

May 27, 2022

Re: U.S. Army Corps of Engineers, “Nationwide Permit 12”

To whom it may concern:

Thank you for the opportunity to comment on the formal review of Nationwide Permit (NWP) 12. As a professor at the Nelson Institute for Environmental Studies at the University of Wisconsin Madison, I am a social scientist whose research focuses on environmental governance, particularly industrial expansion including oil and gas pipelines. My graduate students and I have ongoing research projects on the U.S. Army Corps of Engineers (USACE) permitting processes for the Dakota Access Pipeline (DAPL), and our research shows that Tribes’ environmental and social concerns are often negated or overlooked. Approximately 200 water body crossings for DAPL’s construction were authorized under NWP 12.

NWP 12 allows minimal evaluation of the potential repercussions of pipeline construction. Because of the potential for severe environmental damage from an oil or gas leak, and for the destruction of sacred sites all along a pipeline’s pathway, pipeline constructions should be evaluated under the **standard individual permit** process, including thorough and careful **Tribal consultation** on potential effects of the **entire pipeline**.

At the very least, NWP General Conditions must be strengthened to require robust Tribal consultation in compliance with Section 106 of the NHPA as well as full consideration of potential impacts on treaty rights. In considering cultural heritage impacts, USACE’s Appendix C – which the Advisory Council on Historic Preservation (ACHP) has never approved – should not be used. Instead, USACE must defer to **ACHP guidance**, including ACHP definitions of the permit area and of traditional cultural properties, and requirements for Tribal consultation and for offering ACHP an opportunity to comment before any termination of consultation efforts.

However, while the elimination of, or changes to, NWP 12 would be a step in the right direction, my research revealed that more transformative change is needed, going beyond policy changes per se (Horowitz, 2022). To truly safeguard against further social and environmental damage to Tribal communities, USACE must:

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1. Evaluate and reform its institutional culture and perceived institutional mission.

USACE’s long-standing, mission-driven interest in the efficient completion of projects prioritizes national interest over Tribal concerns. This is an impediment to forging sensitive, trust-based relationships with Tribes.

USACE’s institutional culture has already begun to embrace greater respect for Tribes. Many

commanders, aware of Tribal sovereignty and sympathetic to Tribal concerns, have set the tone for their districts to implement regulations in a sensitive fashion.

Such awareness and empathy can be taught and encouraged through **training programs**, already offered through USACE's Tribal Nations Program. These training sessions should be expanded and made mandatory for all USACE employees. Trainers should include Tribal members, to ensure that Tribal perspectives are incorporated into training.

Pre-decisional consultation with Tribes must also be expanded. Where Tribes have developed their own **consultation protocols** (e.g. Yankton Sioux Tribe), these must be respected; when Tribes have not developed their own protocols, they should be provided resources and support to do so.

2. **Encourage a shift toward more balanced power relations, including those among different governmental bodies.** Congress and the Executive Branch can exert significant pressure over USACE since the Corps's budget has to be requested by the President and provided by Congress through annual and supplemental appropriations.

Intragovernmental power dynamics will doubtless be difficult to shift, although the path forward is clear. Simply put, **the Corps's budget needs to be allocated differently**, so as not to be dependent upon politicians' self-interest.

While such changes may seem a daunting task, and surely will not occur overnight, I argue that they are feasible. Altering institutional culture and power relations may seem a formidable challenge, but some changes are already underway and can be further encouraged and prioritized. Accounting for the bigger picture of how policy interacts with other factors is the only way to ensure that any policy changes are interpreted, implemented, and enforced in the way they were intended.

Sincerely,

A handwritten signature in black ink, appearing to read 'L. Horowitz', with a long horizontal line extending to the right.

Dr. Leah S. Horowitz

Work cited:

Horowitz, L.S. 2022. "Conflicts of interests" within and between elite assemblages in the legal production of space: Indigenous cultural heritage preservation and the Dakota Access Pipeline. *The Geographical Journal* 188(1): 91-108.