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## Sierra Club v. United States Army Corps of Engineers, 803 F.3d 31 (D.C. Cir. 2015)

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***Sierra Club v. United States Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015)**

**Ariel Overstreet-Adkins**

Despite the majority’s “needlessly circuitous” route, as described by concurring Judge Brown, *Sierra Club v. U.S. Army Corps of Engineers* stands as a limit of the application of NEPA to a private pipeline constructed largely on private land. While the main issue identified by the District of Columbia Circuit Court was the scope of environmental review required under NEPA, the court also addressed issues dealing with the ESA and the CWA relating to the construction and operation of a pipeline in the Midwest. The court held that under these circumstances, NEPA review was mandated only for those small stretches where it crossed federally managed lands, not for the entire pipeline project.

I. INTRODUCTION

At issue in *Sierra Club v. United States Army Corps of Engineers* was the scope of environmental review required under the National Environmental Policy Act (“NEPA”) before the construction of the Flanagan South oil pipeline, stretching 593 miles from Illinois to Oklahoma.<sup>1</sup> In 2013, Sierra Club filed suit in the United States District Court for the District of Columbia, seeking to enjoin the construction and operation of the pipeline and to nullify a number of federal agency regulatory approvals relating to the pipeline.<sup>2</sup> On appeal, Sierra Club argued that under NEPA, the federal agencies should be required to prepare a NEPA analysis of the environmental impact of the entire pipeline, including those sections crossing private land and not otherwise subject to federal approvals.<sup>3</sup> Sierra Club also challenged the United States Army Corps of Engineers’s (“Corps”) verifications of the pipeline’s many water crossings under the Clean Water Act (“CWA”).<sup>4</sup> The United States Court of Appeals for the District of Columbia Circuit held that the federal government was not required to conduct NEPA analysis on the entire pipeline and rejected Sierra Club’s CWA challenge.<sup>5</sup>

II. FACTUAL BACKGROUND

Enbridge Pipelines (FSP), LLC, (“Enbridge”) began the planning and permitting process for the Flanagan South oil pipeline in 2011.<sup>6</sup> The pipeline was designed to run parallel to an existing pipeline and ship around 600,000 barrels of crude oil per day over 593 miles, from Flanagan, Illinois, through Missouri and

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<sup>1</sup> *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 33 (D.C. Cir. 2015).

<sup>2</sup> *Id.* at 34.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 35.

Kansas, to Cushing, Oklahoma.<sup>7</sup> From Cushing, the oil would then flow to Gulf Coast refineries.<sup>8</sup>

Before construction, Enbridge negotiated rights of ways across “approximately 2,400 tracts of land owned by approximately 1,700 private landowners.”<sup>9</sup> Enbridge received easements from the Corps and Bureau of Indian Affairs (“Bureau”) to cross thirty-four federally-managed parcels of Indian lands covering 12.3 total miles, and two federally owned land parcels covering 1.3 miles along the Mississippi and Arkansas Rivers.<sup>10</sup> The company also sought Corps CWA Nationwide Permit 12 verifications for dredge and fill at 1,950 water crossings.<sup>11</sup>

The Corps and Bureau consulted with the United States Fish and Wildlife Service (“Service”) under Section 7 of Endangered Species Act (“ESA”) to evaluate the potential impact to threatened or endangered species under these approvals.<sup>12</sup> The Biological Opinion (“BiOp”) issued by the Service concluded that the construction and operation of the pipeline would likely result in some take of the endangered Indiana Bat and American Burying Beetle, but that the take would not be “so extensive as to jeopardize the continued existence of the species.”<sup>13</sup> An Incidental Take Statement (“ITS”) included in the BiOp identified habitat restoration and monitoring efforts to minimize the take that would coincide with the project.<sup>14</sup> The Corps incorporated the ITS under its CWA jurisdiction but not under the Corps or Bureau easements.<sup>15</sup>

NEPA analyses were conducted by the Corps when it reissued Nationwide Permit 12, and by the Corps and Bureau in conjunction with the easements on a limited geographic basis in the form of environmental assessments.<sup>16</sup> No agency performed a NEPA analysis of the full pipeline project.<sup>17</sup>

### III. PROCEDURAL BACKGROUND

In August 2013, on the day Enbridge began construction of Flanagan South, Sierra Club filed suit against the Corps seeking a declaration that all the federal actions permitting the project were unlawful and a preliminary injunction to stop the construction of the pipeline.<sup>18</sup> The amended complaint asserted that the easements, CWA verifications, and issuance of the ITS “individually and collectively, constituted major federal action that triggered defendants’ NEPA

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 35, 38.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 35.

<sup>13</sup> *Id.* at 36.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 36, 38.

<sup>17</sup> *Id.* at 36.

<sup>18</sup> *Id.* at 42.

obligations’ to prepare NEPA analysis of ‘the entire project.’”<sup>19</sup> Sierra Club also alleged that the Corps verifications under the CWA were unlawful because the agency did not evaluate the cumulative impacts of the pipeline.<sup>20</sup> Enbridge intervened as defendant.<sup>21</sup>

The district court denied the preliminary injunction and ruled in favor of defendants’ motion for summary judgment, stating that the agencies had “‘permitting authority over only small segments of this private pipeline project and none of the defendant agencies, along or in combination, ha[d] authority to oversee or control the vast portions of the [ ] Pipeline that traverse private land.’”<sup>22</sup> The court also ruled for the defendants on the Sierra Club’s CWA claim, holding that conducting region-based analyses of the effects of the water crossings was appropriate.<sup>23</sup> Sierra Club appealed.<sup>24</sup>

#### IV. ANALYSIS

The District of Columbia Circuit Court focused on Sierra Club’s NEPA and CWA complaints on appeal. The court also ruled on two procedural issues, which are not discussed in this summary.

##### A. NEPA

Sierra Club’s main complaint in the case was that no federal agencies completed a NEPA analysis of the entire pipeline project.<sup>25</sup> The organization contended that the federal agency approvals for the easements, CWA verifications under Nationwide Permit 12, and the ITS implemented by the Corps in its verifications “triggered a requirement under NEPA that one of the agencies review the environmental impact of the entire pipeline, including portions outside the segments that the federal actions purported to address.”<sup>26</sup>

In addressing these issues under NEPA, the court examined two key areas: (1) the scope and implementation of the ITS as a federal action, and (2) the applicability of the connected actions, cumulative actions, and Corps-specific NEPA regulations.

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<sup>19</sup> *Id.* (quoting Complaint ¶ 5, *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31 (D.C. Cir. 2015) (No. 14-5205)).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 34.

<sup>22</sup> *Id.* at 42 (quoting *Sierra Club v. Army Corps of Eng’rs*, 64 F. Supp. 3d 128, 133-34 (D.D.C. 2014)) (brackets in original).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 38.

<sup>26</sup> *Id.*

### 1. Scope and Implementation of the ITS as Federal Action

Sierra Club argued that a federal action mandating NEPA review of the entire pipeline occurred upon either the issuance of the ITS by the Service during consultation with the Corps and Bureau, or when the Corps implemented the ITS as a condition for its CWA verifications.<sup>27</sup> The court concluded that the Service's issuance of the ITS in this case was not federal action that would mandate NEPA review, stating that the Service was acting in an advisory capacity in this case and therefore was not an "action agency," for NEPA purposes.<sup>28</sup>

However, the court held that the Corps's implementation of the ITS was a federal action, though limited in scope.<sup>29</sup> By implementing the ITS, the Corps made it the "functional equivalent" of a permit, constituting a federal action triggering NEPA review.<sup>30</sup> The court stated the obligations that arose for review "extended only to the segments under the Corps' asserted CWA jurisdiction," because the Corps "emphatically disclaimed responsibility outside the verification areas."<sup>31</sup> The Corps stated that it only had authority over "a very small percentage" of the pipeline and would "only initiate Section 7 ESA consultation, as appropriate, for the limited activities associated with this project that it has sufficient control and responsibility to evaluate."<sup>32</sup> The terms of the ITS and verifications made it clear to the court that Enbridge was only bound to comply with the ITS in the segments of the pipeline falling under the Corps's CWA jurisdiction.<sup>33</sup>

Because the Sierra Club argued from the beginning that the federal agencies should be required to conduct a NEPA analysis of the entire pipeline project, the court declined to address arguments relating to anything less than the whole pipeline as those arguments had not been preserved for appeal.<sup>34</sup>

### 2. Applicability of the Connected Actions, Cumulative Actions, and Corps-specific NEPA Regulations

The court was unpersuaded by Sierra Club's argument that both the connected-action and cumulative-action doctrines in the Council on Environmental Quality and Corps-specific NEPA scoping regulations should have been triggered.<sup>35</sup>

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<sup>27</sup> *Id.* at 45.

<sup>28</sup> *Id.* (citing *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 644 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 948 (2015)).

<sup>29</sup> *Id.* at 45.

<sup>30</sup> *Id.* at 46; *see* 40 C.F.R. § 1508.18(b)(4) (2015).

<sup>31</sup> *Sierra Club*; 803 F.3d at 47.

<sup>32</sup> *Id.* (quoting Pl.-Appellant's App. to Opening Br. at 403, *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015) (No. 14-5205)).

<sup>33</sup> *Id.* at 47-48.

<sup>34</sup> *Id.* at 48-49.

<sup>35</sup> *Id.* at 49 (citing 40 C.F.R. §§ 1508.25(a)(1)-(2), 1508.7 (2015); 33 C.F.R. pt. 325 app. B (2015)).

The court found Sierra Club's connected-action argument unconvincing, stating "[t]he connected actions regulation . . . does not dictate that NEPA review encompass private activity outside the scope of the sum of the geographically limited federal actions."<sup>36</sup> Rather, the purpose of the connected-action doctrine is to prevent federal agencies from artificially breaking their projects into segments to avoid addressing the full "scope and impact" of the projects.<sup>37</sup> The court noted that under *Delaware River Keeper*, projects that are "connected, contemporaneous, closely related, and interdependent" cannot be segmented by an agency if the entire project is subject to federal review.<sup>38</sup> While the court acknowledged the pipeline here fit the connection element of the rule, only five percent of the project was subject to federal review.<sup>39</sup>

Sierra Club further argued that "full-project NEPA review is required where federal agencies have substantial involvement in a private project such that it would not have been undertaken without the federal action," relying on *Karst Environmental Education & Protection, Inc.*<sup>40</sup> The court held that another case, *Macht*, which held that a rail project was not subject to NEPA analysis for the entire project because federal agencies only had regulatory control over "a negligible portion of the entire project,"<sup>41</sup> was more applicable here.<sup>41</sup>

The court similarly found Sierra Club's cumulative-action doctrine argument unpersuasive.<sup>42</sup> The court explained that a cumulative impact is that "which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."<sup>43</sup> This doctrine does not apply to geographic segmentation, otherwise "it would be wholly redundant of the connected actions doctrine."<sup>44</sup> Rather, it prevents agencies from ignoring environmental effects of other actions, federal or otherwise.<sup>45</sup> Because Sierra Club argued that the agencies failed to analyze the impacts of the entire pipeline project, rather than the agencies disregarding the cumulative environmental impacts of all actions on the distinct sections of the pipeline, the court held that the cumulative-actions doctrine did not apply.<sup>46</sup>

Deferring to the Corps interpretation of 33 C.F.R. Part 325, Appendix B, the specifically applicable NEPA scoping regulations, the court found that the regulations do not apply to easements or verifications.<sup>47</sup> Appendix B provides that

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<sup>36</sup> *Id.* at 49.

<sup>37</sup> *Id.* (quoting *Del. River Keepers v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)).

<sup>38</sup> *Id.* at 50 (quoting *Del. River Keepers*, 753 F.3d at 1308).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (citing *Karst Env'tl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1296 (D.C. Cir. 2007)).

<sup>41</sup> *Id.* at 50-51 (quoting *Macht v. Skinner*, 916 F.2d 13, 19 (D.C. Cir. 1990)).

<sup>42</sup> *Id.* at 51.

<sup>43</sup> *Id.* (quoting 40 C.F.R. § 1508.7).

<sup>44</sup> *Id.*; see *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 70-71 (D.C. Cir. 1987).

<sup>45</sup> *Sierra Club*; 803 F.3d at 51.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 51-52.

the Corps's NEPA analysis should encompass "those portions of the entire project over which the [Corps] has sufficient control and responsibility" when a party seeks a CWA permit for a specific activity that is part of a bigger project.<sup>48</sup> The Corps interprets Appendix B to apply only when individual CWA permits are issued, not general permits and verifications.<sup>49</sup>

### B. Clean Water Act

Sierra Club argued that the Corps should have assessed cumulative effects for the entire pipeline, not just the regional effects because of Nationwide Permit 12's instruction that the decision "shall 'include an evaluation of the individual crossings . . . as well as the cumulative effects caused by all of the crossings authorized by the [Nationwide Permit].'"<sup>50</sup> The court noted, however, that Nationwide Permit 12 states that "cumulative effects are evaluated on a regional basis" and "[c]umulative effects analysis may be done on a watershed basis, or by using a different type of geographic area, such as an ecoregion."<sup>51</sup>

Sierra Club further argued that the Corps did not explain its conclusions adequately.<sup>52</sup> Finding that the Corps's District Managers' conclusions were made "at the end of a lengthy memorandum explaining, among other things . . . the details concerning the scope of the proposed project in each respective district, the expected effect of the project on [jurisdictional] waters . . . within that district, and specific mitigation techniques to be employed in response" the court held that the Managers adequately supported their verification decisions.<sup>53</sup>

## V. CONCLUSION

The court held the federal agencies "were not required to conduct NEPA analysis of the entirety of the Flanagan South pipeline, including portions not subject to federal control or permitting."<sup>54</sup> The easements, CWA verifications, and authorization to take endangered species without liability under the ESA were "limited to discrete geographic segments of the pipeline comprising less than five percent of its overall length."<sup>55</sup> The court said the agencies were required to conduct NEPA analyses of "the foreseeable direct and indirect effects of those regulatory actions," but here were "not obligated also to analyze the impact of the construction and operation of the entire pipeline."<sup>56</sup>

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<sup>48</sup> *Id.* at 51 (quoting 33 C.F.R. pt. 325, app. B(7)(b)(1)-(3)).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 52 (quoting 77 Fed. Reg. 10,184, 10,287 (Feb. 12, 2012)).

<sup>51</sup> *Id.* (quoting 77 Fed. Reg. at 10,264).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 53 (quoting *Sierra Club*, 64 F. Supp. 3d at 157).

<sup>54</sup> *Id.* at 34.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*