

Understanding Corps Of Engineers Approach to Pipeline Permit Approvals

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The United States is in the beginning stages of a long-term energy revolution. New fracking technologies allow access to previously inaccessible hydrocarbons. In the last few years, the nation became the world's largest oil and gas producer, and our Nation has the potential to be entirely energy independent – an idea that even 10 years ago was unimaginable.

But for this to come to fruition, private industry will need to spend hundreds of billions in projects that will require permit approvals from U.S. Army Corps of Engineers. Anyone who thinks the Corps can be ignored in projects that involve long linear pipelines such as Keystone XL and Dakota Access or marine export facilities is mistaken and will likely incur unnecessary delays in construction start.

The Corps has federal statutory authority under the Rivers and Harbors Act of 1899 (Section 10) to require a permit for any construction or work in traditional navigable waters, that is, waters with actual or potential movement of commerce including coastal ocean waters. Section 408 of the 1899 Rivers and Harbors Act, requires a separate permit for any proposed project including linear pipelines that would potentially affect any federal navigation and flood control project.

The Corps also has authority under the Clean Water Act (Section 404) to require a permit for any discharge of dredged or fill material in any water of the U.S. These waters include small streams, wetlands and other small bodies.

Also, under the Marine Research, Protection and Sanctuaries Act, the Corps has authority to issue

construction permits involving the disposal of dredged material in ocean waters. As the Corps' permitting is a federal action, it must ensure that many other federal statutes are complied with, including, but not limited to, the Endangered Species Act, National Historic Preservation Act, Migratory Bird Treaty Act and, of course, the National Environmental Policy Act (NEPA).

WORKING WITH THE CORPS

The Corps has its own well-developed set of regulations and procedures on project evaluation and securing a permit. Most major energy infrastructure projects, such as interstate gas transmission pipelines or a major processing or export facility on navigable waters, will involve crossing or having an effect on U.S. waters, including traditional navigable waters, on either a temporary or permanent basis.

Let's consider a pipeline project that will traverse forested areas, and open former and active agricultural areas. Any such pipeline will cross many small streams, wetlands and perhaps a navigable river that has barge or other commercial boat traffic. The Corps permit for such a project would normally involve expedited review under Corps-issued general permits to cross the small streams and small wetland areas.

The Corps' evaluation will normally be focused on each stream or wetland crossing. However, even for general permits, such as the Corps Nationwide Permit No. 12 for pipeline and other linear utility lines, the Corps will work to have the applicant avoid wetlands and streams to the maximum extent practicable.

In the Corps regulatory program “practicable” means to the extent feasible — a high standard. This may involve horizontal directional drilling (HDD) to go under the stream or wetland totally avoiding impacting that stream or wetland and eliminating the need for a Corps permit for that particular crossing. However, the navigable river would require a permit even if the applicant agrees to directionally drill the pipeline under the river.

This river crossing will involve substantial coordination within the Corps and likely with other federal and state agencies to ensure that the navigable capacity of the river will not be impacted by the permitted project. A petitioning company’s early planning should identify where all the Corps’ regulated waters are located.

A suggestion: If the route cannot fully avoid an impact by changing the route, consider HDD to avoid the need for a permit for some crossings.

For major projects, Corps approval can routinely take up to three years. This detailed review will include an alternatives analysis and efforts to avoid waters of the U.S. to the extent practicable.

If an energy company applicant has a few wellhead and gathering lines and perhaps one transmission line, but the entire project does not require FERC approval, then you will likely be able to get the permitted through multiple general permits, one for each of the many crossings of small streams and wetlands. But this will only happen if you careful attention to detail is exercised on maximizing the avoidance of impacts.

In such cases you may be able to get Corps permits within two to 12 months, depending on other issues such as endangered species or historic properties.

Alternately, if you have a major pipeline project that requires FERC approval and may cross a traditional navigable water, or effects so many wetlands and small streams (for example more than half the pipeline’s length is within U.S. waters), then you will likely have to obtain a Corps individual permit.

Unlike general permit authorizations, which do not involve a public notice, individual permits involve a public notice and critical review and comment by several other federal and state agencies.

If traditional navigable waters are involved, and particularly if the pipeline project would have an impact a federal levee or other federal structure operated by the Corps, the request will require additional internal coordination with the Corps. Commenting federal agencies have the ability to invoke a review process that will add four to six months to the process, if these agencies are not satisfied with the Corps’ proposed permit.

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With such a multitude of moving parts, an applicant needs a clear plan based on detailed knowledge of the types of U.S. waters to be crossed, the likely Corps permitting strategy (general permits, individual permits or both) and careful attention to detail to avoid impacts to the maximum extent practicable.

But even when you avoid these impacts, other issues such as federally listed endangered species and historic properties, essential fish habitat in coastal areas and even migratory bird issues in forested areas can derail the Corps permit evaluation.

The issues with energy facilities will revolve around siting and how much wetland area will be affected. It will also address whether such impacts have been reduced on the site chosen or by the Corps determining that an entirely different site is “practicable and available.”

Regardless of the project, there are crucial points to keep in mind when working with Corps officials. First, you must develop a sound permitting strategy before the project begins and certainly before the pipeline’s route or facility location is finalized.

This strategy will be enhanced by informally meeting with the Corps in advance and regularly during project planning to discuss the proposed project and identify areas of concern. Other important factors involve working in a fully transparent manner and being responsive and cooperative in handling potential problems that the Corps raises.

Generally, the wrong approach in trying to move a major permitting decision forward with the Corps is to bring political pressure to bear or to take legal action. Experience shows time and time again that bringing political pressure to bear will slow the approval process down.

Another huge mistake is to plan the pipeline project with the hope that no one will oppose it. Given the state of tension that exists with environmental groups and large-scale gas transmission and other energy infrastructure projects, the underlying assumption that should be made in planning a project should be that the project will be opposed every step of the way. Strategies and contingency plans can then be developed to address likely matters that environmental groups will raise in opposition to the proposed project.

INTERSTATE PROJECTS

The Corps has been regulating construction activities in traditional navigable waters, including major rivers, coastal ports and coastal ocean waters since the 1890s, initiated by concern in Congress that railroad expansion was negatively effecting commerce on the nation's waterways.

In 1972, Congress expanded the Corps' role in regulating construction to all waters of the U.S. to include small streams, ponds and wetlands under Section 404 of the Clean Water Act (CWA). Since then, the Corps regulatory program has increasingly become a lightning rod for groups opposing construction of commercial activities, including major pipelines, processing facilities and coastal export facilities.

A clear example of the lightening rod nature of the Corps program is the Keystone XL pipeline southern extension. It is common knowledge that the environmental community is opposed to Keystone because it hopes to stop Canada from developing its oil sands resource.

Those efforts delayed the northern portion of the pipeline as the State Department, which must approve the crossing from Canada to the U.S., evaluated and re-evaluated its action. The southern portion of the pipeline in Oklahoma and Texas does not cross a border with another nation and no Department of State permit is required.

Corps districts in Oklahoma and Texas permitted the pipeline's southern portion with general permits. But the environmental community sued the Corps, asserting the permit process required more extensive evaluation of the pipeline route, greenhouse gas effect in Canada and other matters.

Similar unrelated objections to pipeline construction or a coastal energy facility may result in landowner groups or the environmental community attacking the Corps' permit action when they simply do not want the project to be built.

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The Corps regulations and procedures include consultation on federally endangered species, coastal essential fish habitat and historic properties among others. This provides ample procedural actions for those opposed to projects to challenge in federal court, which potentially results in significant construction delays.

That is why applicants must help the Corps develop a sound administrative record. Moreover, the regulatory requirements have become more restrictive on a continuing basis since the 1970s.

These more restrictive regulations have resulted in more intensive alternative route and facility location analysis under the NEPA and the CWA. It also requires extensive evaluations of effects to U.S. waters and detailed consultations on federally listed endangered species.

CONCLUSION

America's ongoing energy revolution will spur unprecedented energy infrastructure investment and deployment. But delays in permitting can add hundreds of millions of dollars to project costs, put them months or years behind schedule and increase project costs to such an extent that it may no longer be economically viable.

Any company planning on expanding energy infrastructure in a substantive way must include a clear strategy and plan for achieving the right permitting outcome with the Army Corps of Engineers that makes business sense and serves the public interest.

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