The Corps of Engineers’ Nationwide Permitting Program

Lessons from Permitting Linear Projects
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.
Some Fundamental Truths

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.
Basics of NWP 12 (Utility Line Activities)
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)

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

• 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.
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
Does my project require NEPA review?

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?
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.
Does my project require NEPA review?

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?

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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

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
Cumulative Effects Analysis Takeaways

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

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

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.


- 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 ensure.

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.
Other Nationwide Permitting Issues

- 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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