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When Fast-Tracking Slows You Down: Reconsidering Nationwide Permit 12 Use for Large-Scale Oil Pipelines

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When Fast-Tracking Slows You Down: Reconsidering Nationwide Permit 12 Use for Large-Scale Oil Pipelines

Megan Rulli*

ABSTRACT

The consumption of oil pervades everyday life in America. The network of pipelines transporting oil from field to consumer is largely invisible. Until a major news event bursts pipelines onto headlines, this indispensable and invisible system fuels the country without fanfare. At the same time, concern over global climate change has made new large-scale projects for fossil fuel extraction and consumption highly controversial. The Keystone XL (“KXL”) pipeline was originally designed to transport crude oil extracted from oil sands in Canada to the Gulf of Mexico for international export. After more than a decade of false starts, the project currently sits dormant.

This Comment uses the battle over the KXL to illustrate the federal framework of interstate oil pipeline regulation in the United States. It examines the preliminary regulatory hoops required for construction and the energy policies gatekeeping key permits. At the heart of the KXL controversy is the United States Army Corps of Engineers’ (“Corps”) permitting program under Section 404 of the Clean Water Act. This Comment critically examines whether the regulatory path of the KXL was appropriate. The KXL sought to fast-track construction by using the Corps’ Nationwide Permit 12, but legal challenges to that permit halted the KXL’s construction.

This Comment ultimately recommends that the Corps and the fossil fuel industry stop relying on Nationwide Permit 12 for large-scale pipeline projects. Pipelines longer than 250 miles should instead be individually permitted. Individual permitting would trigger review under the National Environmental Policy Act (“NEPA”), the bedrock environmental law that examines direct and indirect environmental impacts of major federal actions.

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Comprehensive NEPA review would promote transparency through public input and give the federal government an important foothold in combatting climate change.

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I. INTRODUCTION

The proposed Keystone XL pipeline, to the chagrin of its proponents, has never been just a pipeline.¹ Instead, the Keystone XL (“KXL”) embodies the cultural debate over climate change and energy policy in the United States.² Environmentalists and climate activists used the KXL to turn the amorphous threat of climate change into a physical reality.³ These groups raised instant and prolonged opposition at each stage of the KXL’s construction.⁴ The goal to halt the KXL became a movement.⁵

Oil pipeline construction in the United States is a lengthy process particularly ripe for challenge because federal oil pipeline regulation is fragmented.⁶ Construction authorizations are spread over many agencies with multiple permitting programs.⁷ This fragmentation regularly delays pipeline construction and leaves projects vulnerable to legal actions at each step.⁸ This Comment focuses on the federal authorization required for pipeline water crossings. In 2019, the movement against the KXL targeted Nationwide Permit 12 (“NWP 12”), the required permit for the pipeline’s water crossings.⁹ Meant to streamline construction, the KXL’s use of NWP 12 likely proved fatal.¹⁰ An early 2020 injunction against the KXL’s NWP 12 permits delayed construction long enough to miss the 2020 construction season.¹¹ And in January 2021, in one of the first acts of his administration, President Biden withdrew the KXL’s preliminary permit, terminating construction altogether.¹²

1. See Ted Hamilton, *The Virtues of Uncertainty: Lessons from the Legal Battles Over the Keystone XL Pipeline*, 18 Vt. J. ENV’T L. 222, 251 (2016) [hereinafter Hamilton].

2. *Id.*

3. See *Keystone XL Pipeline Political Timelines*, BALLOTPEDIA, <https://bit.ly/34oESdR> [perma.cc/PZ9L-6RXB] (last visited Aug. 25, 2021).

4. *See id.*

5. *See id.*

6. See BRANDON J. MURRILL, CONG. RSCH. SERV., R44432, PIPELINE TRANSPORTATION OF NATURAL GAS AND CRUDE OIL: FEDERAL AND STATE REGULATORY AUTHORITY 8 (2016).

7. *See id.*

8. *See* Hamilton, *supra* note 1, at 224.

9. *See* N. Plains Res. Council v. U.S. Army Corps of Eng’rs, 454 F. Supp. 3d 985, 986 (D. Mon. 2020).

10. *See* Emily Pontecorvo, *This Federal Permit Used to Fast-Track Pipelines. Now it’s Threatening Them.*, GRIST (July 8, 2020), <https://bit.ly/3jrJruk> [https://perma.cc/9RWU-KBX3].

11. *See* Rod Nickel, *Explainer: What is Happening with the Keystone XL Oil Pipeline?*, REUTERS (Nov. 18, 2020), <http://reut.rs/3teDNrt> [https://perma.cc/L7WH-ML6R].

12. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

While the KXL may be dormant, the controversy surrounding it remains active.¹³ The next major pipeline proposed, or perhaps a revival of the KXL, will raise the same climate change debate.¹⁴ This Comment considers NWP 12's impact on the KXL's demise and its suitability for large scale pipelines moving forward. The history of the KXL and the current structure of federal oil pipeline regulations lay the backdrop for the analysis. This Comment then evaluates the recent shift of the Army Corps of Engineers to rely on NWP 12 for individual water crossings rather than completing whole pipeline environmental review.¹⁵ Finally, the Comment examines whether the federal government, through existing regulatory structures, could use whole pipeline review as a tool in fighting climate change.

II. BACKGROUND

The battle over the KXL began over a decade ago.¹⁶ Controversial since its inception, the crude oil it would transport is a symbol of dirty fossil fuel dependence in a country struggling to address global climate change.¹⁷ This section outlines the history of the KXL.¹⁸ To understand the controversy surrounding the pipeline, it is necessary to understand the pipeline itself.

A. *The Saga of the Keystone XL Pipeline*

The KXL is a proposed crude oil pipeline that aimed to transport hundreds of thousands of barrels of crude oil daily, in a direct line from oil deposits in Canada to refineries along the Gulf of Mexico.¹⁹ The KXL would be an upgrade and expansion of an already-existing Keystone Pipeline System, which currently stretches from Hardisty, Alberta, to the Gulf Coast of Texas.²⁰ The builder

13. See, e.g., Christopher Vondracek, *Trump Talks Keystone XL in Return to Stage*, GRAND FORKS HERALD (Feb. 28, 2021), <http://bit.ly/38eGd9S> [<https://perma.cc/XK9G-FHT8>].

14. See Hamilton, *supra* note 1, at 285.

15. See Alexander S. Arkfeld, *Nationwide Permit 12 and Domestic Oil Pipelines: An Incompatible Relationship?*, 92 WASH. L. REV. 1991, 2004 (2017) [hereinafter Arkfeld].

16. U.S. DEP'T OF STATE, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEystone XL PROJECT, S-2 (2019) [hereinafter SEIS].

17. Brad Plumer, *9 Questions About the Keystone XL Pipeline Debate You Were Too Embarrassed to Ask*, VOX (Sept. 22, 2015), <https://bit.ly/3jzMfVv> [<https://perma.cc/Z8QY-U47C>].

18. SEIS, *supra* note 16, at S-2 to S-3.

19. Melissa Denchak, *What is the Keystone Pipeline?*, NAT. RES. DEF. COUNCIL (Apr. 7, 2017), <https://on.nrdc.org/2GnRREH> [<https://perma.cc/65NU-2YP9>].

20. *Id.*

and operator of the KXL and Keystone Pipeline System is TC Energy.²¹ If completed, the KXL would be approximately 1,209 miles long and run from Canada in Hardisty, Alberta, to Steele City, Nebraska.²² It would pass through Alberta and Saskatchewan; cross the United States-Canada border in Montana; then traverse Montana, South Dakota, and finally Nebraska; where it would connect into the existing Keystone Pipeline System.²³

The KXL pipeline would be a 36-inch diameter pipe able to transport 830,000 barrels of crude oil per day.²⁴ That quantity would be a dramatic increase in capacity over the Keystone Mainline pipeline, which the KXL would replace.²⁵ The source of crude oil is one of many reasons why the pipeline is so controversial—the crude oil is extracted from oil sands, also known as tar sands.²⁶

1. “*The Dirtiest Fossil Fuel on the Planet*”

Oil extracted from oil sands has the infamous reputation of being “the dirtiest fossil fuel on the planet.”²⁷ Oil sands earn this reputation because they create greater carbon emissions per barrel than most other crude oils.²⁸ Oil sands formations are unique.²⁹ They are not found in deep geological formations, but are located close to the surface and are “a mixture of sand, water, clay and a

21. SEIS, *supra* note 16, at S-1. TC Energy was formerly TransCanada Keystone Pipeline, L.P. Melissa Denchak, *What is the Keystone Pipeline?*, NAT. RES. DEF. COUNCIL (Apr. 7, 2017), <https://on.nrdc.org/2GnRREH> [<https://perma.cc/FU27-8EM7>].

22. *Id.*

23. *Terminated Pipeline Route*, TRANSCANADA PIPELINES LTD., <https://bit.ly/3ofqn4F> [<https://perma.cc/W82F-UKQE>] (last visited Aug. 25, 2021); SEIS, *supra* note 16, at S-1.

24. U.S. DEP’T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION: TRANSCANADA KEYSTONE PIPELINE, L.P. APPLICATION FOR PRESIDENTIAL PERMIT 2 (2015).

25. JONATHAN L. RAMSEUR & RICHARD K. LATTANZIO, CONG. RSCH. SERV., R42611, OIL SANDS AND THE KEYSTONE XL PIPELINE: BACKGROUND AND SELECTED ENVIRONMENTAL ISSUES 14 (2014). The current Keystone Mainline pipeline is a 30-inch diameter pipeline with “a capacity of nearly 600,000” barrels of crude oil per day. *Id.*

26. Melissa Denchak, *What is the Keystone Pipeline?*, NAT. RES. DEF. COUNCIL (Apr. 7, 2017), <https://on.nrdc.org/2GnRREH> [<https://perma.cc/E8GK-V7KT>].

27. See Rafi Letzer, *The Keystone XL Pipeline, Which Trump Just Advanced, Will Carry the Dirtiest Fossil Fuel on the Planet*, BUS. INSIDER (Jan. 24, 2017), <https://bit.ly/2TrWfp9> [<https://perma.cc/XP5U-7ZJ4>].

28. JONATHAN L. RAMSEUR & RICHARD K. LATTANZIO, CONG. RSCH. SERV., R42611, OIL SANDS AND THE KEYSTONE XL PIPELINE: BACKGROUND AND SELECTED ENVIRONMENTAL ISSUES 25 (2014).

29. *What are the Oil Sands?*, CANADA’S OIL & NAT. GAS PRODUCERS, <https://bit.ly/322luDt> [<https://perma.cc/ZEF4-UQ9K>] (last visited Aug. 25, 2021).

type of oil called bitumen.”³⁰ Despite being closer to the surface, oil extracted from oil sands is more costly than extraction from other sources.³¹ These extra costs arise because oil must be separated from the sands and refined before market.³²

The extra effort to extract oil from oil sands is also more energy intensive.³³ An operator’s method of extraction depends on the depth of deposits.³⁴ Surface mining is used for deposits less than 200 feet deep, while “*in situ* recovery” is used to reach deeper deposits.³⁵ Both methods are more energy-intensive than conventional oil recovery methods,³⁶ and carbon dioxide emissions from a gallon of oil extracted from tar sands outpace those from a gallon of conventional gasoline by 15 percent.³⁷

The KXL would originate in the Athabasca River region in Alberta, the largest oil sands deposit known in the world.³⁸ The deposit has the potential to produce 174.5 billion barrels of oil.³⁹ Because the proposed KXL is key to transporting oil sands oil into the global market, it is entwined in a larger national conversation about climate change and dependence on fossil fuels.⁴⁰

30. *Id.*

31. *Oil Extraction*, CANADA’S OIL & NAT. GAS PRODUCERS, <https://bit.ly/3q7V8u9> [<https://perma.cc/67DJ-VNKP>] (last visited Aug. 25, 2021).

32. *Id.*

33. See Rachel Nuwer, *Oil Sands Mining Uses Up Almost as Much Energy as It Produces*, INSIDE CLIMATE NEWS (Feb. 19, 2013), <https://bit.ly/2G0PW8Y> [<https://perma.cc/NWA3-6RCN>] (citing studies showing the energy return in relation to energy invested in extracting oil sands oil is 5:1 through surface mining and 2.9:1 using *in situ* recovery, while the average for conventional oil is 25:1.).

34. See *id.* for a thorough description of extraction methods. In brief: surface mining consists of shoveling out the sands, removing and crushing them, mixing them with hot water and finally “pump[ing] by pipeline to a plant called an up-grader, where the bitumen (oil) is separated from the other components such as sand, clay and water.” *Id.* In contrast, *in situ* recovery separates oil from sands within the deposit itself by “heating the bitumen so it becomes fluid enough that it can be pumped to the surface” through drilled wells. *Id.*

35. *Oil Extraction*, CANADA’S OIL & NAT. GAS PRODUCERS, <https://bit.ly/322luDt> [<https://perma.cc/VUD5-CFHV>] (last visited Aug. 25, 2021).

36. See Rachel Nuwer, *Oil Sands Mining Uses Up Almost as Much Energy as It Produces*, INSIDE CLIMATE NEWS (Feb. 19, 2013), <https://bit.ly/2G0PW8Y> [<https://perma.cc/R9NY-NTQN>] (comparing the energy used to extract oil from oil sands with the energy produced from that source).

37. *What Are Tar Sands?*, UNION OF CONCERNED SCIENTISTS (Feb. 23, 2016), <https://bit.ly/37PwJTr> [<https://perma.cc/FLQ6-B6TC>].

38. Holli Riebeek, *Mining Canada’s Oil Sands*, NASA (Dec. 13, 2011), <https://go.nasa.gov/2HsiVU7> [<https://perma.cc/RXB4-Y4TE>].

39. *Id.*

40. *Id.*

2. *Presidential Permitting Problems*

a. *Presidential Permits and Border Crossings*

The KXL required permission from the United States government to begin construction.⁴¹ Specifically, pipelines that cross an international border require special authorization in the form of a presidential permit.⁴² The State Department issues presidential permits for cross-border pipelines like the KXL that carry petroleum products and hazardous liquids.⁴³

The State Department's presidential permitting process is full of broad discretion and centers around a finding that the project "serves the national interest."⁴⁴ Executive Orders ("E.O.") 11423 and 13337 create the presidential permitting process for the State Department to follow, but they do not define "national interest."⁴⁵ Instead, those E.O.'s offer general directives.⁴⁶ The E.O.'s require the State Department "to refer the application and pertinent project information to and request the views of" other agency heads such as the Administrator of the Environmental Protection Agency and the Secretary of Energy.⁴⁷ Environmental effects of cross-border projects are evaluated by the State Department at the presidential permitting stage.⁴⁸

41. LINDA LUTHER & PAUL W. PARFOMAK, CONG. RSCH. SERV., R44140, PRESIDENTIAL PERMIT REVIEW FOR CROSS-BORDER PIPELINES AND ELECTRIC TRANSMISSION 1 (2017).

42. *Id.* A Congressional Research Service report details the source of the President's authority to grant these permits: "Lower federal courts have held that the President's authority to issue such permits derives from Article II of the Constitution, which the Supreme Court has interpreted to include the power to conduct the nation's foreign relations." BRANDON J. MURRILL, CONG. RSCH. SERV., R44432, PIPELINE TRANSPORTATION OF NATURAL GAS AND CRUDE OIL: FEDERAL AND STATE REGULATORY AUTHORITY 10 (2016).

43. LINDA LUTHER & PAUL W. PARFOMAK, CONG. RSCH. SERV., R44140, PRESIDENTIAL PERMIT REVIEW FOR CROSS-BORDER PIPELINES AND ELECTRIC TRANSMISSION 6 (2017).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* The other agency heads that must be consulted are the "Attorney General; Administrator of the Environmental Protection Agency; the Secretaries of Defense, the Interior, Commerce, Transportation, Energy, and Homeland Security, or the heads of those departments or agencies with relevant authority or responsibility over relevant elements of the proposed project." *Id.*

48. *Id.* This environmental review is completed pursuant to the National Environmental Policy Act ("NEPA"), which requires federal agencies to analyze the environmental effects of "major federal actions." *Id.* The scope of the anticipated impact determines the level of environmental review. *Id.* Agencies prepare Environmental Impact Statements ("EIS") for "major federal actions significantly affecting the quality of the human environment. If the agency is uncertain whether a proposal would have significant impacts, it may prepare an environmental assess-

Yet, as the Congressional Research Service (“CRS”) notes in a survey of presidential permits and their methods, the E.O.’s do not direct the State Department to evaluate specific factors before issuing a presidential permit.”⁴⁹ Despite any confusion this murky process may cause for applicants, presidential permits are rarely denied.⁵⁰ Indeed, the State Department can include in the issued permit any conditions it deems necessary to ensure the project serves the national interest.⁵¹

The KXL project stretched the boundaries of the State Department’s discretion. Typical projects subject to presidential permits are confined to the border itself.⁵² Only the KXL and one other pipeline cross the border and continue hundreds of miles into the United States.⁵³ The State Department’s review of the KXL’s environmental effects and its national security justification eventually spanned three administrations and lasted more than a decade.⁵⁴ Given the discretion involved in the presidential permitting process, it is unsurprising that the fate of the KXL’s authorization rested on the energy policy of the administration in power.

b. The Obama Administration

TC Energy filed its original application for the KXL with the State Department in September 2008, at the tail end of George W. Bush’s administration.⁵⁵ This filing initiated a national interest evaluation as well as an environmental review of the pipeline’s construction.⁵⁶ The Obama administration’s State Department denied

ment (EA) to determine if an EIS is necessary, or a finding of no significant impact (FONSI) may be issued.” *Id.* Agencies can also predetermine categories of actions that have “no significant effect on the environment,” negating a need for an EIS or EA—known as categorical exclusions (“CE”). LINDA LUTHER & PAUL W. PARFOMAK, CONG. RSCH. SERV., R44140, PRESIDENTIAL PERMIT REVIEW FOR CROSS-BORDER PIPELINES AND ELECTRIC TRANSMISSION 6 (2017).

49. *Id.* The report notes that the State Department considers “the proposal’s potential effect on energy security, environmental and cultural resources, the economy, and foreign policy” as factors in its national interest determination. *Id.*

50. *Id.* at 3.

51. *Id.* at 2.

52. *Id.* at 1.

53. *Id.* The Alberta Clipper, constructed by Enbridge Energy, is the other pipeline. *Id.* Additionally, the KXL stands out as a rare project that was initially denied a presidential permit. *Id.* at 3. The CRS described the norms of the process, stating, “the permitting process is generally used to determine *how* a project must be implemented to comply with federal law (and meet the national or public interest standard) rather than *whether* it can be implemented.” *Id.*

54. See SEIS, *supra* note 16, at S-2 to S-3 for a detailed timeline of the KXL permitting and review process.

55. *Id.* at S-2.

56. *Id.*

the presidential permit application in January 2012.⁵⁷ The State Department based its denial on the grounds of insufficient time to make the determination, primarily because Congress had enacted a 60-day deadline in an attempt to force the administration to speed up the project's approval.⁵⁸ The denial also referenced an environmental concern, specifically the desire to consult with interested parties to reroute the project to avoid "the uniquely sensitive terrain of the Sand Hills in Nebraska."⁵⁹ This denial explicitly left the door open for TC Energy to submit another permit application once the Congressional deadline passed.⁶⁰

TC Energy refiled its application in May 2012, rerouting around the Sand Hills.⁶¹ Following public hearings, agency and tribe consultation, and evaluation under an Environmental Impact Statement, the KXL's presidential permit was again denied in November 2015.⁶² Secretary of State John Kerry issued the rejection, which focused on the implications that the KXL held for climate change and the future of America's energy policy.⁶³ Secretary Kerry explained, "The critical factor in my determination was this: moving forward with this project would significantly undermine our ability to continue leading the world in combatting climate change."⁶⁴ In the months leading up to the final determination,

57. Office of the Spokesperson, *Denial of the Keystone XL Pipeline Application*, U.S. DEP'T OF STATE (Jan. 18, 2012), <https://bit.ly/30xFPQ3> [<https://perma.cc/6V5Z-N8UL>].

58. *Id.* This Congressional deadline illustrates the controversy that marked every step of the KXL's progress. In the fall of 2011, large protests at the White House called for President Obama to deny the KXL permit, arguing it would further fossil fuel dependence and increase greenhouse gas emissions. Daniel Stone, *Obama Delays Keystone Pipeline at Least 12 Months*, THE DAILY BEAST (Nov. 10, 2011), <http://bit.ly/3qeiwK>. Shortly after the protests, the State Department announced that it would need more time to study the environmental impact of the project, with a decision likely in early 2013. George Zornick, *Keystone XL Is Back on the Table—for Now*, THE NATION (Dec. 17, 2011), <http://bit.ly/3c3zSzc> [<https://perma.cc/NPP3-6BPC>]. Republicans in Congress who supported the KXL were unhappy with the delay and inserted a 60-day deadline for the permit decision into a bill which extended payroll tax cuts. *Id.* The State Department followed the enacted deadline, announcing its decision to deny the KXL's permit on January 18, 2012. Office of the Spokesperson, *Denial of the Keystone XL Pipeline Application*, U.S. DEP'T OF STATE (Jan. 18, 2012), <https://bit.ly/30xFPQ3> [<https://perma.cc/LH7E-4FDW>].

59. *Id.*

60. *Id.*

61. SEIS, *supra* note 16, at S-3.

62. *Id.*

63. John Kerry, U.S. Sec'y of State, *Keystone XL Pipeline Permit Determination*, U.S. DEP'T OF STATE (Nov. 6, 2015), <https://bit.ly/35JKYq8> [<https://perma.cc/R88H-WTYM>].

64. *Id.*

public controversy around the KXL had grown, with voices speaking out on both sides of the debate.⁶⁵ The KXL became a focal point for the larger national conversation concerning climate change.⁶⁶ The State Department received “nearly five million public comments” while reviewing the KXL application.⁶⁷ Environmentalists celebrated the denial as a key victory in the fight against climate change and declared the project dead.⁶⁸

Yet even as the Obama administration was halting the border-crossing leg of the Keystone Pipeline System, it was greenlighting TC Energy’s completion of its southern leg.⁶⁹ Known as the Gulf Coast Pipeline, this 487-mile section of 36-inch crude oil pipeline connected Cushing, Oklahoma, to the Gulf Coast in Texas.⁷⁰ Despite the ongoing KXL controversy, the southern leg’s completion marked a key moment in the export of oil sands oil.⁷¹ Oil sands oil flowed directly from the Hardisty, Alberta fields to the Gulf Coast for the first time in January 2014.⁷² President Obama’s address authorizing the Gulf Coast Pipeline contrasted Secretary Kerry’s rejection of the KXL’s presidential permit.⁷³ President Obama endorsed the Gulf Coast Pipeline because it represented American energy development; specifically, the project supported the oil fields of South Dakota and Colorado.⁷⁴ President Obama’s policy tried to strike a balance between energy independence and conservation.⁷⁵ But this focus would change when a new energy policy entered the White House following the election of President Donald Trump, and the KXL’s presidential permit was quickly revived.⁷⁶

65. See, e.g., Brad Plumer, *9 Questions About the Keystone XL Pipeline Debate You Were Too Embarrassed to Ask*, VOX (Sept. 22, 2015), <https://bit.ly/3jzMFvV> [<https://perma.cc/Z8QY-U47C>].

66. *Id.*

67. John Kerry, U.S. Sec’y of State, *Keystone XL Pipeline Permit Determination*, U.S. DEP’T OF STATE (Nov. 6, 2015), <https://bit.ly/35JKYq8> [<https://perma.cc/BPG2-T9F9>].

68. Ben Adler, *The Inside Story of the Campaign that Killed Keystone XL*, VOX (Nov. 7, 2015), <https://bit.ly/33xGRNr> [<https://perma.cc/2AUX-5VES>].

69. Barack Obama, U.S. President, *Remarks by the President on American-Made Energy*, OFFICE OF THE PRESS SEC’Y (Mar. 22, 2012), <https://bit.ly/35SWks1> [<https://perma.cc/JXJ8-327U>].

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. See Construction of the Keystone XL Pipeline: Memorandum for the Secretary of State, the Secretary of the Army, and the Secretary of the Interior, 82 Fed. Reg. 8663 (Jan. 30, 2017).

c. The Trump Administration, E.O. 13783, and Shifting Energy Policy

With a new administration in 2017 came a new energy policy and renewed interest in the route of the KXL. On January 24, 2017, just days after his inauguration, President Trump issued a “Presidential Memorandum Regarding Construction of the Keystone XL Pipeline.”⁷⁷ In it, he specifically invited TC Energy to apply for a new presidential permit.⁷⁸ President Trump also directed the State Department to expedite the review of an application upon arrival.⁷⁹ TC Energy resubmitted its permit application two days later.⁸⁰ In March 2017, a State Department presidential permit greenlit the KXL for the first time.⁸¹

The KXL approval was part of a larger domestic energy policy. On March 28, 2017, President Trump issued E.O. 13783: Promoting Energy Independence and Economic Growth.⁸² Paired with his encouragement of the construction of the KXL, this E.O. signaled a shift in American energy policy away from climate concerns and in favor of accelerated domestic fossil fuel resources development.⁸³

77. *Id.*

78. *Id.* at 8663.

79. *Id.* The President also addressed the Secretary of the Interior, Directors of the Bureau of Land Management and the United States Fish and Wildlife Service. *Id.* at 8664. President Trump singled out the U.S. Army Corps of Engineers (“Corps”), ordering:

The Secretary of the Army shall . . . take all actions necessary and appropriate to review and approve as warranted, in an expedited manner, requests for authorization to utilize Nationwide Permit 12 under section 404(e) of the Clean Water Act, 33 U.S.C. 1344(e), with respect to crossings of the “waters of the United States” by the Keystone XL Pipeline, to the maximum extent permitted by law.

Id.

80. SEIS, *supra* note 16, at S-2.

81. *Id.*

82. Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017).

83. *Executive Order 13783: Energy Development*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (Oct. 30, 2017), <https://bit.ly/3kNLJ7O> [<https://perma.cc/8QQL-VPE4>]. Within E.O. 13783 was an explicit directive:

The heads of agencies shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions . . . that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.

Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017). The Department of Energy, the Environmental Protection Agency, the Department of Commerce, and the Department of the Interior all released responsive reports to the E.O. within months of its issuance. *Executive Order 13783: Energy Development*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (Oct. 30, 2017), <https://bit.ly/3kNLJ7O> [<https://perma.cc/8QQL-VPE4>]. The E.O. has been the source of many environmental “deregulatory actions” within those agencies. *Id.* See *id.* for an account of

3. *Permitted Yet Paused*

Nearly a decade after filing its initial application, TC Energy had finally secured the presidential permit needed to begin constructing the KXL. However, TC Energy remained unable to begin meaningful construction of the KXL.⁸⁴ Environmental groups and Native American tribes immediately began a series of challenges to the KXL's presidential permit, delaying construction.⁸⁵ These suits focused on the State Department's level of review conducted prior to issuing the presidential permit.⁸⁶

The environmental suits alleged that the State Department's environmental review was inadequate.⁸⁷ In *Indigenous Environmental Network v. United States Department of State*, environmental groups won an initial victory.⁸⁸ The district judge required the State Department to supplement its 2014 environmental review to consider the impacts of a reroute.⁸⁹ A related suit culminated in a November 2018 injunction issued from the Montana District Court, which halted the KXL's construction altogether.⁹⁰

the Trump administration's environmental regulation rollbacks linked to E.O. 13783.

84. *Id.*

85. *Id.*

86. *Id.* One such lawsuit challenged the sufficiency of the entire Presidential Permit review process. In September 2018, two Native American tribes sued the State Department, the Rosebud Sioux Tribe, and the Fort Belknap Indian Community. Vanessa Romo, *Native American Tribes File Lawsuit Seeking To Invalidate Keystone XL Pipeline Permit*, NAT'L PUB. RADIO (Sept. 10, 2018), <https://n.pr/2VcN78P> [<https://perma.cc/C4CS-ZRXA>]. Their suit cited failure to analyze KXL impacts on treaty rights and cultural sites, and the impact of potential spills on their communities in violation of NEPA and the National Historic Preservation Act. *Id.* It called for rescission of the KXL's Presidential Permit pending adequate review. *Id.*

87. *See, e.g.*, *Indigenous Env't Network v. U.S. Dep't of State*, 317 F.3d 1123–24 (D. Mont. 2018).

88. *Id.*

89. *Id.* TC Energy was forced to reroute its line in Nebraska to gain approval from the Nebraska Public Service Commission ("NPSC"). *Id.* The new route sought to reduce environmental impacts of the pipeline. The State Department's approval of the KXL's permit, however, relied on its previously prepared 2014 Environmental Impact Statement ("EIS"). SEIS, *supra* note 16, at S-2. Because the NPSC approval hinged on a reroute, the 2014 EIS no longer included analysis of the actual route of the KXL through Nebraska. *Id.* at S-3. Environmental groups alleged the failure to adequately review the environmental impacts of the current route violated the National Environmental Policy Act ("NEPA"). *Keystone XL Pipeline*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, <https://bit.ly/2JnbNsy> [<https://perma.cc/TAP9-GR4M>] (last visited Aug. 25, 2021).

90. *Keystone XL Pipeline*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, <https://bit.ly/2JnbNsy> [<https://perma.cc/B7JA-EMQX>] (last visited Aug. 25, 2021).

Crucially, the injunctive order took issue with the shift in policy between the Obama and Trump administrations.⁹¹ It called for the State Department to defend, with data, its reversal of the Obama administration's climate change findings.⁹² The order required "the State Department to revisit key aspects of its NEPA analysis before pipeline construction [could] begin, including reassessing and further explaining its analysis of cumulative greenhouse gas emissions."⁹³ The injunction paused "all preconstruction and construction activities for the pipeline."⁹⁴ Despite appeals filed by both TC Energy and the Trump administration, the injunction continued to prevent all but peripheral construction activities on the KXL through March 2019.⁹⁵

4. *Presidential Permit: Take Two*

In March 2019, President Trump took matters into his own hands and circumvented the ongoing litigation surrounding the KXL's presidential permit. On March 29, 2019, President Trump issued a new presidential permit for the KXL.⁹⁶ President Trump simultaneously revoked the 2017 permit and instated a new permit in its place.⁹⁷ It relied solely upon President Trump's own authority as President for its issuance.⁹⁸ The new KXL permit no longer expressly involved the State Department, which was the named government defendant in the legal actions by tribes and environmental groups against the original KXL permit.⁹⁹ Consequently, on June 6,

91. Karl Puckett, *Judge Blocks Construction of Keystone XL Pipeline*, GREAT FALLS TRIBUNE (Nov. 8, 2018), <https://bit.ly/3o9FMTP> [<https://perma.cc/F89H-EKH5>].

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* The injunction was amended on February 15, 2019, to allow minor construction activities outside of the main route "such as work on pipe storage and container yards." *Id.*

96. See Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 84 Fed. Reg. 13101 (Apr. 3, 2019).

97. *Id.* at 13101. ("By virtue of the authority vested in me as President of the United States of America, I hereby grant permission, subject to the conditions herein set forth, to TransCanada Keystone Pipeline, L.P.").

98. Joshua Axelrod, *Keystone XL Gets a Win—But the Fight Goes On*, NAT. RES. DEF. COUNCIL (June 11, 2019), <https://on.nrdc.org/37a0MD2> [<https://perma.cc/7952-QSLL>].

99. *Keystone XL Pipeline*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, <https://bit.ly/2JnbNsy> [<https://perma.cc/CD9D-ANXE>] (last visited Aug. 25, 2021). Interestingly, the State Department continued its environmental review despite the new Presidential Permit and published its Supplemental Environmental Impact Statement for the KXL in October 2019. SEIS, *supra* note 16.

2019, the Ninth Circuit dismissed as moot the November 2018 injunction blocking construction of the KXL.¹⁰⁰

This development came too late for construction to begin on the KXL in 2019.¹⁰¹ By May 2019, a TC Energy executive acknowledged to investors that delays due to legal challenges caused the company to miss the 2019 construction season.¹⁰² With legal challenges to the KXL's original presidential permit now moot, environmental groups turned to other linchpins to halt construction of the KXL.¹⁰³ TC Energy readied to begin construction.

By mid-2019, construction of the KXL was finally green lit, although TC Energy could not start breaking ground until the 2020 construction season.¹⁰⁴ President Trump's unilateral issuance of a new presidential permit mooted the initial round of lawsuits challenging approval of the project.¹⁰⁵ Following this, negotiations with state agencies finalized the pipeline's route.¹⁰⁶ However, TC Energy still needed to navigate the logistical network of the remaining state and federal permits necessary for construction of the pipeline.¹⁰⁷

B. Federal Oversight of Interstate Oil Pipelines

1. A Fragmented Federal Framework

Although states play a role in pipeline construction regulation, this Comment focuses on the regulations affecting oil pipelines at the federal level. Direct federal oversight of oil pipelines in the

100. See *Indigenous Env't Network v. U.S. Dep't of State*, No. 4:17-cv-00029, 2019 U.S. App. LEXIS 17095 (D. Mont. June 6, 2019) (order granting motion to dismiss district court's injunction as moot).

101. *Court Delays Block Keystone XL Pipeline Construction in 2019*, ASSOCIATED PRESS (May 3, 2019), <https://bit.ly/3o4iFKr> [<https://perma.cc/639J-YT2N>].

102. *Id.*

103. Joshua Axelrod, *Keystone XL Gets a Win—But the Fight Goes On*, NAT. RES. DEF. COUNCIL (June 11, 2019), <https://on.nrdc.org/37a0MD2> [<https://perma.cc/FD95-5WE8>]. At least one lawsuit against the new presidential permit challenged the constitutionality of the permit. See *Indigenous Env't Network v. Trump*, 4:19-cv-00028-BMM 2020 U.S. Dist. LEXIS 192451 (D. Mont. 2020).

104. *Court Delays Block Keystone XL Pipeline Construction in 2019*, ASSOCIATED PRESS (May 3, 2019), <https://bit.ly/3o4iFKr> [<https://perma.cc/639J-YT2N>].

105. *Keystone XL Pipeline*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, <https://bit.ly/2JnbNsy> [<https://perma.cc/2RZE-ACQY>] (last visited Aug. 25, 2021).

106. SEIS, *supra* note 16, at S-3.

107. See Brandon J. Murrill, Cong. Rsch. Serv., R44432, PIPELINE TRANSPORTATION OF NATURAL GAS AND CRUDE OIL: FEDERAL AND STATE REGULATORY AUTHORITY (2016) (summarizing extensively the various state and federal agencies involved in permitting natural gas and oil pipelines).

United States consists mainly of pipeline safety concerns.¹⁰⁸ The Pipeline and Hazardous Materials Safety Administration (“PHMSA”) produces and enforces federal safety standards for interstate oil pipelines.¹⁰⁹ The Federal Energy Regulatory Commission (“FERC”) also has limited oversight of interstate oil pipelines, which focuses on fair competition practices.¹¹⁰ FERC regulates the transportation rates companies charge, “ensuring that there are ‘equal service conditions’ such that shippers have equal access to pipeline transportation.”¹¹¹ Neither PHMSA nor FERC direct siting of oil pipelines.¹¹²

Indeed, unless the federal government is the landowner, state and local authorities—not the federal government—oversee siting for crude oil pipelines.¹¹³ Factors like land ownership, geography, and cultural resources dictate the necessary state and local authorizations.¹¹⁴ There is no centralized federal authority that administers oil pipeline construction, but pipelines still require federal permits or authorizations for many aspects of their construction.¹¹⁵ Without a centralized federal administrator, these authorizations proceed in piecemeal fashion.¹¹⁶ A significant intersection between pipeline

108. Catherine Little, *Regulation of Oil and Natural Gas Pipelines: A Legal Primer*, 235 PIPELINE & GAS JOURNAL 124 (2008), <https://bit.ly/2HOSfNr> [<https://perma.cc/3DCJ-WMAY>]. Interstate oil pipeline safety is overseen by the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (“PHMSA”), through the Office of Pipeline Safety. *Id.*

109. CONG. RSCH. SERV., R44201, DOT’S FEDERAL PIPELINE SAFETY PROGRAM: BACKGROUND AND KEY ISSUES FOR CONGRESS 5 (2019).

110. Catherine Little, *Regulation of Oil and Natural Gas Pipelines: A Legal Primer*, 235 PIPELINE & GAS JOURNAL 124 (2008), <https://bit.ly/2HOSfNr> [<https://perma.cc/3DCJ-WMAY>]. Under the Interstate Commerce Act, FERC regulates oil pipeline companies as “common carriers.” *Id.*

111. *Id.*

112. BRANDON J. MURRILL, CONG. RSCH. SERV., R44432, PIPELINE TRANSPORTATION OF NATURAL GAS AND CRUDE OIL: FEDERAL AND STATE REGULATORY AUTHORITY 8 (2016).

113. *Id.* at 7. The Department of the Interior (“DOI”), under authority from the Mineral Leasing Act, grants rights-of-ways (“ROWs”) and oversees most pipeline routing through federal lands. *Id.* Where other federal agencies have jurisdiction, they coordinate with DOI to develop ROWs. *Id.* “The Bureau of Land Management (BLM) within DOI has promulgated regulations governing various aspects of oil or natural gas pipeline ROW, including requirements as to which lands are available for ROW; qualifications for holding a ROW; and terms and conditions on holding ROW.” *Id.* An oil pipeline that crosses international borders requires a Presidential Permit. *Id.* at 9. In contrast, FERC does exercise siting authority over natural gas pipelines, overseeing the “siting, construction, and operation of natural gas pipelines.” *Id.*

114. *Id.* at 8.

115. *Id.*

116. BRANDON J. MURRILL, CONG. RSCH. SERV., R44432, PIPELINE TRANSPORTATION OF NATURAL GAS AND CRUDE OIL: FEDERAL AND STATE REGULA-

construction and federal regulations materializes when pipelines cross waters that fall under federal jurisdiction.¹¹⁷ These water crossings are at the heart of the ongoing litigation over the KXL.¹¹⁸

2. Section 404 Permitting Under the Clean Water Act

Pipelines like the KXL, which traverse hundreds of miles, pass over countless bodies of water as they snake their way to their destinations.¹¹⁹ Under Section 404 of the Clean Water Act (“CWA”), the Army Corps of Engineers (“Corps”) is the gatekeeper of those crossings.¹²⁰ Section 404 Permits regulate activities that may discharge “dredged or fill material” into jurisdictional waters.¹²¹ However, not all waters fall under the Corps’ jurisdiction.¹²²

The CWA “established federal jurisdiction over ‘navigable waters,’ defined in the act as ‘waters of the United States’” (“WOTUS”).¹²³ The definition of WOTUS is codified at 33 C.F.R. § 328.3 as:

- (1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; (2) Tributaries; (3) Lakes and ponds, and impoundments of jurisdictional waters; and (4) Adjacent wetlands.¹²⁴

TORY AUTHORITY 8 (2016). For example, pipelines that discharge pollutants into waters of the United States must obtain National Pollutant Discharge Elimination System permits. *Id.* at 15. Clean Air Act permits are necessary for emissions from the “construction and operation of facilities related to pipeline transportation, such as stations or pumps that move natural gas or oil through pipelines.” *Id.* at 17.

117. *Id.* at 12.

118. *Id.*

119. Arkfeld, *supra* note 15, at 1993.

120. Clean Water Act of 1972, 33 U.S.C. § 1344 (2018).

121. *Permit Program Under CWA Section 404*, ENV’T PROTECTION AGENCY (June 17, 2020), <https://bit.ly/3q5rYvs> [<https://perma.cc/S9EC-8QHC>].

122. *Id.*

123. *Section 404 of the Clean Water Act: Permitting Discharges of Dredge or Fill Material*, ENV’T PROTECTION AGENCY (Sept. 16, 2020), <https://bit.ly/3jsv09t> [<https://perma.cc/2Q6R-L4Y4>].

124. 33 C.F.R. § 328.3. The codified definition also includes a list of waters that are not WOTUS. *Id.* This definition is the product of recent rulemaking, finalized on June 22, 2020. Farris Gillman, *WOTUS Redefined: The New Definition of Waters of the United States*, JDSUPRA (Apr. 23, 2020), <https://bit.ly/2VmhW15> [<https://perma.cc/V73S-MWNM>]. The initial permits at issue in this Comment were issued under an earlier WOTUS definition, promulgated by the EPA and the Corps in 2015. *Id.* That definition included:

- (1) waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) interstate waters and wetlands; (3) the territorial seas; (4) impoundments of waters otherwise

The Corps makes the final call on whether jurisdiction is implicated.¹²⁵ Section 404 permits are commonly required for construction activities “where the filling in of a waterbody occurs as a necessary element of the project,” such as oil pipelines.¹²⁶ Section 404 permits themselves fall into two categories—individual or general.¹²⁷

Before Congress amended the CWA in 1977, the Corps authorized every Section 404 Permit individually.¹²⁸ The 1977 amendments created a general permitting option for the Corps and allowed applicants to engage in Section 404 activities without individual review of a project or its environmental effects.¹²⁹ The Corps can issue general permits for:

[A]ny category of activities involving discharges of dredged or fill material if . . . 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.¹³⁰

The Corps issues general permits on a five-year basis, at which point the permits must be reissued or they will expire.¹³¹ The three most common general permit forms are nationwide, regional, or

identified as jurisdictional; (5) tributaries of the first three categories; and (6) adjacent waters.

Id. The rule also allowed for evaluation, “on a case-by-case basis,” of other waters, such as “isolated waters that are not connected to navigable waters but are ecologically important.” *See id.* (summarizing the differences between the old and new rules).

125. *Permit Program Under CWA Section 404*, ENV’T PROTECTION AGENCY (June 17, 2020), <https://bit.ly/3q5rYvs> [<https://perma.cc/DN6L-2YU5>]. The Environmental Protection Agency (“EPA”) is also involved in the Section 404 program, including through its role enforcing the CWA and consulting with the Corps on individual permit applications. *Id.*

126. CLAUDIA COPELAND, CONG. RSCH. SERV., RL31411, CONTROVERSIES OVER REDEFINING “FILL MATERIAL” UNDER THE CLEAN WATER ACT 3 (2013).

127. Captain Nathan R. Menard, *Creek on a Leash: A Primer on the Clean Water Act’s Section 404*, 4 ARMY L. 29, 31 (2019). Another path for Section 404 permitting is securing a “letter of permission” from a district engineer. *U.S. Army Corps of Engineers Permitting Process Information*, DEP’T OF THE ARMY CORPS OF ENG’RS, <https://bit.ly/35U8wJE> [<https://perma.cc/RL44-KH7T>] (last visited Aug. 25, 2021). (“Letters of permission may be used where, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environment values, and should encounter no appreciable opposition.”).

128. Arkfeld, *supra* note 15, at 1997.

129. *Id.*

130. 33 U.S.C. § 1344(e) (1987).

131. *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 454 F. Supp. 3d 985, 987 (D. Mon. 2020).

programmatic general permits.¹³² Nationwide permits (“NWP”) operate on a national basis, while regional general permits and programmatic general permits operate on a regional or state basis, respectively.¹³³

The Corps’ NWP program consists of over 50 permits, each overseeing a common activity.¹³⁴ The Corps designed the program to simplify and accelerate Section 404 permitting.¹³⁵ NWPs are issued every five years through rulemaking rather than in response to individual applications.¹³⁶ Because of this procedure, the environmental review, including substantive CWA compliance and procedural NEPA analysis, is completed periodically at the issuance stage.¹³⁷ Applicants using NWPs seek verification “that a project satisfies the previously issued NWP’s requirements” before commencing with projects.¹³⁸

While the Corps designed the NWP program to expedite pipeline construction, weaknesses in the program have frustrated that purpose.¹³⁹ In recent years, the anti-KXL movement set its sights

132. *U.S. Army Corps of Engineers Permitting Process Information*, DEP’T OF THE ARMY CORPS OF ENG’RS, <https://bit.ly/35U8wJE> [<https://perma.cc/8PMC-7SS8>] (last visited Aug. 25, 2021). Regional and programmatic general permits differ in purpose rather than geographic scope. *Id.* While the Corps issues regional general permits that cover a distinguishable region, programmatic general permits allow another agency (state, local, tribal, or federal) to issue an equivalent Section 404 permit to avoid duplicating regulatory duties. *Id.*

133. *Id.*

134. Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57,298, 57,304–05 (Sept. 15, 2020).

135. *Id.*

136. *Id.* A full NWP reissuance took place in March 2017, with fifty-two separate NWPs issued. *Nationwide Permit Information*, DEP’T OF THE ARMY CORPS OF ENG’RS, <http://bit.ly/3qYhFZZ> [<https://perma.cc/7N35-CS6V>] (last visited Aug. 25, 2021). Like other general permits, nationwide permits group similar activities into categories, such as NWP 6 for “survey activities,” and NWP 17 “hydropower projects.” Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57,298, 57,299 (Sept. 15, 2020). The 2017 NWPs were set to expire on March 18, 2022. *Id.* However, a proposed rulemaking in September 2020 sped up that time frame to comply with the policy directives of E.O. 13783 of March 2017. *Id.* The E.O. charged agencies with studying and streamlining regulations to encourage development of domestic energy resources. *Id.* According to the Corps, the proposed rulemaking is a fulfillment of that order. *Id.* On March 15, 2021, this latest rulemaking went into effect, with the Corps “reissuing and modifying 12 existing NWPs and issuing four new NWPs.” *Nationwide Permit Information*, DEP’T OF THE ARMY CORPS OF ENG’RS, <http://bit.ly/3qYhFZZ> [<https://perma.cc/FAN4-5ZPL>] (last visited Aug. 25, 2021).

137. Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57,298, 57,355–56 (Sept. 15, 2020).

138. Arkfeld, *supra* note 15, at 1997.

139. BRANDON J. MURRILL, CONG. RSCH. SERV., R44432, PIPELINE TRANSPORTATION OF NATURAL GAS AND CRUDE OIL: FEDERAL AND STATE REGULATORY AUTHORITY 8 (2016).

on the Corps' nationwide permit used in pipeline construction, Nationwide Permit 12.¹⁴⁰

III. ANALYSIS

Nationwide Permit 12 (“NWP 12”) is commonly used to permit oil pipeline water crossings.¹⁴¹ Recent Corps practice relies on separate NWP 12s for each water crossing rather than a single individual permit for the pipeline as a whole, even for pipelines like the KXL that stretch hundreds of miles.¹⁴² Corps rulemaking treats each water crossing as a separate project, in effect allowing the Corps “to evade whole-pipeline review.”¹⁴³ By contrast, an individual permit triggers whole-pipeline review, which would in turn consider the cumulative effects of those crossings.¹⁴⁴

A. *The Rise of Nationwide Permit 12*

The shift in reliance on NWP 12 for major pipeline projects began in 2012.¹⁴⁵ That year, President Obama issued a Presidential Memorandum in response to anticipated pipeline bottlenecks created by increased domestic oil production.¹⁴⁶ The Memorandum directed agencies:

140. See Christin Rideout Schirra et al., *U.S. Supreme Court Limits Nationwide Permit 12 Injunction to Keystone XL Pipeline*, BRICKER & ECKLER ATT'YS AT L. (July 7, 2020), <https://bit.ly/2Gwkv6o> [<https://perma.cc/94JF-RQ26>].

141. *Id.* at 2004. Under the 2017 reissuance of NWP 12, the permit encompassed the broad category of “utility line activities,” including oil and gas pipelines, electric utility lines, and telecommunication utility lines. CONG. RSCH. SERV., 97-233, THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS 2 (2017) [hereinafter ISSUES AND REGULATORY DEVELOPMENTS]. “[A] ‘utility line’ is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communications.” *Id.* On March 21, 2021, the Corps reissued NWP 12 with a narrowed scope. Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2,744, 2,744 (Jan. 13, 2021). NWP 12 now governs solely “oil or natural gas pipeline activities.” *Id.* Two new NWPs were created to cover the utility line activities now excluded from NWP 12: NWP 57 will “authorize elective utility line and telecommunications activities” and NWP 58 will authorize “utility line activities for water and other substances.” *Id.* at 2,769.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Re: Comments on the U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permit 12*, Docket No. COE-2015-0017, SIERRA CLUB (Aug. 1, 2016), <https://bit.ly/3jEVwwc> [<https://perma.cc/E9P6-AL3T>].

146. Presidential Memorandum Expediting Review of Pipeline Projects from Cushing, Oklahoma to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects (Mar. 22, 2012), <http://bit.ly/3ctWxXz> [<https://perma.cc/9RDV-MEH3>].

[T]o the maximum extent practicable and consistent with available resources and applicable laws . . . [to] coordinate and expedite their reviews, consultations, and other processes as necessary to expedite decisions related to domestic pipeline infrastructure projects that would contribute to a more efficient domestic pipeline system for the transportation of crude oil, such as a pipeline from Cushing to Port Arthur.¹⁴⁷

Following this Memorandum, the Corps' practices changed.¹⁴⁸ For example, the Corps issued 2,227 separate NWP 12 permits for the 485-mile-long Gulf Coast Pipeline's water crossings rather than using an individual permit and thereby completing whole-pipeline review.¹⁴⁹ The Corps followed the same protocol for the Flanagan South Pipeline, which runs 593 miles from Pontiac, Illinois to Cushing, Oklahoma, using NWP 12 for its 1,950 water crossings.¹⁵⁰ This shift to using NWP 12 for major pipeline projects intended to fast-track pipeline permitting, so that infrastructure buildout could keep pace with growing oil production.¹⁵¹

The disparity between the financial and time burdens of NWP versus individual permits encourages companies to use NWP 12.¹⁵² Section 404 permits add enormous costs to construction, with more than 1.7 billion dollars "spent each year by the public and private sectors obtaining wetlands permits."¹⁵³ Compliance is not optional—the CWA imposes criminal liability and civil fines on those who act without authorization.¹⁵⁴ An independent 2002 study found that "[t]he average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not

147. *Id.*

148. *Re: Comments on the U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permit 12*, Docket No. COE-2015-0017, SIERRA CLUB (Aug. 1, 2016), <https://bit.ly/3jEVwwc> [<https://perma.cc/5BRC-BBVM>].

149. *Id.* The Gulf Coast Pipeline is the Southern leg of the Keystone Pipeline, which runs from Cushing to Port Arthur. Barack Obama, U.S. President, *Remarks by the President on American-Made Energy*, OFFICE OF THE PRESS SEC'Y (Mar. 22, 2012), <https://bit.ly/35SWks1> [<https://perma.cc/9CX9-FDLA>].

150. Arkfeld, *supra* note 15, at 2004.

151. Emily Pontecorvo, *This Federal Permit Used to Fast-Track Pipelines. Now it's Threatening Them.*, GRIST (July 8, 2020), <https://bit.ly/3jrJruk> [<https://perma.cc/9RWU-KBX3>]; Presidential Memorandum Expediting Review of Pipeline Projects from Cushing, Oklahoma to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects (Mar. 22, 2012), <http://bit.ly/3ctWxXz> [<https://perma.cc/9LMM-R5AV>].

152. ISSUES AND REGULATORY DEVELOPMENTS, *supra* note 141 at 3.

153. *Rapanos v. United States*, 547 U.S. 715, 721 (2006).

154. *Id.*

counting costs of mitigation or design changes.”¹⁵⁵ According to Corps data from 2016, the average processing time for nationwide and general permits was 40 days, while individual permit processing averaged 217 days.¹⁵⁶ The economy of NWP 12 undoubtedly makes it attractive to the Corps and industry alike, but practice limits NWP 12’s appeal.¹⁵⁷

B. Functions and Disfunctions of NWP 12

Like all NWPs, the Corps conducts environmental review for NWP 12 at its five-year issuance interval.¹⁵⁸ Once issued, use of NWP 12 requires only verification from the Corps that proposed activities are within NWP 12’s scope.¹⁵⁹ At the point of verification, the Corps uses a system of pre-construction notices (“PCN”) and general conditions to trigger further review if proposed activities risk having more than minimal environmental impact.¹⁶⁰ Pipelines require a separate NWP 12 for each water crossing, meaning a single pipeline may use NWP 12 thousands of times.¹⁶¹ By only regulating water crossings, NWP 12 use results in only a small percentage of a pipeline’s construction falling under Corps’ jurisdiction.¹⁶²

1. Unpredictable Project-Level Environmental Review

The Corps undertakes environmental review of NWP 12 when it periodically reissues the permit.¹⁶³ The Corps predicts the environmental impact of future NWP 12 use under both the CWA and NEPA.¹⁶⁴ The CWA analysis requires that all activities authorized

155. *Id.*

156. ISSUES AND REGULATORY DEVELOPMENTS, *supra* note 141 at 2.

157. *See id.* at 7–8.

158. Arkfeld, *supra* note 15, at 1997.

159. *Id.*

160. ISSUES AND REGULATORY DEVELOPMENTS, *supra* note 141 at 8. A PCN is “a brief document that is intended to provide the Corps district engineer with enough information to determine whether an activity may be authorized by a nationwide permit. Project-specific information must be submitted, but detailed studies or analyses are not required.” *Id.* at 4 n.8. Proposed activities trigger PCNs under certain conditions, such as discharges that “result in the loss of greater than 1/10-acre of waters of the United States.” *Id.* at 3. NWPs contain PCN thresholds tailored to the permitted activity. *Id.* at 4. General conditions function like PCNs but apply to some or all NWPs. *Id.* at 3. For example, General Condition 18 requires further review where activities may impact endangered species. *Id.* at 9.

161. Arkfeld, *supra* note 15, at 2003. For example, the Gulf Coast Pipeline required 2,227 NWP 12s for its 2,227 water crossings. *Id.* at 2004.

162. ISSUES AND REGULATORY DEVELOPMENTS, *supra* note 141 at 8.

163. Arkfeld, *supra* note 15, at 1993.

164. *Id.*

under NWP 12 have “no more than minimal individual and cumulative adverse environmental effects” on the impacted aquatic environment.¹⁶⁵ The NEPA review is broader.¹⁶⁶ The Corps’ NEPA review of NWP 12 must consider “reasonably foreseeable cumulative effects” that will arise during the lifespan of NWP 12’s issuance.¹⁶⁷ This means the Corps performs hypothetical rather than actual project-level CWA and NEPA analysis.¹⁶⁸ Projects using NWP 12 only undergo verification that activities are within the scope of the permit, not specific CWA and NEPA analysis.¹⁶⁹

The Corps defends this environmental review process, arguing that the ease of NWP 12 encourages project developers to minimize environmental effects to qualify to use NWP 12.¹⁷⁰ However, there is little data to support the Corps’ assertion that environmental effects are minimized. In fact, the environmental effects may evade notice all together under this system.¹⁷¹ A decision document accompanies each reissuance of NWP 12, detailing the environmental review conducted and outlining the anticipated usage and impacts associated with the permit.¹⁷² NWP 12’s decision document does not include definitive retrospective data disclosing the number of times NWP 12 was actually used during its previous issuance, nor does it detail the amount of WOTUS actually affected.¹⁷³ The Corp does not otherwise keep track of this data in a comprehensive public database.¹⁷⁴ Without data to review, NWP 12’s purported neutral environmental impacts are not verifiable.¹⁷⁵

Another controversial NWP 12 feature is its reliance on compensatory mitigation to offset more than minimal environmental effects of its usage.¹⁷⁶ Where activities result in the loss of more than

165. DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, DECISION DOCUMENT: NATIONWIDE PERMIT 12, at 3 (2017).

166. Arkfeld, *supra* note 15, at 2001.

167. *Id.*

168. *Id.*

169. *Id.*

170. ISSUES AND REGULATORY DEVELOPMENTS, *supra* note 141 at 3.

171. *Id.* at 8.

172. *Id.* at 9.

173. *Id.* The decision document does include some estimated data, including estimates of average yearly use of the NWP, broken down by whether they triggered PCNs. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 11. Compensatory mitigation is “the restoration, establishment, enhancement, or in certain circumstances preservation of wetlands, streams or other aquatic resources for the purpose of offsetting unavoidable adverse impacts.” *Wetlands Compensatory Mitigation*, ENV’T PROT. AGENCY, <https://bit.ly/3crGglV> [<https://perma.cc/V5F5-V37V>] (last visited Aug. 25, 2021).

1/10-acre of wetlands, a PCN is triggered, requiring district engineer verification and compensatory mitigation to replace the lost “aquatic resource function.”¹⁷⁷ Environmentalists argue that the Corps’ reliance on compensatory mitigation violates the CWA by allowing more than minimal effects on aquatic resources.¹⁷⁸ In fact, government studies have shown that “mitigation is not fully successful and does not compensate for wetlands lost to permitted fills.”¹⁷⁹ On the other hand, the industry argues that compensatory mitigation should not be so rigidly required and that waivers should be available to allow for other forms of mitigation, not simply compensatory.¹⁸⁰ As it stands, the Corps’ use of compensatory mitigation fails to satisfy environmentalists or industry.¹⁸¹

Along with mitigation requirements, NWP 12 use remains subject to the discretion of district engineers through use of PCNs and other permit-specific conditions.¹⁸² When an application triggers a PCN, a district engineer gets involved and may review plans and impose conditions to “ensure that they will cause no more than minimal adverse environmental effects, individually and cumulatively.”¹⁸³ If the district engineer takes no action within 45 days, the activity is automatically authorized in all but 2 cases.¹⁸⁴ This process leads to industry frustration, as individual review of NWP 12 activity seems to conflict with the streamlining purpose behind the NWP program.¹⁸⁵ However, the Corps relies on these PCNs and conditions as a check against more than “minimal adverse environmental

177. ISSUES AND REGULATORY DEVELOPMENTS, *supra* note 141 at 11.

178. *Id.* at 12.

179. *Id.* at 11.

180. *Id.* at 12.

181. *Id.*

182. *Id.* at 8.

183. Proposal to Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57,299, 57,300 (Sept. 15, 2020).

184. *Id.* The two exceptions are activities “conducted by non-Federal permittees that require PCNs under . . . the ‘Endangered Species’ and ‘Historic Properties’ general conditions.” *Id.*

185. ISSUES AND REGULATORY DEVELOPMENTS, *supra* note 141 at 8. In a landmark Supreme Court case concerning the definition of WOTUS, Justice Scalia issued a scathing review of the discretion at the heart of PCNs, and the conditions district engineers may require on NWPs:

The burden of federal regulation on those who would deposit fill material in locations denominated “waters of the United States” is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as “economics,” “aesthetics,” “recreation,” and “in general, the needs and welfare of the people.”

Rapanos v. United States, 547 U.S. 715, 721 (2006).

effects.”¹⁸⁶ This reliance raises the question of whether activities truly fall within the scope of NWP 12 if imposing conditions is necessary to prevent environmental harms. Upon review, district engineers can require a switch to an individual rather than a nationwide permit if they determine effects could be more than minimal.¹⁸⁷ Because PCN review is highly discretionary, industry and environmentalists alike criticize the system.¹⁸⁸ Both sides lament that inconsistent enforcement coupled with ambiguous guidelines results in inadequate administrative records and unpredictable oversight.¹⁸⁹

2. *Lack of Project-Level Public Input*

Because NEPA review is completed at NWP 12’s issuance stage, there is no public comment period for projects that use NWP 12.¹⁹⁰ Under both NEPA and the Administrative Procedure Act, agencies may not undertake major federal actions without public input.¹⁹¹ Yet, the verification of project-level NWP 12 permits occurs behind closed doors, negotiated privately between district engineers and project applicants.¹⁹² Courts have upheld this process, deferring to the Corps and not requiring project-level NEPA review.¹⁹³ This precedent allows major pipeline construction to carry on without public scrutiny.¹⁹⁴

Despite the disparity between the timing of public input and the effects of permit verification, the public remains interested in NWP 12.¹⁹⁵ In response to the proposed NWP program issuance in September 2020, the Corps received over 22,700 public comments.¹⁹⁶ Members of the public concerned with climate change remain keenly interested in projects like the KXL, which depend on the use of NWP 12.¹⁹⁷ In recent years, these voices are heard

186. Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2,744, 2,745–46 (Jan. 13, 2021).

187. *Id.*

188. ISSUES AND REGULATORY DEVELOPMENTS, *supra* note 141 at 10.

189. *Id.* at 10.

190. *Id.* at 8.

191. Arkfeld, *supra* note 15, at 2020.

192. ISSUES AND REGULATORY DEVELOPMENTS, *supra* note 141 at 10.

193. Arkfeld, *supra* note 15, at 2020.

194. *Id.* at 2015.

195. Arkfeld, *supra* note 15, at 2020.

196. Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2,744, 2,749 (Jan. 13, 2021).

197. See, e.g., Delilah Friedler, *Thanks to Trump, Keystone XL is Back. The Anti-Pipeline Movement is Ready.*, MOTHER JONES (Feb. 7, 2020), <http://bit.ly/3btk4ad> [<https://perma.cc/CT43-XKN7>].

through protest and litigation where traditional avenues of public notice and comment are exhausted or unavailable.¹⁹⁸

The lack of public involvement is also problematic because compliance with NWP 12 relies heavily on the judgment of project applicants.¹⁹⁹ The Corps does not independently verify applications, but “only responds to information presented in a PCN.”²⁰⁰ Accordingly, companies are trusted to accurately report the presence and extent of PCNs within project boundaries.²⁰¹ Reliance on the subjective view of both a private applicant and a reviewing district engineer, with no public input, leaves a void in accountability in the heart of the NWP program.²⁰²

C. *Recent NWP 12 Litigation: When Fast-Tracking Slows You Down*

Recent litigation illustrates that reliance on NWP 12 to fast-track project verification may threaten construction.²⁰³ In 2020, a Ninth Circuit challenge to the KXL’s NWP 12s led to a nationwide injunction vacating the use of all NWP 12s, not solely the NWP 12s of the KXL.²⁰⁴

Northern Plains Resource Council (“NPRC”), an environmental nonprofit, alleged the Corps’ 2017 reissuance of NWP 12 violated the CWA, NEPA, and the Endangered Species Act (“ESA”).²⁰⁵ NPRC also specifically challenged the KXL’s Yellowstone and Cheyenne River crossings.²⁰⁶ A Montana district court judge sided with NPRC, holding that the Corps did not engage in the necessary consultation required by Section 7 of the ESA.²⁰⁷

Under Section 7 of the ESA, federal agencies must consider whether proposed actions “may affect” listed species or critical habitat.²⁰⁸ This determination must happen “at the earliest possible time.”²⁰⁹ In its 2017 issuance of NWP 12, the Corps independently

198. *See id.*

199. ISSUES AND REGULATORY DEVELOPMENTS, *supra* note 141 at 10.

200. *Id.*

201. *Id.*

202. Arkfeld, *supra* note 15, at 2020.

203. Emily Pontecorvo, *This Federal Permit Used to Fast-Track Pipelines. Now it’s Threatening Them.*, GRIST (July 8, 2020), <https://bit.ly/3jrJruk> [<https://perma.cc/9RWU-KBX3>].

204. *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 454 F. Supp. 3d 985, 986–87 (D. Mon. 2020).

205. *Id.* at 987.

206. *Id.* at 986.

207. *Id.* at 993–94.

208. *Id.* at 989.

209. *Id.*

determined that NWP 12 would “have no effect on listed species or critical habitat.”²¹⁰ The Corps did not undergo formal programmatic consultation with the National Fish and Wildlife Service (“FWS”) in reaching this conclusion.²¹¹ Instead, the Corps justified the finding through use of General Condition 18 (“GC 18”).²¹² GC 18 triggers a PCN and requires applicants to notify a district engineer if their proposed activity “‘might’ affect any listed species or habitat.”²¹³

The district court found this procedure to be inadequate.²¹⁴ The court held that delaying ESA Section 7 consultation until project-level review violated the ESA.²¹⁵ The court forecasted that the delayed timing of this Section 7 analysis could lead to “piecemeal destruction of species and habitat.”²¹⁶ The court also found that at least two endangered species may be affected by the reissuance of NWP 12.²¹⁷ Accordingly, the Corps’ NWP 12 reissuance violated the ESA.²¹⁸ The district court granted summary judgment to NPRC on the ESA claim and vacated NWP 12.²¹⁹

The outcome of this decision had an instantly severe and sweeping effect on pipeline construction across the United States.²²⁰ On April 15, 2020, the court enjoined the Corps from using NWP 12 to authorize any activities until it fulfilled programmatic consultation under the ESA.²²¹ The Corps and the industry, including KXL backer TC Energy, appealed this action.²²² On May

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 454 F. Supp. 3d 985, 992 (D. Mon. 2020).

215. *Id.*

216. *Id.* at 993.

217. *Id.*

218. *Id.* at 992.

219. *Id.* at 996. The court did not reach decisions on NPRC’s CWA or NEPA claims. *Id.* The judge did, however, predict that the required ESA consultation would result in further agency action under the CWA and NEPA. *Id.* Because that action could affect the substance of the remaining claims, the court avoided ruling on them. *Id.*

220. *Id.*

221. *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 454 F. Supp. 3d 985, 992 (D. Mon. 2020).

222. *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 460 F. Supp. 3d 1030, 1049 (D. Mon. 2020). TransCanada Keystone Pipeline LP and TC Energy Corporation, representing the interests of the KXL, were intervenor-defendants in the original lawsuit. *See N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, No. 4:19-cv-0044, 2019 U.S. Dist. LEXIS 194114 (D. Mon. Nov. 7, 2019) (order granting motions to intervene). Also intervening as defendants were the “Nationwide Permit 12 Coalition,” an alliance of five national energy organizations: the Ameri-

11, 2020, the court amended its order, narrowing the scope of the injunction to apply only to new construction related to oil and gas pipelines.²²³ On July 6, 2020, the United States Supreme Court further limited the district court's injunction, keeping it in place only for the KXL pipeline and staying it for all other new oil and gas pipeline construction.²²⁴

As a result of the injunction, the KXL once again lost another construction season.²²⁵ At the end of 2020, KXL construction remained on track in Canada, including a completed international border crossing between the United States and Canada.²²⁶ The progress was short-lived. The harm from the delay in the loss of its NWP 12 verification foreshadowed the final major blow to the KXL: President Biden's cancellation of the KXL's presidential permit on day one of his presidency.²²⁷ Consequently, on June 9, 2021, TC Energy terminated the KXL project entirely.²²⁸

The very permit meant to accelerate pipeline development put the entire industry at risk.²²⁹ The recent trend in reliance on NWP 12 for pipelines with thousands of crossings may not be a viable long-term strategy. The underlying issues with NWP 12 raised in the NPRC lawsuit remain unresolved.²³⁰ Thorough environmental review with direction and buy-in from the industry could offer a better legal defense than fast-tracking and relying on agency discretion that shifts with the administration in power.

can Gas Association, the American Petroleum Institute, the Association of Oil Pipe Lines, the Interstate Natural Gas Association of America, and the National Rural Electric Cooperative Association. *Id.*

223. *N. Plains Res. Council*, 460 F. Supp. 3d at 1049 (D. Mon. 2020).

224. *U.S. Army Corps of Eng'rs v. N. Plains Res. Council*, 141 S. Ct. 190 (2020) (Mem.).

225. Rod Nickel, *Explainer: What is Happening with the Keystone XL Oil Pipeline?*, REUTERS (Nov. 18, 2020), <http://reut.rs/3teDNrT> [<https://perma.cc/J3PN-RU9R>].

226. *Id.* at 992.

227. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

228. *TC Energy Confirms Termination of the Keystone XL Pipeline Project*, TC ENERGY (June 9, 2021), <https://bit.ly/3CECJLA> [<https://perma.cc/JTD5-QHQR>].

229. Emily Pontecorvo, *This Federal Permit Used to Fast-Track Pipelines. Now it's Threatening Them.*, GRIST (July 8, 2020), <https://bit.ly/3jrJruk> [<https://perma.cc/9RWU-KBX3>].

230. Juan Carlos Rodriguez, *9th Circ. Finds Keystone Permit Appeal Moot*, LAW360 (Aug. 11, 2021), <https://bit.ly/37zO6X1> [<https://perma.cc/SEC9-JYNK>]. The Ninth Circuit found the case moot on August 11, 2021, holding that the 2021 reissuance of NWP 12 "supersedes the previous [2017] permit" challenged by NPRC and leaves the court without jurisdiction. *Id.* The 2021 reissuance of NWP 12 is being challenged by environmental groups in a separate suit. *Id.*

D. Embracing Thorough Review of Large-Scale Pipeline Systems

1. The Current Individual Permitting System

Individual permits, as the name suggests, are reviewed case-by-case, with “all authorizations and conditions . . . tailored to the specific project for which the permit is granted.”²³¹ There are three phases to complete before authorization—“pre-application consultation (for major projects), project review, and decision-making.”²³² While the need for an individual permit arises under the CWA, the permit must also comply with other federal regulations, including NEPA, the Endangered Species Act, and the National Historic Preservation Act.²³³ Applicants work closely with the Corps at each application phase to ensure compliance with these overlapping regulations.²³⁴

In the pre-application phase, informal meetings between the applicant and the Corps confirm the project’s viability before a formal application is submitted.²³⁵ During the review process, the Corps appoints a single project manager to usher the project application from submission to decision.²³⁶ The project manager implements a public notice and comment period for the project, “negotiates necessary modifications of the project” with the applicant, and creates an administrative record for the project in anticipation of approval.²³⁷ The decision-making phase evaluates the project’s compliance with the CWA’s Section 404(b)(1) guidelines and determines whether the project is in the public interest.²³⁸

231. Captain Nathan R. Menard, *Creek on a Leash: A Primer on the Clean Water Act’s Section 404*, 4 ARMY L. 29, 31 (2019).

232. *U.S. Army Corps of Engineers Permitting Process Information*, DEP’T OF THE ARMY CORPS OF ENG’RS, <https://bit.ly/35U8wJE> [<https://perma.cc/TV9R-QWTA>] (last visited Aug. 25, 2021).

233. Captain Nathan R. Menard, *Creek on a Leash: A Primer on the Clean Water Act’s Section 404*, 4 ARMY L. 29, 31 (2019).

234. *U.S. Army Corps of Engineers Permitting Process Information*, DEP’T OF THE ARMY CORPS OF ENG’RS, <https://bit.ly/35U8wJE> [<https://perma.cc/85E3-A3N5>] (last visited Aug. 25, 2021).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* The CWA guidelines govern any permitted “discharges of dredged or fill material into waters of the United States,” with “no permit . . . granted if the proposed activity is found to be contrary to the Section 404(b)(1) guidelines.” *Id.* CWA permits seek to minimize these discharges, and so “restrict discharges . . . where less environmentally damaging practicable alternatives exist.” *Id.* The Corps outlines its public interest factors as:

- (1) The relevant extent of public and private need for the proposed work.
- (2) Where unresolved conflicts of resource use exist, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
- (3) The extent and perma-

When issued, permits are accompanied by “permit decision documents,” which detail the findings of the project’s environmental and public interest reviews and any project-specific evaluation necessary for its specific conditions.²³⁹

The Corps’ use of an individual permit to meet its CWA requirements, thereby triggering NEPA, results in whole pipeline review.²⁴⁰ Under the CWA, the Corps must substantively evaluate the effects that discharges into WOTUS will have on the aquatic environment.²⁴¹ Under NEPA, the Corps must ensure, through specific procedures, that the environmental impact of the permit’s issuance is thoroughly understood.²⁴² The NEPA analysis goes beyond impacts on WOTUS—“the Corps must complete an analysis of all reasonably foreseeable cumulative effects of the permit.”²⁴³ NEPA also allows public input through its required public comment period, recognizing the value of the public perspective in federal decision-making.²⁴⁴

Individual permits require heightened environmental review but do not limit the total amount of aquatic resources affected under the permitted activity.²⁴⁵ The Corps argues that increased use of individual permits would actually lead to a corresponding increase in affected acreage, believing the comparative ease of the NWP process incentivizes applicants to minimize environmental effects.²⁴⁶ This argument is not supported by data, but the incentive is working whether or not it results in protection of aquatic resources.²⁴⁷ Industry and the Corps use general permits for the vast majority of permits issued.²⁴⁸ As a CRS report noted, “between 2012 and 2015, the [Corps] authorized an average of 63,000 activities per year; 97% were authorized by nationwide and other general

nence of the beneficial and/or detrimental effects the proposed structure or work is likely to have on public and private uses to which the area is suited.

Id.

239. *Id.*

240. Arkfeld, *supra* note 15, at 1994.

241. *Id.* at 2001.

242. *Id.* at 1998.

243. *Id.* at 2001.

244. *Id.* at 1999.

245. ISSUES AND REGULATORY DEVELOPMENTS, *supra* note 141 at 3.

246. *Id.*

247. *Id.* at 2.

248. *Id.*

permits.”²⁴⁹ Corps use of NWP 12 rather than individual permits in recent years is part of that documented trend.²⁵⁰

2. *Requiring Individual Permits for Large-Scale Pipelines like the KXL*

It is time to rethink the Corps’ reliance on NWP 12 for major pipeline projects. Recently, the Corps took a step toward a new process. The 2021 reissuance of NWP 12 includes a new PCN, which is triggered by pipeline projects longer than 250 miles.²⁵¹ While the new PCN recognizes the need for more thorough review of large pipeline projects, it does not address the other defects of streamlined permitting, such as public involvement.

Rather than using this 250-mile limit as a PCN trigger, the Corps should use it as a cutoff for use of NWP 12 altogether.²⁵² A 250-mile limit would allow the Corps to maintain use of NWP 12 for smaller projects and maintenance, as well as implement a new, transparent system for large-scale, controversial pipelines such as the KXL. As demonstrated above, there is already a functioning system for individual permitting which utilizes NEPA and incorporates public involvement.

Implementing whole-pipeline review of large-scale projects could also provide a federal foothold on combatting climate change.²⁵³ Much of the controversy surrounding the KXL comes

249. *Id.*

250. *Re: Comments on the U.S. Army Corps of Engineers’ Proposal to Reissue and Modify Nationwide Permit 12*, Docket No. COE-2015-0017, SIERRA CLUB (Aug. 1, 2016), <https://bit.ly/3jEVwwc> [<https://perma.cc/PN83-P6QC>].

251. Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2,744, 2,860 (Jan. 13, 2021).

252. In 2021, a pipeline project voluntarily shifted from using NWP 12s to applying for an individual permit for its water crossings, illustrating the practicality of this proposal. Maya Weber, *Mountain Valley Pipeline Adjusts Permit Approach After Setbacks at FERC, Court*, S&P GLOBAL MARKET INTELLIGENCE (Jan. 27, 2021), <https://bit.ly/3yKHX60> [<https://perma.cc/DBG5-DCNN>]. The Mountain Valley Pipeline is a proposed 303-mile natural gas pipeline in Virginia and West Virginia. *Id.* Ongoing legal challenges to its use of NWP 12 stayed completion of construction in 2020. *Id.* In response to the stay, Mountain Valley Pipeline LLC applied for an individual permit from the Corps in early 2021. *Id.* Because all permitting for the project is secured aside from its water crossing permits, Mountain Valley believes an individual permit “is the most-efficient path to satisfying objections, completing remaining work in an environmentally responsible and protective manner, and keeping within [its] current budget and schedule.” *Id.* (quoting Mountain Valley spokesperson Natalie Cox).

253. See, e.g., Jayni Foley Hein & Natalie Jacewicz, *Implementing NEPA in the Age of Climate Change*, 10 MICH. J. ENV’T & ADMIN. L. 1, 11 (2020) (arguing federal agencies can use NEPA to analyze downstream and upstream greenhouse gas emissions of proposed projects).

from concerns about the upstream and downstream effects the pipeline will have on climate change, not simply the environmental effects of its initial construction.²⁵⁴ Canada, where the KXL began, has expanded its environmental review on major projects to include upstream effects.²⁵⁵ United States courts have held that agencies must take greenhouse gas emissions into consideration during NEPA analyses.²⁵⁶ Addressing climate change through whole pipeline review would be a first step toward answering the concerns of the anti-pipeline movement. As the effects of climate change become more acute, the federal government should use every tool on its belt to address them.

IV. CONCLUSION

Without a centralized federal administrator for oil pipeline construction, controversial projects are open to challenge at each phase of authorization. The Corps' use of NWP 12 provides insight into the legal vulnerabilities of the current system. By intending to fast-track pipeline construction, the Corps and TC Energy instead contributed to the KXL's recent defeat. This Comment aimed to place the KXL controversy in context, because the next major pipeline proposed will undoubtedly face similar opposition. President Biden's withdrawal of the KXL's presidential permit left its many legal issues unresolved.

This Comment advocates for a new path forward for federal regulation of major oil pipelines. The Corps already has a functioning individual permitting system. The Corps' reluctance to use individual permits for all pipeline-related construction is understandable, considering the costs and resources needed to evaluate activity that purports to have no more than minimal environmental impact. Instead, the Corps should impose a 250-mile limit on NWP 12 use and thereby ensure cumulative environmental review of major oil pipelines, including upstream and downstream effects. Rather than remaining bogged down in unending pipeline wars, the practical path forward for pipelines should incorporate community involvement, thorough environmental review, and an understanding of climate impacts.

254. Melissa Denchak, *What is the Keystone Pipeline?*, NAT. RES. DEF. COUNCIL (Apr. 7, 2017), <https://on.nrdc.org/2GnRREH> [<https://perma.cc/K52C-2E6D>].

255. Jayni Foley Hein & Natalie Jacewicz, *Implementing NEPA in the Age of Climate Change*, 10 MICH. J. ENV'T & ADMIN. L. 1, 11 (2020).

256. *Id.*
