May 27, 2022

Michael L. Connor
Assistant Secretary of the Army (Civil Works)
Headquarters, U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Submitted via Federal eRulemaking Portal

Comments to the U.S. Army Corps of Engineers
From: Protect Our Aquifer, Memphis, TN

RE: Renewal of Nationwide Permit #12
Subject: Docket ID No. COE-2022-0003

Protect Our Aquifer (POA) is a local nonprofit whose mission is to protect, conserve, and preserve the Memphis Sand Aquifer (MSA) for all those living in this region and for generations to come. Our aims include better management of local water resources and the remediation of contaminated sites that may harm the MSA. We found neither of these aims honored in the Nationwide Permit #12 Determination that we experienced in the Byhalia Pipeline regulatory process.

With personal exposure to the fast-track, limited approach of the Corps, POA believes that the following are significant problems with the NWP #12 process and must be addressed.

The Pre-Approval Process
As we understand NWP #12, its conditions, approvals, range, and purview are all decided years in advance of any actual project. This negates the role of local input and participation. It makes a mockery of public comments and consultation with local authorities. You cannot set regulations for a generalized project. This ignores the unique physical, ecological,
engineering, and dangerous conditions that will be different at each specific site. Designers, engineers, architects, and POA strive to understand and respond to site-specific particulars.

NWP #12 prior approvals based on General Conditions abandons logic and acts as a barrier to a true understanding of facts as they appear at specific locales. They seem to be counterproductive to the aim of the Corps’ charge—to rule on the dangerous transmission of oil and gas products.

The NWP #12 pre-approval process shuts affected communities out of the decision-making process by relying on public comment opportunities offered years before projects are proposed—at a time when communities are unaware that a project may eventually be slated for their neighborhood. The Corps cannot meaningfully assess the environmental effects of specific projects before it knows what those projects are, where they will be located, how they will be constructed, and other essential information about specific sites. This is a poor substitute for a thorough and complete review of site-based conditions, especially those that may harm people, destroy property values, or wound sensitive ecological conditions.

Place matters when citing projects. When conducting a permitting process, the Corps must source details locally—because it will be the locality that pays the price.

*The PCN Process*

The Corps uses the “pre-construction notification” process as cover for certain decisions and justification for avoiding certain details. In what regulatory universe does one ask for and rely on information supplied by the regulated party? It should never be used as a justification for lack of due diligence on the part of a regulatory agency.

The Corps must perform a full accounting of the social, scientific, and resource risks when authorizing use of NWP #12 for each site and project. That analysis should make it clear exactly what risks it has examined, how it has examined them, and the level of uncertainty in its conclusions. In this way, politicians, agencies, developers, and industry interests will
not be able to say “the Corps gave its go-ahead,” because the limits of the Corps’ analysis and approval will be clear.

In a robust and realistic public comment process, such information as the PCN should be assessed and vetted by both the Corps and the public.

A Public Process
NWP #12 barely engages the public, local authorities, or certified experts. The public has a right to know, a right to understand, and a right to be involved when a project like this shows up in their backyard. Thorough study and knowledge of the physical realities must take into account the connectivity inherent in this project. Dangers and disasters must be considered, not ignored, before any shovel hits the ground.

It has been established through over 50 years of environmental legislation that public notice, public hearings, and public comments are at the core of a safe and successful process. Including the public (and local leaders) in the planning process is not just a way to drag out large public infrastructure projects. They are designed to take advantage of local wisdom, avoid dangerous mistakes (often revealed in site-specific info), and engage local communities as partners in projects that can upend their lives—even putting their lives at risk.

In its attempt to fast-track dangerous projects, NWP #12 minimizes such input.

Climate Considerations
The fast-track effort of the Corps to site and construct oil and gas pipelines is another aim at odds with the current stated goals of the Biden administration. NWP #12 greenlights construction of fossil fuel pipelines with no accounting of their harmful greenhouse gas emissions. This is another part of the Corps’ inability to rule on the science and sense of such projects.

By locking in more greenhouse gas emissions, NWP #12 exacerbates the effects of climate change, including increasing severe weather, droughts, and flooding. NWP #12 also makes
severe weather, droughts, and flooding worse by disrupting functioning ecosystems that would otherwise help keep communities resilient. Again, Communities of color and Indigenous communities will suffer the brunt of these effects.

Worldwide, we are beginning to understand the narrow window of time to reduce greenhouse gas pollution and avoid the worst effects of climate change. At the same time, we have feasible alternatives to more oil and gas. It is reckless to fast-track new pipelines that will lock in decades of unnecessary greenhouse gas emissions. The Corps estimates NWP 12 will be used thousands of times over the next five years. The permit therefore fast-tracks a massive buildout of oil and gas pipelines with no climate analysis, which is inconsistent with President Biden's goals to reduce greenhouse gas pollution and to consider climate impacts of agency decision-making.

The Corps should not use NWP #12 for any new or expanded gas or oil pipelines.

Disclaimers
The Corps' Determination was most harmful. The Corps holds a unique position of authority, quoted often in regard to this and other pipelines. It's good to go if the Corps says so. We encountered this attitude all through our saga with Byhalia Pipeline. In discussions with City Council, County Commission, Mayoral Administrations, business interests, and even local residents, we had to explain that the Corps had not ruled on all types of connected—but not obligatory—features surrounding this project. Even one year after the Project came to a halt, Tennessee legislators—in passing a law to override local control of pipelines—argued: The Byhalia Pipeline was approved by the Army Corps.

The Corps should be explicit in their NWP #12 process what areas, what resources, and what related or connected features in a particular project were not studied or factored into their Final Determination.

Our Local Example of the Failure of NWP #12
For almost two years, regulators, authorities, and citizens of Shelby County wrestled with the Byhalia Pipeline and its potential to harm local resources (like the Memphis Sand
Aquifer) and people along the proposed path (through 38109, one of the poorest areas of Shelby County).

The Corps, in their review of the Byhalia Pipeline proposal, did not give sufficient attention to several critical connections. Key local details that put communities and resources at risk were never considered in the Corps' Determination. Remarkably, many of these details (such as the Memphis Aquifer) are directly connected to elements of the Corps' analysis. The Corps, through the narrow window of the NWP #12 process, explained away any connection or charge to rule on these related elements. Remarkably, no other regulatory agency or local authority ruled on these ecological issues or climate justice matters, even though all of these agencies and authorities are bound by oath to protect the people and resources of this political jurisdiction. Here are several critical areas left unexplored or unexplained in the Byhalia Pipeline saga.

The Aquifer
The Memphis Sand Aquifer, named for the city that sits above it, supports 1.4 million people with clean, healthy drinking water and ready sources of water for hundreds of commercial uses from making coffee and beer to cleaning delicate million-dollar machinery. Our region depends upon the health and bounty of the MSA.

In answer to a letter from our Representative Steve Cohen (10 February 2021), the Corps said their work “Specifically excludes groundwater and recharge zones.” In this same letter, the Corps’ admits most comments they received concerned the MSA. Rep. Cohen asks: “(W)ould an additional environmental review be advantageous?” Putting the blinders on, the Corps’ replies: “Additional environmental reviews are not required...There is no cumulative adverse impact.”

How can the Corps say it conducted a study and ignore most of what is pertinent to the study? The Corps ignored this aquatic fact. If our community did not rise to the occasion, we would have put the MSA at risk.

The Aquifer System
Beyond direct use of the Aquifer waters, the Aquifer is the completion of a water cycle that involves—in our unique area of west TN and in abundance in southwest Shelby County where this pipeline was planned—a whole host of aquatic features: ponds, lakes, upper aquifers, deep aquifers, stormwater, sewers, cutoffs, man-made streams, large rivers (three in the County), and the Mississippi River System. This Aquifer System also includes recharge zones that feed the aquifers and a groundwater system that connects it all.

The Corps ignored these aquatic connections, putting all of it at risk.

**Contamination Issues**
The actual path of this proposed pipeline ran directly over a sensitive area for pollution, contamination and a blending of problems that already exist. Legacy pollution in soils adjacent to the pipeline such as arsenic and lead from burning coal runs throughout the pipeline path according to the scientists at CAESER at the University of Memphis who conduct research along this path.

A casual glance at the contamination data available at the State level indicates a pock-marked mess of dangerous, moving substances on soils and shallow groundwater in the region. Much is known about the connections and sharing of pollutants between the shallow groundwater and the MSA along this route; much more is unknown as the scientists have theorized about breaches to the east of the pipeline route and actual physical connections with the Mississippi River to the west. CAESER has advocated for more research in the area of the Davis Well Field—the wellhead protection zone crossed by this pipeline.

Throughout this process, the Corps also refused to evaluate the impacts of oil and gas pipeline spills, including impacts on communities’ clean drinking water. History has shown spills and leaks as a regular feature of pipeline projects.

All of this was sidestepped and ignored by the Corps in this process.

*The Davis Wellfield*
Most people in Memphis and in this part of the world cherish their pristine, sweet, pre-industrial, pre-plastic, 2000-year-old drinking water. The deep drinking water aquifer (300 – 1000 feet deep) is understood as the main source of everyday water for the use of Shelby County families. From toilet water to dishwater to bath water to some of the sweetest, cleanest water in the entire world—the Aquifer is understood as our signature natural resource known all across the globe. Our utility—MLGW—pumps up to 200 million gallons a day for our area through a vast system of wells and pumping stations.

The proposed pipeline—fast-tracked through Permit #12—crossed directly over the Davis Field, within a quarter mile of four wells, feeding a system of over two dozen wells and a pumping station. This station supplies household water for residents of 38109 and much larger quantities of water to over twenty industries to the north and west of the path.

The Corps ignored the route of this pipeline over this sensitive public infrastructure that is protected by federal and state law though no regulator or pipeline official or local authority commented on or calculated the cost or risk that this project carried with it.

*The Pipeline Route*

The decision to run this pipeline route through southwest Memphis is in direct conflict with current federal policies and activities. The Biden Administration's effort to bring an end to these types of piling-on decisions is clear on the federal level. Indeed, through its Justice40 initiative, the Biden White House wants to decrease the burdens and exposure of disadvantaged communities to major environmental activities.

The problems of environmental decisions harm and haunt low-income communities throughout America. History has verified that major polluting industries and large public projects (e.g., power plants, wastewater treatment facilities, waste transfer stations) are usually located in disadvantaged communities. Such sites make bad neighbors and prey on the politically powerless and voiceless. Besides the obvious effect of lowering property values and decreasing the quality of life in these areas, research has demonstrated that such exposure to pollutants and contaminants generated by these sites create documented health risks for nearby residents.
The Boxtown area—380109—that was slated for the Byhalia Pipeline—is a textbook case of looking for the easiest route through one of the poorest communities in Shelby County. In this particular case, the Plains Pipeline company actually stated that the Boxtown route was “the point (path) of least resistance.

The history here and the conditions today tell a story of environmental injustice written across generations. Boxtown, a small corner of the world for railroad and agricultural workers from as far back as the early 1800s, began, became, and remains a hard scrabble, poor Black neighborhood. Even after 200 years—from actual slavery through reconstruction, Jim Crow and then the great awakenings of our current millennial—people here have endured industrial neighbors. Downwind and adjacent to Frank Pidgeon Park (site of a shuttered coal plant and new gas power plant as well as a major city wastewater treatment plant) and President’s Island (site of over two dozen major industrial plants) the residents of 38109 have endured over 60 years of environmental toxins.

As history clearly shows, these neighbors would not be tolerated in more expensive parts of any town. It was in the Boxtowns and Westwoods of the County that industry settled, power plants were built, and city plants were sited. Along comes a pipeline, another major industrial intrusion, and its builders want a path through the same neighborhood. The Corps ignored this history, and the lives of Memphians in 38109 were almost once again invaded by the public need for energy, without realizing the cost of such an intrusion and who bears it.

It is not good enough for a federal regulatory agency, charged with the health and safety of people and the environment, to ignore such history and such dangers.

**Conclusion**

Each one of these issues above should have alerted the Corps to the inadequacy of the fast-track, #12 approach. Taken together, these skips and misses on the part of the Corps demonstrate a lack of protection, an effort to ignore connectivity, and a decision to not even consider the communities along the path. We understand that these three issues are
not a part of the general conditions of the Corps’ work. This is exactly why NWP #12 is a blunt instrument that has no place in approving dangerous and potentially harmful public projects.

You cannot fast-track danger or risk to people or nature—especially when the plan is to move a dangerous product at high pressure in a wide swath, almost 50 miles long. “Due diligence” is of necessity a “slow-track” function. Besides studying and determining a complex of interactive natural features, a wise decision will of necessity involve the people along the route; the communities, cities, and counties at risk; and leaders responsible for citizen safety, private property, and public resources.

Talking with locals, conferring with leaders, understanding site-specific conditions must be standard procedures for such an undertaking. Because these are not part of the NWP #12 process, the Corps should require use of individual permits for new pipeline construction or expansion, and consider other methods to regulate and approve dangerous oil and gas pipelines in the future.

Ward Archer
President, Protect Our Aquifer

Sarah Houston
Executive Director, Protect Our Aquifer