the Corps must either analyze oil spills and the full range of other direct, indirect, and cumulative impacts of oil pipelines upon issuance of NPW 12 or require further NEPA analysis at the project-verification level.

5. Natural Gas Pipeline Leaks and Explosions

The Corps should also review PHMSA data on gas pipeline incidents to determine whether natural gas pipelines permitted under NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects. The risks posed by gas pipelines are different from those posed by oil pipelines and therefore, should be considered separately.

PHMSA Pipeline Incidents (2006-2015)
For Onshore, Gas Transmission Pipelines[317]

Year	Number	Fatalities	Injuries	Total Cost
2006	108	3	3	$31,383,314
2007	86	2	7	$43,176,634
2008	93	0	5	$111,977,088
2009	92	0	11	$43,988,350
2010	84	10	61	$582,994,584
2011	104	0	1	$107,341,159
2012	89	0	7	$49,108,395
2013	96	0	2	$45,503,482
2014	119	1	1	$46,029,005

[315] http://www.latimes.com/local/lanow/la-me-ln-ventura-county-oil-spill-20160623-snap-story.html
[316] http://www.latimes.com/local/lanow/la-me-ln-ventura-oil-spill-pipeline-criticism-20160705-snap-story.html
[317] *Id*.

2015	131	6	14	$48,552,988

As with oil pipelines, the Corps should take a hard look at major gas pipeline accidents on an individual basis in addition to examining the overall safety record of gas pipelines.

6. PHMSA Leak Detection Study

In response to a request by Congress, PHMSA conducted a leak detection study in 2012 for hazardous liquid and natural gas pipelines, which the Corps should consider in its analysis.[318] The study included: 1) an assessment of past incidents to determine if additional LDS (leak detection system) may have helped to reduce the consequences of the incident; 2) a review of installed and currently available LDS technologies along with their benefits, drawbacks, and their retrofit applicability to existing pipelines; 3) a study of current LDS being used by the pipeline industry; 4) a cost benefit analysis of deploying LDS on existing and new pipelines; and 5) a study of existing LDS Standards to determine what gaps exist and if additional Standards are required to cover LDS over a larger range of pipeline categories.

In particular, the Corps should review the eleven hazardous liquid case studies and eight natural gas transmission case studies in the study. The Corps must also consider the study's compilation of methods of initial identification of incidents, which looked at 197 right-of-way incidents that occurred on hazardous liquids pipelines and 141 incidents that occurred on gas transmission pipelines between 2010 and 2012. The summary tables are below.

Method for Initial Accident Identification-Hazardous Liquid Pipelines[319]

Identifier	# of Incidents	% of Incident Reports
Air Patrol	10	5%
Controller	10	5%
CPM Leak Detection System or SCADA-Based Information	23	12%
Ground Patrol by Operator or Contractor	4	2%
Local Operating Personnel	38	19%
Notification from Emergency Responder	14	7%
Notification from Public	45	23%
Notification from 3rd Party that Caused Accident	11	6%

[318] Kiefner & Associates, Inc., *Final Report on Leak Detection Study to U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration* (December 10, 2012), attached as Exhibit 28.
[319] *Id.* at 3-39.

Static Shut-In Test or Other Pressure or Leak Test	2	1%
Other	8	4%
Blank – No Data	32	16%

Of the 165 spills for which an initial identifier was reported, only 12% were detected by a leak detection or SCADA system while the public was the first to report in 23% of the cases.

Method for Initial Accident Identification-Natural Gas Transmission Pipelines[320]

Identifier	# of Incidents	% of Incident Reports
Air Patrol	5	3.55%
Controller	1	.71%
CPM Leak Detection System or SCADA-Based Information	21	14.89%
Ground Patrol by Operator or Contractor	7	4.96%
Local Operating Personnel	40	28.37%
Notification from Emergency Responder	4	2.84%
Notification from Public	38	26.95%
Notification from 3rd Party that Caused Accident	15	10.64%
Other	10	7.09%

Of the 165 hazardous liquid spills for which an initial identifier was reported, only 12% were detected by a leak detection or SCADA system while the public was the first to report in 23% of the cases. Similarly, of the 141 natural gas incidents, approximately 15% were detected by a leak detection or SCADA system while the public reported almost 27% of the time.

Furthermore, an analysis of PHMSA data from 2002 to July 2012 by InsideClimate News found an even greater disparity with remote sensors detecting 5% of pipeline spills versus the public reporting 22%.[321] The limitations and drawbacks of leak detection systems pointed out by the PHMSA study must be considered in the Corps' impact analysis for NWP 12 because it is clear that they are less reliable than pipeline operators would like to claim.

[320] *Id.* at 3-39.

[321] http://www.bloomberg.com/news/articles/2012-09-19/oil-pipeline-spills-go-undetected-by-much-touted-sensors

E. The Corps Must Analyze the Cumulative Impacts of Pipelines Permitted under NWP 12

NEPA requires that the Corps consider the direct, indirect and cumulative impacts of "past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[322] Thus, the proper scope of the Corps' cumulative effects analysis for NWP 12 must include all federal and non-federal actions that impact the environment. Because NWP 12 allows project proponents to use NWP 12 thousands of times (and in fact, unlimited number of times) to approve massive pipeline projects, and those pipeline projects could not be constructed without the use of NWP 12, the Corps must analyze the full range of environmental impacts of these large pipeline projects.

Put another way, while the Corps may view the *individual* environmental impacts of each 1/2-acre fill of US waters for utility projects as minimal, NEPA's cumulative effects analysis requires the Corps to consider the impacts that occur as a result of allowing NWP 12 to be used hundreds or thousands of times to approve a large crude oil or gas pipeline . The environmental impacts of these overall pipeline projects are a direct result from the cumulative use of NWP 12. The Corps must analyze the cumulative impacts of overall pipeline projects that are built as a result of using NWP 12 multiple times.

Courts have universally held that the Corps' cumulative effects analysis cannot be limited to impacts to aquatic resources, but must also include environmental impacts to non-aquatic resources. *See* pages 87-91, *infra*. For massive fossil fuel projects approved by NWP 12, that includes an evaluation of on-the-ground impacts of pipeline construction, maintenance, and operation, including the impacts of creating permanent rights-of-way through forests and wildlife habitat, the increased sedimentation and erosion from trenching and filling in waterways, the loss of ecosystem services provided by wetlands, and the climate impacts associated with burning the fossil fuels transported by the pipelines.

1. Legal Background

NEPA requires "agencies to consider the cumulative impacts of proposed actions."[323] "The purpose of NEPA is to require disclosure of relevant environmental considerations that were given a 'hard look' by the agency, and thereby to permit informed public comment on proposed action and any choices or alternatives that might be pursued with less environmental harm."[324] The cumulative impacts requirements serves this purpose by "prevent[ing] agencies

[322] 40 C.F.R. §1508.7.
[323] *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988).
[324] *Lands Council v. Powell*, 395 F.3d 1019, 1027-28 (9th Cir. 2005).

from dividing one project into multiple individual actions 'each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'"[325]

As the D.C. Circuit has explained, NEPA requires review of a proposed action in light of "the cumulative harm that results from [the action's] contribution to existing adverse conditions or uses in the area.... [E]ven a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory ... may represent the straw that breaks the back of the environmental camel."[326]

To that end, the Council on Environmental Quality ("CEQ") NEPA regulations contain several provisions requiring an analysis of cumulative effects or cumulative actions.[327] First, cumulative effects must be analyzed in an EA as part of an agency's determination of whether a project's impacts would be "significant" enough to require a full EIS.[328] The term "significantly" is defined in the CEQ regulations as actions "with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment."[329]

In addition, the scope of any EA or EIS must also include cumulative actions, which are defined as actions "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement."[330]

Cumulative effects, in turn, are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[331]

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[325] *NRDC v. Hodel*, 865 F.2d at 297 (quotations omitted).
[326] *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 342-43 (D.C. Cir. 2002) quoting *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir.1972).
[327] The CEQ regulations are binding on all federal administrative agencies. *Andrus v. Sierra Club*, 442 U.S. 347, 357–58 (1979).
[328] NEPA requires agencies to prepare EISs for "every ... major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). If an agency is unsure whether a project's impacts would be "significant" enough to require a full EIS, it can first prepare a less-detailed EA. 40 C.F.R. § 1508.9; *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).
[329] 40 C.F.R. § 1508.27(b)(7).
[330] *Id.* § 1508.25(a)(2); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1314 (D.C. Cir. 2014).
[331] 40 C.F.R. §1508.7. The terms "cumulative effects" and "cumulative impacts" are used interchangeably. *See., e.g., Delaware Riverkeeper*, 753 F.3d at 1319.

The court in in *Delaware Riverkeeper* found that the four pipelines were not only "connected" actions, as discussed above, but also projects with "cumulative impacts." The court examined the definition of cumulative effects found at 40 C.F.R. § 1508.7, and noted that "the three Eastern Leg upgrade projects preceding and following the Northeast Project were clearly 'other actions—past, present, and proposed, and reasonably foreseeable.'"[332] There, FERC refused to analyze the cumulative effects of the four projects, arguing that the construction impacts from the Northeast Project were temporary and separated by time in distance, and that the connected pipeline projects were "not expected to significantly contribute to cumulative impacts in the Project area."[333] The court held that "[t]his cursory statement does not satisfy the test enunciated in *Grand Canyon Trust*," and explained:

> It is apparent that FERC did not draft these pages with any serious consideration of the cumulative effects of the other project upgrades on the Eastern Leg of the 300 Line. In light of the close connection between the various sections of the line that have been upgraded with new pipe and other infrastructure improvements, FERC was obliged to assess cumulative impacts by analyzing the Northeast Project in conjunction with the other three projects.[334]

The obligation to consider cumulative effects is not limited to actions taken by the same federal agency, nor is it limited to federal actions at all. For example, in *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002), the court held that the Federal Aviation Administration's EA for an airport expansion, which analyzed the incremental noise impacts that the airport would have on a nearby National Park, was inadequate because it failed to analyze the cumulative impacts of the airport combined with other man-made noises affecting the park.[335]

Thus, the "general rule under NEPA is that, in assessing cumulative effects, the Environmental Impact Statement must give a sufficiently detailed catalogue of past, present, and

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[332] *Delaware Riverkeeper*, 753 F.3d at 1319.
[333] *Id*. at 1319-20 (citations to record omitted).
[334] *Id*.; *see also Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 346 (D.C. Cir. 2002) (an EA's cumulative effects analysis "must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum.").
[335] *See also N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1081 (9th Cir. 2011) (an agency's EIS for a railroad failed to analyze the cumulative effects of railroad combined with future coal mines in the same area of Southeast Montana); *The Humane Soc. of U.S. v. Dep't of Commerce*, 432 F. Supp. 2d 4 (D.D.C. 2006) (NMFS's EIS for permits to conduct research on endangered populations of Steller sea lions violated NEPA because its cumulative effects analysis failed to analyze mortality to the species from non-research-related causes); *Alpine Lakes Prot. Soc. v. U.S. Forest Serv.*, 838 F. Supp. 478, 482 (W.D. Wash. 1993) (whether the cumulative impacts of a related action must be considered "does not turn on whether that action is federal or non-federal in nature").

future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment."[336]

The DC Circuit has articulated that "a meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, present, and proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate."[337]

2. The DDD Fails to Adequately Analyze the Cumulative Effects of Pipelines Permitted by NWP 12, and Instead Improperly Defers that Analysis to the Project Level.

The DDD's cumulative impacts analysis is woefully inadequate. The nine-page cumulative effects section of the DDD provides a brief overview of NEPA's requirement to analyze cumulative impacts/effects;[338] provides a summary of some of the historic and current causes of wetlands depletion in the US;[339] discusses US waters and species/ habitat loss generally;[340] and attempts to estimate the total acreage and condition of wetlands in the US.[341]

This cumulative effects analysis does not once mention any cumulative impacts specifically associated with the construction, maintenance, operation, or repair of utility projects such as crude oi or natural gas pipelines. For example, it does not mention the cumulative effects associated with the creation and permanent maintenance of a 50-120 foot-wide pipeline right-of-way such as forest fragmentation, habitat loss, erosion and sedimentation, soil nutrient loss, aesthetic impairment, etc. *See* pages 92-95, *infra*. This nine-page cumulative effects "analysis" is the same boilerplate language contained verbatim in the draft decision documents for each of the 52 proposed NWPs.[342] In other words, the Corps' cumulative effects analysis it uses for every

[336] *Lands Council*, 395 F.3d at 1027-28 (citations omitted).
[337] *Delaware Riverkeeper*, 753 F.3d at 1319 (quoting *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002).
[338] DDD, at 26-29.
[339] *Id.* at 29-30.
[340] *Id.* at 30-31.
[341] *Id.* at 32-33.
[342] *See*, *e.g.*, Draft Decision Document Nationwide Permit 50 (underground coal mining), available at https://www.regulations.gov/document?D=COE-2015-0017-0051; Draft Decision Document Nationwide Permit 21 (surface coal mining activities), available at https://www.regulations.gov/document?D=COE-2015-0017-0024; Draft Decision Document Nationwide Permit 34 (cranberry production activities), available at https://www.regulations.gov/document?D=COE-2015-0017-0036. All decision documents are available at

NWP is so broad and brief that it never mentions a single impact associated with the actual activities it is permitting, whether it be crude oil pipelines, cranberry farms or a surface coal mines.

The DDD contains another short section intended to satisfy its 404(b)(1) regulations entitled: "7.2.2 Cumulative effects (40 CFR 230.7(b)(3))."[343] Again, this section constitutes a five-page general overview of wetlands functions, mitigation, and restoration and enhancement activities nationwide; and it is the same verbatim analysis used for each of the 52 NWPs, with the exception of the Corps' estimates of the number of uses of NWP 12 and number of acres of wetlands loss as a result yearly and over a five-year span.[344]

Such conclusory cumulative impacts statements are insufficient.[345] Therefore, the NWPs, including but not limited to NWP 12, violate NEPA's requirement to analyze cumulative impacts or effects. 40 C.F.R. §§ 1508.7, 1508.27(b)(7).

Furthermore, because no further NEPA analysis is completed for specific projects that qualify for NWPs, this brief and inadequate overview of wetlands in the US serves as *the only cumulative effects analysis* used to permit tens of thousands of projects nationwide for a period of five years—not only pipelines, but coal mines, stormwater management facilities, marinas, bridges, oil and gas structures on the outer continental shelf, and any other projects permitted by the NWP program.

Rather than analyze the cumulative impacts of pipelines upon issuance of NWP 12, the Corps' DDD improperly defers that analysis to be completed by other agencies and/or district engineers at the project-approval stage. For example, the DDD explains that it is impractical to analyze cumulative effects at the national scale, so district and division engineers will conduct that assessment at the regional level and/or for specific projects:

> It is not practical or feasible to provide quantitative data on the multitude of other contributors to cumulative effects to these resources, including the federal, non-federal, and private activities that are not regulated by the Corps that will also

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https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=SR%2BO&D=COE-2015-0017.

[343] DDD, at 48.

[344] *See id.* at 48-49.

[345] *Delaware Riverkeeper*, at 28; *Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 138 (D.D.C.2001) (remanding an EIS "because the discussion of cumulative impacts consists only of conclusory remarks and statements that do not equip a decisionmaker to make an informed decision") (internal quotations omitted); *Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F. Supp. 2d 30, 41-42 (D.D.C. 2000) (while EA devoted 9-10 pages to cumulative impacts, the discussion was nothing more than a historical recitation of area development and a conclusory statement that the impacts are minimal).

> occur during the five year period this NWP is in effect. National-level data on these many categories of activities that are not regulated by the Corps but contribute to cumulative effects are either not collected for the nation or they are not accessible. The activities authorized by this NWP will result in a minor incremental contribution to the cumulative effects to wetlands, streams, and other aquatic resources in the United States because, as discussed in this section, they are one category of many categories of activities that affect those aquatic resources. The causes of cumulative effects discussed in this section include past, present, and reasonably foreseeable future federal, non-federal, and private activities.
>
> For the national-scale cumulative effects analysis presented in this section, it is not possible to quantify the relative contributions of all of the various activities that affect the quantity of wetlands, streams, and other aquatic resources and the functions and services they provide, because such data are not available at the national scale.
>
> In a specific watershed, division or district engineers may determine that the cumulative adverse environmental effects of activities authorized by this NWP are more than minimal. Division and district engineers will conduct more detailed assessments for geographic areas that are determined to be potentially subject to more than minimal cumulative environmental adverse effects. Division and district engineers have the authority to require individual permits in watersheds or other geographic areas where the cumulative adverse environmental effects are determined to be more than minimal, or add conditions to the NWP either on a case-by-case or regional basis to require mitigation measures to ensure that the cumulative adverse effects of these activities are no more than minimal. When a division or district engineer determines, using local or regional information, that a watershed or other geographic area is subject to more than minimal cumulative adverse environmental effects due to the use of this NWP, he or she will use the revocation and modification procedure at 33 CFR 330.5. In reaching the final decision, the division or district engineer will compile information on the cumulative adverse effects and supplement this document.[346]

As discussed above, the Corps has not committed to holding an additional NEPA process at the regional level with a public comment period, and has not done so with prior authorizations of NWP 12. This passage suggests that division engineers will only conduct more detailed assessments at the regional scale ***if*** it finds that specific watersheds is subject to more than minimal cumulative effects.

Throughout the DDD, the Corps further explains that division and district engineers will evaluate the cumulative effects of specific projects in specific regions to ensure that the cumulative effects are no more than minimal:

[346] DDD, at 34.

> Corps divisions and districts also monitor and analyze the cumulative adverse effects of the NWPs, and if warranted, further restrict or prohibit the use of the NWPs to ensure that the NWPs do not authorize activities that result in more than minimal individual and cumulative adverse environmental effects.
> …
>
> Although the terms and conditions for this NWP have been established at the national level to authorize most activities that have no more than minimal individual and cumulative adverse environmental effects, division and district engineers have the authority to impose case-specific special conditions on an NWP authorization to ensure that the authorized activities will result in only minimal individual and cumulative adverse environmental effects.[347]
>
> This document contains a general assessment of the foreseeable effects of the individual activities authorized by this NWP and the anticipated cumulative effects of those activities. In the assessment of these individual and cumulative effects, the terms and limits of the NWP, pre-construction notification requirements, and the standard NWP general conditions are considered. The supplemental documentation provided by division engineers will address how regional conditions affect the individual and cumulative effects of the NWP.
>
> …
>
> Only the reasonably foreseeable direct, indirect, and cumulative effects are included in the environmental assessment for this NWP. Division and district engineers will impose, as necessary, additional conditions on the NWP authorization or exercise discretionary authority to address locally important factors or to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects.[348]
>
> The pre-construction notification requirement allows district engineers to review proposed activities on a case-by-case basis to ensure that the individual and cumulative adverse environmental effects of those activities are no more than minimal. If the district engineer determines that the adverse environmental effects of a particular project are more than minimal after considering mitigation, then discretionary authority will be asserted and the applicant will be notified that another form of DA authorization, such as a regional general permit or individual permit, is required (see 33 CFR 330.4(e) and 330.5).[349]

This deferral of the cumulative effects analysis to be completed by district or division engineers at the project level violates NEPA for several practical reasons. First of all, project proponents are only required to notify the Corps district offices through submission of pre-

[347] *Id.* at 9.
[348] *Id.* at 24.
[349] *Id.* at 25.

construction notifications (PCNs) if certain criteria are met. That means that the Corps *will not even be notified* when many thousands of projects begin construction in US waters under NWP 12, so the Corps will have no opportunity to conduct any further environmental review.

Second, even for projects that do require PCNs, numerous project approvals have revealed that the district engineers do not actually prepare any cumulative effects analysis at the project level. *See* supra pages 15-19, *supra*. Finally, even if district engineers did routinely evaluate the cumulative effects of overall pipeline projects verified under NWP 12, they certainly do not prepare any NEPA analysis at the project level. Therefore, the Corps must satisfy all of its NEPA obligations now, including its obligations to analyze the cumulative effects of all projects it is permitting, upon issuance of NWP 12.

Courts have repeatedly held that the Corps cannot defer its cumulative effects analysis when issuing a NWP because there is no guarantee that any further NEPA analysis will be completed.

In *Defenders of Wildlife v. Ballard*, 73 F. Supp. 2d 1094 (D. Ariz. 1999), the Corps issued three NWPs but deferred its cumulative impacts analysis to be completed by Corps regional offices at a later date. The court rejected that approach, holding that the NEPA analysis must include sufficient analysis "to measure the impact of implementing the NWP program under which thousands of projects will be authorized."[350] *Ballard* was based on the fact that the further NEPA analysis never actually happened before projects were approved.[351]

Similarly, in *Wyoming Outdoor Council,* 351 F. Supp. 2d at 1243, the court struck down the Corps' NEPA analysis of a NWP for oil and gas development that deferred its cumulative effects analysis to be completed by other agencies at the project level. As the court explained, the Corps cannot defer its cumulative impacts analysis to the project-approval stage because "[b]y their very nature, the 'cumulative impacts' of a general permit cannot be evaluated in the context of approval of a single project."[352]

In *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402 (6th Cir. 2013), the court held that the Corps' NEPA analysis for NWP 21, which permitted surface coal mining operations, failed to adequately analyze cumulative impacts. There, the Corps argued that its three-tiered review process— including its regional conditions and project-level verification— ensured that

[350] *Id*. at 1113.
[351] *Id*. at 1112.
[352] *Id*. (citing *Pennaco,* 377 F.3d at 1159) ("Agencies are required to satisfy the NEPA 'before committing themselves irretrievably to a given course of action, so that the action can be shaped to account for environmental values.'"); *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1027-30 (9th Cir. 2007) (Forest Service violated NEPA by deferring its cumulative impacts analysis of a categorical exclusion to the project level).

the cumulative impacts of projects approved under NWP 21 were minimal. The court rejected this argument as "non-responsive," and held that Corps' cumulative impacts analysis must satisfy NEPA *upon issuance of a NWP* and cannot rely on additional reviews conditions that may come later.[353]

In *Sierra Club v. Bostick*, the majority held simply that Sierra Club waived its cumulative effects arguments for failing to raise the issue in its comments, and thus did not discuss the Corps' deferral of its cumulative effects analysis upon issuance of a NPW. However, Judge McHugh issued a thoughtful concurrence that outlined the Corps' NEPA obligations and agreed with the many courts that have struck down the Corps' attempt to defer its cumulative impacts analysis:

> Nevertheless, I remain unconvinced that the Corps can permissibly defer any portion of its NEPA analysis to the verification stage. First, NEPA requires agencies to complete their environmental analysis at the point of agency action—in this case, the reissuance of NWP 12. *See Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1178 (10th Cir. 2008) (noting that NEPA requires agencies to "take a hard look at the environmental consequences *before* taking a major action" (emphasis added) (internal quotation marks omitted)); *see also Ky. Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 409 (6th Cir. 2013) (rejecting as "nonresponsive" the Corps' argument that district engineers would assess required NEPA elements in greater detail at the verification stage). It is impossible for an agency to have taken the "hard look" required by NEPA—and thereby have made a fully informed decision to undertake an action—if it knowingly defers portions of its analysis to a later date.
>
> Second, in the context of nationwide permits, it may well be that, as happened here, there is no lead agency that will conduct an environmental assessment. And the NWP 12 environmental assessment expressly contemplates that "[i]ndividual review of each activity authorized by an NWP will not normally be performed, except when preconstruction notification to the Corps is required or when an applicant requests verification that an activity complies with an NWP." *Decision Document* at 4. That is, unless an individual utility line project requires a pre-construction notification, parties are authorized to use NWP 12 without ever notifying the Corps. Thus, in the context of nationwide permits, it is often the case that *no* further environmental analysis is ever contemplated. As such, I would conclude the Corps was not permitted to defer any portion of its NEPA analysis to the verification stage. Rather, the agency was required to fully evaluate all of the required NEPA factors *before* reissuing NWP 12. That did not happen here.[354]

[353] *Id*. at 409.
[354] *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1067 (10th Cir. 2015).

Finally, as Judge McHugh notes, CEQ regulations specify that a partial deferral of a NEPA analyses is allowed in certain contexts, but only in cases where further NEPA analyses will, in fact, occur at the regional, local, or projects-specific level.[355] Because "the Corps is not required to conduct further NEPA analysis at the verification stage, the type of deferral contemplated by the CEQ's guidance on programmatic NEPA reviews is unworkable in the nationwide permit context."[356]

Therefore, because the Corps prepared no meaningful analysis of the cumulative effects of pipelines and other projects permitted under NWP 12 in its decision document, and instead deferred this analysis to the project level where no further NEPA analysis will occur, the DDD violates 40 C.F.R. §1508.7. The same is true for each DDD prepared for each of the other proposed NWPs.

3. Proper Scope of Cumulative Impacts Analysis

NEPA dictates that the Corps' cumulative impacts analysis must include the full range of impacts of the overall pipeline projects permitted by NWP 12, including the impacts to resources that fall outside of the Corps' jurisdictional waters.

In *Wyoming Outdoor Council*, 351 F. Supp. 2d at 1237, the Corps issued a general permit for dredging and filling associated with oil and gas development in Wyoming, but limited its cumulative impacts analysis to jurisdictional waters. The court held that when an oil and gas developer needs to discharge dredge and fill material into U.S. waters in conjunction with a project, "the Corps …becomes the gatekeeper for approval of the project."[357] Therefore, "the Corps is obligated to assess cumulative impacts relating to projects in which the use of [the general permit] is essential to completion of the project," and that cumulative impacts analysis "cannot be limited to impacts to wetlands" and must include uplands.[358]

In *Sierra Club v. Bostick*, the majority did not discuss the scope of the Corps' NEPA obligations with respect to cumulative impacts, having held that Sierra Club waived its

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[355] *Id*. at 1067 (citing Council on Envtl. Quality, *Final Guidance for Effective Use of Programmatic NEPA Reviews* (2014), *available at* https://www.whitehouse.gov/sites/default/files/docs/effective_use_of_programmatic_nepa_reviews_final_dec2014_searchable.pdf.).

[356] *Id.*

[357] *Id*. at 1242 (citing *Utahns for Better Transp.,* 305 F.3d at 1173).

[358] *Id*. at 1242, 1245; *see also Save Our Sonoran,* 408 F.3d at 1121-24 (Corps' NEPA analysis was improperly limited to jurisdictional waters that ran through 5% of construction site); *Stewart v. Potts*, 996 F. Supp. 668, 682-83 (S.D. Tex. 1998) (Corps' NEPA analysis of a golf course must consider impacts to uplands forests because the project could not proceed without wetlands fill); *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1040-41 (9th Cir. 2009).

cumulative impacts argument.[359] However, Judge McHugh's concurring opinion held that the Corps improperly "attempts to limit the scope of its NEPA analysis when reissuing NWP 12 to the consideration of only those environmental impacts occurring within jurisdictional waters as a result of the discharge of dredged and fill material."[360] As Judge McHugh explains, "the Corps conflates its obligations under NEPA with its obligations under § 404(e) of the CWA" because while the Corps' cumulative effects analysis under the CWA may focus on "the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material," 40 C.F.R. § 230.11(g)(1), NEPA is not so limited.[361]

Judge McHugh recites an exhaustive litany of authority in which "[c]ourts have consistently held that the Corps' NEPA obligations when issuing a § 404 dredge and fill permit—which constitutes a major federal action—extend beyond consideration of the effects of the discharge of dredged or fill material in jurisdictional waters."[362]

Indeed, courts routinely require the Corps to consider the direct, indirect, and cumulative effects—including nonaquatic effects—of the *installations* the Corps' dredge and fill permits authorize.

For example, in *Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, we considered the validity of the Corps' NEPA analysis when issuing a § 404 dredge and fill permit for the construction of an intermodal rail/truck terminal.[363] In its NEPA analysis, the Corps "considered both [the] direct and reasonably foreseeable indirect impacts to land use, air quality, noise, traffic, water quality, threatened and endangered species, and cultural resources" from the operation of the intermodal terminal.[364] Far from limiting its analysis to the impact of dredged and fill material on jurisdictional waters, the Corps conducted a broad environmental assessment. And we upheld the Corps' NEPA analysis *because* it had properly considered all of the environmental impacts of the intermodal terminal, not only the aquatic impacts associated with the discharge of dredged and fill material.[365] As such, we have recognized that a NEPA environmental assessment requires the Corps to look beyond the effects occurring directly within its jurisdictional waters.[366]

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[359] *Id.* at 1051.
[360] *Id.* at 1062.
[361] *Id.*at 1063.
[362] *Id*.
[363] 702 F.3d 1156, 1162–63 (10th Cir. 2012).
[364] *Id.* at 1164.
[365] *Id.* at 1172–77.
[366] *See Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1190–91 (10th Cir. 2002) (recognizing that the CWA defines "cumulative impacts" more narrowly than does NEPA).

Other courts similarly require the Corps to look beyond the effects of the discharge of dredged and fill material. The Ninth Circuit's analysis in *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2004), is particularly instructive. In that case, the Corps issued a § 404 dredge and fill permit to a developer building a gated community near Phoenix.[367] The development required Corps approval because several desert washes—which filled with water during the rainy season—intersected the proposed development site.[368] The Corps prepared an environmental assessment and found the development would have no significant impact.[369] "In reaching this conclusion, the Corps examined only the washes rather than the entire project."[370] On appeal, the Ninth Circuit considered whether "the Corps had improperly constrained its NEPA analysis to the washes, rather than considering the development's effect on the environment as a whole."[371] The court stated:

> Although the Corps' permitting authority is limited to those aspects of a development that directly affect jurisdictional waters, it has responsibility under NEPA to analyze all of the environmental consequences of a project. *Put another way, while it is the development's impact on jurisdictional waters that determines the scope of the Corps' permitting authority, it is the impact of the permit on the environment at large that determines the Corps' NEPA responsibility.* The Corps' responsibility under NEPA to consider the environmental consequences of a permit extends even to environmental effects with no impact on jurisdictional waters at all.[372]

Thus, the Ninth Circuit held the Corps had improperly limited the scope of its NEPA analysis to the considerations relevant to issuing a permit under the CWA.[373]

In her concurring opinion, Judge McHugh examined holdings from other Circuits and concludes that this view of the Corps' NEPA obligations has been "universally adopted":

> My understanding of the scope of the Corps' responsibility under NEPA parallels that of the Ninth Circuit. The Corps may not limit its NEPA analysis to the consideration of the environmental effects of the discharge of dredged and fill material into jurisdictional waters, as would be appropriate under § 404(e) of the CWA. Rather, for NEPA purposes, the Corps is required to consider the direct, indirect, and cumulative effects reasonably foreseeable as a result of its permitting

[367] *Id.* at 1118–19.
[368] *Id.* at 1118.
[369] *Id.*
[370] *Id.*
[371] *Id.* at 1121.
[372] *Id.* at 1122 (emphasis added).
[373] *Id.* at 1123.

> decision. This includes the environmental effects caused by the operation of the installations authorized by the Corps' permitting decision.[374]
>
> …
>
> And this understanding of the Corps' NEPA responsibilities has been universally adopted. *See, e.g.*, *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 232–34 (5th Cir. 2007) (holding Corps' environmental assessment of proposed subdivision insufficient when it failed to properly evaluate adverse effects on area's flood capacity due to increased pavement, increases in non-point source pollution from increased run-off, loss of habitat for non-aquatic wildlife, and adverse effects associated with increased vehicle traffic); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2004) (holding Corps had NEPA obligation to consider effects of increased oil tanker traffic and increased risk of oil spills when issuing § 404 permit for construction of oil refinery dock); *Sierra Club v. Marsh*, 769 F.2d 868, 877–78 (1st Cir. 1985) (holding Corps' environmental assessment insufficient for failure to consider future industrial development when issuing § 404 permit for construction of a port and causeway). *See also Pres. Soc. of Charleston v. U.S. Army Corps of Eng'rs*, No. 2:12- 2942-RMG, 2013 WL 6488282, at *12 (D.S.C. Sept. 18, 2013) (rejecting Corps' attempt "to justify what amounted to essentially a non-review of the proposed passenger terminal on the basis that its jurisdiction is limited to the portion of the project physically touching the navigable waters of the United States"); *Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1237, 1242 (D. Wyo. 2005) (rejecting Corps' argument that it was not obligated to consider cumulative impacts on non-wetland areas of regional permit authorizing dredge and fill associated with coalbed methane gas production); *Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 37–41 (D.D.C. 2000) (holding Corps was required to consider adverse effects associated with increased sewage, increased wastewater runoff, creation of large shaded areas on the aquatic habitat, creation of a "sump" that would trap aquatic wildlife, increased draw on area aquifers, and increased upland development when issuing § 404 permit for dredge and fill associated with construction of floating casino barges); *Hoosier Envtl. Council, Inc. v. U.S. Army Corps of Eng'rs*, 105 F. Supp. 2d 953, 972–75 (S.D. Ind. 2000) (upholding Corps' environmental assessment when it properly considered the indirect effects of § 404 permit for construction of riverboat gambling facility, including construction of a hotel, pavilion, golf course, and parking facilities). Thus, when reissuing NWP 12, the Corps was required to consider all of the environmental effects reasonably foreseeable as a result of its permitting decision.[375]

Finally, Judge McHugh cites the Corps' own Decision Document for the 2012 reissuance of NWP 12, which acknowledges that "NEPA requires consideration of all environmental impacts, not only those to aquatic resources, so there may well be situations where aquatic

[374] *Id.* at 1064.
[375] *Id.* at 1065.

impacts are minimal even though environmental impacts more generally are not."[376] "Given this explicit acknowledgement, the Corps cannot now take the contrary position that it satisfied its NEPA obligations when it focused exclusively on the aquatic impacts associated with the discharge of dredged and fill material."[377]

The same is true with respect to the 2016 Draft Decision Document. The Corps quotes 40 CFR 1508.7 and then acknowledges that:

> [T]he NEPA cumulative effects analysis for an NWP is not limited to activities authorized by the NWP, other NWPs, or other DA permits (individual permits and regional general permits). The NEPA cumulative effects analysis must also include other Federal and non-Federal activities that affect the Nation's wetlands, streams, and other aquatic resources, as well as other resources (e.g., terrestrial ecosystems, air) that may be directly or indirectly affected by the proposed action and other actions.[378]

> Cumulative effects also include environmental effects caused by reasonably foreseeable future actions that may take place after the permitted activity is completed. Such effects may include direct and indirect environmental effects caused by the operation and maintenance of the facility constructed on the discharge of dredged or fill material into waters of the United States or the structures or work in navigable waters of the United States. For NWP 12, this includes activities associated with the operation and maintenance of the utility lines, substations, and access roads constructed or expanded as a result of activities authorized by this NWP.[379]

Because no further NEPA analysis will be conducted for specific projects permitted by NWP 12, the Corps must consider all of the impacts of those projects, including impacts to non-aquatic resources, upon issuance of NWP 12.

4. Examples of the Cumulative Impacts/Effects of Pipelines

The Corps must take a hard look at the cumulative environmental impacts from the construction and operation of entire pipelines that will be permitted under NWP 12. NEPA requires consideration of the direct, indirect, and cumulative effects of an action, which means the Corps is required to evaluate the impacts to U.S. waters as well as upland areas. We believe such an analysis would reveal that the activities authorized under NWP 12 will result in more than minimal adverse environmental effects.

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[376] *Id.*at 1066 (quoting Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184, 10,197 (Feb. 21, 2012)).
[377] *Id*.
[378] DDD at 26.
[379] *Id.* at 28.

The multiple environmental impact statements released for the Keystone XL Pipeline will serve as a good starting point for the Corps' cumulative impacts analysis.[380] The Corps' EA or EIS for NWP 12 should also include, but not be limited to, an assessment of the cumulative impacts to soils and sediments, surface water and groundwater, wetlands, vegetation, wildlife, fisheries, threatened, endangered, and sensitive species, land use, recreation and special interest areas, visual areas, air quality, and noise.

Pipeline construction, maintenance, and operation all result in a multitude of temporary, long-term, and permanent impacts to the environment. The EISs for the Keystone XL Pipeline identify many – but not all – of these impacts. For example, the following is a list of potential impacts to wetlands alone:

- Loss of wetlands due to backfilling or draining;
- Modification in wetland productivity due to modification of surface and subsurface flow patterns;
- Temporary and permanent modification of wetland vegetation community composition and structure from clearing and operational maintenance (clearing temporarily affects the wetland's capacity to buffer flood flows and/or control erosion);
- Wetland soil disturbance (mixing of topsoil with subsoil with altered biological activities and chemical conditions that could affect reestablishment and natural recruitment of native wetland vegetation after restoration);
- Compaction and rutting of wetland soils from movement of heavy machinery and transport of pipe sections, altering natural hydrologic patterns, inhibiting seed germination, or increasing siltation;
- Temporary increase in turbidity and changes in wetland hydrology and water quality;
- Alteration in vegetation productivity and life stage timing due to increased soil temperatures associated with heat input from the pipeline; and
- Alteration in freeze-thaw timing due to increased water temperatures associated with heat input from the pipeline.[381]

Impacts to other resources include:

- Increased risk of soil erosion due to lack of vegetative cover;

[380] Excerpts from U.S. Department of State's 2011 FEIS and 2014 FSEIS for the Keystone XL Pipeline, attached as Exhibits 29 and 30.
[381] Exhibit 29 at 3.4-10.

- Expansion of invasive and noxious weed populations along the pipeline ROW as a result of construction and operational vegetation maintenance;
- Habitat loss, alteration, and fragmentation;
- Direct [wildlife] mortality during construction and operation;
- Indirect [wildlife] mortality because of stress or avoidance of feeding due to exposure to construction and operations noise; low-level helicopter or airplane monitoring overflights, and from increased human activity;[382]

We also submit for the Corps' consideration a declaration written by Dr. Thomas David Hayes, an expert conservation ecologist. [383] His declaration was originally submitted in the Sierra Club's challenge of the Corps' use of NWP 12 to authorize construction of the Gulf Coast Pipeline. Dr. Hayes identified numerous deficiencies in the Corps' NWP 12 decision document from 2012, which the Corps should now remedy in the latest reissuance. He describes the adverse environmental impacts from actions allowed under NWP 12, including immediate and irreparable impacts to ecosystem functions of streams and adjacent wetlands, introduction of invasive species, soil damage, water quality degradation and harm to fish, cumulative impacts to bank stability and floodplain vegetation leading to erosion, sedimentation, release of toxic substances, reduced biodiversity and productivity, and permanent harm from conversion from forested wetlands to scrub wetlands.[384]

The aforementioned impacts from oil pipelines are also applicable to gas pipelines, which are constructed and maintained in a similar manner. Both involve clearing trees and vegetation for a right-of-way, removing topsoil, filling wetlands, dumping trench materials into streams, and maintaining a cleared right-of-way for the operational life of the pipeline.[385] Therefore, the Corps must also undertake a review of extant environmental analyses completed for natural gas pipeline projects. These instructive documents not only assess project-specific impacts but detail the overall impacts of pipeline construction on the surrounding environment.

A study examining the short and long-term consequences of the construction of the PennEast Gas Pipeline found that it will "irreversibly disturb and alter the ecological properties of natural waterways including high quality waters, a variety of habitats, preserved farmland and preserved, public open-space."[386] Acute impacts from construction of the PennEast Pipeline include, but are not limited to, land clearing; removal of vegetation; soil, steep slope, and

[382] *Id.* at 3.5-26, 3.6-13.
[383] Declaration of Dr. Thomas David Hayes, attached as Exhibit 31.
[384] *Id.* at 3-10, 12-13.
[385] *Cf.* Delaware Riverkeeper Network Comments on the Proposed State Water Quality Certification for the PennEast Gas Pipeline (June 10, 2016), attached as Exhibit 32.
[386] Princeton Hydro, LLC, *The Short and Long-Term Consequences of the Construction of the PennEast Pipeline* (July 2015), attached as Exhibit 33, at 3.

bedrock disturbance; alteration of the hydrologic regime of streams; and increased runoff and stormwater loading. Long-term impacts identified by the study include, but are not limited to, destabilization of the traversed ecosystem; increased predation/loss of native forest core species; introduction and colonization of invasive species; reduction in water quality; fragmentation of habitat; increased pollutant loading to wetlands and streams; and increased erosion.[387]

Other common environmental impacts from the construction, maintenance, operation, and repair of pipelines have been documented in the approval proves for other specific pipelines. While this section is not meant to be exhaustive or describe all impacts of pipelines, it illustrates some of the many categories of environmental impacts from pipelines that the Corps must consider under NEPA upon issuance of NWP 12, since further NEPA analyses will not be completed for specific projects.

In April of 2016, the New York State Department of Environmental Conservation denied a Clean Water Act Section 401 Water Quality Certification for the proposed Constitution Gas Pipeline.[388] The Department's rationale for denial included an examination of the pipeline's cumulative impacts on waterways, which the Corps should consider. The denial notice stated:

> [c]umulatively, impacts to both small and large streams from the construction and operation of the Project can be profound and include loss of available habitat, changes in thermal conditions, increased erosion, creation of stream instability and turbidity, impairment of best usages, as well as watershed-wide impacts resulting from placement of the pipeline across water bodies in remote and rural areas.[389]

We also urge the Corps to reconsider its definition of "loss" of wetlands to include the permanent loss of wetlands values from conversion. Wetlands provide ecologically valuable functions including, but not limited to, filtering of pollutants, flood control, erosion control, nutrient and water storage, and wildlife habitat. The conversion of high-quality forested wetlands to scrub shrub or herbaceous wetlands can lead to the reduction or loss of important services and benefits provided by wetlands.

We have attached a report prepared by ecologists that details some of the environmental impacts of converting forested wetlands in Pennsylvania to herbaceous wetlands for the construction and permanent maintenance of pipeline rights-of-way.[390] Some of the functional losses that would result from wetland conversion include: decreased structural and species diversity; decreased soil and streambank stabilization; decreased erosion and sedimentation

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[387] *Id. at 10-27.*
[388] New York State Department of Environmental Conservation Notice of Denial Addressed to Constitution Pipeline Company, LLC (April 22, 2016), attached as Exhibit 34.
[389] *Id.* at 12.
[390] Schmid & Company, Inc. Consulting Ecologists, *The Effects of Converting Forest or Scrub Wetlands to Herbaceous Wetlands in Pennsylvania* (2014), Exhibit 7.

control; loss of forest interior habitat and species; decreased nutrient storage; loss of visual and aural screening.[391] Furthermore, the report casts doubt on the ability of wetland mitigation to succeed in compensating for permitted impacts to wetlands. "Seldom has mitigation created the same kind of wetlands as those damaged. Most attempted mitigation that succeeded in creating wet areas resulted in open water ponds rather than forested or scrub wetlands (Cole and Shaffer 2002)."[392]

We encourage the Corps to fully consider these impacts of wetland conversion, especially from forested or scrub wetlands to herbaceous wetlands. These impacts were specific to certain types of forested wetlands in Pennsylvania, and while many of these impacts may occur in forested wetlands around the country, others may vary from region to region or watershed to watershed. These impacts are indicative of the types of cumulative impacts that occur as a result of forested wetland conversion for NWP 12 pipelines across the country. Thus, the Corps must conduct a comprehensive evaluation of these and other impacts of forested wetlands conversion nationwide scale, as no further NEPA analysis will be conducted for specific pipelines permitted under NWP 12.

NWP 12 has already been used to authorize pipeline projects that cumulatively, had more than minimal adverse effects on the environment. The Corps now has the opportunity and obligation to redress this error and ensure that a proper and adequate cumulative impacts analysis is conducted for the activities permitted under this nationwide permit.

F. The Proposed Reissuance of NWP 12 Violates NEPA's Prohibition on Project Segmentation

As set forth in sections III C-D, *supra*, NWP 12 defines "single and complete linear project" so as to apply the acreage limitations separately to each water crossing, and allows unlimited usage of NWP 12 along an along an overall pipeline project. In addition to violating the CWA §404(e), NWP 12 also violates NEPA's prohibition on segmenting overall projects as well as NEPA's requirement that all connected and cumulative impacts be analyzed in a single EIS. It does so by artificially dividing massive pipeline projects up into hundreds or thousands of smaller pieces (*i.e.*, each water crossing with up to ½ acre of loss of US waters), each of which the Corps' DDD determines will have "no significant impact" on the environment individually, but fails to consider each of the connected parts of overall pipelines within Corps jurisdiction that are "connected actions" or the non-federal components of a pipelines that are connected and or cumulative actions. In recent years, project proponents and the Corps have used NWP 12 to avoid considering the overall impacts of pipelines permitted under NWP 12 as required by NEPA (either upon issuance of NWP 12 or at the project level). Therefore, the provisions that

[391] *Id.* at 29-30.
[392] *Id.* at 33.

allow multiple (and unlimited use) of NWP 12 to permit a larger overall project, the environmental impacts of which the Corps never considers, violates 40 C.F.R. § 1508.25.

NEPA requires federal agencies to analyze a project and all of its connected, cumulative, and similar actions together in a single EIS before the project is allowed to proceed.[393] The CEQ regulations define connected actions as actions that: "(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; or (iii) Are interdependent parts of a larger action and depend on the larger action for their justification."[394] "The justification for the rule against segmentation is obvious: it 'prevent[s] agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'"[395] Thus, despite whether CWA §404 allows the Corps to piecemeal its permitting of massive pipeline projects NEPA unquestionably does not.

The D.C. Circuit allows individual components of pipelines and other linear projects to be analyzed in a separate NEPA document only if they would have "independent utility."[396]

In *Delaware Riverkeeper*, the court held that the Federal Energy Regulatory Commission's ("FERC") EA for a 40-mile natural gas pipeline project called the Northeast Project violated NEPA by failing to include all connected actions as required by 40 C.F.R. § 1508.25(a). The court held that the Northeast Project was actually one of four "physically, functionally, and financially connected and interdependent" components that resulted in a complete overhaul of a 200-mile pipeline, and that FERC had improperly segmented its NEPA analysis.[397]

The *Delaware Riverkeeper* court applied three factors in determining that FERC had improperly segmented its NEPA review of the Northeast Project from the other three sections of the 300 Line pipeline in violation of 40 C.F.R. § 1508.25(a): (1) whether the Northeast Project had logical termini; (2) whether the Northeast Project had substantial independent utility; and (3)

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[393] 40 C.F.R. § 1508.25(a).
[394] *Id.* § 1508.25 (a)(1) (emphasis added).
[395] *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1314 (D.C. Cir. 2014) (quoting *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988)); *see also Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298-99 (D.C. Cir. 1987) (the segmentation doctrine "was developed to insure that interrelated projects the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.").
[396] *Hammond*, 370 F. Supp. 2d at 244 (applying the independent utility test in holding that an entire 480-mile oil pipeline must be analyzed in a single NEPA document); *Delaware Riverkeeper*, 753 F.3d at 1316-17 (applying the independent utility test to four sections of a natural gas pipeline); *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987) (applying the independent utility test to a highway project).
[397] 753 F.3d at 1308.

whether the timing of the Northeast Project overlapped with the other three projects.[398] These factors are equally applicable to NWP 12.

First, *Delaware Riverkeeper* found that the Northeast Project and the other three projects comprised a "single pipeline running from beginning to end" that was "linear and physically interdependent, and …contain[ed] no physical offshoots."[399] Thus, the Northeast Project did not have "logical termini" justifying a NEPA analysis separate from the larger pipeline. The same is true with pipelines permitted by NWP 12. None of the individual sections of overall linear pipelines would have logical termini, as they are physically interdependent with no physical offshoots that would justify isolated NEPA analyses.

Second, the court found that the Northeast Project would not have independent utility. It examined the record and found that the four projects were both *functionally* and *financially* interdependent, and rejected FERC's argument that the Northeast Project would have independent utility because the company secured new shipping contracts based on the capacity of the Northeast Project.[400] It noted that "[g]as does not enter and exit the pipeline between segments" and "customers do not take gas from the Northeast Project portion" of the larger pipeline. *Id*. at 1317. Instead, the "Northeast Project's utility is inextricably intertwined with the other three improvement projects…" *Id*. Similarly, individual water crossings permitted by NWP 12 that are part of the same overall project could never have independent utility. They are all *part of a single pipeline project*, the purpose of which is to transport materials from point A to point B. Not a single drop of crude oil (or an amount of natural gas) could flow through an overall pipeline unless the *entire pipeline* is constructed. They are necessarily "physically, functionally, and financially connected and interdependent."[401] Therefore, there is no rationale for analyzing thousands of individual water crossings separately in the DDD and ignoring the impacts of the larger pipeline projects NWP 12 permitting in reality.

Third, *Delaware Riverkeeper* held that the temporal overlap of the four pipeline upgrade projects suggested that they were "connected."[402] The court found that "FERC plainly was aware of the physical, functional, and financial links between the two projects" and that the reviews of the various projects overlapped in time.[403] "Because of the temporal overlap of the projects, the scope and interrelatedness of the work should have been evident to FERC as it reviewed the Northeast Project. Yet FERC wrote and relied upon an EA that failed to consider fully the

[398] *Id.* at 1315-19 (citing *Taxpayers Watchdog v. Stanley*, 819 F.2d 60, 68 (D.C. Cir. 1987)).
[399] *Id*. at 1316.
[400] *Id*. at 1316-17.
[401] *Id.* at 1308.
[402] *Id*. at 1317-18.
[403] *Id*. at 1318.

contemporaneous, connected projects."[404] Here, because NWP 12 can be used numerous times simultaneously to permit a single overall project, NEPA requires the Corps to analyze the full range of impacts of the pipelines it is permitting.

NEPA requires all connected federal actions—not just Corps actions—to be analyzed in a single EIS.[405] In many cases, the Corps' verifications of pipeline water crossings under NWP 12 are only one aspect of numerous federal approvals of a pipeline (*e.g.*, a project may also require the granting of easements across federal lands or properties, the issuance of incidental take statements pursuant to section 7 of the ESA). However, these multiple actions are not always taken at the same time—the Corps may issue NWP 12 after preparing an EA/FONSI, verify a particular pipeline's water crossings under NWP 12, and *then* the Corps or another agency must prepare additional NEPA analyses. Nonetheless, these are connected actions pursuant to 40 C.F.R. § 1508.25 (a)(1). If it is not feasible for the Corps to analyze all connected federal actions for every pipeline project upon issuance of NWP 12, it must require additional or supplemental NEPA analyses at the project level that covers both the water crossings and all connected federal actions together in one document.

NEPA also requires federal agencies to analyze all "cumulative actions" together in a single EIS.[406] Cumulative actions are defined as actions "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement."[407] Cumulative effects, in turn, are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[408]

As set forth above, the cumulative impacts associated with using NWP 12 multiple times to permit large pipeline projects are well-documented and significant. Therefore, *multiple uses* of NWP 12 on the same project an example of cumulative actions that must be analyzed together under NEPA. Instead, the DDD focuses only on the impacts of *single uses* of NWP 12 to waterways, and ignores the impacts of the cumulative actions that NPW 12 permits. The DDD must analyze all cumulative actions, which includes both the discharges of fill into US waters and the sections of the pipelines that fall outside of Corps jurisdiction.

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[404] *Id.*
[405] 40 C.F.R. § 1508.25 (a)(1).
[406] 40 C.F.R. § 1508.25(a).
[407] *Id.* § 1508.25(a)(2); *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1319 (D.C. Cir. 2014).
[408] 40 C.F.R. § 1508.7.

G. The Corps' NEPA Regulations Extends its "Control and Responsibility" to Overall Pipelines Permitted by NWP 12.

Section IV.E discusses the Corps' obligation to analyze the cumulative impacts of pipelines, including the impacts of pipeline construction, operation, maintenance, and repair on areas outside of Corps jurisdictional areas. That obligation is reinforced by the Corps' NEPA regulations located at 33 C.F.R. § 325 App. B.

The Corps' regulations instruct that in some instances, the Corps must analyze "the impacts of the specific activity requiring a [§404] permit *and those portions of the entire project* over which the district engineer has sufficient control and responsibility to warrant Federal review."[409] "These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action."[410]

Because nearly all proposed pipelines cross numerous US waters, they cannot be constructed without a Corps §404 permit. By issuing NWP 12 and allowing multiple uses along a single project, the Corps is allowing the construction of entire pipelines that would not otherwise be permitted to proceed. Thus, the environmental consequences of the larger pipeline projects are products of the Corps permit action.

The Corps' NEPA regulations dictate that the scope of the Corps' NEPA review on a linear project is determined by several factors. One of those is "[w]hether or not the regulated activity comprises 'merely a link' in a corridor type project."[411] In some cases, such as the Corps' approval of the Flanagan South pipeline, the Corps' jurisdiction over the pipeline included verification of 1,950 water crossings spread along the entire length of the pipeline (as well as easements for two major river crossings). Thus, Corps jurisdiction over Flanagan South did not represent "'merely a link' in a corridor type project" like the single river crossing in *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980). Rather, the Corps has control over "a major portion" of the pipeline, as its jurisdiction extends to *every mile* of the 600-mile pipeline. The same is true with respect to the Gulf Coast Pipeline, the Dakota Access Pipeline, and many other pipelines permitted by NWP 12. Corps' regulations make clear that in such situations, the Corps' control and responsibility extends to the entire project.[412] Therefore, the Corps' DDD should analyze the environmental impacts to "upland" or non-jurisdictional parts of pipelines permitted by NWP 12.

[409] 33 C.F.R. § 325 App. B (emphasis added).
[410] *Id*.
[411] 33 C.F.R. § 325 App. B.
[412] 33 C.F.R. § 325 App. B(7)(b)(3),(1).

Another factor that extends the Corps' "control and responsibility" beyond Corps jurisdictional areas is "[t]he extent of cumulative Federal control and responsibility."[413] The regulations explain further:

> A. Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project. These are cases where the environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation, or approval (not including funding assistance solely in the form of general revenue sharing funds, with no Federal agency control over the subsequent use of such funds, and not including judicial or administrative civil or criminal enforcement actions).
>
> B. In determining whether sufficient cumulative Federal involvement exists to expand the scope of Federal action the district engineer should consider whether other Federal agencies are required to take Federal action under the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), Executive Order 11990, Protection of Wetlands, (42 U.S.C. 4321 91977), and other environmental review laws and executive orders.[414]

Thus, the Corps must analyze the impacts of larger pipeline projects if/when other agencies are involved in a pipeline's approval. If the Corps cannot conduct that analysis at a nationwide level, it must ensure that NWP 12 requires further NEPA analysis at the project-verification level if/when other agencies are involved (*see, e.g*, following formal consultation under section 7 of the ESA and/or when easements across federal lands are required).

In sum, the Corps must analyze the entirety of pipelines in a NEPA document because they are "functionally inseparable" from the portions within Corps jurisdiction.[415] Therefore, the

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[413] 33 C.F.R. § Pt. 325, App. B.

[414] *Id*.

[415] *Mainella*, 459 F. Supp. 2d at 105 (NEPA required National Park Service ("NPS") to analyze the impacts of a project occurring outside NPS jurisdiction where it was "functionally inseparable" from the NPS-regulated part of the project); *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1040-41 (9th Cir. 2009) (Corps' NEPA analysis must analyze extra-jurisdictional parts of a project where none of the project could not proceed without Corps permits); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1121-24 (9th Cir. 2005) (Corps NEPA analysis was improperly limited to jurisdictional waters that ran through 5% of construction site); *Wyoming Outdoor Council*, 351 F. Supp. 2d at 1242 (Corps was responsible for analyzing uplands impacts of a general §404 permit for oil and gas development because its approval was "essential to completion of the project") (citing *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1173 (10th Cir. 2002) (NEPA required where water crossings were

law is clear: the Corps cannot limit its NEPA analysis to the discharges into U.S. waters; rather, it must analyze the impacts of the entire Pipeline.

H. The Corps Must Analyze the Climate Impacts of NWP 12.

The DDD must consider the climate change impacts of pipelines permitted under NWP 12. That includes an analysis of the increased extraction and end-use combustion of conventional and unconventional forms of oil and gas transported by NWP 12.

As explained above, NWP 12 is often the only federal approval required to construct major fossil fuel pipelines, with no further NEPA analysis required. For example, NWP 12 permitted the Flanagan South tar sands pipeline across four states, which now transports 600,000 barrels per day of high-carbon tar sands crude oil to market. The Corps estimates that NWP 12 will be used an estimated 69,700 times over the next five years. That represents a major build-out of fossil fuel infrastructure, the cumulative climate impacts of which will be significant. Incredibly, the DDD is completely silent on the permit's climate change impacts.

The Paris Agreement on climate change, signed by 178 nations as of June 2016, establishes the goal of "holding the increase in global average temperature to well below 2°C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5°C above preindustrial levels."[416] The current U.S. long-term climate target—which may not be enough to achieve the 'well below 2 degrees' goal set in Paris—is an emissions cut of 83 percent from 2005 levels by 2050.[417] At stake is the attainment of U.S. climate goals. Locking in new fossil fuel pipeline infrastructure, with an economic lifespan of at least 40 years, would exceed the U.S. emissions budget.

An increasing body of scientific literature indicates that to avoid the worst consequences of climate change, the vast majority of fossil fuel reserves must stay in the ground. For example, a peer-reviewed article published in the prestigious research journal *Nature* concluded that if we are to keep climate change below dangerous levels – 80 percent of global coal reserves, half of

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"so interdependent that it would be unwise or irrational" to complete the project without a discharge permit.)).

[416] United Nations Framework Convention on Climate Change (UNFCCC). Adoption of the Paris Agreement. December 12, 2015. https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf.

[417] USA. Climate Action Tracker. September 4, 2015. http://climateactiontracker.org/countries/usa.html.

all gas reserves, and a third of oil reserves must stay in the ground through 2050.[418] For unconventional oil, closer to 90% of such fossil fuels must remain in the ground.

As has been demonstrated in recent years, the fossil fuel industry has increasingly relied on NWP 12 to expand our nation's oil and gas pipelines, including oil from unconventional sources like tar sands and fracked natural gas. Pipelines permitted under NWP 12 would allow much of these fossil fuels to be extracted and transported to market. Without these pipelines, much of the deposits would stay in the ground.

The tar sands are the third largest oil reserve in the world, and the vast majority of it cannot be burned if we are to avoid the worst impacts of climate change.[419] If industry expansion plans are realized, carbon emissions from the tar sands would see CO2 emissions rise, rather than fall at a time when the country has promised to reduce emissions in line with limiting global warming to two degrees Celsius or less.

The potential for further growth in gas production represents a major challenge for U.S. climate policy. The U.S. Energy Information Administration's (EIA) latest projection for U.S. gas supply and demand (Annual Energy Outlook 2016) shows a 55 percent increase in production and a 24 percent increase in consumption by 2040.[420] If gas were the only source of greenhouse gases in 2040, it would still blow the U.S. carbon budget. This makes it clear that the growing use of gas is out of sync with U.S. climate goals.

NWP 12's fast-track permitting of major oil and gas pipelines, without any further analysis of their greenhouse gas emissions, is inconsistent with the efforts of the Obama Administration and the global community to curb climate change. The Obama Administration's Clean Power Plan, fuel economy standards, methane regulations, review of federal coal leasing, and denial of the Keystone XL Pipeline are all steps toward achieving the U.S.'s climate goals, but the pipelines to be authorized by NWP 12 threaten to offset this progress.

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[418] Christophe McGlade & Paul Ekins, *The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2ºC*, NATURE Vol. 517, pp. 187-190 (Jan. 7, 2015), http://www.nature.com/nature/journal/v517/n7533/full/nature14016.html.

[419] Views on the impact of the fall in oil prices vary among industry sources. The Canadian Association of Petroleum Producers has revised its 2030 tar sands production forecast to 4 mbpd (CAPP, Crude Oil Forecast, Markets & Transportation, June 2015, p.ii) whereas the Canadian Energy Research Institute forecasts 4.9 mpbd by 2035(Oil sands supply cost update, 2015-2035), August 2015, http://www.ceri.ca/images/stories/Study_152_-_Oil_Sands_Supply_Cost_Update_2015-2035_-_August_2015.pdf.

[420] Oil Change International. *A Bridge Too Far: How Appalachian Basin Gas Pipeline Expansion Will Undermine U.S. Climate Goals*. July 2016. http://priceofoil.org/content/uploads/2016/07/bridge_too_far_report_05_web_Finalv2.pdf

Thus, the NWP 12 DDD must evaluate: the potential individual and cumulative greenhouse gas emissions from pipelines permitted by NWP 12, including GHG emissions from upstream fuel extraction and downstream combustion of the fuel transported by these pipelines; whether the buildout of fossil fuel infrastructure permitted by NWP 12 is consistent with our nation's greenhouse gas reduction goals; and any potential climate mitigation measures.

I. The DDD must Evaluate the Impacts of Conversion of Forested Wetlands for Pipeline Rights-of-way

The DDD fails to adequately analyze the impacts of converting forested wetlands to lesser quality wetlands such as scrub/shrub or herbaceous wetlands. The Corps acknowledges that NWP 12 allows the conversion of wetlands "to other uses and habitat types" explaining, "[f]orested wetlands will not be allowed to grow back in the utility line right-of-way so that the utility line will not be damaged and can be easily maintained. Only shrubs and herbaceous plants will be allowed to grow in the right-of-way."[421]

The Gulf Coast Pipeline resulted in the conversion of over 130 acres of forested wetlands to scrub shrub wetlands.

Section III.G of these comments explains why the Corps should clarify its definition to "loss of waters of the US" to include wetland conversion. However, regardless of whether the conversion is considered a loss, the Corps has an independent obligation under NEPA to analyze the significant impacts of these conversions, which may vary from region to region. For example, Exhibit 7 explains some of the impacts of forested wetlands conversion in Pennsylvania, which includes: decreased structural and species diversity; decreased soil and streambank stabilization; decreased erosion and sedimentation control; loss of forest interior habitat and species; decreased nutrient storage; loss of visual and aural screening.[422]

The DDD merely states that NWP 12 will result in the conversion of forested wetlands, but fails to discuss any of the actual impacts of the conversion. This is hardly the type of "hard look" that NEPA requires.

J. NWP 12 must Prohibit Construction in Jurisdictional Waterways until all other Federal and State Permits are Issued for Pipelines.

NWP 12 violates NEPA's prohibition against allowing an irretrievable commitment of resources prior to the completion of a full NEPA analysis for particular pipelines.

[421] DDD, at 36.
[422] Exhibit 7, at 29-30.

The purpose of NEPA is to "insure that ... environmental amenities and values may be given appropriate consideration in decisionmaking ...."[423] "NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment…., [so] the appropriate time for preparing an EIS is *prior* to a decision, when the decisionmaker retains a maximum range of options."[424]

Therefore, NEPA requires agencies to comply with NEPA when the "critical agency decision" is made which results in "irreversible and irretrievable commitments of resources" to an action which will affect the environment.[425]

To that end, NEPA regulations prohibit any action on a proposal, until an agency issues a record of decision, that would either "[h]ave an adverse environmental impact" or "[l]imit the choice of reasonable alternatives."[426] If an agency becomes aware that a non-federal project applicant is about to take such action before the agency concludes its NEPA process, "the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved."[427]

In *Maryland Conservation Council, Inc. v. Gilchrist,* 808 F.2d 1039 (4th Cir. 1986), the court held that where a private highway project required federal approval to cross a park, no part of the highway could begin construction until the agency completed its NEPA analysis. The court explained that if the agencies allowed construction of a private highway all the way up to the border of the park prior to completion of the NEPA process, "the completed segments would stand like gun barrels pointing into the heartland of the park.... It is precisely this sort of influence on federal decision-making that NEPA is designed to prevent. Non-federal actors may not be permitted to evade NEPA by completing a project without an EIS and then presenting the responsible federal agency with a *fait accompli.*"[428]

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[423] 42 U.S.C. § 4332(2)(B).
[424] *Sierra Club v. Peterson,* 717 F.2d at 1414; 40 C.F.R. § 1501.2 ("Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values…").
[425] *Id. (citing Mobil Oil Corp. v. F.T.C.,* 562 F.2d 170, 173 (2d Cir.1977); *see also Fund for Animals v. Norton,* 281 F. Supp. 2d 209, 229 (D.D.C. 2003); *Scientists' Inst. for Public Information, Inc. v. Atomic Energy Comm'n,* 481 F.2d 1079, 1094 (D.C.Cir. 1973) (in determining *when* to prepare an EIS the agency must ascertain to what extent its decision embodies an "irretrievable commitment" of resources which precludes the exercise of future options); *Conner v. Burford,* 848 F.2d 1441, 1446 (9th Cir. 1988) (an EIS must be prepared before any irreversible and irretrievable commitment of resources).
[426] 40 C.F.R. § 1506.1(a).
[427] *Id.* § 1506.1(b).
[428] *Id.* at 1042 (internal quotation marks and citation omitted).

NWP 12 allows precisely this situation to occur. In many instances, there have been one or more other federal agency actions that must be taken in addition to the Corps' verification of a pipeline before the pipeline can be constructed. Often, these other approvals are major federal actions that require further NEPA analysis. In such cases, these other federal actions should consider the environmental impacts of the stream crossings, as well as the other federal actions, prior to any action being taken. Regardless, NPW 12 allows the district engineers to issue verifications, after a consideration of the cumulative impacts of all of the water crossings, and allow construction in US waters prior to the other agency NEPA analyses concluding. In other words, NWP 12 allows the Corps to irretrievably commit agency resources while it or other agencies are still considering NEPA analyses for connected portions of the same project. This unfairly prejudices the outcome of the pending NEPA reviews, unduly restricts the choice among alternatives, and inflicts undue pressure on remaining decision-makers to approve the project.

For example, in the case of the Flanagan South pipeline, the Corps district engineers verified the pipeline's 1,950 water crossings in four states and allowed pipeline construction to begin while the Corps and the Bureau of Indian Affairs (Bureau) was still engaged in NEPA analyses to inform their decisions as to whether and/or how to issue easements across federal lands for connected parts of the pipeline. It came as little surprise that the Corps and Bureau ultimately approved the easements, as the rest of the multi-billion dollar pipeline had already been built and stood "like gun barrels pointing" at the unapproved federal sections.

NWP 12 thus violates NEPA. The Corps should condition the use of NWP 12 on all connected portions of an overall project first receiving all other federal and state approvals.

K. Must Require Supplemental NEPA Review at the Project Verification Level

NEPA requires a supplement to an EIS when significant new information or changes in a project implicate significant changes in the environmental analysis. The NEPA regulations require that:

> (1) Agencies…[s]hall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.[429] (2) [Agencies] may also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.[430]

[429] 40 C.F.R. § 1502.9 (1978).
[430] *Id*. § 1502.9 (1978).

The use of the word "shall" is mandatory: it creates a duty on the part of the agency to prepare a supplemental EIS if substantial changes from any of the proposed alternatives are made and the changes are relevant to environmental concerns.[431] In determining whether new information is significant, a court should look to the NEPA "significance factors" found in 40 C.F.R. § 1508.27(b) (1978).[432]

When determining if new circumstances or new information require an agency to issue a supplemental EIS, a court should consider the following factors: (a) the environmental significance of the new information; (b) its probable accuracy; (c) the degree to which the agency considered the new information and considered its impact; and (d) the degree to which the agency supported its decision not to supplement its decision not to supplement its impact statement with explanation or additional data.[433]

The information submitted with these comments on the environmental impacts of pipelines permitted by NWP 12 constitutes significant new information relevant to environmental concerns that the Corps must consider in an SEIS. In addition, NWP 12 must specify that the Corps prepare an SEIS at the project-verification level when additional impacts about specific projects come to light. This project-level NEPA analysis will supplement the Corps' brief DDD for NWP 12 that fails to discuss the full range of impacts associated with oil and gas pipelines in various parts of the country.

L. The DDD Violates NEPA by Relying on Future Project-Level Mitigation that is Uncertain to Occur

The DDD for NWP 12 relies entirely on district engineers to impose mitigation measures on a case-by-case basis at the project level to ensure that projects permitted by NWP 12 will have no more than minimal environmental impacts. *See, e.g.*, DDD at 4 ("The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects.); *Id.* at 33-34 ("Compensatory mitigation required by district engineers for specific activities authorized by this NWP will help reduce the contribution of those activities to the cumulative effects on the Nation's wetlands, streams, and other aquatic resources… District engineers will establish compensatory mitigation requirements on a case-by-case basis, after evaluating pre-construction

[431] *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 372 (1989) (recognizing the duty where there are significant new circumstances or information); *see also Dubois v. U.S. Dep't. of Agric.*, 102 F.3d 1273, 1292 (1st Cir. 1996).
[432] *Natural Res. Def. Council v. Lujan*, 768 F. Supp. 870, 886 (D.D.C. 1991) (a new report that contained a substantially different estimate of the amount of oil expected to be found in Alaska required the preparation of an SEIS).
[433] *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1025 (9th Cir. 1980); *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983).

notifications."); *Id*. at 35 ("Compensatory mitigation, if required for activities authorized by this NWP, will result in the restoration, enhancement, establishment, or preservation of aquatic habitats that will offset losses to conservation values); *Id*. at 36 ("General condition 23 requires mitigation to minimize adverse effects to the aquatic environment through avoidance and minimization at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse environmental effects are no more than minimal).

Reliance on district engineers to impose adequate mitigation at the project-verification level cannot be used to justify a "Finding of No Significant Impact," and thus the DDD violates NEPA.

Pursuant to NEPA, the US ACOE cannot make a finding of no significant impact without the study and analysis of effective mitigation measures. Where an environmental assessment relies on mitigation measures to reach a finding of no significant impact, that mitigation must be assured to occur and must "completely compensate for any possible adverse environmental impacts." *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982). The court will not accept conclusory statements that mitigation measures are effective: the agency must be able to support its conclusions with information in the administrative record. *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1985). In making a "finding of no significant impact," the agency cannot rely on mitigation measures that "are speculative without any basis for concluding they will occur." *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002). In order for mitigation measures to form the basis of a FONSI, "the mitigation measures must be more than a possibility. They must be imposed by statute or regulation or have been so integrated into the initial proposal that it is impossible to define the proposal without the mitigation." *Wyoming Outdoor Council decision in the Dist. of Wyoming*, 351 F. Supp. 2d 1232 (D. Wyo. 2005) (citing *Davis v. Mineta* and NEPA's Forty Most Asked Questions).

As the Second Circuit noted: "[W]e emphasize the requirement that mitigation measures be supported by substantial evidence in order to avoid creating a temptation for federal agencies to rely on mitigation proposals as a way to avoid preparation of an EIS." *National Audubon Society v. Hoffman*, 132 F.3d 7, 17 (2nd Cir. 1997). See also *Friends of the Ompopompoosuc v. FERC*, 968 F.2d 1549, 1556-57 (2nd Cir. 1992). Similarly, the Ninth Circuit rejected a timber sale where "[t]he Forest Service's broad generalizations and vague references to mitigation measures do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required to provide." *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380-81 (9th Cir. 1998).

If the effectiveness of such mitigation is not assured, then the US ACOE cannot issue a FONSI and must prepare an EIS. *Foundation for North American Wild Sheep v. U.S. Dep't of Agric*., 681 F.2d 1172, 1178 (9th Cir. 1982). If the plaintiff "raises substantial questions whether a project may have a significant effect, an EIS must be prepared." *Steamboaters v. FERC*, 777

F.2d 1384 (9th Cir. 1985). Alternatively, we recommend excluding the Allegheny and Blue Ridge Mountain region from coverage under the Nationwide 12.

In explaining its regulations, the CEQ has stated that such mitigation-based FONSIs are inappropriate in most situations:

> Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement.

NEPA's 40 Most Asked Questions, 46 Fed. Reg. 18,038. If a proposal appears to have adverse effects that could be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such possible mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation opportunities without altering the nature of the proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision. *Id*. at 18,026.

In an EA, the government must detail the mitigation measures it relies upon to reach a FONSI. *Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332, 353 (1989); *Carmel-By-the-Sea v. United States Dep't of Transp*., 123 F.3d 1142, 1154 (9th Cir. 1997) ("mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated"); *Neighbors of Cuddy Mountain v. United States Forest Serv*., 137 F.3d 1372 (9th Cir. 1998). NEPA requires agencies to "analyze the mitigation measures in detail [and] explain how effective the measures would be. A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Northwest Indian Cemetery Protective Assn. v. Peterson*, 764 F.2d 581, 697 (9th Cir. 1985), rev'd on other grounds, 485 U.S. 439 (1988).

NEPA requires agencies to "discuss potential mitigation measures in their EISs and decision documents." *Pacific Coast Fed. of Fisherman's Assocs. v. Blank*, 693 F.3d 1084, 1103 (9th Cir. 2012) (citing 40 C.F.R. §§ 1502.14(f), 1502.16(e)–(h), 1505.2(c), 1508.25(b)(3)). An EIS must discuss mitigation "in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Id*. (citing *Methow Valley*, 490 U.S. at 353. The discussion "necessarily includes an assessment of whether the proposed mitigation measures can be effective." *Id*. (citing *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009)). Without a discussion of mitigation, "neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Methow Valley*, 490 U.S. at 352.

> An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. Compare *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998) (disapproving an EIS that lacked such an assessment) with *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477 (9th Cir. 2000) (upholding an EIS where "[e]ach mitigating process was evaluated separately and given an effectiveness rating"). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. *Methow Valley*, 490 U.S. at 351-52 (citing 42 U.S.C. § 4332(2)(C)(ii)). A mitigation discussion without at least some evaluation of effectiveness is useless in making that determination.

S. Fork Band Council of W. Shoshone v. United States DOI, 588 F.3d 718, 727 (9th Cir. 2009).

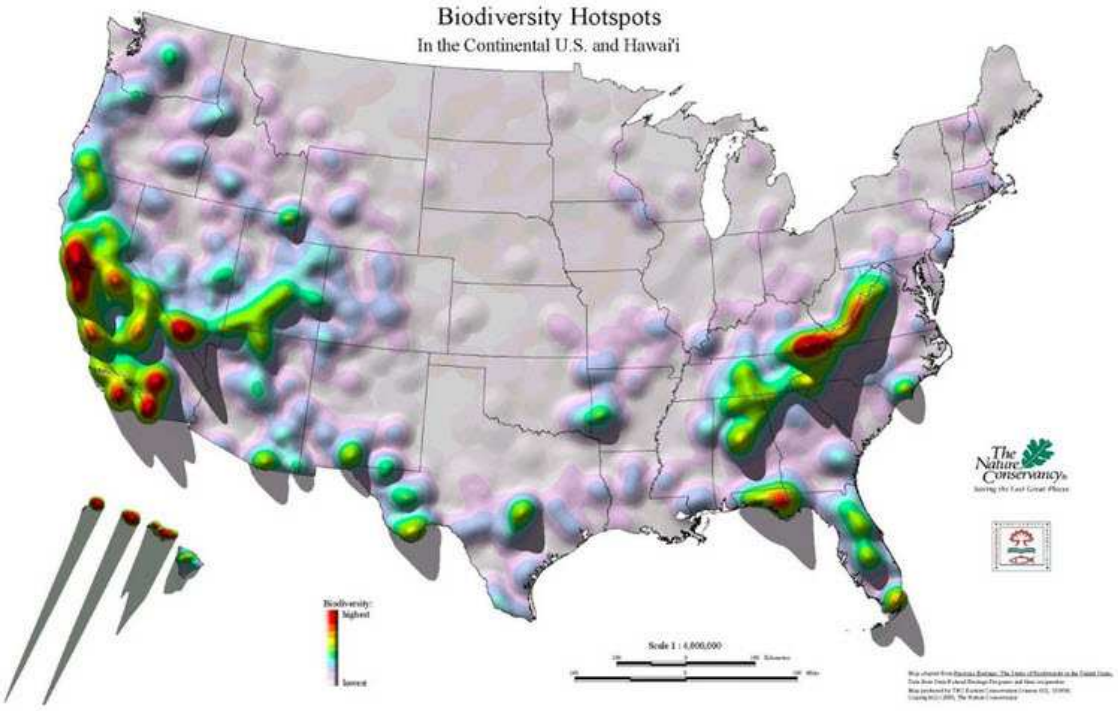
Most fundamentally, NEPA requires that the public be informed of, and participate in, the entire decision making process, including the analysis of mitigation. In 2011, the Council on Environmental Quality issued guidance on the appropriate use of mitigation and monitoring. The guidance directed the need for transparency and public involvement in the use of mitigated findings of no significant impact. "Mitigation commitments needed to lower the level of impacts so that they are not significant should be clearly described in the mitigated FONSI document and in any other relevant decision documents related to the proposed action. *Agencies must provide for appropriate public involvement during the development of the EA and FONSI*." Council on Environmental Quality Memorandum, January 14, 2011, p 7 (emphasis added), https://ceq.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf, citing 40 CFR § 1501.4(b) (requiring agencies to involve environmental agencies, applicants, and the public, to the extent practicable); *id.* § 1501.4(e)(l) (requiring agencies to make FONSIs available to the affected public as specified in§ 1506.6); *id.* § 1501.4(e)(2) (requiring agencies to make FONSIs available for public review for thirty days before making any final determination on whether to prepare an EIS or proceed with an action when the proposed action is, or is closely similar to, one which normally requires the preparation of an EIS under agency NEPA implementing procedures, or when the nature of the proposed action is one without precedent); *id.* § 1506.6 (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures). Absent the inclusion of complete, objective analyses of mitigation measures that demonstrate the appropriateness of relying on mitigation the decision documents are incomplete and violate NEPA.

M. NWP 12 is not Appropriate for the Regulation and Control of Impacts from Gas Pipeline Construction in the Mid-Atlantic Mountain Region.

There are numerous interstate gas pipeline projects proposed in the mid-Atlantic mountain region to transport gas from the Marcellus Shale region. Some of the projects propose the construction of 42-inch pipelines, the size of which is unprecedented. When the Nationwide 12 permit was initially promulgated, 42-inch gas pipelines were not conceivable, and no such gas pipeline had ever been proposed for construction through the mid-Atlantic mountain region. At this time, there are several projects proposed that would cross both the Allegheny and Blue

Ridge Mountain formations. The severity of the mountain slopes and the fragile geology throughout the region make pipeline construction risky at best. Contributing to the risk is the lack of proven efficacy of mitigation measures. Without the study of the effectiveness of mitigation, impacts cannot be discounted in the analysis. Therefore, we propose excluding the mid-Atlantic mountain region from coverage under Nationwide 12.[434]

Water resources and the extraordinary biodiversity still present in the mid-Atlantic mountain region are most at risk from gas pipeline construction. The map below identifies the region as one of the nation's remaining biodiversity treasure chests as determined by The Nature Conservancy.



The heart of the issue is mitigation. The Corps has no published, standard mitigation practices for gas pipeline construction in the mid-Atlantic region. Even if it did, the measures would not be proven to be effective on the extraordinarily steep slopes, unstable soils, and karst geology that dominate the mid-Atlantic mountain region, including the Blue Ridge, Ridge and Valley, and Appalachian Plateau physiographic provinces. The NWP 12 DDD makes only conclusory references to mitigation measures and entirely lacks any analysis of the effectiveness

[434] By proposing the exclusion of the mid-Atlantic region, commenters in no way endorse the use of NWP 12 in any other parts of the country.

of mitigation measures in the severe conditions of the mid-Atlantic mountain region. Furthermore, there would be no further analysis at the project level.

Not only is there no mitigation proven to be effective in the gas pipeline construction process in the mid-Atlantic mountain region, there are likely to be significant adverse impacts that last beyond the construction phase. Pipeline construction corridors are notoriously difficult to revegetate. In addition to the continuous threat of erosion and stream sedimentation, the permanent clearings increase runoff velocity and volume, and the potential for temperature increases in streams that support cool water, mountain fisheries.

In support of the argument that mitigation is not proven effective, we include below a summary of the effects of the G-150 and TL-589 gas pipelines in the mountains of West Virginia where the following impacts occurred:

- lower slope failure at pipeline stream crossing locations during and post construction resulted in harm to streams
- harm to streams occurred despite the application of industry-standard erosion and sediment control practices.
- site-specific analysis may have identified the risk factors and allowed avoidance or mitigation

The relevant documents are attached as exhibits:

- Consent Order issued by the West Virginia Department of Environmental Protection, attached as Exhibit 35;
- Geotechnical analysis of root causes as prepared by Dominion Transmission, Inc., attached as Exhibit 36.

1. G-150 and TL-589 Gas Pipelines Summary

West Virginia Department of Environmental Protection (WVDEP) Consent Order No. 8078, dated October 1, 2014, addressed a series of 13 locations in West Virginia where lower slope slippage or landslides along pipeline construction right-of-ways introduced sediment into streams in violation of regulations concerning conditions not allowable in waters of the State, specifically sediment deposits. The pipeline construction company was Dominion Transmission, Inc. (DTI) and the specific pipelines were designated the G-150 and the TL-589 pipelines. They are located in the northwestern section of West Virginia.

The consent order required that DTI provide a written report to WVDEP describing findings of a geotechnical analysis to define the root causes of historical pipeline right-of-way failures and including a plan of corrective action to address these causes. The Consent Order

further required that Dominion develop and implement a written policy for slips, including specifically listed procedures, although there was no requirement for submission of the written policy to WVDEP.

Dominion Chief Environmental Officer, Pamela F. Faggert, submitted the required geotechnical analysis to WVDEP on June 15, 2015. The report was titled, *Root Cause Evaluation Dominion Transmission Slips, Doddridge, Marshall and Ohio Counties, West Virginia.*

The report included the following general statements concerning the causes of the slips or landslides that resulted in stream sedimentation:

- "It should be noted that a primary contributing factor to these slips was the natural geologic conditions in this portion of West Virginia." – *page iii*
- ". . . the region is characterized by steep slopes with colluvial soil overlying shallow bedrock. These weak soil and rock materials result in slip-prone conditions." – *page iii*
- ". . . a desktop review of slip maps reveals that this portion of West Virginia [Appalachian Plateau Province] is known to have a high susceptibility for natural slips." - *page 2*

The report included the following statements concerning causes for the individual slips or landslides*:*

- ". . . contributing factors to this slip [UT of Grave Creek (1i)] include natural geologic conditions, construction activities which involved tree removal, the removal of bedrock and replacement with soil fill to match existing contours, the presence of pre-existing slips, and groundwater." – *page 4*
- ". . . contributing factors to this slip [UT of Leech Run (1g)] include natural geologic conditions, construction activities which involved tree removal, the removal of bedrock and replacement with soil fill to match existing contours, the presence of pre-existing slips, and groundwater." – *page 5*
- ". . . contributing factors to this slip [UT of Little Tom's Run (1h)] include natural geologic conditions, construction activities which involved tree removal, the removal of bedrock and replacement with soil fill to match existing contours, the presence of pre-existing slips, and groundwater." – *page 5*
- ". . . contributing factors to this slip [Bartlett's Run (1f)] include natural geologic conditions, construction activities which involved tree removal, the removal of bedrock and replacement with soil fill to match existing contours, and possibly the presence of groundwater." – *page 5*
- ". . . contributing factors to this slip [UT of Grave Creek (1e)] include natural geologic conditions, construction activities which involved tree removal, the removal of bedrock and

replacement with soil fill to match existing contours, and the presence of pre-existing slips." – *page 6*

- ". . . contributing factors to this slip [UT of Little Tribble Creek (1d and 2c)] include natural geologic conditions, construction activities which involved tree removal, the removal of bedrock and replacement with soil fill to match existing contours, the presence of pre-existing slips, and possibly groundwater." – *page 6*
- ". . . contributing factors to this slip [UT of Little Tribble Creek (1c and 2b)] include natural geologic conditions, construction activities which involved tree removal, the removal of bedrock and replacement with soil fill to match existing contours, and possibly groundwater." – *page 6*
- ". . . contributing factors to this slip [UT of Long Run (2a)] include natural geologic conditions, construction activities which involved tree removal, the removal of bedrock and replacement with soil fill to match existing contours, and possibly groundwater." – *page 7*
- ". . . contributing factors to this slip [Simms Run (1b] include natural geologic conditions, construction activities which involved tree removal, the removal of bedrock and replacement with soil fill to match existing contours, the presence of pre-existing slips, and possibly surface water." – *page 7*
- ". . . contributing factors to this slip [Middle Run (3a)] natural geologic conditions [sic], include a water point source discharging on the slope, and the presence of pre- existing slips." – *page 8*

The report included the following statements concerning the application of Erosion and Sediment Control practices or Best Management Practices:

- "The construction documents appear to be prepared in accordance with typical industry standards for Erosion and Sediment Control (ESC) practices." – *page 10*
- ". . . there were no indications that the contractor deviated from typical construction practices." – *page 10*
- "the construction documents appear to be prepared in accordance with typical industry standards for reclamation protocol, meaning pipeline backfilling, ROW redressing, and ESC practices. However, industry practice does not address the engineering aspects of reclamation on steepened slopes . . . ." – *page 10*
- ". . . there were no indications of deficient management functionality during our review. Existing management controls provide acceptable oversight to project staffing, employee training, engineering engagement, and compliance with internal practices." – *page 10*

It is reasonably foreseeable that erosion, slides, and sedimentation will occur based on gas pipeline projects already constructed in the mid-Atlantic mountain region. According to Dominion, the geologic conditions predetermined the impact caused by its pipeline construction activing in West Virginia, and the approved and properly installed BMPs failed. Although the

slope and sediment and erosion control failures on the G-150 and TL-589 pipelines are generally outside the jurisdiction of the Corps, the problem is that the increased soil and runoff, and landslides, flow downhill directly into the stream crossings. An investigation and report on the incidents at the Stonewall Gathering pipeline project, also in West Virginia, illustrate that the runoff and sedimentation completely overwhelmed the mitigation that was under the jurisdiction of the US ACOE at the associated stream crossing.

The aerial photograph shown below illustrates the nexus between slope failure, erosion and sedimentation with the jurisdiction of the Corps: The photograph shows the location of a horizontal drill at Big Isaac Creek on June 22, 2015). The excavated pits on either side of the stream and road are filled with runoff water. The construction crew was pumping the runoff water directly into the adjacent wetland and stream, bypassing the sediment filtering structure. The WVDEP inspected this site on July 7, 2015 and issued a Notice of Violation.

Big Isaac Creek, West Virginia: June 22, 2015. Sediment laden runoff pumped directly into stream and wetland area, bypassing sediment filtering structure, Stonewall Gathering Pipeline. Photo by Dominion Pipeline Monitoring Coalition Pipeline Air Force.

A complete summary of the situation at the Stonewall Gathering pipeline project is found at this link, which includes a dozen or more aerial photographs: http://pipelineupdate.org/2015/08/28/stream-zero/.

In addition to steep slopes and unstable soils, the mid-Atlantic mountain region hosts karst geology. Ernst H. Richard Kastning, Ph.D., P.G., the preeminent scholar on karst geology, prepared a report documenting the presence of significant karst terrain over which a proposed 42-inch gas pipeline is proposed to be constructed. Most significantly, Kastning concluded that the impacts from the construction of this unprecedented pipeline proposal are un-mitigatable. The report, entitled *An Expert Report On Geologic Hazards in the Karst Regions of Virginia and West Virginia: Investigations and Analysis Concerning the Proposed Mountain Valley Gas Pipeline*, is attached as Exhibit 37.

It is well-known that pipeline trenches can act as drainage channels. This phenomenon is a concern not only in karst terrain -- because water and sediment can unpredictably end up anywhere -- but also in attempts to mitigate wetland impacts. There is no evidence that 42-inch pipelines that require 150 feet of completely cleared pathways, and 12-feet-deep trenches can be built over wetlands that can then be restored. Not only is it unproven that a wetland can be restored from this extraordinary construction activity, the risk of permanently channeling the water away from the area is enormous.

The Corps has not analyzed the impacts of constructing 42-inch diameter gas pipelines in the extraordinary environmental conditions that are present in the mid-Atlantic mountain region; nor has the ACOE studied or analyzed the efficacy of mitigation measures. Forty-two-inch gas pipelines were not even conceivable when the Nationwide 12 permit was initially promulgated, and the Corps' NEPA analysis has not caught up to the technological expansions in the gas industry. We recommend excluding from coverage under the Nationwide 12 permit all proposed pipeline projects that would traverse the mountain ridges in the mid-Atlantic mountain region.

N. Operational Impacts of Pipelines

The DDD must consider the operational impacts of pipelines permitted under NWP 12, including an analysis of the various products transported through the pipelines, including but not limited to various types of crude oil (e.g., light/sweet crude, diluted bitumen or "dilbit," heavy synthetic crude, etc.), natural gas, hazardous materials, etc. That includes an analysis of the potential risks and impacts of various products being released into the environment.

The DDD must consider the reasonably foreseeable "upstream" and "downstream" impacts of the transported fuels, including but not limited to: the increased development of fracked oil and gas, tar sands crude, oil shale, and other upstream fuel deposits that the pipelines will cause or allow; the downstream air and water quality impacts associated with the downstream refining, processing, and combustion of the products transported by NWP 12 pipelines.

O. The DDD Must Analyze the Risks, Impacts and Potential Mitigation Measures of Pipeline Drilling Fluid Reaching US Waterways.

The DDD violates the requirements of NEPA by failing to evaluate the risks, impacts, and potential mitigation measures associated with inadvertent returns of drilling muds during pipeline drilling under waterways, also known as "frac-outs." The Corps' Federal Register announcement explains this occurrence:

> [W]e are proposing to add a paragraph to NWP 12 to authorize, to the extent that DA authorization is required, discharges of dredged or fill material into section 404 waters, and structures and work in section 10 waters, necessary to remediate inadvertent returns of drilling muds (also known as ''frac-outs'') that can occur during directional drilling operations to install utility lines below jurisdictional waters and wetlands. An inadvertent return takes place when drilling fluids are released through fractures in the bedrock and flow to the surface, and possibly into a river, stream, wetland, or other type of waterbody. The entity making the suggestion expressed concerns about inconsistencies in how inadvertent returns are managed when they occur.
> …
>
> The fluids used for directional drilling operations consist of a water bentonite slurry. This water-bentonite mixture is not considered a toxic or hazardous substance, but it can adversely affect aquatic organisms if released into bodies of water. Because a frac-out releases a drilling fluid and that fluid is not a material that can be considered ''fill material'' under 33 CFR 323.2(e), the inadvertent returns of these drilling muds is not regulated under section 404 of the Clean Water Act.[435]

Despite acknowledging that frac-outs can cause a release of water-bentonite slurry into waterways and adversely affect aquatic organisms, the DDD is silent on discussing this issue or its impacts on waterways and the aquatic environment. The only mention of frac-outs in the DDD consists of three sentences that simply acknowledge the proposed change. DDD, at 2 ("This NWP authorizes, to the extent that DA authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling muds to waters of the United States through sub-soil fissures or fractures (i.e., frac-outs) that might occur during horizontal directional drilling activities to install or replace utility lines."); *id*. at 6 **(**"We also proposed to add a paragraph to authorize, to the extent that DA authorization is required, discharges of dredged or fill material into section 404 waters, and structures and work in section 10 waters, necessary to remediate inadvertent returns of drilling muds (also known as "frac-outs") that can occur during directional drilling operations to install utility lines below jurisdictional waters and wetlands."); *id*. at 8 ("the Corps proposed to add a paragraph authorizing regulated activities necessary to remediate inadvertent returns of drilling muds (also

[435] 81 Fed. Reg. 35198.

known as “frac-outs”) that can occur during directional drilling operations to install utility lines below jurisdictional waters and wetlands.

The Corps must analyze the potential risks and impacts associated with frac-outs, since no further NEPA analysis will be conducted at the project or regional levels.

V. CONCLUSION

Thank you for the opportunity to comment on this important NWP that impacts citizens and communities nationwide. For the reasons set forth above, we urge the Corps to let NWP 12 expire without reissuance. Alternatively, we look forward to reviewing an amended notice and NEPA analysis that addresses the legal and policy issues set forth above. Please keep us informed of any additional comment periods or public hearings at the contact information provided below.

Respectfully submitted,

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