November 16, 2020

Via Regulations.gov

U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street, N.W.
Washington, D.C. 20314-1000

Re: Comments on Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57,298 (Sept. 15, 2020) Docket COE-2020-0002

Dear Sir or Madam,

The GPA Midstream Association ("GPA Midstream") appreciates the opportunity to provide comments to the U.S. Army Corps of Engineers ("Corps") proposal to reissue and modify Nationwide Permits ("2020 Proposal").

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 70 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products ("NGLs") such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

Summary

GPA Midstream commends the Corps for reissuing the Nationwide Permits. Our members include companies that frequently use Nationwide Permits 3, 12, 14, 18, 33, and 39, among others, to construct and maintain vital energy infrastructure, such as gathering lines and compressor stations. These projects are relatively small in scale and must be constructed quickly to service the drilling of new wells in order to avoid interrupting the nation's natural gas, crude oil, and NGL supply. The ability to use a Nationwide Permit, which eliminates unnecessary delay, costs, and burdens, to cross streams, construct access roads, and maintain infrastructure is imperative to the mission of GPA Midstream members. Midstream companies rely on Nationwide Permits to keep pace with market needs for natural gas, crude oil, and NGLs.

As explained in more detail below, GPA Midstream offers the following comments on the 2020 Proposal:

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- GPA Midstream strongly supports the Corps' decision to maintain the NWP program for certain linear oil and gas activities that do not disturb more than 1/2 acre per crossing.

- GPA Midstream strongly opposes separating Nationwide Permit 12 ("NWP 12") into three permits. The Corps' proposal fails to articulate a reasonable basis for doing so and, if finalized, the 2020 Proposal could create unnecessary administrative burdens for the midstream industry for a similar amount of ground disturbance.

- Any new national standards or best management practices for NWP 12 should first be described in detail so that the public may provide meaningful and informed comments.

- GPA Midstream opposes the proposed new threshold for NWP 12 that would require a pre-construction notice ("PCN") for any oil or gas pipeline that exceeds 250 miles. The selection of a 250 mile threshold is arbitrary, does not address any particular environmental impact, and would create unnecessary administrative burdens for the midstream industry.

- GPA Midstream supports the 2020 Proposal's expansion of NWP 3 to all serviceable structures and fills.

- GPA Midstream supports removing the 300 linear foot limit for NWP 39 and other Nationwide Permits. A 1/2 acre limit accounts for the significant variations in waterbody width but would still ensure that authorized activities will cause only minimal adverse effects.

- GPA Midstream recommends a slight revision to General Condition 20(d) to encourage State Historic Preservation Officers to consult directly with non-federal permittees under Section 106 of the National Historic Preservation Act prior to receiving a notification from the district engineer.

- The Corps should directly address a recent court ruling regarding programmatic Endangered Species Act consultation for the Nationwide Permits.

- Should the Corps exempt federal agencies from PCN requirements, then it should also exempt non-federal permittees who are undertaking projects in conjunction with the exempt activities of those agencies.

I. Nationwide Permit 12

A. GPA Midstream Opposes Splitting Nationwide Permit 12 into Three Permits

Based on the explanation provided in the proposed rule, GPA Midstream cannot support the Corps' decision to separate NWP 12 into three distinct permits, one for oil and gas pipeline construction activities (NWP 12), one for electric utility/ telecommunication lines (NWP C), and one for all other non-oil and gas utility lines (NWP D).

1. The Corps Failed to Provide a Reasonable Basis for Separating NWP 12

Foremost, the Corps should not divide NWP 12 into three permits, as the record before the Corps does not support this extraordinary change from long-settled agency practice. The Corps asserts that separating NWP 12 into three Nationwide Permits is necessary to "address the differences in how different linear projects are constructed, the substances they convey, and the different standards and best management practices" ("BMPs") for each type of construction project. 85 Fed. Reg. at 57,322. The proposal, however, does not identify any national standards or BMPs for any of the three proposed NWPs. Instead, the Corps invited comments and suggestions on what those should be. Thus, the Corps concluded that differing standards and BMPs justify separating NWP 12 before even knowing what those standards and BMPs are. NWP 12 has covered oil and gas pipelines, electric utility and telecommunications lines, and non-oil and gas pipelines since 1977. See 42 Fed. Reg. 37,122 (July 19, 1977). Despite 43 years of this practice, the 2020 Proposal does not identify a single complication, difficulty, or drawback from covering all three categories of activities under NWP 12. That standards may differ by some degree is not a reasonable justification for the proposed action in any case; let alone standards that have not even been identified, proposed, or adopted at this time.

The Corps indirectly attempts to justify a possible need for new standards and BMPs by describing perceived differences between the three categories of activities. Specifically, the Corps offers that there are differences in the "relative amounts of ground disturbance" for each activity based on typical pipeline or cable diameters. 85 Fed. Reg. at 57,323. However, the record before the Corps does not support that claim. The 2020 Proposal asserts that there is a significant difference between oil and gas pipelines and buried utility lines (5.5 to six inches in diameter) and non-oil and gas pipelines (three to 24 inches in diameter). Id. Yet, as the proposal acknowledges, oil and gas pipeline diameters can range from two to 48 inches. Id. at 57,322. The proposal does not explain why a utility lines of the same or comparable sizes should be subject to separate permits.[1] Thus, the proposal offers no rational basis for differentiating among the various activities

Nor does the record demonstrate why the asserted relative differences in ground disturbance provide a reason to transform the well-established permitting process. On the contrary, the proposal's attempted focus on alleged narrow differences in ground disturbance is a purported distinction without a difference. Equipment used to construct gas pipelines is similar to that used to construct water or underground utilities lines, as are the necessary erosion and sedimentation controls. Further, rights-of-way for all types of utility lines must be maintained, including for overhead utility lines. See, e.g., Duke Energy, Distribution Lines (requiring clearing of trees and other vegetation within 15 feet of each side of the overhead lines).[2] The establishment and maintenance of rights-of-way involve similar impacts to waters and wetlands from multiple crossings over a continuous route. Thus, when considering both ground disturbance and the creation and maintenance of rights-of-way, the similarities between all three

[1] With respect to electricity and telecommunications line activities, electricity and phone lines are more likely to be overhead while fiberoptic cables are more likely to be buried. Thus, there appears to be more variability within that category of activities than between the two categories of pipeline activities.

[2] Available at, https://www.duke-energy.com/community/trees-and-rights-of-way/what-can-you-do-in-right-of-way/distribution-lines-guidelines-and-restrictions?jur=NC01

categories of activities far outweigh any purported dissimilarities raised in the 2020 Proposal. Separating NWP 12 into three Nationwide Permits would be arbitrary and capricious based on the record offered.

This is only confirmed by the Corps' previous findings that these types of utility line activities were similar enough to be covered under NWP 12. Specifically, the Corps determined "[t]he utility line activities authorized by NWP 12 are similar in nature because they involve linear pipes, cables, or wires to transport physical substances or electromagnetic energy from a point of origin to a terminal point." 82 Fed Reg. 1,860, 1,869 (Jan. 6, 2017). In rejecting comments urging the Corps to separate these utility line activities, the Corps relied on its long-standing practice of interpreting "the 'categories of activities that are similar in nature' requirement broadly to keep the NWP program manageable in terms of the number of NWPs." Id. at 1,868. The Corps provides no record evidence to contradict its prior factual and legal interpretation of the similarity of these utility line activities.

2. The Separation Will Add Unnecessary Administrative Burdens When Running Parallel Utility Lines

In certain circumstances, creating separate permits for oil and gas pipelines and other pipelines will unnecessarily add administrative burdens, without any off-setting environmental benefit. Companies commonly run produced or fresh water lines parallel to, and in the same right-of-way with, crude oil gathering lines.[3] Currently, running these lines together involves a single Nationwide Permit (NWP 12) and, if threshold criteria are met, a single PCN. This is, of course, sensible as the parallel pipelines run together through the same stream and wetland crossings, are constructed in the same manner, and will have the same minor adverse environmental impacts.

Under the 2020 Proposal, however, running parallel gathering and water lines might require midstream companies to obtain coverage under both NWP 12 and NWP D for the same project or construction activity. General Condition 28 restricts the use of multiple NWPs for a single and complete project. Although this should be permitted under 33 C.F.R. § 330.6(c) (assuming the Corps correctly views this as a single and complete project), the additional burden and regulatory uncertainty created cannot be justified. Under the 2020 Proposal, there are no clear differences in the requirements under NWP 12 and NWP D, given that the Corps has yet to propose any standards or BMPs, and environmental impacts from the pipelines would be the same. Yet, midstream companies might be unnecessarily required to obtain verifications under both NWPs.

[3] This also serves as an example of how the proposal's generalization that non-oil and gas pipelines "are often limited to specific areas, where they serve cities, towns, and other communities, residential developments, [and] commercial developments" is incorrect. 85 Fed. Reg. at 57,323. Produced water pipelines are invaluable for areas that are sparsely populated, avoid the need for a multitude of produced water impoundments near oil and gas wells, and can facilitate produced water recycling.

3. The Corps Should Not Include Any Standards or BMPs in the Final Reissuance

The Corps proposes to "potentially add industry-specific standards or best management practices that would be appropriate to add as national terms to the applicable NWP." 85 Fed. Reg. at 57,322. The intent is to "address concerns expressed regarding Corps regional conditions added to the NWPs by division engineers" and the "potential inconsistency in Corps conditions for the NWPs." Id. at 57,323. GPA Midstream does not oppose the idea of adding effective and efficient national standards or BMPs to NWP 12 in order to improve regional consistency. However, the 2020 Proposal does not identify or describe any, opting instead to solicit "suggestions for national standards or best management practices." Id. GPA Midstream cannot support or oppose any particular standard or BMP without a specific description. The specifics are important, not only to ensure that they are consistent with industry practices, technically feasible, effective, and cost-efficient, but also because GPA Midstream does not support the wholesale abolition of regional conditions. Certainly, some regional variation may be appropriate. Currently, however, neither GPA Midstream nor the general public has the ability to evaluate any national standard or BMP and provide meaningful and informed comments.

GPA Midstream strongly opposes the Corps finalizing any national standard or BMP for NWP 12, either as a whole or in the separated iterations of NWP 12, NWP C, and NWP D. It is a basic principle of administrative law that "[n]otice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment." Amer. Med. Ass'n v. Reno, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995). Any proposal must "articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970). Agencies are required to "set out their thinking in notices of proposed rulemaking" as this "not only allows adversarial critique of the agency but is perhaps one of the few ways that the public may be apprised of what the agency thinks it knows in its capacity as a repository of expert opinion." Home Box Office v. FCC, 567 F.2d 9, 55 (D.C. Cir. 1977). Should the Corps seek to include new national standards or BMPs in any Nationwide Permit, it should do so in a separate proposal that provides specific information about what would be required and allows for meaningful and informed comments.

B. The Addition of a New 250 Mile PCN Threshold Lacks a Reasonable Basis

The 2020 Proposal would add a new PCN threshold for "oil or natural gas pipeline activities that are associated with an overall project that is greater than 250 miles in length, and the purpose of the overall project is to install new pipeline (vs. conduct repair or maintenance activities) along the majority of the distance of the overall project length." 85 Fed. Reg. at 57,327. There is no reasonable basis to add this new PCN threshold. Therefore, GPA Midstream urges the Corps not to finalize this proposal.

1. The 250 Mile Requirement is Arbitrary

The Corps provides no explanation as to why it selected a 250 mile threshold. The proposal invites "public comment on the 250 mile threshold, and whether the threshold should be for a greater or lesser number of miles," id., but it is impossible for the public to provide any meaningful or informed comment without further explanation. The proposal provides no hint of

the 250 mile threshold's origin or purpose other than, as discussed in more detail below, to allow a district engineer to generally evaluate potential adverse environmental effects without any particular trigger for doing so. All other PCN thresholds, both in NWP 12 and other NWPs, identify some concrete criteria directly related to potential adverse environmental impacts, such as a loss of more than 1/10 of an acre of waters of the United States (NWP 12), discharges or excavations exceeding 10 cubic yards below the ordinary high water mark (NWP 18), construction or dewatering in Section 10 waters (NWP 33), or activities that may affect listed species or critical habitat (General Condition 18).

The mere length of a pipeline does not, by itself, present similar environmental concerns. Potential adverse environmental impacts are typically dictated by the area through which a pipeline is routed and the construction methods. Under certain circumstances, a five mile pipeline could have much greater adverse environmental impact than a 500 mile pipeline. By all appearances, the 250 mile threshold was arbitrarily selected and has no anchor in any particular potential environmental impact. This means that any comments on this proposed PCN threshold would likewise be arbitrary. The public might offer up differing numbers, such as five miles or 500 miles, but without any explanation of the proposed threshold's relationship to a concrete environmental impact, no number is any more or less justifiable than another.

2. <u>The Proposed Threshold Could Result in a General Catch-All PCN Requirement and Eliminate Incentives to Minimize Environmental Impacts</u>

The only rationale provided is that the PCN will allow "the district engineer the opportunity to review all crossings of waters of the United States for long-distance oil or natural gas pipelines to ensure that the activities authorized by NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects." 85 Fed. Reg. at 57,327. Many oil and gas pipelines, when "associated with an overall project," would trigger this threshold as the line's very purpose is to connect upstream assets to a larger "overall" system of oil or gas pipelines. The Corps offers no interpretation of what it means for a new pipeline to be "associated with an overall project." It is not clear, for instance, if the construction of two miles of new gathering lines would be "associated with" an existing gathering system that, when added together, may exceed 250 miles. Even a moderately expansive interpretation of these terms would require a PCN for minor projects with indisputably minimal adverse environmental impacts. As a further example, it is not clear whether the co-location of multiple pipelines in the same right of way would count towards the 250 mile threshold once or if the length of each pipeline would be added. Without identifying some criteria of where an "overall project" begins and ends, such as guidance on identifying independent termini, or guidance for co-located pipelines, the proposed 250 mile threshold could effectively act as a general catch-all PCN requirement.

Creating such a broad PCN threshold is also inconsistent with the Corps' rationale for eliminating other PCN thresholds: "to simplify the notification requirements of this NWP and reduce burdens on the regulated public." 85 Fed. Reg. at 57,324. Further, such a general catch-all PCN threshold makes all other thresholds moot. It eliminates the incentive to minimize adverse environmental impacts in order to avoid triggering a PCN requirement. Minimizing adverse environmental impacts often means <u>longer</u> routes that avoid sensitive waters, wetlands, or other areas. Imposing additional regulatory burdens based on nothing more than mileage might

encourage developers to take the shortest route instead of the route with the least adverse environmental impacts.

3. The Proposed PCN Threshold Could Undermine the Corps' Longstanding Definition of a Single and Complete Project

Corps regulations define a "single and complete project" for linear projects as "each crossing of a separate water of the United States (i.e., single and complete crossing) at that location." 33 C.F.R. § 330.2(i). The proposal, which would allow district engineers unbounded discretion to review all crossings for oil or gas pipelines of 250 miles or longer, assess the cumulative adverse environmental effects, and either impose mitigation requirements or require individual permits, could drain the definition of "single and complete project" of its meaning. As a result, a district engineer could arbitrarily disqualify oil and gas pipeline projects from using NWP 12 based on generalized concerns of cumulative environmental impacts over multiple crossings. Under the proposed PCN threshold, this could be done without any changes to the regulatory language at § 330.2(i). Because the proposed 250 mile PCN threshold could be used to significantly alter the operation of the Corps' regulations without additional notice-and-comment rulemaking, GPA Midstream urges the Corps not to finalize this proposal.

II. GPA Midstream Supports the Proposed Revision to NWP 3

GPA Midstream supports the proposal to expand the use of NWP 3 to all serviceable structures and fills, including those that did not require authorization when constructed. This is consistent with both prior versions of NWP 3 and the current version of NWP 31. Restoring the grandfather clause to allow the use of NWP 3 for structures or fills constructed prior to the permitting requirements under CWA § 404 or § 10 of the Rivers and Harbors Act provides an incentive for companies to continue maintaining those structures or fills with no more than minimal adverse environmental impacts. Discouraging these maintenance activities could lead to the replacement of older structures or fills with the potential for more significant environmental impacts.

GPA Midstream also supports expanding the coverage of NWP 3 to include the placement of riprap to protect structures or fills. 85 Fed. Reg. at 57,322. Installing riprap has negligible adverse environmental effects and its protection from erosion provides significant environmental benefits.

III. GPA Midstream Supports the Removal of the 300 Linear Foot Limit from NWP 39

GPA Midstream supports the proposal to rely exclusively on the 1/2 acre limit instead of a 300 linear foot limit for NWP 39 and others. We agree that measuring stream bed losses in acres is far more accurate and meaningful than linear feet. Calculating stream bed loss by linear feet disregards stream order and operates under the presumption that filling or excavating 100 feet of a wide, high order river is no different than filling or excavating 100 linear feet of a small, trickling creek. Nor do linear feet calculations consider whether portions of streams are completely or only partially filled or excavated. This means that the total impact area, and any related impacts on functional capacity, are not accurately calculated. This is especially important for bank stabilization work as, under a linear foot calculation, it presumes that the entire stretch of the stabilized stream loses functional capacity even though both the acreage impacted and the

adverse environmental impacts are minimal. GPA Midstream agrees that calculating actual acreage, as illustrated using Downing's estimates for stream width, 85 Fed. Reg. at 57,317-18, provides more accurate information by properly accounting for stream order.

We also note that, under the current NWP 39, permittees may apply for, and the Corps may issue, waivers for the 300 linear foot limit. In fact, such waivers are routinely issued. Relying exclusively on the 1/2 acre limit would eliminate the need for permittees and the Corps to expend time on unnecessary paperwork to obtain and issue these routine waivers.

GPA Midstream opposes the creation of a more restricted or complicated system that would involve different quantitative limits for non-tidal wetlands or waters or different limits based on stream function. 85 Fed. Reg. at 57,320. First, the purpose of a general permit such as NWP 39 is to provide a simple and streamlined authorization process. Using different quantitative limitations for non-tidal wetlands and waters or for various stream functions is inappropriate for a Nationwide Permit. This is especially so with respect to limits depending on stream function, as this would likely require Corps personnel to visit the site and parties are more likely to dispute these types of issues. Second, NWP 39, and several other Nationwide Permits, require a PCN for the activities they authorize. This allows the district engineer to evaluate whether the authorized activity will have more than a minimal adverse environmental impact, which is the touchstone of the Nationwide Permit program. Considerations such as tidal versus non-tidal waters or stream function are already evaluated by the district engineer. Creating more restrictive or complicated standards are not necessary under the existing program.

IV. General Condition 20 Should Allow for Direct Coordination Between State Historic Preservation Offices and Non-Federal Permittees

Under General Condition 20(d), non-federal permittees must wait at least 45 days to be notified by the district engineer that consultation under Section 106 under the National Historic Preservation Act is required.[4] In most instances, companies are already aware that Section 106 consultation will be required prior to receiving notification. Unfortunately, State Historic Preservation Officers ("SHPOs") typically will not begin the consultation process until the non-federal permittee receives formal notification from the Corps or otherwise undertake direct consultation with the permittee. This delay is unnecessary and frustrates the purpose of the Nationwide Permit program, which is to allow for an expedited authorization to construct projects with minimal adverse environmental impacts. The Corps should add language to General Condition 20(d) encouraging SHPOs to undertake direct consultation with non-Federal permittees in advance of a formal notification from the district engineer.

V. Programmatic Endangered Species Act Consultation is Not Required for Re-Issuing the Nationwide Permits

As the Corps is well aware, a recent district court decision claimed that it failed to comply with the Endangered Species Act ("ESA") when re-issuing the Nationwide Permits in 2017 and that district court purported to impose a duty for the Corps to undertake programmatic

[4] Note that, under General Condition 20(d), even if "the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps."

consultation. Northern Plains Resource Council v. U.S. Army Corps of Engineers, Case No. 19-cv-00044 (April 15, 2020), appeal docketed, Case No. 20-35412, et al. (9th Cir. May 13, 2020). Among the district court's holdings was that General Condition 18 was inadequate to avoid a programmatic consultation and that the Corps' prior "no effect" determination for the 2017 reissuance of the Nationwide Permits was arbitrary and capricious. The Supreme Court stayed, in large part, the district court's injunction pending appeal, No. 19A1053 (July 6, 2020), and the Corps has defended its 2017 re-issuance of Nationwide Permit 12 on appeal. In the proposed rule, however, the Corps reached the same conclusions regarding programmatic consultation, but declined to even mention the Montana district court case, much less defend the Corps' disagreements with its holdings.

GPA Midstream strongly believes that the Montana district court case was wrong with respect to programmatic consultation and that the decision will be overturned on appeal. However, project opponents may continue to rely on the Montana district court's reasoning to block individual projects. It is important for the Corps to provide a rebuttal to the Montana district court's in the final rule for purposes of future litigation.

The Corps must insure that the actions it authorizes are not likely to jeopardize the continued existence of any listed species or result in the destruction or modification of critical habitat. 16 U.S.C. § 1536(a)(2). This requires formal consultation unless, as a result of a biological opinion or informal consultation, the Corps determines that an action is not likely to adversely affect listed species or their critical habitat. 50 C.F.R. § 402.14. As noted in the proposed rulemaking, the Corps adopted a legal interpretation in October 2012 which effectively defers ESA consultation under General Condition 18 on an activity-specific basis. 85 Fed. Reg. at 57,357; see also 33 C.F.R. § 330.4(f) ("No activity is authorized by any NWP if that activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the [ESA], or to destroy or adversely modify the critical habitat of such species."). Instead, where listed species or critical habitat "might be affected or is in the vicinity of" a particular project, the project proponent must file a pre-construction notice with the applicable Corps district. Id. § 330.4(f)(2). Where a "Corps district makes a 'may effect' determination" on a specific project, "it will notify the non-federal applicant and the activity is not authorized by [the] NWP until ESA Section 7 consultation has been completed. The Corps' reasoning that "the issuance or reissuance of NWPs does not require ESA section 7 consultation because no activities authorized by any NWPs 'may affect' listed species or critical habitat without first completing activity-specific ESA Section 7 consultations" under General Condition 18," 85 Fed. Reg. at 57,357, is sound, but was rejected by the district court.

The district court claimed that there was "'resounding evidence' in this case that the Corps' reissuance of NWP 12 'may affect' listed species and their habitat." Northern Plains Resource Council, Slip Op. at 11. This "resounding evidence" consisted of declarations by two professors outlining hypothetical scenarios where, if NWP 12 activities were undertaken in critical habitat and one ignored all of NWP 12's conditions (including General Condition 18 ESA consultation) and typical mitigation measures, then those activities "may affect" listed species. Id. at 11-12. The district court further held that as a general matter, because activities authorized by NWP 12 result "in a minor incremental contribution to the cumulative" environmental "effects to wetlands, streams, and other aquatic resources," and because listed species live or rely upon these resources, then NWP 12 activities "may affect" listed species. Id.

at 13 (internal quotation omitted). In other words, the district court errantly presumed that any environmental effect, no matter how minor, "may affect" listed species.

Based on these errors, the Montana district court erroneously concluded that programmatic review "provides the only way to avoid piecemeal destruction of species and habitat." Id. at 18; see also id. at 16 ("Project-level review does not relieve the Corps of its duty to consult on the issuance of nationwide permits at the programmatic level. The Corps must consider the effect of the entire agency action."). This reasoning ignores both existing regulations governing ESA programmatic review and the actual nature of project-level review.

First, under General Condition 18, project-level review considers a broadly defined action area, including any potential cumulative effects on listed species and critical habitat. 50 C.F.R. §§ 402.14(g)(2)-(4). This includes all "past and present impacts" of "human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." Id. § 402.02(d) (defining "environmental baseline" for ESA project-level review). Thus, a determination of whether or not a single project "is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat," id. § 402.14(g)(4), involves a much broader analysis than the project itself, specifically to avoid the "piecemeal destruction of species and habitat" that concerned the district court. Any "jeopardy" finding is memorialized in a Biological Opinion that includes reasonable and prudent alternatives to prevent jeopardy. Id. § 402.14(g)(5); see also 33 C.F.R. § 325.4(a) (allowing the Corps to add its own "special conditions" to the BiOp). And even if there is a "no jeopardy" finding, the project may be subject to "discretionary conservation recommendations" to reduce any potential impacts. 50 C.F.R. § 402.14(g)(6).

Second, the district court failed to consider regulations that specifically authorize the Corps' deferral of consultation until projects are actually proposed. 50 C.F.R. § 402.14(i)(6) states that, where the Corps finds that a programmatic action will not result in an incidental take, then "any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate." A programmatic consultation is only required for "those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation." Id. Thus, contrary to the Montana district court's reasoning, no ESA consultation is required where "a framework for the development of future action(s)" and a take "would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation." Id. § 402.02(d). The Corps determinations that the mere issuance of the Nationwide Permits would have "no effect" on listed species or critical habitat, and that ESA consultation can be deferred to the project level, are bolstered by the recent changes to the ESA implementing regulations at 50 C.F.R. §§ 402.17(a) and (b). These require that "program actions that are reasonably certain to occur" and the potential consequences of proposed actions to be based on "clear and substantial information." Such information is simply not available without understanding the potential impacts of a particular project or the vicinity in which it would be located. Therefore, the Corps' "no effect" determination and deferral of ESA consultation until the project level is perfectly in sync under the ESA implementing regulations.

GPA Midstream is confident that the Corps' position that programmatic ESA consultation is not required for reissuing the Nationwide Permits will ultimately prevail in court. However, even if it does, the use of Nationwide Permits may be subject to challenges similar to that raised in the Montana district court outside of the Ninth Circuit. See Sierra Club v. U.S. Army Corps of Engineers, Case No. 20-cv-00460 (W.D. Tex.) (challenge to Permian Highway pipeline relying on Montana district court holdings). The Corps should provide a full and direct rebuttal to the Montana district court's reasoning in the final rulemaking. The Corps' legal interpretation of its obligations, and ultimately the validity of the Nationwide Permits themselves, affects GPA Midstream's members as much as the Corps itself.

VI. Exemptions for Federal Agencies Should Include Private Projects Undertaken at the Federal Agencies' Behest

The Corps is proposing to exempt federal agencies from PCN requirements "under the theory that Federal agencies may employ staff who are environmental experts and who already review these projects before submitting PCNs to the Corps to determine whether they meet the criteria for the applicable NWP." 85 Fed. Reg. at 57,303. GPA Midstream takes no position on the merits of this proposal. However, should the Corps exempt other federal agencies from PCN requirements, then it should also exempt private companies that are undertaking projects in conjunction with, or in response to, those federal projects. Most frequently this scenario occurs when midstream companies are required to relocate pipelines to accommodate federal dredging or highway projects. In these situations, the federal agency with environmental staff expertise is already knowledgeable about the project's environmental impacts, including the environmental impacts of any pipeline relocation. It would be fundamentally unfair, and an unnecessary burden, to require industry to submit a PCN for a private activity that has already been considered as part of a larger overall federal project while the federal agency itself is exempt.

Further, should the Corps adopt the proposal to exempt federal agencies, it should clarify whether States, or those acting with or on behalf of States, would be exempt from filing PCNs when operating under the Surface Transportation Block Grant Program. This allows states to implement road and other projects using federal money and with some amount of regulatory oversight by the Federal Highway Administration. See generally 23 U.S.C. § 106 (project approval and oversight requirements). Given that oil and gas operations can involve heavy truck traffic, some companies agree to perform road work on behalf of the State. If States, by extension of the Surface Transportation Block Grant Program, are deemed to have the equivalent environmental staff expertise as federal agencies (such as the Federal Highway Administration) and are exempted from PCN requirements, then companies performing such work on the States' behalf should be similarly exempt.

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GPA Midstream appreciates the opportunity to submit these comments in response to the Corps' proposal to re-issue the Nationwide Permits and is standing by to answer any questions that the agency may have.

Respectfully submitted,

Matt Hite
Vice President of Government Affairs
GPA Midstream Association