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DAPL Opinion Highlights Pipeline Project NEPA Challenges

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Despite oil already flowing through the pipeline, federal litigation involving the controversial Dakota Access pipeline (DAPL) recently took another turn when Judge James E. Boasberg of the United States District Court for the District of Columbia granted partial summary judgment to two tribes challenging the adequacy of the U.S. Army Corps of Engineers' review of DAPL under the National Environmental Policy Act (NEPA) and other statutes. The Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe filed suit in July 2016 (*Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Engineers*, Case No. 16-1534 (D.C. Columbia June 14, 2017)) to block construction of the last remaining segment (and subsequent operation) of DAPL.

As sometimes is the case, agency approvals came faster than the court's opinion, and without a stay of proceedings DAPL began operating in early June 2017. Although it granted partial summary judgment, the court did not require pipeline operations to cease, instead delaying the question of an appropriate remedy until after further briefing by the parties.

In a lengthy memorandum opinion issued on June 14, 2017, Judge Boasberg noted that the USACE "substantially complied" with NEPA in many areas of its analysis. Nevertheless, the court found deficiencies in the Corps' consideration of the "highly controversial" effects of the pipeline's operation: the potential impacts of an oil spill from the pipeline regarding environmental justice and tribal fishing and hunting rights. The court remanded the matter to the Corps for further analysis of these issues, ruling against the tribes on all their other claims.

Background

The case before the court was one of three lawsuits brought by the Standing Rock Sioux and Cheyenne River Tribes challenging the Corps' decisions authorizing the DAPL project. DAPL notified the Corps in June 2014 of its intent to construct a portion of DAPL under Lake Oahe, a reservoir created by the Corps in 1958 via a dam that spans North and South Dakota and borders the tribes' reservations. The court recited a lengthy factual history, noting extensive Corps deliberations and exchanges with the tribes on DAPL permits, consultations and other needed authorizations, including verification by the Corps that DAPL's activities satisfied the terms and conditions of Nationwide Permit (NWP) 12; issuance of a Rivers and Harbors Act (RHA) Section 408 permit to cross Lake Oahe; and a real estate easement under the Mineral Leasing Act to cross Corps-managed federal lands at Lake Oahe.

In December 2015 the Corps published a draft environmental assessment (EA) of the project, in which it concluded that "construction of the proposed Project [was] not expected to have any significant direct,

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indirect, or cumulative impacts on the environment.” This was followed by the July 2016 publication of a final EA and mitigated finding of no significant impact (FONSI), in which the Corps reached the same conclusion, provided that the project sponsors adopted certain measures to avoid, mitigate and minimize potential impacts of the DAPL crossing Lake Oahe.

The Corps subsequently verified that the pipeline activities satisfied the terms and conditions of NWP 12 and granted permission under RHA Section 408 for DAPL’s placement at Lake Oahe. The litigation ensued, as well as further negotiations and consultations among the tribe, the Corps and various other governmental entities. Despite the Corps’ initial determination that it could not grant the requested easement based on the record before the agency in December 2016 — and its subsequent “policy decision” to prepare an environmental impact statement for the project — USACE ultimately reversed course under the new presidential administration, granting the easement in February 2017 and withdrawing its notice of intent to prepare an EIS in February 2017. DAPL completed construction of the last segment of the pipeline beneath Lake Oahe in March 2017, and the project became fully operational on June 1, 2017.

Substantive Flaws in Corps’ NEPA Analysis

The opinion touches on several significant issues with respect to agencies’ NEPA obligations for pipeline projects generally and oil pipelines in particular, including:

- **Judicial “Flyspecking” of the NEPA Process:** The court reiterated important D.C. Circuit precedent that its role is to determine the adequacy of an agency’s action using a rule of reason rather than search for any deficiency, no matter how minor. This limited role thus only leads to overturning an agency’s decision if the decision was arbitrary, capricious or an abuse of discretion.
- **“Highly Controversial” Effects:** The court found that the Corps failed to sufficiently evaluate the degree to which the effects of the proposed action (i.e., the pipeline’s crossing of Lake Oahe) on the quality of the human environment are “likely to be highly controversial” — not measured by newsworthiness or the existence of opposition, but instead by whether a substantial dispute exists regarding the size, nature or effect of the permit action. The court referenced expert reports submitted to the Corps concerning the likelihood and consequences of an oil spill as evidence of identified “methodological and data flaws” in the environmental assessment (EA) that were “wholly ignore[d]” by the Corps.
- **Spill Impacts on Tribal Hunting and Fishing Rights:** Although the court rejected Standing Rock’s argument that tribal treaty rights should be addressed separately from the ecological impacts to fish and game habitat, the court did find deficiencies in the Corps’ analysis of project effects, including a potential spill, on tribal members’ treaty rights to water, hunting and fishing on reservation land. The court noted the Corps had only given a “cursory nod” to the potential effects of an oil spill on the aquatic environment, without explaining what those effects would be. Further, while the EA discussed the effects of pipeline construction, it said nothing about the effects of a spill on tribal rights once the pipeline became operational.
- **Environmental Justice:** The court considered the propriety of the Corps’ decision to define the geographic unit for its environmental justice (EJ) analysis as a half-mile radius around the Lake Oahe crossing, which excluded the Standing Rock Reservation and indicated low percentages of

impoverished and minority populations relative to surrounding counties and North Dakota as a whole, leading the Corps to conclude in the EA that “there is no concern regarding environmental justice to minority populations at the Proposed Action Area at ... Lake Oahe.” The court found that such a narrowly focused EJ inquiry was insufficient to discharge the Corps’ EJ responsibilities under NEPA. In defending this delineation, the Corps relied on the fact that a half-mile was the buffer typically used for transportation and natural gas pipeline projects. The court rejected this justification, however, noting that “DAPL is neither a transportation project nor a natural-gas pipeline; it is a crude-oil pipeline” and that it was thus improper for the Corps to restrict its EJ analysis to such a limited geographical area.

- **Remedy for NEPA Violations:** Turning to the question of remedy for the identified NEPA violations, the court noted that the Administrative Procedures Act requires courts to “hold unlawful and set aside” arbitrary and capricious agency action and, under D.C. Circuit precedent, the standard remedy for NEPA violations is vacatur. In this case, applying the “standard remedy” would mean vacating DAPL’s permits and easements, forcing it to cease operations until the Corps fully complied with NEPA requirements. The court noted its discretion to depart from the presumptive remedy of vacatur, however, in light of its potentially “serious consequences” and ordered further briefing on whether to do so.

Agency “Mind-Changing”

The Standing Rock tribe argued unsuccessfully that the Corps’ reversal on its decision to grant an easement to DAPL under Lake Oahe constituted an arbitrary and capricious agency action. On Dec. 4, 2016, the Corps assistant secretary of the army for civil works issued a memorandum to the Corps’ district commander stating that the Army had “not made a final decision on whether to grant the easement” and that the Army would “not grant an easement to cross Lake Oahe at the proposed location based on the current record” as “additional analysis,” including exploration and evaluation of siting alternatives, were needed. Subsequent to the inauguration of President Donald Trump, however, the new administration directed the secretary of the Army to consider whether to “rescind or modify” the assistant secretary’s Dec. 4 memorandum and to “take all actions necessary and appropriate to ... approve in an expedited manner ... requests for approvals to construct and operate the DAPL.” The Corps determined shortly thereafter to grant the easement and provided notice of its intent to do so on Feb. 8, 2017.

According to the court, while the Corps’ reversal plainly constituted a change in official policy, this reversal satisfied the “reasoned explanation” standard established in previous cases examining agency reversals of policy under the APA. Under this precedent, an agency need not show that its reasons for changing position are “better than the reasons for the old policy,” nor must it “refute the factual underpinnings of its prior policy with new factual data.” Rather, it suffices that an agency offer “reasoned explanation ... for disregarding the facts and circumstances that underlay the prior policy.”

The Corps’ explanation displayed an “awareness that it was changing position.” Its explanation for its new policy was based upon the premise that the Corps’ NEPA analysis to date was sufficient to make a “fully informed” decision on whether to grant an easement. Supplementation of the EA was not required prior to making this decision because there had been no “substantial changes” to the proposed action under consideration. Therefore, the Corps could justify its reversal simply by a change in policy judgment and was not required to refute the factual basis for its previous decision or offer heightened justification for its new one.

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Conclusion

The court also rejected the tribes' additional arguments related to NWP 12 coverage, issuance of a Rivers and Harbors Act Section 408 permit, and whether the Corps had discharged its trust responsibility to protect tribal rights and whether it had adequately engaged in predecisional consultation with the tribes. Opening briefs by the Corps and Dakota Access to address the appropriate remedy are due to be filed no later than July 17, 2017. This is a case that NEPA and pipeline practitioners will surely continue to follow.

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