

INDIGENOUS ENVIRONMENTAL NETWORK NATIONWIDE PERMIT 12 PRIMER



What is the Indigenous Environmental Network's NWP 12 Primer?



The purpose of the Indigenous Environmental Network's NWP 12 ("Primer") is to provide an overview of the Nationwide Permit ("NWP") process managed by the United States Army Corps of Engineers, ("Corps"), and specifically to prepare Indigenous rights advocates to respond to the Corps' request for comments on NWP 12 - Oil or Natural Gas Pipeline Activities, (NWP 12). The Federal Register Notice calling for public and tribal comment on NWP 12 is attached as **Appendix A**.

Prepared by Indigenous Environmental Network with assistance from Big Fire Law & Policy Group.



What are Nationwide Permits or NWPs?

Nationwide Permits (“NWPs”) are general permits issued by the Corps that are intended to streamline the Corps’ review of certain categories of activities in federal jurisdictional waters and wetlands that have **no more than minimal individual and cumulative adverse environmental impacts.** These are the key words that are supposed to differentiate the general NWP process from the individual permit process a project proponent, i.e., a pipeline company, would normally have to go through.

NWPs provide authorizations for those activities under Section 404 of the Clean Water Act (CWA), which cover discharges of dredge and fill material into the jurisdictional waters and wetlands of the United States, and/or Section 10 of the Rivers and Harbors Act, which covers the construction of structures in or over navigable waters.¹

The purported purpose of the NWP program is to establish standard terms and conditions for protection of waters and wetlands within federal jurisdiction, while also authorizing the activities to proceed with minimal delay and paperwork. The January 13, 2021, Federal Register Notice states, “The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, where those activities will result in no more than minimal individual and cumulative adverse environmental effects. NWPs were first issued by the Corps in 1977 (42 FR 37122) to authorize categories of activities that have minimal adverse effects on the aquatic environment, for the purpose of streamlining the authorization process for those minor activities.”²

So, if the Corps determines that a project will have “no more than minimal individual and cumulative adverse environmental impacts”, then a project proponent may obtain a general NWP instead of having to apply for an individual permit, which involves more intensive study of the impacts through the development of an Environmental Assessment or an Environmental Impact Statement.

There are currently 59 NWPs which cover activities ranging from survey activities (NWP 6), and mooring buoys (NWP 10), to hydropower projects (NWP 17), and cranberry production activities (NWP 34). The range of activities is very broad, yet the Corps has determined that each of these activities generally have a minimal environmental impact and are therefore eligible for permitting under the NWP program. The Corps produced a summary chart which lists all 59 current NWPs and sets forth for each permit: the statutory authority; limits; the threshold for pre-construction notification; whether delineation is required; applicable waters; changes from the previous permit; and other information relevant to the reissuance of the NWPs. NWPs can be issued for a period of no more

¹ Notice of Virtual Public and Tribal Meetings Regarding the Review of Nationwide Permit 12; Establishment of a Public Docket; Request for Input, 87 Fed. Reg. 17281 (March 28, 2022).

² Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744, 2745 (Jan. 13, 2021).

than five years and if they are not reissued within five years of their effective date, they automatically expire.³

What is NWP 12?

NWP 12 covers oil or natural gas pipeline activities and this is the only NWP for which the Corps is requesting input and comments. Prior to 2021, NWP 12 was called “Utility Line Activities” with “utility line” defined as “any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication.” Now, NWP 12 is limited solely to oil or natural gas pipeline activities and the Corps has issued 2 new NWPs for electric utility line and telecommunications activities (NWP 57) and for utility line activities for water and other substances (NWP 58).

³ Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744, 2745 (Jan. 13, 2021).

This is an excerpt from the text of the 2021 NWP 12 for Oil or Natural Gas Pipeline Activities:

Oil or Natural Gas Pipeline Activities. Activities required for the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

Oil or natural gas pipelines: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of oil and natural gas pipelines. There must be no change in pre-construction contours of waters of the United States. An “oil or natural gas pipeline” is defined as any pipe or pipeline for the transportation of any form of oil or natural gas, including products derived from oil or natural gas, such as gasoline, jet fuel, diesel fuel, heating oil, petrochemical feedstocks, waxes, lubricating oils, and asphalt.

Material resulting from trench excavation may be temporarily side cast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a French drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Oil or natural gas pipeline substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities (e.g., oil or natural gas or gaseous fuel custody transfer stations, boosting stations, compression stations, metering stations, pressure regulating stations) associated with an oil or natural gas pipeline in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for above-ground oil or natural gas pipelines: This NWP authorizes the construction or maintenance of foundations for above-ground oil or natural gas pipelines in all waters of the United States, provided the foundations are the minimum size necessary.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of oil or natural gas pipelines, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize oil or natural gas pipelines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (see 33 CFR part 322). Oil or natural gas pipelines routed in, over, or under section 10 waters without a discharge of dredged or fill material may require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the oil or natural gas pipeline activity.

Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.⁴

⁴ Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744, 2860 (Jan. 13, 2021).

The Corps also published a “Decision Document” which explained the factors the Corps considered during the issuance process for the NWP. For NWP 12, the decision document sets forth the actual text of NWP 12, the terms and conditions for the permit, the activities authorized by the permit, as well as public comments received prior to issuance of the permit, along with the Corps’ responses.⁵

So, providing input on NWP 12 is important to encourage lawmakers to force project proponents to pursue individual permits instead of trying to fit their pipelines into a category not intended for them, namely, projects that have no more than minimal individual and cumulative adverse environmental impacts.

What are the General Conditions for NWP 12 that address Tribal rights, issues, or interests?

NW Permittees must comply with 32 General Conditions, in addition to regional and case-by-case conditions imposed by the Division Engineer (see 33 CFR 330.4(e)). They must also comply with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its CWA section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination. These General Conditions (GCs), apply to all 59 NWPs, to all NW Permittees, and impose limits on activities such as avoiding spawning areas (GC 3) and migratory bird breeding areas (GC4) “to the maximum extent practicable”.⁶

Of these 32 GCs, only two relate to Tribal rights or interests and they are GC 17 and GC 20. GC 17 relates to Tribal Rights and provides that “no activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.”⁷ GC 20 relates to Historic Properties and provides that all non-Federal permittees:

“must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties.

Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as

⁵ Decision Document: Nationwide Permit 12, U.S. Army Corps of Engineers, <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll7/id/16834> (last visited May 4, 2022).

⁶ Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744, 2868 (Jan. 13, 2021).

⁷ Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744, 2868 (Jan. 13, 2021).

appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)).”⁸

Based on our review, these appear to be the only references to addressing Tribal rights and interests in the General Conditions, even after the Corps’ recent failures in this area. Further, there is no longer a reference to the Corps’ Tribal Consultation Policy in the 2021 NWP 12 Decision Document. The January 2021 final rule itself does make a general referral to an Executive Order from November 6, 2000, addressing “Consultation and Coordination with Indian Tribal Governments.”⁹ As such it’s imperative that our constituents provide input on NWP 12 that clearly sets forth tribal expectations that we must be consulted, at a minimum, and that the Corps, because of its trust responsibility, should aim to obtain the free, prior and informed consent of tribes impacted by projects permitted by the Corps.

Why is the Corps requesting comments now if all these permits have just been re-issued?

On January 13, 2021, the Corps published a final rule (86 FR 2744) reissuing and modifying 12 existing Nationwide Permits (NWPs) and issuing four new NWPs, as well as the NWP general conditions and definitions for each.¹⁰ In addition, the Corps published another final rule (86 FR 73522) reissuing 40 NWPs and issuing one new NWP on December 27, 2021. Both sets of NWPs are currently set to expire on March 14, 2026.¹¹

Now, pursuant to President Biden’s Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” federal agencies must review and act to address regulations from the previous administration that conflict with national objectives to improve public health and the environment.¹² Further, the Order directs agencies to prioritize environmental justice. It is pursuant to Executive Order 13990 that the Corps is undertaking its review of **NWP 12 - Oil and Gas Activities** by requesting input from all stakeholders and perspectives regarding potential revisions to the NWP 12 currently in place.

What type of input is the Corps requesting?

The Corps requests public and tribal input on all aspects of NWP 12, including “consideration for going beyond the current construct towards what any new or revised NWP 12 should look like.”¹³ To this end, the Corps is requesting input on the following nine (9) questions¹⁴ :

(1) As part of any future action the Army may take with respect to NWP 12, should

8 Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744, 2869 (Jan. 13, 2021).

9 Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

10 Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744 (Jan. 13, 2021).

11 Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73522 (Dec. 27, 2021).

12 12 Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

13 Notice of Virtual Public and Tribal Meetings Regarding the Review of Nationwide Permit 12; Establishment of a Public Docket; Request for Input, 87 Fed. Reg. 17281, 17282 (March 28, 2022).

14 Notice of Virtual Public and Tribal Meetings Regarding the Review of Nationwide Permit 12; Establishment of a Public Docket; Request for Input, 87 Fed. Reg. 17281, 17283 (March 28, 2022).

the Army consider utilization of the procedures in 33 CFR 330.5 in advance of the current cycle for nationwide permit review? 3

- 2) Should modifications be considered to further ensure NWP 12 has no more than minimal individual and cumulative adverse environmental effects under Section 404(e) of the Clean Water Act?
- (3) Should modifications to NWP 12 be considered to provide notice to and an opportunity to be heard by potentially impacted communities, particularly with regard to environmental justice communities?
- (4) Would it be prudent for the Corps to consider further limits on the NWP 12, PCN requirements, general conditions, and the ability of division and district engineers to modify, suspend, and revoke NWP authorizations to further ensure that the NWP 12 causes no more than minimal cumulative adverse environmental effects at the national, regional, and site scales?
- (5) Should distinctions be drawn between new construction of oil and natural gas pipelines and maintenance of existing oil and natural gas pipelines?
- (6) Should distinctions be drawn between oil pipelines and natural gas pipelines, especially in consideration of differences in overall Federal regulation of different types of pipelines?
- (7) Does the NWP 12 verification process ensure that environmental justice and climate change factors are adequately considered?
- (8) Are the PCN requirements for the current NWP 12 adequate?
- (9) Should there be new triggers for oil or natural gas pipeline activities in jurisdictional waters that mandate review under an individual permit?

What does the Corps consultation process entail and how do I submit comments?

The following outlines the when, where, and how comments can be submitted on NWP 12. The information below can be found in the Corps' Federal Register Notice attached as Appendix A to this Primer.

A. WHEN

The Corps will hold **PUBLIC** virtual meetings, open to ALL stakeholders, on the following dates: <https://www.eventbrite.com/e/nwp-12-review-virtual-public-meetings-registration-304755290277>

1. May 10, 2022, from 1 p.m. to 3 p.m. Eastern
2. May 12, 2022, from 6 p.m. to 8 p.m. Eastern
3. May 17, 2022, from 1 p.m. to 3 p.m. Eastern
4. May 19, 2022, from 2 p.m. to 4 p.m. Eastern

The Corps will hold **TRIBAL** virtual meetings on the following dates: <https://www.eventbrite.com/e/nationwide-permit-12-review-virtual-tribal-meetings-registration-304954636527>.

1. May 11, 2022, from 1 p.m. to 3 p.m. Eastern
2. May 18, 2022, from 2 p.m. to 4 p.m. Eastern

B. WHERE

All meetings will be held **VIRTUALLY**. Attendees must be registered in advance because speaking slots are limited.

C. HOW

If you register in advance at <https://www.eventbrite.com/e/nwp-12-review-virtual-public-meetings-registration-304755290277>, you will be able to speak and present **VERBAL** comments. **WRITTEN** comments may be submitted through:

1. Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method).
2. Email: usarmy.pentagon.hqda-asacw.Mbx.asa-cw-reporting@army.mil and nationwidepermit12@usace.army.mil. Include Docket ID No. COE– 2022–0003 in the subject line of the message.

DEADLINE for WRITTEN COMMENTS is MAY 27, 2022

What does the IEN have to say about all of this?

In 2017, under the prior NWP 12 permit, oil and natural gas pipelines were coupled with other utilities, however, the terms and conditions from 2017 permit applicable to oil and natural gas pipelines are nearly the same as the terms and condition for the new 2021 permit. As such, most critiques of NWP 12 from its 2017 issuance still hold true today.

In 2020, IEN filed a lawsuit against the United States Bureau of Land Management (BLM), the Corps, and others to oppose the Keystone XL Pipeline arguing that the Corps' 2017 decision to reissue NWP 12, violated the National Environmental Protection Act (NEPA), as well as other claims.¹⁵ IEN argued that NWP 12 did in fact pose potentially significant impacts on the aquatic environment under the Clean Water Act (CWA), and therefore under NEPA, and so the Corps had a duty to prepare, or receive from another federal agency, an adequate environmental impact statement addressing those impacts. Even though KXL was canceled, the arguments we made in this case hold true as to any other pipeline project greenlit by the Corps' Nationwide Permit process; NWP 12 is an end run around a statutory framework specifically intended to protect the environment and to take into consideration the impact these types of projects will have on cultural rights, religious freedom, treaty rights, and more.

The Corps now asks for input on the nine (9) questions listed above and although we will provide a response directly to the Corps as part of our submission, we wanted to share some of our thoughts with our constituents. We have not addressed every question but will do so in our formal submission.

In response to whether the Corps should use the procedures contained in 33 CFR 330.5 in advance of the current cycle for review of NWP 12, we think it would be prudent for the Corps to commence review of NWP 12 as soon as possible. 33 CFR § 330.5 is a section of the Code of Federal Regulations that sets forth the procedures for issuing, modifying, suspending, or revoking nationwide permits and authorizations.¹⁶ The issues raised repeatedly in litigation need to be addressed well in advance of the expiration of the current permit. One of the most important issues that the Corps needs to pay closer attention to is how it engages in consultation with tribes. The Corps is an agency of the United States and like the United States, has a general trust responsibility to tribes.

There is one change to the 2021 NWP 12 for oil and natural gas pipelines and that is the absence of any reference to the Corps' 2012 Consultation Policy, which was included in the previous permit. The 2017 permit stated that activities authorized under NWP 12 which require that government-to-government consultation to protect tribal trust resources and tribal treaty rights, be conducted in accordance with the Corps' tribal policy principles.¹⁷ Further the 2017 NWP 12 permit stated that “[i]n fulfilling its trust responsibilities to tribes, the Corps follows the Department of Defense American Indian and Alaska Native Policy,” but that the Corps’

¹⁵ Indigenous Environmental Network v. U.S. Bureau of Land Management, 4:20-cv-0015 (D. Mont. Dec 4, 2020).

¹⁶ 33 CFR § 330.5 (2001).

¹⁷ Cite 2017 NWP 12 Permit

trust responsibility applies only to activities regulated by the Corps. In contrast, the 2021 NWP 12 contains mainly references to General Conditions 17 and 20 with no reference to the Corps Tribal Policy Principles and its Tribal Consultation Policy. However, as stated above, the final rule includes a reference to Executive Order 13175 from November 6, 2000, addressing “Consultation and Coordination with Indian Tribal Governments.”

The Corps, as an agency of the federal government, has a trust responsibility to all tribes and clearly, these regulations do not provide the means to properly carry out these duties. The Supreme Court has recognized “the undisputed existence of a general trust relationship between the United States and the Indian people.”¹⁸ This obligation has been interpreted to impose a fiduciary duty owed in conducting “any Federal government action” which relates to Indian Tribes.¹⁹ This Court has tacitly recognized that the duty extends to the Corps in the exercise of its permit decisions.

These failures perpetually result in litigation which often requires project proponents to go back and conduct an EIS after all. For example, in *Nw. Sea Farms, Inc., v. U.S. Army Corps of Engr's*, 931 F. Supp. 1515, 1519–20 (W.D. Wash. 1996), the Federal district court found the Army Corps had a duty to consider treaty rights, even when these considerations were not in the governing regulations, because it is the “fiduciary duty, rather than any express regulatory provision, which mandates that the Corps take treaty rights into consideration.” The court also determined that the Army Corps simply had no authority, without Congressional authorization, to make permitting decisions that “would conflict with the Lummi Nation’s fishing rights at one of its usual and accustomed fishing places under the Treaty of Point Elliott.”

The Corps also asks whether modifications should be considered to further ensure NWP 12 has no more than minimal individual and cumulative adverse environmental effects under Section 404(e) of the Clean Water Act. Clearly, the answer to this question is yes. This is already what the regulations require but instead of encouraging project proponents to minimize their environmental impact to avail themselves of the more streamlined NWP process, project proponents instead attempt to fit projects, with more than minimal impacts, into this process instead of properly seeking an individual permit.

The Corps’ assessment of the “no action alternative” for NWP 12 reiterates that the activities permitted under the Nationwide Permit Program are “minor” and that it would not be a wise use of resources to require these activities to go through the individual permit process. In its 2021 NWP Decision Document on page 84, the Corps stated:

“[i]f this NWP is not available, substantial additional resources would be required for the Corps to evaluate these minor activities through the individual permit process, and for the public and federal, tribal, and state resource agencies to review and comment on the large number of public notices for these activities. *In a considerable majority of cases, when the Corps publishes public notices for proposed activities*

18 *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 2972, 77 L. Ed. 2d 580 (1983); See e.g., *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1523 (W.D.Wash.1988) (granting an injunction against the construction of a marina in consideration of the effect upon Indian treaty rights).

19 *Id.*

that result in no more than minimal adverse environmental effects, the Corps typically does not receive responses to these public notices from either the public or federal, tribal, and state resource agencies. Therefore, processing individual permits for these minimal impact activities is not likely to result in substantive changes to those activities. Another important benefit of the NWP program that would not be achieved through the no action alternative is the incentive for project proponents to design their projects so that those activities meet the terms and conditions of an NWP. The Corps believes the NWPs have significantly reduced adverse effects to the aquatic environment because most applicants modify their activities that require DA authorization to comply with the NWPs and avoid the longer permit application review times and larger costs typically associated with the individual permit process.” (emphasis added)

This language appeared in the NWP decision document for both 2017 and 2021 and serves as part of the Corps’ rationale for not pursuing the “no action alternative” when it was considering whether to reissue NWP 12 for oil and natural gas pipeline activities. Again, it is important that our constituents respond to this request for input.

IEN’s Conclusions and Recommendations

The last question we will comment on for purposes of this Primer is the Corps’ question of whether modifications should be considered to provide notice to and an opportunity to be heard by potentially impacted communities, particularly regarding environmental justice communities.

Modifications should be made to NWP to ensure environmental justice is achieved for those potentially impacted communities. The United States and its agencies, like the Corps, owe a special trust duty to tribes and Indian nations, whether possessed of a treaty or not. This general trust responsibility requires the United States to act as a fiduciary and with due consideration to tribal nation interests.

Further, especially when a project has the potential to impact any Indian resources, be it land, water, medicines, or sacred sites necessary for the practice of one’s culture and ceremony, tribes are entitled to be consulted, at a minimum, and the agency on behalf of the United States, should be required to seek the free, prior and informed consent of tribal nations potentially impacted by projects.

Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, (“Declaration”), provides that “states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”²⁰

Other articles call for free, prior, and informed consent (“FPIC”) in particularized

²⁰ United Nations Declaration on the Rights of Indigenous Peoples, United Nations, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (last visited May 4, 2022).

situations. For example, Article 11 calls for redress, potentially including restitution, with respect to Indigenous Peoples’ “religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”²¹ Article 28 prescribes redress, “that can include restitution or, when this is not possible, just, fair and equitable compensation” in the case of lands including sacred places, taken without the “free, prior and informed consent” of Indigenous Peoples.²² This is particularly important because our experience has been that even with Presidential Executive Orders and Agency policies mandating meaningful consultation, the existing standards are not being met.

Courts have generally held that consultation with tribes is a “mere procedural requirement, and so agencies do not need to change their substantive decisions to accommodate information shared by tribes, much less reach mutual agreement with them.”²³ Implementing FPIC would recognize that tribes have a special relationship with the federal government that must be honored by US agencies such as the Corps.

Nationwide permits, like NWP 12, provide project proponents, like Energy Transfer Partners’ Dakota Access Pipeline, with a way to avoid environmental reviews required by the Environmental Protection Agency. Laws like the Federal River and Harbors Act and the Clean Water Act were put in place to protect the American people and environment from contamination and other threats to human and ecosystem health. Nationwide Permits are meant to fast-track construction by pre-authorizing “small-scale activities” that pose minimal cumulative negative environmental effects. So, the intent of NWP 12 is to cut down governmental red tape put in place to protect people and the environment. See *Standing Rock Primer*, 2017, p. 15.²⁴

Because of these risks, as well as other factors, there were several lawsuits filed in which tribes and environmental advocates sued the Corps over its failure to do a proper environmental review. This lawsuit resulted in a win for tribes when the Court in *Standing Rock Sioux Tribe, et al., v. U.S. Army Corps of Engineers, et al.*, 1:16-cv- 01534, March 25, 2020, ruled that the Corps needed to complete an Environmental Impact Statement (“EIS”). The Corps is currently engaged in its development of an EIS for Dakota Access Pipeline (“DAPL”).

In terms of the Corps’ track record of consulting with Indigenous Peoples, we’d like our constituents to know that all members of the Sioux Nation were invited to participate as Cooperating Agencies in the development of the EIS ordered for DAPL. Most Nations agreed to participate but six months into the process, all Nations formally withdrew as cooperating agencies because the process is just flawed, futile, and not a sensible use of our nations’ resources and time. Our nations tried, in good faith, to provide information and to serve as experts in certain areas required to be reviewed, such as the impact of DAPL on our treaty rights and its impact on our cultural practices, rights and properties. The EIS process is just not intended to receive our input in a sincere and meaningful way.

21 Id.

22 Id.

23 Tribal Implementation Toolkit, The Implementation Project, <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf> (last visited May 4, 2022).

24 Standing Rock Primer: A guide to the people, places and events that took place to put a stop to the Dakota Access Pipeline, Bioneers, <https://bioneers.org/wp-content/uploads/2017/10/StandingRockPrimer.pdf> (last visited May 4, 2022).

Our main recommendation to the Corps is that when any project has the potential to impact any tribal interests in any way, the Corps shall implement a new rule which simply prohibits project proponents from using the nationwide permit system to further their pipelines or other projects.

Now, the fight continues and providing comments on NWP 12 is yet another step we must take to protect our water, resources, and culture. We encourage all those who support Indigenous rights and responsibilities, as well as environmental protection to submit your comments and objections to the continued use of NWP 12 to allow big oil and other like industries to exploit our inherent rights tribal sovereignty and jurisdictional authority connections to our respective lands and waters with just the minimal review required by the nationwide permit program.

Please follow the instructions on page 10 to submit your comments **before May 27, 2022.**

For more information, please see the following:

March 28, 2022, Federal Register Notice – Announcement of public and tribal meeting dates and solicitation of input. <https://www.federalregister.gov/documents/2022/03/28/2022-06458/notice-of-virtual-public-and-tribal-meetings-regarding-the-review-of-nationwide-permit-12>

2021 Corps Summary CHART of ALL 2021 Nationwide Permits
<https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/19757>

President Biden’s January 25, 2021 Executive Order 13990 “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis” <https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis>

2021 Nationwide Permit 12 Decision Document
<https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/16834>

January 13, 2021, Federal Register Notice of Final Rule Reissuance and Modification of Nationwide Permits <https://www.federalregister.gov/documents/2021/01/13/2021-00102/reissuance-and-modification-of-nationwide-permits>

NARF-CU LAW UNDRIP Tribal Implementation Toolkit <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf>

address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential nonresponse bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

Affected Public: Individuals or households; Businesses or other for-profits; Not-for-profit institutions; Federal Government; State, Local, or Tribal Governments.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Dated: March 22, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022-06473 Filed 3-25-22; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Notice of Virtual Public and Tribal Meetings Regarding the Review of Nationwide Permit 12; Establishment of a Public Docket; Request for Input

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice; announcement of virtual public and tribal meeting dates and solicitation of input.

SUMMARY: The Department of the Army and the U.S. Army Corps of Engineers (Corps) (together, "Army"), are publishing this notice to announce a formal review of Nationwide Permit (NWP) 12 for Oil or Natural Gas Pipeline Activities. This review includes a series of public and tribal virtual meetings to gather input to inform future potential decision-making related to NWP 12 as well as a public docket to gather written comments.

DATES: Written recommendations must be received on or before May 27, 2022. The Army will hold public virtual meetings on the following dates: May 10, 2022, May 12, 2022, May 17, 2022, and May 19, 2022. In addition, the Army will hold tribal virtual meetings on the following dates: May 11, 2022 and May 18, 2022. Please refer to the **SUPPLEMENTARY INFORMATION** section below for additional information on these virtual meetings.

ADDRESSES: You may send written feedback, identified by Docket ID No. COE-2022-0003, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting written feedback.
- *Email:* usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil and nationwidepermit12@usace.army.mil. Include Docket ID No. COE-2022-0003 in the subject line of the message.

Instructions: All submissions received must include Docket ID No. COE-2022-0003. Written feedback received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. Out of an abundance of caution for the health of members of the public and staff and to reduce the risk of transmitting COVID-19, the Army cannot currently accept hand delivery of comments. The Army encourages the public to submit written feedback via <https://www.regulations.gov/> or email, as there

may be a delay in processing mail and faxes.

FOR FURTHER INFORMATION CONTACT: Stacey Jensen, in writing at the Office of the Assistant Secretary of the Army (Civil Works), 108 Army Pentagon, Washington, DC 20310-0108; by telephone at 703-697-4671; and by email at usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil; or, David Olson, in writing at Regulatory Program, Headquarters, U.S. Army Corps of Engineers at 441 G. Street NW, Washington, DC 20314; by telephone at 202-761-4922; and by email at nationwidepermit12@usace.army.mil.

SUPPLEMENTARY INFORMATION:

I. Background

On January 13, 2021, the Department of the Army, U.S. Army Corps of Engineers (Corps) published a final rule (86 FR 2744) reissuing and modifying 12 existing Nationwide Permits (NWPs) and issuing four new NWPs, as well as the NWP general conditions and definitions. In addition, the Corps published another final rule (86 FR 73522) reissuing 40 NWPs and issuing one new NWP on December 27, 2021. Both sets of NWPs are currently set to expire on March 14, 2026.

The NWPs authorize certain activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 with no more than minimal individual and cumulative adverse effects to the environment. Section 404(e) of the Clean Water Act provides the statutory authority for NWP issuance, after notice and opportunity for public hearing, for a period of no more than five years after the date of issuance (33 U.S.C. 1344(e)). Nationwide permits are a type of general permit and are designed to regulate with little, if any, delay or paperwork certain activities in federally jurisdictional waters and wetlands (see 33 CFR 330.1(b)). This program can incentivize project proponents to reduce the adverse effects of their planned activities that would otherwise require an individual permit under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, in order to qualify for NWP authorization. The categories of activities authorized by NWPs must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal cumulative adverse effects on the environment (see 33 U.S.C. 1344(e)(1)). By regulation, NWPs can be modified, reissued, revoked, or suspended before they expire (see 33 CFR 330.5).

NWPs were first issued by the Corps in 1977 (42 FR 37122) to authorize categories of activities that have minimal adverse effects on the aquatic environment, for the purpose of streamlining the authorization process for those minor activities. One such activity authorized in 1977 was for “Utility lines,” which included “any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication” (42 FR 37146). Over the iterations of the NWPs issued since 1977, this NWP has evolved and is commonly referred to as “NWP 12.”

During the previous Administration, a review effort was conducted consistent with Executive Order 13783, *Promoting Energy Independence and Economic Growth*, concluding with a report issued by the Office of the Assistant Secretary of the Army for Civil Works on October 25, 2017. The November 28, 2017 issue of the **Federal Register** (82 FR 56192) published a notice of availability for that report. The report included recommendations for modifying NWP 12 (e.g., lowering the number of Pre-Construction Notification (PCN) requirements) which informed the current version of NWP 12.

In the NWPs published in January 2021 (86 FR 2744), NWP 12 was modified and reissued expressly for “Oil or Natural Gas Pipeline Activities.” That final rule limited NWP 12 to only include oil or natural gas pipelines rather than all utility lines, as in previous NWP 12 versions. The January 2021 NWP 12 also removed a number of PCN requirements previously required for the NWP but also included a new PCN requirement for new oil or natural gas pipelines greater than 250 miles in length.

For ease of reference, the full text of the current NWP 12 issued on January 13, 2021 can be found at 86 FR 2860. Note that the general conditions and definitions, such as “single and complete linear project” (86 FR 2877), issued under the same rule action in January 2021 also apply to NWP 12.

II. Review of the Nationwide Permit 12

Pursuant to Corps regulations, the Chief of Engineers is authorized at any time to consider whether modifications or other future actions on an existing NWP 12 may be appropriate. If the Chief of Engineers determines that an action may be appropriate, it implements any such action through the procedures set forth in 33 CFR 330.5.

President Biden signed an Executive Order on January 20, 2021, providing that “[i]t is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.” Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Executive Order 13990, 86 FR 7037 (Jan. 25, 2021). The order further “directs all executive departments and agencies (agencies) to immediately review . . . the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.” *See also* Fact Sheet: List of Agency Actions for Review, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/> (last visited on March 22, 2022), which included the January 2021 “Reissuance and Modification of Nationwide Permits” (86 FR 2744) in the “list of agency actions that heads of the relevant agencies will review in accordance with the Executive Order.”

Therefore, in conformance with Executive Order 13990, and for the reasons below, this **Federal Register** notice announces a formal review of NWP 12 to determine whether any future actions may be appropriate under 33 CFR 330.5 for NWP 12 prior to its March 14, 2026 expiration. The Army seeks input on the appropriate balance for allowing efficient authorization processes with due consideration for the potential effects of oil and natural gas pipelines as well as the need to engage and inform the public, particularly communities that potentially may be impacted by pipeline construction and operations.

Previous uses of NWP 12 have raised concerns identified in Executive Order 13990, such as environmental justice, climate change impacts, drinking water impacts, and notice to impacted communities. By way of example, in one recent scenario associated with the now defunct Byhalia oil pipeline, the Corps is aware that disadvantaged

communities in Memphis, Tennessee expressed environmental justice concerns that the proposed pipeline was to be located in an area which was already the site of many industrial and emission sources, would result in increased air emissions, and would be routed through a drinking water well field providing drinking water to communities and businesses in Memphis from the Memphis Sand Aquifer. The opposition to the Byhalia pipeline identified a concern that the NWP 12 process, as applied to the specific pipeline in question, did not afford any opportunity for notice to the community, a written comment period or a public hearing prior to the Corps providing authorization for the pipeline. In July 2021, the Plains All American Pipeline Company announced that it would not be proceeding with the Byhalia pipeline project or NWP 12. The Army would be interested in receiving comments on potential revisions to NWP 12, including potential off-ramps, to address the type of concerns raised in the Byhalia pipeline situation.

Before deciding on a path forward regarding any potential future actions which may be taken on NWP 12, the Army wants to gather public and tribal input on NWP 12 to make an informed decision. One important function of this engagement is to receive input from all stakeholders and perspectives. A series of questions are posed below in the Stakeholder Engagement Section to assist in receiving such input. The Army encourages comments on all aspects of NWP 12, to include consideration for going beyond the current construct towards what any new or revised NWP 12 should look like.

The Army acknowledges that there is not a single Federal agency charged with the responsibility for regulating oil pipeline routes or construction as well as the fact that the Corps has limited statutory authorities for construction of such pipelines in jurisdictional waters. However, that does not preclude consideration of alignment of the NWP 12 with Administration priorities and policies established in Executive Order 13990 (86 FR 7037), Executive Order 14008, “Tackling the Climate Crisis at Home and Abroad” (86 FR 7619), as well as due consideration of environmental justice and climate change factors. In addition, input related to compliance with the statutory authority for the NWP program (Section 404(e) of the Clean Water Act) is also of pertinent interest. The Army further acknowledges that current world events have highlighted the unstable nature of energy production and that domestic oil and natural gas production and

distribution will be considered in the review of NWP 12.

III. Stakeholder Engagement

The Army poses a series of questions detailed below for stakeholder input. These questions are only guideposts for comments. Input on all aspects of NWP 12 are welcome. Written input to the docket as well as verbal input during the virtual meetings are strongly encouraged.

(1) As part of any future action the Army may take with respect to NWP 12, should the Army consider utilization of the procedures in 33 CFR 330.5 in advance of the current cycle for nationwide permit review?

(2) Should modifications be considered to further ensure NWP 12 has no more than minimal individual and cumulative adverse environmental effects under Section 404(e) of the Clean Water Act?

(3) Should modifications to NWP 12 be considered to provide notice to and an opportunity to be heard by potentially impacted communities, particularly with regard to environmental justice communities?

(4) Would it be prudent for the Corps to consider further limits on the NWP 12, PCN requirements, general conditions, and the ability of division and district engineers to modify, suspend, and revoke NWP authorizations to further ensure that the NWP 12 causes no more than minimal cumulative adverse environmental effects at the national, regional, and site scales?

(5) Should distinctions be drawn between new construction of oil and natural gas pipelines and maintenance of existing oil and natural gas pipelines?

(6) Should distinctions be drawn between oil pipelines and natural gas pipelines, especially in consideration of differences in overall Federal regulation of different types of pipelines?

(7) Does the NWP 12 verification process ensure that environmental justice and climate change factors are adequately considered?

(8) Are the PCN requirements for the current NWP 12 adequate?

(9) Should there be new triggers for oil or natural gas pipeline activities in jurisdictional waters that mandate review under an individual permit?

IV. Public Meetings and Outreach

The Army will hold a series of public virtual meetings intended to solicit input to inform its review of potential future actions regarding NWP 12. The Army will hold four virtual meetings open to all stakeholders and an additional two virtual meetings specific

for tribal input. Registration information for the public and tribal virtual meetings is below. Separate notification to tribal leaders is also being provided.

Registration of members of the public who wish to attend the virtual meeting is required. Spots are limited and those unable to attend are encouraged to provide written comments to the docket which will be given equal consideration. Attendees will be asked to provide their name, title, affiliation, and contact information to include email address and daytime telephone number at registration.

Registration instructions can be found at the following website: <https://www.army.mil/article/254909>. Persons or organizations wishing to provide verbal input during the meetings will be selected on a first-come, first-serve basis. Due to the expected number of participants, individuals will be asked to limit their spoken presentation to three minutes. Once the speaking slots are filled, participants may be placed on a standby list to speak or continue to register to listen to the input. Supporting materials and written feedback from those who do not have an opportunity to speak can be submitted to the docket as described above. The schedule for the NWP 12 virtual meetings is as follows:

Public virtual meetings:

- May 10, 2022, from 1 p.m. to 3 p.m. Eastern,
 - May 12, 2022, from 6 p.m. to 8 p.m. Eastern,
 - May 17, 2022, from 1 p.m. to 3 p.m. Eastern, and
 - May 19, 2022, from 2 p.m. to 4 p.m. Eastern.
- Tribal virtual meetings:
- May 11, 2022, from 1 p.m. to 3 p.m. Eastern, and
 - May 18, 2022, from 2 p.m. to 4 p.m. Eastern.

Michael L. Connor,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 2022–06458 Filed 3–25–22; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID USN–2022–HQ–0009]

Proposed Collection; Comment Request

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995*, the Department of the Navy announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by May 27, 2022.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Commanding General, Marine Corps Recruiting Command (G3), Officer Programs, 3280 Russell Road, Quantico, VA 22134–5103, ATTN: Captain David P. Foley, or contact Head, Officer Programs or Deputy, Officer Programs at 703–784–9449.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Personal Information Questionnaire; NAVMC 100064; OMB Control Number 0703–0012.

Needs and Uses: The Officer Selection Officer (OSO) will forward a Personal

About Indigenous Environmental Network & Big Fire Law & Policy Group

Indigenous Environmental Network was formed by grassroots Indigenous peoples and individuals to address environmental and economic justice issues (EJ). IEN’s activities include building the capacity of Indigenous communities and tribal governments to develop mechanisms to protect our sacred sites, land, water, air, natural resources, health of both our people and all living things, and to build economically sustainable communities. IEN accomplishes this by maintaining an informational clearinghouse, organizing campaigns, direct actions and public awareness, building the capacity of community and tribes to address EJ issues, development of initiatives to impact policy, and building alliances among Indigenous communities, tribes, inter-tribal and Indigenous organizations, people-of-color/ethnic organizations, faith-based and women groups, youth, labor, environmental organizations and others. IEN convenes local, regional and national meetings on environmental and economic justice issues, and provides support, resources and referral to Indigenous communities and youth throughout primarily North America – and in recent years – globally.

Big Fire Law & Policy Group is a 100% Native owned and majority Native women-owned national law firm providing legal representation and advocacy in the areas of tribal law and federal Indian law. We understand the unique nature of tribal nations, which allows us to tailor our services and focus on achieving real solutions and positive outcomes for our clients. From general governmental affairs and business development to tax disputes and complex litigation, we have the experience and resources to truly meet the needs of our clients. Our personal understanding of the unique challenges our communities face is the basis for our dedication to assist our communities and people in developing the long-term tools not just to survive but to thrive. We respect the sovereignty of tribal nations, value the wisdom and decision making of tribal leaders and recognize that Indian country does best when Indian country controls our own destiny. It is the Big Fire mission to utilize our skills to provide unparalleled service for Indian country while conducting ourselves with the integrity that Indian country deserves.

