

INSIGHTS

Courts Affirm Limits on Scope of Environmental Review

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Ruling on a pipeline project and a mine project, two different federal courts issued decisions Monday affirming limits on the scope of environmental review. The pipeline case was a challenge to Enbridge's Flanagan South pipeline, designed to transport tar sands crude from Illinois to Oklahoma. The mine case involved Raven Crest Contracting's Boone North No. 5 coal mine in West Virginia. Neither decision breaks new ground; their significance lies in reaffirming that NEPA analysis should be confined to the scope of the federal agencies' control over the project in question. These cases encourage federal agencies to fend off demands for broader consideration of social and political issues surrounding major infrastructure projects. The plaintiffs in the pipeline case took issue with the decision by the U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service and the Bureau of Indian Affairs that the National Environmental Policy Act does not require them to review the entire pipeline route, when their involvement with the project is limited. Each agency had determined that their involvement in the project was not sufficiently significant to warrant review of more than a small portion of the project.

As an oil pipeline, no FERC approvals were needed, so the only federal involvement was a Corps nationwide permit for filling wetland, a FWS biological opinion regarding possible limited endangered species impacts and a BIA easement over Native American land. The Court agreed that these actions were not sufficient, either individually or in aggregate, to require a review of the entirety of the pipeline project. It also agreed that the duty to submit an oil spill plan to the Pipeline and Hazardous Materials Safety Administration was not itself a major federal action for which a pipeline-wide NEPA analysis was required. The mine case had the same outcome.

There, the plaintiffs claimed that the Corps failed to adequately consider the human health impacts of surface coal mining. Plaintiffs asserted that such an analysis was required under both NEPA and the Clean Water Act. The court rejected Plaintiffs' NEPA claims, noting that (1) the project did not involve any valley fills, (2) the Corps' regulations limit its NEPA analysis to those portions of the project over which it has sufficient control and responsibility, (3) the Corps did indeed conduct a limited review of impacts, (4) other agencies had more expansive permitting authority over the project, such as the West Virginia Department of Environmental Protection (under the federal Surface Mining Control and Reclamation Act), and (5) SMCRA is inherently broad in scope. The court similarly discarded plaintiffs' Clean Water Act challenges. Neither of these cases is groundbreaking. They apply well-settled limits of environmental review under both NEPA and the Clean Water Act. As opponents of energy and infrastructure

projects call for broader consideration of regional and global impacts from development in general, these decisions reaffirm that federal agencies can limit their environmental analysis to the scope of the project over which they have control and authority.