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Development in Environmentally Sensitive Areas: Strategies for Avoiding Litigation under NEPA, CWA, and ESA

Douglas M. Halsey and T. Neal McAliley, White & Case LLP
Christopher Bell, Greenberg Traurig LLP
Mike Dennis, Ph.D., Breedlove, Dennis & Associates, Inc.

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Summary of Presentation

- Fundamentals of the Key Federal Environmental Statutes:
 - National Environmental Policy Act (NEPA)
 - Clean Water Act (CWA) Section 404
 - Endangered Species Act (ESA)

Summary of Presentation

- NEPA – An Overview
 - Procedure vs. Substance
 - EIS vs. EA – Agency Discretion
 - Relevance of CEQ Rules
- CWA Section 404 – Fundamentals
 - Regulated Activities and Jurisdiction
 - COE Permitting – Substance and Procedure
- ESA – Key Provisions
 - Formal vs. Informal Consultation – Agency Discretion
 - Section 7 and Section 9
- Administrative Record
 - Permitting Decision
 - Judicial Review

Project Examples

- ☐ Mining
- ☐ Pipelines
- ☐ Real Estate Development

NEPA Fundamentals

NEPA Fundamentals

□ NEPA's Purpose

- Federal agencies must prepare detailed analysis of environmental impacts for all proposed Federal actions significantly affecting the human environment.
- NEPA's requirements are procedural: Agencies must follow certain steps in analyzing potential environmental impacts. Agency must consider alternatives as part of the scoping process prior to making final decision on a federal action.

□ NEPA does not mandate substantive results

NEPA Fundamentals

- Three Mechanisms for NEPA Compliance
 - Environmental Impact Statement (EIS) for actions with “significant” impacts;
 - Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for actions with no “significant” impacts; and
 - Categorical Exclusions, established by rule, eliminate NEPA review for certain types of actions thought to have no significant impacts.
 - Example: FDA categorical exclusion for New Drug Applications where active ingredient will be less than 1 ppb when entering environment

NEPA Fundamentals

- NEPA document must analyze impacts that are:
 - Reasonably foreseeable
 - Proximately caused by the proposed federal action
- Types of impacts federal agency must consider (40 C.F.R. §§ 1508.8):
 - Direct impacts
 - Effects which are caused by the action and occur at the same time and place
 - Indirect impacts
 - Effects which, though caused by the action, occur later in time or are further removed in distance
 - Cumulative impacts
 - Impacts which result from the incremental effect of the action when added to other past, present, or reasonably foreseeable future actions of the same kind

NEPA Fundamentals

- The Council on Environmental Quality (“CEQ”) has identified ten factors in 40 C.F.R. §1508.27(b) that an agency should consider when assessing whether the environmental impacts of a project are “significant”, including:
 - “Proximity” of the project to “[u]nique characteristics” such as “parklands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas”;
 - Whether the proposed project will result in violations of “Federal, State or local law or requirements imposed for the protection of the environment”;
 - The degree to which the project “may adversely affect an endangered or threatened species or its habitat”;
 - The degree to which the effects of the project are “controversial”;
 - The degree to which the effects of the project are “highly uncertain” or “involve unique or unknown risks”; and
 - Whether the cumulative impacts of the proposed project along with other projects are significant.

NEPA Fundamentals

- Agency compliance with NEPA is reviewable in federal court under the Administrative Procedure Act
 - Standard of review: whether an agency's action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” (5 U.S.C. § 706(1)(A))
 - Courts are required to give great deference to agency decisions and are not permitted to reweigh the evidence before the agency

NEPA Fundamentals

- When an agency's decision not to prepare an EIS is challenged, the reviewing Court determines whether the agency has:
 - Accurately identified environmental concerns;
 - Taken a hard look at the issues;
 - Made a convincing case for its findings; and
 - Included safeguards to reduce impacts to a minimum.

Clean Water Act Fundamentals

Basic Permit Requirement

- Clean Water Act requires a permit for “discharges” into the “waters of the United States”
 - Discharges of “dredged or fill material” require a permit under CWA Section 404 from the U.S. Army Corps of Engineers
 - Discharges of other “pollutants” require a permit under CWA Section 402 from the Florida DEP (pursuant to delegation from U.S. EPA)
 - Stormwater discharge permits fall under CWA Section 402

Waters Subject to Clean Water Act Jurisdiction

- Clean Water Act only regulates discharges into the “navigable waters,” which are defined in the statute as “waters of the United States”
- Court decisions indicate that not all waters are “waters of the United States”
- Scope of Clean Water Act jurisdiction is in flux

Waters Subject to Clean Water Act Jurisdiction

- Existing regulations at 33 CFR Section 328.3 define “waters of the United States” to include –
 - All waters susceptible for use in interstate or foreign commerce
 - All waters subject to the ebb and flow of the tide
 - All interstate waters
 - All waters the use or destruction of which could affect interstate or foreign commerce
 - Tributaries of other jurisdictional waters
 - The territorial seas
 - Wetlands adjacent to other jurisdictional waters

Waters Subject to Clean Water Act Jurisdiction

□ Current Limitations on the Scope of Jurisdiction

- Exclusions from “waters of the US” contained in regulations
 - Prior converted croplands
 - Waste treatment systems
- Other categories of waters that EPA and the Corps have indicated are not subject to federal jurisdiction
 - “Non-tidal drainage and irrigation ditches excavated on dry land”
 - “[P]its excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States”

Waters Subject to Clean Water Act Jurisdiction

□ Current Limitations on the Scope of Jurisdiction

- Supreme Court has cut back the scope of jurisdiction
 - SWANNC v. U.S. Army Corps of Engineers (2001)
 - Isolated waters are not jurisdictional simply due to their use by migratory birds
 - Rapanos v. U.S. Army Corps of Engineers (2006)
 - “Adjacent wetlands” that are near, but do not directly abut ditches, are not jurisdictional unless there is some greater connection to downstream navigable waters
 - Different justices articulated different tests for what is a sufficient connection to make a wetland jurisdictional
 - Key opinion: Justice Kennedy wrote that there is a sufficient connection if there is “significant nexus”
- Agencies currently regulate wetlands where they find a significant nexus to a navigable water

Waters Subject to Clean Water Act Jurisdiction

- Proposed New Regulation Defining Waters of U.S.
 - All waters used or susceptible to use in interstate or foreign commerce, including waters subject to the ebb and flow of the tide
 - The territorial seas
 - Tributaries
 - All impoundments of otherwise jurisdictional waters
 - All waters, including wetlands, adjacent to otherwise jurisdictional waters
 - “Adjacent” includes waters in the same floodplain or with a shallow subsurface connection
 - Other waters, including wetlands, having a significant nexus to otherwise traditionally navigable waters

Waters Subject to Clean Water Act Jurisdiction

□ Exclusions Contained in the Proposed New Regulation

- Waste treatment systems
- Prior converted cropland
- “Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow”
- “Ditches that do not contribute flow, either directly or through another water, to an [otherwise jurisdictional water]”
- Water-filled depressions created incidental to construction activity
- Artificially irrigated areas that would revert to upland should irrigation cease
- Groundwater
- Gullies, rills and non-wetland swales

Section 404 Permitting

- Army Corps can only issue a Section 404 permit if it follows certain procedures
 - Section 404(b)(1) Guidelines prohibit issuance of a permit if –
 - “There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem”
 - The project “will cause or contribute to significant degradation of the waters of the US”
 - Corps must also comply with other procedural laws, including
 - NEPA
 - Endangered Species Act

Section 404 Permitting

- When the application is complete, the Corps issues a public notice
 - The notice must provide sufficient information for public to have a clear understanding of the nature of the proposed action
 - Typical comment period is 30 days
- The Corps also “may” hold a public hearing

Section 404 Permitting

- Corps makes the decision to issue or deny the permit, but the EPA has the authority to veto a permit under Section 404(c)
- Corps permitting decisions subject to judicial challenge under the APA “arbitrary and capricious” standard of review

Endangered Species Act Fundamentals

ESA Fundamentals

- Two primary substantive elements:
 - Under ESA Section 7 [16 USC § 1536], each federal agency shall, in consultation with [Commerce or Interior] ... insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of a listed species or cause adverse modification to the designated critical habitat of a listed species.
 - “Jeopardize” means reduce appreciably the likelihood of the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species
 - ESA Section 9 [16 USC § 1538] prohibits the “take” of any listed species without a permit
 - “Take” includes “harm” which includes habitat modification that kills or injures wildlife by significantly impairing ... breeding, feeding, or sheltering.
 - An “incidental take” is permitted if there is a Habitat Conservation Plan

ESA Fundamentals

- Action agency must consult with NMFS or FWS if its proposed action may adversely affect a listed species
- Two different kinds of consultation:
 - Informal – Sufficient if the action of the federal agency “is not likely to adversely affect” listed species or critical habitat. FWS or NMFS must concur.
 - Formal – Necessary if the action agency determines that the project “may adversely affect” a listed species

ESA Fundamentals

□ Informal Consultation –

- Consultation requirement is satisfied through preparation of a “biological assessment” analyzing impacts. Either the action agency or the project applicant may prepare the biological assessment.
- The form and content of the biological assessment are determined by the action agency. 50 C.F.R. § 402.12.

ESA Fundamentals

- Formal Consultation –
 - Necessary if the biological assessment concludes that the project “may adversely affect” a listed species or its critical habitat.
 - Requires preparation of a biological opinion, a more detailed analysis of the project’s impacts on listed species and its habitat.
 - The requirements regarding the form and content of a biological opinion are more detailed. 50 C.F.R. § 402.14
- If FWS finds “jeopardy or adverse modification” to a listed species or its critical habitat, the FWS shall suggest “reasonable and prudent alternatives.”
- Action agency can then either terminate the action or implement the proposed alternative.

Practical Issues Concerning the Use of Technical Issues in Permitting

Types and Amount of Data to Gather

- Focus on regulatory requirements given the type of permit(s) required
- Coordinate with Regulatory Agencies on data they will require
- Use best available data
 - GIS databases
 - Aerial photography
 - Publications
- Gather appropriate field data
 - Wetland jurisdictional lines
 - Data on nexus to Traditional Navigable Water
 - Hydrologic data, both regional and site specific
 - Protected species surveys following protocols
 - Archaeological surveys as required
 - Assessment of wetland functions and values

How to Collect and Manage Data

- Document sources
- Again, focus on necessary, relevant regulatory data required
- Maintain proper chain of custody
- Full use of GPS/GIS format
- Document field conditions at time of collection and any pertinent antecedent condition
- Follow standard practices and methods
- Establish proper scale and resolution of data

How to Present Data and Permit Applications to Agencies

- Follow the statutory and rule criteria
- Establish permit template up front with lead Agency
- Meet with Agencies as necessary, depending on complexity of project, to ensure complete coordination (e.g., interagency coordination)
- Make sure all key criteria for review and permitting decisions are fully addressed
- Review key documents, such as Public Notice, Statement of Findings, Biological Opinions, Record of Decision, and Environmental Assessment, to make sure Agency fully incorporates all essential data provided to meet statutory tests and completeness
- Always assume permit will be challenged – develop full application and permitting records

The Administrative Record

Overview of Administrative Record

- An administrative record is a compilation of all materials that were before the federal agency at the time it made its final decision in the NEPA review process. It is the complete “paper trail” of the agency’s decision-making process and the basis for the decision.
- The administrative record should include all documents directly and indirectly considered by the agency in making its decision.
- Administrative Record should include:
 - Documents/materials before or available to decision makers at the time the decision was made, whether or not they were considered or relied upon.
 - Not just paper documents, but all means of storing or presenting information, including items kept in electronic format, handwritten notes, graphs and charts.

Overview of Administrative Record

- Kinds of information that should be in administrative record include:
 - Articles and books
 - Decision documents
 - Factual information or data
 - Communications the agency received from, or sent to, other agencies and the public
 - Drafts that were circulated for comment outside the agency
 - Technical information, sampling results, survey information, reports or studies
 - Minutes or transcripts of meetings

Administrative Record Function During Permitting Process

- Administrative Record allows the public – both officials and citizens – to fully understand the administrative process.
- Ideally, task of gathering documents will begin from the start of NEPA process and continue until its conclusion.
- Administrative record is typically not formally assembled until litigation is initiated.
- Even if litigation is not anticipated, maintaining an accurate/complete record is important, because it lets the project team locate key documents quickly and reduces inefficiencies and duplication of effort.
- A strong record greatly enhances agency's ability to defend its position, while a weak/incomplete record increases chance decision will be overturned by a court.

Role of the Administrative Record in Judicial Review

- In a court challenge, the court determines the lawfulness of the agency's decision based only on a review of the administrative record.
- Usually, no other evidence may be presented to the court on the merits.
- If the court finds that the record fails to demonstrate the basis for the agency's decision, court can enjoin agency action until agency supplements the record.
- When administrative record fails to explain agency action, court may allow agency to supplement record with testimony/affidavits.
 - But, once the agency supplements the record with affidavits or testimony, opposing party might be able to depose witnesses and/or submit additional affidavits or testimony.

Strategies for Building an Administrative Record to Withstand Judicial Scrutiny and Third Party Attack

- Submit materials to the agency that support your preferred alternative.
- Submit materials to the agency that point out flaws/deficiencies in other alternatives.
- Submit materials to the agency to help them respond to criticisms from project opponents.

Strategies for Building an Administrative Record to Withstand Judicial Scrutiny and Third Party Attack

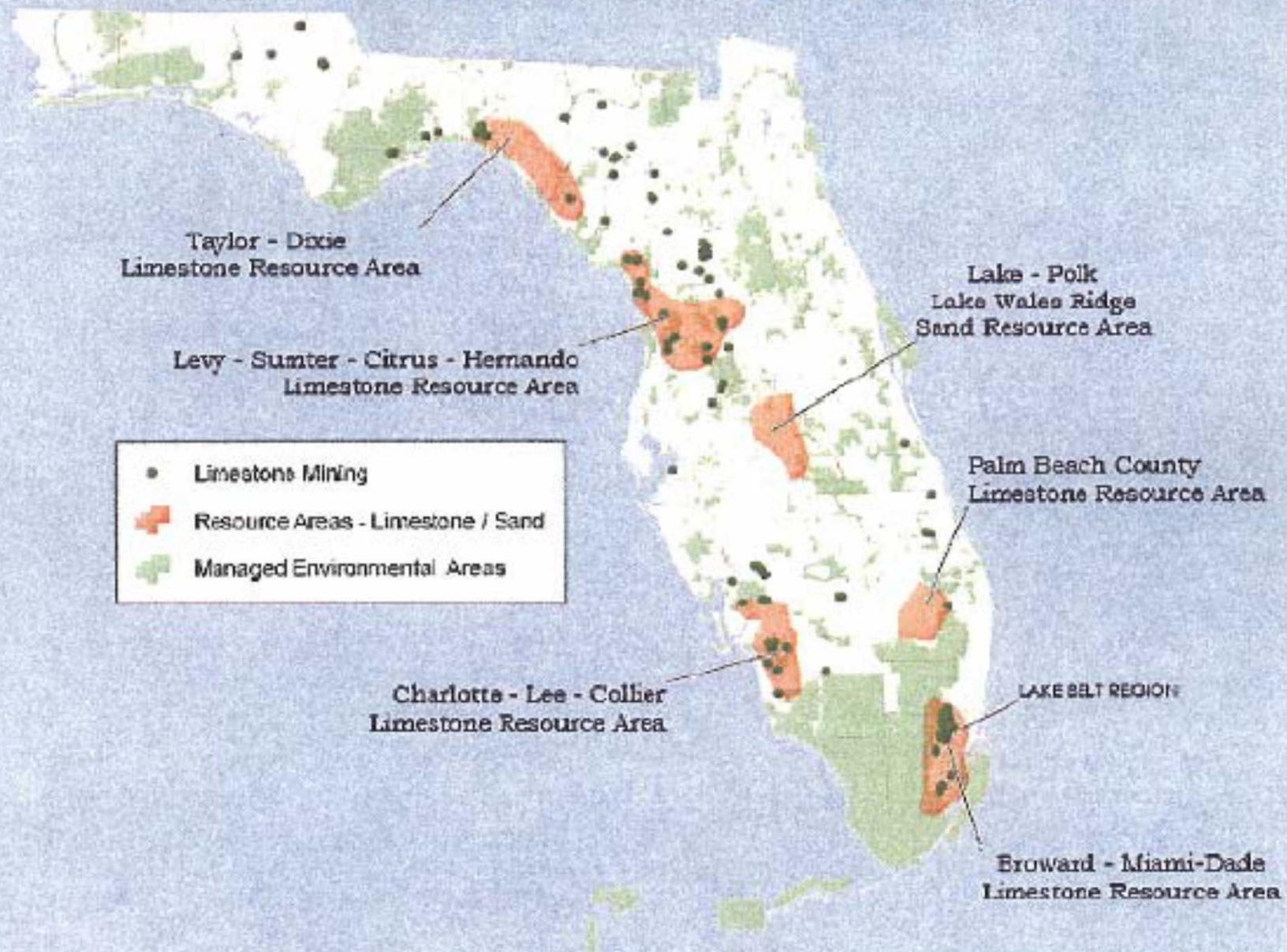
- Examples of cases where building the record helped the project be more defensible.
 - Lakebelt: in process of supplementing environmental impact statement, project opponents raised Greenhouse Gas Emissions as an issue. Applicants did own calculations of GHG emissions from project and their impact on the world's temperature, using other agencies' and respected sources' formulas for calculations. This allowed agency building the record to respond to comments referencing these sources, further bolstering their position on the issue.
 - Fort Lauderdale International Airport Expansion: project opponents raised practicable alternatives as an issue. To further eliminate other alternatives (and one in particular), applicant and agency placed materials in record to support reasons why other alternatives necessarily impacted the same or more wetlands than the proposed project.

Mining Projects

Scope of Mining in Florida

- Significant limestone mining in Florida
 - Important construction material
 - High weight/cost ratio means that mines served by truck must be located near potential markets
 - High quality limestone deposits are located around Florida
 - Limestone mining in Florida since 1800s

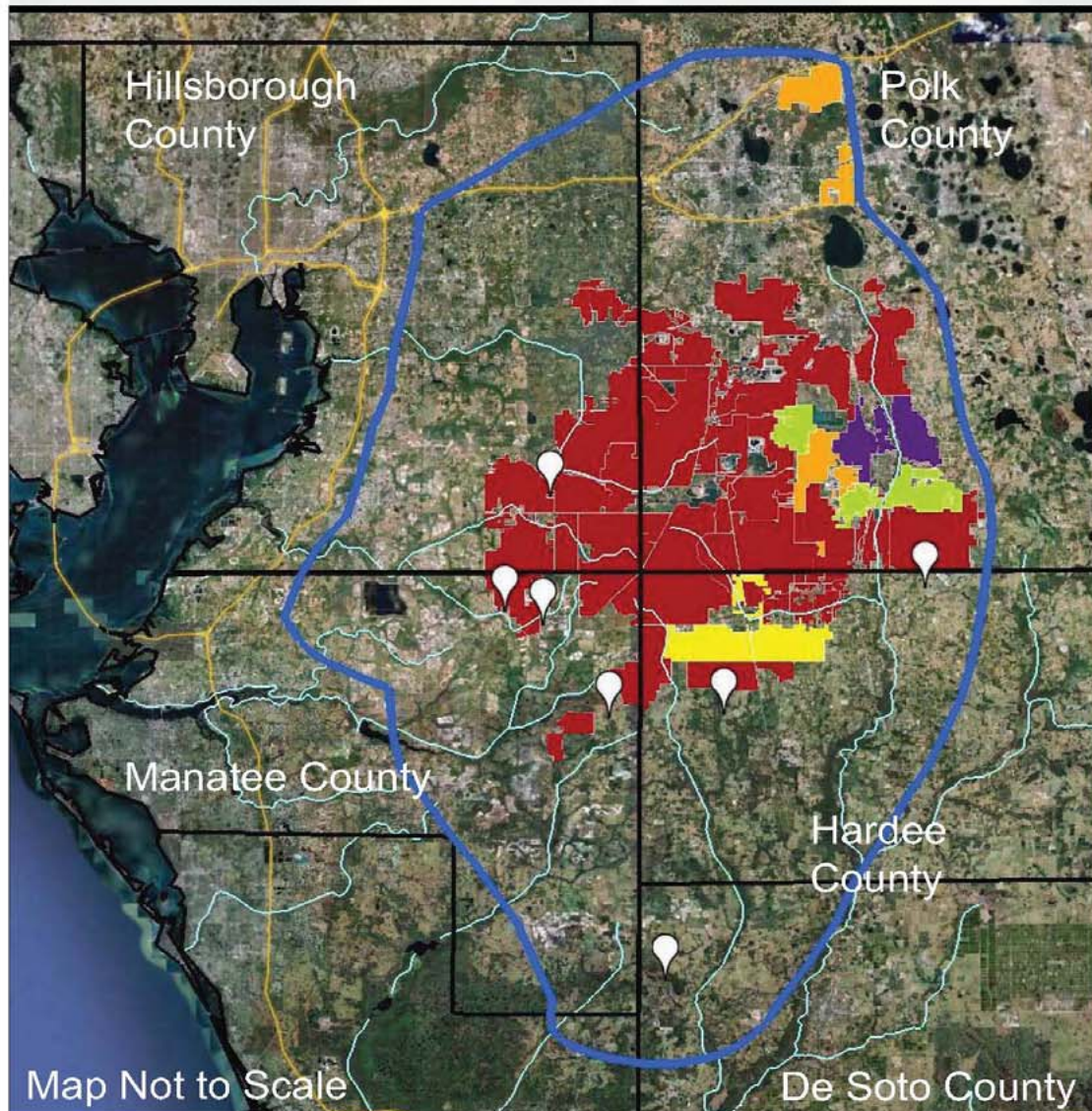
LIMESTONE AND SAND RESOURCE AREAS



Scope of Mining in Florida

- Florida has phosphate deposits of worldwide significance
 - Phosphate is important material for fertilizers and animal feed
 - Florida's "Bone Valley" is the location of Florida's most important phosphate deposit
 - Phosphate mining in Florida since 1880s

Central Florida Phosphate District Mining Activities



Legend

— Central Florida Phosphate District Boundary

📍 Proposed Mine Locations

Existing Mine Locations by Company:

■ Mosaic

■ U.S. Agri-Chemicals

■ Estech

■ MobilExxon

■ CFIndustries

Created September 9, 2010



BUILDING STRONG®

Perennial Conflict Over Mining

- Mining projects are recurrent targets of litigation
 - Neighbors often do not like mines nearby
 - Industrial activity
 - Truck traffic
 - Blasting
 - Environmental groups raise concerns over environmental impacts
 - Wetlands
 - Water
 - Species



Key Initial Issue: Is a Federal Permit Required?

- State generally regulates mining, but federal agencies only regulate mining in certain locations
- Key issue in Florida: does a mine need a Clean Water Act permit?
 - U.S. Army Corps of Engineers can only issue a permit in compliance with –
 - Clean Water Act regulations
 - NEPA
 - Endangered Species Act

CWA Jurisdiction Over Mining Sites

- Some mining sites are located almost entirely in federally-regulated wetlands
 - Example: Miami-Dade County “Lake Belt”
- Other mining sites are mostly uplands, with small areas of regulated “waters of the United States”
 - Example: agricultural ditches crossing upland fields
- Project proponents can seek to avoid or minimize areas under federal wetland jurisdiction

Scope of NEPA Review

- NEPA review dominates the permitting process
 - EIS's take 3-5 years to complete
- If any part of the mine site requires a federal permit, the Corps will analyze the impacts of the entire site under NEPA
- Corps in recent years has analyzed groups of mines together in Programmatic EIS's
 - Lake Belt Supplemental Programmatic EIS (2009)
 - Phosphate District Area-Wide EIS (2013)

Endangered Species Act Review

- Whether the FWS prepares a BA or BiOp does not turn entirely on whether the Corps prepares an EIS
 - FWS is shifting to preparation of full Biological Opinions for proposed new mines
- Different mines share similar endangered species issues
 - Wood stork foraging
 - Indigo snake use of site
 - Florida panther
 - Audubon's Crested Cara Cara

Clean Water Act Regulatory Compliance

- “Practicable alternatives” analysis
 - The Corps considers whether there is a practicable alternative to use of the site for mining
 - Extensive analyses performed about whether upland mine locations are available which would meet the overall project purpose
- Wetland mitigation
 - Scoring wetland impacts, and compensating for those impacts is another focus of agency planning

History of Litigation Related to Mining

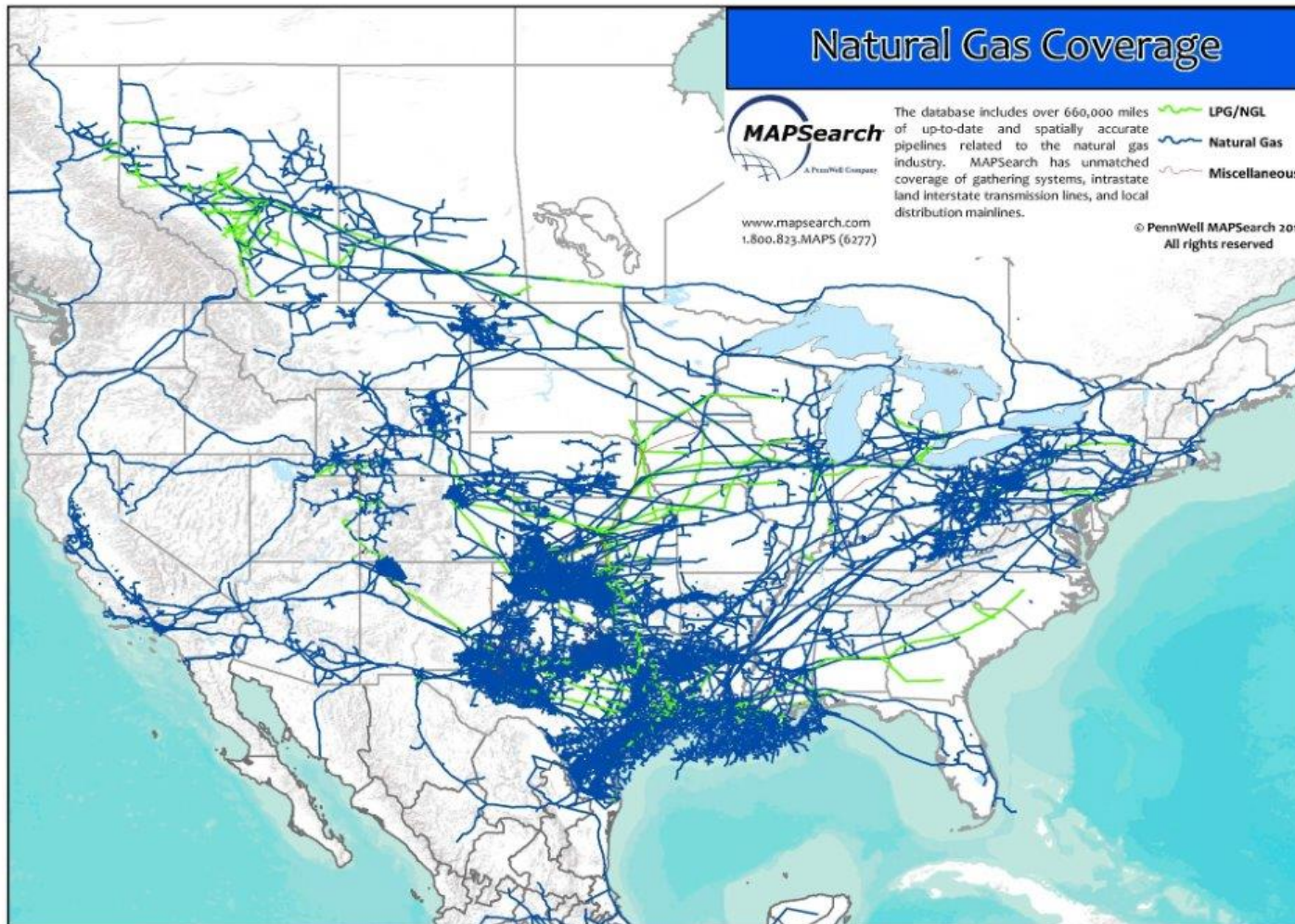
- Miami-Dade County “Lake Belt”
 - Long-running litigation from 2002-2010
- Central Florida Phosphate Mines
 - Multiple lawsuits over the past several decades
- Southwest Florida Limestone Mines
 - Ft. Myers Florida Rock Quarry #2
 - Collier Hogan Quarry Litigation

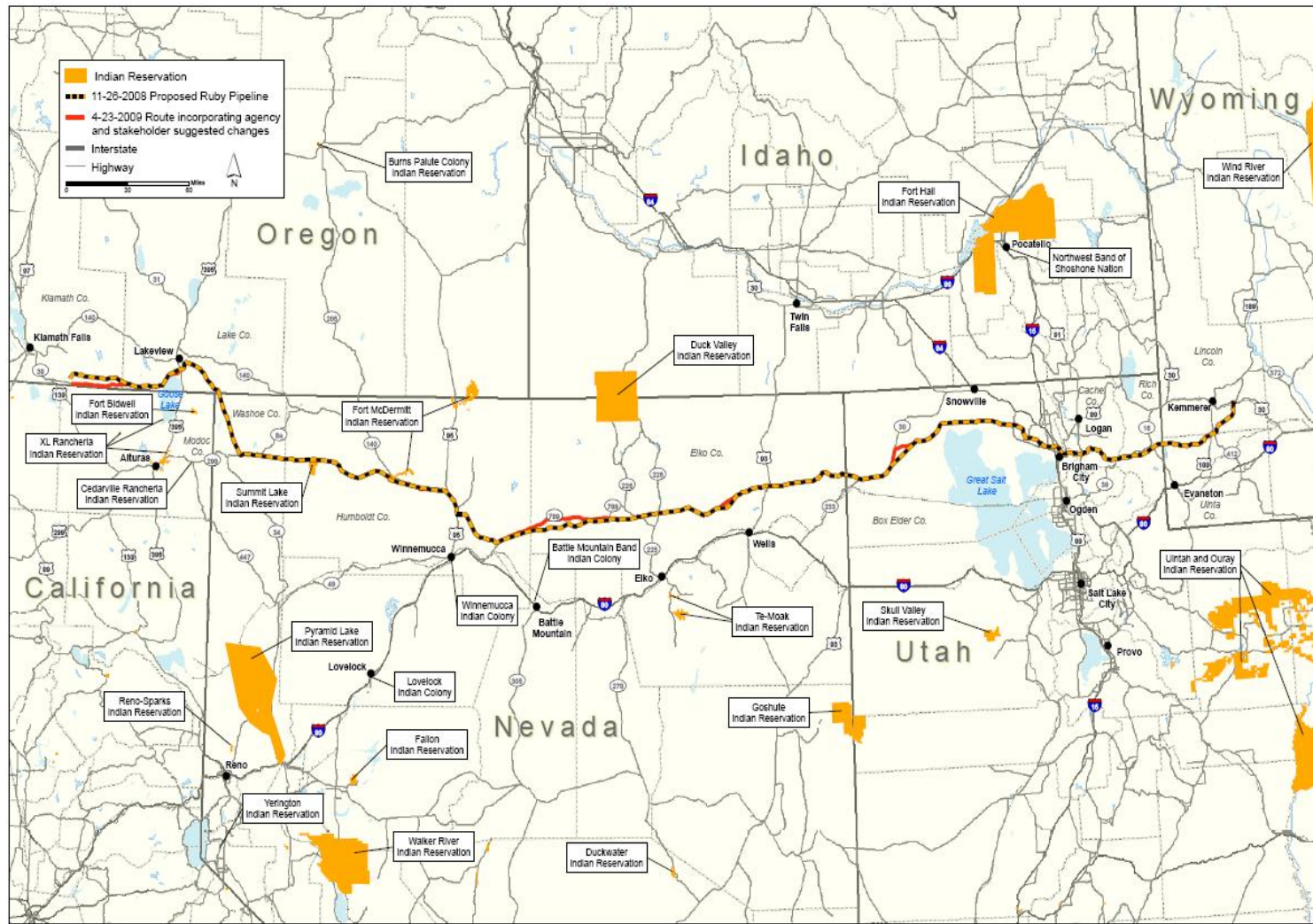
Case Study: Natural Gas Pipelines

Christopher Bell

Greenberg Traurig LLP

Natural Gas Pipelines: There are a lot of them out there,
with more to come!





May 14, 2009

Ruby Pipeline
Construction began in July 2010
Placed in service in July 2011

Ruby Pipeline Project

- ❑ 680 miles of 42-inch Pipe - Opal, WY to Malin, OR
- ❑ Links Rocky Mountain Gas w/ Western US Markets
- ❑ Crosses over 200 rivers and streams
- ❑ 9 threatened or endangered species
- ❑ 5 designated critical habitats
- ❑ 65% on public lands (over 2,000 acres of Federal land)
- ❑ Cultural heritage/historic sites
- ❑ Plenty of litigation
 - 9th Cir. cases against BLM, FWS and the Corp, raising ESA, NEPA, CWA and National Historic Preservation Act issues
 - D.C. Cir. cases challenging FERC on similar grounds

Trencher in Action



A Selection Of Issues

□ Endangered Species Act

- Creates substantive challenges at all phases of a project
 - Before: identifying endangered/threatened species and critical habitats at the design/approval stage
 - During: mitigation measures during construction.
 - 9th Cir. remanded a Fish & Wildlife Service Biological Opinion that relied on the effects of an agreement on mitigation that was enforceable by FERC and BLM, thought not by FWS under ESA. *Center for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101 (9th Cir. 2012)
 - Mitigation can be interesting: A Florida project had to have “manatee wranglers” to encourage manatees to move away from construction area
 - After: must pay attention during operations as well
- Moving target: opinions on species and habitats change
 - 3/27/14: Lesser Prairie Chicken listed as a “threatened” species, but in a somewhat novel approach, is allowing an “incidental take” tied to conformance with existing 5-state conservation plan
 - No one is happy: trade associations, NGOs and some states have sued FWS from every angle

A Selection of Issues

□ NEPA

- Draws in broad range of stakeholders, and transparency generates substantive debate, even though NEPA is only procedural
- Font of litigation
 - 9th Cir. dismissed as moot several post-construction NEPA claims against Ruby as moot, but entertained claim re cumulative impacts, since post-construction mitigation might be available
 - D.C. Cir. recently reminded FERC that NEPA review had to include other connected, interdependent and closely related projects, rejecting effort to “segment” projects. *Delaware Riverkeeper v. FERC*, 2014 U.S. App. LEXIS 10523 (D.C. Cir. June 6, 2014).

□ Tribal lands and culture

- Key statutory provision: Section 106 of the National Historic Preservation Act (like NEPA, procedural, not substantive)
- Traditional cultural property (“TCP”) often outside of reservation boundaries
- Ruby was re-routed around some TCP and “cultural resource” (NEPA) areas, and construction was closely monitored by 100+ tribal representatives

Tribal Monitors / Trenching



A Selection of Issues

□ Clean Water Act

- If you are crossing rivers, streams, wetlands, etc., this will bring Section 404 permits into play
- 9th Cir. affirmed Corp's application of Nationwide General Permit 12 ("NWP 12") to Ruby, avoiding need for crossing-specific permits
 - NWP 12 also affirmed for southern leg of Keystone pipeline. *Sierra Club v. Bostick* 2013 U.S. Dist. LEXIS 181087 (W.D. Okl. Dec. 30, 2013)

□ Presidential permits

- Required for pipelines that cross the Mexican or Canadian border
- Environmental reviews for natural gas pipelines typically focuses on (usually modest) impact of construction activity at the border
- Keystone (oil) has taken the environmental review portion of Presidential permits to a completely new level

□ Plenty of other legal issues to worry about

- E.g., Clean Air Act for natural gas compressor stations, operational oversight by DOT's PHMSA (recent emphasis on corrosion)
- State and local laws, including rights-of-way

Some Concluding Thoughts

- Route selection critical
 - Impacts everything from ESA to community response
- Develop and execute an overall strategy
 - Stay on top of all of the moving parts
- Transparency is a good thing
 - Trust can quickly erode if the facts are rationed out reactively
 - Incomplete reviews up front can be costly down the line
- Stay ahead on the facts and science
 - Don't wait for the "bad facts" to bubble up
- Figure out who your stakeholders are, particularly everyone along the path of the project
 - Communicate. Listen. Don't be patronizing.
 - Accommodate agency staff turnover
 - Work with project proponents; explore options with skeptics; accept that some won't accept the project under any circumstance
 - Hire and buy local, when you can

Questions?

Thank you

White & Case

Southeast Financial Center, Suite 4900

200 South Biscayne Boulevard

Miami, Florida 33131-2352

United States

T + 1 305 371 2700

F + 1 305 358 5744 / 5766