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Ninth Circuit Should Reverse Keystone XL Pipeline NEPA Ruling

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The National Environmental Policy Act (NEPA) continues to result in delays to critical infrastructure projects despite streamlining pronouncements under the Obama and Trump Administrations. For example, the Department of Energy recently found that the average time to complete an environmental impact statement (EIS) is 49 months.[1] And this process is but one essential part of the steps needed to green light these projects.

Much of this delay can be attributed to agencies' efforts to cross every "t" and dot every "i" during the environmental review. Because these projects are often controversial and draw strident opposition, agencies are increasingly risk adverse and seek to meticulously evaluate every possible detail within an EIS. This approach is contrary to law and precedent. As long as an agency demonstrates that it has taken a "hard look" at environmental impacts, courts have historically deferred to agency expertise and decision making. But in *Indigenous Environmental Network v. U.S. Department of State*,[2] the district court's opinion inappropriately "fly specked" the Department of State's 2014 EIS for the TransCanada Keystone Pipeline ("Keystone") and substituted its judgment for that of the agency.[3] Such decisions only serve to delay projects even further, wasting agency resources for little to no additional environmental benefit.

It is a bedrock principle of NEPA that "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized."[4] Instead, a supplemental EIS is required only where the new information shows that the action will affect the quality of the human environment in a significant manner or to a significant extent not already considered.[5] The court in *Indigenous Environmental Network* disregarded this well-established standard, finding that new information related to oil spills and lower than expected oil prices necessitated a second supplemental EIS. While it's true this new information arose after the 2014 EIS was issued, the Department in fact considered the information in its 2017 Record of Decision (ROD) and found that it did not rise to the level of requiring a supplement because such information would not significantly impact the EIS analysis.[6] The court did not find otherwise and no evidence was presented to support that finding. If anything, the administrative record showed that lower oil prices would lead to *fewer* environmental impacts.[7]

The court also inappropriately found that a supplemental EIS was required to assess the cumulative impacts of a separate and independent pipeline project, the Alberta Clipper Expansion Project. While NEPA requires

[1] U.S. Dep't of Energy, National Environmental Policy Act Lessons Learned (Mar. 1, 2016) at 11 (available at: https://www.energy.gov/sites/prod/files/2016/03/f30/LLQR-March-2016.pdf).
[2] 347 F. Supp. 3d 561 (D. Mont. 2018).
[3] *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1183-84 (9th Cir. 1997).
[4] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989).
[5] *Idaho Wool Growers Ass'n v. Vilsack*, 816 F. 3d 1095, 1106 (9th Cir. 2016) (quoting *Marsh*).
[6] U.S. Department of State, Record of Decision and National Interest Determination ("ROD") (Mar. 23, 2017), at 13-15.
[7] Brief for Defendant at 60, *Indigenous Envtl. Network v. United States Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018).

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the environmental consequences of concurrently pending projects that may have "cumulative or synergistic environmental impacts" on the same resources to be considered together,[8] an agency need not do so if it is clear those cumulative impacts will be considered in the NEPA document of another project.[9] The Keystone SEIS did acknowledge the Alberta Clipper as a cumulative action. While it did not evaluate the cumulative greenhouse gas emissions from both pipeline projects in the Keystone EIS, the cumulative impacts of the two pipeline projects were analyzed together in the subsequent EIS for the Alberta Clipper Expansion Project. It is contrary to NEPA's purpose—informed decision making—and a waste of agency resources to require supplementation when an agency has clearly done the appropriate cumulative impact analysis in a subsequent NEPA document.[10] Furthermore, when NEPA's goals are not materially impeded by the omission, remand is not appropriate.[11]

NEPA also does not require all cultural resources to be exhaustively evaluated prior to any agency decision, especially when there is a Programmatic Agreement (PA) under the National Historic Preservation Act.[12] The court's decision to require a supplemental EIS because 1,038 acres of the route remain to be surveyed runs contrary to applicable law and precedent. Like many other large, linear infrastructure projects, the Department reasonably decided to engage in phased identification of cultural resources.[13] The passage of time between issuance of the EIS and the ROD should not change an agency's ability to rely on the framework established in the PA. Under the court's reasoning, a supplemental EIS would be required any time there is a gap between issuance of an EIS and a ROD, leading to an endless cycle of supplementation. A PA documents the framework for evaluating a project's cultural resources effects and appropriate mitigation—all that is required for agency decision-making.

Finally, the court inappropriately interjected its judgment in an area committed to agency discretion by law: the determination that a Presidential Permit is in the national interest. Such decisions are vested solely to the Department's discretion and are not reviewable under the Administrative Procedure Act.[14] Even if the decision were reviewable, the Keystone ROD explained the decision to approve the project (that had previously been denied) was in the national interest because it would "meaningfully support U.S. energy security" by "ensuring access to stable reliable, and affordable energy supplies," maintain "strong bilateral relations" with Canada while ensuring the countries' "shared interests in energy, environmental, and economic issues," provide economic benefits, and be constructed and operated to minimize and mitigate environmental impacts.[15] This was a clear, reasoned explanation for the Department's shift in decision.

In the end, courts should ask whether an EIS provided a "reasonably thorough discussion of the significant aspects of the probable environmental consequences"[16] and whether the agency was apprised of relevant information such that its decision was adequately informed. Here, the Department's decision to issue a Presidential Permit for the Keystone Pipeline unquestionably met this standard and should have been upheld without further environmental review. It is appropriate for the Ninth Circuit to reverse the District Court, and send a clear signal that arbitrary remands to conduct supplemental reviews to dot more "i"s and cross more "t"s should be avoided when agencies have documented their reasoned findings in compliance with NEPA.

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[8] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

[9] *N. Alaska Envtl. Ctr. v. Kepthorne*, 457 F.3d 969, 980 (9th Cir. 2006); *Ctr. For Envtl. Law and Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1010-11 (9th Cir. 2011); *Kleppe*, 427 U.S. at 415 n.26.

[10] *State of N.C. v. F.A.A.*, 957 F.2d 1125, 1131 (4th Cir. 1992) (finding it "not necessary at this point" and "a waste of resources" to require agency to consider cumulative actions when a subsequent EIS had already performed the required cumulative impacts analysis).

[11] *Ground Zero Ctr. For Non-Violent Action v. United States Dep't of Navy*, 860 F.3d 1244, 1252-53 (9th Cir. 2016).

[12] *Te-Moak Tribe v. U.S. Dep't. of Interior*, 608 F.3d 592, 601 (9th Cir. 2010) (upholding agency decision because agency had a plan in place about what to do when cultural resources were encountered); *Colorado River Indian Tribes v. Dep't of Interior*, No. EDCV1402504JAKSPX, 2015 WL 12661945, at *18-19 (C.D. Cal. June 11, 2015) (BLM took a "hard look" at cultural resources even though the FEIS stated the cultural trails were not completely identified and there were unknown subsurface resources).

[13] *See, e.g., HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1234 (9th Cir. 2014).

[14] *See Detroit Int'l Bridge Co. v. Gov't of Canada,* 883 F.3d 895, 903-04 (D.C. Cir. 2018).

[15] ROD, at 27-30.

[16] *California v. Block*, 690 F.2d 753, 761 (1982).

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