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VIRGINIA ELECTRIC TRANSMISSION PROJECT REVIEW COULD STRETCH THE EXTENT OF REMEDIAL ACTION FOLLOWING NEPA RULING

Submitted By

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The appropriate remedy for a violation of NEPA's procedural mandates is usually straight-forward – a court will remand consideration of the project's potential impacts or alternatives to the lead agency. But what if a court orders a more severe remedy? That situation arose in potentially ground-breaking litigation. *National Parks Conservation Assoc. v. Semonite*, (D.C. Cir.,No. 18-5179, March 1, 2019).

The Army Corps of Engineers (Corps) for over six years considered the Virginia Electric and Power Company's (Dominion) permit application to construct a new electrical switching station and two transmission lines. Those lines would be supported by seventeen 250+ feet steel lattice transmission towers and would stretch for eight miles. Central to plaintiffs' challenge, the project and transmission line cut directly through the middle of a National Historic District, in and around the James River, encompassing Jamestown and other extremely valuable historic resources.

The Corps prepared an environmental assessment instead of a full EIS. Multiple "cooperating agencies" under NEPA's regulations and other "consulting parties" identified through the Section 106 process under the National Historic Preservation Act (NHPA) objected strenuously to the Corps' refusal to prepare the highest level of NEPA review. The comment process for the EA resulting in approximately 50,000 submissions, many of which urged the Corps to review a wider range of alternatives and to conduct an EIS. Parties ranging from the National Park Service, the Council on Environmental Quality, and Secretary Sally Jewell herself, all found fault with the Corps'

conclusion that the presence of the transmission lines through the historic district would have only minor effects. The comments were best summarized by the Advisory Council on Historic Preservation, which said that the project "threaten[s] to irreparably alter a relatively unspoiled and evocative landscape that provides context and substance for the historic properties" in the James River area.

Despite these and other comments from entities within the Department of the Interior, shortly after the Trump administration took the reins of power, Secretary Ryan Zinke concurred in the Corps' finding, and approved a letter agreeing that the project's effects on certain "national treasure[s]" were "moderate at most." According to the proposed Finding of No Significant Impact (FONSI), the new transmission lines would not block or dominate views, and in any event, would simply join existing "modern visual intrusions," such as Busch Gardens amusement park and recreational boat traffic along the River.

While the government first convinced a federal district court judge of the reasonableness of the Corps' FONSI, conservation groups found a much more sympathetic audience before the Court of Appeal for the District of Columbia Circuit. There, the appellate court considered three Administrative Procedure Act claims under NEPA, Section 110(f) of the NHPA and the Clean Water Act. However, the panel needed only to consider the Corps' refusal to prepare an EIS to find that the agency's decision-making was arbitrary and capricious.

In sum, the D.C. Circuit held that at least three of the CEQ's "significance" factors under 40 C.F.R. 1508.27 should have led to the conclusion that a full EIS should have been prepared. It found that there was substantial controversy over the Corps' methodology and data in reaching its conclusions. Citing to countless examples in the administrative record, the court determined that the various submissions "cast substantial doubt on the adequacy" of the Corps' methodologies. The fact that many of the criticisms derived from government agencies with "special expertise" over historic resources was especially compelling.

The court then quickly reiterated and concurred with record comments from many government officials concerned with the project's potential impacts on the unique cultural and historic landscape. No other cases cited by the government and Dominion implicated "comparably sized infrastructure nor equally august historic resources" as with the transmission project.

Here is where the decision gets interesting and complicated. The D.C. Circuit not only reversed and remanded to the agency to prepare an EIS, it instructed the Corps to vacate Dominion's permit. That instruction may not have been remarkable except that the transmission line and towers had <u>already been built</u> AND the lines had been electrified the week before the court issued its ruling. Even more noteworthy, the panel explained in a subsequent ruling on May 1, 2019 on a petition for rehearing that the government had not informed the court of that fact! Seeking to have the permit vacatur reversed, the Corps and Dominion argued that the decommissioning of the project would be unfairly costly and highly prejudicial. However, those same parties had argued previously that construction should not be enjoined because, in the worst case, the towers could be removed.

The court was not pleased with this blatant reversal of position. But the appellate court refused to engage in fact-finding on the appropriate remedy on its own accord. It held that the district court was in the best position to determine the remedies necessary to protect the integrity of the resumed NEPA process. Those proceedings are currently under way and have not been resolved.

The examples of NEPA defeats resulting in project demolition are extremely rare. But the circumstances surrounding Dominion's James River transmission project are similarly rare. If the D.C. Circuit's decision stands after fact-finding and hearing before the district court, this case could end up resulting in the most expensive and impactful remedy in NEPA's long common law history.

NO PRIVATE RIGHT OF ACTION UNDER NEPA FOR REVIEW OF ROUTE FOR MINNESOTA TRANSIT LINE

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Plaintiffs sued the Metropolitan Council (the Council), a local regional agency, for violating NEPA in selecting a corridor for a new transit line intended to serve the southwestern suburbs of the Twin Cities. Plaintiffs pursued a theory that they had a remedy to prevent the Council from "eviscerating federal remedies" that may be available later on. Plaintiffs' theory required the existence of a private right of action under NEPA against non-federal parties since the only federal defendant, FTA, was no longer a party to the litigation. FTA had completed the NEPA process with a Record of Decision (ROD) but had not been sued by Plaintiffs for a review of the ROD under the federal Administrative Procedure Act. The 8th Circuit held that there was no private right of action under NEPA so there was no remedy to pursue against the Council.

Lakes and Parks Alliance of Minneapolis v. Federal Transit Administration and The Metropolitan Council, 8th Circuit No. 18-1686, July 1, 2019.

NEXT DEADLINE SEPTEMBER 16, 2019

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