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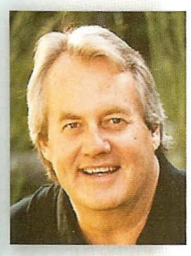
A Brief Summary of NEPA and its Possible Implications on Your Projects in Texas

by Ray L. McKim III, CPL/ESA

Recently the question of the National Environmental Policy Act (NEPA) study came to my attention. One of my clients was broaching the subject on some telecommunication towers they were installing for an oil company in a remote West Texas oilfield. The company's project manager (not a landman, by the way) insisted that he did not need a NEPA study done because he was not erecting the towers on federal or Indian lands. He was taken aback when told that he most surely did need one for every site — regardless of location — if he wanted to comply with the licensing and use of frequencies as regulated by the FCC. Any project that is federally regulated or is a "federal undertaking" (funded by the federal government) requires an environmental assessment as set out under NEPA.

Such western states as New Mexico, Wyoming, Utah, etc. have large amounts of federally owned lands that are managed by the BLM. Many oil operators that have lease acreage positions on BLM lands in these western states know of the many environmental issues that are stipulated on these leases because the BLM has gone through the NEPA checklist (see page 48) and has cleared the issues ahead of them. However, as most of the landmen who have worked Texas for any length of time know, the Lone Star State came into the union owning its own land and therefore there is very little federal or BLM land in Texas. What little federal land there is in Texas is comprised mainly of national parks (i.e., Big Bend).

About the Author



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NATIONAL ENVIRONMENTAL POLICY ACT

"to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation … ."

Now, as new onshore drilling and exploration activities reach closer to urban areas, many state agencies and other political subdivisions (cities and counties) have adopted environmental requirements that may closely follow the NEPA regulations and may require the operator to submit a report showing it has addressed these environmental issues even on "private" lands. So awareness of the NEPA and other environmental issues should be paid close attention when contemplating drilling or production operations (or federal regulated/funded projects) — even on nonfederal public or privately owned lands.

Richard Nixon enacted the National Environmental Policy Act of 1969 (NEPA) on Jan. 1, 1970. Its purpose is "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation … ."

The fundamental concerns of NEPA's environmental assessment are outlined in the "checklist" as follows:

NEPA Checklist

(47 CFR Subpart 1, Chapter 1, Sections 1.1301-1.1319)

Category	Special Interest Item	Yes	No	Pending
1	Is the site located in an officially designated wilderness area?			
2	Is the site located in an officially designated wildlife preserve?			
3	Will the proposed site development likely affect threatened or endangered species or designated critical habitats? (Ref. 50 CFR Part 402)			
4	Will the proposed site development likely affect the continued existence of threatened or endangered species or critical habitats?			
5	Will the proposed site development affect districts, sites, buildings, structures or objects significant in American history, architecture, archeology, engineering or culture that are listed or potentially eligible for listing in the National Register of Historic Places (NRPH)? (Ref.36 CFR Part 800 regulations implementing Section 106 of the National Historic Preservation Act)			
6	Will the proposed site development affect Indian religious site(s)?			
7	Will the proposed site development be located in a flood plain? (Ref. Executive Order 11988 and 40 CFR Part 6, Appendix A)			
8	Will the proposed site development involve significant change in surface features (e.g., wetlands, deforestation or water diversion)? (Ref. Executive Order 11990 and 40 CFR Part 6, Appendix A)			

Items 1 and 2 are easily determined — you are either in or out of these areas, and they are for the most part easily defined. Item 3 requires an awareness of threatened or endangered species or critical habitats and is subject to supervision by the U.S. Fish & Wildlife and the state agencies (i.e., Texas Parks and Wildlife Department). Both have lists and mapped areas of animal and plant life that may be sensitive in your region, and your investigation of your project area may also be subject to a USF&W "Incidental Take Permit" (such as Bastrop County and the Houston Toad). Item 8 is a determination of the impact of projected excavation actions and the effect on dense forest lands and wetland areas.

Items 5 and 6 require notice and approval for specific projects. Section 110(k) of the National Historic Preservation Act informs states that "each federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106 of this Act, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Advisory Council on Historic Preservation, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant."

In Texas, the Texas Historical Commission (THC) has the Section 106 review powers with authority vested in the State Historical Preservation Officer (SHPO). The SHPO's office keeps up with not only national historical landmarks but also archeological sites. If the ground has not been previously disturbed, and there is to be "significant" disturbance to the ground as a result of the project activity, an archeological survey of the project area may be required. If the SHPO office requires an archeology study, it will be performed at the applicant's expense, then sent in for the SHPO to review, as well as along to the various Indian tribes that have indicated a geological preference for notification of the specific area. (For towers and other projects under the FCC purview, the applicant must follow those specific guidelines as outlined in the Nationwide Programmatic Agreement for SHPO and Tribal reviews and notifications.)

Simply researching books or Web pages for "recorded" archeological sites in suspected sensitive areas will not be sufficient conduct. Many sites that are recorded are also not disclosed to the public in order to preserve the site from damage. The THC has a record of many such sites, but officials will also state that they may not know all.

The SHPO will review the applicant's detailed report and documentation outlining the proposed project (called a Section 106 review), and within 30 days of receipt, the applicant hopes to receive a letter from SHPO stating that the project will "have no effects" and that the project may proceed. If the project is not approved, the federal agency shall notify the applicant of a probable violation of Section 110(k) and will consider a resolution, which may include negotiating a memorandum of agreement that will resolve any adverse effects.

Item 7 addresses flood plains. Most counties have FEMA/FIRM flood zone maps that can be viewed, studied and copied. If an area is not mapped (common to rural, arid parts of the country), you must otherwise satisfy yourself that your project will not be located in an area prone to flooding.

Apart from the NEPA checklist, under the Antiquities Code of Texas, legal responsibilities to conduct archeology surveys also apply to nonfederal property owners (city, county, school, water districts, etc.) and their project sponsors. The oil and gas industry enjoys a broad exclusion to these rules and regulations — except, however, all project sponsors are required to notify the THC when projects occurring on these lands involve a disturbance to five or more acres, or the excavation of 5,000 or more cubic yards of soil, or when a project will occur in a historic district or if an archeological site is recorded within the project area.

In sum, while much of the drilling operations in rural areas of the arid Southwest will not be subject to most of the NEPA environmental issues, other operations, however, that are closer to more populated areas and associated with production operations — such as telecommunicating data from production equipment to the laying of pipelines — may be subject to a NEPA checklist or review of historical or archeological records on nonfederal public or private lands.