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The Shortcomings of the National Environmental Protection Act and Clean Water Act in Protecting Private Land

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The Shortcomings of the National Environmental Protection Act and Clean Water Act in Protecting Private Land

Sierra Club v. United States Army Corps of Eng'rs[1]

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I. INTRODUCTION

Congress enacted the National Environmental Protection Act of 1969 ("NEPA") and the Clean Water Act ("CWA") in 1972 to remedy and prevent damage to the environment.[2] In furtherance of its purpose, the NEPA requires government agencies to evaluate the consequences of actions that significantly affect the quality of the environment.[3] This requirement, however, only applies to the federal government,[4] which limits the statutes' effectiveness. For example, if the federal government wants to build a pipeline for oil transportation, then the NEPA requires an environmental evaluation.[5] But if a private company builds a pipeline on private land, no environmental impact assessment is required, unless an agency issues a permit allowing the project to proceed.[6]

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[1] 64 F. Supp. 3d 128, 145 (D.D.C. 2014).
[2] *See* 42 U.S.C. § 4321 (2012) (Stating the purpose of NEPA is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."); 33 U.S.C. § 1251(a) (2012) (The purpose of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").
[3] 42 U.S.C. § 4332(2)(C)(ii) (2012).
[4] *Id.*; 40 C.F.R. § 1500.1(c) (2014).
[5] 42 U.S.C. § 4332(2)(C) (2012).
[6] Sierra Club v. United States Army Corps of Eng'rs, 64 F. Supp. 3d 128, 145 (D.D.C. 2014) *aff'd sub nom*. Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31 (D.C. Cir. 2015); see also Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1117 (9th Cir. 2000).

Sierra Club v. United States Army Corps of Eng'rs involved an attempt to expand the government's responsibilities for evaluating the impact of oil pipelines.[7] In that case, Enbridge, a private company, was constructing a 589-mile pipeline on mostly privately owned land in Illinois, Missouri, Kansas, and Oklahoma.[8] Of that stretch, only 27.28 miles crossed federal land and waterways.[9] The Army Corps of Engineers ("the Corps") and the Bureau of Indian Affairs ("BIA") had jurisdiction over certain portions of that federal land, and the agencies each conducted an environmental impact study accordingly.[10] No federal agency interpreted the NEPA to mean that a comprehensive study of the entire pipeline was required.[11] However, the plaintiff, Sierra Club, whose stated mission includes the responsible use of the earth's resources,[12] filed suit claiming that some federal agencies, perhaps even all of them, have a statutory duty to complete a comprehensive environmental study.[13] The Sierra Club filed a six-claim complaint against five government agencies[14] alleging violations of the NEPA, CWA, and Administrative Procedure Act.[15]

The United States District Court for the District of Columbia denied Sierra Club a preliminary injunction during a November 2013 hearing.[16] Following most of the reasoning set forth in that hearing, the District Court in the instant case held that no agency had the responsibility to conduct a comprehensive assessment of the entire Enbridge pipeline project.[17] The court dismissed one complaint for failure to state a claim and awarded

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[7] *Sierra Club*, 64 F. Supp. 3d at 132.
[8] *Id.*
[9] *Id.* at 134.
[10] *Id.* at 137.
[11] *Id.* at 139.
[12] The mission statement reads: "To explore, enjoy, and protect the wild places of the earth; To practice and promote the responsible use of the earth's ecosystems and resources; To educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives." SIERRA CLUB (last visited Nov. 7, 2014), http://sierraclub.org/policy.
[13] *Sierra Club,* 64 F. Supp. 3d at 139.
[14] The defendants include the Corps, BIA, United States Department of Transportation, United States Fish and Wildlife Service, and the Environmental Protection Agency. *Id.* at 132.
[15] *Id.*
[16] Sierra Club v. United States Army Corps of Eng'rs, 990 F. Supp. 2d 9 (2013).
[17] *Sierra Club*, 64 F. Supp. 3d at 157-58.

summary judgment to the defendant for all remaining claims.[18] The court rejected Sierra Club's claim that the extent of the defendant's involvement triggered a larger duty under the NEPA.[19] As a result, the pipeline's construction continued. The court followed what it believed the statutes expressed and Congress intended, and as a result the 560 miles of pipeline on private land will not be assessed for environmental impact. If the goal of the NEPA and CWA is to prevent damage to the environment, that goal is not fully achieved when 95 percent of an oil pipeline traversing the middle of the U.S. will not be examined for possible environmental impact.

II. FACTS AND HOLDING

In January 2012, Enbridge, a private company that constructs oil pipelines,[20] started to build the 589-mile Flanagan South Pipeline ("the pipeline") to transport tar sands crude from Pontiac, Ill., to Cushing, Okla.[21] In response, the plaintiff, Sierra Club, sought a preliminary injunction against several federal agencies[22] to enjoin the pipeline's construction.[23] Sierra Club, joined by the National Wildlife Federation, filed a six-count complaint, but its main contention was that a federal agency should be required to analyze the pipeline's impacts on the environment before construction begins.[24] Plaintiff alleged the defendants violated the National Environmental Protection Act ("NEPA"),[25] the Clean Water Act ("CWA"),[26] and the

[18] *Id.* at 157.
[19] *Id.* at 157-58.
[20] *Id.* at 134.
[21] The pipeline would also run through Missouri and Kansas. *Id.* at 132.
[22] The Defendants include the United States Army Corps of Engineers, the United States Department of Transportation Pipeline and Hazardous Materials Safety Administration, the United States Fish and Wildlife Service, the United States Department of Interior Bureau of Indian Affairs, and the United States Environmental Protection Agency. The court also granted Enbridge intervenor status. Sierra Club v. U.S. Army Corps of Eng'rs, 990 F. Supp. 2d 9, 12 n.1 (D.D.C.2013).
[23] *Sierra Club*, 64 F. Supp. 3d at 132.
[24] *Id.* at 133.
[25] 42 U.S.C. §§ 4321-4347 (2012).
[26] 33 U.S.C. §§ 1251-1387 (2012).

Administrative Procedure Act ("APA")[27] by not assessing the entire pipeline.[28]

At least 560 miles of the pipeline run through privately owned land.[29] No federal statute authorizes the government to oversee or regulate pipeline running through private land.[30] The court said that despite the fact the pipeline crossed 27.28 miles of federal land,[31] Plaintiff "significantly overstated the breadth of federal involvement in the pipeline project and have failed to establish sufficiently that applicable federal statutes and regulations would require the extensive environmental review process that plaintiffs seek."[32] The court denied Plaintiffs' motion for a preliminary injunction on November 13, 2013, and the defendants and Enbridge filed a motion to dismiss.[33] On December 9, 2013, Plaintiff filed a motion for summary judgment and brought the same claims as it did in its preliminary injunction motion.[34] Defendants responded with a cross-motion for summary judgment.[35] By this time, the defendants had conducted the environmental reviews for the easements sought by Enbridge and had given the company permission to begin construction on the portion of the pipeline running across federal lands.[36]

The United States District Court granted, in part, the defendants' and Enbridge's partial motion to dismiss and granted their cross-motions for

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[27] 5 U.S.C. §§ 701-706 (2012).
[28] *Sierra Club*, 64 F. Supp. 3d at 133.
[29] Sierra Club v. United States Army Corps of Eng'rs, 990 F. Supp. 2d 9, 13 (D.D.C. 2013). This private land comprised 2,368 tracts owned by 1,720 separate landowners. *Id.*
[30] *Sierra Club*, 64 F. Supp. 3d at 132.
[31] *Sierra Club*, 990 F. Supp. 2d. at 13. The pipeline crosses 13.68 total miles over 1,950 parcels of wetlands and 1.3 miles of other lands subject to the jurisdiction of the Army Corps of Engineers, and 12.3 total miles over 34 parcels of privately owned Indian land subject to the jurisdiction of the Bureau of Indian Affairs. *Id.* at 13-15.
[32] *Id.* at 13. The court also said the Plaintiff did not show irreparable harm would result from the continuing construction of the pipeline during litigation and the balance between harms and public interest factors did weigh in their favor. *Id.*
[33] *Sierra Club,* 64 F. Supp. 3d at 136.
[34] *Id.* The plaintiffs also had a comment from the Environmental Protection Agency ("EPA") on their side this time, concluding that the entire pipeline should be analyzed according to NEPA. *Id.* at 137.
[35] *Id.* at 136.
[36] *Id.* at 137.

summary judgment on all remaining claims, allowing for the pipeline construction to proceed.[37] The court held that when the defendants only had authority over small segments of the pipeline, the pipeline traverses mostly private land, and the defendants have no authority to oversee control of that land, no federal agency has an obligation under any statute to conduct an environmental review of the entire pipeline.[38]

III. LEGAL BACKGROUND

The plaintiffs focused on three Congressional acts – the National Environmental Protection Act ("NEPA"),[39] the Clean Water Act ("CWA"),[40] and the Administrative Procedure Act ("APA")[41] – to make their case.[42][43] The NEPA is the basic national charter for environmental protection.[44] Its general purpose is to require the federal government to consider the environmental consequences of its actions.[45] The CWA's purpose is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[46] The CWA accomplishes this by prohibiting the discharge of pollutants like dredged material into the waters – with some exceptions.[47] Under the APA, a court reviews an agency's actions to determine whether it

[37] *Id.* at 133-34.
[38] *Id.* at 134.
[39] 42 U.S.C. §§ 4321-4347 (2012).
[40] 33 U.S.C. §§ 1251-1387 (2012).
[41] 5 U.S.C. §§ 701-706 (2012).
[42] *Sierra Club*, 64 F. Supp. 3d at 132-33.
[43] In the preliminary injunction hearing, the plaintiffs also cited the Oil Pollution Act, 33 U.S.C. §§ 2701-2762 (2012), which mandates that the operators of oil facilities submit a plan for the worst-case scenario oil discharge. Sierra Club v. United States Army Corps of Eng'rs, 990 F. Supp. 2d 9, 16 (D.D.C. 2013). However, the operator does not have to submit a plan before constructing a pipeline. 49 C.F.R. § 194.7(a) (2005). The operator can even run a pipeline for up two years without approval of the plan as long as it has been submitted and operator certifies it can capably deal with an oil spill. 49 C.F.R. §§ 194.7(c), 194.119(e) (2009).
[44] 40 C.F.R. § 1500.1 (2013).
[45] 42 U.S.C. § 4331(b)(1) (2012).
[46] 33 U.S.C. § 1251 (2012).
[47] 33 U.S.C. §§ 1311, 1344, 1362 (2012).

is "arbitrary or capricious."[48] Domestic pipelines built on private land do not require federal authorization.[49]

The NEPA requires agencies to consider the environmental consequences of "major federal action … significantly affecting the quality of human environment."[50] "Major federal actions" are defined as "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies."[51] The regulations direct each federal agency to decide which of its activities qualifies as a major federal action.[52] If an agency is not spearheading the project, a major federal action occurs when the agency issues a permit allowing the project to proceed.[53] Thus, an otherwise non-federal action can become federalized for NEPA purposes if the federal government exercises substantial control over the otherwise private project.[54]

Not all of an agency's activities can properly be considered major federal actions; only those that implicate an agency's decision-making authority qualify as major federal actions under the NEPA.[55] In some

[48] 5 U.S.C. § 706(2)(A) (2012).
[49] Sierra Club v. United States Army Corps of Eng'rs, 990 F. Supp. 2d 9, 32 (D.D.C.2013).
[50] 42 U.S.C. § 4332(2)(C) (2012).
[51] 40 C.F.R. § 1508.18 (2014).
[52] 40 C.F.R. § 1507.3(b) (2014).
[53] *See Sierra Club*, 990 F. Supp. 2d at 25-26; *see also* Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1117 (9th Cir. 2000) (finding no major federal action when project "could proceed without the permit" issued by a federal agency).
[54] *See, e.g.*, Daniel R. Mandelker, NEPA Law & Litig. § 8:19 (2d ed. 2015) (noting that in cases where "the action claimed to fall under NEPA was nonfederal, the question becomes whether the action was federalized and brought under NEPA because a federal agency exercised control over the nonfederal action"); 40 C.F.R. § 1508.18 (defining "major federal action" to include actions "potentially subject to Federal control and responsibility"); Citizens Alert Regarding the Env't v. EPA, 259 F. Supp. 2d 9, 20 (D.D.C. 2003), *aff'd* 102 F. App'x 167 (D.C. Cir. 2004) (noting that a non-federal project can be federalized where the federal agencies "have sufficient authority over the local project so as to control or influence its outcome"); Ross v. Fed. Highway Admin., 162 F.3d 1046, 1051 (10th Cir. 1998) (a project may be federalized where "the federal government has actual power to control the project") (internal quotation marks and citation omitted).
[55] *See, e.g.,* Citizens Against Rails to Trails v. Surface Transp. Bd., 267 F.3d 1144, 1151 (D.C. Cir. 2001).

circumstances, the issuance of a "Biological Opinion and Incidental Take Statement" by the United States Fish and Wildlife Service ("FWS") can prompt the NEPA review.[56] Under the Endangered Species Act ("ESA"),[57] all federal agencies must consult with the FWS to ensure that any action or support does not jeopardize the existence of endangered or threatened species or their habitat.[58] The FWS must then issue an opinion about its findings and, if any issues are identified, suggest reasonable and prudent alternatives to avoid the ESA violation.[59] However, Biological Opinion and Incidental Take Statements pursuant to the ESA do not directly affect the agency's ensuing underlying action under consideration because the requesting agency ultimately decides how to process the information.[60]

CWA verification does not qualify as a major federal action when the United States Army Corps of Engineers ("the Corps") provides a verification letter for a general permit, and for many projects seeking a general permit there is no federal action whatsoever.[61] Under the CWA, a party seeking to discharge dredged material into wetlands or waters under the jurisdiction of the Corps must obtain federal approval[62] either by applying to the Corps for an individual permit[63] or requesting that the Corps verify that the actions are already authorized under an existing general permit.[64] The National Permitting System deals with construction projects likely to have "minimal separate" or "cumulative adverse" effects on the environment.[65] Nationwide Permit 12 ("NWP") specifically allows discharges into federal waterways for the construction of utility lines and associated facilities in U.S. waters as long as this does not result in the loss of more than a half-acre of the waters for

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[56] *See Sierra Club*, 990 F. Supp. 2d at 30; *see also* In re Consolidated Salmonid Cases, 688 F. Supp. 2d 1013, 1024 (E.D. Cal. 2010) (finding that Biological Opinion counts as a "major federal action" under NEPA because the federal agency itself managed and operated the projects at the heart of the Biological Opinion).
[57] 16 U.S.C. §§ 1531-1544 (2012).
[58] 16 U.S.C. § 1536(a)(2) (2012).
[59] 16 U.S.C. § 1536(b)(3)(a) (2012).
[60] 50 C.F.R. § 402.15(a) (2013).
[61] 33 C.F.R. § 330.1(e)(1) (2014).
[62] *See* 33 U.S.C. § 1344 (2012).
[63] *Id.* § 1344(a).
[64] *Id.* § 1344(e).
[65] 33 U.S.C. § 1344(e)(1) (2012); *see also* Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184, 10,271 (Feb. 21, 2012).

each single and complete project.[66] A utility line includes any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose,[67] and a single and complete project encompasses each crossing of a water body at a separate and distant location.[68] The cumulative effects caused by all of the crossings are also evaluated.[69]

In determining the scope of the required environmental review, the mandate to consider "connected actions" comes into play.[70] The regulations provide that "the scope of an environmental impact statement" should include any connected actions.[71] Connected actions are those that are "closely related."[72] When determining the scope of environmental impact statements, agencies shall consider whether: (1) the actions will automatically trigger other actions which may require environmental impact statements; (2) the actions cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) the actions are interdependent parts of a larger action and depend on the larger action for their justification.[73] The regulations also provide that:

> "[a] lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either: (1) proposes or is involved in the same action; or (2) is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity."[74]

The APA also determined the standard of review.[75] In most civil cases, courts grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[76] However, the court takes on a limited role when

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[66] 77 Fed. Reg. at 10,184, 10,271 (Feb. 21, 2012).
[67] *Id.*
[68] 77 Fed. Reg. at 10,290 (Feb. 21, 2012).
[69] 77 Fed. Reg. at 10,287 (Feb. 21, 2012).
[70] 40 C.F.R. § 1508.25 (2014).
[71] 40 C.F.R. § 1508.25 (2014).
[72] *Id.* § 1508.25(a)(1).
[73] *Id.*
[74] 40 C.F.R. § 1501.5(a) (2014).
[75] Stuttering Found. of America v. Springer, 498 F. Supp. 2d, 203 207 (D.D.C. 2007).
[76] Fed. R. Civ. P. 56(a).

reviewing administrative record to determine the level of an agency's compliance with the APA.[77] Under the APA, the agency resolves factual issues to obtain a decision supported by the administrative record, whereas "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."[78] So, "when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal," and "[t]he 'entire case' on review is a question of law."[79]

When a governing statute lacks a standard of judicial review, the APA provides a default standard: "[a] court must set aside agency action it finds to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[80] The "arbitrary and capricious" standard "is highly deferential" and the court must, therefore, "presume the validity of agency action."[81] An agency acts arbitrarily or capriciously when it relies on factors Congress had not intended for it to consider, fails to consider an important aspect of the problem, offers an explanation for its decision that conflicts with the evidence, or is so implausible that it cannot be attributed to a different viewpoint or level of expertise.[82] However, when an agency is responsible solely for a small part of a larger project, it need not consider anything outside of its jurisdiction.[83]

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[77] *Stuttering*, 498 F. Supp. 2d at 207.
[78] *Id.* (quoting Occidental Eng'g Co. v. INS, 753 F.2d 766, 769-70 (9th Cir. 1985)).
[79] Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (footnote omitted) (citations omitted).
[80] Tourus Records, Inc. v. DEA, 259 F.3d 731, 736 n. 10 (D.C. Cir. 2001) (quoting 5 U.S.C. § 706(2)(A) (2012)).
[81] Am. Horse Prot. Ass'n v. Yeutter, 917 F.2d 594, 596 (D.C. Cir. 1990) (citation omitted).
[82] Stephens v. U.S. Dept. of Labor, 571 F. Supp. 2d 186, 191 (D.D.C. 2008).
[83] *See, e.g.,* Weiss v. Kempthorne, 580 F. Supp. 2d 184, 189 (D.D.C. 2008) ("In conducting an EA where the proposal being reviewed is but a small piece of a larger project over which the agency has no authority, an agency does not go beyond the scope of its permitting authority to review the area over which it has no jurisdiction.") (citations omitted).

IV. INSTANT DECISION

The plaintiff's primary complaint – that the National Environmental Protection Act ("NEPA") required the defendants to perform a comprehensive review of potential environmental impacts of the entire Flanagan South Pipeline ("the pipeline") before its construction commences. The complaint relied on three bases: (1) that the defendants' activities qualified as "major federal actions," so they should have done an assessment of the entire pipeline, (2) that the myriad of all the defendants' federal activities indicates that the defendants have sufficient control over the pipeline, despite its private ownership and construction on overwhelmingly private land, and (3) that the defendants must review the pipeline in its entirety because the pipeline is one "connected action."[84]

In the instant case, the court ruled that a "major federal action" includes "actions with effects that may be major and which are potentially subject to Federal control and responsibility."[85] However, it is established that if a federal agency itself is not undertaking or financing the project, the agency's action only qualifies as a "major federal action" if the act is tantamount to a permit allowing the project to proceed.[86] The plaintiffs argue that the Army Corps of Engineers ("the Corps"), by issuing verification letters allowing the construction of the pipeline across federal waters and wetlands, and the United States Fish and Wildlife Service ("FWS"), by issuing a biological opinion and incidental take statement, "were effectively 'permits' for the purpose of the NEPA definition."[87]

The court found two ways a party can seek approval for a pipeline constructed across federally controlled property: (1) by applying to the Corps for an individual permit, or (2) by requesting that the Corps verify that an already-existing general permit authorizes the pending actions.[88] Under the general permitting system, a party is "merely requesting 'verification' of their own belief that the proposed construction project satisfies the Corps'

[84] Sierra Club v. U.S. Army Corp of Eng'rs, 64 F. Supp. 3d 128, 144 (D.D.C. 2014).
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 145.

previously established requirements."[89] In this case, Enbridge went to the Corps for "verification" that the construction was consistent with Nationwide Permit 12, a general permit.[90] The court found these verifications to be clearly distinct from an individual permit.[91] A request for an individual permit requires the Corps to consider "the location, purpose and need for the proposed activity" as well as "the type, [source,] composition and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material."[92] The Corps also determines whether the particular project satisfies the applicable regional guidelines.[93] A request for verifications under the Clean Water Act ("CWA") general permitting system allows the Corps "to designate certain construction projects as eligible for the CWA discharge permits 'with little, if any, delay or paperwork' because they fit within [certain] pre-cleared categories of activities."[94]

In the instant case, the court also held that the plaintiffs were unable to demonstrate that the Biological Opinion and Incidental Take Statement demonstrated that the FWS had a duty to conduct its own NEPA review because the statement does not have a direct effect on the underlying action; rather, it influences the action of the agency that requested the statement.[95] The court stated that in this instance the only way the statement could function as a permit would be if the underlying federal action hinged on it.[96] Furthermore, the FWS ultimately concluded the pipeline would probably not have any major negative impact.[97] Therefore, neither the verifications nor the biological opinion and incidental take statement satisfied the "major federal action" requirement. As such, the court issued summary judgment in favor of the defendants.[98]

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[89] *Id*.
[90] *Id.*
[91] *Id.* at 146.
[92] *Id.* at 146-47 (*quoting* 33 C.F.R. § 325.1(d) (2014)).
[93] *Id.* at 147.
[94] *Id.* (*quoting* 33 C.F.R. § 330.1(b) (2014)). The plaintiffs sought to sidestep this argument by claiming the Corps had "discretion over a substantial part" of the pipeline, which makes the verifications qualify as "major federal actions." The court stated the plaintiffs had a point, but it was immaterial to the applicable legal process. *Id.* at 146.
[95] Which, in this case, is the Corps and co-defendant Bureau of Indian Affairs. *Id*. at 148.
[96] *Id.*
[97] *Id.* at 149.
[98] *Id.* at 144.

In response, the plaintiffs argued that the collective actions of the defendants displayed a requisite degree of control over the project and effectively "federalized" the pipeline for NEPA purposes.[99] However, the court found that because every reasonably sized oil pipeline project would likely pass over federal land or waters, finding in the plaintiffs' favor would transform the NEPA into a statute requiring environmental review over all domestic oil pipelines, and Congress has yet to enact an environmental statute that federalizes the construction of private, domestic oil pipelines.[100] The court found the defendants' involvement to be minor, and the plaintiffs' contention to be at odds with the court's perception and conclusory, failing to offer any legal argument or evidence to demonstrate its point.[101] Therefore, the defendants' collective actions did not federalize the pipeline and summary judgment was entered in their favor.[102]

The plaintiffs' final contention on their core NEPA claim is that the pipeline should be analyzed as a whole because it is one "connected action" and all the various activities of the defendants are interdependent on the larger action of constructing and operating the pipeline.[103] However, the instant court found that the plaintiffs incorrectly interpreted when an agency must consider "connected actions."[104] Whether something is a "connected action" is a matter of scope to be determined only after finding that "major federal actions" existed for the purposes of an NEPA review.[105] The court had already shown that no "major federal action" existed, and nothing in the federal regulations otherwise triggered an agency's NEPA responsibility.[106] The court rejected the plaintiffs' arguments and concluded that the "connected action" doctrine did not apply, noting that it was inconsistent under the NEPA to require the defendants to conduct environmental impact assessments over the parts of the pipeline they do not control.[107]

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[99] *Id.* at 150.
[100] *Id.* (referring to the opinion in Sierra Club v. U.S. Army Corps of Eng'rs, 990 F. Supp. 2d 9, 37 (D.D.C.2013)).
[101] *Id.* at 151.
[102] *Id.* at 152.
[103] *Id.* at 152-53.
[104] *Id.* at 153.
[105] *Id.*
[106] *Id.* at 154.
[107] *Id.* at 155.

The plaintiff lost on all counts in the instant case.[108] The court held that because Enbridge's pipeline runs across 95 percent private property over which the federal agencies do not have the requisite authority, no statute obliges any federal agency to conduct an environmental review of the entire pipeline's impact.[109]

V. COMMENT

While the court's decision in the instant case is not shocking, it is somewhat unsettling. The case essentially demonstrates a crude blueprint for how to circumvent the National Environmental Protection Act ("NEPA"). If a private company builds an oil pipeline over private land, no federal agency has the obligation under the NEPA, or any other statute, to conduct an environmental study of the impact of that section.[110] If the pipeline crosses over federal land or waterways, the federal agencies are required to issue environment impact statements or assessments when granting an easement for this purpose.[111] But the issuance of these statements does not qualify as a "major federal action" under the NEPA – and therefore cannot trigger a comprehensive survey of the pipeline's environmental impacts.[112] So as long as you are a private company operating on predominantly private land, the NEPA does not apply to you.

If the purpose of the NEPA is in part "to promote efforts which will prevent or eliminate damage to the environment,"[113] then the legislation fails here. If federal agencies assessed only 27.28 miles of the 589-mile pipeline,[114] that leaves 561.72 miles unassessed. The NEPA did its job for only 4.6 percent of the pipeline. In very few situations do efficiency rates that low suggest success. The environment itself cares little if the land is federally or privately owned. The effects are the same. An oil spill will negatively

[108] *Id.* at 157-58.
[109] *Id.* at 133.
[110] Sierra Club v. United States Army Corps of Eng'rs, 64 F. Supp. 3d 128, 135 (D.D.C. 2014).
[111] *Id.*
[112] *Id.* at 139.
[113] 42 U.S.C. § 4321 (2012).
[114] *Sierra Club*, 64 F. Supp. at 135.

affect species on land and water no matter whether the property is owned by the National Park Services or John Doe. The goal should be to prevent spills, leaks, and other negative environmental impacts regardless of the land ownership. However, statutory language of the NEPA makes it clear that this is unachievable. Only federal land is protected, which covers about 635-640 million acres, most of which is in the southwestern United States.[115] That leaves about 72 percent of the country's estimated 2.27 billion acres at risk of environmental abuse.[116]

Understandably, this concerned Sierra Club, which is no stranger to litigation in matters concerning environmental protection.[117] In a press release prior to the preliminary injunction hearing, Sierra Club staff attorney Doug Hayes said: "This pipeline was rubber-stamped behind closed doors with no public involvement whatsoever. Neither the Corps nor any other federal agency analyzed the risks of tar sands spills or the dismal safety record of Enbridge, as required by the National Environmental Policy Act."[118] That could explain its shotgun firing of claims – some legitimate, some seemingly desperate – in its attempt to coax the government into forcing the agencies to conduct a comprehensive environmental review of the pipeline. It should be noted that the Sierra Club is not trying to shut down Enbridge's pipeline entirely; rather, the plaintiffs just want an environmental review and the reassurance that the entire pipeline is up to NEPA standards before it is built and operational.[119] Perhaps an unstated goal of Sierra Club is to delay construction as well, but the instant case is not about shutting the pipeline down. Presumably, given Sierra Club's mission for responsible use of resources,[120] compliance with its request for a comprehensive review

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[115] ROSS W. GORTE, ET. AL, CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 2 (2012); The Open West, Owned by the Federal Government, N.Y. TIMES (Mar. 23, 2012), http://www.nytimes.com/interactive/2012/03/23/us/western-land-owned-by-the-federal-government.html.

[116] GORTE, supra note 6, at 2.

[117] SIERRA CLUB, http://sierraclub.org/policy (last visited Nov. 7, 2014) (stating its mission includes promoting the responsible use of the earth's resources through whatever lawful means possible).

[118] Press Release, Sierra Club, Sierra Club Sues U.S. Over Rubber Stamp of Flanagan South Pipeline (Aug. 23, 2013) (on file at http://content.sierraclub.org/press-releases/2013/08/sierra-club-sues-us-over-rubber-stamp-flanagan-south-pipeline).

[119] *Sierra Club*, 64 F. Supp. at 136.

[120] GORTE, *supra* note 6, at 2.

would quell its concerns. Only after an environmental study finds no significant impact can Enbridge continue with its FS Pipeline plans.

Given its stated purpose, the NEPA should cover privately owned land and a survey of the pipeline should have been done. In the instant case, the federal defendants most likely wanted to avoid wasting time and resources by conducting such an extensive survey. According to data collected by the Department of Energy, its median environmental impact statement contractor costs from 2003 to 2012 was $1.4 million.[121] Enbridge most likely did not want anything to interfere with the construction schedule. The median environmental impact statement completion time from 2001 to 2010 generally varied between twenty and thirty-five months.[122] Completion of the pipeline has already been delayed, as Enbridge's goal was to finish by mid-2014.[123] If the environmental impact study found a negative impact, Enbridge would have to pay the extra costs for complying with the study. Instead, the NEPA lets Enbridge off the hook. Congress passed the NEPA in 1969 in response to public pressure, and the final product was the result of a "compromise of a variety of pressures and points of view."[124] Congress clearly intended the act to apply to federal actions and federal agencies.[125] But, what exactly Congress intended to accomplish with this piece of legislation does not appear in the text of the act nor is it clarified by the remarkably uninformative legislative history.[126]

Regardless of the reasoning behind it, the application of the NEPA to federal land is nothing new.[127] Regulations clearly state that the NEPA

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[121] U.S. Gov't. Accountability Office, GAO-14-369, National Environmental Policy Act: Little Information Exists on NEPA Analyses 2 (2014).
[122] NATIONAL ENVIRONMENTAL POLICY ACT LESSONS LEARNED, U.S. Department of Energy Quarterly Report, September 1, 2011; Issue No. 68, third quarter, http://energy.gov/sites/prod/files/LLQR-2011-Q3.pdf, page 4.
[123] *Flanagan South Pipeline Project*, ENBRIDGE, *available at* http://www.enbridge.com/~/media/www/Site%20Documents/Delivering%20Energy/Projects/Flanagan/ENB2013-FlanaganSouth-L05.pdf.
[124] 4-9 Treatise on Environmental Law § 9.01 – Environmental Bill of Rights or Disclosure Statute: Legislative History, Page 1.
[125] *Id.*
[126] *Id.*
[127] *See* Spiller v. Walker, 2002 U.S. Dist. LEXIS 13194, (W.D. Tex. July 19, 2002) (stating the regulations are binding on federal agencies.); Williams v. Dombeck, 151 F.

applies to *federal* agencies,[128] so the summary judgment in favor of the defendants is not surprising. What is surprising is that the case's holding clarifies that even if the pipeline collectively crosses a significant portion of federal land and water (27.28 miles covers a lot of territory), federal agencies are still not required to assess the environmental impact of the overall project.

Some of the reasoning behind the court's decision demonstrates the flaws of the NEPA, the Clean Water Act ("CWA"), and the Administrative Procedure Act ("APA"). The court points out that Nationwide Permit 12, issuance of which Sierra Club contends counts as a major federal action, required a cumulative effects analysis, but only on a regional basis.[129] Engineers from four different districts – Kansas City, St. Louis, Rock Island, and Tulsa – each performed analysis of the water crossings in their region.[130] But no statute requires the Corps to analyze the 1,950 water crossings in their entirety.[131] Looking at water impact by region seems misguided. Unless every body of water is self-contained, such as a lake or pond (and also assuming no underground water flow), rivers and streams and creeks could carry the oil away from the district. Oil and waterways do not adhere to arbitrary manmade boundary lines. As these districts are adjacent, anything that affects one region could affect the others. Allowing a regional – instead of a cumulative – review neglects to seriously consider the potential impact on the environment.

The court also notes that the regulations implementing the NEPA allow for federal agencies' own regulations to govern whether or not an activity qualifies as a major federal action for NEPA purposes.[132] No regulation requires an agency to determine the scope of required NEPA

Supp. 2d 9 (DDC 2001) (stating that the Council on Environmental Quality administers and promulgates NEPA regulations that are binding on federal agencies).

[128] 40 C.F.R. § 1500.1 (2014).

[129] Sierra Club v. United States Army Corps of Eng'rs, 64 F. Supp. 3d 128, 146 (D.D.C. 2014); *See also* Reissuance of Nationwide Permits, 77 Fed. Reg. 10184, 10264 (stating "cumulative effects are evaluated on a regional basis" and the "[c]umulative effects analysis may be done on a watershed basis, or by using a different type of geographic area, such as an ecoregion.").

[130] *Sierra Club*, 64 F. Supp. 3d at 150.

[131] *Id.*

[132] *Id.* at 153.

analysis until after that determination is made.[133] This certainly takes some of the power out of the statute. If agencies determine what constitutes a major federal action, then it could be conceivable that an agency may make regulations so that nothing counts as a major federal action. By allowing self-regulation, the NEPA regulates nothing. Parameters should be set by Congress to guide the agencies' discretion in determining major federal actions.

Of course, the main deficiency at issue here is the NEPA's lack of jurisdiction over portions of the pipeline running across non-federal land and waterways.[134] The instant court refused to extend the NEPA's authority, stating, "it would be manifestly inconsistent with the purposes of the NEPA" to require an environmental impact statement for the portions of the pipeline "over which the federal government has no control."[135] If it is not federal land or water, it is not protected. Although the simple solution is to expand the scope of the NEPA, this is easier said than done, as it would have to be a legislative matter.

The court also acknowledged that a Biological Opinion and Incidental Take Statement sometimes could trigger an NEPA review as a major federal action.[136] This occurs only when the project hinges on the statements' findings.[137] Because the Fish and Wildlife Service is required to conduct a Biological Opinion and Incidental Take Statement when requested,[138] the project's construction *does* hinge on the findings. Otherwise, the exercise would be futile. It is up to the requesting federal agency to decide what to make of the report, so it's possible the agency, faced with the possibility of extinction of a species, could choose to ignore the report. This does not seem to be in the spirit of the NEPA.

The statutes controlled the court's decision in the instant case, but some of Sierra Club's claims have merit. The court noted that if a federal

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[133] *Id.*
[134] *Id.*
[135] *Id.* at 155.
[136] *Id.* at 140-41.
[137] *Id.* at 148.
[138] *Id.* at 135.

agency is not "undertaking or financing the project in question, the agency action qualifies as major federal action for NEPA purposes only if the agency's act is tantamount to a permit that allows the project to proceed."[139] Sierra Club argues Nationwide Permit 12[140] fits that description.[141] But the court said this isn't an individual permit, which would pass as a major federal action.[142] It is a general permit, which is not a permit, but more of a "verification."[143] One can forgive Sierra Club for thinking that issuing a permit under the nationwide permitting system would constitute a permit. This may have been Sierra Club's strongest argument, but the court ruled as a matter of law based on semantics more than logic, and the plaintiffs lost on this point as well.

One can look at the court's decision as a narrow holding: it applies only to the construction of an oil pipeline, and only when private companies construct it on land that is 95 percent privately owned. One of Sierra Club's complaints stated that the federal agencies had a duty to inspect the entire pipeline because the non-federal project had become federalized.[144] The court rejected that argument because the "[p]laintiffs have significantly overstated the degree of federal involvement in the FS Pipeline."[145] In order for an action to become federalized, the "federal government must exercise substantial control over the otherwise private project."[146] So, what is the threshold at which a private project actually does become federalized? What constitutes "substantial control"? Is it by percentage of the land that is federal or by total mileage? The court here does not elaborate on its decision and does not answer these questions. At the least, we know federalization does not occur when any privately constructed pipeline traverses five percent or

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[139] *Id.* at 144 (internal quote omitted); *See* Sierra Club v. United States Army Corps of Eng'rs, 990 F. Supp. 2d 9, 25-26 (2013).
[140] Nationwide Permit 12 allows discharges into federal waterways as needed for "the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project." Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184, 10,271 (Feb. 21, 2012).
[141] *Sierra Club*, 64 F. Supp. 3d at 145.
[142] *Id.* at 146.
[143] *Id.*
[144] *Id.* at 138.
[145] *Sierra Club*, 990 F. Supp. 2d at 33.
[146] *Sierra Club*, 64 F. Supp. 3d at 150.

less of federal land, nor when any privately constructed pipeline traverses 27.28 miles or less. The court offers little guidance here.

Since the decision, construction has continued and the pipeline is nearing completion.[147] Once completed, Enbridge expects to pump 600,000 barrels of crude oil per day, increasing to 880,000 barrels.[148] Granted, it is entirely likely that an environmental study of the pipeline's impact was never and will never be necessary. It is entirely possible that the pipeline will operate without ever negatively affecting the environment in any way. How that plays out remains to be seen. It can never really be known what effect the lack of a comprehensive review has until something happens to negatively impact the environment, or until the pipeline shuts down. But a comprehensive review would have offered reassurance that, at the least, precautions were undertaken to help prevent a disaster/spill/catastrophe.

Enbridge may be the most scrupulous company in the world. In fact, the company claims a 99.9993 percent safe delivery record and states on its website "nothing is more important to us than the safety of our pipelines, our communities, and the environment."[149] However, Enbridge is responsible for a 2010 oil spill in which 843,000 gallons of crude spilled into a creek that led into the Kalamazoo River in Michigan.[150] Cleanup from that incident has continued through the litigation in the instant case.[151] The next company that comes along and builds a pipeline over the ample private land in America might be less concerned about its impact on the environment. The FS Pipeline generally runs parallel to an already existing pipeline owned by Enbridge, thereby somewhat minimizing its footprint on the environment.[152]

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[147] ENBRIDGE, http://www.enbridge.com/FlanaganSouthPipeline.aspx (last visited Nov. 7, 2014).
[148] *Id.*
[149] ENBRIDGE, http://www.enbridge.com/ECRAI/Line9ReversalProject/PipelineSafety.aspx (last visited Nov. 7, 2014).
[150] *EPA Response to Enbridge Spill in Michigan*, EPA, http://www.epa.gov/enbridgespill/ (last visited Nov. 7, 2014).
[151] *Id.*
[152] *Flanagan South Pipeline Project*, ENBRIDGE, *available at* http://www.enbridge.com/~/media/www/Site%20Documents/Delivering%20Energy/Projects/Flanagan/ENB2013-FlanaganSouth-L05.pdf.

However, nothing in the opinion indicates the court factored that into its reasoning for its decision. So, presumably the holding would apply equally to a company building a pipeline through previously untouched land and waterways.

There is no question that America thrives on oil. There is also no question that oil can have a destructive, even catastrophic, impact on the environment. Generally, those kinds of disasters are rare. But there can be a more subtle impact on the environment as well. The value of the short-term benefits stemming from the precaution of reviewing the entire pipeline for the environment and the long-term benefits of assessing the impact on future projects far outweigh any detriment to Enbridge and federal agencies. But, as the law is currently constructed, the courts cannot mandate a complete environmental impact study of a privately owned pipeline on private land.

VI. CONCLUSION

Plaintiff Sierra Club seems to have a legitimate concern in the instant case. A private company is constructing a 589-mile pipeline that will transport tar sands across four states and a combined 1,950 separate waterways. Only 27.28 miles of that pipeline was studied for its environmental impact, and the company constructing the pipeline has the specter of a recent devastating oil spill looming over it. So, Sierra Club wants an environmental impact study on all 589 miles of the pipeline cumulatively.

However, no statute provides Sierra Club with the means to achieve this. The NEPA, which was enacted in part to prevent damage to environment, cannot be of any assistance because it only applies to federal agencies and federal lands. Sierra Club tried to find a way around that with a six-claim complaint that looked for a possible loophole in the language of the NEPA, the Clean Water Act, and the Administrative Procedure Act. But the statutes and the court in the instant case do not afford the plaintiff a lifeline. The court had little choice but to issue summary judgment on all but one claim that was dismissed in favor of the defendant federal agencies. As a result, no environmental impact study of the roughly 560 miles of privately owned land was conducted.

It is difficult to say that the NEPA did not do its job here. The appropriate groups, according to NEPA guidelines, studied the federally

controlled land and waterways. However, the act comes up short. Only a small portion of the possibly affected environment benefitted from its existence. It would be difficult for the court to extend the scope of the NEPA, but it could be taken up on a legislative level. Oil is a critical natural resource, but also one that can have a profound impact on the environment. Given the history of oil spills in the United States, there is no reason to think it will never happen again. If it does, the oil will flow over private land and water just as easily as federal. The government and the pipeline's owner should be prepared and take precautions with this fact in mind.