

Army Corps Easement Process and Dakota Access Pipeline Easement Status

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The Dakota Access Pipeline (DAPL) is a 1,172-mile pipeline system to transport oil from North Dakota to Illinois. The pipeline's developer is pursuing a route that would cross under the Missouri River on federally owned land in North Dakota at the Lake Oahe project of the U.S. Army Corps of Engineers (Corps). Public debate and litigation over the pipeline has raised questions for Congress regarding the Corps' process for granting pipeline easements to cross federally owned, Corps-managed land (hereinafter referred to as Corps land), including the scope of impacts considered, especially oil spill risks and tribal impacts. Below is a discussion of both the Corps' process for approving pipeline easements and the DAPL easement request specifically.

Easement Process and DAPL Easement Status

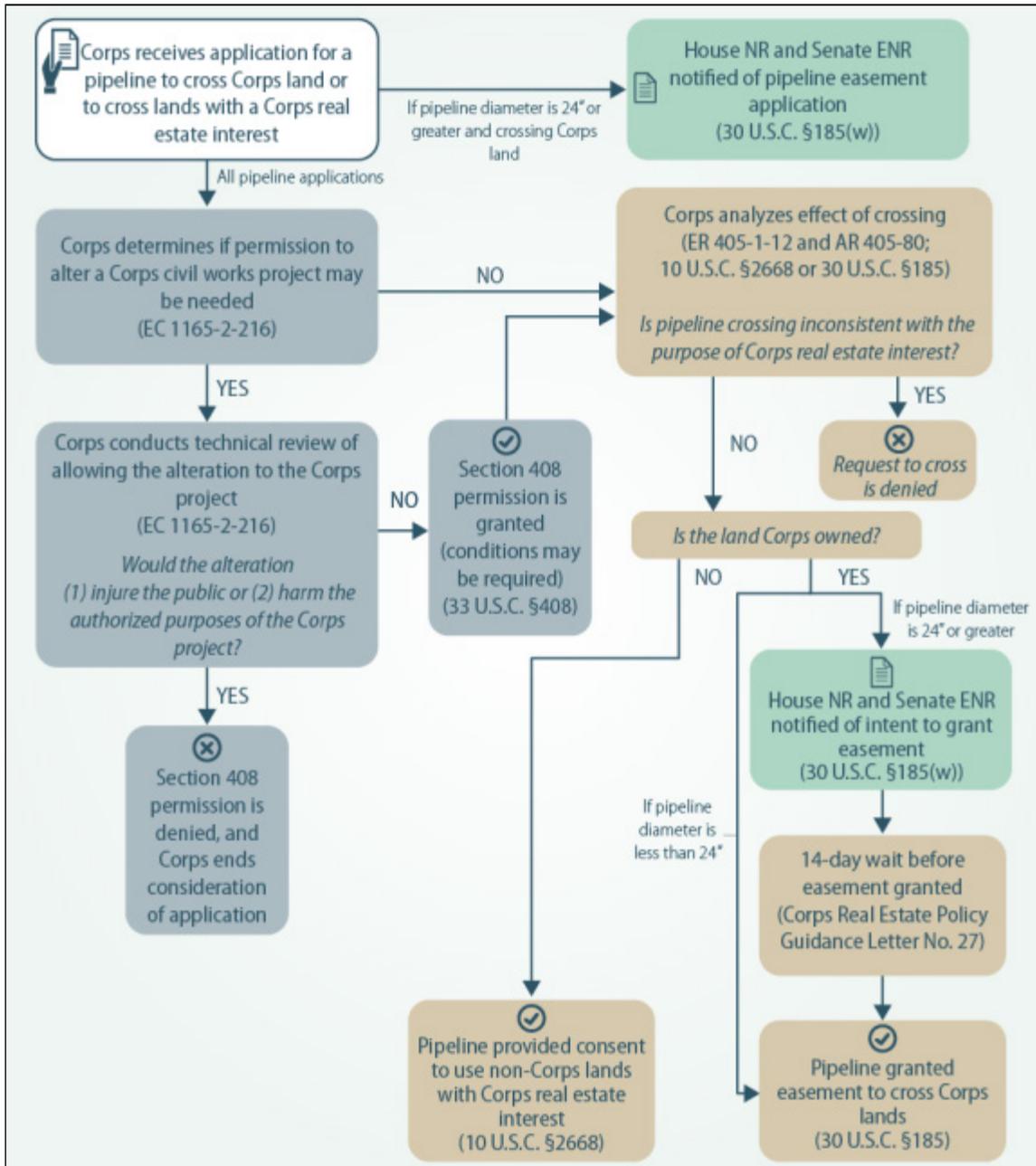
[Figure 1](#) shows the Corps' decisionmaking process for evaluating requests for private oil or gas pipelines to cross Corps land and non-Corps land with a Corps real estate interest (e.g., private lands with a federal flood or other flowage easement). As shown in [Figure 1](#), the process may consist of both

- a Corps *permission* to alter a Corps civil works project (shown in grey) and
- a Corps *easement* to cross Corps land or a *consent* to cross non-Corps land with a Corps real estate interest (shown in beige).

In July 2016, the Corps provided permission for DAPL to alter the Corps' Lake Oahe project, subject to certain conditions being included in a final easement. This permission moved the easement request into the first beige box in [Figure 1](#). During the Obama Administration, on December 4, 2016, the Assistant Secretary of the Army (Civil Works) issued a [statement](#) that the agency would "not grant an easement to cross Lake Oahe at the proposed location based on the current record." On January 18, 2017, the Corps published a [Notice of Intent](#) (NOI) to prepare an environmental impact statement (EIS), pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. §4321), in connection with the requested easement for the pipeline to cross Lake Oahe. The NOI indicated that the EIS would analyze alternative crossings of the Missouri River, oil spill risks, and various tribal impacts. For more on the Corps and tribes, see CRS Insight IN10608, [Army Corps Projects and Tribal Consultation: Requirements, Policies, and Controversy](#), by Nicole T. Carter.

On January 24, 2017, President Trump issued a [presidential memorandum](#) directing the Corps to consider both rescinding or modifying its December 2016 decision and rescinding the January 2017 NOI. The Corps rescinded the NOI on February 7, 2017; the following day, the Corps granted [the easement](#). For more on DAPL, see CRS Insight IN10567, [Dakota Access Pipeline: Siting Controversy](#), by Paul W. Parfomak. Analysis of the presidential memorandum is available in CRS Legal Sidebar WSLG1722, [Executive Memorandum Pushes Army Corps to Reconsider Recent Dakota Access Pipeline Decisions](#), by Adam Vann.

Figure 1. Corps Process for Approving the Crossing of Corps Projects and Real Estate Interests by Oil and Gas Pipelines



Source: CRS.

Notes: House NR = House Natural Resources Committee; Senate ENR = Senate Energy and Natural Resources Committee. Information within parentheses refers to the U.S. Code (U.S.C.) for the guiding statute or to Corps documents, including Engineer Circulars (EC), Engineer Regulations (ER), and Army Regulations (AR).

Permission to Alter a Corps Project

Corps authority to allow alterations to its projects derives from Section 14 of the Rivers and Harbors Act of 1899, also known as "Section 408" based on its codification at 33 U.S.C. §408. A Section 408 permission is required for all alterations to Corps projects, not only alterations by pipelines. For pipelines over 24 inches (24") in diameter, the Corps conducts a technical review of the pipeline's effects on Corps projects pursuant to [Engineer Circular \(EC\) 1165-2-216](#).

The Corps' July 25, 2016, permission for DAPL to alter the Lake Oahe project was accompanied by a Finding of No Significant Impact. The finding was based on an [environmental assessment](#) prepared pursuant to NEPA to determine if impacts of the permission would be significant.

Easement or Consent to Cross

Pursuant to Section 28 of the Mineral Leasing Act (MLA; 30 U.S.C. §185), federal agencies have authority to grant a private oil and gas pipeline an *easement* to cross federal land. The Corps evaluated the DAPL easement request to cross federal land at Lake Oahe under this MLA authority.

The Corps also can *consent* to a pipeline crossing non-Corps lands with a Corps real estate interest (e.g., flowage easement) using a broad, military-wide real estate authority (10 U.S.C. §2668). The Corps has provided DAPL with consents to cross federal flowage easements at various locations on its route.

Congressional Notification

Under the MLA, two congressional authorizing committees must be notified if the developer of an oil and gas pipeline with a diameter of 24" or greater is requesting to cross federal land. The Corps notified the committees of the DAPL application to cross federal lands at Lake Oahe in September 2015.

The Corps must notify the committees if it intends to grant an easement and must include any conditions to be imposed on the applicant. The notification requirements are shown in green in [Figure 1](#). The Corps notified the committees of its intent to grant the DAPL Lake Oahe easement on February 7, 2017. Pursuant to the presidential memorandum, the Corps expedited the easement by waiving the agency's policy of a 14-day wait following notification.

Evaluation of Request

To decide on easements and consents, the Corps follows Chapter 8 of Engineer Regulation (ER) 405-1-12, *Real Estate Handbook* and Army Regulation (AR) 405-80. ER 405-1-12 requires that the Corps find that "the proposed easement will not be inconsistent with the authorized purposes of the Federal installation or project." According to ER 405-1-12, site-specific environmental, cultural, and operational requirements may be added to the easement or consent; also, the agency is to impose any special requirements for safe operation of a pipeline or related facilities.

During its analyses of the DAPL Lake Oahe easement, the Corps was required to determine whether the crossing was inconsistent with the Corps real estate interest and if the agency could issue a pipeline easement consistent with the MLA requirements for pipeline easements on federal lands.