Interstate Natural Gas Association of America

April 18, 2011

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

Re: INGAA's Comments Regarding the U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits, Dated February 16, 2011(76 FR 9174), Docket Numbers **COE-2010-0035** and/or **ZRIN 0710-ZA05**

Dear Docket Clerk:

The Interstate Natural Gas Association of America (INGAA) is a trade association of the interstate natural gas pipeline industry. INGAA member companies transport the vast majority of the natural gas consumed in the United States through over 185,000 miles of interstate natural gas pipelines.

INGAA hereby submits comments regarding the Proposal to Reissue and Modify Nationwide Permits (NWPs), dated February 16, 2011 (Proposed Rules). Under the Proposed Rules, the Corps would reissue most NWPs, General Conditions and Definitions with some modifications. The United States Army Corps of Engineers (Corps), however, would not reissue NWP 47, which applies to Pipeline Safety Program Designated Time Sensitive Inspections and Repairs. The Proposed Rules would also add two new NWPs and two new general conditions for onshore and offshore renewable energy facilities.

The operation and maintenance of natural gas pipelines sometimes requires obtaining NWPs, hence the Corps' proposal to reissue and modify such permits is of great importance to INGAA and its member companies. Over the years, INGAA has offered a number of comments concerning the nationwide permit program and appreciates the opportunity to submit the following comments as well.

Overall, INGAA has no objection to the Proposal to Reissue and Modify Nationwide Permits, including the elimination of NWP 47. INGAA members primarily use NWPs 3 and 12, often in conjunction with NWP 13, and our comments focus on those, including applicable General Conditions and Definitions. Our comments will detail the following suggestions:

1. **No Objection to Allowing NWP 47 to Expire, but the Concept that Emergency Activities Warrant Special Consideration Should Be Retained.**
2. **Clarity Is Needed to the Definition Of Mechanized Land Clearing and Loss of Waters to the United States.**
3. **Responses Regarding Information Deficiencies in Pre-construction Notifications Should be Specific and Timely.**
4. **Only Require Bottomless Culverts Where Demonstrated that Aquatic Life Movements Would Otherwise Be Adversely Affected .**
5. **The Corps Should Consider a NEW General Permit Fashioned after the FERC Blanket Certificate Program.**

Detailed Comments

1. **INGAA Does Not Object to Allowing NWP 47 to Expire, but Urges the Corps to Carry Forward the Concept that Emergency Activities Warrant Special Consideration.**

The Corps is proposing not to reissue NWP 47, which authorized activities in waters and wetlands associated with time sensitive inspections and repairs of pipelines. Specifically, NWP 47 authorized activities required for the inspection, repair, rehabilitation, or replacement of any currently serviceable structure or fill for pipelines that have been identified by the U.S. Department of Transportation (DOT) Pipeline and Hazardous Materials Safety Administration's (PHMSA) Pipeline Safety Program as time-sensitive (see 49 CFR parts 192 and 195) as well as additional maintenance activities accomplished in conjunction with the time-sensitive inspection and repair activities. Further, the terms of NWP 47 specifically forbid Corps Division engineers from requiring "pre-construction notification (PCN) or other actions that would delay time sensitive inspections and repairs." However, NWP 47 relied on a reporting tool that was never fully developed by the DOT.

In the absence of NWP 47, INGAA members generally were able to use either NWP 3, Maintenance, or NWP 12, Utility Line Activities, to authorize pipeline maintenance and repair activities, often in conjunction with NWP 13, Bank Stabilization. In some cases, however, members had to justify an expedited review process. Additionally, the terms of NWP 3 and 12 do not limit the ability of Corps Division engineers to require PCN submittals in association with pipeline repair and maintenance activities, and Regional Conditions have been adopted in many states that actually require PCN submittals for any activity that would be authorized by NWP 12. While INGAA does not oppose eliminating NWP 47, we do not wish to lose the concept that emergency pipeline maintenance and repair activities, especially those related to pipeline safety, should be afforded special consideration. Specifically, the Corps should include language in NWP 3, NWP 12, and NWP 13 that precludes the need for PCN submittal or other actions that would delay time-sensitive pipeline repairs, inspections, rehabilitations and replacements required for public safety such as "immediate repairs," "Corrective Action orders," and "Safety Orders," as defined by PHMSA[1].

.

2. **Clarity Is Needed to the Definition of Mechanized Land Clearing and Loss of Waters to the United States.**

Definition – Mechanized Land Clearing

One of the notification provisions governing the use of NWP 12 indicates that pre-construction notification to the applicable district engineer is required if the activity involves mechanized land clearing in a forested wetland for the utility line right-of-way. INGAA believes that the intent of this provision is to minimize the potential for significant ground disturbance, and associated potential for discharge of dredged material, within wetland areas during land clearing activities (e.g., raking or grubbing of stumps and root systems within a utility right-of-way). However, INGAA notes that some districts have interpreted this provision of NWP 12 to mean that any utility right-of-way clearing activity utilizing motorized equipment requires pre-construction notification if conducted in a forested wetland. In some instances, even the use of chain saws has been interpreted to represent "mechanized land clearing" subject to pre-construction notification.

The Corps' regulations at 33 CFR 323.2(d)(ii) specify that the term *discharge of dredged material* excludes "activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material." As such, INGAA believes that utility right-of-way clearing activities using those types of equipment that cut timber at

[1] 192.711 Transmission lines: General requirements for repair procedures, 192.933 (2)(d) Immediate repair, Part 190 Pipeline Safety Programs and Rulemakings Subpart B Enforcement (190.233 Corrective Action Orders), Subpart C Procedure for Adoption Of Rules (190.239 Safety Orders).

or above ground level, avoid substantial disturbance of root systems, and typically result in little or no ground disturbance (e.g., feller buncher, chain saws, etc.), thereby minimizing the potential for a discharge of dredged material, should not result in the need for pre-construction notification. Accordingly, INGAA recommends that the Corps modify Section E, Definitions, of the NWP regulations to include a definition of mechanized land clearing. INGAA further recommends that this definition exclude those activities that involve only the cutting or removal of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material, consistent with 33 CFR 323.2(d)(ii).

Definition – Loss of Waters of the United States

Section E, Definitions, of the Nationwide Permit program defines a "loss of waters of the United States" as those "waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody." The definition goes on to add that "waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States."

Restoration of pre-construction contours in waters of the United States (both wetlands and waterbodies) is a standard impact avoidance and minimization strategy for natural gas pipeline construction projects.[2] Further, the description of NWP 12, Utility Line Activities, which is commonly used to authorize natural gas pipeline construction projects states that the "NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in pre-construction contours." However, INGAA notes that many Corps districts have interpreted such practices as temporary impacts and/or conversion of one dominant wetland vegetative status to another (e.g., forested wetland converted to emergent wetland within a maintained utility right-of-way) to represent a "loss of waters of the United States" even when pre-construction contours and elevations are restored. In some instances, districts have even indicated that conversion of greater than ½ acre of forested wetland would preclude a natural gas pipeline project from eligibility for authorization under the Nationwide Permit program altogether, even though no waters would be permanently filled, flooded, excavated, or drained. Although INGAA concurs that conversion of one wetland type to another may represent a long-term adverse wetland impact potentially subject to compensatory mitigation (if exceeding 1/10 acre), INGAA does not believe that such conversion represents a loss of wetland. Further, such interpretation seems in direct conflict with the definition of a loss of waters of the United States and the intent of NWP 12.

Accordingly, INGAA recommends that the definition of loss of waters of the United States, as defined in Section E, Definitions, of the Nationwide Permit program be modified to state that "waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction (e.g., wetlands and waterbodies impacted by utility lines authorized pursuant to NWP 12), are not included in the measurement of loss of waters of the United States.

3. Responses Regarding Information Deficiencies in Pre-construction Notifications Should Be Specific and Timely

INGAA supports a pre-construction notification process that will allow adequate time for completeness evaluations, but minimize unnecessary project delays. INGAA believes the 30-day

[2] The Federal Energy Regulatory Commission's (FERC) *Wetland and Waterbody Construction and Mitigation Procedures*, which interstate natural gas pipelines installed pursuant to FERC authority must comply with, include multiple best management practices designed to minimize the extent and duration of natural gas pipeline construction-related disturbance within wetlands. Those practices include such measures as limiting the construction right-of-way width through wetland areas; cutting woody vegetation at ground level to leave the root systems intact; installation of trench plugs to maintain wetland hydrology; and stripping and restoration of topsoil layers to preserve native seed stocks and enhance revegetation.

completeness review schedule outlined in paragraph (a) of General Condition 30, Pre-Construction Notification (PCN), should provide adequate time to make an informed evaluation. In practice, however, some District Offices have abused the intent of the specified review period by deeming an application incomplete within 30 days of PCN submittal, yet failing to describe the specific deficiencies that should be addressed in order for the PCN to be deemed complete. In some cases a response simply indicates that an application is deficient, which results in an extended review process with no indication of a defined end date or applicable regulatory clock. Additionally, and even when a complete PCN submittal is provided, some District Offices simply send a prospective permittee an acknowledgement that a PCN submittal has been received (e.g., postcard assigning a project identification number). These District Offices interpret the issuance of such an acknowledgement as a "written notice from the district or division engineer," as detailed under paragraph (a)(2) of the General Condition 30, such that a prospective permittee would be unable to proceed with their project even though 45 calendar days could pass without receiving a written notice of PCN deficiencies or a determination that an individual permit is required. These practices seem inconsistent with, and appear to circumvent, the intent of the NWP program, which was designed to provide an administratively efficient and timely means of authorizing projects that would have minimal adverse environmental effects.

While INGAA does not wish to rush the PCN review process, more accountability is needed in the schedule and duration of that review process. Specifically, INGAA suggests that District Offices be required to formally identify any PCN deficiencies in writing within 30 days of a PCN submittal. Further, if 45 calendar days have passed since a PCN submittal is made and a prospective permittee has not received written notice of either formally identified deficiencies or a determination that an individual permit is required, then the PCN submittal should self execute and the permittee should be allowed to proceed with the proposed activity. Within this timeframe, the Corps can allow other agencies (i.e. U.S. Fish and Wildlife Service, State Historic Preservation Offices, and the U.S. Environmental Protection Agency) adequate time to provide comments and the permittee has some assurance of a timely review. We believe this is a reasonable request as NWP permits are designed to cover typical and routine activities, which should not be overly difficult to make a determination on within the suggested timeframe.

4. Only Require Bottomless Culverts Where Demonstrated that Aquatic Life Movements Would Otherwise Be Adversely Affected.

Under General Condition 2, Aquatic Life Movements, the Corps proposes to insert a statement requiring that bottomless culverts be used unless sub-grade soil instability would make it unsafe to do so. The bottom of any culvert would also have to be below the grade of the stream bed unless that bed consists of bedrock or boulders. INGAA agrees that use of bottomless culverts could be of benefit in perennial streams where aquatic life movements of imperiled or sensitive species are of particular concern (e.g., streams supporting runs of anadromous fishes, areas of protected species habitat, or other sensitive waters), but a requirement for bottomless culverts on ephemeral and intermittent streams or other waterbodies where aquatic life movement is not of concern does not seem practical or beneficial. INGAA is also concerned that the requirement for adoption of bottomless culverts could be impractical, as the availability of bottomless culverts, particularly in a range of appropriate sizes, could be of real concern. While cylindrical corrugated metal culvert pipe is ubiquitous and widely available, the same is not true of bottomless culverts, particularly in some portions of the country. Additionally, the adoption of bottomless culverts could also conflict with the design requirements of some state and/or regional construction stormwater manuals.

INGAA concurs that the use of bottomless culverts may be appropriate in some instances, but it would seem that such use would be more appropriately mandated in a more narrowly defined set of circumstances (i.e., perennial streams where aquatic life movements of imperiled or sensitive species are identified as a resource issue of particular concern) or on a regional basis (e.g., through adoption of applicable Regional Conditions). INGAA instead proposes that the NWP program, and any changes to General

Condition 2, Aquatic Life Movements, place the emphasis on proper culvert installation that minimizes potential for impacts on downstream flow and thereby provides for aquatic life movement (i.e., requirements to place the bottom of the standard culverts at or below the level of a stream bed).

5. **The Corps Should Consider a <u>NEW</u> General Permit Fashioned after the FERC Blanket Certificate Program.**

While INGAA is supportive of these proposed renewals and changes, INGAA believes that they could be strengthened and streamlined considerably by creating a new NWP for linear natural gas facility infrastructure. INGAA recommends that the Corps consider modeling a new general permit after the blanket certificate permitting process currently used by the Federal Energy Regulatory Commission (FERC). Under section 7(c) of the Natural Gas Act, the FERC may issue a blanket certificate that allows a natural gas company to undertake an array of routine activities without the need to obtain a case-specific certificate (authorization) for each individual project. The blanket certificate program provides an administratively efficient means to enable a company to construct, modify, acquire, operate, and abandon a limited set of natural gas facilities, and to offer a limited set of services, provided that each activity complies with constraints on costs and environmental impacts set forth in the FERC's regulations. By creating a new general permit modeled after the FERC's successful program for natural gas facilities, the Corps can create administrative efficiencies both for itself and for the regulated community, while continuing to protect rivers, streams and waters of the United States.

It is our understanding that the Corps has already discussed the above concept with representatives of one of our members (namely NiSource Inc.). INGAA encourages the Corps to continue that dialogue and would appreciate the opportunity to meet with the Corps to discuss such a streamlining initiative. INGAA commits to meet with representatives of the Corps and to assist in the development and implementation of a mutually acceptable and beneficial program.

INGAA appreciates your consideration of these comments and looks forward to your response. Please contact me at 202-216-5935 or lbeal@ingaa.org if you have any questions. Thank you.

Sincerely,

Lisa S Beal

Lisa Beal
Vice President, Environment and Construction Policy
Interstate Natural Gas Association of America