



Adverse Federal Court Decision Against the Dakota Access Pipeline; U.S. Army Corps Ordered to Prepare an Environmental Impact Statement; Decision on Vacating Easement Pending

A recent federal court decision regarding the adequacy of NEPA review has broad potential ramifications for future pipeline projects. In the third of a series of legal challenges against the Dakota Access Pipeline (DAPL), the Standing Rock Sioux and the Cheyenne River Sioux Tribes successfully challenged the U.S. Army Corps' decision not to prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) for the project.

The DC federal court decision is available here: [*Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534 \(JEB\), 2020 U.S. Dist. LEXIS 51540 \(D.D.C. March 25, 2020\)](#).

The Court ordered the Corps to prepare an EIS for the easement authorizing DAPL to cross a lake, finding that unresolved expert critiques and outstanding questions about operational and safety components triggered NEPA's "highly controversial" standard, which required the Corps to complete an EIS. Promulgation of an EIS is a lengthy process usually taking several years, and significant expenditure of financial and technical resources.

Next Steps

The Court will now consider remedies—that is, whether to vacate the easement. This briefing will be completed on May 27, 2020, and a Court order on remedy is anticipated soon after.

In determining whether to vacate the agency action approving the easement, the Court will weigh the seriousness of the Corps' NEPA deficiencies versus the disruptive consequences of vacating the easement. Given that DAPL has been constructed and is operational, voiding the pipeline easement is an extreme remedy that would cause considerable business and economic harm to the pipeline and its customers. For midstream and upstream operators, vacatur would create detrimental legal precedent supporting the argument that substantive remedies are available for mere procedural violations of NEPA.

Highly Controversial Effects

To determine whether to prepare an EIS, NEPA requires an agency to consider the proposed action's context and intensity to determine if it will have a significant effect on the environment. In doing so, agencies must consider the degree to which the project's effects on the quality of the human environment are likely to be highly controversial. Effects are controversial when there is a substantial dispute as to the size, nature, or effect of the federal action rather than to the existence or opposition to a use.

A highly controversial proposed action requires more than opposition to a project. Rather, there should be scientific or other evidence that reveals flaws in the methods or data relied upon by the agency in reaching its conclusions.

The *Standing Rock* Court relied on the D.C. Circuit Court's recent decision in *National Parks Conservation Association v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019), which held that an agency's acknowledgment and attempt to address concerns raised during the NEPA process does not satisfy NEPA's requirements. Instead, agencies must resolve the concerns or controversy. Applying this precedent, the *Standing Rock* Court determined that the Corps' easement approval was highly controversial considering the unresolved expert critiques and safety questions, triggering the need for an EIS.

The Court's decision focused extensively on the fact that several other federal and state agencies, and Native American Tribes, disagreed with the Corps' analyses related to the pipeline, particularly the worst-case discharge analysis required under the Corps' regulations. Plaintiffs successfully characterized these disagreements as being "highly controversial," which under the NEPA regulations is a significant factor as to whether an agency must prepare a more detailed EIS.

These recent decisions underscore the importance of agencies and project proponents proactively resolving technical and scientific critiques during the NEPA process to avoid the potential for significant project delays, disruptions, and expenses, and the importance of industry intervening in environmental cases that have the potential to set precedent for oil and gas-related claims in the future.

We will provide an update upon the Court's decision on remedy as soon as it is available.

Please contact [Nicole Blevins](#) or [Bret Sumner](#) for more information.