

Dec. 03, 2019

Clerk, U.S. District Court  
District of Montana  
Great Falls Division

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION

<p>NORTHERN PLAINS RESOURCE COUNCIL, et al,</p> <p>Plaintiffs,</p> <p>v.</p> <p>U.S. ARMY CORPS OF ENGINEERS AND LIEUTENANT GENERAL TODD T. SEMONITE (IN HIS OFFICIAL CAPACITY AS U.S. ARMY CHIEF OF ENGINEERS AND COMMANDING GENERAL OF THE U.S. ARMY CORPS OF ENGINEERS), DEFENDANTS,</p> <p>TC ENERGY CORPORATION, ET AL. DEFENDANT-INTERVENORS.</p> <p>Defendants.</p>	<p><b>Cause No. CV 19-44-GF-BMM</b></p> <p><b>MOTION OF EDISON ELECTRIC INSTITUTE AND UTILITY WATER ACT GROUP FOR LEAVE TO FILE AMICUS BRIEF LOCAL RULE 7.5</b></p>
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## **INTRODUCTION**

Edison Electric Institute (“EEI”) and Utility Water Act Group (“UWAG”) (“Electric Utility Amici”) respectfully move for leave to file an amicus curiae brief in support of Federal Defendants the United States Army Corps of Engineers (“Corps”), et al., as well as the Defendant-Intervenors. Defendants and Defendant-Intervenors do not oppose this motion. Plaintiffs have indicated through counsel they oppose this motion.

Plaintiffs ask this Court to declare unlawful Nationwide Permit 12 (“NWP 12”), which Electric Utility Amici’s members rely on for critical infrastructure projects across the nation. That permit is essential to the construction and maintenance of transmission and distribution lines that are vital to the resiliency of the nation’s electrical grid. Many of NWP 12’s provisions were developed specifically to address electric utility lines and ensure their minimal impact on environmental resources. Electric Utility Amici have participated in the development of NWP 12 since its initial issuance decades ago and believe their unique perspective will aid this Court’s understanding of the issues in this case, including the conditions and aspects of NWP 12 that support a determination that the permit is lawful. Electric Utility Amici therefore request that the Court permit them to file one amicus brief supporting Defendants and Defendant-Intervenors, no longer than 5,000 words, on or before January 6, 2020.

## **STATEMENT OF INTERESTS**

Electric Utility Amici are industry groups specifically representing the electric power sector. Their members often rely on NWP 12 to allow the efficient and environmentally-sensitive construction and maintenance of electric transmission and distribution lines, which sometimes unavoidably cross waters subject to Clean Water Act (“CWA”) jurisdiction. It is critical to the safe and reliable supply of electricity at an affordable price that those thousands of miles of transmission and distribution lines crossing our nation remain operational.

EEI is the national association of all U.S. shareholder-owned electric utilities. Its members provide electricity in 50 states and the District of Columbia for 220 million Americans. As a whole, the electric power industry supports over seven million jobs in communities nationwide. EEI’s members take environmental stewardship seriously and advocate for clear, reasonable regulatory programs.

UWAG is a voluntary, *ad hoc*, non-profit, unincorporated group of 183 individual energy companies and three national trade associations, which represent investor-owned utilities, publicly-owned utilities, and non-profit rural cooperatives. UWAG’s members operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. UWAG’s members engage in construction, operation, and maintenance of transmission and distribution lines and other operations that

sometimes take place in waters of the U.S. pursuant to NWP 12 authorization.

UWAG is comprised of a diverse and extensive range of public and private entities whose activities are nationwide and who often depend on NWP 12.

The laws and rules governing NWP 12 are important to Electric Utility Amici's members, as well as to the public at large, whose health, safety, and general welfare depend on a cost-effective, safe, and reliable supply of electricity. Electric Utility Amici's members have public service obligations to ensure a reliable and safe supply of electricity to their customers, and streamlined authorization through NWP 12 is critical to ensuring that their members can meet those obligations. The supply of electricity throughout the country requires the construction of thousands of miles of transmission and distribution lines, which is needed to relieve congestion on the electrical grid, to wheel power between utilities, and to connect new sources of energy (such as wind and solar facilities) to the grid—all of which serve to increase the reliability and diversity, or to manage the cost of, electricity. Amici's members also rely on NWP 12 for performing critical construction, maintenance and servicing projects, and many of the utility line-related activities covered by NWP 12 span above water bodies, or take place underground, resulting in only minor, temporary impacts to water bodies.

Electric Utility Amici have a particularly longstanding interest in NWP 12 because many electric utilities rely extensively on NWP 12 to provide timely and

reliable installation of and maintenance on transmission and distribution lines to deliver essential electric supplies to homes, public institutions, and businesses. Electric utilities seek to conform their construction and maintenance activities, whenever practicable, to comply with the terms of NWP 12, the general conditions applicable to all NWPs, the regional conditions imposed by Corps Division Engineers (including those required by the State), and any project-specific conditions imposed by Corps District Engineers. Because of the industry's and the public's reliance on NWPs for the timely and reliable delivery of electricity, Electric Utility Amici have a unique and specific role in the development and use of NWP 12, and they have particular expertise and perspective on the development of NWP 12 conditions and how those conditions meet the CWA's minimal adverse environmental effects standard.

In short, Amici have a strong interest in the outcome of this case because their members routinely engage in important activities that rely on NWP 12. The Electric Utility Amici respectfully submit that their participation as amici in this case is desirable and relevant because they will address the importance of NWP 12 to work routinely conducted by the electric utility sector; address the lawfulness of its application to non-pipeline-specific activities; and draw upon their extensive and specific knowledge of the development of NWP 12 to provide the Court with

valuable and unique information demonstrating that NWP 12 was issued in full compliance with the CWA and other applicable laws.

### ARGUMENT

Plaintiffs challenge the Corps' reissuance of NWP 12, a general permit issued under CWA section 404, 33 U.S.C. § 1344, and applicable to many projects undertaken by electric utilities. Titled "Utility Line Activities," NWP 12 authorizes discharges in connection with "the construction, maintenance, repair, and removal of utility lines" for the "transmission for any purpose of electrical energy." 77 Fed. Reg. 10,184, 10,271-72 (Feb. 21, 2012). Plaintiffs challenge the application of NWP 12 to projects related to the Keystone XL oil pipeline, but they also bring facial claims alleging that NWP 12 was issued in violation of the National Environmental Policy Act ("NEPA"), the CWA, the Endangered Species Act ("ESA"), and the Administrative Procedure Act ("APA").<sup>1</sup> They ask the Court to "declare the Corps' issuance of NWP 12 in violation of" those statutes and "applicable regulations," and to remand NWP 12 to the Corps.<sup>2</sup>

While Plaintiffs assert that they do not seek vacatur of NWP 12, the arguments raised and relief sought could significantly impact the proposed amici.

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<sup>1</sup> See Amended Complaint (ECF Doc. 36) at p.73-77, 81-84 (raising three claims broadly challenging the "reissuance of NWP 12" as unlawful).

<sup>2</sup> *Id.* at 87-88 (Prayer for Relief at (a)-(b)).

Plaintiffs have not limited their request that the Court declare NWP 12 unlawful to oil pipelines or even pipelines generally. Rather, Plaintiffs specifically target electric transmission lines as allegedly violating federal law in their Amended Complaint.<sup>3</sup> And in their summary judgment brief, most of Plaintiffs' arguments attack NWP 12 broadly, not just its application to Keystone XL-related projects or petroleum pipelines. *See* Pl. Memo. in Support of Mot. for Summary Judgment (Doc. 73) ("SJ Mot.") at 17-42. In particular, Plaintiffs argue that the Environmental Assessment for NWP 12 unlawfully fails to consider cumulative impacts and climate change impacts, *id.* at 17-27; that the Corps failed to complete formal ESA consultation on NWP 12, *id.* at 27-33; that, in general, the Corps cannot rely on project-level reviews to ensure that applications of NWP 12 have only minimal impacts, *id.* at 22-25, 33-38, 39-42; and that NWP 12 fails to comply with the CWA's minimal adverse effects standard, *id.* at 38-43. Indeed, in the opening line of their brief, Plaintiffs assert that NWP 12 is unlawful in its entirety, including as applied to permit non-pipeline-related projects: "Plaintiffs challenge the [Corps'] 2017 reissuance of Nationwide Permit 12, a general permit that will be used an estimated 69,700 times over five years to approve pipelines *and other utility projects* under the [CWA]." *See* SJ Mot. at 1 (emphasis added).

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<sup>3</sup> *E.g.*, *id.* ¶¶ 129 & 221.

If this Court finds NWP 12 unlawful, as Plaintiffs ask, that decision could immediately call into question electric utilities' ability to continue relying on NWP 12 to construct or work on their distribution and transmission lines, thereby jeopardizing their ability to provide safe and reliable power. A decision in Plaintiffs' favor could also increase risks of third party challenges to routine uses of NWP 12. In short, this Court's adjudication of Plaintiffs' facial challenge could have serious consequences for Electric Utility Amici, who believe they can aid this Court's understanding of the issues in and potential ramifications of this case.

**I. Amicus Participation is Warranted Where Amici Bring A Unique Perspective to the Case.**

“District courts have inherent authority to appoint or deny *amici* which is derived from Rule 29 of the Federal Rules of Appellate Procedure.” *See Jin v. Ministry of State Sec’y*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008)) (internal quotation omitted). Where “the amicus has unique information or perspective that can help the court beyond the help that lawyers for the parties are able to provide,” the court should permit the participation of amici. *Id.* at 137 (quotation omitted). Amici provide important benefits by “assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that might otherwise escape consideration.” *Funbus System, Inc. v. Cal. Pub. Util. Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (citing *Miller-Wahl Co. v. Comm’nr of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982)).



While on the Third Circuit, Justice Alito cogently advocated for liberal consideration of motions to participate as amicus curiae:

The decision whether to grant leave to file must be made at a relatively early stage of [litigation]. It is often difficult at that point to tell with any accuracy if a proposed amicus filing will be helpful. Indeed, it is frequently hard to tell whether an amicus brief adds anything useful to the briefs of the parties without thoroughly studying those briefs and other pertinent materials, and it is often not feasible to do this in connection with the motion for leave to file. . . . Under these circumstances, it is preferable to err on the side of granting leave . . . . [I]f a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.

*Neonatology Associates, PA. v. Comm'r*, 293 F.3d 128, 132-33 (3rd Cir. 2002). Put simply, the standard for amicus participation is liberal, and proposed Amici believe that their participation is appropriate here given their unique perspective on NWP 12 and its lawful application to critical electric utility projects.

## **II. Electric Utility Amici Have a Unique Interest In and Perspective on the Facial Validity of NWP 12.**

Electric Utility Amici believe they can aid this Court's understanding of the issues raised by Plaintiffs' facial challenges to NWP 12 and provide perspective beyond that which the parties can provide by, *inter alia*, addressing the types of projects that electric utilities conduct under the auspices of NWP 12, which are unique from pipeline projects, and explaining why such applications are consistent with the CWA's and other legal requirements governing the issuance and use of nationwide permits. For decades, Electric Utility Amici have actively participated in both the development of NWP 12 through regulatory proceedings and in

litigation concerning NWP 12, and they would offer specific and unique perspectives on how NWP 12 terms and conditions meet the CWA, NEPA, and ESA requirements that Plaintiffs allege the Defendants have violated.

Electric Utility Amici can also aid this Court by highlighting specific issues, both practical and legal, raised by Plaintiffs' facial challenge to NWP 12, which would impact their ability to conduct routine electric utility construction and maintenance activities. For example, Plaintiffs allege that "NWP 12 can be used numerous times along a pipeline or utility route . . . with no mechanism to ensure that impacts would be minimal," SJ Mot. at 43. Electric Utility Amici have a long history of complying with the very conditions of NWP 12 that ensure consistency with the CWA's minimal adverse effects standard. NWP 12 is a critical tool that electric utilities use to maintain compliance with CWA section 404 in a timely and cost effective manner. It is among the most commonly used Corps permits, and it allows utilities to expedite the permit process for activities that have minimal adverse environmental impacts to jurisdictional waters, such as the repair, maintenance, and construction of electric transmission lines. Importantly, NWPs authorize projects with minimal impacts without the need for lengthy and expensive individual CWA section 404 permit proceedings, which could significantly hinder utility customers' accessibility to reliable and secure energy services at a reasonable cost. Review and reissuance of NWP 12 through notice

and comment rulemaking every five years ensures ongoing compliance with applicable statutory requirements. *See* 82 Fed. Reg. 1860 (Jan. 6, 2017) (reissuing NWP 12 in 2017).

NWP 12 was largely designed with electric utilities in mind, reflecting both the importance of a streamlined permit process for electric transmission and distribution lines and the minimal effect of such projects on the aquatic environment. Many NWP 12 terms are specific to electric transmission and distribution lines, such as provisions on foundations for overhead utility line towers, poles, and anchors; the exclusion of overhead lines from the 500 foot pre-construction notification requirement; and minimum clearance requirements for aerial electric power transmission lines. Continued reliance on NWP 12 is especially important in emergency circumstances where critical electric lines may be damaged or destroyed by extreme weather or some other cause, and need to be repaired or replaced quickly.

Given NWP 12's vital import to their everyday operations, the Electric Utility Amici have extensively participated in the development and use of NWP 12 throughout its decades-long history.<sup>4</sup> Amici and their members have also participated in litigation concerning the NWP program. *E.g.*, *Nat'l Wildlife Fed'n*

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<sup>4</sup> For instance, EEI's and UWAG's comments on the 2017 reissuance of the NWPs are available at <https://www.regulations.gov/document?D=COE-2015-0017-0467> and <https://www.regulations.gov/document?D=COE-2015-0017-0499>, respectively.

*v. Marsh*, 22 Env't Rep. Cas. 1417 (D.D.C. Dec. 17, 1984) (some of amici's member companies intervened to defend the NWP program and participated in negotiation of the settlement agreement); *Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015) (UWAG intervened to support the successful defense of NWP 12 against NEPA and CWA challenges). Proposed amici are thus well positioned to provide unique insights to the Court regarding the substance and lawfulness of NWP 12, including how the permit satisfies the CWA's "minimal adverse environmental effects" standard, *see* 33 U.S.C. § 1344(e)(1), and how the Corps' reissuance of NWP 12 complies with NEPA and the ESA.

This case is of particular significance to the Electric Utility Amici because future electric utility projects under NWP 12 may be threatened if Plaintiffs prevail on their facial challenge and if this Court declares NWP 12 unlawful and remands the permit. The Corps could potentially suspend some or all uses of NWP 12 while it cures any violation, and it might seek to impose additional requirements or limits on uses of NWP 12 to remedy any deficiency perceived by this Court. An electric utility project proponent could find it difficult to secure financing or proceed with a project based on a permit declared unlawful. The Court should be aware of these potential impacts of a decision stating that NWP 12 is unlawful, which could have immediate disruptive consequences for Amici's members.

The other parties to this suit represent interests that are adverse to, distinct from, or much broader than those of the proposed amici. Thus, they cannot be expected to adequately convey the perspective the Electric Utility Amici would present. Indeed, no other party is focused on *electric* utility interests or the specific needs of that sector. While Defendant-Intervenors include a coalition of entities primarily engaged in the construction and operation of gas pipelines,<sup>5</sup> electric utility projects in or on jurisdictional waters are generally quite different in scope and substance, with different impacts. Proposed amici would explain the significance of these differences in their brief and how those differences belie Plaintiffs' claim that NWP 12 is facially unlawful regardless of how or where applied. Proposed amici can demonstrate how NWP 12 conditions that are specific and important to the electric power industry meet the statutory minimal effects standard and other statutory requirements. Electric Utility Amici are also well situated to aid the Court's understanding of how NWP 12 ensures compliance with environmental requirements for the operations in which it is implicated, which are much broader than and extend beyond pipeline-related activities. In short, the existing parties lack Electric Utility Amici's focus on the electric utility sector's experience with NWP 12.

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<sup>5</sup> See ECF Doc. 49 (motion to intervene filed by Coalition of "national energy organizations" primarily involved in natural gas pipeline activities); ECF Doc. 59 (order granting Coalition's motion for leave to intervene in support of Defendants)

**III. Proposed Amici's Request to Participate is Timely.**

Finally, this motion is timely. Pursuant to the Modified Case Management Order (ECF Doc. 48), Plaintiffs filed their opening summary judgment brief only a few days ago, on November 22. Federal Defendants' and Defendant-Intervenor TC Energy's briefs are not due until December 23, and the remaining Defendant-Intervenors' brief is not due until December 30. Given that Electric Utility Amici propose to file one amicus brief, no longer than 5,000 words, shortly after all Defendant-Intervenors have filed (so as to allow them to avoid duplication of arguments), allowing their participation will not delay this action or unfairly prejudice Plaintiffs. Electric Utility Amici thus should be permitted to provide their views on the legal and practical implications of Plaintiffs' challenge to NWP 12.

**CONCLUSION**

For the foregoing reasons, Electric Utility Amici respectfully request that this Court grant their Motion for Leave to File an Amicus Curiae Brief in support of Defendants, no longer than 5,000 words, on or before January 10, 2020.

DATED this 26th day of November 2019.




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## CERTIFICATE OF COMPLIANCE

The undersigned, Robert L. Sterup, certifies that Motion of Edison Electric Institute and Utility Water Act Group for Leave to File Amicus Brief - Local Rule 7.5 complies with the requirements of Rule 7.1(d)(2). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 3,015 words, excluding caption and certificates of compliance and service. The undersigned relies on the word count of the word processing system used to prepare this document.



Robert L. Sterup



**CERTIFICATE OF SERVICE**

I hereby certify that on the 26th day of November, 2019, the foregoing Motion was mailed for conventional filing with the Clerk of the Court. I further certify that on the 26th day of November, 2019, I served true and correct copies of the foregoing motion via first-class mail, postage prepaid, upon each of the following counsel of record:

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