

Oil and Natural Gas Pipelines: Role of the U.S. Army Corps of Engineers

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Summary

Growth in North American crude oil and natural gas production has led to efforts to expand the domestic oil and natural gas pipeline network. Pipeline developers are required to obtain authorizations from the U.S. Army Corps of Engineers (Corps) before constructing certain pipeline segments. Under the agency's regulatory program, the Corps is responsible for authorizing activities that may affect federally regulated waters and wetlands. Under its civil works program, the agency is responsible for approving activities that cross or may affect Corps-managed lands and Corps water resource projects. The agency's role with respect to pipelines can be controversial and may raise policy issues for Congress. Congress has a long-standing interest in pipeline development and the regulation of pipelines because of the role of pipelines in the domestic energy markets.

Corps Regulation of Water Crossings. The Corps has regulatory responsibilities pursuant to Section 404 of the Clean Water Act (33 U.S.C. §1344), under which the Corps authorizes activities that may discharge dredge or fill material into waters of the United States, including wetlands. The agency also has regulatory responsibilities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403), under which the Corps authorizes structures and work in or affecting the course, condition, or capacity of navigable waters. Because most pipelines cross or potentially affect U.S. waters and wetlands somewhere along their routes, pipeline developers routinely are required to obtain Corps authorization for some pipeline segments. The Corps authorizes most pipeline water crossings using a general permit—Nationwide Permit 12—for utility-line activities in waters of the United States. A nationwide permit essentially preauthorizes a group of activities similar in nature that are likely to have a minor effect on waters and wetlands both individually and cumulatively.

Approvals Related to Corps Land and Corps Projects. A pipeline developer may need permissions from the agency's civil works program if a pipeline segment may affect or cross a Corps water resource project and Corps-managed land. That is, the Corps would need to grant (1) an easement, typically for a right-of-way, to cross federal land managed by the Corps or (2) a consent to cross non-Corps land with a Corps real estate interest (typically a federal flood easement over nonfederal land). Prior to the granting of the easement or consent, the Corps generally must provide permission for the pipeline to alter the associated Corps water resource project. The easement at a Corps project for the Dakota Access Pipeline to cross under the Missouri River in North Dakota was particularly controversial.

Corps Actions Must Comply with Federal Statutes. In carrying out its regulatory and civil works authorities, the Corps complies with applicable federal requirements. For example, the Corps identifies and considers the environmental impacts of the agency's proposed action (e.g., Corps permit of an activity affecting a wetland) pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. §§4321 et seq.) and considers impacts on historic properties pursuant to the National Historical Preservation Act (NHPA; 54 U.S.C. §306108).

Policy Issues. Various questions arise in policy debates on Corps' actions related to pipelines:

- How does the Corps determine the direct, indirect, and cumulative impacts of its decisions to authorize activities in regulated waters or Corps-managed lands?
- When the federal role in a pipeline is limited to approving activities at discrete segments, to what extent should federal agencies influence siting and other aspects of a pipeline?

- How does the use of Corps general permits affect the agency's review, information available to stakeholders and the public, and compliance with NHPA?

These questions reflect some of the basic debates and challenges that Congress and other policymakers face regarding federal approvals associated with private infrastructure.

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Introduction

Growth in North American crude oil and natural gas production has resulted in efforts to expand the domestic oil and natural gas pipeline network.¹ Pipelines can be a cost-effective and comparatively safe means of hydrocarbon transport. Pipelines and their routes also can be controversial locally, regionally, or nationally. While many new or expanded pipelines have been proposed and completed in recent years, other proposed pipelines have been unable to satisfy all the requirements to obtain federal authorizations, have faced barriers among state regulatory agencies, and have been the subject of litigation. Congress has a long-standing interest in pipeline development and the regulation of pipelines because of the critical role of pipelines in the domestic energy markets.²

Failure to construct pipelines may result in various potential effects, such as greater reliance on road or rail transport and constraints on getting oil and natural gas resources to refineries, power plants, and other consumers—all of which can create economic inefficiencies.³ Local interests along proposed pipeline routes regularly have raised concerns about the local environmental and other impacts of pipeline construction; they also have expressed concerns about the risks during pipeline operations of accidents that could affect the environment and human health. In recent years, stakeholders interested in reducing U.S. reliance on fossil fuels or promoting other energy sources and energy conservation have brought greater public attention both to oil and natural gas pipelines and to federal and state decisions related to new pipelines in particular. Some of these pipeline opponents argue that pipelines may facilitate the use of oil and natural gas, thereby indirectly contributing to the human health, welfare, and environmental effects of oil and natural gas production and use. Pipeline proponents argue that the impacts of development and use of natural gas may be less than impacts associated with other energy sources and that both oil and natural gas pipelines contribute to the nation's energy security and provide broad benefits to the U.S. economy.

This report discusses how the U.S. Army Corps of Engineers (Corps) administers its responsibilities related to certain pipeline segments that require Corps authorizations. The Corps is one of many federal agencies with responsibilities that may relate to oil and natural gas pipelines. Interest in federal approvals and requirements for pipelines relates to a broader policy issue before Congress: What is the appropriate federal role in protecting the environment, public

¹ References in this report to oil pipelines also apply to pipelines carrying refined products, such as gasoline or kerosene.

² Congressional hearings and proposed legislation reflect some of the recent congressional interest related to pipelines. For example, the House Energy and Commerce Committee's Subcommittee on Energy held a hearing, *Legislation Addressing Pipeline and Hydropower Infrastructure Modernization*, on May 3, 2017 (<https://energycommerce.house.gov/hearings-and-votes/hearings/legislation-addressing-pipeline-and-hydropower-infrastructure>), and the Senate Energy and Natural Resources Committee held a hearing, *Oversight Hearing on Oil and Gas Pipeline Infrastructure*, on June 14, 2016 (<https://www.energy.senate.gov/public/index.cfm/2016/6/hearing-to-examine-oil-and-gas-pipeline-infrastructure-and-the-economic-safety-environmental-permitting-construction-and-maintenance-considerations-associated-with-that-infrastructure>). During the 115th Congress, H.R. 2649 would change the Federal Energy Regulatory Commission's review process for natural gas pipelines. During the 114th Congress, S. 3498 proposed altering the requirements for actions by the U.S. Army Corps of Engineers (Corps) related to some oil and natural gas pipelines and Section 1115 of H.R. 8, as passed by the House, would have required the establishment of national energy security corridors for natural gas pipelines on federal land.

³ For example, for natural gas produced as part of oil production, transportation constraints potentially may contribute to flaring or venting of unmarketable natural gas.

health, national economy, and domestic energy security when reviewing and authorizing activities associated with private development of energy-sector or other infrastructure?

The role of the Corps in authorizing oil and natural gas pipelines is limited to (1) the agency's regulatory authorities for authorizing activities affecting regulated water bodies and wetlands and activities that alter or obstruct navigable waters and (2) its civil works authorities, including allowing a pipeline to cross a Corps water resource project and related lands. Because most pipelines cross regulated water bodies, the Corps must authorize the activities at those crossings before construction at those locations can commence. Because the Corps has no broad authority related to pipelines along their entire domestic routes, the agency's analyses to support its authorization decisions are scoped to focus on the application of Corps authorities to specific pipeline segments.

Controversy regarding the Dakota Access Pipeline (DAPL), a crude oil pipeline from North Dakota to Illinois, focused attention on the Corps' authorizations and approvals. This attention to the Corps may continue, given the renewed efforts for the international Keystone XL,⁴ proposed domestic pipelines, and related litigation.

This report provides an overview of the agency's role with respect to oil and natural gas pipelines. Because the Corps' pipeline-related decisions can be controversial, the report also introduces some of the issues raised.⁵ After an overview of the Corps and the broader federal role in approving private oil and natural gas pipelines, the remainder of the report discusses

- how the Corps' regulatory responsibilities apply where pipelines cross water bodies and wetlands (i.e., Corps regulatory program);
- how the Corps' civil works authorities may apply if a pipeline may alter or affect a Corps water resource project or may cross Corps-managed land (i.e., Corps civil works program);
- how the Corps complies with various federal statutes as it arrives at pipeline-related decisions, including the environmental documentation requirements of the National Environmental Policy Act (NEPA) and the historic preservation requirements of the National Historic Preservation Act (NHPA);⁶ and
- how the agency's role in pipelines raises or illustrates various policy issues for decisionmakers.

⁴ For more on Keystone XL, see CRS Insight IN10678, *Keystone XL Pipeline: Development Issues*, by (name redacted) . On May 30, 2017, the developer of the proposed Keystone XL pipeline submitted to the Corps pre-construction notifications (PCNs) for Nationwide Permit 12 (NWP 12). The submittals covered 182 regulated water crossings in South Dakota, 194 crossings in Montana, and 212 crossings in Nebraska. These Keystone PCNs (with some information withheld) are available at <http://www.nwo.usace.army.mil/Missions/Dam-and-Lake-Projects/PCN/>. For more on NWP 12 and PCNs, see "Corps Regulatory Program."

⁵ Tribal treaty and tribal trust responsibilities, including issues of tribal consultation, have been part of the legal challenges related to the Corps' actions in relation to the Dakota Access Pipeline (DAPL). Some of the policy issues raised include the following: How does the Corps evaluate the impacts of its decisions on tribal treaty rights, and how does the agency act on specific trust responsibilities or comply with more general trust duties? Because this CRS report is about the role of the Corps in pipelines generally and not about DAPL or tribal issues specifically, the report does not address tribal treaty and tribal trust responsibilities in detail. Although requirements to consult with tribes may exist in law or regulation, how tribal consultation is performed is largely a function of policy.

⁶ National Environmental Policy Act (NEPA; 42 U.S.C. §§4321 et seq.); National Historic Preservation Act (NHPA; 54 U.S.C. §306108).

Overview of Federal Role in Pipelines

Siting, construction, and operation of oil and natural gas pipelines may be subject to a number of local, state, tribal, and federal requirements.⁷ Whether the entire pipeline will require federal agency authorization generally depends on the commodity the pipeline would transport and whether it would cross state lines.⁸ Specifically, the siting, construction, and operation of interstate natural gas pipelines must be authorized by the Federal Energy Regulatory Commission (FERC), in accordance with requirements established under Section 7(c) of the Natural Gas Act of 1938;⁹ in contrast, domestic oil pipelines and intrastate natural gas pipelines are not subject to a similar federal authorization for their entire routes.

Federal pipeline safety standards also could affect pipeline siting, construction, operation, and maintenance. The Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) is the principal federal agency charged with ensuring the safe interstate movement of natural gas and hazardous liquids, including crude oil. Congress tasked the Department of Transportation, working through PHMSA, with regulating key aspects of interstate pipeline safety, including design, construction, operation and maintenance, and spill response planning. For more information on the Department of Transportation's safety program, see CRS Report R44201, *DOT's Federal Pipeline Safety Program: Background and Key Issues for Congress*, by (name redacted), and see the box later in this report titled "PHMSA Pipeline Safety Regulation and Corps Permit Conditions Related to Safety."

Specific aspects or activities associated with pipelines may be subject to federal agency approval. For example, separate federal agency authorization (in the form of a permit or other approval) may be required if the proposed pipeline, in whole or in part, would cross federal land or potentially would affect an environmental, natural, or cultural resource protected under federal law. As discussed below, the involvement of the Corps in pipelines generally is limited to those pipeline segments that would cross Corps-managed federal land (hereinafter referred to as *Corps land*) or a Corps-managed federal flood easement on nonfederal land and to those pipeline activities that may affect or cross waters and wetlands regulated by the agency.

Corps Involvement in Pipelines

Although the Corps has no authority to approve pipelines, certain pipeline segments and their construction may require Corps authorizations. Under the agency's regulatory program, the Corps is responsible for authorizing activities that could affect federally regulated waters and wetlands. Under its civil works program, the agency is responsible for approving activities that cross or affect Corps lands and projects.

⁷ See CRS Report R44432, *Pipeline Transportation of Natural Gas and Crude Oil: Federal and State Regulatory Authority*, by (name redacted).

⁸ This report focuses on the Corps' roles in authorizing domestic oil and natural gas pipelines because the majority of crude oil and natural gas pipelines in the United States do not cross an international border. Oil and natural gas pipelines that would cross the border with Canada or Mexico require Presidential Permits for border-crossing facilities, in addition to Corps and other permits required for domestic pipelines. For information about Presidential Permits, see CRS Report R44140, *Presidential Permit Review for Cross-Border Pipelines and Electric Transmission*, by (name redacted) and (name redacted), and CRS Report R43261, *Presidential Permits for Border Crossing Energy Facilities*, by (name redacted) and (name redacted).

⁹ 15 U.S.C. §171f. See CRS Report R43138, *Interstate Natural Gas Pipelines: Process and Timing of FERC Permit Application Review*, by (name redacted), and CRS Report R43261, *Presidential Permits for Border Crossing Energy Facilities*, by (name redacted) and (name redacted).

Regulatory Role

A pipeline developer must have authorization from the Corps regulatory program (sometimes referred to as its permit program) for any pipeline segment affecting or crossing Corps jurisdictional water, in accordance with

- Section 404 of the Clean Water Act,¹⁰ under which the Corps regulates the discharge of dredged or fill material into waters of the United States, including wetlands; and
- Section 10 of the Rivers and Harbors Act of 1899,¹¹ under which the Corps regulates structures and/or work in or affecting the course, condition, or capacity of navigable waters.

Because pipelines of any significant length will cross or otherwise may affect U.S. waters somewhere along their routes, pipeline developers are routinely required to have authorization from the Corps under Section 404 of the Clean Water Act (hereinafter Section 404) and/or under Section 10 of the Rivers and Harbors Act (hereinafter Section 10). The Corps regulates all activities affecting regulated waters; for pipelines, the Corps regulates activities whether the pipeline is interstate or intrastate and whether the pipeline is transporting oil or natural gas.

Civil Works Role

A pipeline developer may need certain approvals from the civil works program of the Corps if the proposed pipeline could affect a Corps water resource project or Corps land and real estate interests.¹² Corps land and other real estate interests (e.g., private lands with a federal flood or other flowage easement) typically were acquired as part of a water resource project. For pipelines to cross below, on, or above Corps land and non-Corps land with a Corps real estate interest, the agency generally will decide on granting both

- a Corps *permission* to alter a Corps civil works project; and
- a Corps *easement* to cross Corps land or a *consent* to cross non-Corps land with a Corps real estate interest.

Illustration of Federal Agency Involvement in Approving Pipelines

Figure 1 illustrates pipeline segments over which the Corps may have some role, specifically segments that would cross Section 404 Corps-regulated waters and wetlands or Section 10 Corps-regulated waters (and therefore would involve a role for the agency's regulatory program) and Corps land (and therefore would involve a role for the agency's civil works program). **Figure 1** also illustrates FERC involvement in authorizing the siting and construction of interstate natural gas pipelines; no federal agency has a similar role for domestic interstate or intrastate oil pipelines or for intrastate natural gas pipelines. Stakeholders with an interest in pipeline construction sometimes have focused on the role of the Corps in pipeline-related approvals when

¹⁰ 33 U.S.C. §1344. For a discussion of waters regulated under the Clean Water Act, see CRS Report R44585, *Evolution of the Meaning of "Waters of the United States" in the Clean Water Act*, by (name redacted) .

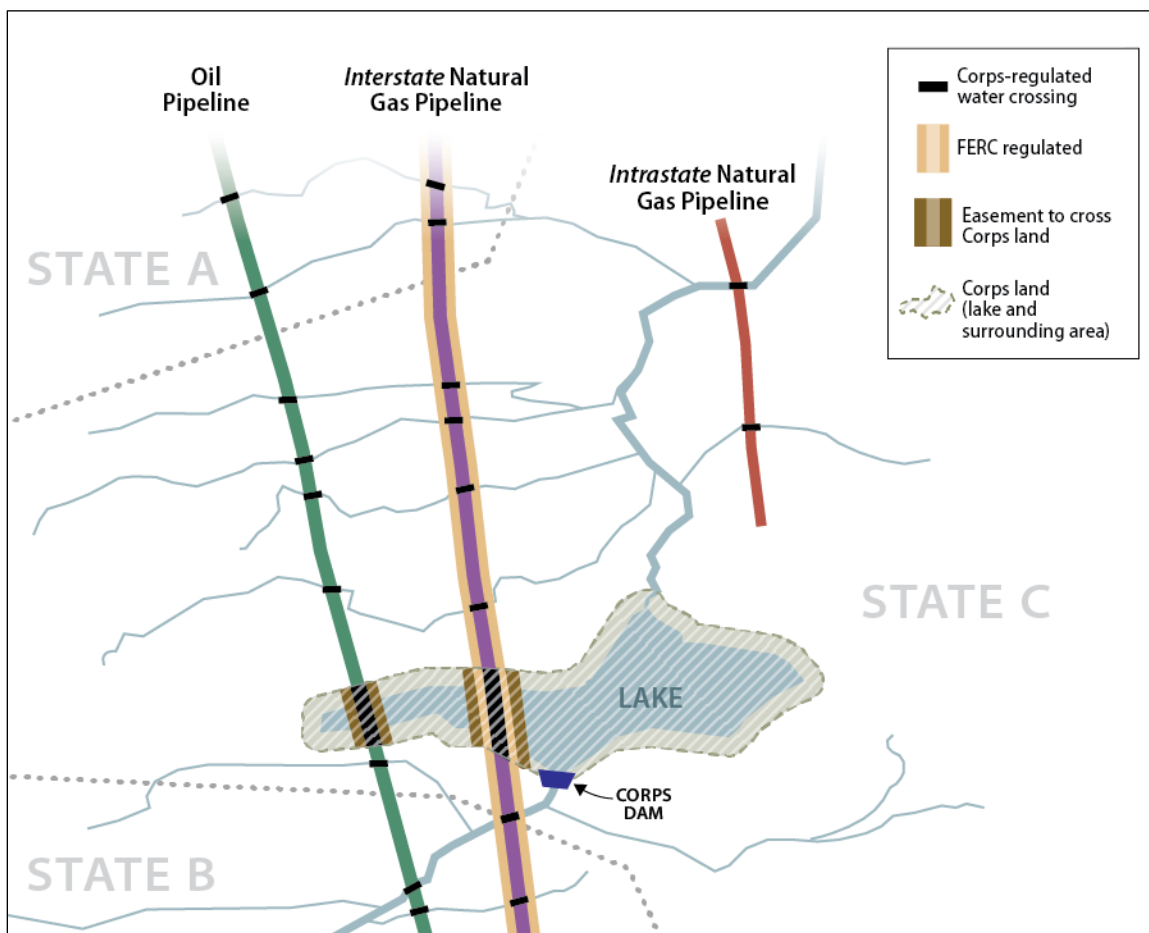
¹¹ 33 U.S.C. §403.

¹² Most Corps civil works projects and lands are associated with infrastructure the agency built to improve navigation and flood control and to restore aquatic ecosystems. For more on the Corps civil works program and its evolution, see the appendix of CRS Report R41243, *Army Corps of Engineers: Water Resource Authorizations, Appropriations, and Activities*, by (name redacted) and (name redacted) .

no other federal agency has authority to approve the entire pipeline, which primarily is the case for domestic pipelines transporting crude oil. In the case of the DAPL to transport crude oil, the pipeline route selected crossed Corps-regulated waters and Corps land at Corps water resource projects. For more on the DAPL, see the box “Why Was the Corps the Main Federal Agency Involved in the DAPL Debate?”

Figure 1. Illustration of Federal Agency Involvement in Approving Pipelines

(federal roles for different types and different routes of oil and natural gas pipelines)



Source: Congressional Research Service (CRS).

Notes: Corps land refers to Corps-managed federal land. FERC = Federal Energy Regulatory Commission. The Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA), which is not included in this figure, also has primary authority to regulate key aspects of interstate pipeline safety. International pipelines may have additional federal entities and pipeline segments that are subject to federal review, approval, or regulation. FERC does not authorize either interstate oil pipelines or intrastate oil pipelines; the role of the Corps is the same for interstate and intrastate oil pipelines.

Why Was the Corps the Main Federal Agency Involved in the DAPL Debate?

The Dakota Access Pipeline (DAPL) is a 1,170-mile pipeline system to transport oil from North Dakota to Illinois. The U.S. Army Corps of Engineers (Corps) became the most prominent federal agency in the DAPL debate in part because other agencies had minimal involvement, given that DAPL is an interstate oil pipeline. Because DAPL domestically transports crude oil, no federal agency has authority over its entire route or the entire construction project. Instead, the four states that the pipeline traverses had primary authority for approving the pipeline’s route.

The Corps was involved only in approving pipeline segments that overlapped with Corps authorities; that is, the agency's jurisdiction was over 37 miles of DAPL's length. The Corps was involved in DAPL because

- the construction of the pipeline required that the Corps authorize activities in regulated waters and wetlands at 202 separate water crossings and
- the route selected for DAPL required that the pipeline developer obtain Corps easements and related agency permissions to cross Corps-managed federal land at the agency's congressionally authorized water resource projects on the Missouri River, as well as the consent of the Corps to cross Corps flood easements on nonfederal land.

The pipeline developer used a Corps-promulgated nationwide permit—Nationwide Permit 12 for utility-line activities (NWP 12)—as the mechanism to obtain the agency's authorization for the 202 water crossings. Given the use of NWP 12, there was no DAPL-specific National Environmental Policy Act (NEPA) environmental documentation required for the Corps' verifications of the 202 water crossings.

The easement and related permission for the pipeline to cross under the Missouri River in North Dakota at the Corps-managed Lake Oahe project and lands received intense public attention, in part because the crossing is 0.55 miles upstream from the Standing Rock Sioux reservation and 73 miles north of the Cheyenne River reservation. DAPL began transporting crude oil on June 1, 2017.

Some litigation related to DAPL continues in the courts. Much of the litigation relates to the agency's compliance with NEPA with respect to the permission and easement decisions at Lake Oahe. A number of these legal challenges initially were rejected. However, in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-1534 (D.D.C. June 14, 2017), the U.S. District Court for the District of Columbia found that “[a]lthough the Corps substantially complied with NEPA in many areas, the Court agrees that it did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial.”

The court reserved judgement on other claims and did not immediately provide for relief, noting the “serious consequences” of vacating the agency's approval now that the pipeline is in operation. The court instead scheduled a new round of briefing on the issue of relief.

Corps Regulatory Program

The Corps is responsible for authorizing activities that may affect waters over which it has jurisdiction under Section 404 or Section 10. The agency performs this work as part of its regulatory program. The types of projects that may cause impacts to regulated waters vary widely, including navigation, coal mining, riverbank stabilization, and transportation projects. One category of activities is a water or wetland crossing by a utility line, which includes oil and natural gas pipelines.

The Corps' regulatory authorities are limited by statute to activities affecting waters and wetlands regulated pursuant to the Section 404 and Section 10 authorities.¹³ That is, the agency's regulatory jurisdiction does not extend to a pipeline's entire route; it is limited to the crossings of regulated waters, as shown in **Figure 1**. Therefore, the Corps generally does not regulate the largest components of pipeline projects because it does not have regulatory jurisdiction over portions of the pipeline that cross upland areas.¹⁴

¹³ A discussion of the waters regulated under Section 404 and how those are defined is beyond the scope of this report. For information on that policy issue, see CRS In Focus IF10125, *Overview of the Army Corps and EPA's Rule to Define "Waters of the United States" (WOTUS) and Recent Developments*, by (name redacted)

¹⁴ In other words, the agency's authorities *federalize* (i.e., make the private action subject to federal authorization or approval) only the portions of the pipeline associated with regulated water crossings. For a project such as an oil pipeline, in which only discrete segments are federalized, the Corps is described as having a “small federal handle” based on the analogue that the pipeline is the pan and the federal role is limited to a small handle. For more on this concept, see box titled “Geographic Limits of Corps Environmental Reviews.” For example, in the case of the Flanagan South pipeline to transport crude oil from Illinois to Oklahoma, the pipeline segments that were subject to the agency's (continued...)

Authorizations pursuant to the Corps regulatory authorities fall under two categories of permits—individual permits and general permits. Actions authorized through general permits represented almost 94% of the Corps’ 53,825 regulatory actions in FY2016.¹⁵

Individual Permits

Activities that may or are expected to have significant adverse impacts on regulated waters require individual permits. The Corps (or states that have been delegated the authority to administer Section 404 permits)¹⁶ can process individual permits as standard individual permits or through an abbreviated process known as a Letter of Permission procedure (which can vary by state).¹⁷ Each standard individual permit is subject to public notice, public interest review, public hearing, activity-specific environmental documentation, and case-by-case evaluation (including an evaluation of alternatives), so these permits typically require more time than general permits before an activity is authorized.¹⁸ Public notification is not required for individual permits processed using Letters of Permission procedures.

General Permits

The Corps issues general permits for activities that are similar in nature and that are expected to have minimal adverse effect on waters and wetlands both individually and cumulatively.¹⁹ General permits essentially preauthorize a group of similar activities on a programmatic level.

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regulatory jurisdiction were 2.3% of the total length of the pipeline. (See U.S. Army Corps of Engineers, *Decision Document Nationwide Permit 12*, January 6, 2017, at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/NWP_12_2017_final_Dec2016.pdf?ver=2017-01-06-125514-797. Hereinafter referred to as NWP 12 Decision Document.)

¹⁵ That is, of the Corps’ 53,825 regulatory actions in FY2016, 60% (32,475 actions) and 34% (18,066 actions) were pursuant to the nationwide permits (NWP) and the regional/state general permits, respectively. These figures were calculated using data in Appendix B of U.S. Army Corps of Engineers, *FY2016 Regulatory Annual Report for Section 1006(2)(e) of WRRDA*, at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/section214/fy16_WRDA214_annual_report.pdf?ver=2017-03-27-075105-620. Figures do not include authorization of actions that do not require reporting to the Corps. An estimate of the total actions under the nationwide permits (including the actions that are not required to be reported) is around 61,500 (U.S. Army Corps of Engineers, *Regulatory Impact Analysis for the Proposed 2017 Nationwide Permits*, May 18, 2016, p. B-2. Hereinafter referred to as 2016 NWP Regulatory Impact Analysis).

¹⁶ The Clean Water Act was amended in 1977 to allow for state administration of individual and general permits (33 U.S.C. §1344). In this report, for simplicity the Corps generally is identified as the entity responsible for administering the permit requirements of Section 404.

¹⁷ Letters of Permission can be used only for activities specified in 33 C.F.R. §325.2(e)(1). For example, Letters of Permission for Section 404 compliance are limited to activities for which the water quality certification (pursuant to Section 401 of the Clean Water Act) is waived and, if appropriate, the Coastal Zone Management Act consistency concurrence is obtained or presumed. For information on state or tribal water quality certification and state coastal zone management consistency, see “Compliance with Federal Statutes” later in this report.

¹⁸ According to the Corps, the agency’s mean number of days for evaluating complete applications for standard individual permits and for Letters of Permission are 211 days and 110 days, respectively (2016 NWP Regulatory Impact Analysis, p. B-2). If additional information is needed from an applicant to complete an application, the permitting process may take longer. The mean number of days from the initial application (which may or may not represent a complete application) to the Corps decision is 291 days for standard individual permits and 140 days for Letters of Permission (*ibid.*, p.10). No data on permit-processing time are available for oil and natural gas pipeline-related individual permits. For information on processing times for some general permits, see footnote 41.

¹⁹ 33 U.S.C. §1344(e). The Clean Water Act does not establish how the Corps is to determine whether or not an impact is minimal or the degree of certainty required to support such a determination; however, the statute does indicate (continued...)

The Corps uses general permits to minimize the permit processing burden of its regulatory program on both itself and applicants. General permits authorize applicants to proceed without the more time-consuming need to obtain standard individual permits in advance. The lower processing burden of general permits creates an incentive for applicants to reduce the impacts of their activities on regulated waters and wetlands in order to qualify for a general permit.

During the process required for the Corps to issue a general permit, the general permit is subject to public notice, public interest review, public hearing, and environmental documentation; the specific actions undertaken pursuant to the general permit do not go through these steps. The Corps issues a range of general permits, including

- *Nationwide permits* (NWPs), which cover a wide range of activities—such as aids to navigation, minor dredging, and bank stabilization.²⁰ There are 52 NWPs in force. Regional conditions also can be applied to NWPs.
- Other general permits that apply in a single state or regionally. *Programmatic permits* are built on an existing state, local, or other federal agency program and are designed to avoid duplication between the existing program and Corps efforts.²¹ *Regional permits* are a type of general permit issued by a division or district engineer at the Corps.²²

Nationwide and other general permits are issued for five-year terms; the permits automatically expire and become null and void (and cannot be extended) if they are not modified or reissued within five years of their effective date.²³ The current NWPs took effect on March 19, 2017, for a five-year period.²⁴

Pipeline 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. It typically would be NWP 12 (which is discussed in more detail in “Nationwide Permit 12: Utility-Line Activities,” below), unless a state or regional general permit applies. To qualify for NWP authorization, proposals must meet a number of general conditions (GCs). (See section titled “General Conditions Required for NWP Authorization” for more information).

Many activities covered by NWPs can proceed without advance notification to the Corps, whereas other activities that can be pursued under an NWP require that the applicant submit a pre-construction notification (PCN) and obtain a verification by the Corps for use of that NWP. A PCN is a request submitted by the applicant to the Corps to confirm (i.e., verify) whether or not a particular activity is authorized by general permits. If the activity does not require the permittee to submit a PCN, the permittee determines if the activity qualifies for an NWP. Therefore, the Corps

(...continued)

criteria applicable to Section 404 permits, including categories of impacts (33 U.S.C. §1344(b)).

²⁰ For more on nationwide permits, see CRS Report 97-223, *The Army Corps of Engineers’ Nationwide Permits Program: Issues and Regulatory Developments*, by (name redacted) and (name redacted) .

²¹ For example, there is a state programmatic general permit (SPGP) for Pennsylvania that allows for the issuance of general permits on a statewide basis that work in conjunction with a Pennsylvania regulatory program that protects the environment in a manner equivalent to the Corps regulatory program.

²² An assessment of the suite of regional and state general permits and how they relate to pipelines is beyond the scope of this report.

²³ Most standard individual permits also expire after five years and must be reissued or renewed, if the activity that they authorize is of a continuing nature.

²⁴ U.S. Army Corps of Engineers, “Issuance and Reissuance of Nationwide Permits, Final Rule” 82 *Federal Register* 1860, January 6, 2017.

reviews the activities for which it receives a PCN but does not conduct a review of all the individual activities potentially authorized by an NWP. (See section titled “Pre-construction Notification” for more on PCNs.)

If a pipeline-related crossing does not meet the conditions of a general permit or qualify for a general permit as determined by statute and regulation, the Corps district may use its discretionary authority to require use of the individual permit process. The Atlantic Sunrise natural gas pipeline is an example of a pipeline for which the Corps reviewed the application as a standard individual permit because the proposed activity would exceed the wetland loss threshold of the applicable general permit.²⁵

Nationwide Permit 12: Utility-Line Activities

One of the 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. The permit defines a *utility line* as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance—including oil or natural gas—for any purpose and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages and radio and television communication.²⁶ NWP 12 can be used only if the activity (e.g., a water crossing) does not result in the loss of more than 0.5 acres of waters of the United States.

Certain activities under NWP 12 require an approved PCN before the activity authorized by that permit may commence. An NWP 12 permit applicant must submit a PCN based on various thresholds and criteria—for example, when a Section 10 permit is required, when mechanized land clearing in forested wetlands is required for the right-of-way, or when discharges are expected to cause the loss of more than 0.1 acres of waters of the United States, among other thresholds and criteria.²⁷ For NWP 12 specifically, the Corps requires that PCNs include information on other water crossings for the linear project (e.g., the pipeline) that will use NWP 12 that do not require PCNs.

The Corps estimates that NWP 12 is used on average approximately 11,500 times per year on a national basis, affecting approximately 1,700 acres of U.S. waters, including wetlands regulated under the Clean Water Act.²⁸ The total includes about 9,000 uses per year for activities that involve submitting a PCN to the Corps and about 2,500 uses for activities that do not require a PCN.²⁹

Individual NWP 12 verifications do not require NEPA documentation, nor do they require an opportunity for public comment.³⁰ The public comment opportunity occurs during the rulemaking procedure for the NWP itself, not with each verification or use of the permit.³¹

²⁵ The applicable general permit would have been a Pennsylvania-specific general permit (see footnote 21). For more information on Atlantic Sunrise, see U.S. Army Corps of Engineers, *Public Notice*, March 31, 2017, at <http://www.nab.usace.army.mil/Missions/Regulatory/Public-Notices/Public-Notice-View/Article/1136707/pn17-15-williams-gas-pipeline-atlantic-sunrise-project-2014-00475/>.

²⁶ NWP 12 Decision Document, p. 1.

²⁷ *Ibid.*, p. 43.

²⁸ *Ibid.*, p. 70.

²⁹ *Ibid.*

³⁰ *Ibid.*, p. 20.

³¹ During the NWP rulemaking, the Corps may consult with tribes. Generally this consultation is to determine regional (continued...)

Whereas for some pipelines Corps regulatory information is publicly available through Corps districts, FERC dockets,³² or court documents, no nationally aggregated data are available on NWP 12 use that is specifically about oil and natural gas pipelines. The 11,500 NWP 12 authorizations cited are not specific to pipelines; the figure includes all utility-line activities. Furthermore, although NWP 12 covers a large majority of utility-line activities, some pipeline activities may not qualify for NWP 12 and may require individual permits. The publicly available database that the Corps maintains on individual permits is not designed to track which individual permits are related to oil and gas pipelines,³³ and no publicly available database is available that tracks each verification for NWP 12 activities related to pipelines specifically or utility lines more broadly.

General Conditions Required for NWP Authorization

By statute, activities that have the potential to result in more than minimal individual and cumulative adverse effects on the aquatic environment cannot be authorized by NWPs, including NWP 12.³⁴ To ensure that individual activities do not exceed that level of impact, each NWP rulemaking includes general conditions (GCs) that a permittee must comply with, as applicable.³⁵ The NWPs reissued in 2017 detail 32 GCs that apply to any activity using an NWP for its authorization, including the following:

- **Navigation** (GC 1). No activity may cause more than minimal adverse effects on navigation.
- **Water Supply Intakes** (GC 7). No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

(...continued)

conditions that may apply to one or more NWPs and to require PCNs for proposed activities in a geographic region that have the potential to cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. According to 82 *Federal Register* 1953, January 6, 2017, during the 2007, 2012, and 2017 NWP rulemakings, “Corps Headquarters issued memoranda to its division and district offices that requested that Corps districts consult with tribes on the NWPs to develop regional conditions, coordination procedures, and other measures to ensure that the NWPs have no more than minimal adverse effects on tribal trust resources and tribal rights.”

³² In 2007, the Corps adopted a regulatory guidance letter on its permit process for proposed natural gas projects, including interstate natural gas pipelines; the letter indicates that the Corps will provide a copy of its verification letters to the Federal Energy Regulatory Commission (Letter from Major General Don T. Riley, Director of Civil Works, Corps Regulatory Guidance Letter, September 19, 2007).

³³ A national database of Corps individual permits is available at http://corpsmapu.usace.army.mil/cm_apex/f?p=340:1:0::NO. The database includes individual permits; it is searchable by Corps regulatory office, month, and year. Available data fields include the name of the applicant and project name (which may reference the type of project); there is no database field for the type of project (e.g., pipeline).

³⁴ 33 U.S.C. §1344(e).

³⁵ Although noncompliance with the general conditions (GCs) can be the basis for enforcement action, courts have held that the Corps need not undertake a searching examination of compliance with each GC prior to issuing an NWP verification (*Mobile Baykeeper, Inc. v. U.S. Army Corps of Engineers*, 2014 WL 5307850 (S.D. Ala. October 16, 2014)). According to 82 *Federal Register* 1952, January 6, 2017, “District engineers monitor the use of the NWPs in specific geographic regions, to ensure that the use of the NWPs does not result in more than minimal cumulative adverse environmental effects, which includes adverse effects to tribal rights, protected tribal resources, and tribal lands.”

- **Management of Water Flows** (GC 9). To the maximum extent practicable, the pre-construction course, condition, capacity, and location of water flows must be maintained.
- **Proper Maintenance** (GC 14). Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP GCs, as well as any activity-specific conditions added by the district engineer to an NWP authorization.³⁶ (For information on how pipeline safety is addressed and how it relates to GC 14, see box titled “PHMSA Pipeline Safety Regulation and Corps Permit Conditions Related to Safety.”)
- **Tribal Rights** (GC 17). No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.³⁷
- **Endangered Species** (GC 18). No activity may be authorized if it is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the federal Endangered Species Act (ESA),³⁸ or if it will directly or indirectly destroy or adversely modify the critical habitat of such species.
- **Historic Properties** (GC 20). In cases where the district engineer determines that the permitted activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, no activity may be authorized until the requirements of Section 106 of NHPA have been satisfied. Section 106 requires federal agencies to take into account the effect of their undertakings on any historic property.
- **Mitigation** (GC 23). The district engineer must consider specific factors when determining appropriate and practicable mitigation measures to ensure that any adverse effects on the aquatic environment are minimal (e.g., to the maximum extent practicable, the activity must be designed and constructed to avoid and minimize temporary and permanent adverse effects, at the project site, to waters of the United States).
- **Water Quality** (GC 25). The permittee must obtain an individual water quality certification or waiver for discharges authorized by the NWP if the state or authorized tribe has not previously certified compliance of the NWP with Section 401 of the Clean Water Act.³⁹

³⁶ NWP 12 Decision Document (p. 24) states:

General condition 14, proper maintenance, requires NWP activities to be maintained to ensure public safety. For NWP 12 activities, this includes maintaining the utility line so that it does not leak. The Corps does not regulate the operation and maintenance of pipelines, if those activities do not include activities that require [Department of the Army] authorization. As discussed above, there are other federal agencies that have legal responsibility for addressing the operation of pipelines and responding to leaks or spills that may occur. Concerns regarding pipeline leaks or spills should be brought to the attention of those federal agencies.

³⁷ According to 82 *Federal Register* 1953, January 6, 2017, “If a tribe has concerns with how a Corps district is implementing these NWPs, the tribe should raise those concerns to the district. Disagreements concerning interpretation of treaties may need to be resolved by other parties.”

³⁸ 16 U.S.C. §1536.

³⁹ 33 C.F.R. §330.4 contains the regulations for implementing Section 401 of the Clean Water Act.

- **Pre-construction Notification** (GC 32). The permittee is required to provide a PCN as specified in each NWP.

Unlike with individual permits, activities in regulated waters can be conducted pursuant to NWPs without an evaluation of alternatives to those activities (e.g., a water crossing proposed by a pipeline developer can be authorized under the NWP without the Corps evaluating alternative crossing locations).⁴⁰ For verification under an NWP, GC 18 and GC 20 may require the use of the NWP to be reviewed if the activity may adversely affect federally listed endangered or threatened species or historic properties. For more on NWP and ESA compliance, see box “Nationwide Permits and Endangered Species Act Compliance.” For more on historic properties compliance, see this report’s section titled “Corps Procedures for Protecting Historic Properties.”

PHMSA Pipeline Safety Regulation and Corps Permit Conditions Related to Safety

The Pipeline and Hazardous Materials Safety Administration (PHMSA) largely determines the minimum federal requirements for interstate pipelines. PHMSA regulations are largely how pipeline safety is addressed in pipeline design, construction, and maintenance. PHMSA also is responsible for reviewing oil spill response plans (known as facility response plans) for oil pipelines that might spill oil into navigable waters or on the shoreline. PHMSA reviews and approves these plans consistent with 33 U.S.C. §1321. Key elements of a facility response plan are, among other things, a worst-case discharge calculation and location (49 C.F.R. §194) and identification of environmentally and economically sensitive areas.

Regarding siting of pipelines, PHMSA identifies high consequence areas (HCAs) to reduce the consequences of an inadvertent release from pipelines. HCAs for natural gas transmission focus solely on populated areas. For hazardous liquid pipelines, such as oil pipelines, the HCAs are identified based on populated areas, drinking water sources, and unusually sensitive ecological resources. PHMSA’s Office of Pipeline Safety identifies and maps HCAs for hazardous liquids because of their complexity, while operators of natural gas pipelines use an equation to calculate a radius of potential impact and then compare the area of potential impact to populated areas. Pipeline segments in the presence of HCAs may require extra integrity protection to reduce risk.

Regarding the scope of the treatment of pipeline safety within the agency’s regulatory program, the Corps has stated:

We do not have the authority to regulate the operation of oil and gas pipelines, and we do not have the authority to address spills or leaks from oil and gas pipelines. ... There are other federal laws that address the operation of pipelines and spills and leaks of substances from pipelines. Those laws are administered by other federal agencies. (U.S. Army Corps of Engineers, Decision Document Nationwide Permit 12, January 6, 2017, p. 1884.)

Instead, when the Corps provides authorization for activities regulated under Section 404 and Section 10, the agency generally requires that the authorized structures be properly maintained to ensure public safety. For example, under Nationwide Permit 12, General Condition 14 on proper maintenance requires that any authorized structure be maintained so that it does not leak.

Pre-construction Notification

GC 32 specifies that the permittee is required to submit a PCN to the Corps pursuant to the applicable NWP; it also establishes the information required for inclusion in the PCN and the timing of the agency’s review of the PCN. When a PCN is submitted, the Corps has 30 days to determine whether a PCN is complete. The Corps district engineer has 45 days to review a complete notification under most NWPs, including NWP 12, unless the proposed activity requires an ESA Section 7 consultation and/or NHPA Section 106 consultation.⁴¹ If no ESA or NHPA

⁴⁰ 40 C.F.R. §230.7(b)(1).

⁴¹ NWP 12 Decision Document, p. 10. According to the Corps, the agency’s mean number of days for evaluating complete applications for verifications pursuant to the NWPs that require PCNs is 41 days (2016 NWP Regulatory Impact Analysis, p. 10). If additional information is needed in order to complete an application, the permitting process may take more time. The mean number of days from the initial notification with a PCN under an NWP (which may or may not represent a complete application) to the Corps decision is 86 days (ibid., p.10). No data on permit-processing (continued...)

consultation is required, the proposed work generally may not proceed without written confirmation from the district engineer; however, if no decision is issued during the 45-day review period, the permittee may presume that the activity qualifies for the NWP.⁴² If ESA or NHPA consultation is required, the proposed work may not begin before receiving a written NWP verification. PCNs and their verifications are not required to be published, nor must a public comment opportunity be provided during the review period. The public may not be aware that a PCN has been submitted to the Corps.

Nationwide Permits and Endangered Species Act Compliance

Section 7 of the Endangered Species Act (ESA) requires federal agencies to consult with the Department of the Interior's Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, to determine whether an activity an agency might authorize "may affect" a species listed or proposed for listing as threatened or endangered under ESA. The Corps does not engage in Section 7 consultation on rulemaking for the nationwide permits (NWPs) because it relies on General Condition 18 and other NWP procedures, such as regional conditions, to ensure that the NWPs are not likely to jeopardize any threatened or endangered species or harm critical habitat. Consequently, the Corps may have to ensure ESA compliance for specific NWP verifications. A Corps document indicates that the agency conducted 1,402 formal consultations and 9,302 informal consultations for specific activities under the NWP pursuant to Section 7 of the ESA during the period March 19, 2012, to September 30, 2016 (U.S. Army Corps of Engineers, *Decision Document Nationwide Permit 12*, January 6, 2017, p. 65). No consultation statistics specific to NWP 12 are available. According to the same Corps document (p. 66), "If the biological opinion concludes that the proposed activity is likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat, the proposed activity cannot be authorized by NWP and the district engineer will instruct the applicant to apply for an individual permit." For more on what is a Section 7 consultation, see CRS Report RL31654, *The Endangered Species Act: A Primer*, by (name redacted) and (name redacted).

Nationwide Permit 12: Issues Raised Regarding Current Approach and Use

As noted, the majority of oil and natural gas pipeline activities subject to the Corps regulatory program are authorized via NWP 12. Some stakeholders have criticized the Corps for relying on NWP 12 to authorize pipeline-related activities. A primary concern is that the NWP process does not allow for a separate environmental review of each activity or set of activities for a pipeline project proceeding under NWP 12. The agency's position is that, if applicable general conditions and limits for using the NWP are met, the environmental impacts would be minimal.

The Corps has developed the general conditions for the use of NWP 12 to establish compliance with federal laws related to species, historic properties, and environmental impacts. Some critics contend that permittees that are not required to submit PCNs make their own determinations about project-specific conditions without Corps review.

Another criticism relates to the scope of environmental impacts considered for projects under NWP 12. NWPs can be used only for a "single and complete project" that will cause only minimal adverse environmental effects, individually or cumulatively.⁴³ The Corps defines a *single*

(...continued)

times are available for NWP 12 or for oil and natural gas pipeline-related verifications pursuant to NWP 12. As noted, these data are for the mean; information on the full distribution of evaluation days and application days is not available.

⁴² According to the NWP 12 Decision Document (p. 11), "If the district engineer determines after reviewing the PCN that the cumulative adverse environmental effects are more than minimal, after considering a mitigation proposal provided by the project proponents, he or she will exercise discretionary authority and require an individual permit."

⁴³ 33 C.F.R. §330.2(i).

and complete project as a portion of a total project that includes all crossings of a single water body at a specific location.⁴⁴ Thus, NWP 12 can be used multiple times for a single pipeline with numerous water crossings if each crossing does not result in the loss of greater than 0.5 acres of waters of the United States. Therefore, the “project” that is subject to Corps authorization is not the entire pipeline but rather the discrete segments that cross waters subject to the agency’s regulatory jurisdiction. Critics say that such segmenting of a pipeline when NWPs are used fails to account for cumulative effects. Legal challenges to the use of NWPs along these lines of argument have been largely unsuccessful.⁴⁵

Corps Civil Works Program

If a proposed nonfederal pipeline of any type or other nonfederal activity would cross or otherwise use federal lands, the developer generally is required to obtain the appropriate real estate interest (e.g., an easement providing a right-of-way for the pipeline) from the federal agency authorized to administer that land. The Corps owns 7.6 million acres of land and manages another 4.1 million acres, often through federal flowage easements on nonfederal, frequently private, land.⁴⁶ The Corps is responsible for these lands because they are part of Corps civil works projects. The agency’s inventory of civil works projects includes 702 dams and associated reservoirs and 14,500 miles of Corps-constructed levees. A pipeline developer also is required to obtain the agency’s permission prior to altering or otherwise affecting the operations of a Corps civil works project.

For requests to have pipelines cross below, on, or above Corps land and non-Corps land with a Corps real estate interest, the Corps generally will decide on whether or not to grant both a *permission* to alter a Corps civil works project and an *easement* to cross Corps land or a *consent* to cross non-Corps land with a Corps real estate interest.

Permission to Alter a Corps Project

Corps authority to allow alterations to its projects derives from Section 14 of the Rivers and Harbors Act of 1899, also known as Section 408 based on its codification at 33 U.S.C. §408. This provision states that the Secretary of the Army may “grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in the judgment of the Secretary such occupation or use will not be *injurious to the public interest* and will not *impair the usefulness of such work*” (emphasis added).

⁴⁴ According to 82 *Federal Register* 2007, January 6, 2017, “For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization.”

⁴⁵ See, for example, *Sierra Club v. United States Army Corps of Eng'rs*, 990 F. Supp. 2d 9 (D.D.C. 2013) related to the Flanagan South oil pipeline; *Mobile Baykeeper, Inc. v. U.S. Army Corps of Engineers*, 2014 WL 5307850 (S.D. Ala. October 16, 2014) related to the use of NWP 12 for 12 water-crossing authorizations for a 41-mile pipeline transporting oil from Alabama to Mississippi; and *Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015) related to the 485-mile Gulf Coast Pipeline to transport oil with more than 2,000 regulated crossings authorized using NWP 12. A dissent in an earlier opinion in the *Sierra Club v. Bostick* litigation contrasts with the previously noted opinions, in that it attributed significance to the absence of a Corps NEPA document for the cumulative impacts of the more than 2,000 NWP 12 verifications (*Sierra Club v. Bostick*, No. 12-6201, 539 Fed. Appx. 885, 896, 2013 U.S. App. LEXIS 20667, 2013 WL 5539633, at *9 (10th Cir. Oct. 9, 2013)).

⁴⁶ U.S. Army Corps of Engineers, *Information Paper: Civil Works Program Statistics*, March 20, 2013. Flowage easement land is non-Corps-owned land on which the Corps has acquired certain perpetual rights, including the right to flood the land.

A Section 408 permission is required for all alterations to Corps projects, not only alterations by pipelines.⁴⁷ For pipelines over 24 inches (24") in diameter, the Corps conducts a technical review of the proposed pipeline's effects on Corps projects pursuant to Engineer Circular (EC) 1165-2-216, *Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408*.⁴⁸ For more details on the technical review conducted for deciding to grant, grant with conditions, or deny a Section 408 permission, see the box "Section 408 Permissions: Guidance Since 2015 and Congressional Action." For smaller pipelines and other encroachments of a more routine or minimal nature, the Corps complies with Section 408 by following the process established in Chapter 17, "Non-Recreation Outgrant Policy," of Engineer Regulation (ER) 1130-2-550, *Recreation Operations and Maintenance Policies*.⁴⁹

Section 408 Permissions: Guidance Since 2015 and Congressional Action

In 2015, the Corps released new regulations for how the agency would process requests for Section 408 permissions—Engineer Circular (EC) 1165-2-216. The regulations require the Corps to review (1) whether granting the 408 permission would impair the usefulness of the specific Corps project and (2) whether the proposed alteration to the Corps project would be injurious to the public interest based on probable, including cumulative, impacts. EC 1165-2-216 states:

Evaluation of the probable impacts that the proposed alteration to the [Corps] project may have on the public interest requires a careful weighing of all those factors that are relevant in each particular case. The benefits that reasonably may be expected to accrue from the proposal must be compared against its reasonably foreseeable detriments. The decision whether to approve an alteration will be determined by the consideration of whether benefits are commensurate with risks.

EC 1165-2-216 also states:

Factors that may be relevant to the public interest depend upon the type of [Corps] project being altered and may include, but are not limited to, such things as conservation, economic development, historic properties, cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation. This evaluation should consider information received from the interested parties, including tribes, agencies, and the public.

As part of the technical review, the Corps complies with other federal statutes, such as the National Environmental Policy Act (NEPA), and provides public notice of the opportunity for public input. As part of the technical review and accompanying documents for NEPA compliance, the Corps considers reasonable feasible alternatives. In practice, the alternatives considered are generally limited to (1) the proposed alteration in place and (2) the proposed alteration not in place. According to EC 1165-2-216, examination of alternatives not proposed by the applicant should be

⁴⁷ The Corps received 1,437 applications (also referred to as requests) in FY2016 for Section 408 permissions. There is no available information on how many of these requests were related to oil and natural gas pipelines (Email from U.S. Army Corps of Engineers staff to Congressional Research Service, November 10, 2016). The Corps processed a total of 847 requests in FY2016; of these, the Corps approved 755 and denied 42, and 52 requests were withdrawn (ibid.). There are no data on how often the Corps used environmental assessments or the more-detailed environmental impact statements as part of its NEPA compliance for the agency's Section 408 permission reviews (ibid.). No data on processing times for Section 408 permissions are publicly available.

⁴⁸ U.S. Army Corps of Engineers, *Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408*, Engineer Circular (EC) 1165-2-216, September 30, 2015 (June 21, 2016, update), at http://www.publications.usace.army.mil/Portals/76/Publications/EngineerCirculars/EC_1165-2-216.pdf?ver=2016-09-01-111054-827.

⁴⁹ U.S. Army Corps of Engineers, *Recreation Operations and Maintenance Policies*, Engineer Regulation (ER) 1130-2-550, October 1, 1999, at http://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1130-2-550.pdf?ver=2014-05-06-112352-670. EC 1165-2-216 states that easements and other approved uses of federal lands by nonfederal entities issued pursuant to ER 110-2-550, Chapter 17 meet "the intent of Section 408."

evaluated only to the extent necessary to allow a complete and objective evaluation of the public interest and an informed decision regarding the permission. At the end of the Section 408 process, the Corps chooses to provide or deny permission for the alteration to the Corps project; the Corps also can attach conditions to its Section 408 permission, including conditions that should be applied to the easement or consent.

EC 1165-2-216 (as drafted in 2015 and updated in 2016) provided some time frames for specific steps within the agency's review process; it did not specify guidance on or requirements for a timeline for completing the entire permission process. EC 1165-2-216 also did not specify that the Corps needed to identify an application as complete or incomplete. Instead, it indicated that Corps district would work with the applicant to determine the level of detail necessary to make a decision for a particular request and that the Corps district may request additional information from the applicant during the agency's review.

The 114th Congress addressed the agency's Section 408 permission process in legislation enacted in December 2016. Specifically, Section 1156 of P.L. 114-322 amended the Section 408 authority to require the Corps to

- indicate whether the application is complete within 30 days of receiving the application,
- decide on the Section 408 permission or provide a schedule of when the decision would be made within 90 days of receiving a complete application, and
- coordinate its NEPA review of an activity requiring a Section 408 permission with other NEPA reviews related to that activity (including any review under the agency's regulatory authorities or led by another agency).
- Section 1156 also allowed the Corps to accept and expend funds received from nonfederal public and private entities to evaluate an alteration or permanent occupation or use of a work built by the United States. In June 2017, the Corps released its implementation guidance for Section 1156. The guidance indicates that EC 1165-2-216, which is set to expire on September 30, 2017, is in the process of being revised to include lessons learned and to implement the changes made in statute in 2016 and 2014 (Section 1007 of P.L. 113-121).

Sources: U.S. Army Corps of Engineers, *Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408*, EC 1165-2-216, September 30, 2015 (updated June 21, 2016); U.S. Army Corps of Engineers, *Implementation Guidance for Section 1007 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014), Expediting Approval of Modifications and Alterations of Projects by Non-Federal Interests and Section 1156 of the Water Resources Development Act of 2016 (WRDA 2016), Structures and Facilities Constructed by Secretary*, Memorandum for Distribution, June 2, 2017.

Corps Easements or Consents for Pipelines

Federal agencies, including the Corps, may grant an easement for oil and natural gas pipelines to cross federal land in accordance with the provisions of Section 28 of the Mineral Leasing Act (MLA).⁵⁰ The Corps also can consent to a pipeline crossing non-Corps lands with a Corps real estate interest (e.g., flowage easement) using a broad, military-wide real estate authority.⁵¹

If a Section 408 permission is needed, the easement or consent is contingent upon the granting of the Section 408 permission.

Congressional Committee Notification

Since 1973, the MLA requires that two congressional authorizing committees—the House Natural Resources Committee and the Senate Energy and Natural Resources Committee—be notified if the developer of an oil or natural gas pipeline with a diameter of 24" or greater is requesting to cross federal land.⁵² The Corps also must notify the committees if it intends to grant an easement

⁵⁰ 30 U.S.C. §185.

⁵¹ 10 U.S.C. §2668. Corps consents do not grant a right or interest in a property.

⁵² 30 U.S.C. §185(w)(2). The Secretary of the Interior or the head of the federal agency appropriate for the land being crossed is required to perform this notification. The remainder of this section of the report discusses these requirements and the related policies of the Corps for Corps-managed, federal lands.

and must provide “detailed findings as to the terms and conditions” to be imposed on the applicant.⁵³

The MLA is not more specific about what the contents of these notifications, nor does it provide guidance about when an agency may grant the rights-of-way application in relation to the committee notification.⁵⁴ The Corps released a policy guidance memorandum in 2008 for easements of pipelines that are 24” or larger.⁵⁵ The policy direction therein regarding congressional notification and the granting of the rights-of-way states: “If the Committee does not provide an affirmative response, [the Corps] District will wait 14 days following Committee notification before execution of the easement.”⁵⁶ The Administration can waive this policy-based waiting period.

Evaluation of Request and Conditions of Easement or Consent

To decide on easements and consents, the Corps follows Chapter 8 of ER 405-1-12, *Real Estate Handbook*,⁵⁷ and Army Regulation (AR) 405-80, *Management of Title and Granting Use of Real Property*.⁵⁸ ER 405-1-12 requires that the Corps find that “the proposed easement will not be inconsistent with the authorized purposes of the Federal installation or project.”⁵⁹

According to ER 405-1-12, site-specific environmental, cultural, and operational requirements may be added to the easement or consent; also, the Corps is to impose any special requirements for safe operation of a pipeline or related facilities.⁶⁰ For example, according to the Corps, the Lake Oahe easement for DAPL “contains 36 conditions that are intended to further mitigate risk of rupture at the Lake Oahe crossing,” including specific coatings to prevent corrosion, corrosion

⁵³ Ibid.

⁵⁴ In 1990, P.L. 101-475 removed a requirement for a waiting period following congressional notification (emphasis added):

The Secretary or agency head shall notify the House and Senate Committees on Interior and Insular Affairs promptly upon receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter, and no right-of-way for such a pipeline *shall be granted until sixty days (not counting days on which the House of Representatives or the Senate has adjourned for more than three days) after a notice of intention to grant the right-of-way*, together with the Secretary’s or agency head’s detailed findings as to terms and conditions he proposes to impose, has been submitted to such committees, unless each committee by resolution waives the waiting period.

H. Rpt. 101-833 and S. Rpt. 101-471 provide information on the congressional discussion surrounding these changes. The congressional notification and waiting period had been added in 1973, as part of the amendments to the Minerals Leasing Act (30 U.S.C. §185(w)(2)) made in legislation.

⁵⁵ Letter from Scott L. Whiteford, Acting Director of Real Estate, Corps Real Estate Policy Guidance Letter No. 27, October 29, 2008. Hereinafter Corps Real Estate Policy Guidance Letter No. 27.

⁵⁶ Corps Real Estate Policy Guidance Letter No. 27 also states that “If the pipeline only crosses an area held in less than fee, such as an easement, then the [Corps] District will follow the process to consent to the fuel-carrying pipeline. No notice to Congress is required for a Consent.”

⁵⁷ U.S. Army Corps of Engineers, *Real Estate Handbook*, Engineer Regulation (ER) 405-1-12, Washington, DC, September 30, 1994.

⁵⁸ These guidance documents do not specify a time frame within which the Corps is to complete its process for granting or denying a request for an easement or consent. Department of the Army, *Management of Title and Granting Use of Real Property*, Army Regulation 405-80, Washington, DC, October 10, 1997, at <http://usahec.contentdm.oclc.org/cdm/ref/collection/p16635coll11/id/1556/>.

⁵⁹ According to ER 405-1-12, the district engineer of the Corps district in which the pipeline easement application is being reviewed will provide notice and a public hearing where appropriate; however, no further hearings are required if the pipeline proposal has been scrutinized through NEPA procedures or other hearings held by federal or state agencies.

⁶⁰ ER 405-1-12, pp. 8-110 and 8-113.

surveys after installation, more stringent enforcement of the pipeline's oil spill facility response plan, mainline valve and automatic shutdown requirements, and measures for initial and ongoing leak and crack detection.⁶¹

If the Corps finds that the pipeline is not inconsistent with the authorized purposes of the Corps project and its lands, the Corps signs a real estate instrument that grants the easement.⁶² If the pipeline crosses lands administered by the Corps and at least one other federal agency, the Secretary of the Interior is authorized, after consultation with the agencies involved, to grant or to deny the easement.⁶³ Each agency head remains responsible for administering and enforcing the easements, as they involve lands under the agency head's jurisdiction.

Illustration of Corps Approval Processes for Pipelines at Corps Projects and Real Estate

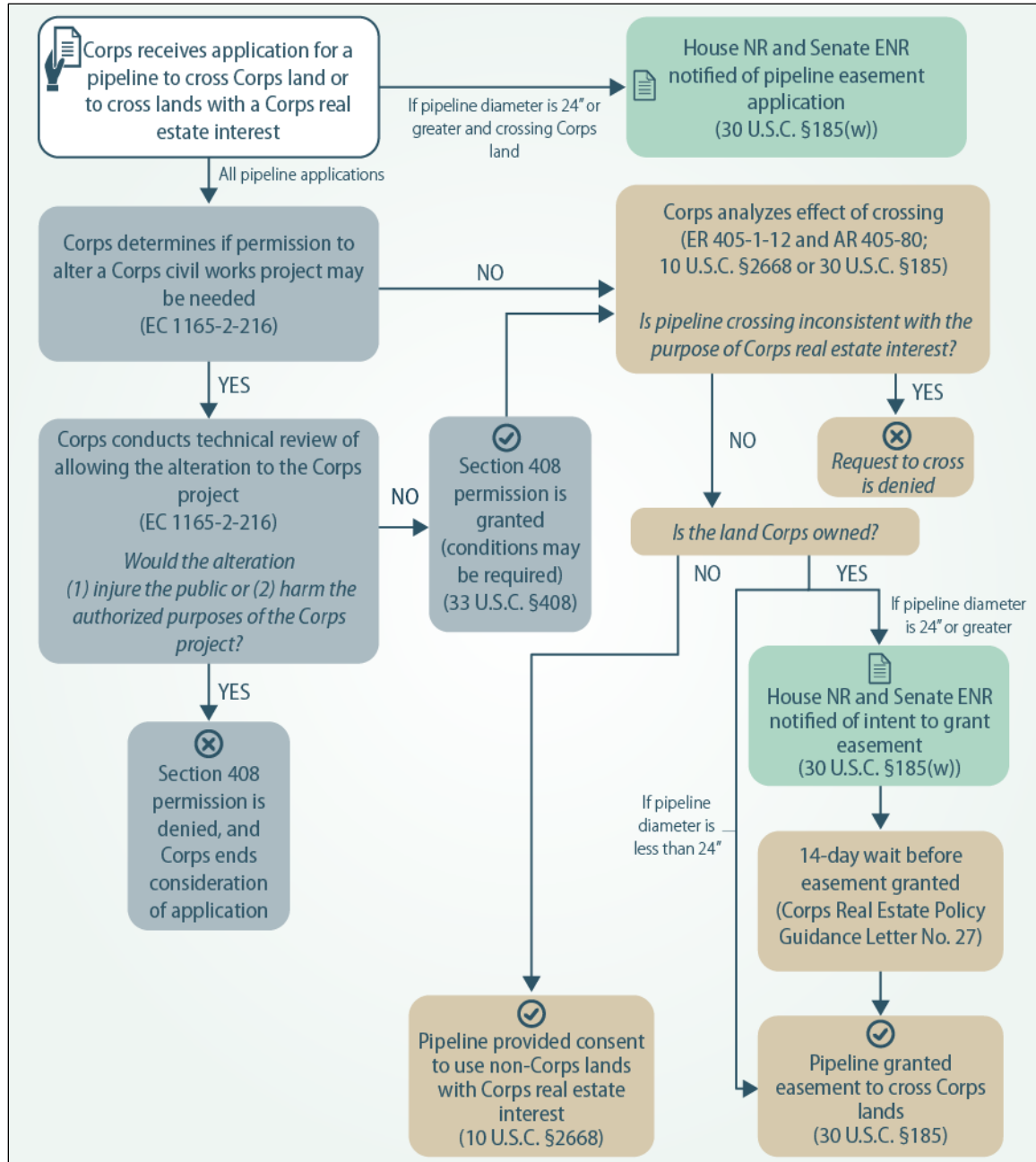
Figure 2 illustrates the relationship between the Section 408 permission, the real estate or consent process, and the MLA congressional notification requirements for proposed pipelines. The Section 408 permission process is shown in the grey boxes on the left side of **Figure 2**. The process to grant or deny the easement or consent is shown in the tan boxes on the right side of **Figure 2**. The MLA notification requirements are shown in the green boxes in **Figure 2**.

⁶¹ U.S. Army Corps of Engineers' Opposition to Standing Rock Sioux Tribe's Motion for Partial Summary Judgment and Cross Motion for Partial Summary Judgment at 9, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-1534 (D.D.C. filed July 27, 2016), ECF No. 172.

⁶² According to ER 405-1-12, the Assistant Secretary of the Army for Installations, Energy, and Environment executes easements for pipelines 24 inches in diameter or larger. The use of not inconsistent (rather than a determination of consistency) reflects the language used in the underlying authority at 33 U.S.C. §408.

⁶³ For example, the Bureau of Land Management (BLM) on behalf of the Secretary of the Interior renewed in 2011 the easement for the natural gas pipeline owned by the Northern Border Pipeline Company to cross the same Corps lands on the Missouri River as DAPL; the renewal also included easements to cross U.S. Forest Service and BLM lands.

Figure 2. Major Steps in Corps Approval Processes for Pipeline Segments Crossing Corps Projects and Real Estate Interests



Source: CRS.

Notes: *Corps land* refers to Corps-managed federal land. House NR = House Natural Resources Committee; Senate ENR = Senate Energy and Natural Resources Committee. Information within parentheses refers to the U.S. Code (U.S.C.) for the guiding statutory authority or to Corps documents, including Engineer Circulars (EC), Engineer Regulations (ER), and Army Regulations (AR).

Compliance with Other Federal Statutes During Corps Civil Works Processes

As part of the process of granting an easement or consent, the Corps must comply with federal statutes. The Corps typically evaluates this compliance as part of its NEPA documentation. For a request that requires both a Section 408 permission and an easement or consent by the Corps, the NEPA document is produced as part of the technical review for the Section 408 permission. As part of the technical review process, the Corps documents and demonstrates that it has gathered relevant information from the pipeline developer and that it has analyzed that and any additional information necessary to determine what federal requirements may apply to the Corps' actions. During that process, the Corps determines the resources potentially affected by granting the permission and easement or consent, and it determines whether the impacts to those resources would trigger actions necessary for compliance with other federal laws, such as Section 106 of NHPA and Section 7 of ESA, among others.⁶⁴

Compliance with Federal Statutes

As previously noted, Corps regulatory actions and civil works actions may be subject to other federal statutes, such as NEPA, NHPA, and ESA.⁶⁵ Part of the compliance may include consultation or input from other entities. **Table 1** lists selected federal laws that, if applicable to a Corps pipeline-related action, may require the Corps to consult with relevant state or tribal entities or with other federal agencies. Most requirements listed in the table are limited to actions taken by federal agencies. For example, an oil pipeline constructed on private land that does not require a federal agency approval (e.g., a pipeline that does not cross Corps jurisdictional waters or federal lands) would not be subject to NEPA or NHPA.

Table 1. Selected Federal Laws That Require Outside Agency Review
(additional laws often applicable to activities authorized by the Corps)

Law/Requirement	Description/Agency Consultation Requirement
National Environmental Policy Act (NEPA; 42 U.S.C. §§4321 et seq.)	Requires federal agencies to identify and consider the potential impacts of their proposed actions (e.g., a proposed rulemaking or an applicant's request to approve a specific project) and to inform the public of those impacts before making a final decision whether to proceed with the action. When preparing the necessary NEPA analysis, the Corps (the lead agency) must request comments and other assistance from any other federal agencies (cooperating agencies) that have jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal. Cooperating agencies may include state and tribal agencies.
Section 106 of the National Historic Preservation Act, as amended (NHPA; 54 U.S.C. §306108)	Requires federal agencies to take into account the effects that activities they may authorize are likely to have on historic properties listed in, or eligible for listing in, the National Register of Historic Places. Agencies must consult with state historic preservation officers (SHPOs) and tribal historic preservation officers (THPOs) and, for certain proposed activities, the Advisory Council on Historic Preservation.

⁶⁴ The Corps also may be required to or may follow policies that result in the agency taking steps to address tribal treaties and tribal trust responsibilities; however, as discussed in footnote 5, these tribal topics are largely not within the scope of this report.

⁶⁵ Although executive orders, regulations, and executive branch policies also may result in the Corps taking certain actions, the discussion herein is limited primarily to requirements associated with statute.

Law/Requirement	Description/Agency Consultation Requirement
Section 7 of the Endangered Species Act, as amended (ESA; 16 U.S.C. §1536)	Requires federal agencies to consult with the Department of the Interior's Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, to determine whether an activity that a federal agency may authorize "may affect" a species listed or proposed for listing as threatened or endangered under ESA. No activity may be authorized by the Corps that is likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. After the consultation, the Corps may add special conditions to its permit or approval to ensure that the activity does not jeopardize endangered or threatened species or destroy or adversely modify critical habitat.
Section 401 of the Clean Water Act, as amended (33 U.S.C. §1341)	Requires a permit applicant to obtain a water quality certification from the U.S. Environmental Protection Agency or an authorized state or tribal agency if the activity subject to permitting may result in the discharge of a pollutant into waters of the United States. The certification specifies any conditions the permittee must meet to ensure compliance with applicable effluent limitations and water quality standards. No nationwide permit or other Corps permit can be authorized until the activity receives a water quality certification from the authorized agency within a reasonable period of time (which shall not exceed one year) or the agency waives certification. ^a
Coastal Zone Management Act of 1972, as amended (CZMA, 33 U.S.C §1456)	If the proposed activity is located or would affect the coastal zone of a state with a coastal zone management program approved by the Secretary of Commerce, Section 307(c) of the CZMA, as amended, requires that the applicant must furnish a consistency concurrence that the proposed project is in compliance with the state's approved coastal zone management program. The state's concurrence with the applicant's certification should be obtained prior to the issuance of the Corps permit. ^b

Source: CRS.

- a. Under the nationwide permits (NWP), the Corps district engineer may issue a provisional verification for an activity that requires a Section 401 certification, but the activity is not authorized until the Section 401 water quality certification or waiver is obtained.
- b. Under the NWPs, the Corps district engineer may issue a provisional verification for an activity that requires CZMA consistency, but the activity is not authorized until the CZMA consistency concurrence or the presumption of concurrence is obtained.

As shown in **Table 1**, federal licenses and approvals, such as Corps individual permits, generally are conditioned on the permittee obtaining a state or tribal water quality certification pursuant to Section 401 of the Clean Water Act and a state or tribal consistency concurrence pursuant to the Coastal Zone Management Act.⁶⁶ For the NWPs, compliance with Section 401 of the Clean Water Act is accomplished by satisfying GC 25. The state or tribe can certify all activities authorized by an NWP or require that verifications of certain activities under an NWP obtain state or water quality certification. The state or tribe can approve, deny, or condition its certification. Although the Corps is not part of the process for the permittee to obtain a state or tribal water quality certification, the denial of a water quality certification can affect the Corps' regulatory authorizations for pipelines. For example, the developer of the Northern Access Pipeline to transport natural gas from Pennsylvania to New York has planned on using the NWP 12 for 276 wetland and 192 stream crossings. In April 2017, the New York State Department of Environmental Conservation (NYSDEC) denied the state water quality certification pursuant for the April 2016 application for the 94-mile pipeline.⁶⁷ Until the pipeline developer complies with

⁶⁶ For the NWPs, Coastal Zone Management Act of 1972, as amended (CZMA, 33 U.S.C §1456) compliance is pursued through GC 26 on coastal zone management. The state can provide a consistency concurrence to all activities authorized by an NWP or require that verifications of certain activities under an NWP obtain a consistency concurrence. The state can approve, deny, or condition its concurrence.

⁶⁷ For the notice and explanation of the state's denial of this water quality certification, see letter from John Ferguson, (continued...)

Section 401 of the Clean Water Act, the Corps will be unable to allow the permittee to proceed in New York under NWP 12 because of the permit's GC 25 on water quality. Individual permits also require state water quality certification. The pipeline developer can address the concerns that led to the NYSDEC denial and submit a new application to NYSDEC for a state water quality certification or pursue a public hearing within 30 days of the denial consistent with New York regulations.⁶⁸ A detailed discussion of how state approvals, and the state water quality certification in particular, may affect federal approvals for pipelines is beyond the scope of this report.

The remainder of this section addresses two agency-specific procedures that the Corps has adopted for its regulatory program: NEPA procedures and historic properties procedures.

Agency-Specific Procedures of the Corps Regulatory Program

The Corps regulations implementing the agency's regulatory program include procedures to implement NEPA and to provide for the protection of historic properties.⁶⁹ Those procedures reveal the agency's interpretation of the limits to its jurisdiction; that is, the procedures reflect that the Corps interprets its regulatory authorities under Section 404 and Section 10 as not extending to private actions upland of regulated waters.

Corps NEPA Procedures

NEPA requires federal agencies to identify and consider the environmental impacts of an action before a final decision is made about that action. Regulations implementing NEPA were promulgated by the Council on Environmental Quality (CEQ).⁷⁰ Those regulations identify federal actions subject to NEPA to include those over which a federal agency has some control or responsibility.⁷¹ Each federal agency was required to adopt the CEQ regulations, supplement them as necessary to include procedures relevant to that agency's authority, and ensure that those

(...continued)

Chief Permit Administrator, New York State Department of Environmental Conservation, to National Fuel Gas Supply Corporation and Empire Pipeline, Inc., April 7, 2017, at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/northaccesspipe42017.pdf. In 2016, the New York State Department of Environmental Conservation (NYSDEC) also denied the state water quality certification for the Constitution Pipeline (John Ferguson, Chief Permit Administrator, New York State Department of Environmental Conservation, to Constitution Pipeline Company, LLC, April 22, 2016, at http://www.dec.ny.gov/docs/administration_pdf/constitutionwc42016.pdf). In 2017, NYSDEC established a special condition for the use of the NWP 12 during its five-year term from 2017 to 2022 in the state; the condition is

Utility Line activities that cross multiple waterbodies or cross the same waterbody at multiple locations, while viewed as multiple 'single and complete' projects for the purposes of the Nationwide Permit program, will be considered by the Department as a single project for all crossings for the entire length of the project in New York State for the purpose of obtaining Water Quality Certification from New York State and determining the disturbance threshold of 300 linear feet or ¼ acre.

(Letter from Kent P. Sanders, Deputy Chief Permit Administrator, New York State Department of Environmental Conservation, to Stephan A. Ryba, Chief Regulatory Branch, U.S. Army Corps of Engineers, March 7, 2017, at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/wqcnwp2017.pdf.)

⁶⁸ Each state develops its own processes for addressing appeals related to denials or required conditions of state water quality certifications.

⁶⁹ 33 C.F.R. Part 325.

⁷⁰ See Council on Environmental Quality, "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act," in 40 C.F.R. Parts 1500-1508 (43 *Federal Register* 55990, November 28, 1978).

⁷¹ See 40 C.F.R. §1508.18.

procedures implementing NEPA are integrated into the agency's broader decisionmaking procedures.⁷² The Corps adopted and supplemented the CEQ regulations in its own Procedures for Implementing NEPA.⁷³ Further, the Corps provides additional procedural guidance for preparing and processing NEPA documents for regulatory actions in Appendix B to the regulations implementing its regulatory program.⁷⁴

Under NEPA, a project known to have a significant impact on the environment requires the preparation of an environmental impact statement (EIS). When impacts are uncertain, an environmental assessment (EA) is prepared to determine if an EIS is needed or a finding of no significant impacts (FONSI) may be issued. The Corps has identified "regulatory actions" (i.e., issuance of a permit) among the actions that normally require an EA but not necessarily an EIS.⁷⁵

The Corps does not require NEPA review for individual NWP verifications.⁷⁶ Instead, to date, the federal action subject to NEPA has been issuance of NWP 12. During the public rulemaking for each of these five-year permits, NEPA compliance has involved preparation of an EA that resulted in Corps issuance of a final decision document (its version of a FONSI).⁷⁷ The Corps EA/decision document for NWP 12 has been prepared, in part, to identify conditions that must be met to ensure that authorization via an NWP is appropriate. Part of the process to develop the decision document is the identification of general conditions to ensure that activities related to a single and complete project will have minimal adverse environmental effects (i.e., no significant impacts that would require the preparation of an EIS).

Understanding the scope of Corps NEPA reviews is useful in recognizing how far upland the Corps will evaluate the impacts of a larger project (e.g., a pipeline that extends beyond Corps-regulated waters). As noted, under NEPA, the Corps is required to evaluate the impacts of an action over which it has control and responsibility. Depending on the details of the activity subject to Corps approval, the agency's interpretation of the extent of its control and responsibility over a proposed action will dictate the geographic area over which environmental impacts are evaluated (i.e., how far upland from regulated waters the agency will review the impacts of a larger project).⁷⁸ For a discussion of the geographic limits of Corps environmental reviews for pipelines, see the box titled "Geographic Limits of Corps Environmental Reviews."

⁷² See directives included in 40 C.F.R. §§1505.1 and 1507.3.

⁷³ 33 C.F.R. Part 230.

⁷⁴ Specifically, "NEPA Implementation Procedures for the Regulatory Program" in Appendix B to 33 C.F.R. Part 325.

⁷⁵ 33 C.F.R. §230.7(a).

⁷⁶ 82 *Federal Register* 1861, January 6, 2017.

⁷⁷ All "2017 Nationwide Permit Final Decision Documents" are available at http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/2017_NWP_FinalDD/.

⁷⁸ See requirements applicable to "scope of analysis" associated with an "EA/FONSI document" in 33 C.F.R. Part 325, Appendix B(7)(b). Specifically, see the typical factors to be considered in determining whether sufficient control and responsibility exists in Appendix B(7)(b)(2), including the discussion of the extent of federal control and responsibility—"Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project"—and examples in Appendix B(7)(b)(3), such as "[f]or those regulated activities that comprise merely a link in a transportation or utility transmission project, the scope of analysis should address the Federal action, i.e., the specific activity requiring a DA [Department of Army] permit and any other portion of the project that is within the control or responsibility of the Corps of Engineers (or other Federal agencies)."

Geographic Limits of Corps Environmental Reviews

Whether an entire pipeline or activities associated with segments of a pipeline are subject to federal authorization or approval shapes how a federal agency scopes its environmental review. This is sometimes referred to as the extent to which the project is *federalized*, particularly for purposes of complying with the National Environmental Policy Act (NEPA). Some of the controversy over the actions of the Corps related to pipelines stems from the limits of the agency's authorities. When an agency has a limited role in a private action the federal authority is sometimes characterized as a *small federal handle*. That term refers to the limits of federal authority related to projects that are largely nonfederal but become partially federalized because some aspect of the project is subject to a federal permit or approval. In contrast, as previously noted, the Federal Energy Regulatory Commission (FERC) is authorized to approve interstate natural gas pipelines; therefore, in its evaluation, FERC must identify and consider the impacts of the entire pipeline.

A privately funded linear project, such as an oil pipeline, built largely on nonfederal land is an example of a project with a small federal handle for the Corps. For example, the Corps interprets its permitting authority under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 to mean that it is required to evaluate the environmental impacts of only those activities associated with the geographically discrete segments of the pipeline related to regulated waters and wetlands. Generally, the review by the Corps does not encompass private activity outside the scope of the sum of the geographically limited federal authorizations. A 2015 court decision related to Flanagan South oil pipeline's more than 2,000 water crossings authorized under NWP 12—*Sierra Club v. U. S. Army Corps of Engineers*, 803 F.3d 31, 34 (D.C. Cir. 2015)—stated:

We hold that the federal government was not required to conduct NEPA analysis of the entirety of the Flanagan South pipeline, including portions not subject to federal control or permitting. The agencies' respective regulatory actions—in the form of easements, Clean Water Act verifications, and authorization to harm or kill members of endangered species without incurring liability under the Endangered Species Act (ESA)—were limited to discrete geographic segments of the pipeline comprising less than five percent of its overall length. As explained below, the agencies were required to conduct NEPA analysis of the foreseeable direct and indirect effects of those regulatory actions. However, on the facts of this case, the agencies were not obligated also to analyze the impact of the construction and operation of the entire pipeline.

Corps Procedures for Protecting Historic Properties

The Corps established “Procedures for the Protection of Historic Properties” in Appendix C to its regulations applicable to Department of the Army permits.⁷⁹ The Corps follows Appendix C to fulfill the procedural requirements set forth in NHPA, other applicable historic preservation laws, and presidential directives as they relate to the Corps regulatory program.

Section 106 of NHPA provides that federal agencies, prior to expending federal funds or granting a license to any undertaking over which they have direct or indirect jurisdiction, must “take into account the effect of [the] undertaking on any historic property.”⁸⁰ If historic properties might be

⁷⁹ 33 C.F.R. Part 325, Appendix C; also see U.S. Army Corps of Engineers, “Revised Interim Guidance for Implementing Appendix C of 33 C.F.R. Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 C.F.R. Part 800,” April 25, 2005, at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/techbio/InterimGuidance_25apr05.pdf; and U.S. Army Corps of Engineers, “Clarification of Revised Interim Guidance for Implementing Appendix C of 33 C.F.R. Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 C.F.R. Part 800 Dated 25 April 2005,” January 31, 2007, at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/inter_guide2007.pdf. The Corps uses its own procedures for the regulatory program, rather than the standard procedures for complying with Section 106, which are established in Subpart B of the Advisory Council on Historical Preservation (ACHP) Section 106 regulations (36 C.F.R. Part 800). See footnote 81 for more information.

⁸⁰ P.L. 89-665, as amended; 54 U.S.C. §306108. The law defines a *historic property* as “any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register [of Historic Places], including artifacts, records, and material remains relating to the district, site, building, structure, or object” (54 U.S.C. §300308). The Section 106 regulations promulgated by ACHP add to this definition by stating that “[t]he term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria” (36 C.F.R. §800.16(l)(1)).

affected, the agency must consult with the state historic preservation officer or tribal historic preservation officer, as applicable, about alternatives to avoid, minimize, or mitigate adverse effects to those properties.⁸¹ The Advisory Council on Historical Preservation (ACHP), an independent federal agency established under NHPA to promote and advise on historic preservation,⁸² also may be involved in consultations under certain circumstances.⁸³

Procedures for NHPA Section 106 compliance for the regulatory program of the Corps have been the subject of disagreements with the ACHP and some other stakeholders. According to 2016 ACHP communications to the Corps, the ACHP has not accepted the Corps procedures as being consistent with ACHP regulations.⁸⁴ Some federal district courts have declined to apply the agency's procedures, on the bases of inconsistency with NHPA or non-approval by the ACHP;⁸⁵ however, others have cited or applied the Corps procedures.⁸⁶

The ACHP has objected particularly to the decision by the Corps to review each water crossing by a linear project, such as a pipeline, as a separate undertaking.⁸⁷ The ACHP regulations define an "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval."⁸⁸ The ACHP contends that this definition would in many cases require the

⁸¹ 36 C.F.R. Part 800. These regulations implementing Section 106 are promulgated by the ACHP under 54 U.S.C. §304108(a).

⁸² A description of the council's duties is at 54 U.S.C. §304102.

⁸³ NHPA Section 106 does not require an agency to ensure that adverse effects to historic properties are avoided; the agency is required only to *consult* on potential alternatives. However, regulations implementing Section 106 (36 C.F.R. §800.6) discuss potential ways to resolve situations in which adverse effects may occur, such as through a memorandum of agreement among the agency and other stakeholders on a plan to minimize damage to the historic property.

⁸⁴ See, for example, letter from the ACHP to Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works, August 19, 2016, at <http://www.achp.gov/docs/asadarcy.pdf>. Under 36 C.F.R. §800.14, agencies are allowed to develop their own procedures for complying with Section 106, but those procedures must be consistent with the ACHP's regulations and must be approved by the ACHP. More specifically, Subpart C of the regulations establishes five *program alternatives* that federal agencies may use to meet their obligations under Section 106. One of these program alternatives is the development of *alternate procedures*, whereby agencies may "develop procedures to implement Section 106 and substitute them for all or part of" the ACHP rules, "if they are consistent with the Council's regulations" (36 C.F.R. §800.14(a)). The agency official must submit the proposed alternate procedures to the ACHP for a 60-day review period; if the ACHP finds them to be "consistent" with the ACHP regulations, the alternate procedures may be adopted in lieu of the standard regulations (36 C.F.R. §800.14(a)(2)).

⁸⁵ See, for example, *Sayler Park Vill. Council v. U.S. Army Corps of Eng'rs*, 2002 U.S. Dist. LEXIS 26208, *23-24 (S.D. Ohio 2002) (finding that "the Corps Interim Guidance is inconsistent with the ACHP Interim Guidance and irrelevant"); *Comm. to Save Cleveland's Hulets v. U.S. Army Corps of Eng'rs*, 163 F. Supp. 2d 776, 792 (N.D. Ohio 2001) (holding that the Corps "cannot rely on its own regulations to define the scope of its notice obligations or to define the 'permit area'"). See also, for example, *McGee v. U.S. Army Corps of Eng'rs*, No. 3:11-CV-160-H, 2011 U.S. Dist. LEXIS 56652, at *16-17 (W.D. Ky. May 23, 2011) (recognizing "possibility of conflict" between the two sets of regulations but finding no conflict under the circumstances).

⁸⁶ See, for example, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016) ("[I]t falls squarely within the expertise of the Corps, not the Advisory Council, to determine the scope of the effects of construction activities at U.S. waterways."); *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 251 (D. Vt. 1992) ("Procedurally the Corps is in technical violation.... However, this violation is not fatal, given the NHPA's permission that its regulations 'may be implemented in a flexible manner.'").

⁸⁷ CRS personal communication with the ACHP, March 27, 2017; and ACHP, "Section 106 Reviews for United States Army Corps of Engineers Permits and Undertakings with Small Federal Handles," November 2015, at <http://www.achp.gov/docs/fapc.pdf>.

⁸⁸ 36 C.F.R. §800.16(y).

Corps to conceive of the “undertaking” as broader than a single water crossing. The approach used by the Corps, the ACHP states, “dismiss[es] the potential for effects to historic properties that may be located within the broader project area of an undertaking when properly defined under the Section 106 regulations.”⁸⁹ The Corps maintains that its procedures for historic properties in Appendix C satisfy the requirements of NHPA Section 106.⁹⁰ The Corps explained its interpretation of an undertaking related to pipelines as follows:

For oil pipelines and other utility lines, the activities that are subject to the Corps’ regulatory authorities and require DA [Department of Army] authorization are crossings of jurisdictional waters and wetlands, as well as utility line substations, foundations for overhead utility lines, and access roads, that involve discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Segments of an oil pipeline or other utility line in upland areas outside of the Corps’ jurisdiction, or attendant features constructed in upland areas, do not require DA authorization and therefore are not, for the purposes of the Corps’ compliance with section 106 of the NHPA, “undertakings.” The Corps does not have direct or indirect jurisdiction over pipeline segments in upland areas. The Corps does not regulate oil pipelines, or other utility lines per se; we only regulate 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).⁹¹

The Corps indicates in this statement its position that the agency has neither direct nor indirect jurisdiction over the entire pipeline and that its control does not extend to areas upland of regulated waters.⁹² The essence of this interpretation was adopted by one district court, the U.S. District Court for the District of South Dakota, in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*.⁹³ However, as noted above, other district courts have declined to apply other elements of the agency’s procedures on the basis of inconsistency with NHPA or lack of approval by the ACHP.⁹⁴

⁸⁹ Letter from the ACHP to Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works, August 19, 2016, at <http://www.achp.gov/docs/asadarcy.pdf>. The ACHP did not specify in its letter whether the “broader project area” would encompass an entire pipeline or a more broadly defined area around each water crossing.

⁹⁰ See, for example, Federal Defendants’ Opposition to Plaintiff-Appellant’s Emergency Motion for Injunction Pending Appeal at 9 and 10, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-5259 (D.D.C. Court of Appeals filed September 14, 2016), ECF No. 1635700.

⁹¹ NWP 12 Decision Document, p. 18.

⁹² 33 C.F.R. §325 Appendix C, in Section (2)(c), states:

The district engineer will take into account the effects, if any, of proposed undertakings on historic properties *both within and beyond the waters of the U.S.* Pursuant to Section 110(f) of the NHPA, the district engineer, where the undertaking that is the subject of a permit action may directly and adversely affect any National Historic Landmark, shall, to the maximum extent possible, condition any issued permit as may be necessary to minimize harm to such landmark (emphasis added).

Appendix C (5)(f) provides additional detail in this paragraph:

The Corps of Engineers’ responsibilities to seek eligibility determinations for potentially eligible historic properties is limited to resources located within waters of the U. S. that are directly affected by the undertaking. The Corps responsibilities to identify potentially eligible historic properties is limited to resources located within the permit area that are directly affected by related upland activities. The Corps is not responsible for identifying or assessing potentially eligible historic properties outside the permit area, but will consider the effects of undertakings on any known historic properties that may occur outside the permit area.

⁹³ 205 F. Supp. 3d 4, 30-32 (D.D.C. 2016).

⁹⁴ See footnote 85 and accompanying text.

Separately, stakeholders have raised concerns about the Corps' procedures whereby the permit applicant, rather than the Corps itself, is responsible for identifying historic properties that may be affected by a pipeline activity under an NWP. The ACHP regulations specify that "[i]t is the statutory obligation of the Federal agency to fulfill the requirements of section 106," including identification of historic properties that may be affected by an undertaking.⁹⁵ For pipeline activities that occur under NWP 12, GC 20 provides that the Corps must initiate Section 106 review and consultation when an applicant identifies historic properties in a PCN.⁹⁶ Once a PCN is submitted, the activity cannot proceed until the Corps district engineer completes a site-specific analysis and verifies either that the activity will not affect any eligible historic site or that the consultations required by NHPA are complete. However, the Corps does not undertake the analysis unless the project applicant raises the issue through a PCN. For pipeline activities that require individual permits, by contrast, the Corps district engineer is responsible for identifying historic properties that may be affected by the permitted activity and completing consultations as necessary.

Policy Issues Raised by Corps' Pipeline Roles and Decisions

Growth in North American crude oil and natural gas production has led to efforts to expand the domestic oil and natural gas pipeline network. Pipeline construction and operation may impact the environment, human health, and welfare. The interest in expanding the domestic pipeline network and the concerns about the local, regional, and national effects of pipeline construction and operation have raised policy questions about how the Corps' regulatory authorities and civil works processes may influence the development and approval of pipelines and their routes. The Corps is authorized as part of its regulatory program to regulate certain pipeline activities that may affect certain waters and wetlands; it also is authorized to grant permissions, easements, and consents for pipeline segments that cross Corps water resources projects and associated lands. These Corps roles in pipelines are not without controversy. Some of the issues raised center on the following policy questions:

- **Impacts.** How does the Corps determine the geographic area for its evaluations of impacts on the environment, historic properties and cultural resources, communities, and specific population groups? How does the Corps evaluate cumulative impacts?
- **Limits of Agency Authority.** When a pipeline is largely a nonfederal undertaking and the federal role is limited to discrete segments, to what extent should the federal government shape siting and other aspects of the pipeline?
- **Risk and Safety.** To what extent is the Corps authorized to address oil and natural gas pipeline safety (e.g., risk of spills) as part of its regulatory authorizations and civil works decisions? How are low-probability, high-consequence safety risks considered and addressed in the Corps' decisionmaking processes?

⁹⁵ 36 C.F.R. §800.2.

⁹⁶ The permit applicant may seek the assistance of a state historic preservation officer or tribal historic preservation officer and may consult the National Register of Historic Places to identify relevant properties that either are on the register or may be eligible for listing.

- **Public Interest.** How does the Corps arrive at and document its assessment of public interest in its pipeline-related regulatory and civil works activities? That is, how are anticipated costs and benefits (both monetized and non-monetized) for one group weighed relative to costs and benefits for another group, and how is the national public interest considered?
- **General Permits.** How does the use of general permits (rather than individual permits) for Corps-regulated pipeline segments affect the agency's review of proposed water crossings, the information available to stakeholders and the public, and compliance with the requirements of NHPA?

An extensive discussion of each of these questions is beyond the scope of this report. Many of these questions are not unique to pipelines or to the Corps; that is, many of them have been the subject of past (and ongoing) court cases related to other Corps approvals or to similar actions by other federal agencies. As Congress considers the Corps' current and future roles and the federal role in pipelines more broadly, these questions reflect some of the basic debates about federal actions associated with private infrastructure.

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