



American Gas Association

VIA FACSIMILE

October 31, 2001

The Honorable James L. Connaughton
Chair, Council on Environmental Quality
Executive Office of the President
17th & G Streets, N.W.
Washington, D.C. 20503

Attention: Task Force

Re: Comments of the American Gas Association
Energy Task Force Notice and Request for Comments
66 Fed. Reg. 43,586 (Aug. 20, 2001); 66 Fed. Reg. 50,434 (Oct. 3, 2001)

Dear Chairman Connaughton:

The American Gas Association (AGA) appreciates this opportunity to comment on how to expedite energy-related projects pursuant to Executive Order 13212. That order established an interagency task force (Task Force), which you chair, to work with federal agencies to help them expedite their review of permits or to take other actions to accelerate completion of energy projects. The Council on Environmental Quality (CEQ) has requested comment and recommendations for improving agency permitting procedures to help accelerate the completion of energy-related projects, to increase energy production, to improve energy transportation, and to coordinate permitting in geographic areas where increased permitting activity is expected. AGA applauds this effort and provides the following comments and recommendations for expediting projects that will help deliver clean natural gas to American homes and businesses.

AGA represents 185 local natural gas utilities across the country. Additionally, AGA provides services to member natural gas pipelines, marketers, gatherers, international gas companies and a variety of industry associates. Natural gas is used by more than 62 million homes and businesses in all 50 states.

Natural Gas Projects – AGA Supports INGAA Comments on MOU

We support the comments submitted by the Interstate Natural Gas Association of America (INGAA) on October 11, 2001 regarding how the Task Force can help expedite interstate natural gas pipeline projects. AGA members have a vital interest in ensuring the existence of ample interstate pipeline infrastructure. In particular, we agree that the Task Force could significantly improve agency coordination for interstate natural gas pipeline projects by developing an interagency Memorandum of Understanding (MOU) that allows Federal and state agencies to agree on responsibilities, timelines, and information gathering. AGA

believes, however, that the MOU should allow participating federal and state agencies to harmonize and streamline the permit application and review process for *intra-state* natural gas transmission and distribution line projects as well as *interstate* natural gas pipeline projects.

The agencies subscribing to the MOU should include those suggested in INGAA's comments (at pages 7-9), plus at the federal level we would add the U.S. Department of Agriculture Forest Service and the Department of Interior's National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management. The Federal Energy Regulatory Commission (FERC) should be involved because it has the lead role in reviewing interstate pipeline projects.

While FERC does not have jurisdiction over natural gas local transmission and distribution projects, these projects undergo similar economic and environmental reviews by state public utility commissions (PUCs). In addition, in many states, counties and other local governments have substantial environmental review authority. We suggest in a later section of these comments that the Task Force should encourage each state to establish a permit coordinator within the governor's office to help streamline and coordinate the various state and local permit requirements for intra-state gas utility projects within that state. In addition, it would be helpful for the MOU to address how to coordinate federal, state and local permitting for such intra-state gas utility projects.

Among the state and local approvals, we would also add Tribal Historic Preservation Office (THPO) reviews. Interstate pipeline and some high-pressure intra-state gas transmission and distribution projects may cross areas in which multiple tribal authorities have an interest. This can lead to confusion and delays. It would be very helpful to develop a way to allow meaningful THPO review while providing better coordination with other permitting decisions. This could significantly reduce delays and uncertainties in planning and constructing new lines or repair projects. We note that this is already clearly within the scope of the Task Force. The Executive Order explicitly directed the Task Force "to assist agencies in setting up appropriate mechanisms to coordinate Federal, State, *tribal* and local permitting" for energy projects. AGA agrees that this is an appropriate scope for the Task Force; coordination is needed among all of these entities.

We agree with INGAA that adding another layer of bureaucracy would not help to expedite energy projects. Instead, the Task Force can best help by acting as a facilitator and source of creative ideas for streamlining the permitting process for all natural gas projects rather than focussing on individual projects on a case-by-case basis.

Coordinate EPA, Corps & State Water & Wetland Permits

AGA urges the Task Force to pay particular attention to improving coordination among different agencies with authority to regulate construction activities that affect streams or wetlands. Both the Corps and EPA exercise authority under Clean Water Act section 404 over wetlands; EPA and the states share authority over storm water discharges under Clean Water Act section 402 and state laws; and states issue water quality certifications under Clean Water Act section 401. In addition, states and some local entities exercise authority over streams and wetlands under separate state laws. Interstate natural gas pipelines typically extend across several states, Corps districts, and EPA Regions. Intra-state natural gas distribution projects also can involve multiple federal, state and local authorities. This can create administrative delays and conflicting requirements for different segments of a

pipeline or gas utility line project. Better coordination is essential if we are to expedite these needed projects while protecting the environment.

Encourage Each State Governor To Establish A Permit Coordinator

In July 2001, the Interstate Oil and Gas Compact Commission (IOGCC) and the National Association of Regulatory Utility Commissioners (NARUC) issued a final report of their Pipeline Siting Work Group. Their first recommendation was that every governor "should establish within the office of the governor a coordination effort to organize and expedite the activities of all state and local permitting entities" that regulate natural gas utility and pipeline projects. The state coordinator would have a role similar to the Task Force.

"The purpose ... would be to monitor the process and encourage prompt consideration, while eliminating duplication of effort. This coordinating effort will not be a new level of regulation, but will draw upon the expertise of the appropriate state agencies. The coordinating effort will insure all data needed are provided by the appellant in a timely fashion and will facilitate sharing of information and experts among state and federal agencies, and with local government."

Final Report of the IOGC-NARUC Pipeline Siting Work Group (July 2001) at p. 2. AGA supports this recommendation and urges the Task Force to encourage its adoption by every state. A copy of this IOGC-NARUC Final Report is attached as Appendix A.

Corps Wetlands Permits – Ideas for Expediting Gas Utility Projects

One specific area where the Task Force could be of assistance is in encouraging reform of the wetlands permitting program to expedite gas utility projects. There are several ways in which the Corps' Nationwide Permit (NWP) program could be implemented in a manner that reduces unnecessary delays for gas utility projects. The Corps has made a good start. It recently proposed certain revisions to the NWP program, some of which will help to expedite gas utility projects. See 66 Fed. Reg. 42070 (August 9, 2001). AGA applauds the Corps' effort in this regard. But as described in AGA's Comments on that proposal, more could be done. The Task Force could encourage changes that will help expedite natural gas utility projects.

A copy of AGA's October 1, 2001 comments on the Corps' proposal to reissue and modify the NWPs is attached as Appendix B (AGA NWP Comments).

For example, we believe there is no need to require compensatory mitigation for all Nationwide Permit pre-construction notifications as proposed by the Corps. The compensatory mitigation concept may be appropriate in the context of a building or housing development that permanently affects a wetland by creating a permanent, above ground structure. But gas utility line projects are different. Natural gas utility projects by their nature cause only *temporary* minimal impacts to any streams or wetlands that they cross. The lines are buried and natural contours and vegetation are restored immediately afterwards. Gas utility projects typically disturb narrow areas of water or wetlands for only a few days. AGA has suggested setting a threshold so that gas utility projects affecting less than ½ acre would not be required to acquire or create additional "compensatory" wetland acreage to "replace" these small patches of wetland that are not lost but in fact are restored within a few days. The requirement to obtain compensatory mitigation delays the ability of gas utilities to repair

existing gas lines swiftly and to extend lines to new customers for new more efficient natural gas based distributed energy. See AGA NWP Comments Appendix B pp. 3-4.

Also, several regulatory requirements are triggered by "mechanized land clearing" operations, yet there is no clear definition of what activities fall within this term. See AGA NWP Comments at pp. 2-3. We have suggested several ways to clarify what types of gas utility activities would fall within this term and for streamlining the requirements that it triggers. These changes should help expedite projects that will help transport clean natural gas for new more efficient energy service to homes and businesses.

In addition, energy projects could be expedited if the Task Force could assist in clarifying that THPO consultations should not be required when a project has no known cultural resource impacts. This is a concern especially in the context of the Nationwide Permits (NWP) issued by the Corps of Engineers (Corps). The NWPs are generic permits by regulation for certain types of construction projects that will have only minimal impacts on jurisdictional waters and wetlands. Certain of the NWPs require the permittee to submit a Pre-Construction Notification to the Corps. In this context, some Corps district offices have required gas utilities to consult with THPOs for all tribes that may have ever been in the area, even when there are no known cultural resources in the project area. This can lead to lengthy and unnecessary delays while the company conducts an elaborate historical search for tribes that long ago left the area, locates someone to act as a THPO, and then awaits review and an ultimate decision that there is nothing of concern. Where a gas utility or pipeline project has such minimal impacts that it qualifies for an NWP, and there are no known cultural impacts, it should be clear that the gas company is not required to engage in multiple Tribal Historic Preservation Officer (THPO) consultations for each and every Pre-Construction Notification submittal to the Corps for a natural gas project. Requiring such burdensome historical searches and multiple consultations does not help to protect tribal resources, and it impedes the ability of gas utilities to provide quick service to new cleaner energy sources, such as natural gas combined cycle turbines, micro-turbines, and natural gas heating and cooling.

AGA appreciates the opportunity to comment and looks forward to continuing discussions.

Respectfully submitted,

AMERICAN GAS ASSOCIATION

By



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APPENDIX A

Final Report
of the
IOGCC / NARUC
Pipeline Siting Work Group

July 2001

Overview

In early 2000, the National Association of Regulatory Commissioners (NARUC) Committee on Gas and the Interstate Oil and Gas Compact Commission (IOGCC) Legal and Regulatory Committee formed a work group to address regulatory challenges of substantial expansion to the U.S. natural gas pipeline system.

In a report to the U.S. Secretary of Energy, the National Petroleum Council (NPC) in late 1999 projected a need to build 38,000 miles of natural gas transmission pipeline and 255,000 miles of distribution mainlines to meet the needs of increased demand. Much of the demand for more natural gas stems from most new electric power plants using gas as their fuel source.

New pipelines must also be constructed to bring natural gas from new producing areas, and increased pipeline capacity will be required in areas of the country growing in size. The infrastructure required to deliver gas to market must be optimized and expanded to accommodate the increase in demand as well as the changing logistics of getting new supply to all customers, from residential home heating customers to 850 MW power plants.

Capital expenditures for the expanded pipeline system are estimated to be from \$33.6 to \$43.7 billion nationally. The NPC report discusses the myriad of regulatory layers involved in siting a natural gas pipeline and calls on government, industry, and other stakeholders to address the uncertainty of addressing market demand when regulatory processes take many years.

Thus, the IOGCC and NARUC formed a work group to make recommendations addressing regulatory issues. The work group approached the issue by first examining current permitting practices. The group found that the states did not really have a comprehensive list of all regulatory requirements, so turned to the pipeline industry which provided the group with detailed information about the number and nature of permits. The group also looked at FERC regulation and was impressed with the many modifications in recent years aimed at streamlining the FERC process.

The work group also visited a pipeline under construction through a variety of areas – suburban residential, wetlands, a school yard, light industrial and under a river. They looked at the kinds of challenges faced in pipeline construction and gained a greater understanding of the need for a variety of regulatory roles.

At their initial meeting, the work group decided they would make no recommendations adding additional regulation, nor would they recommend elimination of any regulations. Their goal was to make recommendations to streamline existing processes. These are their recommendations.

RECOMMENDATIONS OF THE NARUC/IOGCC PIPELINE WORK GROUP

Sustaining Economic Expansion

States striving to sustain and encourage economic development will find the challenge increasingly dependent upon energy availability. As a result of recent events, new and expanding businesses often no longer assume needed energy supplies will be available. In order to expand, or develop new businesses, as well as meet basic human needs of the population, states must ensure that an adequate energy infrastructure is available. The recent California experience with energy shortages has prompted businesses, generally, to ask state development offices about the availability of electricity and natural gas within a state. Governors will increasingly be called upon, as they promote economic development in their states, to respond to the energy availability question.

The current natural gas infrastructure was not planned to meet the expected rate of natural gas consumption growth which the nation will see in the next decade, particularly demand driven by needs in electric power generation. More than 90 percent of all planned new power generation in the United States will be fueled by natural gas. Almost all small, supplemental back-up generating units (such as those used by hospitals and schools) are powered by natural gas. Natural gas demand has been well documented by the National Petroleum Council (NPC) report which spurred creation of this work group.

One of the key challenges to energy availability is an adequate natural gas pipeline and distribution system to provide an ever increasing gas demand across the country. The NPC report estimates over 38,000 miles of new transmission lines will be needed, as well as 263,000 miles of new distribution lines. That much pipeline will require the attention of every state, and many regulatory bodies within the states. It will require the attention of the Federal Energy Regulatory Commission (FERC), the Bureau of Land Management (BLM), the U.S. Forest Service and many other federal entities.

The work group has found pipeline siting controlled by a variety of state and local government offices, as well as by the federal government. In terms of permit volume, the bulk of individual permits, required for infrastructure expansion, are state and local. State and local regulations are not only necessary, but add an element of local oversight which is critical to a project being reviewed with the unique interests of the state or locality at the forefront. However, only a few states have effective coordination of the natural gas pipeline permitting process while state and local regulatory steps can add many months – and sometimes years – to building a pipeline.

State and local regulation is perhaps the most effective level of regulation because it rests closest to the public being served. However, state and local regulation is sometimes duplicative both between levels of government and between different state agencies, and for interstate pipelines must take federal requirements into consideration.

Recommendations

1. Every governor should establish within the office of governor a coordinating effort to organize and expedite the activities of all state and local natural gas permitting entities. The purpose of the coordination would be to monitor the process and encourage prompt consideration, while eliminating duplication of effort. This coordinating effort will not be a new level of regulation, but will draw upon the expertise of the appropriate state agencies. The coordinating effort will insure all data needed are provided by the applicant in a timely fashion and will facilitate sharing of information and experts among state and federal agencies, and with local government.
2. States should decide, prior to beginning a natural gas pipeline siting process, what information they need to collect and communicate that information to the general public and to the pipeline. States should identify all of the participants in the permitting process and coordinate regulatory roles, to the goal of processing information only once. States should consider naming a lead agency which would have the authority to monitor processing schedules within existing regulatory requirements.

3. Every state economic development office (Commerce Department) should be involved with the coordination effort and recommend actions to streamline the process.
4. States should work with the federal government to conduct regional needs and pipeline/utility corridor identification. This federal-state coordination is endorsed in Executive Order 13212, issued May 18, in which President Bush created a federal interagency task force charged with "...setting up appropriate mechanisms to coordinate federal, state, tribal and local permitting in geographic areas where increased permitting activity is expected."
5. States should consider a special task force of state environmental experts to focus and coordinate all environmental issues stemming from the proposed pipeline. When time-sensitive issues arise, the governors need a plan for reaction, which would be coordinated with federal entities where appropriate. This is recognized in the National Energy Policy released in May by the Bush Administration which recommends that "...the President direct agencies to continue their interagency efforts to improve pipeline safety and expedite pipeline permitting in an environmentally sound manner and encourage the Federal Energy Regulatory Commission to consider improvements in the regulatory process governing approval of interstate natural gas pipeline projects."
6. States should encourage research spending, including government, university and pipeline spending, to continue the development of pipeline installation techniques to disturb less surface, complete the installation more quickly and enhance safety.
7. States should undertake a comprehensive review of policies, procedures and regulations for the siting and installation of natural gas pipelines to determine how to eliminate duplication, reduce the cost and time of review, without any compromise to state regulatory oversight.
8. States should be a partner in FERC pipeline pre-filing citizen meetings, and consider developing similar citizen meetings for intrastate projects. Stakeholder notification and involvement in the process must be adequate to evaluate their interests.

9. States should encourage public education and outreach on the part of the pipeline. Pipelines, and states, should exchange innovative and high quality effective public outreach techniques, including informing the public about economic development and human needs issues as they link to new natural gas infrastructure requirements. Such public education should include adequate information about steps taken to ensure public safety, details of construction and contingency plans (i.e. what happens when it rains for a week in the middle of construction?), and information about the direct benefits of the project.

10. States should consider developing a model for clear and accessible state and local regulations governing the siting of natural gas pipelines.

IOGCC/NARUC PIPELINE SITING WORKGROUP

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APPENDIX B

October 1, 2001

HQUSACE
Attn: CECW-OR
441 "G" Street, NW
Washington, DC 20314-1000

RE: Department of the Army, Corps of Engineers
Proposal to Reissue and Modify Nationwide Permits
66 Fed. Reg. 42070 (August 9, 2001) (Proposal)
66 Fed. Reg. 43961 (August 21, 2001) (Correction)
66 Fed. Reg. 48665 (Sept. 21, 2001) (Extension of Comment Period)

Dear Sir or Madam:

The American Gas Association (AGA) appreciates the opportunity to submit these comments on the Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits in the captioned proceeding.

AGA represents 185 local natural gas utilities that serve customers in all 50 states. AGA members deliver natural gas to homes and businesses throughout the U.S. that use gas.

General Comments

AGA member companies are directly affected by the Corps' proposal, because many of them rely on the nationwide permit program to obtain streamlined approvals for natural gas pipeline and distribution line construction and maintenance projects. Natural gas pipelines and distribution lines can cover many miles and often must cross streams, wetlands, or other waters of the United States. When they must cross a stream or wetland, the impact is typically limited because these long, narrow projects affect an area only a few yards wide. These crossings are often completed within a few days. In addition, natural gas utilities follow best management practices (BMPs) to minimize sedimentation and other impacts.

AGA commends the Corps for developing a nationwide permitting process to help reduce regulatory burdens associated with obtaining case-by-case 404 permits, while still meeting the intent of the Clean Water Act. However, we are concerned that some aspects of the nationwide permit (NWP) program, proposed for reissuance, could significantly burden the Corps and industry with unnecessary requirements that will delay necessary and desirable natural gas utility projects without appreciable environmental benefit.

The removal of any unnecessary burdens would further the goals of Executive Order 13212 regarding actions to expedite energy-related projects. AGA is therefore providing the following

specific comments to help expedite the 404 permitting process and to provide for the protection of wetland functions and values.

Specific Comments on the NWP Proposal

1. Preconstruction Notifications under Nationwide Permit #12 Notification Criteria (d):

Nationwide Permit #12 Notification criteria (d) requires the submittal of a Preconstruction Notification (PCN) whenever a utility line is placed within a jurisdictional area (i.e. water of the US), and it runs parallel to a stream bed that is within that jurisdictional area. 66 Fed. Reg. 42085 (August 9, 2001). One Corps district indicates that this notification requirement is triggered if a utility line is within a 45% angle of the streambed for any length of the stream. Previous conversations with the Corps indicate that this requirement only exists because of sewer lines that are typically designed to run parallel to a stream for great distances following the stream's drainage contour to meet flow gradient requirements. As a result, sewer line installations often cause considerable stream impacts. Natural gas lines do not have to follow gradient lines and typically cross a stream perpendicularly in a straight line. Thus natural gas lines typically impact only a short segment of the stream. The Corps should exempt all utility projects other than sewer lines from this requirement because it is an unnecessary burden on non-sewer, energy-related utility projects. The removal of this unnecessary burden would further the goals of Executive Order 13212 regarding actions to expedite energy-related projects.

2. Preconstruction Notifications of "Mechanized Land Clearing": A PCN is required whenever "mechanized land clearing" occurs within a forested wetland. 66 Fed. Reg. 42085 (August 9, 2001). One District Office of the Corps has verbally stated that "mechanized land clearing" is the use of a blade in clearing (i.e. a bulldozer) while the use of a chain saw or bush-hog to clear does not constitute "mechanized land clearing."

The term "mechanized land clearing" is not defined in the definition section of the Nationwide Permit. AGA recommends that the Corps add a definition for this term within the definition section.

AGA also recommends that the Corps provide a threshold for this notification requirement to help prevent unnecessary requirements, such as interpreting the notification requirement to apply if a single sapling tree is removed by mechanized means. The notification requirement would be more reasonable and consistent with other Nationwide Permit (NWP) criteria, if it only applied when mechanized land clearing affects more than a reasonable threshold acreage of forested wetland. The absence of a clear definition of "mechanized land clearing" and a reasonable threshold for requiring PCNs creates regulatory uncertainty and an unnecessary burden on gas utility and pipeline construction projects. Gas companies need to maintain their pipeline and utility rights-of-way clear of trees to promote both public safety and national security. Trees are cleared to prevent roots from damaging pipes and causing leaks. The tree canopy also must be cleared to allow inspection to prevent gas leaks or possible sabotage. One of the most effective inspection methods is to fly over the right-of-way. Such aerial over-flights would be impaired if necessary tree clearing activities were delayed by NWP notification and other restrictions on minimal amounts of "mechanized land clearing." In the wake of recent events, gas companies have been encouraged to increase the frequency of these over-flights for security reasons. Removing this unnecessary burden would further the goal of Executive Order 13212 to expedite energy-related projects and would facilitate over-flights needed for pipeline safety and security.

3. Presumption that "Mechanized Land Clearing" Exceeds Incidental Fallback: One Corps District has previously indicated that there is a rebuttable presumption that "mechanized land clearing" exceeds incidental fallback and is therefore a regulated Section 404 discharge. This may be an appropriate assumption for large, localized construction activities, but it is not appropriate for utility line projects. AGA recommends that the Corps clarify that there is no presumption that incidental fall back occurs during natural gas utility projects due to the temporary, narrow, linear nature of typical natural gas projects. Unlike most other construction projects, the narrow, linear trenches associated with natural gas distribution and pipeline projects are typically excavated and closed within a very short period of time. The removal of this unnecessary presumption would further the goal of Executive Order 13212 to expedite energy-related projects.

4. Mandatory Delineations with all Preconstruction Notifications: The Corps requires that a delineation of affected special aquatic sites, including wetlands be submitted with all PCNs. See notification sub-section 13(b)(4) at page 42095. Given the numerous situations that could easily trigger the PCN requirements with respect to de minimis impacts to waters of the United States, natural gas local distribution companies (LDCs) would be forced to engage qualified wetland delineators to perform wetland delineations on numerous routine natural gas distribution projects. Such projects would include short main extensions, the installation of service lines to new customers, and supply lines to new power generation facilities. This would also be a significant burden on gas pipeline companies and gas utilities doing business in the arid regions of the United States because the Corps has given jurisdictional status to dry washes where there are no delineation standards. In the absence of standards, the problem is compounded for natural gas companies that do business in more than one Corps administrative unit. At times the determinations made by Corps staff have been based on the preferences of individual inspectors and they are certainly not consistent between states. The removal or minimization of such burdens would further the goals of Executive Order 13212 regarding actions to expedite energy-related projects. This notification requirement would be more reasonable if it only applied when a reasonable threshold were triggered.

5. Compensatory Mitigation Requirements: Nationwide Permit General Condition #19 [c] states "Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland impacts requiring a Preconstruction Notification (PCN), unless the District Engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement." 66 Fed. Reg. 42097 (August 9, 2001). Nationwide Permit #12 requires the submittal of a PCN, and thus requires compensatory mitigation, if any of the following criteria are met:

- (a) Mechanized land clearing in a forested wetland for the utility line right-of-way;
- (b) A section 10 permit is required;
- (c) The utility line in waters of the US, excluding overhead lines, exceeds 500 feet;
- (d) The utility line is placed within a jurisdictional area (i.e. water of the US), and it runs parallel to a stream bed that is within that jurisdictional area;
- (e) Discharges associated with the construction of utility line substations that result in the loss of greater than 1/10-acre of waters of the US; or
- (f) Permanent access roads constructed above grade in waters of the US for a distance of more than 500 feet.
- (g) Permanent access roads constructed in waters of the US with impervious materials (Sections 10 and 404).

These criteria present several common situations where compensatory mitigation will be required for de minimis impacts with no established thresholds to trigger the mitigation requirement (e.g. criteria (a) and (d)). The Corps should establish a threshold, below which compensatory mitigation would not be required, unless a District Engineer makes a determination otherwise. AGA suggests an appropriate threshold would be ½ acre, consistent other thresholds in NWP #12 for authorized activities.

6. Compensatory Mitigation via In Lieu Fee Programs and Mitigation Banking: For situations where compensatory mitigation is required, AGA supports "in lieu fee programs" and mitigation banking for the compensatory mitigation of any natural gas pipeline or distribution line impacts as an alternative to more onerous mitigation measures. The Corps discusses "in lieu fee programs" at page 42071 and in Notification section 19 (h) at page 42098. Given that natural gas pipelines are linear projects that may cross numerous stream basins, it may be very difficult or impractical to mitigate a multitude of small impacts via direct one-for-one mitigation efforts within the impacted stream basin. In lieu fee programs via state or conservation organizations such as the Nature Conservancy could achieve compensatory mitigation goals in an effective manner that maximizes economies of scale. In like fashion, mitigation banking would encourage companies and states to create wetlands in anticipation of future mitigation requirements. Such streamlined approaches would also support the goal of Executive Order 13212 to expedite energy-related projects.

7. Compensatory Mitigation for the Conversion of Forested Wetlands into Emergent or Herbaceous Wetlands: In Nationwide Permit #12 the Corps states "Where certain functions and values of waters of the US are permanently adversely affected, such as the conversion of a forested wetland to a herbaceous wetland in the permanently maintained utility line right-of-way, mitigation will be required to reduce the effects of the project to the minimal level." AGA supports efforts to minimize the area of forested wetlands to be disturbed. However, there are several important safety and security reasons for clearing trees from a utility right-of-way. As mentioned above in the discussion of mechanized land clearing, gas utilities and pipeline companies cannot allow trees to grow back within rights-of-way, because the roots of those trees could damage the buried pipelines underneath and inhibit repair and maintenance efforts. U.S. Department of Transportation (DOT) rules under 49 C.F.R. effectively require natural gas pipeline and utility companies to maintain their rights-of-ways clear of trees and tall vegetation both to prevent root damage and to allow the lines to be inspected regularly to prevent damage to the lines and gas leaks. See 49 C.F.R. §§ 192.614 (Damage Prevention), 192.705 (Transmission Patrolling), and 192.721 (Distribution Patrolling). Gas lines are often inspected visually by aerial over-flights or by crews on the ground, and this would not be possible if the rights-of-way were blocked by trees. In addition, in the wake of the tragic events on September 11, 2001, DOT is recommending more frequent over-flights and inspections as a matter of national security.

The permanent conversion associated with maintaining gas line rights-of-way only alters the values and physical functions of the wetland. The wetland itself is not lost. The changes in values and functions are more likely to be beneficial than detrimental, because there would be an increase in vegetation diversity. AGA recognizes that the relationships between various values and functions are likely to be relevant to large areas of disturbances, but due to the subjective nature of these relationships, analysis of functional changes would do nothing but eviscerate the purpose of NWP 12. That purpose is to expedite permitting of activities that have minimal impacts on the environment. It is also important to recognize that under the authority of NWP 12, the extent of vegetation change would be limited to less than 500 linear feet or ½ acre area of

disturbance. Because of the likely benefits to values and functions as well as the very limited extent of vegetation change, AGA recommends that a standard mitigation ratio of 1:1 be adopted for NWP 12 wetland disturbances above a ½ acre threshold regardless of vegetation type.

8. Required Approval of All Compensatory Mitigation Plans prior to Beginning any Work Within Waters of the United States: Section 3(b)(17)(d) specifies that the District Engineer must approve any compensatory mitigation plans before a permittee commences work in waters of the US. See 66 Fed. Reg. at 42096. Even though the Corps, in this sub-section, also provides that a prospective permittee may submit a proposed mitigation plan with the PCN to expedite the process, such efforts still represent a very significant burden to numerous routine everyday natural gas distribution projects. Compensatory mitigation plans are usually complex and time-consuming endeavors. It must also be kept in mind that utility line disturbance activities are temporary in nature. The original contours are restored, and the hydrology is not permanently altered. Given the numerous situations that could easily trigger the PCN requirements, and thus the compensatory mitigation requirements, gas utilities would be delayed in their efforts to complete numerous routine natural gas distribution projects. These projects would include short main extensions, the installation of service lines to new customers, and supply lines to new power generation facilities. Such necessary and routine gas projects would be delayed while the utility develops and obtains Corps approval for compensatory mitigation plans. To facilitate such small routine projects, AGA recommends that the Corps include in Nationwide Permit #12 a standard mitigation ratio of 1:1 for utility line construction activities above a ½ acre threshold. In addition, AGA recommends that the Corps allow companies to proceed with construction while resolving the complex details of compensatory mitigation during the activities and/or after the activities have been completed. The removal or minimization of such burdens would further the goal of Executive Order 13212 to expedite energy-related projects.

9. Nationwide Permit Prohibitions within "Designated Critical Resource Waters": Nationwide Permit General Condition #25 states that Nationwide Permit #12 (Utility Line Activities) are not authorized within "critical resource waters" with certain exceptions. The Corps defines "critical resource waters" to include critical habitat for Federally listed threatened or endangered species, state natural heritage sites, outstanding natural resource waters. Other waters officially designated by a state as having particular environmental or ecological significance may also be designated as "critical resource waters" after notice by the District Engineer and opportunity for public comment. Given the vast designation of numerous streams as critical habitat for various threatened or endangered species, this prohibition will be triggered by many routine natural gas utility activities. General Condition #25 and General Condition #11 provide that the District Engineer must approve NWP #12 activities within critical habitat after a determination has been made that there will be no adverse impacts and the U.S. Fish & Wildlife Service has concurred with those findings. This conditional prohibition represents a significant burden to energy related projects considering that biological experts must be engaged to make these determinations with respect to many routine activities that will have only minimal impacts. NWP 12 requires the utility to restore original contours, and this further minimizes any adverse impact on critical habitat. AGA recommends that the Corps exempt utility activities in such areas affecting ½ acre or less from the prohibition in General Condition #25. Such projects would have only minimal impacts and should be allowed under NWP 12 without a requirement for notification or consultation. This would further the goal of Executive Order 13212 to expedite energy-related projects.

AGA is pleased that the definition of "critical resource waters" does not include Clean Water Act § 303(d) impaired stream segments or those stream segments where a Total Maximum Daily Load

(TMDL) has not been developed. This change from previous proposals will help expedite energy projects and reduce administrative burdens.

10. Fills Within 100-year floodplains: AGA supports the Corps' proposal to delete the notification requirement and requirement to document compliance with Federal Emergency Management Agency (FEMA) requirements within 100-year flood plains. The removal of this burden will further the goal of Executive Order 13212 to expedite energy-related projects. The Corps has set forth valid justifications for the deletion of these requirements. 66 Fed. Reg. at 42081 (August 9, 2001).

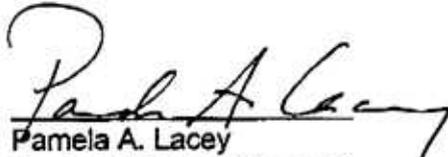
11. State Administered Section 404 Programs: Nationwide Permit #24 authorizes "State Administered Section 404 Programs" pursuant to 33 U.S.C. 1344(g)-(1) and/or Section 10 of the Rivers and Harbors Act of 1899. 66 Fed. Reg. 42087 (August 9, 2001). State assumption of 404 permitting programs and state and/or local regulation of isolated water bodies raises a number of issues. A comparison of wetland regulations in the two states that have assumed Section 404 permitting responsibilities reveals significant differences in how these two states define and regulate wetlands and other water bodies. If states across the country begin to "do their own thing", natural gas companies operating in multiple states will find it difficult to keep up with a complex matrix of non-uniform approaches to regulating water bodies. The minimization of such burdens would further the goal of Executive Order 13212 to expedite energy-related projects.

Again, AGA appreciates the opportunity to comment on the Corps of Engineers' proposed changes to the nationwide permit program.

Respectfully submitted,

AMERICAN GAS ASSOCIATION

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