

Environmental Impact Reviews In Oil & Gas Operations

Professor Tracy Hester
Environmental Law in Oil & Gas

Nov. 6, 2017

Looking back – Fracking and the Safe Drinking Water Act



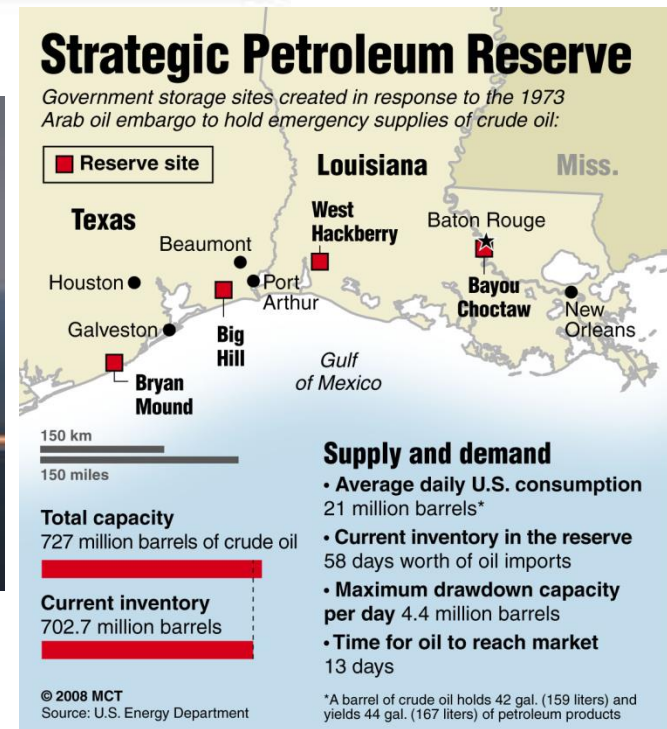
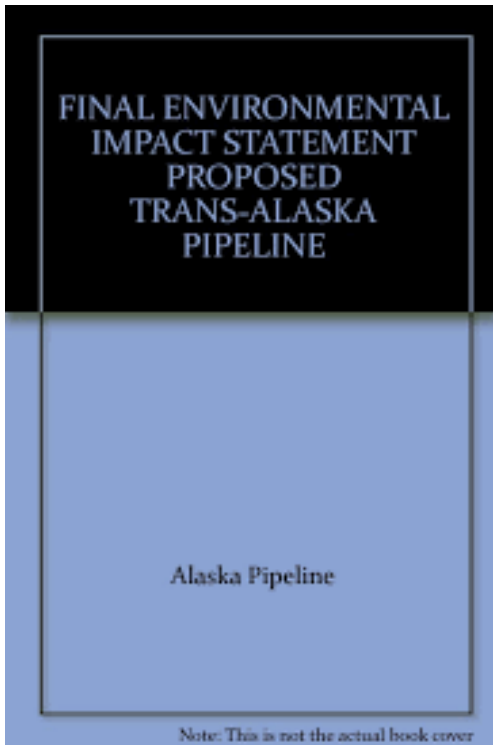
- Discharges from fracking and other oil & gas operations
 - Direct – NPDES, TPDES, and delegation
 - Indirect – sewer treatment systems, publicly owned treatment works
 - Pretreatment order
 - Bypass, Upset, Slugs
 - Injection
 - Safe Drinking Water Act, Underground Injection Control regs
 - Class II wells – enhanced oil recovery
 - Halliburton Amendment
- Seismicity effects
- Stormwater requirements and permitting
- OPA – liability, reporting, penalties



Does this look familiar?



Or these?





The common threat – environmental impact assessments

- Required under the **National Environmental Policy Act of 1969**
- One of the first modern environmental statutes, with broadest scope and aspirational goals
- Establishes a national policy 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.

42 U.S.C. sec. 101(a)





NEPA's machinery

- At heart: *All Process, No Substantive Standard*
- Triggers:
 - Major Federal Action +
 - That Significantly Affects +
 - The Quality of the Human Environment



“Major Federal Action”...

- Includes more than action directly by federal government
 - Discretionary actions, permitting decisions or approvals
 - Funding or grants
- Explicitly excludes
 - Congress
 - the judiciary, and
 - the President
 - EPA?
- Does not include enforcement activity (e.g., fracking enforcement initiative)



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“That Significantly Affects”...

- Must look to both context and intensity
 - Context – can include short-term and long-term effects, affected region, affected interests. Look to the size of the project to assess its context for impacts
 - Intensity – can include
 - Good and bad effects
 - Unique characteristics of geographic area (historical, cultural, park lands, “ecologically significant”
 - “highly controversial
 - “establish precedent for future action”
 - Possible effects are “highly uncertain” or involve “unique or unknown risks”



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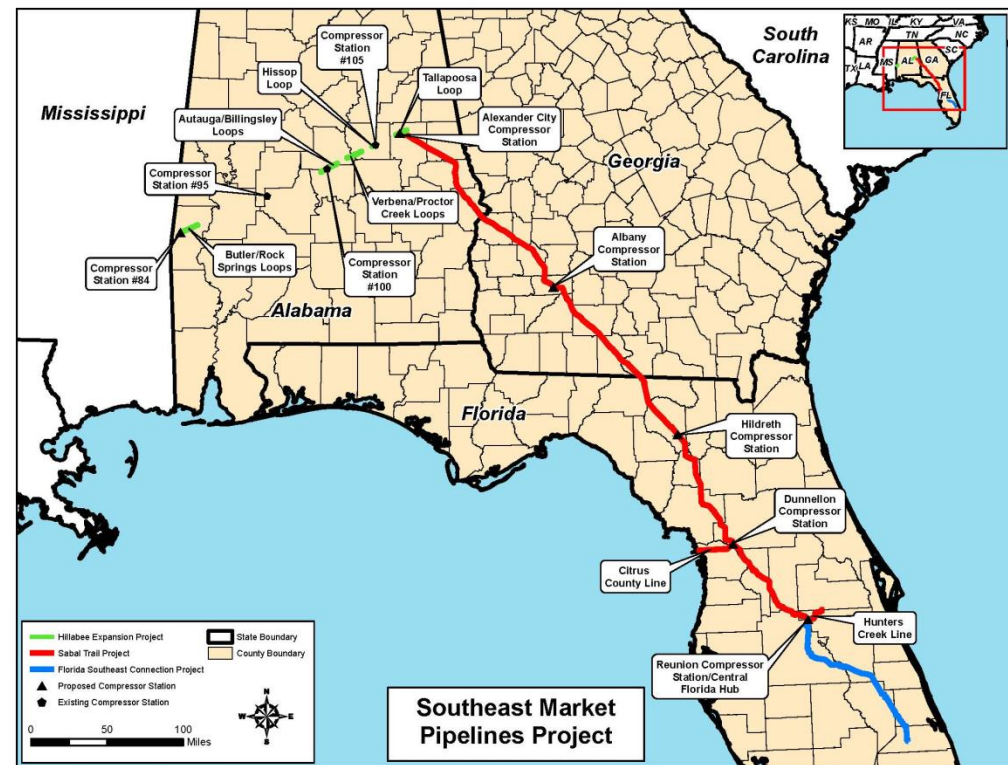
- Rule of Thumb: some physical effect required; can't rely solely on psychic injury
- But once physical injury established, can focus on historical, cultural and even aesthetic impacts.



“The Quality of the Human Environment”



- Must look to
 - *Direct* Effects (oil pipeline’s footprint)
 - *Indirect* Effects (oil pipeline’s effect at other ends of pipe)
 - *Cumulative* Effects (other pipelines in affected region)



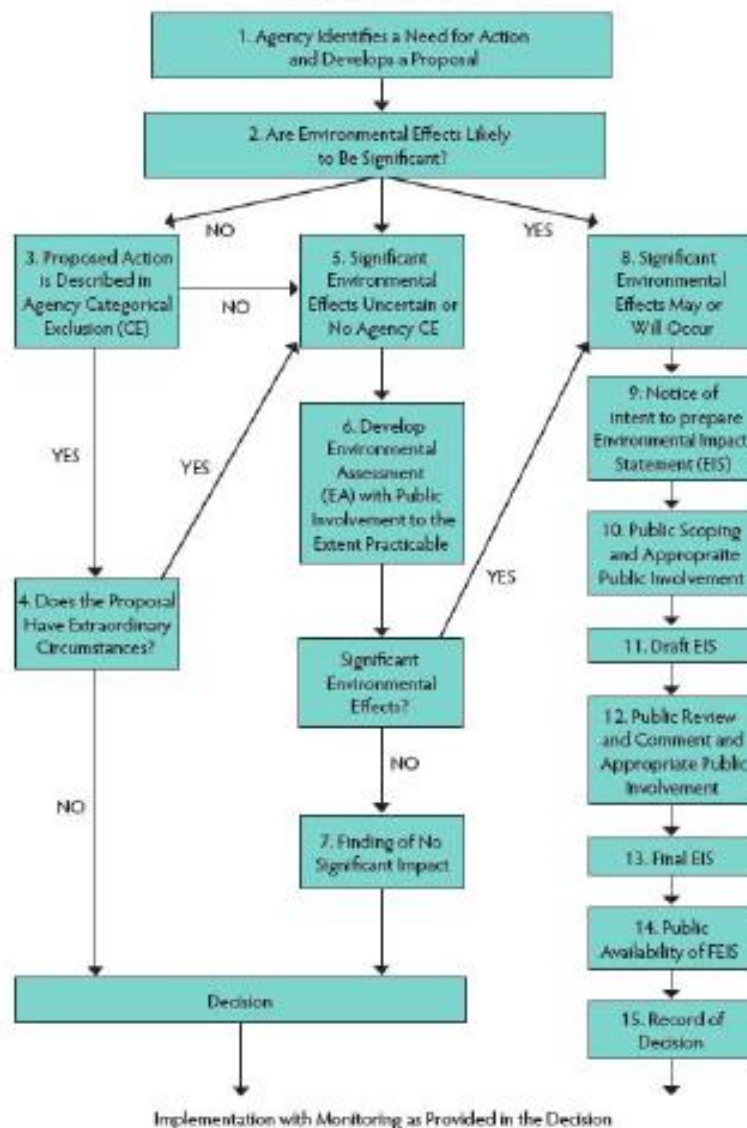


If NEPA applies, what process gets triggered?

- Environmental Assessment
- Finding of No Significant Impact (FONSI)
- Categorical Exclusion (Cat-X)
- Environmental Impact Statement
- Record of Decision



The NEPA Process



**Significant new circumstances or information relevant to environmental concerns or substantial changes in the proposed action that are relevant to environmental concerns may necessitate preparation of a supplemental EIS following either the draft or final EIS or the Record of Decision (CEQ NEPA Regulations, 40 C.F.R. § 1502.9(c)).*

NEPA Games



- Scoping and Segmenting – programmatic, regional, and site
- Mitigation Efforts
- Process, Procedure, Tactics and Strategy

THE KEYSTONE XL PIPELINE



SOURCE: TRANSCANADA PIPELINES LTD.; USGS

THE CANADIAN PRESS



NEPA and Oil & Gas

- Section 390 Categorical Exclusion
 - Statutory (Energy Policy Act of 2005)
 - Presumption, not absolute
- Qualify for Section 390 Cat-X if:
 - Individual surface disturbances of less than five (5) acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to NEPA has been previously completed.



Section 390 Cat-X for Oil & Gas Operations

- Drilling an oil and gas well at a location or well pad site at which drilling has occurred previously within five (5) years prior to the date of spudding the well.
- Drilling an oil or gas well within a developed field for which an approved land use plan approved within five (5) years prior to starting the well.
- Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five (5) years
- Maintenance of a minor activity, other than any construction or major renovation of a building or facility.



NEPA, Oil & Gas, and the Trump Administration

- Executive Order 13,807 (Aug. 15, 2017) on Environmental Review and Permits for Infrastructure
- “Infrastructure Projects” include

...energy production and generation, including from fossil, renewable, nuclear, and hydro sources,...pipelines...



NEPA, Oil and Gas, and the Trump Administration



- Presidential Memoranda on Keystone XL and DAP permit approvals (Jan. 17, 2017)
- Bernhardt memo (Aug. 31, 2017)
 - Interior Department projects
 - 150 pp (300pp for special projects)
 - 1 year to conclude



Presidential Documents

Memorandum of January 24, 2017

Construction of the Keystone XL Pipeline

Memorandum for the Secretary of State[,] the Secretary of the Army[, and] the Secretary of the Interior

Section 1. Policy. In accordance with Executive Order 11423 of August 16, 1968, as amended, and Executive Order 13337 of April 30, 2004, the Secretary of State has delegated authority to receive applications for Presidential permits for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country, and to issue or deny such Presidential permits. As set forth in those Executive Orders, the Secretary of State should issue a Presidential permit for any cross-border pipeline project that “would serve the national interest.”

Accordingly, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct as follows:

Sec. 2. Invitation to Submit an Application. I hereby invite TransCanada Keystone Pipeline, L.P. (TransCanada), to promptly re-submit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline, a major pipeline for the importation of petroleum from Canada to the United States.

Sec. 3. Directives. (a) *Department of State.* The Secretary of State shall, if the application referred to in section 2 is submitted, receive the application and take all actions necessary and appropriate to facilitate its expeditious review. With respect to that review, I hereby direct as follows:



Looking Ahead

- States have their own mini-NEPAs, and often much more stringent
 - California State Environmental Quality Act
 - New York State Environmental Quality Review
 - Texas – discretionary
- No NEPA citizen suit provision – have to use the federal Administrative Procedure Act.
 - Arbitrary and capricious standard
 - Standing
 - *Chevron* deference?



Questions?

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