

# Dakota Access Pipeline: Siting Controversy

January 26, 2017 (IN10567)

---

## Related Author

- [Paul W. Parfomak](#)

---

Paul W. Parfomak, Specialist in Energy and Infrastructure Policy ([pparfomak@crs.loc.gov](mailto:pparfomak@crs.loc.gov), 7-0030)

---

## Background

Recent growth of domestic crude oil production has resulted in an unprecedented expansion of the United States' oil pipeline network. One of the largest domestic oil pipelines currently in development is the [Dakota Access Pipeline](#), a 30-inch diameter, 1,172-mile project that would carry crude oil produced in northwest North Dakota to southern Illinois ([Figure 1](#)). The Dakota Access Pipeline is projected to carry 470,000 barrels per day, although its capacity could reach 570,000 barrels per day.

Figure 1. Dakota Access Pipeline Route



**Source:** CRS using data from Platts PowerMap 2016, and Esri Data and Maps 2014.

Siting Approval

The federal government does not have jurisdiction over the siting of domestic oil pipelines like the Dakota Access Pipeline. Instead, authorization for the overall route must be granted by individual states, each of which may impose its own requirements and procedures. The Dakota Access Pipeline developer, [Energy Transfer Partners](#), was granted siting approval from state utility regulators in [South Dakota](#) and [Illinois](#) in 2015, and from [North Dakota](#) and [Iowa](#) early in 2016.

In addition to state siting approval for an overall route, a pipeline developer may require federal government approvals for specific parts of a pipeline project. For example, interstate pipelines usually require [permits](#) from the U.S. Army Corps of Engineers (Corps) in compliance with the 1899 Rivers and Harbors Act and the Clean Water Act due to numerous water crossings, disturbance of wetlands, or the use of Corps property or easements. U.S. Fish and Wildlife Service (USFWS) permits under the [National Wildlife Refuge System Administration Act](#) are required where wildlife refuge lands could be affected. Consultation with the USFWS could be required where protected species or critical habitat may be affected. The review of these federal permit applications must examine potential environmental impacts in accordance with the [National Environmental Policy Act \(NEPA\)](#). Other federal statutes may also come into play, notably the [National Historic Preservation Act \(NHPA, Section 106\)](#), which requires federal agencies to account for the effects of their actions (e.g., issuing permits) on historic properties. Along with federal permits, a range of other state and local permits may be required.

In June 2016, the Dakota Access Pipeline developer secured a "[finding of no significant impact](#)" from the USFWS, clearing the way for a permit allowing temporary disturbance of the agency's wetland easements in North Dakota and South Dakota. In July 2016, the Army Corps of Engineers [granted the developer a series of permits](#) authorizing the parts of the pipeline under the [Corps' jurisdiction](#). The Corps provided the developer with verification of [Nationwide Permit 12](#) ("Utility Line Activities") permits under the Rivers and Harbors Act (Section 10) and the Clean Water Act (Section 404) for 202 proposed water crossings dispersed along the pipeline route. The Corps also granted permissions under separate provisions of the Rivers and Harbors Act (33 U.S.C. Section 408) for the pipeline to cross federal lands or flowage easements acquired and administered by the Corps in seven locations, including Lake Sakakawea, ND; Lake Oahe, SD; and five locations in Illinois. The actual easements, pursuant to the Mineral Leasing Act (30 U.S.C. Section 185), reportedly have also been issued, except for the Lake Oahe crossing. Apart from the water crossings, Corps lands, and flowage easements, the Corps does not have regulatory authority over the pipeline. Together with the USFWS permit, the Corps permits and easements would comprise all the federal permissions required for the Dakota Access Pipeline project to proceed. Accordingly, the developer reportedly has completed construction on over 90% of the pipeline, excluding the segment crossing Lake Oahe, discussed below.

## Pipeline Opposition and Litigation

The Dakota Access Pipeline has become the focus of opposition from various stakeholders, including Native American groups with direct interests in the pipeline's route and environmental groups, such as the [Sierra Club](#), with broader interest in fossil fuel infrastructure. On July 27, 2016, the [Standing Rock Sioux Tribe](#) of North Dakota filed in federal court a request for declaratory and injunctive relief. The [complaint](#) argues that the Corps did not properly comply with the NHPA when it authorized construction under Nationwide Permit 12, and that the Corps violated the Clean Water Act, NEPA, and the NHPA when it authorized pipeline construction under the Missouri River at Lake Oahe and also authorized discharge into waters on the tribe's ancestral lands. On August 4, 2016, the tribe sought a [preliminary injunction](#) requiring the Corps to withdraw its verifications under Nationwide Permit 12. On September 4, 2016, the tribe filed an [emergency motion](#) for a temporary restraining order against the developer to halt construction in locations where the tribe believes it has identified historic sites of cultural significance that were overlooked by the Corps in its permit reviews. On September 9, 2016, the federal court [denied](#) the tribe's request for an injunction, allowing construction to continue. Shortly after the court issued its opinion, the Department of Justice, the Department of the Army, and the Department of the Interior issued a [joint statement](#) that the Corps would "not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions" regarding that site. On December 4, 2016, the Corps issued a [statement](#) that the agency would "not grant an easement to cross Lake Oahe at the proposed location based on the current record." On January 18, 2017, the Corps published a [Notice of Intent](#) to prepare an Environmental Impact Statement for the Lake Oahe crossing.

Notwithstanding the Corps' decision, Energy Transfer Partners [has stated](#) that it expects to complete the pipeline "without any additional rerouting." The developer has filed a motion in federal court seeking permission to construct the pipeline under Lake Oahe as currently configured. On January 24, 2017, President Trump issued an [executive memorandum](#) directing the Corps to consider rescinding or modifying its December decision as well as rescinding the January 2017 Notice of Intent. Further analysis of the executive memorandum is available in [CRS Legal Sidebar WSLG1722](#).