



**DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
MEMPHIS DISTRICT
167 NORTH MAIN STREET B-202
MEMPHIS, TN 38103-1894**

February 5, 2021

Executive Office

The Honorable Steve Cohen
U.S. House of Representatives
2104 Rayburn House Office Building
Washington, DC 20515

Dear Representative Cohen:

This letter memorializes our telephonic discussion from February 4, 2021 and provides written response to your initial correspondence to U.S. Army Corps of Engineers (USACE) Headquarters dated January 8, 2021 requesting information on the Byhalia Pipeline connection. You had requested responses to six questions concerning the Byhalia Connection pipeline's eligibility for a Nationwide Permit 12 verification. This letter codifies my telephonic responses.

The Memphis (MVM) and Vicksburg Districts (MVK) reviewed the pre-construction notification of Byhalia Pipeline LLC under NWP 12 for utility line activities to determine whether the proposed crossings of waters of the United States associated with this project meet the terms and conditions for coverage under NWP 12. On 01 February and 25 January MVM and MVK respectively verified eligibility.

The Byhalia pipeline is a proposed 24-inch diameter crude oil pipeline approximately 49.63 miles in length. The pipeline is designed to carry oil from the Valero refinery to the Valero Collierville facility in Mississippi. MVM has regulatory jurisdiction over 0.7% (4.319 acres) of the pipeline pursuant to Section 10 of the Rivers and Harbors Act and Clean Water Act (CWA) Section 404. The activities within potential jurisdictional waters of the United States requiring permit verification in the Memphis District include the construction of 14 crossings in Tennessee and 15 crossings in Mississippi. The total impact of the 14 aquatic resource crossings in Tennessee is less than 2.5 acres of temporary wetland impacts and less than 1.5 acres of permanent wetland conversion. A total of 0.902 acres of forested wetland at two locations would be permanently converted to emergent/scrub-shrub wetland habitat upon project completion. There are no projected impacts resulting in total permanent loss of either wetlands or streams with the project. Pre-construction contours will be returned at all stream crossings where traditional trenching methods are employed.

You specifically asked, “since this proposed pipeline crosses over a public water supply intake, how does it meet the criteria to operate under a NWP 12?” NWP 12 authorizes utility line construction activities in waters of the United States, such as those proposed by the Byhalia pipeline. NWP 12 applies so long as “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.” Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017). A “utility line” is “any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose”. *Id.* Each single and complete project references the individual crossings of jurisdictional waters and wetlands.

General Condition (GC) 7 to NWP 12 provides that “No activity may occur in the proximity of a “public water supply intake.” 82 Fed. Reg. at 1999 (emphasis added). The activity is each crossing, as USACE does not have direct or indirect jurisdiction over pipeline segments in upland areas. “USACE ...only regulate[s] those components of oil pipelines or other utility lines, that involve activities regulated under our authorities (i.e., section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899).” 82 Fed. Reg. at 1864. A “public water supply intake” refers to surface water intakes per USACE interpretation, application, and past practice. This understanding is consistent with the limited jurisdiction enumerated in the 2020 Navigable Waters Protection Rule which specifically excluded Corps’ regulatory jurisdiction over groundwater or discharges into groundwater, including groundwater drained through subsurface drainage systems and groundwater recharge structures. 33 C.F.R. 328.3(b)(2), (11); 40 C.F.R. §§120.2(2)(ii), (xi).

Members of the public opposing this verification notified USACE of their position that “the plain language of NWP 12 does not allow for the construction of pipelines near drinking water intakes,” citing the express language of General Condition (GC) 7 and public interest concerns related to the pipeline’s crossing of the Davis Wellfield, a Memphis Light Gas and Power (MLGW) wellhead protection zone, and “numerous Source Water Protection Areas.” USACE understands the concerns but lacks jurisdiction to require changes to the pipeline alignment or to regulate groundwater or discharges into groundwater.

Your next question involved whether “the crossing over a public water supply intake mandate that the project obtain an individual permit under Section 404 of the CWA? If not, why not?” As noted above, USACE has not identified surface water intakes of this pipeline necessitating conversion to an individual permit. Typically, USACE is not obligated to ensure compliance of non-executing General Conditions (including proximity to water intake structures in GC 7) prior to verifying that the pipeline’s activity falls within the scope of NWP 12. Rather, the nationwide permit program was designed to enable quick determinations of activities with minimal environmental impacts. Accordingly, where a general condition is written to not require a permit application to

provide verifying documentation, USACE relies on the PCN as sufficient evidence of compliance.

This same issue was raised prior to verification by members of the public, specifically noting the intake at the Davis Wellfield as an example. MVM Regulatory did perform a site assessment of two crossings in the vicinity of the pipeline near Doubletree Elementary School. Based on the findings of that site visit, MVM Regulatory Division determined that there is no proximity between the nearest crossing and the nearest wellhead as any stormwater/surface flow would flow to the south/southwest and would carry sediment increases away from the pipeline and the wellhead.

Next you asked, “would an additional environmental review be advantageous to USACE to determine the potential impacts of an oil spill on the Memphis Sand Aquifer, especially the Davis Wellfield?” Additional environmental review is not required under USACE processes. Prior to verification, members of the public raised to USACE concerns related to the risks of the pipeline alignment in upland areas and not in the crossings that USACE regulates. USACE’ authority “for a linear project...include[s] an evaluation of the individual crossings of waters of the United States to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP.” The NWP 12 decision document expressly emphasizes that USACE does not have the ability to regulate or evaluate pipeline alternative alignments. There is not a cumulative adverse impact from the impact of the project crossings (less than 2.5 acres of temporary wetland impacts, less than 1.5 acres of permanent conversion, 0.902 acres of forested wetlands permanently converted to emergent/scrub-shrub wetland habitat) once mitigation is considered.

USACE has a duty to supplement under the National Environmental Policy Act, where there remains a major Federal action and “new information is sufficient to show that the remaining action will ‘affect the quality of the human environment’ in a significant manner or to a significant extent not already considered. PCN verifications do not constitute major federal action.

USACE does not have the authority to regulate the operation of the pipeline, however, the risks of oil spills from pipeline operation are considered during its issuance of Nationwide Permit 12. Many public comments received on NWP 12 highlighted concerns related to potential oil spills and requested that oil and gas pipelines should be subject to the individual permit process instead. In issuing its final decision approving NWP 12 for the construction of utility lines (including oil and gas pipelines), USACE evaluated concerns relative to safety, environmental and community health, and included several general conditions into the NWP to address such concerns. Those conditions include GC 12 (requiring stabilization of exposed soils and fills at the earliest practicable date, to minimize dispersion by currents, rainfall, or other erosive forces), GC 14 (requiring proper maintenance to ensure public safety), and the understanding

that the NWP does not obviate the need to comply with all other federal, state and local requirements.

The District Engineer also has the discretion to convert a PCN to an individual permit if the DE determines, based on the information presented to him/her, that the adverse environmental effects will be more than minimal or otherwise determines that sufficient concerns for the environment or any other factor of the public interests so requires. 33 CFR 330.4€(2). In this case, conversion was not recommended as the aquatic impacts of the project are minimal, and verification of this action is consistent with the processing of similar PCNs across USACE.

You also asked whether USACE previously issued NPW 12's to other pipeline projects "that crossed over a city's sole source of drinking water;" or, that "crossed through a city that was located in an active earthquake zone." The Memphis District has verified other similarly situated pipelines including the Diamond Pipeline in 2016 and is currently reviewing its files relative to the Collierville Pipeline, which runs from the Valero refinery in Memphis to the Collierville terminal.

To the extent your question involves concerns with a spill causing contamination of the aquifer, the information received from members of the public on this point indicate that contamination of the aquifer is not reasonably likely to occur due to local geography as well as distance between the pipeline and the Memphis Sands aquifer. Aside from the terminus in Eastern Mississippi, the pipeline will be located 3-10 feet underground, well over 100 feet above the drinking water aquifer, and separated by a confining clay layer. This is confirmed in Tennessee Department of Environment and Conservation's (TDEC) November 9, 2020 notice of determination, where TDEC found that "[a]ccording to the 1995 USGS study of the Davis wellfields, the Cockfield and Cook formations are the confining layers within the project area. As the applicant proposes 30-foot directional borings for the pipeline, such borings are well above these confining formations."

While USACE does not regulate the operation of pipelines or have the authority to require mitigation measures for the risk of spills, TDEC's notice of determination and Byhalia Connection's website show that mitigation measures are part of the proposed project. During construction, the applicant will develop inadvertent release contingency plans for any releases that occur during the drilling process. Trained personnel will observe and respond to any inadvertent release of drilling fluid. Each crossing area will be observed during drill operations by the contractors for any release of drilling fluid. In addition, the permittee will implement and maintain its sediment and erosion control plans at each stream and wetland crossing. The pipeline incorporates safety measures such as new pipe specifications that require each joint to be inspected, 100 percent of field wells examined by x-ray, a post-construction hydrotest, greater pipe wall thickness than required by federal standards, cathodic protection system designed to guard against corrosion and to maintain structural integrity, regular aerial surveillance and

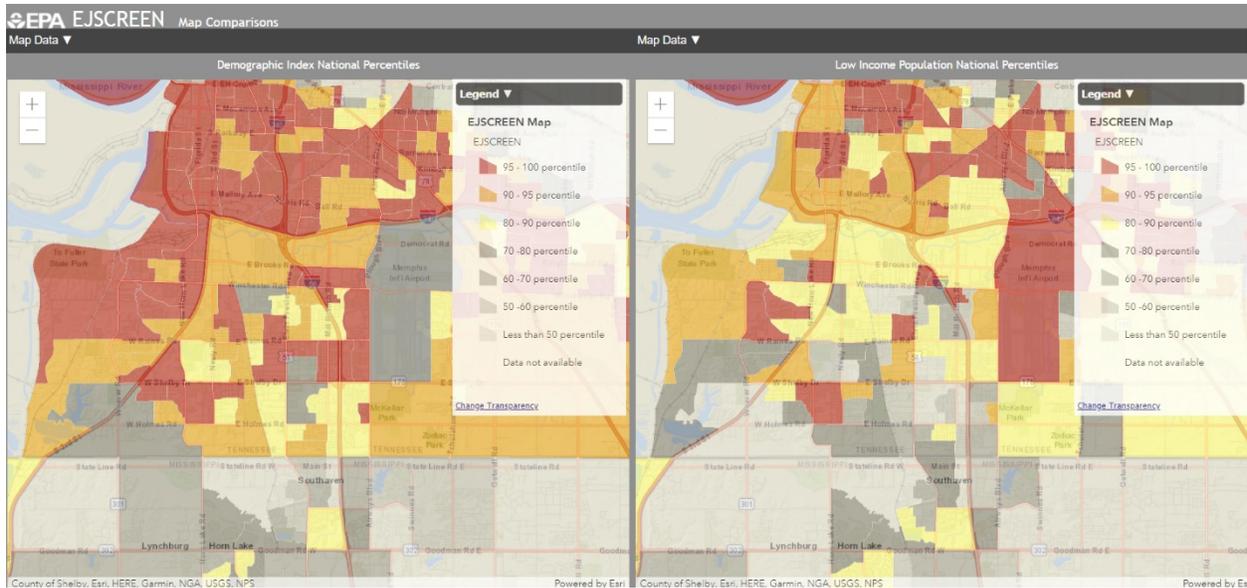
ground patrols to preventatively identify pipeline threats, remotely operated valves to limit risk to local communities and the environment. During operation, the pipeline will have shutoff valves every nine miles to limit areas of spills and will have to comply with all federal and state requirements as to the cleanup efforts of those spills.

Finally, you asked “does the USACE take environmental justice into consideration when deciding whether to issue a NPW 12?” Executive Order 12,898 requires federal agencies to “make achieving environmental justice part of their mission” — “[t]o the greatest extent practicable and permitted by law” — “by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations.” 59 Fed. Reg. 7629 (Feb. 11, 1994).

In a 1999 memo, EPA has indicated that an agency should evaluate the environmental impact of the proposed action should consider environmental justice (EJ) when: (a) minority populations, low-income populations, or Indian tribes are present in the area affected by the proposed action; and (b) there may exist disproportionately high and adverse human health or environmental effects on minority populations, low-income populations or Indian tribes.

Prior to verifying this permit, members of the public raised environmental justice and concerns that the proposed project is contrary to the public interest as unjustly impacting “several predominantly African American neighborhoods in South Memphis that are over-burdened by environmental degradation,” noting the proposed pipeline route runs through several predominantly African American communities already burdened by dozens of industrial facilities, including a Valero refinery, a retired coal plant, and an active gas plant. Health concerns raised included “a cumulative cancer risk from toxic air tied to industrial and transportation-related pollutants like benzene and formaldehyde and the risk of contamination of the aquifer upon which hundreds of thousands of people, and numerous industries, depend every day.”

The socioeconomics and demographics of the area do support “(a) minority populations, low-income populations, or Indian tribes present in the area affected by the proposed action.” However, information provided did not support the second prong of the EPA test. The socioeconomics and demographics of the area are shown in the following screen shots from EPA’s EJScreen Tool.



The disproportionately high and adverse health or environmental effects related to action to be analyzed under the Executive Order are the construction impacts to the jurisdictional crossings, not the entirety of the pipeline. To the extent that adverse air quality impacts and aquifer contamination were raised to USACE by members of the public prior to verification, discussed by opponents, the NWP 12 decision document states that the permit has been analyzed for conformity applicability pursuant to Section 176(c) of the Clean Air Act and it has been determined that the activities authorized by this permit will not exceed de minimis levels of direct emissions and are exempted by 40 CFR 93.153. Any later indirect emissions are generally not within USACE’s continuing program responsibility and generally cannot be practicably controlled by USACE; therefore, a conformity determination is not required for this NWP. Furthermore, while USACE does not regulate the operation of the pipeline, it is anticipated that the proposed pipeline’s effect on air quality will be negligible or positive as the pipeline’s purpose is to move oil out of Memphis, and the pipeline’s own website indicates that the pipeline’s effect will be to reduce traffic from trucks transporting oil from the area.

Although the 2017 NWP 12 decision document evaluated oil spills as reasonably foreseeable future actions, it also states that USACE does not have the authority to regulate the operation of oil and gas pipelines, and does not have the authority to address spills or leaks from oil and gas pipelines. Given the activities that USACE regulates (discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States), USACE finds that there is negligible risk of contamination of the aquifer that supports a finding of a disproportionately high and adverse health or environmental effects. Although outside USACE’ authority, the pipeline’s own documentation notes that the pipeline will have shutoff valves and operation monitoring to minimize and ensure the safety of the aquifer

and community. Pertaining to the operation of the pipeline, Memphis Light, Gas and Power's (MLGW) documents show that its pumping operations occur 350-1,100 feet below the surface. A USGS study shows that the confining clay layer is at least 100 feet thick above the Davis wellfield. USGS Water Resources Investigation Report 89-4131 available at: <https://pubs.usgs.gov/wri/wri894131/pdf/wri89-4131.pdf>.

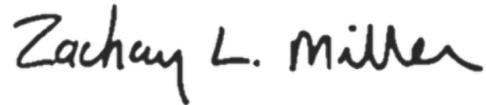
Even if USACE found an adverse effect to the affected community, the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe does not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory. Rather, the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.

As each crossing is considered its own individual verification action under the NWP program, USACE lacks jurisdiction to require changes to pipeline alignment of the non-federalized portion of the pipeline under the NWP program. However, TDEC evaluated five different pipeline alignments (including the no-action alternative) in its aquatic resource alteration permit issued on 17 November 2020. Those alternatives consisted of a no action alternative, a corridor route, a western route, a south route, and the proposed route. The corridor route consisted of a 35-mile route travelling through the city of Memphis, would encroach on T.O. Fuller State Park and cross under Robco Lake, and was deemed non-practicable as it could not be safely constructed due to railroad and overhead lines. The 50-mile western route would cross Ensley Levee System, a USACE civil works project twice, potentially impacting the structural integrity of the flood control system. The construction of this route through a coal ash remediation site could potentially exacerbate pre-existing groundwater contamination and cause contamination migration through the aquifer. This route required the crossing of T.O. Fuller State Park as well as cultural resources contained in the Chucalissa Archeological Park. The 43-mile South route required crossing McKellar Lake, T.O. Fuller State Park, a recorded cemetery and a public softball field. This alternative was found impracticable due to landowner access and cultural resources concerns. The current alignment avoids recreation areas such as T.O. Fuller State Park, civil works structures, Robco Lake, and potential cultural resources areas. For those reasons, TDEC concluded that the current pipeline alignment was the most practicable alternative with the least adverse environmental impact on resource values.

USACE does not evaluate whether an applicant for a 404 or 10 permit has obtained the requisite zoning or real estate rights for the proposed action. Additionally, the Clean Water Act is not intended to pre-empt decisions and authorities that rest at the state and local municipal level. How the state and local community set zoning restrictions and the realty interests obtained by the local utility to protect the aquifer are decisions outside the jurisdiction of USACE' Clean Water Act authority.

Please let me know if I can be of further assistance.

Sincerely,

A handwritten signature in black ink that reads "Zachary L. Miller". The signature is written in a cursive, slightly slanted style.

Zachary L. Miller
Colonel, Corps of Engineers
District Commander