

Court Rules Dakota Access Pipeline Needs Further Environmental Review

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The Dakota Access Pipeline (DAPL), a crude oil pipeline developed by Energy Transfer Partners, carries crude oil from the Bakken fields in northwest North Dakota to southern Illinois. As discussed in this Legal Sidebar, the DAPL has been the subject of extensive debate and media attention, as well as prolonged litigation. Much of the attention on the DAPL centers on the portion of the pipeline route that is near or runs under Lake Oahe in North Dakota, a lake that has particular significance to Native Americans in the region. The U.S. District Court for the District of Columbia (D.C. District Court) recently held that this controversial portion of the route needs further environmental review.

Background on DAPL Environmental Review

Because the pipeline crosses waters subject to regulation under the Clean Water Act and land controlled by the federal government, federal law required the Army Corps of Engineers (Corps) to issue several authorizations for the project, including authorization for the stretch of pipeline under Lake Oahe. The Corps' federal actions triggered the [National Environmental Policy Act](#) (NEPA), which requires federal agencies to assess the environmental impacts of a proposed action before making a decision about that action. Under NEPA, agencies considering actions not eligible for "categorical exclusions" must prepare Environmental Assessments (EAs). If the federal action will "significantly affect the quality of the human environment," agencies must prepare an Environmental Impact Statement (EIS). (Sometimes the agency skips the EA and moves directly to prepare the EIS.) Despite a [previous determination](#) that the Corps should prepare an EIS to assess the environmental impacts of the Corps action in depth, a 2017 [Presidential Memorandum](#) encouraged the Corps to consider a [previously published EA](#)—one that concluded with a Finding of No Significant Impact—sufficient to satisfy NEPA.

Litigation over NEPA Compliance

The Corps followed the Presidential Memorandum and did not prepare an EIS. Instead, it finalized its decision to issue a right of way under Lake Oahe and [notified Congress](#) in February 2017. However, a number of groups challenged the Corps' decision, alleging, among other things, that the Corps had not

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satisfied NEPA's requirements. The D.C. District Court [found flaws](#) in the Corps' NEPA compliance. As a result, the court remanded the matter to the Corps for further administrative proceedings to address these NEPA shortcomings.

The Corps completed its efforts on remand in [February 2019](#), maintaining its position that an EIS was not required for this federal action. In response, several parties again petitioned the court to declare the Corps' NEPA compliance efforts insufficient. A number of Indian tribes [claimed](#) that the Corps failed to address flaws in their NEPA analysis previously noted by the court, while other parties re-raised claims that the Corps had not complied with the [National Historic Preservation Act](#) (even though the court [previously rejected](#) those claims) and other issues.

March 2020 Decision

In its March 2020 [decision](#), the D.C. District Court found that, on remand, the Corps had not adequately addressed the shortcomings in its NEPA analysis identified in the [2017 decision](#).

The opinion focused on the argument that the Corps failed to address adequately whether the project was "highly controversial," a designation that would require an EIS because it would automatically deem the project "significant" under NEPA regulations ([40 C.F.R. § 1508.27\(b\)\(4\)](#)). Citing precedent, the court [noted](#) that federal actions are "controversial" where "substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use," but [also](#) that "something more is required besides the fact that some people may be highly agitated and be willing to go to court over the matter." Based on this precedent, the court [concluded](#) that "the significant public protests near Lake Oahe do not transform the pipeline's approval into a highly controversial action within the meaning of 40 C.F.R. § 1508.27(b)(4)."

Nevertheless, the court [found](#) that an EIS was required because the DAPL project was "highly controversial" for other reasons. Before identifying those reasons, the court set out to determine the scope of the inquiry. [Quoting *National Parks Conservation Association v. Semonite*](#), a recent decision by the U.S. Court of Appeals for the District of Columbia, the court noted that "consistent and strenuous opposition, often in the form of concrete objections to the Corps's analytical process and findings, from agencies entrusted with preserving historic resources and organizations with subject-matter expertise," was enough to trigger an EIS under the "highly controversial" criteria. A number of public and private actors with subject matter expertise had raised similar objections to the Corps' findings with respect to the DAPL. The appeals court in *Semonite* also [rejected](#) the argument that simply acknowledging and attempting to address the controversial aspects of the federal action was sufficient to satisfy NEPA, noting that agencies must provide adequate reasoning to support their decision making, which the Corps had arguably failed to do with respect to DAPL. Furthermore, as the D.C. District Court [noted](#), in this case the Corps "has had an additional chance to respond to these renewed criticisms during the remand." Based on the *Semonite* decision, the court in this case [found](#) it "prudent to analyze the substance of expert comments made both before and during the remand to determine whether they 'succeed' in resolving the points of scientific controversy that continue to be raised by experts."

The court divided these expert criticisms and comments by subject matter. [First](#), the court reviewed concerns related to the DAPL's leak-detection system. Some of the tribes' experts pointed to a Pipeline and Hazardous Materials Safety Administration study finding that the type of leak-detection system deployed by DAPL had an 80% failure rate, and that, even as designed, the system would fail to detect smaller leaks. The court found that the Corps had failed to address these concerns on remand. The court [said](#) that "[s]tating that [the Corps] had considered the information was a good start, but, while the Corps did indicate the type of monitoring devices that were used, it did not mention their locations, and, most critically, it did not point to any analysis that did in fact take these two details into consideration."

Next, the court turned to the safety record of the DAPL's operator. Several experts argued that the Corps' initial analysis had not addressed the operator's safety record. These experts argued that a safety record review was an important part of a risk analysis because of its possible impact on the likelihood and severity of a potential pipeline spill. Experts also questioned the safety record of the DAPL's designated operator, Sunoco/ETP (the two companies completed a merger during the litigation). One expert contended that Sunoco had "one of the lower performing safety records of any operator in the industry for spills and releases." The court noted that the Corps' response on remand "focused its responses on defending the operator's performance record itself rather than on justifying its decision to not incorporate that record into its analysis," and that "[i]t did not directly reply to the comment that it had not explained 'why historic shutdown discharges from other Sunoco/ETP pipeline incidents are not discussed or relevant.'" The court concluded that this response did not adequately address the operator issues raised by experts.

The court next turned to concerns related to how winter conditions in North Dakota could affect the DAPL. Some experts questioned the Corps' claim in the original EA that icy conditions would "serve as a natural barrier to the spread of oil," and alleged that the Corps had not sufficiently addressed concerns about ice interfering with oil recovery in the event of a winter spill. The Corps defended their efforts to address this issue on remand, but the court found these efforts insufficient, noting that they had not resolved the controversy as required to satisfy the NEPA requirements for "highly controversial" federal projects.

Finally, the court turned to what it called "the largest area of scientific controversy, particularly during remand": the Corps' consideration of the Worst Case Discharge (WCD). The WCD analysis requires agencies to consider the impacts of the maximum discharge flow and length if met with the slowest potential response time. The court addressed whether the Corps resolved three perceived flaws in its analysis: leak detection timing, post-incident shutdown timing, and the impact of adverse weather and other adverse conditions on the WCD. In each case, the court held that the Corps had failed to address issues and gaps in its analysis raised by experts.

In sum, the court concluded that the Corps' efforts to rebut the experts' comments were insufficient to resolve the controversy surrounding the project:

The many commenters in this case pointed to serious gaps in crucial parts of the Corps' analysis—to name a few, that the pipeline's leak-detection system was unlikely to work, that it was not designed to catch slow spills, that the operator's serious history of incidents had not been taken into account, and that the worst-case scenario used by the Corps was potentially only a fraction of what a realistic figure would be—and the Corps was not able to fill any of them.

As a result, the court found that the Corps violated NEPA by determining an EIS was unnecessary even though one of the EIS-triggering factors was met. At the same time, the court declined to address other challenges to the DAPL. The court considered it unnecessary to address the impact of a hypothetical oil spill on the Tribe's fishing and hunting rights or the environmental-justice effects of the project, given that the finding that the project remained "highly controversial" for NEPA purposes already triggered the EIS requirement. The court also dismissed the Tribes' non-NEPA-based claims.

What's Next for the DAPL?

The Corps is likely to move forward with both the EIS and an appeal of the D.C. District Court's decision. In the meantime, the court asked the parties to brief the issue of whether the court must vacate the easement across Lake Oahe that allows the pipeline to flow until the review on remand is completed or the issue is otherwise resolved. As those judicial and administrative proceedings move forward, legislators also have the option of superseding judicial or agency action with legislative action related to the DAPL and NEPA obligations.

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