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Army Corps Permits for Oil and Natural Gas Pipelines

The U.S. Army Corps of Engineers (the Corps) administers a regulatory program that requires permits for certain activities in waters of the United States, including wetlands. Under Section 404 of the Clean Water Act (CWA, 33 U.S.C. §1344), the Corps regulates the discharge of dredged or fill material into these waters. Under Section 10 of the Rivers and Harbors Act (RHA, 33 U.S.C. §403), the Corps regulates structures and/or work in or affecting the course, condition, or capacity of navigable waters.

Because construction of pipelines of any significant length will cross or otherwise affect U.S. waters somewhere along their routes, the Corps is usually involved in approving discrete aspects of pipeline siting. The Corps is not the only governmental agency from which location-specific permits may be required for a new pipeline, but its role has received scrutiny recently, particularly in connection with controversy over siting of the Dakota Access Pipeline (DAPL). (See CRS Insight IN10567, *Dakota Access Pipeline: Siting Controversy*, by Paul W. Parfomak.)

Nationwide Permits for Pipelines

Pipeline construction and other activities that require Corps authorization and that are similar in nature with minimal environmental impacts (e.g., minor stream crossings) may qualify for a general permit. Nationwide permits, which cover a wide range of activities such as aids to navigation, minor dredging, and bank stabilization, are one type of general permit. Some general permits apply regionally or in a single state. General permits essentially preauthorize a group of similar activities on a programmatic level. The Corps uses general permits to minimize the burden of its regulatory program; general permits authorize applicants to proceed without the more time-consuming need to obtain standard individual permits in advance. Individual permits are subject to public notice, public interest review, public hearing, activity-specific environmental documentation, and case-by-case evaluation, so they typically require more time before an activity is authorized. Over 97% of the Corps' regulatory workload—which averages about 63,000 authorized activities each year—is processed in the form of general permits.

Many activities covered by nationwide permits can proceed without advance notification to the Corps, while others require that the applicant submit a Pre-construction Notification (PCN) to the Corps and receive written verification from the Corps before proceeding. Nationwide permits are issued for five-year terms; the Corps' authority to issue them expires unless they are reissued. The current permits were issued in 2012 and will expire in March 2017; in June 2016, the Corps proposed to reissue the nationwide permits. (For background, see CRS Report 97-223, *The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments*.)

One of the current nationwide permits, NWP 12, is used to authorize utility line activities, including the construction, maintenance, or repair of utility lines in waters of the United States. Under this permit, a "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose—including oil or natural gas—and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication.

Under the CWA and the RHA, the Corps' regulatory authority only applies to areas where a pipeline or other utility line activity crosses waters of the United States. The Corps generally does not have regulatory jurisdiction over portions that cross upland areas. As a result, for many pipelines, the Corps has jurisdiction over a very small portion of the overall pipeline.

When the Corps proposes to reissue the nationwide permits, as it did in June 2016, the rulemaking process concludes with Decision Documents that incorporate analytic requirements under the National Environmental Policy Act (NEPA). In the Decision Document for NWP 12, the Corps estimates that NWP 12 is used on average approximately 14,000 times per year on a national basis, resulting in impacts to approximately 1,750 acres of waters of the United States, including wetlands that are regulated under the CWA. (The total includes about 11,500 times per year for activities that involve a PCN to the Corps and about 2,500 that do not require a PCN.)

The 14,000 number includes all utility line activities that are authorized by NWP 12. Because of the broad definition, oil or natural gas pipelines are only a part of the total. The Corps' data do not break out pipelines versus other types of utility line activities under NWP 12. Furthermore, while it covers the large majority of utility line activities, some do not qualify for a nationwide permit – generally because they will have more than minimal environmental impacts – and thus they must be authorized by individual Corps permits. The Corps does not have a centralized database or other information on the number of individual permits that it issues for pipelines or the number of pipeline and utility line activities that are authorized by NWP 12.

Tribal Rights Consultation

In order to qualify for nationwide permit authorization, proposed activities must meet a number of general conditions, as well as permit-specific restrictions. One of the general conditions concerns tribal rights: General Condition 17 states that no authorized activity or its operation may impair reserved tribal rights, including but not limited to, reserved water rights and treaty fishing and hunting rights. (For information on Corps tribal

consultation requirements and policy, see CRS Insight IN10608, *Army Corps Projects and Tribal Consultation: Requirements, Policies, and Controversy*, by Nicole T. Carter.)

Endangered Species Consultation

Other general conditions apply if a project has potential to affect a threatened or endangered species or critical habitat. When a PCN is submitted to the Corps, the applicant must identify endangered species issues, if any are present, and may not begin work without written verification from the Corps that allows the activity to proceed. General Condition 18 states that no activity may be authorized if it will directly or indirectly jeopardize a threatened or endangered species or critical habitat. Furthermore, no activity is authorized that “may affect” a listed species or critical habitat unless consultation pursuant to Section 7 of the Endangered Species Act (ESA, 16 U.S.C. §1536) has been completed. Through ESA consultations and coordination with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, the Corps establishes procedures to ensure that nationwide permits are not likely to jeopardize any threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

Historic Properties Consultation

General Condition 20 states that when an activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized until requirements of Section 106 of the National Historic Preservation Act (NHPA, 54 U.S.C. §306108) have been satisfied. Section 106 requires federal agencies to consider the effects of actions that they carry out, approve, or fund on historic properties. The Corps’ rules for meeting these requirements are detailed in 33 CFR Part 325, Appendix C. If such properties are identified by the applicant in a PCN for a nationwide permit, the Corps is responsible for initiating Section 106 review and consultation, most of which takes place between the agency and state and tribal or Native Hawaiian historic preservation officials. Agencies consult with officials of federally recognized Indian tribes when activities have the potential to affect historic properties on tribal lands or historic properties of significance to such tribes located off tribal lands. Once General Condition 20 is triggered, the activity cannot proceed unless the Corps district engineer completes a site-specific analysis and verifies either (1) that the activity will not affect any eligible historic site, or (2) that the consultations required by the NHPA are complete. The Advisory Council on Historical Preservation (ACHP) may be involved in consultation under certain circumstances, such as those involving substantial impacts to important historic properties, but it does not have a veto over the Corps’ decision. Section 106 requires agencies to consult, but it does not require agencies to avoid impacts.

Issues Related to NWP 12

Environmental advocates have frequently criticized several of the current nationwide permits, including NWP 12. Under Corps regulations, nationwide permits can be used for a “single and complete project” that will cause only minimal adverse environmental effects, individually or

cumulatively (33 CFR 330.2(i)). A “single and complete project” is a portion of a total project that includes all crossings of a single waterbody at a specific location. Thus, NWP 12 can be used for each individual crossing of a waterbody, even if it is part of a large pipeline project that consists of multiple stream crossings.

Because the Corps interprets its authority as limited to individual water crossings, it believes that it must evaluate pipeline water crossings in this segmented fashion. It does not evaluate the environmental or other impacts of the totality of water crossings for a pipeline or a pipeline from end-to-end. This approach has led to criticism that, by reviewing discrete geographic segments, the Corps fails to evaluate whether the full scope of a pipeline may have adverse environmental effects. Considered in totality, a pipeline’s impacts might require authorization under a standard individual permit, not a nationwide permit, critics say. The Corps’ response is that under the CWA and the RHA, its regulatory jurisdiction does not cover aspects in upland areas on private property. Critics say that such segmenting of pipeline projects fails to account for cumulative effects that can have more than minimal impact on aquatic resources, but legal challenges to use of this permit have been largely unsuccessful.

A related criticism of the Corps’ reliance on NWP 12 to authorize pipeline construction activities is that the nationwide permit process does not allow for project-specific public input or environmental review. The agency’s position in its environmental assessment of NWP 12 is that, with the qualifying conditions and limits that are attached to the permit, the Corps has determined that environmental impacts will be no more than minimal. Furthermore, the Corps maintains that its procedures for addressing possible impacts on threatened or endangered species or historic property meet all requirements of other federal laws, including the ESA and the NHPA. The Corps asserts that the action of issuing or reissuing the NWPs *per se* has no effect on listed species or their critical habitat and that General Condition 18 and Corps rules ensure that ESA Section 7 consultation will take place on an activity-specific basis wherever appropriate at the field level between the Corps and other federal agencies. Critics contend that under the nationwide permits, private project proponents can make their own project-specific determinations about the presence of threatened or endangered species or historic properties, through submission of a PCN. The Corps, they say, generally only responds to information presented in a PCN, because it is not independently responsible for determining their presence on a project site.

It has been more than 15 years since Congress examined the Corps’ nationwide permit program through oversight hearings or legislation. Whether recent controversies about NWP 12 and its use in siting aspects of pipeline and utility line projects will lead to greater congressional interest in the program is unknown for now.

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