

Army Corps Issues Notice of Nationwide Permit 12 Review and Seeks Stakeholder Input

Update

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On March 24, 2022, the Department of the Army and the U.S. Army Corps of Engineers (“Corps”) (collectively “Army”) announced their intent to publish a Notice (the “Notice”) in the Federal Register initiating a formal review of Nationwide Permit (“NWP”) 12 for Oil or Natural Gas Pipeline Activities, and soliciting input from stakeholders to inform future potential decision-making by the agency related to NWP 12. The Notice marks the anticipated reconsideration of NWP 12, which could significantly affect construction timelines for oil and natural gas pipelines. Consistent with several other initiatives from the current administration, this request for input signals the administration’s continued focus on considering environmental justice and climate impacts in federal decisionmaking. Companies interested in using NWP 12 should consider commenting on the Army’s proposal to ensure that NWP 12 remains a meaningful and effective means of authorizing needed oil and gas infrastructure.

Citing President Biden’s issuance of Executive Order 13990 (“Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”), issued just a few days after the current NWP 12 appeared in the Federal Register, the Army Notice references its obligation to review NWP 12 to achieve the administration’s environmental justice and climate change goals. The Army will have these goals in mind as it conducts a formal review of NWP 12 to determine “whether any future actions may be appropriate” to modify or revoke NWP 12 prior to its March 14, 2026 expiration. The agency “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.”

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Notably, the Army appears to be considering a notice-and-comment process for projects that seek to take advantage of NWP 12. The Army points to claims made against one particular pipeline and suggests through “an opportunity for notice to the community, a written comment period or a public hearing prior to the Corps providing authorization for the pipeline,” the Corps could have more extensively considered environmental justice, climate change impacts, and drinking water impacts. A notice-and-comment process for specific uses of an NWP would be a significant departure from the intent of the NWP program and from its implementation history.

The Army will be conducting a series of public meetings with speakers and participants, and also seeks written comment in response to the Notice’s publication in the Federal Register. Although the agency seeks input on “all aspects of NWP 12,” it specifically seeks responses to the following questions:

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?

These questions suggest that the Army is considering a significant alteration in its approach to NWP 12 in light of this administration's focus on addressing environmental justice and climate concerns. While NWPs have long been designed for efficiency when a private applicant is conducting minimally impactful activities under the CWA or RHA, the Army's review of NWP 12 could result in revocation of the permit or substantial changes in applicability or implementation.

Comments in response to the Notice are due within 60 days of the Notice's publication in the Federal Register. The Corps will conduct a number of virtual meetings throughout the month of May.