

Vinson & Elkins

The Corps of Engineers' Nationwide Permitting Program

Lessons from Permitting Linear Projects

Texas Wetlands Conference

January 30, 2015

All nations are shaped by belligerence and slaughter. Their borders are a fretwork of scars; they are the history of violence made legible on earth.

Adam Gopnik



The Clean Water Act and Section 404 Permitting

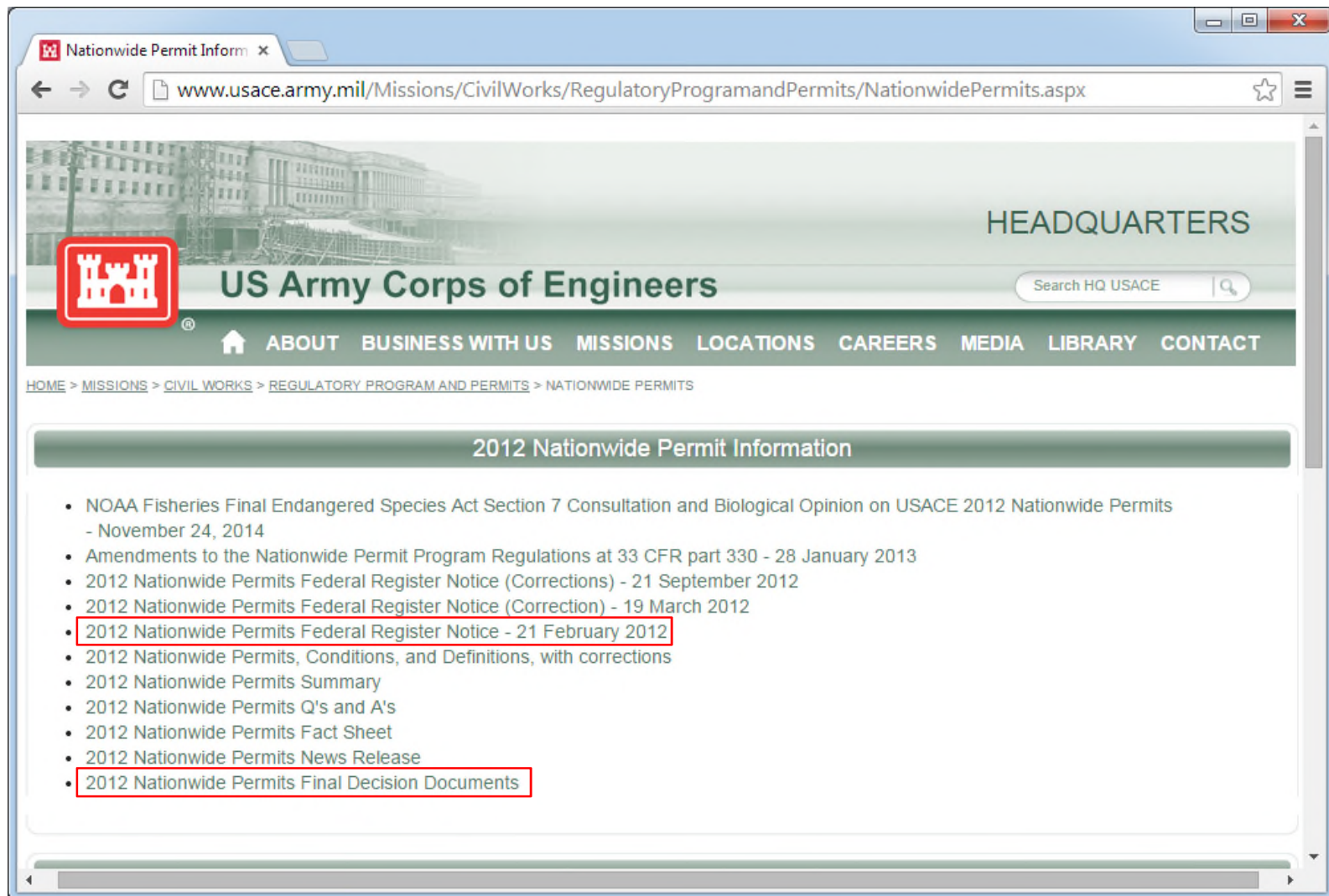
- The Clean Water Act prohibits the discharge of any pollutant, including dredged or fill material, into waters of the United States.
- Section 404 allows the Corps of Engineers to issue permits for discharge of dredged or fill material into navigable waters.
 - Individual permit for a particular project; requires a detailed application and extensive processing; the Corps conducts a case-specific review and environmental analysis.
 - General permit for activities in certain geographic areas (e.g., regional, nationwide); streamlines permitting for pre-approved categories of activities that will only cause minimal adverse environmental effects.

The Corps may issue Section 404 general permits for category of activities as long as those activities:

1. are similar in nature;
2. will individually cause only minimal adverse environmental effects; and
3. will cumulatively cause only minimal adverse environmental effects.

2012 Nationwide Permit Information

V&E



Basics of NWP 12 (Utility Line Activities)

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Reissuance of Nationwide Permits, Final Notice (Feb. 21, 2012)

Federal Register / Vol. 77, No. 34 / Tuesday, February 21, 2012 / Notices

10271

must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

(d) This NWP does not authorize maintenance dredging for the primary purpose of navigation. This NWP does not authorize beach restoration. This NWP does not authorize new stream channelization or stream relocation projects.

Notification: For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 31). The pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. (Sections 10 and 404)

Note: This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Clean Water Act Section 404(f) exemption for maintenance.

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities. Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and clam and oyster digging, fish aggregating devices, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Sections 10 and 404)

5. Scientific Measurement Devices. Devices, whose purpose is to measure and record scientific data, such as staff gages, tide and current gages, meteorological stations, water recording and biological observation devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. Upon completion of the use of the device to measure and record scientific data, the measuring device and any other structures or fills associated with that device (e.g., foundations, anchors, buoys, lines, etc.) must be removed to the maximum extent practicable and the site restored to pre-construction elevations. (Sections 10 and 404)

6. Survey Activities. Survey activities, such as core sampling, seismic, exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, sample plots or transects for wetland delineations, and historic resources surveys. For the purposes of this NWP, the term "exploratory trenching" means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work and must not drain a water of the United States. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed $\frac{1}{2}$ -acre in waters of the U.S. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under Section 402 of the Clean Water Act. (Sections 10 and 404)

7. Outfall Structures and Associated Intake Structures. Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (Section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

8. Oil and Gas Structures on the Outer Continental Shelf. Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of Interior, Bureau of Ocean Energy Management. Such structures shall not be placed within the limits of any designated shipping safety fairway

or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). The district engineer will review such proposals to ensure compliance with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this NWP will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f), as well as 33 CFR 322.5(l) and 33 CFR part 334. Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, nor will such structures be permitted in EPA or Corps designated dredged material disposal areas.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Section 10)

9. Structures in Floating and Anchorage Areas. Structures, buoys, floats and other devices placed in anchorage or floating areas to facilitate moorage of vessels where the U.S. Coast Guard has established such areas for that purpose. (Section 10)

10. Mooring Buoys. Non-commercial, single-boat, mooring buoys. (Section 10)

11. Temporary Recreational Structures. Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use, provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 40)

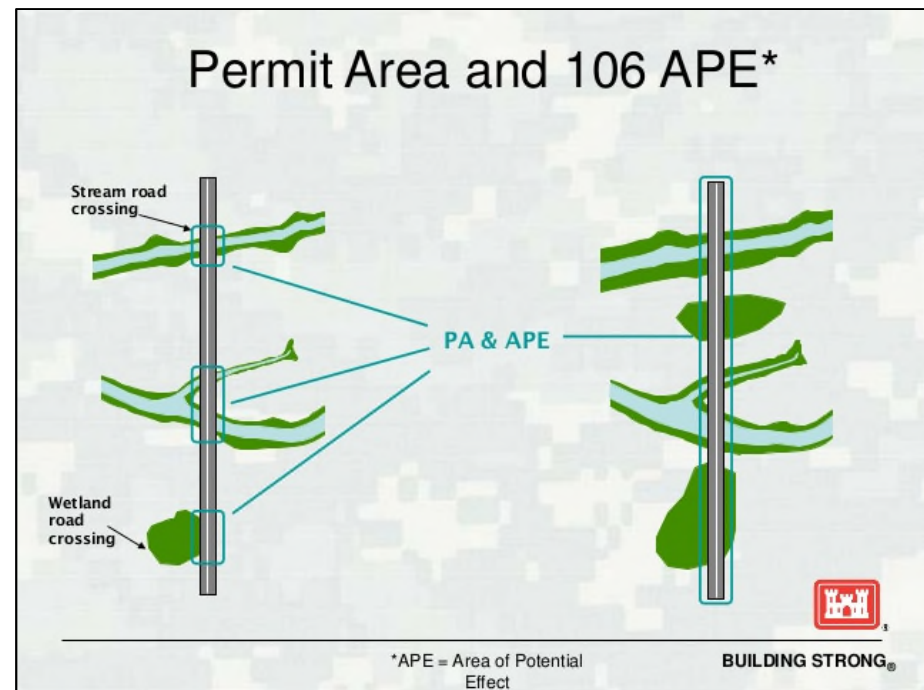
12. Utility Line Activities. Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than $\frac{1}{2}$ -acre of waters of the United States for each single and complete project.

Utility lines: This NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in pre-construction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefied, or slurry substance, 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

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For linear projects, a “single and complete project” means all crossings of a waterbody at a specific location.

- Crossing one waterbody at separate and distant locations?
 - Each crossing is a single and complete project.
- Crossing individual channels in a braided stream or individual arms of an odd-shaped wetland or lake?
 - The crossings together are a single and complete project.



Basics of NWP 12 (Utility Line Activities)

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10272

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television communication. The term "utility line" does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from one area.

Material resulting from trench excavation may be temporarily sideloaded into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead utility line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the

road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP also authorizes temporary structures, fills, and work necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/2-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 31.) (Sections 10 and 404)

Note 1: Where the proposed utility line is constructed or installed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of

the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

Note 2: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 3: Pipes or pipelines used to transport gaseous, liquid, liquefied, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

Note 4: For overhead utility lines authorized by this NWP, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

13. Bank Stabilization. Bank stabilization activities necessary for erosion prevention, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(c) The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(e) No material is of a type, or is placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the United States;

(f) No material is placed in a manner that will be eroded by normal or

- Build, maintain or repair utility lines as long as no change in pre-construction contours.
- Build, maintain, or expand utility substations in non-tidal waters.
- Build and maintain foundations for overhead utility lines.
- Build access roads in non-tidal waters (with appropriate contours, culverts, etc.).
- Use temporary fill for these activities.

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(f) No material is placed in a manner that will be eroded by normal or

Pre-construction Notification (PCN):

- Mechanized land clearing in forested wetlands
- Section 10 permit required
- Line in waters exceeding 500 ft.
- Runs parallel in jurisdictional area
- Results in loss greater than 1/10 ac.
- Permanent roads above grade in waters for more than 500 ft.
- Permanent roads in waters with impervious materials [all impervious surfaces amendment coming]
- [listed species or designated critical habitat amendment coming]

**National Environmental Policy Act
Implications for NWP Permitting**

National Environmental Policy Act

- Before a federal agency undertakes a major federal action significantly affecting the quality of the human environment, the agency must evaluate its environmental consequences.
 - CatEx: Is the action one that is categorically excluded from additional NEPA reviews?
 - EA: Does the agency need to prepare an environmental assessment to confirm a finding of no significant impact?
 - EIS: Does the agency need to prepare an environmental impact statement?

Does my project require NEPA review?

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From the 2012 NWP 12 Decision Document:

7.0 Determinations

7.1 Finding of No Significant Impact

Based on the information in this document, the Corps has determined that the issuance of this NWP will not have a significant impact on the quality of the human environment. Therefore, the preparation of an Environmental Impact Statement is not required.

Does my project require NEPA review?

Pre-construction Notifications

If a PCN is not required:

- The NWP covers the activity (as long as the activity is consistent with the permit's terms and conditions).
- No federal action, so no additional NEPA obligation.

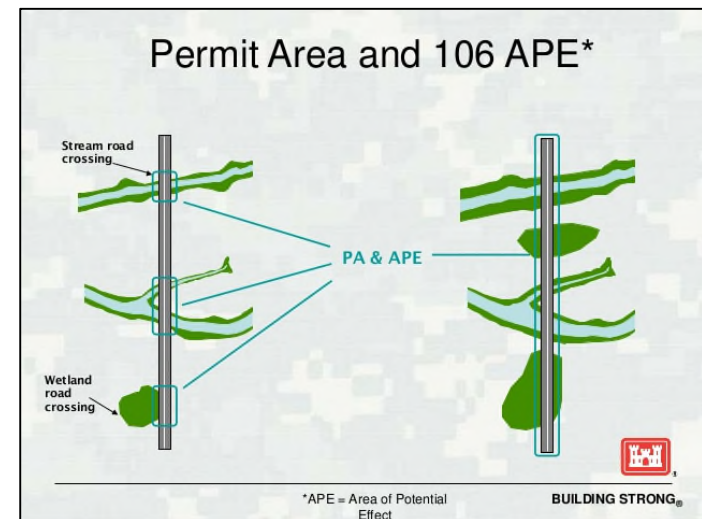
If a PCN is required:

- Corps review to “verify” that the activity is consistent with the NWP and is likely to have “minimal” separate or cumulative adverse effects on the environment.
- Corps may add conditions or require mitigation to ensure all effects remain “minimal.”
- Issuing the NWP is a major federal action; issuing a verification letter to a permittee is not.

What about effects in uplands?

- Starting point: Winnebago Tribe v. Ray (8th Cir. 1980)
 - 67-mile power line, with a 1.25-mile river crossing
 - Corps okay to limit its EA to the river crossing
 - Corps had no control or responsibility over the rest

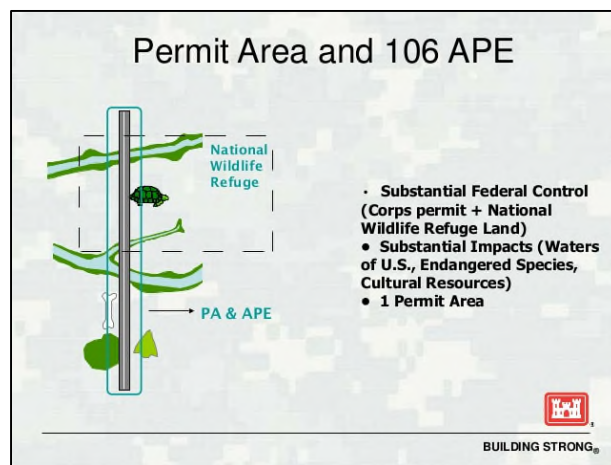
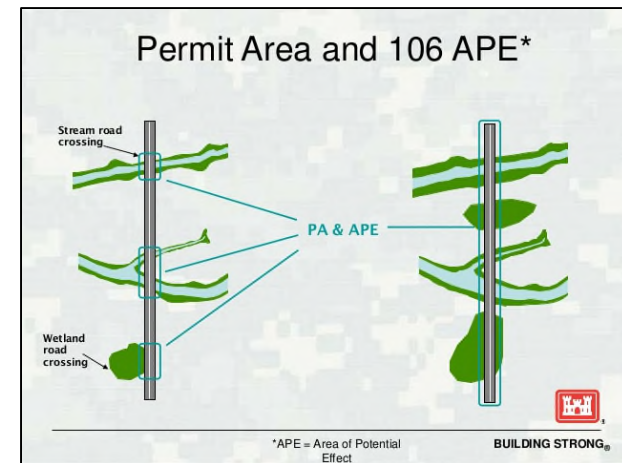
- Degree of discretion
- Direct financial aid
- Overall federal involvement



Does my project require NEPA review?

Factors for determining control and responsibility:

- Regulated activity “merely a link” in a corridor project?
- Any aspects of the upland facility in the immediate vicinity that affect the regulated activity’s location and configuration?



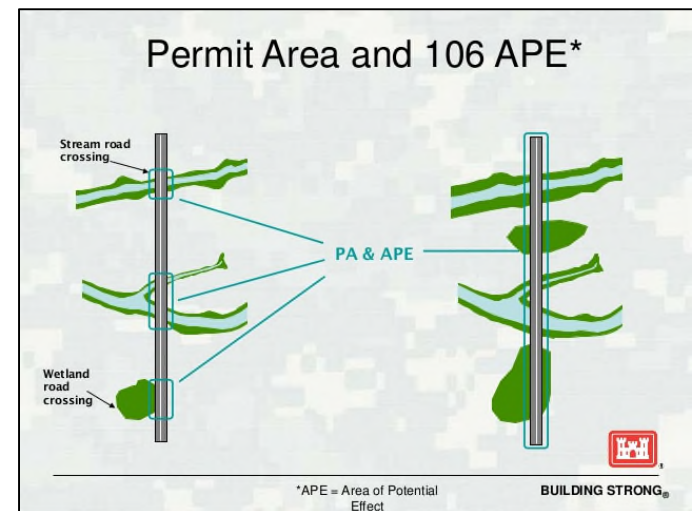
- What extent of the entire project is in Corps jurisdiction?
- What is the extent of cumulative Federal control and responsibility?

**Recent Cases Challenging
NWP 12 Permitting**

How much is too much?

When the Corps of Engineers is verifying NWP 12 coverage for a linear project, how much Corps involvement does there need to be before that involvement “federalizes” the entire project?

- Must the Corps consider uplands effects?
 - Are total effects more than minimal such that NWP 12 is no longer applicable, and the applicant must seek an individual permit?
 - Must the Corps complete an environmental assessment or environmental impact statement before approving the project.



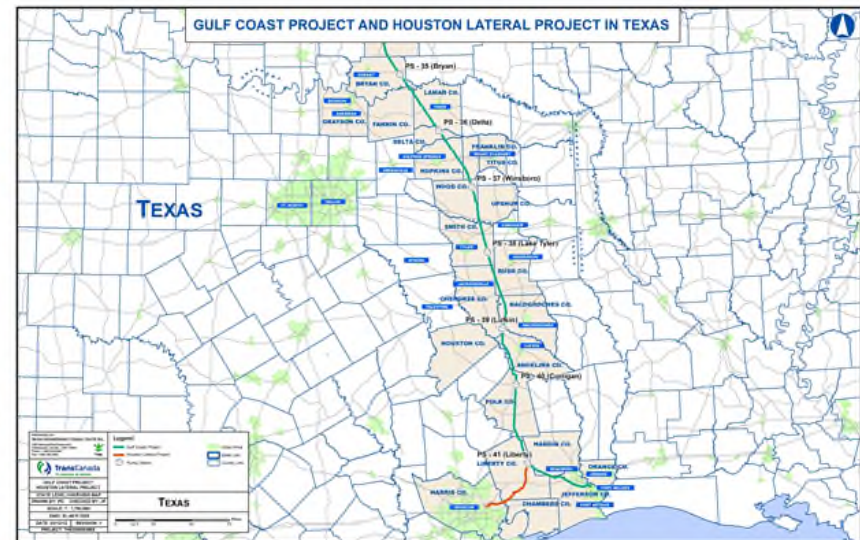
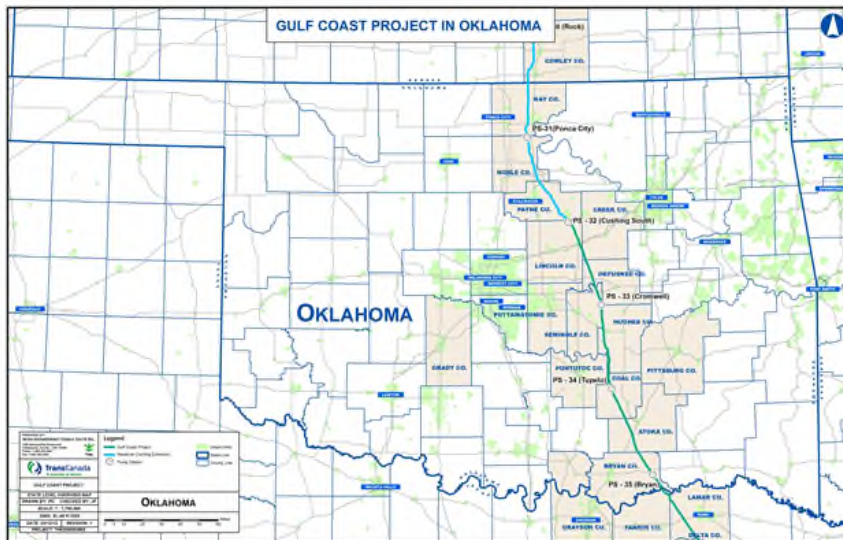
Federal Control or Responsibility

V&E

TransCanada's Gulf Coast Pipeline, *Sierra Club v. Bostick* (W.D. Okla. And 10th Cir. 2013/2014)

485-mile crude oil pipeline from Cushing, OK to the Gulf

Route has 2,227 separate U.S. water crossings



No separate environmental analysis for the entire pipeline.

Verifying the water crossings is not a “major federal action” because:

- The agency is not the one undertaking or funding the action.
- The agency is not enabling the action.
 - Many NWP activities are automatically authorized without any additional inquiry or agency action.
 - If the act of verifying means an action is a “major federal action,” then the entire scheme of streamlining analysis using nationwide permits is nullified whenever a PCN is required.
 - The Corps doesn't have control over the action; it is only verifying permit applicability.
- The entire pipeline causes the loss of less than one acre of U.S. waters.

Judge Martinez, sitting by designation in the 10th Circuit, dissenting:

- “The Gulf Coast Pipeline is 485 miles long, and required the Corps to issue 2,227 permits for water crossings. This means that the Gulf Coast Pipeline crosses United States waters almost five times in each mile, or about once every 1150 feet.”
- “Considering the number of permits issued by the Corps relative to the overall size of the Gulf Coast Pipeline, it is patently ludicrous for Appellees to characterize the Corps' involvement in the subject project as minimal, or to maintain that the Corps' permitting involves only a ‘link’ in the Gulf Coast Pipeline.”
- In response to the “less than one acre loss of U.S. waters” argument, Judge Martinez said that the district court “failed to address the real and significant harm caused by the actual construction of the pipeline, including the clearing of trees and vegetation, removing topsoil, filling wetlands, building access roads, and clearing an eighty-five foot construction right-of-way for the length of the pipeline.”

Nearly 590-mile crude oil pipeline



Pipeline route crosses:

- ~27 mi. of federal land
- ~14 mi. of U.S. waters
- ~2,000 separate U.S. water crossings
- 4 Corps districts

No separate environmental analysis for the entire pipeline.

Verifying the water crossings is not a “major federal action” because:

- “If the federal agency itself is not undertaking or financing the project in question, the agency action qualifies as “major federal action” for NEPA purposes only if the agency's act is tantamount to a permit that allows the project to proceed.”
- Verifications and permits clearly distinguished in the Clean Water Act context.
 - Verification only to confirm “the benign nature of a project” under the general permit scheme “with little, if any, delay or paperwork because they fit within certain pre-cleared categories of activities.”
 - Individual permits require “searching scrutiny,” including analysis of “the location, purpose and need for the proposed activity, as well as the type, source, composition and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material, and whether or not the particular project satisfies the applicable regional guidelines for such activity.”

Verifying the water crossings is not a “major federal action” because:

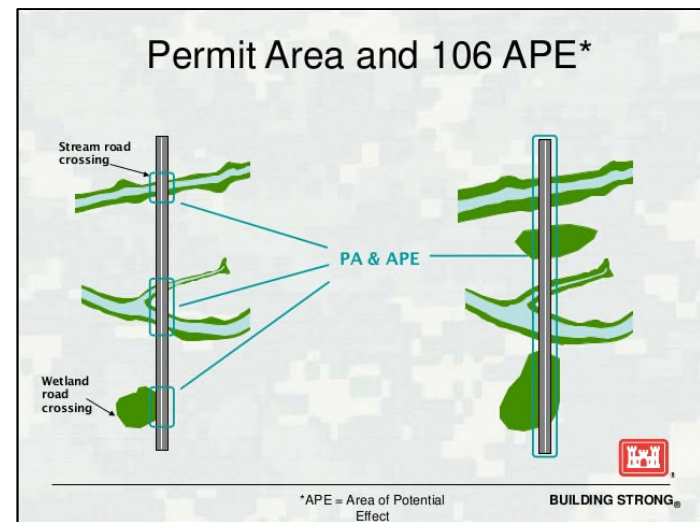
- “The entire point of the general permitting system is to avoid the burden of having to conduct an environmental review under NEPA when a verification—as distinguished from an individual discharge permit—is sought.”
- “It would therefore make little sense” that eligibility for verification would require the Corps to conduct a full environmental review under NEPA.

Sierra Club relied on a 2002 district court decision (*Spiller v. Walker*) that held that verifications were a “major federal action,” and on the *Sierra Club v. Bostick* 10th Circuit dissent.

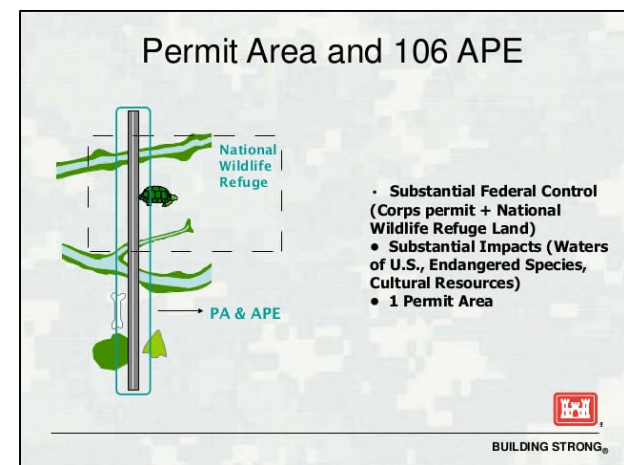
- The court cast both aside because they failed to address the fact that verifications occur under the general permit scheme, not the individual permit scheme.

Sierra Club argued that the 1,950 verifications gave the Corps discretion over a substantial part of the pipeline.

- The court said that Sierra Club has “a point about scale, but that point is not material to the applicable legal analysis.”
- Federal involvement very small (less than 14 miles of crossings, with another 14 miles under easements addressed in an EA).



1. Remember the differences between obtaining a verification that your activity is covered under a general permit and obtaining an individual permit.
2. If you have a linear project, think about where you have single and complete projects.
 - If you have a non-linear project, the “single and complete project” standard for each water crossing is different. There, you need to think about whether different components have independent utility.
3. Corps permitting or verifications do not happen in a vacuum. When determining whether there is federal control or responsibility, cumulative federal involvement could trigger analysis of all uplands effects.



(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

The EA/FONSI for NWP 12 contains a cumulative effects discussion for the nationwide application of the permit.

For those activities requiring a PCN, the District Engineer will:

- Review the PCN to confirm that each water crossing meets the terms and conditions of the NWP
- Review all crossings for the overall utility line to confirm that any adverse cumulative effects on the aquatic environment are no more than minimal.

The District Engineer may require compensatory mitigation to offset losses of waters or functions and to ensure the net adverse effects are minimal.

- If mitigation does not bring the adverse effects down to the “minimal” level, the NWP cannot apply, and the applicant must obtain some other Corps approval.

How little is too little?

When the Corps of Engineers is verifying NWP 12 coverage for a linear project, what is the necessary scope, depth, and timing of the cumulative effects analysis?

Sierra Club argued:

- NWP 12 analysis failed to discuss uplands effects.
- NWP 12 analysis of aquatic effects faulty given thousands of lost acres.
- NWP 12 impermissibly defers the NEPA analysis to the District Engineer.
- Here, the Corps failed to coordinate the analysis across districts.

The Court held:

- NWP 12 analysis failed to discuss uplands effects.
 - Waived, and reach into uplands appropriate for IP, not NWP
- NWP 12 analysis of aquatic effects faulty given thousands of lost acres.
 - Waived, and adequately considered, esp. given mitigation requirements
- NWP 12 impermissibly defers the NEPA analysis to the District Engineer.
 - PCN action is not a deferral of analysis, but a confirmation check
- Here, the Corps failed to coordinate the analysis across districts.
 - Evidence the Corps consulted, and had factual basis for support (which Judge Martinez calls a post hoc rationalization not properly before the agency)

Sierra Club argued:

- Verifications failed to contain a statement containing the cumulative effect determination.
- Verifications failed to contain a discussion of the cumulative effects analysis.
- The Corps failed to conduct a pipeline-wide analysis.

The court held:

- Verifications failed to contain a statement containing the cumulative effect determination.
 - No requirement for the letters to contain such a statement
- Verifications failed to contain a discussion of the cumulative effects analysis.
 - The letters' details about scope, effects, and mitigation adequate to support the final conclusion that the activity is authorized under the NWP
- The Corps failed to conduct a pipeline-wide analysis.
 - No pipeline-wide analysis required; Federal Register notice discusses cumulative effects analysis occurring on a regional basis or on a watershed or ecoregion basis

1. Even though terse verification letters may meet the legal minimum, encourage Corps staff to expressly state the cumulative effects determination.
2. Even though the Flanagan South court held that a pipeline-wide analysis was not required given language in the Federal Register, there is friction with language in the EA/FONSI. Encourage coordination among Corps districts, with some indication of that in the record (and not in post-litigation affidavits).
3. Anticipate significant scrutiny on this front in the next nationwide permitting comment period. Those arguments deemed “waived” in the Gust Coast Pipeline case will likely be raised in public comments and may become the basis of subsequent facial challenges.

Compliance with NWP General Conditions

V&E

Reissuance of Nationwide Permits, Final Notice (Feb. 21, 2012)

10270 Federal Register / Vol. 77, No. 34 / Tuesday, February 21, 2012 / Notices		
39. Commercial and Institutional Developments	High Tide Line	such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project or within the boundaries of the structure or fill. This NWP also
40. Agricultural Activities	Historic property	
41. Reshaping Existing Drainage Ditches	Independent utility	
42. Recreational Facilities	Indirect effects	replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.
43. Stormwater Management Facilities	Intermittent stream	
44. Mining Activities	Non-tidal wetland	
45. Repair of Uplands Damaged by Discrete Events	Open water	(b) This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and/or the placement of new or additional riprap to protect the structure. The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. The placement of new or additional riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.
46. Discharges in Ditches	Ordinary high water mark	
47. [Reserved]	Perennial stream	
48. Commercial Shellfish Aquaculture Activities	Practicable	(c) This NWP also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, across fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills
49. Coal Remining Activities	Pre-construction notification	
50. Underground Coal Mining Activities	Preservation	
51. Land-based Renewable Energy Generation Facilities	Re-establishment	The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. The placement of new or additional riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.
52. Water-Based Renewable Energy Generation Pilot Projects	Rehabilitation	
Nationwide Permit General Conditions	Restoration	
1. Navigation	Kill and pool complex	The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. The placement of new or additional riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.
2. Aquatic Life Movements	Riparian areas	
3. Spawning Areas	Shellfish seeding	
4. Migratory Bird Breeding Areas	Single and complete linear project	The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. The placement of new or additional riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.
5. Shellfish	Single and complete non-linear project	
6. Suitable Material	Stormwater management facilities	
7. Water Supply Intakes	Stream bed	The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. The placement of new or additional riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.
8. Adverse Effects From Impoundments	Stream channelization	
9. Management of Water Flows	Structure	
10. Fills Within 100-Year Floodplains	Tidal wetland	The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. The placement of new or additional riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.
11. Equipment	Vegetated shallows	
12. Soil Erosion and Sediment Controls	Waterbody	
13. Removal of Temporary Fills	B. Nationwide Permits	
14. Proper Maintenance	1. <i>Aids to Navigation.</i> The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66). (Section 10)	
15. Single and Complete Project	2. <i>Structures in Artificial Canals.</i> Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)	
16. Wild and Scenic Rivers	3. <i>Maintenance.</i> (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill;	
17. Tribal Rights		
18. Endangered Species		
19. Migratory Bird and Bald and Golden Eagle Permits		
20. Historic Properties		
21. Discovery of Previously Unknown Remains and Artifacts		
22. Designated Critical Resource Waters		
23. Mitigation		
24. Safety of Impoundment Structures		
25. Water Quality		
26. Coastal Zone Management		
27. Regional and Case-by-Case Conditions		
28. Use of Multiple Nationwide Permits		
29. Transfer of Nationwide Permit Verifications		
30. Compliance Certification		
31. Pre-Construction Notification		
District Engineer's Decision		
Further Information		
Definitions		
Best management practices (BMPs)		
Compensatory mitigation		
Currently serviceable		
Direct effects		
Discharge		
Enhancement		
Ephemeral stream		
Establishment (creation)		

7. Water Supply Intakes. 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.

What if you don't comply with the general condition?

Scenario 1 – Plaintiffs provide declaration of person asserting the water crossing is in proximity to a public water supply intake, but the Corps determined that the crossings were not near any water supply intakes.

- Flanagan South Pipeline
- Evidence must prevail over Corps' record evidence, its expert determination, and the substantial deference to which the agency is entitled.

Scenario 2 – Plaintiffs highlight that the pipeline is in close proximity to a public water supply intake, and the Corps entirely neglected to make any proximity determination.

- *Mobile Baykeeper v. U.S. Army Corps of Engineers* (S.D. Ala. Oct. 2014)
- 41-mile crude oil pipeline with 14 crossings verified for NWP 12 applicability in the Alabama portion
- “The nationwide permit system was designed to enable the Corps to quickly reach determinations regarding activities that will have minimal environmental impacts. Requiring an elaborate analysis of the applicable regulations and the facts would defeat this purpose.”
- Even if PCN required, applicants need not prove compliance with all conditions.
- Absurd to require the Corps to conduct “in-depth pre-verification examination” of general condition compliance.

1. Do not interpret the *Mobile Baykeeper* holding to create any leeway in compliance obligations.
 - If the Corps were aware of a general condition issue and issued the verification anyway, a court would likely find that arbitrary and capricious.
 - If the applicant is aware of a general condition issue and hides it from the Corps when seeking verification, civil and criminal enforcement could ensue.
2. But the notion that the verification process is supposed to be streamlined when compared to a full-blown environmental analysis can be helpful when managing how much analysis and preparation is necessary to support verification and to create an adequate and defensible record.

- The loss of wetlands functionality (e.g., forested wetlands being converted to scrub-shrub wetlands) not being a loss of waters.
- Reasoned rationale for why the Corps uses the 0.5-acre loss threshold.
- Consideration for the risk of oil spills.
- Controversial nature of pipelines.



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