Power to the People: Primer on NEPA and Transmission Lines

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Slowly but surely, the US economy is coming back to life. The revival is due in no small part to a renaissance in domestic energy production, and, of course, to the transmission infrastructure carrying energy to load. Increased natural gas production is driving construction of pipelines. The demand for renewable energy is driving construction of transmission through remote and previously undeveloped areas. Aging infrastructure is being replaced, new facilities are being built, and a new generation of operators, managers, and investors is stepping up to lead the way. To the extent that their projects will require federal permit approvals—and many will—the next generation is going to need to know about the National Environmental Policy Act (NEPA).

This article seeks to provide transmission developers with an introduction to the many aspects of NEPA, understood in the context of the law’s history, yet taking into account the cutting edge of the present day. Today, NEPA is known mostly functionally as the law that may require the costly and time-consuming preparation of a multivolume project study, collected in an Environmental Impact Statement (EIS), and also as the law that may be used to seek to delay that project, perhaps indefinitely. But this is not the whole story.

Over 40 years ago, NEPA was passed to ensure that government agencies incorporate environmental concerns into their other considerations. Federal courts quickly adopted it as the primary mechanism for ensuring that environmental interests have their day in court. Sifting through the decades of analyses that have come since, it is possible to plan and prepare for, and to achieve, compliance.

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One caveat: while what follows focuses on NEPA in the transmission context (and is applicable to other linear infrastructure proposals), project advocates should be aware that many states have their own laws styled after NEPA, with varying degrees of difference, and that even a purely federal review may be influenced by the requirements of numerous other environmental and natural resource laws. Nonetheless, NEPA is the place to start.

NEPA’S ENACTMENT: THE “ENVIRONMENTAL MAGNA CARTA”

Before getting into the nuts and bolts of NEPA compliance today, it is important to take a look back and understand where the law came from.1

A “National Environmental Policy”

In order to understand NEPA’s present role, it is useful first to imagine a world similar to our own, but without NEPA. Fortunately, such a world exists for comparison: the postwar, pre-NEPA world of the United States in the 1950s and 1960s.

During this era, the industrial might developed during World War II was turned to private enterprise, and thrived. The expanding

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federal power of the late nineteenth and early twentieth centuries, including the programs of the New Deal and the war years, had greatly expanded the federal bureaucracy. At the same time, there was emerging a collective concern over the impacts of the modern world on the environment in which we all live, a concern that would soon grow into the modern environmental movement. But there was no NEPA.

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Before 1970, a person concerned about the environmental impacts of some activity might have cast around for some legal mechanism by which to make his concerns heard. But a review of the available authorities would have been found wanting. The first stop, the US Constitution, would have revealed that there is no federal constitutional right to a clean environment. Nor did any statute grant a person the ability to force an accounting or recognition of “environmental” concerns, or to bring a lawsuit on behalf of the environment to stop environmental harm. The common law, the court-made law of published legal opinions, contained no “environmental” cause of action, and the available precedent—for example, involving fights over nuisances created by factory dust—would have proven inadequate to address the complex ecological, biological, and population-level human health concerns of environmentalism.

The only thing left to do would have been to submit one’s concerns to, say, the government agencies with responsibility for permitting activities entailing environmental impact, and request their forbearance. The response would have been that the laws that created the agencies themselves did not grant them authority to factor environmental impacts into their decision making. In any event, through these laws the agencies placed such issues secondary to the agencies’ development mandates.

It is against this backdrop, and to address these types of concerns, that NEPA was originally drafted and enacted. It was not called the “National Environmental Impact Statement Act.” Rather, the primary concern was to ensure that federal agencies had a sort of environmental constitution to follow, a “national environmental policy,” which was set forth in Section 101 of the law.2 In highly aspirational language, the Congress committed to do no less than to “use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” Recognizing “the profound impact of man’s activity on the interrelations of all components of the environment,” and “that each person should enjoy a healthful environment,” the law made it the “continuing responsibility of the Federal Government to use all practicable means” to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations” and to “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.” Such remains the law of the United States to this day.

There was just one catch: none of the above was mandatory. Finely worded though it may have been, the policy was just that, a “policy,” aspirational to be sure but full of words like “should” and “practicable.” A debate among the drafters therefore ensued as to whether it was necessary to include some sort of “action-forcing” mechanism into the law, some check or balance to ensure that the agencies were, in fact, now thinking about the environmental policy. Eventually, a proposal was incorporated as Section 102 of the law:3 agencies undertaking “major Federal actions significantly affecting the quality of the human environment” were to prepare a “detailed statement” of the action’s environmental impact. The statement, the drafters agreed, would probably be three to five pages long, and would be provided to Congress—not the courts—to allow oversight.

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**Calvert Cliffs Defines NEPA**

NEPA became law on January 1, 1970, and the assumptions of its drafters were quickly put to the test. The Atomic Energy Commission (AEC), responsible for considering applications for new nuclear generating facilities and not historically much interested in seeing nuclear
development stalled by environmental concerns, took the position that the new law simply stated a policy, and that notwithstanding Section 102 the AEC could simply rely on a report generated elsewhere, leaving it free to receive that report, put it in a file, ignore it, and get on with the business of licensing nuclear power stations. A group of attorneys in the Washington, DC, area, especially concerned with the AEC’s licensing of the Calvert Cliffs nuclear station on the Chesapeake Bay, challenged the AEC’s approvals in the US Court of Appeals for the DC Circuit. The result was *Calvert Cliffs’ Coordinating Committee, Inc. v. U.S. Atomic Energy Commission.*

In a stroke of luck that should be the envy of every litigator, the judge assigned to the case was Judge J. Skelly Wright, who had lately spent over a decade as a federal judge vigorously enforcing the school desegregation decision *Brown v. Board of Education* in the hostile territory of the Eastern District of Louisiana. To Judge Wright, the role of the federal judiciary was to provide a voice to the voiceless and to ensure that the government did what it was required to do. The ramifications for his interpretation of NEPA should be evident. Judge Wright found in Section 102 all he needed to claim for the federal bench a central role in ensuring that the Executive Branch did what Congress had decided it should.

He wrote: “Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.” The AEC would be required to strictly comply with the Section 102 process by preparing environmental impact statements for its licensing decisions. The court would see it done correctly, and ordered construction halted until then.

Whatever NEPA had been before, after *Calvert Cliffs* it was the key tool in the arsenal of every project opponent. The decision demonstrated that the federal courts were concerned about environmental issues. To this day, NEPA is referred to as the “magna carta” of environmental law.

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As it turned out, *Calvert Cliffs* also had a lesson to teach on NEPA’s ultimate limitations. The Calvert Cliffs station proponents completed an environmental impact statement, discussing the risks of nuclear energy development. The AEC then reaffirmed its decision, and the station was built. It continues to operate to this day.

**Council on Environmental Quality Writes the Rules**

One last piece of history remains. NEPA, the statute itself, does not specify in any detail what its requisite “detailed statement” must contain. However, the law did create a body called the Council on Environmental Quality (CEQ). While originally intended as an advisory panel, it was quickly granted the authority to adopt guidelines, and later to promulgate official regulations, describing the requirements of environmental impact statements. In 1978, the CEQ thus promulgated regulations that are accepted today as authoritative guidelines for EIS drafting.

Thereafter, each federal agency has drafted its own implementing regulations consistent with the basic CEQ regulations but tailored to each agency’s mission. The statute, the courts, and the CEQ and agency regulations work in tandem to control the complex process of environmental review.

**PUTTING NEPA INTO PRACTICE**

The history just described should be kept in mind whenever NEPA compliance is concerned. The purpose of compliance is to demonstrate to a federal court that the permitting agency has provided ample opportunity for the voicing of environmental concerns and has fully considered all relevant environmental issues raised to it prior to reaching any decision, such that the federal court will not delay the project approvals pending further review. This goal is
more nuanced, but ultimately more useful, than simply “preparing an EIS.”

What follows then is a discussion of the basic issues of NEPA compliance as applied to transmission projects. To get the most out of it, it is useful to have an example in mind. Perhaps the reader already has a project in mind.

Otherwise, imagine being responsible for the construction of a 500-kilovolt transmission line, needed due to construction of new generation some distance from load. The proposed route will entail the demolition of most of an existing 138-kilovolt distribution line, using the existing right-of-way for much of the new line’s length. The proposed route traverses private land, state land, federally managed land, and a designated wild and scenic river. The permitting outlook is good, but there is organized local opposition. It is NEPA time.

Jurisdiction: Does NEPA Apply?

The first question to ask for any transmission project is whether NEPA applies at all. With few exceptions, the short answer is that if a project requires a federal permit or approval for any reason—for example, due to the crossing of lands under federal jurisdiction, NEPA applies.8 Complexities arise in other contexts, but when building something, usually the answer is that simple.

It is important to understand that the permitting agency, not the project applicant, is responsible for complying with NEPA, by demonstrating its consideration of environmental issues prior to reaching its decision. Thus, generally, the NEPA review process is coordinated by the federal agency with the most significant approval authority over a project, called the “lead agency.” The review will be coordinated with any other federal or state agencies with review or approval authority and with the project proponent, who is responsible for submitting most of the information necessary to support the review.

Categorical Exclusions: Can We Skip the Paperwork?

Having concluded that NEPA is triggered and begun the NEPA process, it is not yet time to begin drafting the EIS. Agencies have been conducting NEPA reviews for 40 years. This has allowed them to develop categories of actions that are deemed typical enough to warrant an exemption from further review by means of a “categorical exclusion” (commonly called a cat-ex or CX).9 Agencies each promulgate their own CX rules based on their unique regulatory authorities and experiences.

For transmission projects, determining whether a CX is available requires locating the CX rules of the agency responsible for permitting.10 Their scope will vary according to the mission of the agency—for example, the Department of Energy will consider a cat-ex for any line under 10 miles in length, while the Bureau of Land Management’s (BLM’s) are generally limited to projects that entail minimal additional disturbance of BLM lands, and the National Park Service’s are, as might be expected, even more stringent than that. CX approvals for projects in sensitive areas can be very controversial, and when seeking a CX it is important to understand that the agency’s decision that a CX applies can and has been overturned by the federal courts where the project is too far beyond the limited intent of the written CX.

Significance Determination: Will an EIS Be Required?

Even if a project does not qualify for a CX, it is not quite time to begin drafting the EIS. NEPA requires an EIS only for “major Federal actions significantly affecting the quality of the human environment.”11 If there is any doubt, a project’s potential environmental “significance” may be evaluated through preparation of an Environmental Assessment (EA), which may result in a Finding of No Significant Impact (FONSI), meaning that the review is done and no EIS is required.

To determine significance, agencies must consider the “context” and “intensity” of a project’s impacts (see 40 C.F.R. § 1508.27). With respect to “intensity,” regulations provide ten factors that “should be considered,” including any unique characteristics of the area through which the project will pass, any potential impact on sensitive or protected resources, the degree of “controversy,” and the project’s cumulative effects (when taken together with other likely future development in the same area). Each of these investigations comes with its own deep layers of interpretive case law (for example, “controversy” refers to whether there is disagreement over the actual size or nature of the project, not whether it is opposed), and a finding of significance under any of the intensity factors might warrant preparation of an EIS.
Even if the project as initially proposed might threaten some “significant” impact, it may still be possible to convince an agency that an EIS is not necessary if the project proponent can demonstrate that the project’s otherwise potentially significant impacts can be mitigated to such an extent that all impacts will be reduced below significance. However, the so-called mitigated FONSI is not without litigation risk. A court may carefully review an agency’s decision that mitigation measures will actually be put into effect and be effective.

While cost and timing considerations might seem to point toward always arguing that a project does not need an EIS, the proponent must understand and carefully consider the risks. The decision to forgo preparation of an EIS is subject to judicial review and is likely to draw a legal challenge from project opponents. The majority of courts require an EIS to be prepared even if the EA shows a “substantial possibility” that significant impact could occur, and courts have a broader review authority when examining an EA over an EIS. After EIS insufficiency (see below), failure to prepare an EIS is the second most common basis for judicial reversal under NEPA.

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**Scoping, Small Handle, and Segmentation: What Is Being Reviewed?**

Under NEPA, *scoping* is the process of deciding what to review. Scoping may have already occurred as part of a CX or EA review, but in any event if the project will require an EIS, that process must begin with scoping. There is a significant procedural component to the scoping process, as work is allocated and schedules set, and, if it has not already occurred, it is the first opportunity for project opponents to begin to present their objections. Scoping must be noticed and open to the public and include all affected federal, state, and local agencies. As discussed in the next section, imaginative opponents often seek to expand the scope of what must be discussed in an EIS beyond a project’s direct impacts, to encompass impacts “on both ends” (i.e., related to both the source and use of the energy transmitted).

For a transmission line, the idea of scoping may seem simple, but it can be deceptively tricky in application. With respect to linear infrastructure particularly, proponents may face what is known as the “small handle” problem. Where a transmission line or other project passes primarily over nonfederal lands, but also requires a federal crossing—for example, over a large river—opponents may argue that federal jurisdiction over a small part of the project federalizes the entire line, forcing the whole project to be reviewed, rather than just the crossing. Courts have gone both ways on the issue.

The other side of the coin is *segmentation*. Using the same river-crossing scenario just described, imagine it broken into three pieces to avoid NEPA: “Line A” leads from the project origin up to the river; “Line B” starts on the other side of the river and continues to the end; and “Line C” is just the river crossing and is not part of the current project proposal. Generally, courts will examine whether each segment could exist and make sense independently, and if not, they must be considered together. The Federal Highway Administration, which regularly deals with segmentation issues in highway proposals and has adopted influential rules on the issue, examines whether any project segment would connect logical termini; be of sufficient length to address environmental concerns; have independent utility or significance (i.e., be usable even if no additional improvements are made); or would restrict consideration of alternatives. If not, then the scope must be expanded.

**The “Hard Look”: What Must an EIS Discuss?**

To summarize hundreds or even thousands of pages into a single sentence, an EIS will contain the consolidated record of the agency’s considerations and conclusions regarding a project’s potential environmental impacts. The review must discuss all of a project’s actual and alleged direct, indirect, and cumulative impacts, as well as any reasonable alternatives to construction—including necessarily a “no-build” scenario and any identified routing alternatives.

In the transmission context, public and special interest opponents are likely to focus on alleged wildlife impacts, both direct species impacts and potential habitat fragmentation, particularly in previously undeveloped areas. Opponents may also focus on aesthetic and visual resource impacts, particularly in areas of special cultural, historic, or scenic value.
Route-specific challengers will often force lengthy examinations of alternative routes that do not include their own backyards.

Beyond the typical concerns, reviews of transmission lines will often also address more transmission-specific concerns. For example, opponents often focus on electric and magnetic fields, notwithstanding that findings of no significant impact are regularly upheld on this issue. An emerging area of inquiry is terrorism risk—proponents of transmission alternatives such as near-load or distributed generation may point out that it is difficult to defend a hundred-mile-long piece of critical infrastructure. To date, courts that have considered the issue in other contexts have generally upheld agency decisions where the issue, if raised, was disclosed and addressed.

Perhaps most commonly, today’s transmission opponents may argue that the agency should review and disclose the impacts of induced energy generation as an “indirect effect.” This might include greenhouse gas emissions if the line is expected to induce, for example, new fossil generation (an argument that is now so common that the CEQ has issued draft guidance on the topic); or hydraulic fracturing if the fuel is natural gas. Again, courts have accepted agency analyses where these potential impacts are discussed and addressed, even in more limited fashion than the opponents might have liked.

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For the project proponent, the important thing is to ensure that the agency has demonstrated its consideration of each and every concern related to a project’s environmental impacts during the review, and explained itself clearly enough that a court can understand the basis for the agency’s conclusion. In theory, at least, the outcome of the agency’s decision is not subject to reversal simply because the court would not have reached the same conclusion. Rather, while courts differ on the exact language, their expectation is commonly referred to as the “hard look” standard—a court will ask, does the record demonstrate that an agency took a “hard look” at each issue? Nonetheless, the single most common basis for judicial reversal of a NEPA process is a finding that an agency has failed to consider, or failed to adequately consider, some potential effect of the project. For this reason, it is especially important to ensure that the agency reviews and carefully considers any and all public comments raised against a draft EIS, and documents its responses carefully and completely.

Judicial Review: Is It Shovel Time?

The final product of the EIS process is the Final EIS (FEIS), accompanied by the Record of Decision (ROD)—a short document summarizing the agency’s decision—plus, with luck, the requisite permits and approvals. Assuming all other authorizations are in place, it is now legal to start building the project. However, no matter how fully or carefully an EIS discloses and discusses a project’s potential impacts, and no matter what the agency says to explain itself, parties who fundamentally oppose the project will claim that the agency has failed to consider the concerns they raised, in violation of NEPA. These parties will consider filing a lawsuit. An entire industry is built around such lawsuits, and therefore any sufficiently contentious proposal triggering NEPA is likely to result in litigation.

The important thing to keep in mind is that the outcome of the case is largely dependent on the work that already happened: the EIS now says what it says. Subject to very narrow exceptions, the reviewing court will consider only the decision documents and the significant paper trail leading up to them—the “administrative record.” Even with the whole record before the court, the litigation process is considerably assisted by a thorough and comprehensive FEIS and ROD.

NEPA cases involve challenges to the conduct of agency action and decision making, and as such are subject to the law governing agency action—administrative law. The Administrative Procedure Act allows potential plaintiffs to bring a lawsuit, but only under certain specific circumstances—most often by claiming that the action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Gallons of ink have been spilled to define what it means for an action to be “arbitrary and capricious.” For proponents, the most important aspect of the court’s review is that NEPA’s procedure must be followed to the letter, but courts are supposed to be
“deferential” to the agency’s substantive decision making, meaning that the court is not supposed to substitute its judgment for the agency’s. Getting courts to adhere to this standard is one of the key goals of NEPA defense litigation.

Notwithstanding the basis of opponents’ objections—which in many cases boil down to asking the court to substitute its judgment for that of the agency—often the real purpose of a NEPA lawsuit is to delay time-sensitive projects beyond the point of economic viability. Given that project construction can generally start immediately and that it takes years to litigate a federal case, plaintiffs do not generally wait until the case is concluded to effect such a result. Rather, they can be expected to seek “preliminary injunctive relief,” meaning an order from the court (an injunction) halting construction while the merits of the lawsuit are considered. There are two types of preliminary injunctive relief: a temporary restraining order (TRO), effective until preliminary injunction motions are heard, and the preliminary injunction (PI), generally effective until the case is decided. The stakes are at their highest here: if the project is at all time-sensitive, the case may be won or lost in the first few weeks of heated briefing and hearings on emergency injunctive motions.

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Courts do recognize the stakes of injunctive relief, and therefore refer to injunction as an “extraordinary” remedy that is not lightly granted. The Supreme Court has instructed that federal courts must employ a four-part inquiry to decide whether to issue one, including consideration of the eventual likelihood that a plaintiff will prevail in demonstrating some failure in the environmental review (the “merits” of the case); the likelihood of irreparable harm lacking injunction—importantly, requiring a demonstration of a concrete, imminent, and permanent harm to the plaintiff, not simply some general assertion that the project will harm the environment; any harm an injunction would cause, including the loss of the project’s economic value; and any public policy considerations on either side. Given that the court is reviewing the merits, PI/TRO rulings are a strong—but by no means foolproof—indicator of the court’s ultimate decision.

Eventually, barring settlement or withdrawal of the lawsuit, the court will rule on the ultimate merits of the challenge, deciding whether NEPA has been violated in any way. The cure for such a ruling is straightforward: more NEPA review, addressing the issues identified by the court. On the other hand, if a court determines that no violation has occurred—and, if appealed, the appellate court agrees—the case ends. The hard work put into preparing that EIS has paid off.

CONCLUSION

Notwithstanding its length, the above has only scratched the surface on a number of important and complex issues. Hopefully, however, it provides the “big picture” framework in which it is possible to see where the endless details fall. The message is simple: conduct the NEPA review with an eye toward the eventuality of litigation, and understand that a sufficiently comprehensive environmental review under NEPA may be challenged but should prevail.

NOTES

3. 42 U.S.C. § 4332
4. 449 F.2d 1109 (D.C. Cir. 1971).
7. 40 C.F.R. Chapter 1500.
8. See 42 U.S.C. § 4332(2)(C) (applying to “federal” actions), 40 C.F.R. § 1508.18(b) (defining federal actions to include permitting).
9. See 40 C.F.R. § 1508.4.
10. For example, BLM’s transmission-related CXs are found at 516 BLM Department Manual § 11.9(E). The National Park Service’s are found at NPS Handbook DO-12 § 3-4. The US Department of Energy’s are found at 10 C.F.R. Ch. 1021, Appendix B.
12. 23 C.F.R. § 771.111(f).
14. E.g., San Luis Obispo Mothers for Peace v. NRC, 635 F.3d 1109 (9th Cir. 2011).