M E M O R A N D U M

NEPA & Clean Water Act Regulatory Measures

PURPOSE

The purpose of this document is to describe the regulatory landscape to be navigated by any prospective pipeline proponent, especially regarding the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA).

1.0 Regulatory Overview

A pipeline project in Nebraska may require Corps authorization if it involves the placement of fill material into waters of the U.S., including wetlands. Conversely, a project may avoid Corps involvement if wetlands and other waters of the U.S. are not impacted by fill material. "Fill material" is generally any material placed in waters of the U.S. that has the effect of: (1) replacing any portion of a water of the U.S. with dry land; or (2) changing the bottom elevation of any portion of a water of the U.S.

"Waters of the U.S." are under the jurisdiction of the Corps and the Environmental Protection Agency (EPA), pursuant to the CWA. The definition of "waters of the U.S." has evolved since the Clean Water Act was passed in 1972, and has been the subject of much debate in recent years. The current regulatory definition can be found in 40 CFR 230.3(s), and it involves seven detailed categories. For the purposes of this overview, waters of the U.S. can be described broadly as lakes, rivers, streams, and wetlands, which are subject to interstate or foreign commerce. Rivers and streams flow across state lines and are therefore subject to interstate commerce. Many wetlands abut these streams, or are adjacent to streams, and are therefore considered jurisdictional because of that proximity.

Large pipeline projects may eventually cross a wetland or stream, and that disturbance of the resource generally requires authorization from the Corps in the form of a permit. The disturbance also does not necessarily mean that new soil, concrete, rock, or other material is placed in the wetland or stream. Overturning the soil to bury a utility can be considered a "fill" action.

1.1 National Environmental Policy Act of 1969 (NEPA)

NEPA requires that federal agencies consider and evaluate the effects of their official actions upon the environment. To be subject to NEPA, a project may be undertaken directly by a federal agency, receive federal funds, or the project may involve an authorization or permit from a federal agency. Most agencies have developed detailed procedures to document the effect of their actions. While agencies may have individual

documentation standards, the scope of their review is usually categorized as (from EPA website):

- Categorical Exclusion (CATEX). A federal action may be "categorically excluded" from a detailed environmental analysis if the federal action does not, "individually or cumulatively have a significant effect on the human environment" (40 CFR 1508.4). The reason for the exclusion is generally detailed in NEPA procedures adopted by each federal agency.

- Environmental Assessment (EA). A federal agency can determine that a Categorical Exclusion (CATEX) does not apply to a proposed action. The federal agency may then prepare an Environmental Assessment (EA). The EA determines whether or not a federal action has the potential to cause significant environmental effects. Each federal agency has adopted its own NEPA procedures for the preparation of EAs. The EA usually involves a comparison of various alternatives and the environmental impacts of the proposed action and alternatives. The results of an EA can lead to a FONSI (Finding of No Significant Impact). Or, if the EA determines that the environmental impacts of a proposed Federal action will be significant, an Environmental Impact Statement is prepared.

- Environmental Impact Statements (EIS). Federal agencies prepare an Environmental Impact Statement (EIS) if a proposed federal action is determined to significantly affect the quality of the human environment. The regulatory requirements for an EIS are more detailed and rigorous than the requirements for an EA. It involves public notice, a detailed evaluation of each affected environmental factor, and a comparison of alternatives.

Issues to be documented usually include: soils, water resources, wetlands, wildlife, threatened and endangered species, socioeconomics, cultural resources, air quality, greenhouse gasses, hazardous materials, and floodplains, among others.

To fulfill the requirements of NEPA, one agency is usually designated as the lead federal agency to document the potential environmental effects. Pipeline projects, however, are not regulated by a single federal agency. The reason the Corps is a likely lead federal agency is that the crossings of streams, rivers, and wetlands will likely require Corps authorization under Section 404 of the Clean Water Act.

1.2 Clean Water Act as amended in 1972 (CWA)

The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. The basis of the CWA was enacted in 1948 and was called the Federal Water Pollution Control Act, but the Act was significantly reorganized and expanded in 1972. "Clean Water Act" became the Act's common name with amendments in 1972 (USEPA 2016). The EPA enforces the CWA, but others administer various sections of the Act, namely:

- Section 401 is administered by states and Native American tribes. This section requires that any federal applicant whose proposed project will result in a discharge of dredged or fill material into waters of the State or tribal waters must acquire a certification from the State or tribe that the action complies with Section 401. The Nebraska Department of Environmental Quality (NDEQ) administers the program on non-tribal lands in the state.

- Section 404 is administered by the Corps. This section establishes the permitting program whereby the Corps authorizes discharges of dredged or fill material into waters of the U.S. The EPA develops and interprets environmental criteria used to evaluate permit applications, identifies activities that are exempt from permitting, reviews and comments on Individual Permit applications, enforces 404 provisions, and has the authority to veto Corps permit decisions.

The Section 404 authorization process considers the amount of fill impact of an applicant's proposed project. Projects involving minimal amounts of fill impact may be authorized under the Corps' Nationwide Permit program. Projects that do not qualify for a nationwide permit must be evaluated for an individual permit.

- Nationwide Permits (NWPs) are a type of general permit issued by the Corps, and are designed to regulate certain activities having minimal impacts to aquatic resources. The NWP program allows review and approval with reduced time and paperwork. The 2017 version of the NWPs include 52 separate categories of activities, for example transportation projects or maintenance projects or utility projects. The details of the activity categories are published in the Federal Register and the permits are valid for five years. Proposed projects are then evaluated to determine whether they would comply with the conditions of one or more of the NWPs. If so, the Corps will authorize the activity with a verification letter. In this sense, a specific project is not issued a permit; rather the Corps verifies that the project may proceed because it matches exactly the activity category that is permitted.

- Individual Permits (IPs) are a type of permit requiring closer scrutiny, usually due to higher impacts to waters of the U.S., but generally because the scope of a proposed project is outside the terms and conditions of the Nationwide Permits.

Further details regarding CWA permitting in Nebraska are included in Section 2.0, starting on Page 5 below.

When considering permit applications for Section 401 and 404 activities, states or tribes and the Corps must consider other laws and regulations, which are discussed in the following subsections.

1.3 Endangered Species Act of 1973 and Fish and Wildlife Coordination Act of 1934

The Endangered Species Act (ESA) provides a program for the conservation of threatened and endangered plants and animals and the habitats in which they are found (16 USC 1531 et seq.). The lead federal agency for implementing the ESA in Nebraska is the U.S.

Fish and Wildlife Service (USFWS). The law requires that federal agencies (including the Corps) ensure that the actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species, or result in the destruction or adverse modification of designated critical habitat of such species.

The USFWS administers the ESA. Pursuant to ESA Section 7(a)(2), the USFWS consults with federal agencies to ensure that any action those agencies authorize, fund, or carry out, is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.

The Fish and Wildlife Coordination Act requires that fish and wildlife resources receive equal consideration with other project purposes of water resource development (that is, planning, development, maintenance, and coordination of wildlife conservation and rehabilitation). The Fish and Wildlife Coordination Act also requires that federal agencies that construct, license, or permit water resource development projects must first consult with USFWS and the Nebraska Game and Parks Commission (the State fish and wildlife agency in Nebraska) regarding the impacts on fish and wildlife resources and measures to mitigate these impacts (16 USC 661 et seq.).

In accordance with the Fish and Wildlife Coordination Act, the USFWS consults with federal agencies that construct, license, or permit water resource development projects regarding potential impacts on fish and wildlife resources and measures to mitigate those impacts.

1.4 National Historic Preservation Act of 1966 (NHPA)

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires federal agencies to consider the effects of their undertakings on historic properties, and to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment (16 USC 470). Federal agencies initiate Section 106 reviews in consultation with state and tribal officials. The Nebraska State Historic Preservation Office (SHPO) coordinates the Nebraska's historic preservation program and consults with agencies during Section 106 review. More specifically, Nebraska SHPO identifies historic properties, assesses the effects that a project may have on historic properties and cultural resources, and seeks ways to avoid or reduce adverse project effects on historic properties. Agencies also consult with officials of federally recognized Indian tribes when historic properties of significance to tribes are involved.

1.5 Wild and Scenic Rivers Act of 1968 (WSR)

The Wild and Scenic Rivers Act (16 USC 1271 et seq.) established the National Wild and Scenic Rivers System to preserve rivers with outstanding natural, cultural, and recreational values in a free-flowing condition. The National Wild and Scenic Rivers System is administered by the Interagency Wild and Scenic Rivers Coordinating Council, which includes representatives of the Bureau of Land Management, National Park Service (NPS), USFWS, and U.S. Department of Agriculture (USDA) Forest Service. The WSR Act is generally notable for safeguarding the special character of these rivers while also

recognizing the potential for their appropriate use and development. It encourages river management that crosses political boundaries and promotes public participation in developing goals for river protection. In partial fulfillment of Section 5(d) of the WSR Act, the Nationwide Rivers Inventory (NRI) was developed by NPS in August 1982. It registers river segments that potentially qualify as national wild, scenic, or recreational river areas.

The National Park Service is a coordinating agency on the Interagency Wild and Scenic Rivers Coordinating Council and serves as the reviewing and approving agency for projects that have the potential to impact river segments registered on either the National Wild and Scenic Rivers System or the NRI. The NPS Rivers, Trails, & Conservation Assistance Program administers the NRI. These responsibilities are afforded NPS via the WSR Act of 1968 and an August 2, 1979, presidential directive to the heads of federal departments and agencies. The presidential directive requires that each federal agency (including FHWA), as part of its normal planning and environmental review process, (1) take care to avoid or mitigate adverse effects on rivers identified in the NRI, and (2) consult with NPS prior to taking actions that could effectively foreclose wild, scenic, or recreational status for rivers listed on the NRI.

1.6 Title 117, Nebraska Surface Water Quality Standards

NDEQ regulates surface water quality standards in Nebraska. In accordance with Nebraska Administrative Code Title 117, Nebraska Surface Water Quality Standards, and CWA Section 401 discussed above, NDEQ reviews, approves, conditions, or denies all federal permits (including CWA Section 404 authorizations) or licenses that might result in a discharge to State waters, including wetlands (33 USC 1251 et seq.). Approval is in the form of Water Quality Certification, which confirms that a proposed discharge would comply with applicable water quality standards, effluent limitations, new source performance standards, toxic pollutants, and other water resource requirements of State law or regulation. Additionally, Title 117 expands NDEQ authority of Nebraska Surface Water Quality Standards to all activities that have the potential to degrade waters of the State (including streams, lakes, and wetlands), regardless of federal jurisdiction or permitting authority. In efforts to streamline federal permit approvals, NDEQ typically provides conditional authorization for all CWA Section 404 NWPs every five years in association with the revocation and reissuance of the NWPs.

2.0 Clean Water Act Permitting in Nebraska – Nationwide and Individual Permits

2.1 Nationwide Permit

Appendix A is a copy of language from the Federal Register describing Utility Line Activities authorized by NWP-12. An activity is only verified with this NWP if all aspects of the project comply with the terms of the permit. In addition, projects authorized with NWPs must also comply with a list of 32 General Conditions, and the Omaha District's State of Nebraska Regional Conditions.

Important points regarding NWP-12:

- Wetland impacts associated with NWP-12 are typically temporary. The utility trench is usually filled back to original grade and the landscape and vegetation are restored as much as possible to the pre-construction condition. Typically wetland impacts must be mitigated by creating new wetlands to replace impacted wetlands, usually at a ratio of 2 to 1 (mitigation wetlands to impacted wetlands). However, this is not the case with temporary impacts. The mitigation requirement is satisfied with the restoration of the impacted wetlands in place after construction is completed.

  Permanent wetland impacts (above a certain threshold discussed below) are subject to a mitigation plan usually involving creation of new wetlands. Permanent impacts due to utility line substations and access roads are covered under this nationwide permit

- Loss of waters of the U.S. must be below a threshold of ½ acre for each single and complete project, otherwise the project must be evaluated as an IP. "Loss of waters of the U.S." is the length of stream, or acreage of wetland, that is permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. The interpretation of "single and complete project" can vary from project to project, but generally the term is defined to include all crossings of a single water of the U.S. at a specific location. For a long pipeline, this essentially means that the impacts are not necessarily calculated as a cumulative total in regards to the ½ acre threshold for the nationwide permit. According to Section D., the District Engineer and State Program Manager have wide discretion to elevate the requirements of the nationwide permits, or to elevate consideration of a project to the individual permit review level.

  For example, the NWP threshold for mitigation is generally one-tenth acre of impacts at a single transportation crossing under NWP-14. Ordinarily, on a long transportation such as a highway, project impacts below one-tenth acre at each single and complete crossing would be exempt from mitigation, but the Corps includes all permanent impacts as a cumulative project total for mitigation. However, for these project in Nebraska the cumulative total impact calculation is not applied to the threshold of whether the project is eligible for the NWP.

- Pre-Notification (PCN, or the filing of an application) is required for this NWP in many cases, and the PCN must include "a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site." PCN is not required if there are less than 0.1 acre of loss of waters of the U.S.

  Some other NWPs do not require PCN, but merely that the project be constructed with strict adherence to the conditions of the NWP.

- Multiple NWPs may be applied to a single project to authorize different activities associated with the project.

- Most NWPs have already been issued a blanket Water Quality Certification in Nebraska according to Section 401 and Title 117 on a statewide or geographic basis.

However, NWP-12 was not issued the blanket certification and consideration of any NWP-12 verification would require individual qualification.

2.2 Individual Permit

If impacts to aquatic resources are greater than the NWP thresholds, then the application will be considered for approval as an IP. Processing as an IP involves greater scrutiny and additional steps, including public notice and agency coordination. An IP involves an alternatives analysis with a standard of review called the 404(b)(1) Guidelines, which is stricter than the review required by NEPA. The 404 permit becomes a federal nexus to allow consideration and scrutiny by reviewing agencies. In the course of review of an IP, the Corps produces documentation equivalent to an EA, and issues a FONSI. If impacts are more substantial, then the District Engineer could require preparation of an EIS.

3.0 Conclusion

Any proposed pipeline project, which receives federal funding or requires a federal permit, is subject to the preceding laws and regulations. Consideration of all the provisions of NEPA and the CWA would need to be concluded before aquatic resource impacts associated with the project could commence. Even if the pipeline project is not subject to federal action, it must still conform to Nebraska's Title 117 Surface Water Standards.

Therefore, while Public Service Commission (PSC) approval might lead to consideration of the proposed project by the Corps, PSC approval on its own would not prompt immediate construction and operation of a pipeline.

Furthermore, if ultimately granted, a Section 404 CWA authorization is usually accompanied by a long list of special conditions that govern construction methods and the continued operation of the project. These Special Conditions are in addition to General and Regional Conditions described in Section 2 above, and address any particular concerns raised during consideration of the project.

4.0 References (cited or consulted)

Council on Environmental Quality, "Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act", Memorandum for the Heads of Federal Agencies, January 30, 2002, Washington, D.C.

Council on Environmental Quality, "Establishing, Applying and Revising Categorical Exclusions Under the National Environmental Policy Act (NEPA)", November 23, 2010, Executive Office of the President, Washington, D.C.

Council on Environmental Quality, "Forty Most Asked Questions Concerning CEQ's NEPA Regulations", 46 Federal Register 18026 (March 23, 1981), as amended, 51 Federal Register 15618 (April 25, 1986).

Council on Environmental Quality, “National Environmental Policy Act — Regulations”, 40 CFR Parts 1500-1508, July 1, 1986, U.S. Government Printing Office, Washington, D.C.

Council on Environmental Quality, “Reporting Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act”, Memorandum for the Heads of Federal Agencies, December 23, 2004, Washington, D.C.

Cowardin, et al. 1979 (reprinted 1992). Classification of Wetlands and Deepwater Habitats of the United States. U.S. Department of the Interior, Fish and Wildlife Service, Washington D.C.

Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1, Waters Experiment Station, Vicksburg, MS.

Interagency Wild and Scenic Rivers Council. 2004. Wild & Scenic Rivers Act: Section 7. Available at http://www.rivers.gov/documents/section-7.pdf. Accessed June 2017.

Natural Resources Conservation Service, United States Department of Agriculture. 2006. Land Resource Regions and Major Land Resource Areas of the United States, the Caribbean, and the Pacific Basin. U.S. Department of Agriculture Handbook 296.

Nebraska Department of Environmental Quality. “Nebraska’s Keystone XL Pipeline Evaluation, Final Evaluation Report”. Available at: <http://deq.ne.gov/PipeMeet.nsf/MenuFinal!OpenPage&ExpandSection=1 - _Section1>. Accessed June 2017.

NDEQ. 2017. Letter to USACE from NDEQ regarding Conditional CWA Section 401 Water Quality Certification of CWA Section 404 Nationwide Permits.

TransCanada Keystone Pipeline, L.P. 2017. “Major Oil Pipeline Application”. Available at: <http://www.psc.nebraska.gov/natgas/Keystone_Pipeline.html>. Accessed June 2017.

U.S. Army Corps of Engineers, “Compensatory Mitigation for Losses of Aquatic Resources”, 33CFR Part 332, July 23, 2009, Washington, D.C.

U.S. Army Corps of Engineers, 2014. Engineering Circular 1165-2-216, Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408. CECW-CP Circular No. 1165-2-216. Washington, D.C. July 31. Available at: <http://planning.usace.army.mil/toolbox/library/Ecs/EC_1165-2-216.pdf>. Accessed June 2017.

U.S. Army Corps of Engineers, “Minimum Level of Documentation Required for Permit Decisions”, Memorandum, October 26, 2010, Washington, D.C.

U.S. Army Corps of Engineers, “Procedures for Implementing NEPA”, ER 200-2-2, March 4, 1988, Washington, D.C.

U.S. Army Corps of Engineers, “Processing of Department of the Army Permits”, Code of Federal Regulations, Volume 33, Part 325, February 14, 2007.

U.S. Congress, “National Environmental Policy Act”, P.L. 91-190, S. 1075, 91st. Congress, 1970, Washington, D.C.

U.S. Department of State, “Keystone XL Pipeline Project, Final Supplemental Environmental Impact Statement”. Available at: <https://keystonepipeline-xl.state.gov/finalseis/>. Accessed May 2017.

U.S. Environmental Protection Agency, 2005. “Clean Water Act”. Washington, D.C.

U.S. Environmental Protection Agency. 2017. National Environmental Policy Act Review Process. Available at: <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>. Accessed June 2017.

U.S. Fish & Wildlife Service. 2017. Endangered Species Program. Available at: <https://www.fws.gov/endangered/map/state/NE.html>. Accessed June 2017.

U.S. Fish & Wildlife Service. 2016. National Wetlands Inventory, Wetlands Mapper. Available at: <http://www.fws.gov/wetlands/Data/Mapper.html>. Accessed May 2017.

U.S. Geological Survey. 2016. National Hydrography Dataset. Available at: <http://viewer.nationalmap.gov/viewer/nhd.html?p=nhd>. Accessed May 2017.

APPENDIX A

Nationwide Permit 12

12. *Utility Line Activities.* Activities 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.

Utility lines: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of utility lines, including outfall and intake structures. There must be no change in pre-construction contours of waters of the United States. A ''utility line'' is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication. The term ''utility line'' does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (*e.g.,* backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead utility line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non- tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (*e.g.,* at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre- construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (*i.e.,* water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10- acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 32.)

(**Authorities:** Sections 10 and 404)

Note 1: Where the utility line is constructed or installed in navigable waters of the United States (*i.e.,* section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

Note 2: For utility line activities crossing
a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Utility line activities must comply with 33 CFR 330.6(d).

Note 3: Utility lines consisting of aerial electric power transmission lines crossing navigable waters of the United States (which are defined at 33 CFR part 329) must comply with the applicable minimum clearances specified in 33 CFR 322.5(i).

Note 4: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 5: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

Note 6: This NWP authorizes utility line maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

Note 7: For overhead utility lines authorized by this NWP, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Note 8: For NWP 12 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre- construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, ''District Engineer's Decision.'' The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).