

Pipelines 101

Episode 2: EIS or EA? 404/Nationwide 12 and 401 Certification

October 24, 2018

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🌿 Pipelines 101: Episode 2

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The Regulatory Maze

National Environmental Policy Act (NEPA)

Clean Water Act – Sections 401 & 404
and more . . .

- How do the regulatory processes work?
- How can you participate effectively?



NEPA

An Overall Framework for Environmental Analysis

- Federal Energy Regulatory Commission (FERC)
 - the lead agency
- Other federal agencies and state agencies
“cooperating agencies”



NEPA

- Primarily procedural
- Even if results will be harmful, NEPA doesn't prohibit them.



NEPA

- Process governed by NEPA statute, CEQ regulations, and each agency's regulations
- Courts say have to take a “hard look”





May prepare

Environmental Impact Statement (EIS)

or

Environmental Assessment (EA)



NEPA

An initial step:

- Are there likely to be “significant” impacts?
- If so must do an EIS
- If unsure, can start with an EA



NEPA

- Must look at need for project
 - a major flaw in FERC's current approach
- Must have alternatives analysis
 - FERC arbitrarily limits the range of alternatives



NEPA

- Must use “best available science”
- Address the major topics
- Judged by deferential “arbitrary and capricious” standard under the Administrative Process Act (APA)



CWA Section 404

- Administered by the U.S. Army Corps of Engineers
- Commonly known as “dredge and fill” permits
- Applies to work in streams and wetlands or close riparian areas



CWA Section 404

Corps can conduct individual 404 reviews for a project, which include public participation

or

Cover the entire project under a general permit, known as a “Nationwide Permit” (NWP)



🌿 CWA Section 404

- NWP 12 applies to “utility lines”
- Nationwide is supposed to cover only activities with minimal individual or cumulative impacts
- Generally inappropriate for any large pipeline but Corps will attempt to use in most cases



🌿 CWA Section 404

Substantive requirements of 404

- Primarily defined in regs. at 40 CFR 230, known as 404(b)(1) guidelines
- These developed by EPA rather than Corps & have good substantive requirements
- EPA can veto Corps' approval, if guidelines not satisfied



CWA Section 401

Congress reserved authority to states to veto or condition federally-licensed projects if cannot ensure compliance with Water Quality Standards (WQS)

If applicant's project "may" result in a discharge to state waters, must comply with section 401



CWA Section 401

Under 401, State may:

- Issue a Water Quality Certification (WQC) (with or without conditions)
- Deny the application, which vetoes the project
- Waive its authority to act under 401 (can be express or due to failed to act timely)



CWA Section 401

Each federal agency with permitting authority for the project must get either WQC or proof of waiver. If not, cannot approve.
For interstate gas pipelines, WQC must cover approvals by both FERC and the Corps



CWA Section 401

Once the threshold is met – “may result in a discharge” – the state can address and regulate any aspect of the entire “activity,” not just the discharge itself



CWA Section 401

States can have general certifications that cover an entire class of NWP's, with or without conditions.

General certifications issued at time NWP issued (for NWP 12, every 5 years)



CWA Section 401

Individual WQC processes must include public participation.

Provide one of the strongest tools to insist on good substantive reviews of pipelines



CWA Section 401

Under EPA regs. governing 401, the state can only issue a WQC if there is a “reasonable assurance” that all applicable state requirements will be met.



Recent developments
in the world of pipelines

(Warning: changes daily!)



Questions?

Register for Episodes 3 and 4 at
www.upstateforever.org



Thank you!

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