An Introduction to Energy Law, Pipeline Siting, and NEPA

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Traditional Environmental Regulation

Historical Environmental Regulation

- Early precursors in the “common law” — (tort and property law concepts like nuisance and trespass)

- Antipodal federal policies and increasing state codification — (manifest destiny v. national parks)

- The environmental “moment” of the 1970s / increasing federalization — (virtual “explosion” of new laws)

- Foundations in historical environmentalism — (preservationism, conservationism, urban environmentalism)
“Since the original Earth Day . . . , environmental law has gone from a legal curiosity to a mainstay of modern legal practice and public policy. What was once the exclusive cause of radicals is now the day-to-day work of legions of button-down lawyers from Wall Street to San Francisco.”

- James L. Huffman
Traditional Environmental Regulatory Tools

- Pollution prevention – (CAA, CWA, TSCA, FIFRA)
- Pollution cleanup / disposal – (RCRA, CERCLA)
- Natural resources management – (NFMA, FLPMA)
- “Process” statutes – (NEPA, NHPA, etc.)
- Increasing use of market-based regulation

Traditional Energy Regulation
Historical Energy Regulation

- Early precursors in public utility / antitrust law
- Sharp divisions in state and federal jurisdiction
- Emphasis on the so-called “dominant” energy paradigm
- Foundations in economic theory and expediency

The “Dominant” Energy Policy Paradigm

- Assure abundant supplies
- Maintain reasonable prices
- Limit market power of archetype firms
- Promote inter- and intra-fuel competition
- Support a limited number of conventional fuels

“Energy policy-making in the United States is a cyclical enterprise. When energy prices rise rapidly because of limited supplies, energy dominates the political agenda. When supplies are plentiful and prices stable, it fades into the background.”

- Gary Bryner

Traditional Energy Regulatory Tools

- **Structure** – “Natural” monopolies / the “regulatory compact”
- **Rates** – “just and reasonable” prices
- **Procurement** – “prudent” investments
- **Siting** – sufficient and reliable energy supplies
- **Increasing use of market-based regulation**
The “Language” of Energy Lawyers

Photo credit: Bruno & Lígia Rodrigues (2006)
The Early “Energy and Environment” Paradigm

The Extant “Energy and Environment” Paradigm
The Future “Energy and Environment” Paradigm?
The Future “Energy and Environment” Paradigm?

Key Questions in Pipeline Siting

- Governance Structure – State, federal, or both?
- Bottlenecks – type of regulation and regulatory access point?
- Eminent Domain – conditions for use?
- Regulatory Approvals – requirements?
- Safety – additional regulation?
Different Resources, Different Models

- **Natural Gas** – federal siting – FERC
- **Electricity** – primarily state, with federal overlays
- **Oil** – state

Natural Gas Pipelines in the U.S.

*Legend:
- Interstate Pipelines
- Intrastate Pipelines

Source: Energy Information Administration, Office of Oil & Gas, Natural Gas Delivery, Gas Transportation Information System.
Oil Pipelines and Refineries in the U.S.

Siting & Eminent Domain for Oil Pipelines

Legend:
- Black Dots: Refineries
- Black Lines: Crude Oil Pipelines
- Blue Lines: Petroleum Products Pipelines
- Green Lines: Natural Gas Pipelines

Source: Petroleum Geographics Corporation, 2012

No State Approval Required Before Constructing Oil Pipeline
- State Approval Required Before Constructing Oil Pipeline But Not Before Exercising Eminent Domain
- State Approval Required Before Constructing Oil Pipeline And Before Exercising Eminent Domain Authority
- No Eminent Domain Authority For Oil Pipelines
**NEPA’s Trigger**

**TRIGGER:**
Is a major federal action being proposed that might significantly affect the quality of the human environment?

**YES:**
The agency must prepare an EIS.

**NO:**
The EIS requirement does not apply.

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**Applying NEPA’s Trigger**

**Has the agency categorically excluded this type of action?**

**YES:**
No EIS is required unless unusual circumstances exist.

**NO:**
Does this type of action normally require an EIS?

**YES:**
An EIS is probably required, although the agency can prepare an EA.

**NO:**
The agency will prepare an EA.
Applying NEPA’s Trigger, cont’d

If the agency prepares an EA, does the EA show that the proposed action is a major federal action that might significantly affect the quality of the human environment?

**YES:** An EIS is required.

**NO:** No EIS is required, and the agency will issue a FONSI.

Timing of the NEPA Analysis: CEQ Regulations on Timing

- “Agencies shall integrate the NEPA process with other planning at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.”

- 40 C.F.R. § 1501.2.
“Major Federal Action”

“MAJOR” = May significantly affect the quality of the human environment

“FEDERAL” = “[E]ntirely or partly financed, assisted, conducted, regulated, or approved by federal agencies”

“ACTION” = New and continuing activities; new or revised rules, regs, plans, policies, or procedures; legislative proposals

“Significantly”

“[T]he significance of an action [must] be analyzed in several contexts, such as society as a whole ..., the affected region, the affected interests, and the locality.”

Severity of the impact: Beneficial or adverse? Public health & safety Unique characteristics Controversy about effects Uncertainty about effects Cumulative impacts
“Affecting”

DIRECT EFFECTS

Effects caused by the action and that occur at the same time and place

INDIRECT EFFECTS

Effects caused by the action and that occur later in time or at a farther distance, but which are reasonably foreseeable.

AFFECTING = will or may have an effect on

“Human Environment”

- The term “shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.”
- However, socioeconomic impacts alone are not enough to trigger NEPA’s EIS requirement.
Categorical Exclusions

DEFINITION: “[A] category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations *** and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

Other Exceptions: CEQ’s “Emergency Circumstances”

Winter v. NRDC
U.S. Supreme Court
November 2008
Writing an EIS

1. **Agency determines that an EIS is necessary**
2. **Scoping**
   - Notice of intent; comments
3. **Draft EIS**
   - Federal Register notice

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**Final EIS**
- With agency’s response to comments; Federal Register notice

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**Comment Period**
- At least 45 days

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**Waiting Period**
- Generally at least 30 days

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**Circulation of DRAFT EIS**

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**Rod & Implementation**

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**The Scope of the EIS**

- **Scope**: “[T]he range of actions, alternatives, and impacts to be considered in an environmental impact statement.” 40 C.F.R. § 1508.25.

- The agency must consider three types of actions (§ 1508.25(a)):
  - Connected Actions
  - Cumulative Actions
  - Similar Actions
The Scope of the EIS, cont’d

• The agency must consider three types of ALTERNATIVES (§ 1508.25(b)):
  ▫ No action alternative
  ▫ Other reasonable alternatives
  ▫ Mitigation measures

• The agency must consider three types of IMPACTS (§ 1508.25(c)):
  ▫ Direct
  ▫ Indirect
  ▫ Cumulative

Contents of the EIS

• Cover sheet
• Summary
• Table of Contents
• Description of purpose & need
• *** ANALYSIS OF ALTERNATIVES ***
• Analysis of environmental consequences of action & alternatives
• List of preparers
• List of reviewing agencies
• Index
• Appendices
• Recommended length: <150 pages 😊
How Long Does It Take?
SDS Water Delivery System
Bureau of Reclamation & Bureau of Land Management for Colorado cities.

When Is A Supplemental EIS Required?

- Agencies “[s]hall prepare supplements to either draft or final environmental impact statements if:
  - “The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
  - “There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”
- 40 C.F.R. § 1502.9(1).