# Update: Dakota Access Requests SCOTUS Review of NEPA Interpretation

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The continuing legal saga of the Dakota Access pipeline (DAPL) may soon be before the Supreme Court of the United States. On September 20, 2021, the Dakota Access pipeline developer, Dakota Access, LLC, petitioned the Supreme Court for a writ of certiorari to review the lower court's order directing the Army Corps of Engineers to conduct detailed National Environmental Policy Act (NEPA) reviews and prepare an environmental impact statement and vacating a critical easement granted by the Corps over federal land. *Dakota Access, LLC v. Standing Rock Sioux Tribe, et al.*, 985 F.3d 1032 (D.C. Cir. 2021), *petition for cert. filed*, No. 21-560 (U.S. Sept. 20, 2021).

The DAPL is a 1,172-mile-long underground oil pipeline running from the productive Bakken shale formation in North Dakota to an oil terminal near Patoka, Illinois. The pipeline runs beneath Lake Oahe, an artificial reservoir constructed by the Corps on the Missouri River, which is a source of drinking water and a cultural heritage site. Several local tribes, including the Standing Rock Sioux, staunchly oppose the pipeline crossing Lake Oahe, which requires an easement from the Corps.

Prior to July 2020 rule changes, NEPA required the Corps to prepare an environmental assessment (EA) to determine whether the proposed action will result in significant impacts to the environment. *See* 40 C.F.R. § 1508.9(a)(1) (2018). If the action would pose a significant impact to the environment, the federal agency must prepare an environmental impact statement (EIS)—a potentially years-long process. In 2016, the Corps concluded that construction of the pipeline would not significantly affect the environment and that an EIS was therefore unnecessary. The Corps granted an easement for the DAPL to traverse Lake Oahe.

The Corps' decision to not issue an EIS was quickly challenged in court. The federal district court found that the Corps did not adequately consider (1) whether the project's effects were likely to be "highly controversial;" (2) the impact of a hypothetical oil spill on the Tribes' fishing and hunting rights; and (3) the environmental-justice effects of the proposed project. The district court remanded the matter back to the Corps and instructed it to address the three issues but the Corps once again elected not to issue an EIS. Again, the Corps' decision was challenged.

The district court held that an EIS was required and found in relevant part that the easement's effects were likely to be "highly controversial." Whether a federal project has significant environmental impacts depended on its context and intensity. *See* 40 C.F.R. § 1508.27 (2018). Among the factors previously enumerated by NEPA to assess a project's "intensity" was "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." The district court relied on *National Parks Conservation Association v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019), which held that the environmental impact of an agency action is highly controversial if it generates consistent and strenuous opposition from entities with subject-

[1] The content, findings, opinions, and conclusions herein are the work of the author and do not represent finding, opinions, or conclusions of the Texas Commission on Environmental Quality.

matter expertise and the agency does not succeed in resolving the controversy. The district court found that the pipeline's impact was "highly controversial" because the Corps had "not succeeded" in settling several of the plaintiff's criticisms, and an EIS was therefore required. Dakota Access and the Corps appealed.

On appeal, the DC Circuit agreed that the "highly controversial factor of NEPA required the court to delve into the details of the Plaintiff's criticisms." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1043 (D.C. Cir. 2021). The court explained that the decisive factor is not the "volume of ink spilled in response to criticism, but whether the agency has, through the strength of its response, convinced the court that it has materially addressed and resolved serious objections to its analysis." *Id.* Like the district court, the appellate court held that preparation of an EIS was required. *Id.*

Dakota Access now seeks Supreme Court review of two primary issues: (1) whether, under NEPA, "an agency that carefully considers all criticisms of its environmental analysis must also 'resolve' those criticisms to the court's satisfaction to justify a finding of no significant impact;" and (2) "whether procedural error under NEPA per se warrants remand with vacatur." *Dakota Access, LLC v. Standing Rock Sioux Tribe, et al.*, 985 F.3d 1032 (D.C. Cir. 2021), *petition for cert. filed*, No. 21-560 (U.S. Sept. 20, 2021). Dakota Access argues that the appellate court "broke new ground by holding that an agency must prepare an EIS whenever a court determines that some aspect of a federal action's potential environmental impact is highly controversial, even when the agency determines that the supposed controversy is insubstantial or immaterial." *Id.*

At the heart of the petition, Dakota Access argues that the court of appeals erred by applying a heightened standard of review requiring an agency to "convince the court" that the agency has resolved serious objections to its EIS analysis. According to Dakota Access, the proper standard is instead whether the agency's decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. The "convince the court" standard, Dakota Access avers, is far less deferential to the agency and revives a circuit split that the Supreme Court previously resolved in *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 (1989).

The Court has yet to decide whether to grant Dakota Access's petition. The interesting and substantial issues regarding the level scrutiny courts will have over a federal agency's decisions under NEPA puts much at stake for both federal agencies and private entities involved in major federal projects in the future, especially considering recent and proposed changes to the NEPA rules.