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Via email: NWP2017@usace.army.mil

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

Re: Comments on Proposal to Reissue and Modify Nationwide Permits (NWP); Docket No. COE-2015-0017; RIN 0710-AA73

Dear Docket Clerk,

The American Petroleum Institute (API) is pleased to submit comments on the proposal to reissue and modify NWPs (Proposed Rule) issued by the U.S. Army Corps of Engineers (Corps). 81 Fed. Reg. 35,186, June 1, 2016 (Proposed Rule).

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the Clean Water Act (CWA). As you know, API and its members have been constructive participants in the Environmental Protection Agency's (EPA) and the Corps' development of CWA regulations (including NWPs), which affect the oil and natural gas industry.

Nationwide permits serve the important purpose of implementing congressional intent to create a streamlined process for authorizing pre-approved categories of activities that result in minimal environmental impacts. Therefore, if an activity meets the conditions of a general NWP, it can be authorized without the lengthy and complex process of obtaining an individual permit. In order to preserve continuity of operations in an efficient and streamlined manner, it is paramount that the NWPs issued in 2012 be reauthorized with limited changes by March 19, 2017.

The 60-day comment period for the Proposed Rule and the shorter 30-day comment period for the Office of Management and Budget (OMB) review made it difficult for API and its members to meaningfully consider the extensive documents under this docket.

Recognizing these limitations, API has filed a request to extend the comment deadline. With the Corps having declined to extend the comment period, API submits the following comments for Corps consideration. API also incorporates by reference comments filed by API on July 1, 2016

to the OMB on the information collection requirements and attached API comments on the proposed Waters of the U.S. Rule dated November 14, 2014.¹

I. GENERAL COMMENTS

A. **The Corps' request to solicit comments from NWP users on impacts of the stayed 2015 Waters of the U.S. Rule² on NWPs is inappropriate given pending litigation.**

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

API appreciates the Corps' efforts toward proposing streamlined NWP and Pre-Construction Notice (PCN) procedures intended to: a) help the Corps manage its workload more efficiently and b) enable the regulated community to obtain individual permits as well as coverage under the general permit in a cost-effective and timely manner. However, the Corps' Proposed Rule "seeking the views of NWP users on how the 2015 revisions to the definition of 'waters of the United States' might affect the applicability and efficiency of the proposed NWPs" is over-broad, given to myriad interpretations and ambiguities, and subject to intense litigation.³ As stated in the U.S. Court of Appeals for the Sixth Circuit decision that stayed the 2015 Waters of the U.S. rule nationwide, "*the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being.*"⁴ [emphasis added.] Subsequently, the EPA and the Corps issued a Litigation Statement stating that "[i]n response to this decision, EPA and the Department of Army (DA) resumed nationwide use of the agencies' prior regulations defining the term 'waters of the United States.'"⁵ **Yet, critical definitions in the Proposed Rule refer to provisions in the stayed 2015 Waters of the U.S. Rule, and in seeking comments in the Proposed Rule, the Corps has not clarified which jurisdictional definitions apply.**

The term "waters of the U.S." and related concepts are included numerous times throughout the Proposed Rule. Given that pending litigation relating to the 2015 Waters of the U.S. Rule raises fundamental CWA jurisdictional issues, views from NWP users as sought by the Corps on this issue would vary widely and offer interpretations on wide-ranging scenarios which may not even

¹ API comments on the Proposed Waters of the U.S. Rule filed November 14, 2014, available at: <http://www.api.org/news-policy-and-issues/letters-or-comments/2015/02/05/letter-claff-emmert-to-epa-regarding-us>

² See Clean Water Rule: Definition of "Waters of the United States," 80 *Fed. Reg.* 37,054, June 29, 2015 ("2015 Waters of the U.S. Rule").

³ Proposed Rule at p. 35,190.

⁴ *State of Ohio, et al v. United States Army Corps of Engineers, et al*, Nos. 15-3799/3822/3853/3887, Oct. 9, 2015.

⁵ Clean Water Rule Litigation Statement, available at <https://www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement>

materialize. Under the current hearing schedule, it is also highly unlikely that any final legal determinations of the 2015 Waters of the U.S. Rule will be made prior to March 19, 2017.

NWP users need certainty in being able to utilize these permits for their public and commercial activities. With all this uncertainty and faced with an impending expiration date for the 2012 NWPs in 2017, any attempt to revise the applicability of NWPs based on the 2015 Waters of the U.S. Rule and/or any comments solicited, will cause confusion and potentially be subject to additional costly litigation.

B. The proposed NWPs should be issued without any reference to the stayed 2015 Waters of the U.S. Rule and should rely on the pre-2015 Waters of the U.S. Rule.⁶

The first and foremost goal should be to ensure that these important NWPs are fully re-authorized by March 19, 2017. The Corps can accomplish this important requirement by finalizing this rulemaking on schedule through removal of any and all conditions, references and requirements specific to the 2015 Waters of the U.S. Rule. The Corps should simply renew the NWPs, currently in force, with limited revisions. If the 2015 Waters of the U.S. Rule is resolved, a subsequent and separate rulemaking can follow to modify the NWPs.

The final NWPs should not include any prescriptive conditions, concepts, or procedures associated with the 2015 Waters of the U.S. Rule. The regulated community and the Corps cannot wait an indefinite period of time until the litigation relating to the 2015 Waters of the U.S. Rule is resolved and it is unlikely that the courts will be making a decision prior to the comment deadline for this Proposed Rule. Expiration of the NWP regulatory program would be an unnecessary burden on regulated parties and the Corps, since the current NWPs are fully functional at this time and a simple extension/revision of these rules would provide ongoing protection of watercourses and wetlands.

In addition, assuming *arguendo* that the 2015 Waters of the U.S. Rule withstands judicial review, NWPs will undoubtedly increase the number of waters determined to be jurisdictional under the CWA, thereby increasing the number of projects requiring CWA Section 404 authorization, and resulting in greater burden on limited agency resources with more efforts and focus drawn into reviewing costly, time-consuming individual permits.⁷ With the wider scope of jurisdictional waters under the definition of tributaries and uncertainty related to the distance limitations, regulated community will have more difficulty meeting and complying with NWP applicability requirements (e.g. NWP 12). This would also result in a chilling effect on projects going forward with negative economic impacts as industry is driven to costlier individual permits instead.

In conclusion, the public must be given ample opportunity to provide comment on the NWPs if the 2015 Waters of the U.S. Rule withstands judicial review and becomes effective. The appropriate vehicle for that is a subsequent and separate NWP rulemaking once there is a clear

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

⁷ See API Comments on proposed waters of the U.S. Rule referenced at Footnote 1.

path-forward. Doing so now as the Corps seems to be indicating with its call for comments on this unsettled issue is premature and, is likely to cause unnecessary confusion.

C. Any final NWP's issued with any fundamental substantial changes in applicability must satisfy the notice and comment requirements of the Administrative Procedure Act (APA).

Given the breadth of substantive comments sought by the Corps on the proposed NWP's due to the 2015 Waters of the U.S. Rule, any final NWP's issued with any fundamental substantial changes in applicability must satisfy the notice and comment requirements of the APA. Any substantive revision to the NWP's must be a "logical outgrowth" of the Proposed Rule as published in the Federal Register in June, 2016, to satisfy the notice and comment requirements of the APA.⁸

D. At a minimum, the Corps must maintain the current waiver descriptions, acreage limits, and PCN thresholds.

There will be enormous uncertainty in the final NWP's if consideration is given to the broad comments sought by the Corps in fundamental areas governing applicability of NWP's such as acreage limits, waivers, and PCN thresholds.⁹ If the 2015 Waters of the U.S. Rule is implemented, the Corps should initiate separate rulemaking and consider increasing these thresholds to avoid an overwhelming influx of individual permit applications.

1. PCN Thresholds Requirements

Twenty-one NWP's have PCN requirements including two (2) new proposed NWP's.¹⁰ API has suggestions regarding the existing PCN threshold requirements for General Conditions (GCs) 18 and 20. To provide certainty to applicants, API suggests a reasonable time-certain review period in lieu of the current open-ended review period if GCs 18 and 20 are triggered (see below for detailed discussion). However, API cautions against any further, more restrictive PCN threshold requirements which would be unjustified, unnecessary and burdensome. Such changes would be more appropriate under a separate rulemaking if the 2015 Waters of the U.S. Rule withstands judicial review and is implemented.

2. Acreage Limits

As discussed above, if the 2015 Waters of the U.S. Rule prevails, there will be a considerable increase in waters subject to this Proposed Rule, including ephemeral and intermittent drainages, brought into NWP consideration. Under this scenario, increases to acreage limits will be much

⁸ See Footnote 4; APA, 5 U.S.C. § 553. See also *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

⁹ The Proposed Rule also includes comments received after the 2015 Waters of the U.S. relating to the President's Climate Action Plan and EPA's proposed Clean Power Plan and "several entities" requesting that the Corps increase acreage limits and change to PCN thresholds of NWP's such as NWP's 12, 39, 51, and 52. Proposed Rule at pp. 35,190-35,191.

¹⁰ *Id.* at p. 35,187.

needed and should be carefully considered in a separate rulemaking subject to notice and comment. Until then, at a minimum, current acreage limits should be maintained.

3. Authority of District Engineers to use waivers for certain activities under particular NWPs

District Engineers have significant experience in reviewing PCNs and are best able to consider case-by-case scenarios where waivers may be appropriate and reasonable. API supports the continued use of waivers for activities authorized under applicable NWPs. Notwithstanding the 2015 Waters of the U.S. Rule, if the ability for District Engineers to issue waivers of certain NWP limits is removed, then more individual permits would be required for activities that exceed these limits, and processing greater numbers of individual permits would be a burden on the Corps' staff and resources. This would in essence defeat the purpose and intent of NWPs. It would also significantly impact the regulated community with added expense and delay associated with acquiring individual permits for minimal impact to waters.

The Corps also solicits a number of comments on the waivers. API's position is that any changes due to the stayed 2015 Waters of the U.S. Rule should be deferred until this issue is resolved. Overall, the District Engineer should continue to have flexibility to consider waivers on case-by-case basis instead of imposing caps of any kind on waivers. There should also be flexibility for District Engineers to evaluate conditions on a case-by-case basis without making compensatory mitigation a mandatory requirement to offset losses of jurisdictional waters and wetlands authorized by waivers for applicable NWPs including NWP 39.

II. COMMENTS RELATING TO GENERAL CONDITIONS AND DEFINITIONS

The Corps should avoid unnecessary disruption or burdens on permittees that utilize NWPs for important public and commercial activities by taking a circumspect and judicious approach to adding any new restrictions or requirements in the final 2017 NWPs that are issued. As discussed above, any reference to the stayed 2015 Waters of the U.S. Rule should be deferred until there is finality from the courts at which time the Corps may initiate a separate rulemaking, if necessary. Until that time, these GCs and definitions must adhere to the pre-2015 Waters of the U.S. Rule.

In this spirit, API offers the following specific comments for certain general conditions and definitions.

A. General Condition 18 – Endangered Species

API agrees with the Corps that federal agencies should follow their own procedures for complying with the requirements of the Endangered Species Act (ESA); and that the respective federal agency should be responsible for fulfilling its obligations under Section 7 of the ESA. As proposed, API agrees that GC 18 suffices without the need for any ESA-specific conditions added to any NWPs. Within this framework, the Corps should also recognize and encourage its

own authority under GC 18(c) whereby the District Engineer can determine whether the proposed activity for non-federal permittees “may affect” or will have “no effect” to listed species and designated critical habitat within 45-days of receipt of a completed PCN.

A 45-day review time is provided for this District Engineer determination; however, this GC also includes language for cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity and has notified the Corps. In these scenarios, the applicant cannot begin work even if the 45-day review time has passed, until the Corps has provided notification that the proposed activity will have “no effect” on listed species or critical habitat, or until ESA Section 7 consultation is completed. The last provision releases the Corps from any deadline for notifying and/or approving a project. The congressional intent for a streamlined NWP process is lost and the applicant can be left with its project in limbo. Project applicants need regulatory certainty with reasonable review and notification requirements provided in the NWPs. Otherwise, this directly impacts schedule and cost for proposed projects. API recommends that the Corps adhere to the 45-day review time from receipt of a completed PCN provided for District Engineer determination; or as alternative, rewrite it with a not-to-exceed 90-day review requirement for PCN verification in the event this provision is triggered.

B. General Condition 19 – Migratory Birds and Bald and Golden Eagles

The Corps is proposing to modify this general condition by stating that, “[t]he permittee is responsible for contacting appropriate local office of the U.S. Fish and Wildlife Service to determine applicable measures to reduce impacts to migratory birds or eagles, including whether ‘incidental take’ permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.” The Corps believes that compliance with these laws may be achieved through other means other than incidental take permits. API agrees with this assessment.

C. General Condition 20 – Historic Properties

API agrees with the change similar to GC 18 that for federal projects, the respective federal agency and not the Corps is responsible for fulfilling its obligations to comply with National Historic Preservation Act (NHPA) Section 106.

The Corps is also soliciting comments about any provision in the NWP rule. Under GC 31 (and proposed GC 32), if 45 calendar days have passed from the District Engineer’s receipt of the completed PCN and the applicant has not received notification from the Corps, the prospective permittee can begin work. In cases where the non-Federal applicant has identified historic properties on which the activity may have the potential to cause effects, and has notified the Corps, the applicant cannot begin work even if the 45-day review time has passed, until the Corps has provided notification or until the NHPA Section 106 consultation is completed. This in essence releases the Corps from any deadline for approving a project. The congressional intent for a streamlined NWP process is lost and the applicant is left with its project in limbo. This directly impacts schedule and cost for proposed projects. API recommends that the Corps adheres to the 45-day review time from receipt of a completed PCN or as an alternative, rewrite

it with a not-to-exceed 90-day review requirement for PCN verification in the event this provision is triggered.

D. General Condition 23 – Mitigation

The Corps is seeking public comment on ways to improve how compensatory mitigation is implemented to offset direct, indirect, and cumulative effects; and factors used by District Engineers to consider for deciding when and how much mitigation may be necessary. This is an important issue and given the looming deadline and uncertainty with the 2015 Waters of the U.S. Rule, this request for comments and any associated revision should be subject to a separate notice and comment rulemaking.

It should also be noted that there can be significant discrepancies and inconsistencies on determinations made by individual Corps permit writers regarding when compensatory mitigation is required. Separate from any rulemaking, the Corps should focus on consistency between regions and within regions regarding criteria for when to require mitigation.

In addition, new language in GC 23(d) states that mitigation for losses of streams “should” (previous language was “such as”) be provided through stream rehabilitation, enhancement or preservation since streams are difficult resources to replace, citing to 33 CFR Part 332.3(e)(3). However, this cited regulatory provision has key language, “if practicable” that is left out in the Proposed Rule. This “if practicable” language should be reinserted.

New language in GC 23(f)(1) also states that the “preferred mechanism” for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits citing to 33 CFR Part 332.3(b)(2) and (3). Part 33 CFR Part 332.3(b) also includes other permittee-responsible mitigation (33 CFR Part 332.3(b)(4)-(6)). The compensatory mitigation rule already provides for certain preferences and factors for the District Engineer to consider. As provided in 33 CFR Part 332.3, the District Engineer should be given flexibility to consider these types and locations of compensatory mitigation within the considerations provided for under this compensatory mitigation rule. Additional proposed language in this GC is not needed and should be removed.

In addition, the Corps bases its rationale for the new language in GC 23(f)(1) stating that there is “increased availability of mitigation banks and in-lieu fee program credits in much of the country;” however, that is not universally true, especially for certain locations such as the North Slope of Alaska, where there are no mitigation bank or in-lieu fee credits available.¹¹ The Corps should recognize this and include a reference to the 1994 Alaska Wetlands Initiative Summary Report and Memorandum that states that compensatory mitigation is not practicable in Alaska. Alternatively, if the Corps feels the need to include language around prioritization of compensatory mitigation instruments, then language regarding ‘where practicable’ should be included.

¹¹ Proposed Rule at p. 35,210.

The Corps also states that under GC 23(f)(1), it is clarifying that compensatory mitigation should only be required by District Engineers when those losses are caused by regulated activities (e.g. removing vegetation in a utility line right of way in jurisdictional wetlands by using techniques that do not result in a discharge of dredged or fill material into waters of the U.S. does not require District Engineer authorization).¹² This appears to reflect authority granted under CWA Section 404; however, if this language will result in changes to existing Corps practice, the Corps should be transparent and provide more information.

E. General Condition 30 – Compliance Certification

This General Condition now requires that the completed certification document must be submitted to the District Engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation. Given internal review times for permittees and the need to carefully certify the document per the General Condition, 30 days is not adequate and needs to be extended to 90 days. The Corps should also clarify and provide examples of the types of activities that would trigger the “implementation” requirement.

F. General Condition 32 – Pre-Construction Notification

The Corps proposes a number of new information collection requirements for PCNs. The Corps states that the proposed changes “will not alter the number of activities authorized by NWPs, but will provide better information that should reduce the processing time for PCNs.”¹³ The Proposed Rule states that there will be “a minor increase associated with the minor changes we are proposing for the content” required for a completed PCN.¹⁴ However, that is a simplistic view given that the Corps is asking for comments on the impacts from the 2015 Waters of the U.S. Rule, which could significantly alter the number of NWP authorized activities and consequently potential impacts of these new information collection requirements.

Specific revisions include changes for activities related to linear projects. The Corps would require the PCN to state “the quantity of proposed losses of waters of the United States at each single and complete crossing of waters of the United States.”¹⁵ This is more stringent than the provision in the same section relating to proposed activity which states, “including the anticipated amount of loss of water of the United States expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure.”¹⁶ [emphasis added.] With existing language applicable to a proposed activity generally, there is no practical utility for the additional confusing language specific to linear crossings.

New language also preemptively requires “a description of any proposed mitigation measures intended to reduce the adverse environmental effects causing by the proposed activity.”¹⁷ Moreover, it requires the proposed activity and proposed mitigation measures be sufficiently

¹² Id.

¹³ See RIA at p. A-13.

¹⁴ Proposed Rule at p. 35,214.

¹⁵ Id. at p. 35,236.

¹⁶ Id.

¹⁷ Id.

detailed to allow the District Engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. This additional language relating to mitigation measures is unnecessary, burdensome, and is also duplicative since the information required for a proposed activity encompasses mitigation measures. This type of language is appropriate for individual permits where there are impacts beyond the negligible ones contemplated under NWP. In addition, the District Engineer also has the latitude to ask for a statement separately if regional conditions and the situation warrants it. This new proposed language is unnecessary and API requests it should be removed.

The Proposed Rule under GC 32 also states that the applicant will be required to submit any other NWP, regional general permits or individual permits “used or intended to be part of any proposed project or any related activity, including other separate and distant crossings for linear projects that require [Corps] authorization but do not require [PCN] notification.” [new language underlined].¹⁸ API’s understanding is that the Corps is seeking to clarify this particular provision and has not made substantive changes.

G. Form of Pre-Construction Notification

API looks forward to providing comment on the form of PCN when it becomes available for public comment. API encourages the Corps to consider ways to streamline and reduce the time and effort to complete PCNs. In addition, API appreciates the additional language that explicitly provides the option for submitting electronic files of PCNs and supporting material (This is already encouraged in existing GC 31(d)(5) for expediting agency coordination).

The Proposed Rule will also include two questions for the PCN for bank stabilization activities applicable to NWP 13 and B: 1) whether the applicant has considered the use of living shorelines, if he or she is submitting a PCN for a bank stabilization activity; and 2) if there are consultants and contractors in the area that are qualified to design and construct living shorelines.¹⁹ The Corps states that it will modify its automated information system to track these responses during its evaluations of the use of NWP 13 and B. The purpose of collecting information for any bank stabilization activity including NWP 13 is not clear since only proposed NWP B is specific to living shorelines. The Corps also states in the Proposed Rule that it cannot mandate a specific approach to bank stabilization and yet the Corps appears to be steering applicants in a specific direction. API requests the Corps to provide a reasoned basis and utility for collecting this information as required for OMB review.

¹⁸ Id.

¹⁹ Id. at p. 35,200.

III. COMMENTS ON THE DEFINITIONS SECTION

A. Discharge

The current language provides for any discharge of dredged or fill material and now includes “into waters of the United States.” The Corps explains that it is modifying the definition to make it clear that discharges apply to discharges of dredged or fill material and not to other types of pollutants under Section 402 of the CWA.²⁰ API agrees with the clarifying explanation in the preamble but as discussed below, cautions against applying the 2015 Waters of the U.S. rule definition here.

B. Loss of Waters of the United States

The Corps adds “acres” saying that the loss of stream beds can be measured by area or linear feet and that quantifying stream beds as acres results in more accurate reporting on impacts. The Corps emphasizes that those NWP’s that have a linear foot limit for losses of stream bed which can be waived, are still subject to the ½ acre limit which cannot be waived. API’s understanding is that the Corps is seeking to clarify this provision and has not made any substantive changes.

C. Ordinary High Water Mark (OHWM), Non-Tidal Wetland, and Tidal Wetland

The Corps proposes to revise the definitions of OHWM, Non-Tidal Wetland, and Tidal Wetland to reflect citations to the 2015 Waters of the U.S. Rule. As discussed above, API asks that the definitions be in accordance with the pre-2015 Waters of the U.S. Rule. These definitions of OHWM, Non-Tidal Wetland, and Tidal Wetland are substantively unchanged between the pre-2015 Waters of the U.S. Rule and the 2015 Waters of the U.S.; however, changing the citations to reflect a rule that has been stayed pending judicial review is inappropriate. To avoid any further ambiguity with rule citation, these definitions should refer to 33 CFR Part 328 generally with the language of the definitions explicitly spelled out in the Proposed Rule.

If the 2015 Waters of the U.S. Rule withstands judicial review and becomes effective, the Corps can conduct a subsequent rulemaking to incorporate any citation references, if need be. This would be the least complicated and confusing approach for both the Corps and the public.

D. Waterbody

The Corps proposes defining a waterbody as a jurisdictional water of the U.S. and that sentence does not cite to the 2015 Waters of the U.S. Rule which is appropriate. However, for “adjacent wetlands,” a term used within the definition of “waterbody,” the Proposed Rule is revised to reflect the citations in the 2015 Waters of the U.S. As discussed, while the 2015 Waters of the U.S. Rule is stayed, API recommends that the definitions remain in accordance with the pre-2015 Waters of the U.S. Rule. Doing so otherwise brings in the expansive definition of

²⁰ Id. at p. 35,213.

tributaries under the 2015 Waters of the U.S. Rule, along with suspect distance thresholds that are subject to litigation.

To avoid any ambiguity, the definition of waterbody should also explicitly spell out, in the Proposed Rule, the waters bodies that this definition applies to (that is, navigable waters, interstate waters, and territorial seas as well as impoundments, and tributaries as provided in the pre-2015 Waters of the U.S. Rule under 33 CFR Part 328). The Proposed Rule also deletes the words “bordering, contiguous, or neighboring” to describe adjacent. API requests these terms should be restored to the text and remain in the definition and the Corps should be clear that the 2015 Waters of the U.S. Rule’s more expansive definitions of adjacent and neighboring with its distance thresholds subject to litigation will not be applied to this Proposed Rule. If the 2015 Waters of the U.S. Rule withstands judicial review and becomes effective, the Corps should conduct a subsequent rulemaking to incorporate changes. This would be the least complicated and confusing approach for both the Corps and the regulated community.

IV. COMMENTS ON SPECIFIC NWPS OF INTEREST TO OIL AND NATURAL GAS INDUSTRY

At a minimum, the proposed NWPs must be reissued without any substantial changes or must not incorporate any provisions of the stayed 2015 Waters of the U.S. Rule. The NWPs must continue to adhere to the pre-2015 Waters of the U.S. Rule. If the 2015 Waters of the U.S. Rule withstands judicial review and becomes effective, the Corps should conduct a separate rulemaking.

API offers the following comments on certain NWPs of interest to the oil and natural gas industry.

A. NWP 3 – Maintenance

This NWP applies to certain activities in waters of the U.S. The Corps clarifies that the NWP authorizes removal of previously authorized structures and fills. Another new change is that the NWP authorizes use of temporary mats in jurisdiction waters and wetlands (i.e. if activity requires Corps authorization). It specifies that after conducting the maintenance activity, temporary fills must be removed in their entirety and returned to pre-construction elevations. API agrees with these clarifying changes.

B. NWP 12 – Utility Line Activities

This NWP authorizes activities with minor environmental impacts but is critical to the oil and gas industry and should be reissued as is or with limited non-substantive changes. The Proposed Rule clarifies that it “authorizes discharges of dredged or fill material and into the waters of the U.S. 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.”²¹ API agrees with this Corps assessment that a utility line crossing of a water of the U.S. does not, in and of itself, trigger the need for a NWP 12. Rather, it is still the discharge of dredged or fill material into waters of the U.S. and structures or work in navigable waters of the U.S. that triggers the NWP 12 requirement for utility lines that cross waters of the U.S.

As discussed above, the Corps is soliciting comments on acreage comments and API requests that at a minimum, the ½ acre coverage threshold should be retained in this NWP; and if the 2015 Waters of the U.S. rule is made effective, separate rulemaking should be introduced that considers increasing the threshold limit.

Notwithstanding concerns related to 2015 Waters of the U.S. rule, if the ½ acre threshold limit is revised downward at this time, there would be additional burdens on industry with the added time and cost required to process permits. It has been API members’ experience that Corps Districts evaluate wetland impacts differently and increasing in limits would have varying implications. With changes in threshold requirements, more permits would be required which could add to the Corps workload resulting in slowing down of the overall permitting process.

NWP 12 rephrases a provision and now states that, “[t]here must be no change in pre-construction contours of waters of the U.S.” API’s understanding is that the Corps is seeking to clarify this provision and has not made any substantive changes. As written, it is confusing and implies that this may be an additional and/or different requirement and may increase costs as one may need to complete a pre- and post-construction survey for documentation.

The NWP also authorizes inadvertent returns of drilling muds through sub-soil fractures (frac-outs that might occur during directional drilling operations to install utility lines). Limitations are that these must be done “as soon as practicable” to restore affected waterbodies and that the District Engineer may add special conditions to the NWP to require remediation plans for addressing inadvertent returns. API supports these changes and agrees with providing the District Engineer flexibility in considering special conditions.

Similar to NWP 3 above, this NWP allows for the use of temporary mats which API supports.

The Proposed Rule also adds a Note 2 referencing the definition of “single and complete project” that for utility line activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for NWP consideration.²² Note 2 also states that “[u]tility lines with independent utility must comply with 33 CFR [Part] 330.6(d).”²³ The Corps regulations provide that a larger project can be processed under a combination of nationwide permits and individual permits “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.”²⁴ The definition of “independent utility” in the current NWPs and the Proposed

²¹ Proposed Rule at p. 35,198.

²² Id.

²³ Id.

²⁴ 33 CFR Part 330.6(d).

Rule use the phrase “single and complete non-linear project,” which implies that the concept of “independent utility” does not apply to linear projects covered by NWP 12.²⁵

It is API’s understanding that this proposed Note 2 is not a change in practice since the 2012 NWPs. To remove any ambiguity with inconsistent wording that could be source for confusion, API requests that the Corps should clarify that this note is consistent with existing agency regulations and practice, and not intended to be construed as an expanded interpretation of independent utility for linear projects.

Note with the change to waterbody definition as discussed above, this potentially expands the definition of jurisdictional waterbodies to include tributaries and distance limitations related to neighboring in the 2015 Waters of the U.S. Rule and significantly increases the number of crossings that will need coverage under NWPs or individual permits. API recommends the Corps adheres to the pre-2015 Waters of the U.S. Rule. If the 2015 Waters of the U.S. Rule withstands judicial review and becomes effective, the Corps should conduct a subsequent rulemaking to incorporate changes.

NWP 12 also adds Note 6 stating that NWP 12 authorizes utility line maintenance and repair activities that do not qualify for the CWA Section 404(f)(1) exemption for maintenance of currently serviceable structures. This is indicated as a clarifying note and the RIA does not reflect any impact to the Corps or regulated entities from this change. CWA Section 404(f) already broadly provides for the exemption applicable to currently serviceable structures including transportation structures. This is an important exemption to API members as timely repairs to pipelines reduce the potential for spills or leaks in waters of the U.S. and allow for timely repair as part of normal maintenance activity. API requests that the Corps clarifies that the use and practice of this exemption for maintenance activities related to pipelines is unchanged. API also asks the Corps to provide examples of NWP 12 activities relating to utility line maintenance and repair activities that do not qualify for CWA Section 404(f)(1) exemption, supported by rationale. API’s members understand that repairs involving mechanized land clearing outside previously authorized right-of-ways may require NWP 12 authorization as well as pipeline replacement activities which may increase the size of maintained right-of-ways in waters of the U.S. However, normal maintenance should continue to qualify as exempt under CWA Section 404(f)(1) as well as under other applicable exemptions under CWA Section 404(f).

²⁵ See 77 Fed. Reg. 10,184, Feb. 21, 2012, at pp. 10,262-63 (noting that the Corps added “non-linear” in the first sentence of the definition of “independent utility” to reflect the independent utility test only applies to single and complete non-linear projects).

The preamble also states that the Corps is adding 3 notes, and yet there is an additional Note 8 that reflects PCN requirements stated in the proposed GC 32 that is not discussed. The Proposed Rule states that the applicant will be required to submit any other NWP, regional general permits or individual permits used or intended to be part of any proposed project or related activity including other separate and distant crossings for linear projects that require [Corps] authorization but do not require [PCN]. [emphasis added.] The preamble states that this language is to make it clear that for linear projects, the PCN should identify all crossings of waters of the United States that require Corps authorization under CWA Section 404.²⁶ API's understanding is that the Corps is seeking to clarify this provision and has not made any substantive changes.

C. NWP 13 – Bank Stabilization

API agrees with the Corps that it is not appropriate to modify this NWP to require the use of one technique to control bank erosion over other techniques. Providing examples of erosion control or prevention as the NWP does is appropriate. As the Proposed Rule states, “the Corps cannot mandate a specific approach to bank stabilization.”²⁷

A prohibition against use of invasive plant species for bioengineering or vegetative bank stabilization is changed to require “[n]ative plants appropriate for current site conditions, including salinity.” While native plants should be encouraged, there can be circumstances where native species appropriate for current conditions may not be available. API recommends adding the language “where practicable” to allow for some flexibility.

There is one change from “placed” to “measured.” (“The activity will not exceed an average of one cubic yard per running foot ‘as measured’ along the bank . . .”). The cubic yard limit is to be measured and includes in-stream techniques (e.g. barbs). API's understanding is that the Corps is seeking to clarify this provision and has not made any substantive changes.

A companion NWP authorizing nature-based bank stabilization techniques known as living shorelines is also added as NWP B. The Corps is soliciting comments on proposed changes to 13 and B. API provides comments on the two questions sought on PCN form relating to living shorelines above and, overall with an impending deadline, urges Corps to be judicious in their consideration of any potential revisions in response to comments.

D. NWP 14 – Linear Transportation Projects

NWP 14 includes changes similar to NWP 12, which API supports including a new Note 1 clarifying single and complete projects. Note 1 also states that “[l]inear transportation projects with independent utility must comply with 33 CFR [Part] 330.6(d).”²⁸ The Corps regulations provide that a larger project can be processed under a combination of nationwide permits and individual permits “if the portions of the project qualifying for NWP authorization would have

²⁶ Id. at p. 35,211.

²⁷ Id. at p. 35,200.

²⁸ Id.

independent utility and are able to function or meet their purpose independent of the total project.”²⁹

The definition of “independent utility” in the current NWP and the Proposed Rule uses the phrase “single and complete non-linear project,” which implies that the concept of “independent utility” does not apply to linear projects covered by NWP 12.³⁰ To remove any ambiguity with inconsistent wording that could be source for confusion, API requests that the Corps should clarify that this Note 1 is consistent with existing agency regulations and practice, and not intended to be construed as an expanded interpretation of independent utility for linear projects.

Also, while NWP 12 proposed the use of temporary mats which API supports, this addition is left out here. With language relating to temporary structures being almost identical in both NWP, API recommends the Corps allow the use of temporary mats here also to avoid any ambiguity.

The preamble also states that the Corps is adding one note, and yet there is a new Note 3 that reflects PCN requirements stated in the proposed GC 32 that is not discussed. The Proposed Rule states that the applicant will be required to submit any other NWP, regional general permits or individual permits used or intended to be part of any proposed project or related activity including other separate and distant crossings for linear projects that require [Corps] authorization but do not require [PCN]. [emphasis added.] API’s understanding is that the Corps is seeking to clarify this provision and has not made any substantive changes.

E. NWP 19 – Minor Dredging/NWP 35 – Maintenance Dredging of Existing Basins

NWP 19 and NWP 35 add a requirement that dredged material be deposited and retained in an area that has no waters of the U.S. unless approved by the District Engineer under separate authorization.

The new requirement to require separate authorization for placement of minor dredged material in waters of the U.S. is excessive and not necessary. It also is counter to the Corps’ objective of streamlined permitting. Approval of the NWP 19 as well as NWP 35 should allow for deposition of minor dredged material into waters of the U.S. and not require the applicant to file for multiple permits for the same proposed action. For example, dredged material is often used as erosion control or beneficial reuse in erosion prone areas that are directly adjacent to areas proposed for minor dredging.

F. NWP 39 – Commercial and Institutional Developments

This is a useful NWP for commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures.

²⁹ 33 CFR Part 330.6(d).

³⁰ See 77 Fed. Reg. 10,184, Feb. 21, 2012, at pp. 10,262-63 (noting that the Corps added “non-linear” in the first sentence of the definition of “independent utility” to reflect that the independent utility test only applies to single and complete non-linear projects).

The Proposed Rule adds that any losses of stream bed plus any other losses of jurisdictional wetlands and waters cannot exceed the ½ acre limit. Under the 2015 Waters of the U.S. Rule if upheld, there is tremendous ambiguity in interpretations. The very notion of what water bodies would be considered within jurisdictional waters is not clear. Faced with this uncertainty, prospective permittees would have a difficult time ensuring that they are in compliance with the ½ acre limit. There would be additional burden on agency resources as permittees would need to rely further on the Corps for guidance.

G. NWP 43 – Stormwater Management Facilities

This NWP should not be revised to include a change in citation to reflect the 2015 Waters of the U.S. Rule that is currently stayed pending judicial review. While the 2015 Waters of the U.S. Rule provides a beneficial exemption for stormwater management facilities, API recommends the Corps should adhere to the pre-2015 Waters of the U.S. Rule. If the 2015 Waters of the U.S. Rule withstands judicial review and becomes effective, the Corps should conduct a subsequent rulemaking to incorporate changes. This would be the least complicated and confusing approach for both the Corps and the public.

This proposed NWP also adds language stating that the loss of stream bed plus any others losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½ acre. It is API's understanding that the Corps is seeking to clarify this provision and has not made any substantive changes.

If the stayed 2015 Waters of the U.S. Rule is ultimately upheld, there will be tremendous ambiguity in interpretations. The very notion of what waterbodies would be considered within jurisdictional waters is not clear. Faced with this uncertainty, prospective permittees would have a difficult time ensuring that they are in compliance with the ½ acre limit. There would be additional burden on agency resources as permittees would need to rely further on the Corps for guidance. As such, API recommends that the Corps should conduct subsequent rulemaking, if necessary, once the 2015 Waters of the U.S. issue is resolved.

V. COMMENTS ON REGULATORY IMPACT ANALYSIS/DECISION DOCUMENTS

A. Regulatory Impact Analysis

Even though the Proposed Rule seeks comment on the applicability and efficiency of the 2015 Waters of the U.S. Rule and there are citation changes to the new definition, it does not appear to have been taken into account in the RIA. Similar to the 2015 Waters of the U.S. Rule where regulatory activities were grossly underestimated, the underlying estimates and assumptions here do not consider potential increased regulatory activities and impacts on the regulated community and agency resources from the definitional change.³¹ Estimated change in the number of authorizations for NWP 12, NWP 14 and NWP 39 is zero.³² In fact, most of them are zero

³¹ See Footnote 1.

³² RIA at Appendix A.

except NWP 3 with negative 275 due to shifting maintenance requirement activities to NWP 13 related to basin stabilization which is estimated increasing now to more than 310.³³ The New NPW B is estimated to change annual number of NWP authorizations to over 200.³⁴ Estimated change in number of PCNs and number of authorizations from NWPs is also zero based on proposed changes to general conditions.³⁵ Increased information requests in PCNs are viewed as improving processing times;³⁶ however, again, if consideration is given to the 2015 Waters of the U.S. Rule, this conclusion would need to be re-evaluated. As discussed above, these issues would not exist if the Corps was clear that these NWPs will be issued based on the pre-2015 Waters of the U.S. without any reference to the 2015 Waters of the U.S. Rule.

B. Decision Documents

The 52 decision documents prepared for each proposed NWP and associated Environmental Assessments (EAs) provide adequate information to show that the NWPs will authorize only those pre-approved categories of activities that result in minimal adverse effects on the aquatic environment and other public interest review factors. API also is supportive of the preamble language clarifying that, “[b]ecause the required NEPA cumulative effects and 404(b)(1) Guidelines cumulative effects analyses are conducted by Corps Headquarters in its decision documents for the issuance of the NWPs, District Engineers do not need to do comprehensive cumulative effects analyses for NWP verifications.”³⁷ Accordingly, for a NWP verification, the Corps states that “district engineer only needs to assess the cumulative adverse environmental effects of the NWP or NWPs at the appropriate geographic scale (*e.g.* Corps district, watershed, or ecoregion.”³⁸ API is supportive of the Corps’ position that “[i]f an NWP verification includes multiple authorizations using a single NWP (*e.g.* linear projects with crossing of separate and distant waters authorized by NWPs 12 or 14) . . . , the district engineer will evaluate the cumulative effects of the applicable NWPs within the appropriate geographic area.”³⁹

Overall, API requests that the Corps makes a finding of no significant impact (FONSI) for all NWPs under the National Environmental Policy Act (NEPA), thus negating the need for an environmental impact statement. Particularly with NWP 12, issues raised and waived in previous lawsuits by environmental groups as relating to the 2012 NWP 12 decision document have been adequately addressed here by the Corps and the decision document provides adequate information indicating compliance with applicable statutes.⁴⁰

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Id. at A-13.

³⁷ Proposed Rule at p. 35,188.

³⁸ Id.

³⁹ Id.

⁴⁰ See *e.g.* Sierra Club v. Bostick, No. 14-6099 (10th Cir. 2015) finding NWP 12 to be in compliance with NEPA and CWA.

VI. SUMMARY

NWPs are an important tool for authorizing critical and time-sensitive activities that have only minimal, and mostly temporary environmental impacts. API urges careful review of comments under the APA and recommends restraint with revising NWPs unnecessarily. For this rulemaking, API recommends the Corps adheres to the pre-2015 Waters of the U.S. Rule. If the 2015 Waters of the U.S. Rule withstands judicial review and becomes effective, the Corps should conduct a subsequent rulemaking to incorporate changes to the NWPs, as necessary. API appreciates the Corps' diligence with this critical rulemaking and urges timely reissuance of NWPs prior to the 2012 NWPs expiring in March 2017.

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

Sincerely,

A handwritten signature in cursive script that reads "Amy Emmert". The signature is contained within a thin black rectangular border.

Amy Emmert
Senior Policy Advisor

cc:

R. Claff
K. Simon
E. Milito
S. Meadows
K. Cauthen
P. Tolsdorf