

November 30, 2021

Sent Via U.S. Postal Service Certified Mail, Return Receipt Requested

U.S. Army Corps of Engineers
Lieutenant General Scott A. Spellmon
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Washington, DC 20314-1000

U.S. Army Corps of Engineers
Wilmington District Office
69 Darlington Avenue
Washington, NC 28403

U.S. Army Corps of Engineers
South Atlantic Division
60 Forsyth Street SW
Atlanta, GA 30303-8801

RE: 60-Day Notice of Intent to File a Citizen Suit under Clean Water Act Section 505(a)(1) for the U.S. Army Corps of Engineers' Failure to Comply with the Clean Water Act's Provisions Regulating Dredging Activities

Dear Lieutenant General Spellmon:

This letter is to notify the U.S. Army Corps of Engineers ("USACE") that Friends of the Earth, Inc. and Winyah Rivers Foundation, Inc. (d/b/a Winyah Rivers Alliance) ("Potential Plaintiffs") intend to file suit against USACE ("Potential Defendant") for violations of the Clean Water Act.

Unless the violations described below are fully redressed, Potential Plaintiffs will file a lawsuit under the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365 and 40 C.F.R. §§ 135.1 to 135.5, after the applicable notice periods have expired. Potential Plaintiffs will seek injunctive relief, civil penalties, fees and costs of litigation, and such other relief as the court deems proper to address and correct the ongoing violations described below.

I. Background

Nationwide Permits ("NWP") are a type of general permit issued by the U.S. Army Corps of Engineers ("USACE") that authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Such permits are intended to authorize only those activities that will result in no more than minimal individual and cumulative adverse environmental effects. NWPs have been issued and reissued several times since their initial issuance in 1977 (42 Fed. Reg. 37122). Relevant to this letter are the two most recent reissuances of NWP 12 in 2017 (82 Fed. Reg. 1860) and in 2021 (86 Fed. Reg. 2744).

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As adopted in 2017, NWP 12 authorized discharges of dredged or fill material into waters of the United States that resulted from “[a]ctivities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.”¹ Utility lines and associated facilities included oil and natural gas pipelines and their associated infrastructure. NWP 12 included a pre-construction notification (“PCN”) requirement, consistent with general condition 32, that required a permittee to submit a PCN to USACE’s district engineer and to the relevant state agency that issues Clean Water Act Section 401 Certifications when certain criteria were met. In particular, “discharges that result in the loss of greater than 1/10-acre of waters of the United States” triggered the PCN requirement.

PCNs are designed to give the USACE enough information to evaluate proposed NWP activities on a case-by-case basis to determine whether they will result in more than minimal, adverse individual and cumulative environmental impacts. 86 Fed. Reg. 2745. Individual, or separate, impacts refer to those “direct and indirect adverse environmental effects caused by a specific activity authorized by an NWP.” *Id.* Cumulative impacts refers to “the collective direct and indirect adverse environmental effects caused by all the activities authorized by a particular NWP during the time period when the NWP is in effect . . . in a specific geographic region.” *Id.* Upon completing review of a PCN, the USACE’s district engineer must prepare a final decision document that provides the district engineer’s findings, including whether more than minimal individual and cumulative impacts will result from granting the NWP authorization. *Id.* In the event that a proposed project will result in greater than minimal individual and cumulative impacts, then the USACE must require application for an individual, or standard, permit.²

On October 11, 2019, Piedmont Natural Gas (“PNG”) submitted its PCN³ for its two new Robeson Liquefied Natural Gas (“RLNG”) pipelines that are intended to serve the RLNG Facility, a 1.6 billion cubic foot LNG peaking facility that sits on a 685-acre property formerly used primarily for silviculture.⁴ The particular area PNG chose for this RLNG project is of significant cultural importance for the Lumbee Tribe of North Carolina, in large part because of known, documented

¹ <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll7/id/8593>

² See <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/#:~:text=An%20individual%2C%20or%20standard%20permit,more%20comprehensive%20public%20interest%20review.>

³ <https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=1006168&dbid=0&repo=WaterResources&searchid=53583de0-e941-4074-931c-b959d5a1738d&cr=1> (corresponding to USACE DA Number SAW-2019-01960, although this number was not provided in the PCN).

⁴Pre-Construction Notification (PCN) Form, <https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=834072&dbid=0&repo=WaterResources> (corresponding to USACE DA Number SAW-2018-02320) (submitted on March 8, 2019). The RNLG facility itself sits on approximately 50 acres and resulted in 78 permanent stream impacts.

historic sites in PNG’s project area.⁵ The Lumbee have pre-Revolutionary War origins in Robeson County and have had and continue to have tremendous cultural and historical influence in this region, including in the areas surrounding and including the LNG pipeline project area.⁶ Persons who identify as American Indian account for over 42% of the population of Robeson County, which itself is a majority minority community.⁷ This also is an area that has flooded repeatedly over the past several years despite a relatively low assessed flood risk.

The pipeline project includes one 24-inch pipeline and one 8-inch pipeline that will be installed parallel to each other along a 4-mile corridor, with a 70-foot-wide easement. Per the PCN, the pipeline project also includes a 1.3-acre meter station, a 0.5-acre tap station, and an approximately 1,200-foot long by 20-foot wide permanent, gravel access road. PNG estimated that this project will result in the permanent conversion of the approximately 3.5 acres of palustrine forested wetlands to palustrine emergent wetlands.

Further, in response to the question in the PCN asking whether there are “any other NWP(s), regional general permit(s), or individual permit(s) used, or intended to be used, to authorize any part of the proposed project or related activity?” PNG answered “no,” even though it had previously applied for an NWP and 401 Certification and submitted its PCN for the RLNG Facility. By answering “no” PNG failed to identify the associated RLNG Facility—the entire basis for needing to construct the two pipelines—for which it had applied for an NWP and submitted a PCN months earlier.

This failure on PNG’s part, however, does not excuse USACE from assessing the cumulative impacts of all NWP 12-authorized facilities, including PNG’s RLNG Facility and any others within the geographic region. At most, the record supporting USACE’s authorization includes the following statement, which appears to be unmodified form language from the “Memorandum for Record” template: “The activity, with the required mitigation, will result in no more than minimal individual and cumulative adverse effects on the aquatic environment and will not be contrary to the public interest, provided the permittee complies with the special conditions identified above.” This statement is not supported by the documents in this authorization’s record.

For the RLNG pipeline project, cumulative impacts include the watershed’s decreased capacity to control flooding as a result of permanently-destroyed or transformed wetlands. Further, a cumulative impacts analysis must take into account the RLNG pipeline project’s individual impacts together with the impacts of other NWP 12-authorized projects in the region. Based on data from March 19, 2017 to March 18, 2019, USACE expects that NWP 12 will be used

⁵ PNG, Phase I Archaeological Survey Report, <https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=834079&dbid=0&repo=WaterResources&searchid=ddf38614-24b1-47e0-8454-9f8921e750c9> (last visited Sept. 5, 2021).

⁶ See, e.g., N.C. Museum of History, *North Carolina American Indian History Timeline*, <https://www.ncmuseumofhistory.org/american-indian/handouts/timeline> (last visited Sept. 6, 2021); Lumbee Tribe of North Carolina, *History and Culture*, <https://www.lumbeetribe.com/history--culture> (last visited Sept. 6, 2021).

⁷ U.S. Census Bureau, *Quick Facts, Robeson County, North Carolina*, <https://www.census.gov/quickfacts/robesoncountynorthcarolina> (last visited Oct. 28, 2021).

approximately 8,110 times per year on a national basis.⁸ This information suggests that a significant number of NWP 12 authorized projects may already exist in the region. However, this information is absent from the record supporting the RLNG pipeline project's authorization.

USACE issued the NWP 12 authorization for the RLNG pipeline project on February 20, 2020. Shortly thereafter, the U.S District Court for the District of Montana vacated NWP 12 for violating Section 7(a)(2) of the Endangered Species Act's consultation requirements. *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, 454 F. Supp. 3d. 985 (D. Mont. Apr. 15, 2020) (pending consolidated appeals before the 9th Circuit Court of Appeals). The same court later amended this order to limit its application to unconstructed natural gas pipelines, such as those PNG proposed to construct. *Northern Plains v. U.S. Army Corps of Engineers*, 460 F. Supp. 3d 1030 (D. Mont. May 11, 2020). As Potential Plaintiff Friends of the Earth has previously communicated⁹ to the Potential Defendant before PNG had completed pipeline construction, a court's vacatur of one NWP 12 authorization effects a vacatur of all NWP 12 authorizations. *See, e.g., Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C.Cir.1989)).

On March 15, 2021, a USACE final rule that amended the 2017 NWP 12 ("2021 NWP 12") went into effect that purports to address the issues raised in the *Northern Plains* litigation.¹⁰ In relevant part, the 2021 NWP 12 includes the same PCN criterion quoted above in reference to the 2017 NWP 12, and therefore the USACE still is required to determine that no more than minimal adverse environmental impacts will result from an activity authorized under the updated rule. The 2021 NWP 12 also establishes various expiration dates that may apply to an authorized activity. 86 Fed. Reg. 2747. As a general rule, the 2017 NWP 12 expired on March 15, 2021, and the 2021 NWP 12 went into effect on the same day. For activities previously authorized under the 2017 NWP 12 and that still qualify for NWP authorization under the 2021 NWP 12, the 2017 verification letter continues to be in effect until the expiration date indicated in that letter. For the RLNG pipeline, that expiration date would be March 18, 2022. However, if the previously-authorized activity no longer qualifies for authorization under the 2021 NWP 12, then the 2017 NWP 12 authorization will remain in effect for 12 months so long as the authorized activity has commenced.

These general timing rules do not support USACE allowing for activities previously authorized under the legally-deficient 2017 NWP 12 to continue in force without further review and

⁸ USACE, *Decision Document Nationwide Permit 12* at 108, <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/16834> (last visited Oct. 28, 2021).

⁹ Friends of the Earth, Letter to Mr. Gary Beecher, Project Manager, U.S. Army Corps of Engineers, July 13, 2020, https://1bps6437gg8c169i0y1drtgz-wpengine.netdna-ssl.com/wp-content/uploads/2020/07/2020-7-13-US-ACE-demand-ltr_FINAL-signed.pdf.

¹⁰ Pending litigation—to which Potential Plaintiff is a party—challenges the 2021 NWP 12's compliance with the Endangered Species Act, National Environmental Policy Act, and Clean Water Act. *Center for Biological Diversity et al. v. Lieutenant General Scott A. Spellmon et al.*, Case No. CV-21-47-GF-BMM (D. Mont. May 3, 2021). The outcome of this litigation may affect the validity of current NWP 12 authorizations.

verification. Publicly-available documents show that USACE has not made any determination as to whether PNG's authorized activities qualify under the 2021 NWP 12. USACE records obtained through a FOIA request and via the North Carolina Department of Environmental Quality's permit database also indicate that PNG has not submitted additional documentation related to its NWP 12 authorization. Until such actions are taken by Potential Defendant, PNG is operating/constructing its RLNG pipeline in violation of Clean Water Act Section 404, and USACE is allowing PNG's illegal discharge of dredged and filled materials into waters of the United States.

II. Legal Claim

PNG's continued construction and/or operation of its RLNG pipeline without proper NWP 12 authorization violates the Clean Water Act Section 404. 33 U.S.C. § 1344.

USACE, per its own literature and mission statement, is responsible for the stewardship and sustainable development of the waters of the United States where dredging and filling activities occur, and for reducing disaster risk, but continues to allow PNG's RLNG pipeline project to proceed despite being authorized under the legally-deficient 2017 NWP 12.

Section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1), authorizes suit against any person who is alleged to be in violation of the Act. Accordingly, the Potential Plaintiffs are providing this letter as notice of their intent to bring suit against the USACE for its authorization of these actions.

Dates of violations and structures and/or infrastructure involved: PNG has been constructing and/or operating its RLNG pipeline since February 20, 2020 when the USACE authorized those activities under the 2017 NWP 12. Additional specific dates will be proven in litigation, if litigation is necessary.

III. Parties Giving Notice and Their Counsel

The parties (Potential Plaintiffs) giving notice of this claim are as follows:

Friends of the Earth
1101 15th Street NW
11th Floor
Washington, DC 20005
Telephone: (202) 783-7400

Winyah Rivers Alliance
P.O. Box 554
301 Allied Drive
Conway, SC 29528
Telephone: (843) 349-4007

The Potential Plaintiffs are represented by the legal counsel identified below:

James L. Conner II
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Calhoun, Bhella & Sechrest, LLP
4819 Emperor Boulevard, Suite 400
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Please contact the above-named legal counsel as soon as possible if you wish to discuss the allegations set forth in this letter. If this matter is not resolved to our satisfaction, we will file suit on or after the sixtieth day following the date the U.S. Postal Service records delivery of this letter.

IV. Conclusion

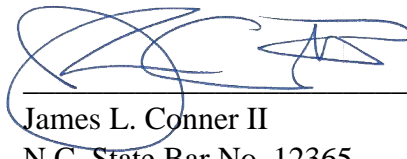
We welcome the chance to meet or speak with USACE or its representatives within the sixty-day notice period to discuss solutions that will resolve these issues. Simply have your legal counsel contact the undersigned to arrange such discussions.

As discussed above, if the Potential Defendant does not either fully redress their respective violations of the Clean Water Act or work out acceptable solutions with us within sixty days, Potential Plaintiff intends to pursue a citizen suit under Section 505(a)(1) of the Clean Water Act, seeking injunctive relief, appropriate monetary penalties, fees and costs of litigation, and such other relief that the court deems proper. Please let undersigned counsel know if you have taken any steps to rectify the underlying cause of the violations described above, or if you believe anything in this letter is inaccurate.

If USACE does not notify us of any remedial actions or inaccuracies within the sixty-day period, the Potential Plaintiffs will assume that no such actions have been taken, that the information in this letter is accurate, and that such violations are likely to continue.

Respectfully submitted,

CALHOUN, BHELLA & SECHREST, PLLC



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