


Corporation Exploiting Major Loophole To Quickly Build 600-Mile Tar Sands Pipeline

BY [KATIE VALENTINE](#)  POSTED ON FEBRUARY 26, 2014 AT 9:35 AM UPDATED: FEBRUARY 27, 2014 AT 8:10 AM

In the five years since TransCanada submitted its first application to build the Keystone XL pipeline, protesters have held marches and vigils, chained themselves to pipeline trucks, interrupted a presidential speech and gotten themselves purposefully arrested, all in the name of stopping the pipeline.

For Debra Michaud, one of the founders of Tar Sands Free Midwest, getting these activists to just take notice of the pipeline her group has been working to stop since early last year would be a victory.

"Nobody's heard of it," Michaud said. "People know Keystone, but nobody's heard of Flanagan South."

Unlike Keystone's northern leg, which has been mired in court challenges and political skirmishes since 2008, Flanagan South is already in the works, after about two years of negotiating with landowners along the route and going through its permitting process. Once completed, it will pass over approximately 1,950 wetlands and waterways, including the Missouri and

approval fell under the jurisdiction of the Army Corps of Engineers, not the State Department. For Flanagan's approval, the Army Corps used a permitting process called [Nationwide Permit 12](#), a process that gives expedited approval to projects like access roads and pipelines that do not "result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project."

In Flanagan's case, the Corps treated each of Flanagan's water crossings — about 1,950 wetlands and waterways — as a single and complete project, thus allowing a pipeline that will impact about 25 acres of streams and 38 acres of wetlands [in Missouri alone](#) to qualify for the NWP 12 process.

That practice of breaking up the pipeline into separate waterway crossings allows it to avoid a project-specific analysis under the National Environmental Policy Act (NEPA), says Doug Hayes, a staff attorney for the Sierra Club. Last year, the Sierra Club [filed a lawsuit](#) in D.C. federal court claiming that the Army Corps of Engineers approved the pipeline without adequate environmental review or public notice.

"This whole idea is that these are single and complete projects, that each water crossing along a pipeline is a single and complete project — it just sort of goes against what your normal understanding of the words 'single' and 'complete' are," Hayes said. "None of the parts of the pipeline that could go through federal waters could exist on their own, none of the easement sections could exist on their own. They all depend on each other for the success of this project."



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The Sierra Club requested that work on Flanagan South stop while the lawsuit was underway, but in November a judge [denied](#) that request, saying that the Sierra Club didn't adequately make the case that the Army Corps' usage of NWP 12 was inappropriate, or that it violated any NEPA or Clean Water Act rules.

"In the Court's view, Plaintiffs have significantly overstated the degree of federal involvement in the FS Pipeline in an attempt to shoehorn this essentially private project into the NEPA statute; consequently, at least on the record as it currently stands, Plaintiffs' claim that NEPA requires a comprehensive environmental review is unlikely to be successful," U.S. District Judge Ketanji Brown Jackson [wrote in the court's opinion](#). She continued, "Because every oil pipeline project of any reasonable length is likely to pass over some segment of federal land or waters of the United States, the practical effect of the result that Plaintiffs seek would be to transform NEPA

into a statute that requires federal oversight of all domestic oil pipelines (in the form of an environmental review).”

In short, Judge Jackson argued that the less rigorous environmental analysis conducted by the Corps when they reissued the permit in 2012 was sufficient and a full review as mandated by NEPA was not necessary. Jackson heard the Sierra Club’s suit in court on February 21, and will decide in the coming weeks whether or not their claims have merit. The Army Corps declined to comment to ThinkProgress on the Sierra Club’s claims, citing the ongoing litigation.

The Sierra Club argues that the analysis and public comment period for NWP 12 as a whole isn’t enough. Under NEPA, the Environmental Protection Agency is required to conduct an Environmental Impact Statement (EIS) and allow for public comments. Since Flanagan South was approved under NWP 12, it didn’t require a project-specific EIS or public commenting period. The lack of project-specific public comment, Hayes said, left the public in the dark.

“When we were talking to people along the pipeline route, many of them were surprised and shocked to learn that there was this major tar sands pipeline being approved without any public involvement whatsoever in their backyards,” Hayes said. “So no, there was not adequate public awareness of this. There still isn’t.”

Michaud said Enbridge did hold open houses for residents along the pipeline’s route, but described them as the company coming in and “selling a bill of goods” to the public. Enbridge said in August that they held 12 open houses to educate the public about the project.

“We’ve been out there, we’ve been open, we’ve been transparent with this project from the get-go,” Enbridge spokeswoman Katie Lange [told the St. Louis Post Dispatch](#).

Not The First Time

NWP 12 has been used on pipelines before — on [Keystone XL’s southern half](#), which was [approved in March 2012](#) and began [shipping oil last month](#).

“This idea that the Corps can approve a 5-or 600-mile pipeline under NWP 12, and no agency has to ever do a project-specific NEPA analysis — that is something that’s new and I believe started with Keystone XL,” Hayes said.

So far, Flanagan South’s history with NWP 12 has closely followed Keystone XL’s. When the group found out about the permitting process for Keystone XL’s southern leg, the Sierra Club filed a lawsuit similar to the one against Flanagan South, asking for a temporary injunction while the lawsuit was active and challenging that the Corps’ approval of Keystone XL violated NEPA and Clean Water Act laws.

In August 2012, the U.S. District Court for the Western District of Oklahoma

denied the Sierra Club's request for injunction, saying, like the Judge in the Flanagan South injunction case, that the Corp's use of NWP 12 for Keystone XL was acceptable and the more thorough environmental review was not required.



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As the pipeline's construction moves forward at an accelerated pace, it's the threat of oil spills that worries Earl Hatley, Riverkeeper of the Grand River Watershed in Oklahoma, most about Flanagan South. Enbridge is required to submit a spill response plan to the Pipeline and Hazardous Materials Safety Administration, but it hasn't made that plan public.

The fact that Enbridge is the company in charge has Hatley particularly concerned. The company was responsible for a July 2010 pipeline break that spilled up to 1,000,000 gallons of tar sands crude into a tributary of the Kalamazoo River, the largest on-land oil spill in U.S. history. More than three years later, oil is still being removed from the affected area after Enbridge missed an EPA deadline to have cleanup completed by the end of 2013.

Hatley said if a spill made its way into Oklahoma's waterways, it would devastate the state economically, due to the high level of fishing, camping and other tourism activity in the area. But he's also concerned about the impact the extraction and use of tar sands oil is having on the climate, and has been dismayed by the way the Army Corps has treated the Flanagan South and Keystone XL cases. He said he's had a hard time getting any information from the Corps, even from those members whom he has known and worked with on other environmental issues.

"I've been an environmental organizer since 1969, so basically all my adult life, and this is one of the toughest things that I've fought," he said. "Primarily because there's no rules and regulations governing it that I can find. They're skirting the environmental laws. It's almost like they're making it up."

Distracted By Keystone

Despite the fact that this permitting process has played a role in the Keystone XL fight, Michaud says it's been hard to spread the word about Flanagan South and what NWP 12 means for future pipelines.

"Your average environmentalist has no idea that this is going on," she said. "Like your average environmental activist — not just the person who sends a \$25 check — but your activist who's in the streets does not know about this."

Michaud is trying, with Tar Sands Free Midwest, to raise enough money to create a short, animated film about Flanagan and NWP 12's role in the

permitting process. She also wants to tour the length of the pipeline to talk to more families and hold educational open houses along the route. But she said the technical nature of the NWP 12 process and the focus on Keystone XL makes it difficult for other, larger environmental groups to spread the word about Flanagan South.

“At this point, it’s a question of how do you put this on the map so that the big groups even want to take it on?” she said.

Hayes said the lack of public notice about the pipeline has also allowed Flanagan South to largely fly under the radar. But learning about Flanagan South is learning about NWP 12, and if the court strikes down the Sierra Club’s lawsuit over NWP 12, the process will likely be used for more U.S. pipelines in the future.

“It’s not just a matter of one pipeline — there are a number of different pipelines that are all trying to do the same thing and that’s allow the tar sands development to increase in Canada by getting increasing amounts to the market,” Hayes said. “I think that while the public has been largely focused on Keystone XL, the Corps and other agencies are quietly approving these projects without allowing the public to become involved in any way.”

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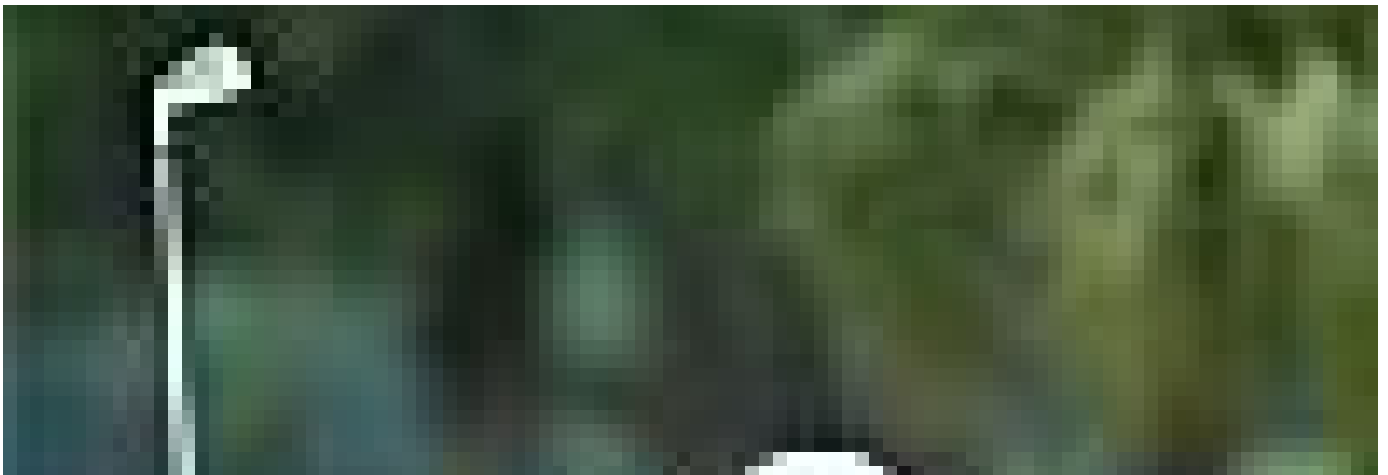
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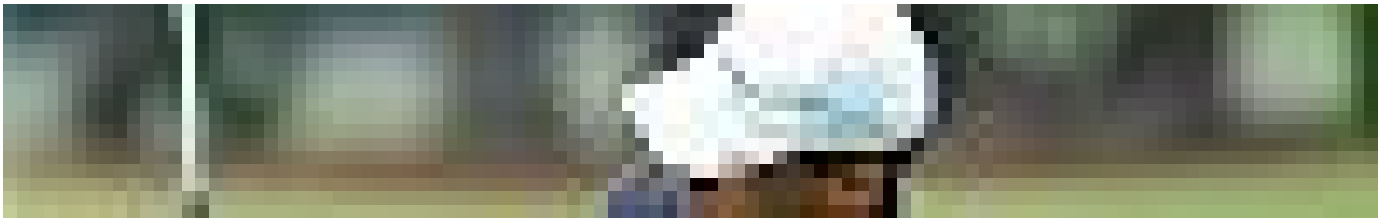


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