

**DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS**

COMPLETE STATEMENT OF:

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BEFORE THE

**COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENERGY AND POWER**

UNITED STATES HOUSE OF REPRESENTATIVES

ON:

**H.R. 3548
The North American Energy Access Act**

February 3, 2012

Mr. Chairman and Members of the Committee, I am Margaret (Meg) Gaffney-Smith, Chief of the Regulatory Program for the U.S. Army Corps of Engineers (Corps). Thank you for the opportunity to discuss the Corps regulatory authority under Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act related to utility line projects and to specifically discuss our regulatory involvement in the proposed Keystone XL pipeline. As the National Program Chief, I oversee program implementation, which is accomplished in the Corps 38 district offices.

Background on Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403)

Section 10 of the Rivers and Harbors Act requires authorization from the Secretary of the Army, acting through the Corps, for the construction of any structure in, under, or over any navigable water of the United States. Structures or work outside the limits defined for navigable waters of the United States require a Section 10 permit if the structure or work would affect the course, location, condition or capacity of the water body. The law applies to any dredging or disposal of dredged materials, excavation, filling, re-channelization, or any other modification of a navigable water of the United States, and applies to all structures, from the smallest floating dock to the largest commercial undertaking. For utility line projects, aerial or sub-aqueous utility line crossings--even when buried beneath the substrate of a navigable waterbody--may affect the navigable capacity of the waterbody and require authorization by the Corps under Section 10 of the Rivers and Harbors Act.

Background on Section 404 of the Clean Water Act (33 U.S.C. § 1344)

Section 404 of the CWA establishes a program to regulate the discharge of dredged or fills material into “waters of the United States”. Since the late 1970s, the Corps has regulated discharges of dredged or fill material into streams and wetlands related to activities such as highway construction; residential, commercial, and industrial developments; energy projects; and utility line projects. A Corps permit is required whether the work, including any discharges, is permanent or temporary. Utility line projects may include temporary fills for access roadways, storage, and work areas, as well as temporary or permanent impacts associated with grading, bank stabilization, or the crossing itself.

Discharges of dredged or fill material into streams and wetlands that are waters of the United States require authorization from the Corps. Activities that are similar in nature and that are expected to cause no more than minimal effects, individually and cumulatively, as described in Section 404(e) of the CWA, may be authorized by a “general permit.” The CWA stipulates that general permits expire after five years, at which point the Corps must evaluate them, update them if necessary, and reissue them through a public notice and comment process. All federal, tribal, state, local agencies and members of the public have an opportunity to comment on general permits as part of the reauthorization process, and the Corps uses input received to improve effectiveness and environmental protection requirements of these permits.

Activities that do not meet the criteria for a general permit are typically processed under the “standard individual permit” procedures. These procedures include issuance of a public notice, preparation of a project specific decision document in accordance with National Environmental Policy Act requirements, and application of the Section 404(b)(1) Guidelines. Regulatory program personnel in Corps districts work with applicants to avoid and minimize impacts to waters of the United States and to develop satisfactory compensatory mitigation plans for unavoidable impacts to aquatic resources. For individual permit applications, the Corps conducts a full public interest review, balancing the anticipated benefits against the anticipated impacts. The Corps can only authorize those activities that are not contrary to the public interest, and must authorize the least environmentally damaging practicable alternative, so long as that alternative does not have other significant adverse environmental consequences.

When implementing the Corps regulatory program, the Corps is neither an opponent nor a proponent for any specific project; the Corps responsibility is to make fair, objective, and timely permit decisions. The Secretary of the Army, through the Chief of Engineers, has delegated responsibility for making final decisions on permit applications to the Corps District Commanders.

Background on Nationwide Permit 12 for Utility Lines

Nationwide Permit 12 (NWP 12) is a general permit promulgated under Section 404(e) of the CWA that may be used to authorize activities that have minimal adverse effects on the aquatic environment, both individually and cumulatively. Specifically, this permit

authorizes the construction, repair, maintenance and removal of utility lines, provided the activity does not result in the loss of greater than ½ acre of waters of the United States. It further includes associated excavation, backfill or bedding for utility lines, provided there is no change in pre-construction contours. Utility lines that are routed in or under Section 10 navigable waters without a discharge of fill material may receive the necessary Section 10 authorization by means of the Nationwide Permit. This Nationwide Permit also includes authorization for temporary structures, fills, and work necessary to construct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable when temporary discharges, work, and discharges are necessary for construction activities, access fills, or dewatering of construction sites. 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. Finally, NWP 12 includes authorization for the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, with the exception of non-tidal wetlands adjacent to tidal waters.

NWP 12 includes quantitative thresholds on the amount of discharge of dredged or fill material into waters of the United States. All activities included for authorization as part of a single and complete project must not result in the loss of greater than one-half acre of waters of the United States. It is important to note that the same Nationwide Permit cannot be used more than once for the same single and complete project. The Corps regulations define a single and complete project at 33 C.F.R. §330.2(i) as “the total

project proposed or accomplished by one owner/developer or partnership or other association of owners/developers... For linear projects, such as the Keystone XL pipeline proposal, the “single and complete project” will apply to each crossing of a separate water of the United States (i.e. single waterbody) at that location.

Applicants requesting authorization under NWP 12 are required to provide a pre-construction notification to the local district commander prior to commencing an activity involving any one of the following seven criteria:

- 1) mechanized land clearing in a forested wetland for the utility line right-of-way;
- 2) the work/discharge is proposed in a navigable waterway (i.e., Section 10 authorization is required);
- 3) the utility line in waters of the United States exceeds 500 linear feet;
- 4) the utility line is placed within a jurisdictional area (i.e., a water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area;
- 5) the activity will result in the loss of greater than one-tenth acre of waters of the United States;
- 6) permanent access roads are constructed above grade for longer than 500 linear feet within waters of the United States; or
- 7) permanent access roads are proposed to be constructed of impervious materials within waters of the United States.

Other Statutes Relevant to Corps Permitting Processes

Other statutes impact the ability of the Corps to authorize activities under any Nationwide Permit. In accordance with the Endangered Species Act (ESA), no activity may be authorized under any Nationwide Permit, including NWP 12 that would be likely to jeopardize the continued existence of a threatened or endangered species or destroy or adversely modify the critical habitat of such species. In addition, no activity may be authorized under any Nationwide Permit until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been fulfilled. Further, the Corps Nationwide Permits do not obviate the need to obtain other federal, state or local permits, approval or authorizations required by law.

Section 10 and Section 404 Permits for the Keystone XL Project

To date, TransCanada has submitted pre-construction notifications (PCNs) requesting verifications under NWP 12 to the Corps Galveston, Fort Worth and Tulsa districts, for the necessary authorization under Section 10 and Section 404 for activities in waters of the U.S. in association with the Keystone XL pipeline project applied for in September and October 2011. Prior to the Presidential Permit being denied, each of the three districts made decisions to exercise discretionary authority on these PCN requests and suspended all work for the discharge of dredged or fill material in waters of the United States because of concerns identified by the Department of State related to the public interest that could not be addressed until a final decision was made on the pending Presidential Permit application. The President has since determined, based upon the State Department's view that 60 days is an insufficient period to obtain and assess the

necessary information, that the Keystone XL pipeline project, as presented and analyzed at that time, would not serve the national interest. Should circumstances change in the future, the districts will process any future requests that are submitted for Department of the Army permit(s) in accordance with the appropriate procedures based on its statutory authorities and implementing regulations.

If H.R. 3548 is enacted, only the Federal Energy Regulatory Commission, and not the Corps, would be responsible for issuing any permit required in conjunction with construction, operation and maintenance of the pipeline. At present, only the Corps has the statutory mandate to review projects like the Keystone XL pipeline for a permit under the provisions of Section 10 of the River and Harbors Act and Section 404 of the Clean Water Act. However, none of these statutory reviews would be allowed for this project under the language in Sec. 4 (a) of this bill, and no Corps permit would be required.

I appreciate the opportunity to be here today and I will be happy to answer any questions you may have.