

## The DAPL And The Corps' Latest Clean Water Act Conundrum

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While the courts consider the Standing Rock Sioux Tribe's challenge to the Dakota Access Pipeline (DAPL), the U.S. Army Corps of Engineers finds itself between a rock and a hard place. On the one hand, the Corps agrees with the proponents of the project that the DAPL is authorized under the Clean Water Act, the Rivers and Harbors Act, the National Environmental Policy Act and the National Historic Preservation Act. On the other hand, the Corps requested that Dakota Access LLC voluntarily pause all construction until the Corps determines if it should "reconsider" the DAPL project authorization. Meanwhile, Dakota Access has no recourse to challenge the Corps' request, or challenge its inability to proceed with the pipeline without the Corps on board.



Kimberly Leue Bick

In fact, the United States announced that it may wait for new permitting regulations or congressional action before allowing DAPL to go forward. In addition, the D.C. Circuit enjoined construction of the DAPL for 20 miles on both sides of the Missouri River at Lake Oahe pending further order of the court. Facing regulatory inaction, and waiting for judicial intervention potentially federalizing the entire pipeline project, the DAPL, and its investors, are in limbo indefinitely.



Allison Ross

What does this mean for the DAPL's future and for other prospective utility line projects that may cross waters of the United States in discrete locations? This case throws into doubt where and when the Corps can limit its jurisdiction and rely upon general or nationwide permits in lieu of evaluating thousands of miles of pipelines or utility lines.

Ironically, this case comes at a time that the Corps is simultaneously in court defending its (and EPA's) new regulations under the Clean Water Act redefining "waters of the United States" (WOTUS) to broaden federal jurisdiction to include land that contains upstream tributaries that may have a temporal connection to navigable waters of the United States. In the WOTUS case, the Corps is seeking to preserve the option to cast a wide jurisdictional net across private land. In the DAPL case, it is seeking to preserve its right to limit its jurisdiction. In both cases, politics is playing a key role.

The DAPL case is a political hot potato with important implications for tribal rights on lands that are adjacent or in proximity to tribal lands. The pipeline runs between the production fields in the Bakken and Three Forks areas of North Dakota to refineries and terminals located in Patoka, Illinois. Although the pipeline does not intrude onto tribal lands, it does come within one-half mile of the Sioux Tribe's reservation boundary. The Sioux Tribe challenges the Corps' compliance with Section 106 of the NHPA. The NHPA review is required as a part of the Clean Water Act permitting process. Under Section 404 of the

Clean Water Act, a project proponent is required to apply to the Corps for permitting of any activities involving discharges of dredged or fill material into waters of the United States. Thus, while the focus of the Sioux Tribe, and the news, is on the NHPA, this is at bottom a Clean Water Act jurisdiction issue.

In some cases, the Clean Water Act allows the Corps to issue general, or nationwide, permits. In the case of DAPL, the Corps issued a nationwide permit (NWP 12). NWP 12 authorizes “[a]ctivities 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 [1/2]-acre of waters of the United States for each single and complete project.” 77 Fed. Reg. at 10,271. A “utility line” includes pipelines like the DAPL.

General Condition 20, under NWP 12, requires a preconstruction notification (PCN) if there is a potential to effect “historic properties.” If activity may affect historic property, then the Corps must complete required Section 106 consultations under the NHPA. This multistep consultative process includes identifying potential historic properties, evaluating the historical significance of the sites in consultation with the State Historic Preservation Officer and tribes, and assessing the adverse effects on the identified historic properties. The Sioux Tribe argues that the Corps unlawfully abdicated its duties by only requiring a PCN for a small number of impacts to federally regulated waters, rather than requiring PCNs on all waters of the United States where the pipeline would cause a discharge. In other words, the Sioux Tribe contends the Corps should not have permitted any construction without a PCN.

In an attempt to assert that it acted properly, the Corps claims it only has jurisdiction over portions of the pipeline: (1) where the pipeline crosses waters of the United States (under the CWA), (2) on Corps project lands (under the RHA), and (3) beneath Lake Oahe, where the Corps will need to provide an easement in order for the pipeline to proceed. These areas account for only 3 percent of the total pipeline where the Corps contends the pipeline is connected to a “federal undertaking” where a PCN is required. The remaining 97 percent is on private land where no PCN is required. The real question in this case is whether the remaining 97 percent can become federalized by review of the Corps under the Clean Water Act.

Under the Clean Water Act, the Corps must determine the potential impact that a proposed development would have on jurisdictional waters, and on “those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.” 33 C.F.R. Pt. 325, App. B §7(b)(1). The Corps has “control and responsibility” for portions of the project in which “the Federal involvement is sufficient to turn an essentially private action into a Federal action.” *Id.* at §7(b)(2). In the case of the DAPL, the Corps determined that it does not have sufficient control for upland portions of the pipeline that do not cross waters of the United States. For that reason, the Corps asserts that it does not have jurisdiction for the entire pipeline.

Section 106 of the NHPA requires the Corps to analyze the effect of a project on a historical property where the Corps has “direct or indirect jurisdiction over the ‘undertaking.’” The Corps asserts that regulations under the Clean Water Act provide that an “undertaking” is limited to each discrete crossing of waters of the United States, and does not encompass the pipeline as a whole. To defend its limited jurisdiction in the DAPL permitting process, the Corps cites to *Sierra Club v. United States Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015). In *Sierra Club*, the Corps’ regulatory approval under the CWA was limited to “discrete geographic segments of the pipeline.” The plaintiffs in *Sierra Club* argued that the Corps’ jurisdiction covered the entire pipeline because the Corps’ action was necessary to complete the construction of the pipeline. The D.C. Circuit rejected the plaintiffs’ argument in *Sierra Club*, finding that portions of the pipeline outside of the Corps’ jurisdiction did not require the Corps’ analysis or review.

The Sioux Tribe distinguishes the Sierra Club case by backing away from arguing that the Corps should have jurisdiction over the entire pipeline. Instead, the Sioux Tribe now argues that the Corps' jurisdiction, at a minimum, includes the "water's edge" along the pipeline's route. The Corps does not dispute this jurisdictional point and instead defends its actions by contending it fully reviewed the pipeline's effects at the water's edge and beyond. In the meantime, the D.C. Circuit has granted the Sioux Tribe's request for an emergency injunction while the court reviews the case, and the Corps has announced it will "determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act or other federal laws." The Corps' reconsideration could include a reexamination of potential actions under the CWA and the RHA, in addition to the NEPA and the NHPA.

The Corps has created for itself a conundrum — the Corps must argue in court that it met its legal obligations under federal law to review the DAPL water crossings, while it simultaneously reconsiders its decisions concerning the pipeline approvals and the easement. Other than waiting for the D.C. Circuit to rule whether or not to enjoin the Corps' permit approval, there is no process or timeframe for the Corps' next steps. In fact, the next steps could be delayed to allow the United States and the Sioux Tribe to engage in "formal, government-to-government consultations" on: (1) how to better ensure "meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights;" and (2) whether Congress should take legislative action to "promote those goals," pursuant to a joint departmental United States announcement following the district court ruling in the case. If the Corps delays its easement decision until there is action on one or both of the two discussion topics, the DAPL could be on hold indefinitely.

For Dakota Access LLC, this presents a significant due process problem. Under the Administrative Procedures Act, the company may challenge a "final agency action" by the Corps. Under the recent *Hawkes* Supreme Court case, it is clear that Dakota Access LLC can immediately challenge an action by the Corps asserting it has CWA jurisdiction over "waters of the United States" on the project property. So far, however, the Corps' jurisdiction and its actions have been favorable to the DAPL and there has been no reason for the company to bring a challenge. Now the company is in limbo with no final agency action to challenge. Rather than take action, the United States has requested that the company "voluntarily halt" construction. The company cannot challenge a request; it can only challenge a final agency action. The next action is for the Corps to decide whether or not to grant the easement at Lake Oahe. Until the Corps makes a decision one way or the other, however, there is no agency action for the company to challenge.

Dakota Access LLC and its investors, contractors, licensors, customers and employees must wait and see if the Corps takes regulatory action, or if the United States takes legislative action to revise the statutory scheme governing the permitting process. The unfortunate message received by pipeline and utility developers nationwide is that the permitting process cannot be trusted and that due process is not guaranteed.

—By Kimberly Leue Bick and Allison Ross, Bick Law LLP

*Kimberly Bick is the founding and co-managing partner of Bick Law LLP in Newport Beach, California. Allison Ross is an associate at Bick Law in Newport Beach.*

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