

# Environmental permits related to pipeline construction

by Alan L. Smith, Ph.D., C.E.P.

***Applications requiring mitigation for approval need to be fully understood by the applicant because signing the permit means acceptance of its requirements. Therefore it is best to complete all negotiations before accepting the terms rather than signing just to get the project started with the hope of getting out of the terms at a later date.***



Adapted from the cartoon from the book, "Wildlife and Recreation Management on Private Lands; A Guide for Washington." By Doug Pineo.

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## Introduction

Construction of pipelines, especially major pipeline projects requires obtaining state and federal permits. Obtaining the necessary permits is often the responsibility of the right of way agent. When a pipeline is to be constructed across a navigable water a Section 404 permit is required from the U.S. Army Corps of Engineers.

The Federal Water Pollution Control Act was enacted in 1972. This act is now referred to as the Clean Water Act (CWA), as amended. The purpose of the act was to restore and maintain the

chemical, physical and biological integrity of the Nation's waters. The CWA is administered by the Environmental Protection Agency (EPA). The Corps is responsible for the administration of Section 404 of the Act which regulates dredge and fill activities in the waters of the United States.

Implementation of the 404 program was initiated July 25, 1975 when the Corps published regulations which adopted a phase-in schedule. Phase I was initiated the same date and regulated dredge and fill activities on all navigable waters and adjacent wetlands. Phase II was initiated September 1, 1976 and included primary tributaries of Phase I waters and lakes greater than 5 acres in surface area plus wetlands adjacent to these waters. Phase III went into effect July 1, 1977 and required permits for discharges of dredge or fill materials into all waters of the United States.

## Definitions

Developing a better understanding of the process requires knowledge of several definitions which one might run into during the permitting process.

Navigable waters are defined in the broadest terms as "The waters of the United States, including the territorial seas."

Wetlands are defined as "Those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction."

The above definition was redefined by the Corps September 18, 1979 as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

The 6th Circuit Court of Appeals ruled in early 1985 that wetlands protected by the Corps 404 program includes only those wetlands primarily created by flooding from adjacent navigable waters. The ruling is to be reviewed by the Supreme Court. If upheld, acres of wetlands now covered by the Corps program would be eliminated from the permitting process.



*The center of the picture features cypress trees. If destruction of large numbers of these trees will result during construction of a pipeline then alternative routes have to be considered. Agencies give strong consideration to the presence of cypress trees during the evaluation of permit applications for pipelines across wetlands in the Gulf Coast Region.*

### The permit process

How does one know if a Corps permit is required for construction of a pipeline? The definitions indicate a lot of emphasis is placed on the type of vegetation. The U.S. Fish & Wildlife Service has prepared a list of plant species used as indicators of wetland areas. Most Corps districts have an abbreviated list of plants that are typically found in wetland areas within their district. A knowledge of these plants is beneficial in making a determination.

If uncertain, the best procedure is to submit a letter to the Corps district(s) where the project is to be constructed requesting a "Jurisdictional Determination." This request must be in writing and about 12 days are required for a response. The letter must contain a map that shows the location and a written description of the proposed action. The jurisdictional determination is handled through the Permit Compliance Section of the district offices. Therefore, the request must be addressed to the Compliance Section and not the Permits Section. A person from the Compliance Section will review maps and may even make a site visit to make a determination. The response from the Corps will indicate if a permit is required and the

type of permit. There are four basic Corps permits.

#### 1. Individual

These are permits issued following a case-by-case analysis of an application.

#### 2. General

Permits issued for future minor work or structures in a particular region of the country that will have only minimal individual and cumulative impact on the environment.

#### 3. Nationwide

Department of Army authorization that has been issued by regulation to permit certain structures or work in or affecting navigable waters of the United States throughout the nation.

#### 4. Letter of Permission

An individual permit issued in accordance with the abbreviated procedures of 33 CFR 325.5(b).

Pipelines are covered within the "Transmission Corridor" Nationwide permit. Application of this permit varies among districts and certain restrictions may apply. It is best to contact the Corps and determine if a particular project would be covered under the Nationwide permit.

Under the original regulations the Corps was required to process permit applications within 105 days after receipt of a complete application. However, most permits were not being processed within the required time frame. A study conducted by the American Petroleum Institute revealed that 60 percent of the permit applications were being processed within 120 days; 7.5 percent required more than 240 days; 2.1 percent required more than 1 year; and, the longest took close to 3 years. If mitigation was a stipulation to the permit then the average time increased.

A Presidential Task Force was assigned to review the regulatory program administered by the Corps of Engineers. A number of recommendations were made by the Task Force and many were reflected in new regulations published in the Federal Register on July 22, 1982. Several changes of significance include:

1. The number of Nationwide permits was increased from 17 to 25. Five additional Nationwide permits were added in 1984.
2. The District Engineers were encouraged to increase the number of General permits. The District and Division Engineers were given more discretionary authority related to individual permits.
3. A number of general criteria were established for evaluating each permit application providing more uniformity among districts. These include a public interest review, evaluating the effects of a project on wetlands, fish and wildlife resources, water quality, cultural resources, floodplain management, navigation, marine sanctuaries and coastal zones as well as the affects on adjacent properties.
4. Provisions were made for pre-application consultation. This affords an applicant the opportunity to consult with the Corps before initiating the permit application process. Potential problems regarding the project as well as concerns other agencies might have with the location or project implementation are discussed. The applicant then has the opportunity to work out any problems with agencies before submitting the permit application.

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5. Standard procedures were established for processing permit applications. Once the Corps receives an application, they have 15 days to make a determination of completeness. If additional information is required the applicant must be notified in writing. After the application is complete, 15 days are allowed to issue the public notice. (Experience indicates it is taking more like 20 days; depending on workload). The regulations require that the public have 30 days to provide comments on a permit application. Some districts have shortened the public comment period. At the end of the public comment period, the Corps has 15 days in which to make a decision to issue the permit. If the permit is to be denied the applicant must be notified in writing stating the reasons for denial.

Issuance of the permit can consume an additional 20 days. This involves drafting the permit and sending it to the applicant for approval and then writing up the final permit. Therefore, it is recommended that a period of 90 to 120 days be allowed for obtaining a Section 404 permit.

It should be noted that receiving a permit to construct a pipeline does not entitle the owner to perform maintenance work along the pipeline right-of-way once the pipeline has been installed. Any maintenance work required, especially at water crossings, necessitates a permit to perform the work. If the pipeline is in danger due to exposure the work will often be allowed to proceed under an emergency permit with the paperwork to be completed after the maintenance is performed.

When planning the construction of a new pipeline through wetland areas it is best to route the line adjacent to established transmission corridors. Discussing the project with the Corps and other agencies during the planning process is highly recommended. It is best to have considered alternate routes and provide the reasons for selecting the preferred route over others.

### Mitigation

Wetlands are considered a valuable resource and routing a pipeline through

some wetlands may require agreeing to some type of mitigation. The U.S. Fish & Wildlife Service, in their role as a commenting agency, has developed a mitigation policy. This policy is broken down into 5 components as follows:

- a. Avoiding the impact altogether by not taking a certain action.
- b. Minimizing impacts by limited the degree or magnitude of the action.
- c. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- d. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- e. Compensating for the impact by replacing or providing substitute resources or environments.

The Fish & Wildlife Service has developed four categories of habitat that are used in the evaluation process. Unique and limited habitat resources require in-kind replacement if the project is allowed to proceed as proposed. More common wetland habitat can often be replaced with out-of-kind habitat. Replacement of habitat is not always on a one to one basis. Unique habitats may have to be replaced on a two to one or even three to one basis. Less critical habitat may be less than one to one replacement.

Replacement of habitat as a form of mitigation can be very expensive; especially where transplanting vegetation is required. Equipment has not been designed for transplanting vegetation in shallow water or muddy environments. Therefore, the process is very labor intensive and quite expensive. It is recommended that any application that requires mitigation for approval be fully understood by the applicant. Once the permit is signed by the applicant, he has a responsibility to fulfill the requirements of the permit. Therefore, it is best to complete all negotiations before accepting the terms of a permit rather than sign the permit to get on with the project and hope to get out of the terms at a later date.

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