



August 1, 2016

**Via eRulemaking Portal**

Docket No. COE–2015–0017 and/or RIN 0710–AA73

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

**Re: Proposal to Reissue and Modify Nationwide Permits (“NWP”) [and Solicitation for Comment on Certain Issues Associated with Docket No. COE–2015–0017 and/or RIN 0710–AA73]**

The West Virginia Oil and Natural Gas Association (“WVONGA”) appreciates the opportunity to submit the following comments on the United States Army Corps of Engineers’ (“USACE”) proposed reissuance and modification of Nationwide Permits (the “Proposed Rule”), 81 Fed. Reg. 35186 (June 1, 2016). Chartered in 1915, WVONGA is one of the oldest trade organizations in West Virginia, and serves the entire oil and gas industry. The activities of our members include construction, environmental services, drilling, completion, gathering, transporting, distribution and processing. WVONGA members operate in almost every county in West Virginia and employ thousands of people across the State, with payrolls totaling hundreds of millions of dollars annually. Our members have cumulative investment of nearly ten billion dollars in West Virginia, account for 80% of the production and 90% of the permits, operate more than 20,000 miles of pipeline across the state and provide oil and natural gas to more than 300,000 West Virginia homes and businesses.

In the Proposed Rule, USACE has solicited comments on several significant changes and other issues that are material to WVONGA and its membership. These issues include (i) soliciting the views of Nationwide Permit (“NWP”) users on how the 2015 revisions to the definition of “waters of the United States” (“WOTUS”) might affect the applicability and efficiency of the proposed NWPs; (ii) whether to retain the 1/2-acre limit that has been imposed on certain NWPs (i.e., NWPs 12, 14, 21, 29, 39, 42, 43, 44, 50, 51, and 52), or to impose different acreage limits on these NWPs; (iii) changing the pre-construction notification (“PCN”) thresholds for those NWPs that require pre-construction notification and proposing to develop a standard form

PCN that will be released in a separate notice and comment rulemaking; and (iv) soliciting comment on five aspects of waivers.<sup>1</sup>

WVONGA hereby submits its comments on the Proposed Rule below and endorses the comments submitted by the American Exploration & Production Council and the Independent Petroleum Association of America. More specifically, WVONGA desires to make its views and concerns known to USACE on the uncertainty introduced by the WOTUS definitional issue and certain aspects of the newly proposed NWP 12 for Utility Line Activities.

## **USACE Should Consider Carefully the Implications of the New WOTUS Rule for the NWP Program**

WVONGA applauds USACE for seeking comment on the potentially sweeping impact of the new proposed definition of WOTUS. The proposed WOTUS rulemaking has generated much controversy and has become the subject of much litigation. Given the uncertain outcome of that litigation, WVONGA submits that it is premature to contemplate changes to the NWP program until the courts decide the merits of the rule challenge. Two terms of critical importance to the NWP most frequently used by the oil and natural gas industry, NWP 12, are “waterbody” and “adjacent”, which are not defined in the Proposed Rule. It is entirely unclear how the WOTUS rule would impact the USACE’s interpretation or definition of those two critical terms. When judicial clarity on the WOTUS rule has been rendered, all parties (including the USACE) will be better postured to offer substantive commentary on the NWP program.

All this being said, WVONGA notes generally that the proposed WOTUS rule changes have the potential to expand Clean Water Act (“CWA”) jurisdiction to an unprecedented scope. WVONGA strongly urges all federal and state agencies to interpret and implement whatever the scope of WOTUS is determined to be by the courts in a manner most consistent with the limitations on the coercive power of the state imposed by the United States Constitution.

### **NWP 12 – Utility Line Activities**

#### *USACE Should Authorize “Frac Out” Remediation under NWP 12 as Proposed.*

WVONGA appreciates USACE’s proposal to include remedial earthwork for unforeseen inadvertent return of drilling muds (i.e. frac-out) as an authorized activity under NWP 12. WVONGA agrees that pre-authorization for such remedial work under NWP 12 is a logical and efficient approach and should be incorporated into the final rule. This approach will help

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<sup>1</sup> These are (1) making changes to the numeric limits that can be waived; (2) retaining the authority of district engineers to issue activity-specific waivers of certain NWP limits; (3) imposing a linear limit on certain waivers; (4) whether to impose a linear limit on losses of intermittent and ephemeral stream bed eligible for certain waivers; and (5) requiring compensatory mitigation.

facilitate more rapid remedial response to such contingencies and is far superior to any enforcement alternative. WVONGA fully supports this amendment by USACE to the NWP 12 authorization.

*No Change in Practice for Single and Complete Projects Should be Imposed.*

WVONGA conditionally supports USACE's proposed new Note 2 to NWP 12 regarding the term "single and complete project." As WVONGA reads the proposed rule's preamble, USACE appears only to be annotating the already existing regulatory language of 33 CFR §330.6(d) within NWP 12's new Note 2. It is unclear to WVONGA why USACE has chosen to highlight this particular issue in this rulemaking, but WVONGA does not oppose its inclusion, so long as USACE does not alter how 33 CFR §330.6(d) is implemented in practice. While WVONGA realizes that 33 CFR §330.6(d) can trigger a requirement for an individual permit for all crossings under certain circumstances, WVONGA submits that such a requirement should be imposed as conservatively as possible so as not to unjustifiably delay projects.

*USACE Should Allow Non-CWA 404(f)(1) Repair/Maintenance Under NWP 12.*

WVONGA supports USACE's addition of new Note 6 expressly stating that utility line maintenance and repair activities that do not qualify for CWA section 404(f)(1) exemption are authorized under NWP 12. This clarifying note should assist in streamlining applicable maintenance and repair activity, maximizing efficiencies for both the private and public sectors.

*USACE Should Allow Larger Acreage to be Covered by NWP 12.*

Due to the unique topographic constraints of West Virginia's central Appalachian highlands, WVONGA supports acreage limits being expanded beyond the current ½ acre limit. WVONGA's support for this expansion is increased by concern about the potential expansion of WOTUS scope under that new controversial rule, notwithstanding the current uncertainty of the scope of WOTUS applicability due to the pending litigation challenging it. WVONGA submits that a modest expansion of acreage covered by NWP 12 will save both private and public sector resources in routine utility construction without causing significant adverse impacts to WOTUS aquatic resources.

**USACE Should Allow for the Removal of PCNs as Proposed**

WVONGA supports the removal of PCNs as proposed. WVONGA supports reasonable streamlining of regulatory requirements. Such increases in efficiency are desirable improvements for both the regulated and regulatory communities.

## **USACE Should Allow for the Waivers as Proposed**

WVONGA supports the continued and expanded use of waivers in the NWP program. As noted above, the topographical constraints of central Appalachia are unique and drive a need for flexibility in dealing with the particular challenges of this region. As previously noted, if the new WOTUS rule is implemented in a manner which appreciably expands the jurisdictional scope of the CWA, flexibility in use of waivers will be all the more critical.

Accordingly, WVONGA supports USACE implementing a waiver policy that can take account of regionally unique topological and hydrological factors to allow for increases of acreage and linear footage that can be waived, as well as activity-specific waivers, if District Engineers find such waivers justifiable. Linear and acreage caps, generally, should be expanded, and likewise losses of intermittent and ephemeral streams should be eligible for such waivers, so long as the District Engineer is satisfied that doing so does not result in adverse impacts to aquatic resources that cannot be otherwise mitigated. While compensatory mitigation should be required for any adverse impacts that are significant, not all losses of stream bed should require compensatory mitigation. For example, isolated waters or substantial discontinuities in the stream channel that eliminate the surface connectivity to a jurisdictional water should not create a mitigation obligation. Even in instances where such stream beds do have continuous surface connectivity to jurisdictional waters, compensatory mitigation may not necessarily be required, provided the District Engineer determines such loss of stream bed results in only a de minimis adverse impact to a jurisdictional aquatic resource.

## **USACE Can Improve Conduct of Compensatory Mitigation**

WVONGA generally supports USACE's new language in General Condition 32. WVONGA agrees that rehabilitation, restoration, enhancement or preservation are appropriate methodologies for implementing compensatory mitigation. However, WVONGA believes that USACE should not impose preferred methodologies of mitigation bank credits or in-lieu credits for compensatory mitigation. Rather, WVONGA submits that USACE should allow the permittee to propose its preferred compensatory mitigation methodology, provided that the District Engineer reasonably finds that the permittee's proposed compensatory mitigation methodology is sufficient to adequately offset the identified adverse impacts of the NWP activity.

## Conclusion

For the reasons stated above, WVONGA respectfully requests that USACE accept WVONGA's commentary and implement WVONGA's suggestions as submitted. WVONGA appreciates the opportunity to comment on the Proposed Rule. Please do not hesitate to contact me at (304) 842-4310 should you have any further questions.

Very truly yours,

A handwritten signature in blue ink that reads "Kevin Ellis /mi/".

Kevin Ellis

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