# Selected NEPA Cases In 1998

### *Adequacy of Environmental Assessments under NEPA*

Blue Mountain Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998), decided December 2, 1998, cert. den'd, 144 L.Ed. 2d 235 (6/14/99).

Following a 51,000 acre fire in the Umatilla National Forest, the Forest Service proposed a program of salvage logging sales in the burned-over areas. The plaintiffs in this case argued that the Forest Service conducted an inadequate environmental assessment of the proposed sales and that "substantial questions" remained about their impacts.

Their charges were leveled primarily at the Forest Service's "cursory and inconsistent treatment" of the risk of damage to salmon and trout habitat as a result of increased sedimentation. The EA conducted by the Service contained no documentation of its sedimentation estimate; indeed the agency's only attempt to measure sediment failed because of an overloaded data collection box. The Ninth Circuit rejected the agency's claims that its decision was supported by adequate data; "The EA contains virtually no references to any material in support of or in opposition to its conclusions. That is where the Forest Service's defense of its position must be found." 161 F.3d at 1214.

The court found other deficiencies, as well. The court ruled that the Service had failed to address the cumulative impacts of five potential logging projects within the same watershed. In conducting its EA on one of the sale areas, the Forest Service had failed to identify any of the routes or locations of the 18 miles of logging roads required by the sale, or to document the estimated sediment that would result from road construction and logging operations. Further, the Forest Service had neglected to analyze the cumulative effects of the sale and four others planned for the same watershed area.

The court rejected the Service's arguments that it had tiered the sale EA to the EIS for the Umatilla Forest's management plan, and, therefore, the EA and EIS together were adequate under NEPA. Regulations promulgated by CEQ define tiering as "the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses", 40 C.F.R. § 1508.28. The court noted that the management plan's EIS had been prepared years before the fire and that it contained no discussion, even in general terms, of the impacts of logging in burned-over areas. Since the EIS did not, and could not, evaluate the impacts of the fire or subsequent logging, it could not serve as the foundation for a tiered EA for the later proposed sale.

Writing for the court, Judge Fletcher took special notice of the efforts the local Forest Supervisor appeared to take to favor logging over compliance with environmental laws. The Service had determined to make timber sales in advance of the EA, fearing a "snag" through appeals and litigation in their timber sales. Over half of the trees in the project area had been harvested before the Circuit Court had imposed a preliminary injunction. In deciding to maintain this injunction, the court imposed "the 'snag' that the Forest Service feared but the law requires." The Forest Service was ordered to comply with its NEPA obligations for a comprehensive examination of the cumulative effects of the proposed sales.

The opinion also contains some notable instruction for district courts hearing NEPA claims. While applauding the district court's

close attention to detail in sorting out the Forest Service's piecemeal studies of the project, the Circuit Court urged that it should have been more mindful of the overall purpose of NEPA. "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making . . . An EIS is required of an agency in order that it explore, more thoroughly than an EA, the environmental consequences of a proposed action whenever 'substantial questions are raised as to whether a project may cause significant (environmental) degradation.' This is exactly the circumstance of this case." 161 F.3d at 1216.

Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998). Decided March 4, 1998.

The Forest Service proposed two timber sales on adjacent tracts, and conducted EAs that led to FONSI determinations despite the presence of bull trout, an indicator species, in streams within the sale areas. The Forest Service neglected to supplement one of the EAs to reflect the cumulative effect of logging on the adjacent tract and relied on a three year old water quality survey as the basis of its FONSI determination. The court held that the use of this survey, even though it was supported by one from 1985, did not meet NEPA requirements because neither provided the public with a basis for evaluating the proposed sale. The court further held that Forest Service undertook insufficient analysis of the brook trout population in the area, and that an EIS was necessary. In requiring that the Forest Service conduct an EIS for the first sale, the court ruled that it was not necessary to supplement the EA for the second, as long as the EIS incorporated an analysis of the cumulative effect of both sales.

Following Idaho Sporting Congress, a district court in the Ninth Circuit gave greater deference to the Forest Service's EA findings in Blue Mountains Biodiversity Project v. Pence, 22 F. Supp. 2d 1136 (D. Or. 1998), decided September 21, 1998. In this case, plaintiffs sought to enjoin a proposed timber sale by alleging that the EA contained no scientific or analytical data to support the conclusion that logging activities would improve water quality and fish habitat. Plaintiffs further maintained that there was substantial uncertainty concerning the impact of the proposed logging on eight woodpecker species.

The court found that a 1996 watershed and fisheries report had examined the water quality impacts of the proposed sale and this analysis resulted in a modification to the forest's management plan. Through this report and other analyses the agency satisfied the "hard look" requirement for consideration of water quality issues.

The court specifically recognized that the EA and the administrative record together provided an "extensive discussion and analysis of water quality and fisheries." 22 F. Supp. 3d at 1142. The court further found that the Forest Service relied on ample scientific evidence in determining that the sale would not have an adverse impact on woodpecker populations or habitat, and it granted summary judgement for the agency.

Courts generally continue to maintain a high level of deference to agencies' findings. Plaintiffs in Mt. Lookout – Mt. Nebo Property Protection Assoc. v. Federal Energy Regulatory Commission, 143 F.3d 165 (4th Cir. 1998), decided Jan. 26, 1998, were unable to persuade the court that the Federal Energy Regulatory Commission erred in an EA or ensuing FONSI determination. The FERC had originally granted the City of Summerville a license to

construct and operate a small hydroelectric power plant and transmission line that would run 8 miles to the northward. Subsequently, FERC approved an amendment to the license that would allow the city's transmission line to run to a different substation, 9.6 miles to the south and across a river. Plaintiffs sought an injunction, alleging that FERC erred in its EA conclusion that an EIS was not warranted and that FERC gave inadequate consideration to reasonable alternatives as required by NEPA. The court held that FERC's FONSI determination was warranted because the record indicated that the impact of the new route would be similar to that of the earlier, proposed route and that this impact was not likely to be significant. Likewise, the FERC analysis of the alternatives, limited to the southerly route and an alternate proposed by the plaintiff, was adequate. Relief was denied.

***No "significant federal action," therefore no NEPA requirement.***

Several court decisions announced that prominent agency programs did not rise to the level of action which triggers NEPA requirements. NEPA requires that federal agencies conduct an environmental analysis for any "major Federal actions significantly affecting the quality of the human environment." This requirement has evolved through case law and regulations to reach final actions that have an actual or immediately threatened effect on the environment.

In the first, Northcoast Environmental Center v. Glickman, 136 F.3d 660 (9th Cir. 1998), decided Feb. 17, 1998, the Forest Service and BLM had prepared an inter-agency management plan for Port-Orford Cedar. As part of the plan, these agencies undertook to develop strategies for controlling a root rot fungus which effects Port-Orford Cedar (POC). Plaintiffs alleged that Secretaries of Agriculture and Interior erred by not preparing a programmatic EIS or at least an EA for this plan and sought to enjoin activities within timber stands until such assessment was conducted. They argued that the POC program was analogous to other federal, interregional management plans which have required EISs. They argued that the agencies were shielding the POC program from NEPA's requirements simply by designating the plan as a guidance document.

The agencies defended their decision not to conduct an EIS by characterizing the plan as preliminary research and development efforts. They pointed out that the documents had been circulated for informational purposes only and did not call for any specific actions nor commit any resources.

Despite being a "close call", the court found for the agencies, agreeing that the formulation of the management plan was merely the beginning of the planning process. 136 F.3d at 669. It noted that the plan set forth guidelines and goals for POC research, management strategies and information sharing. Finding that these guidelines "neither propose any site-specific activity nor do they call for specific actions directly impacting the physical environment," the court ruled that the plan was thus not a major Federal action falling within NEPA's requirements. 136 F.3d at 670.

State of Utah v. Babbitt, 137 F.3d 1193 (10th Cir. 1998), decided March 3, 1998. BLM appealed an injunction granted by a district court against its inventory of Utah lands with wilderness characteristics. The survey was essentially a review of the lands included in a bill which would establish 5.7 million acres of wilderness in Utah. The Secretary of the Interior did not contemplate

making any management decisions or other determinations based on the survey. On appeal, BLM argued that the State would suffer no irreparable damage from the survey, that there was no "final agency action" which made the survey ripe for review, and that the survey did not require public participation under FLPMA or NEPA.

In overturning the injunction, the Circuit Court held that plaintiffs lacked Article III standing because they suffered no injury in fact, that land surveys conducted under FPLMA § 202 do not require public participation, and that NEPA's public process requirements did not apply because the survey did not qualify as a "major federal action significantly affecting the quality of the human environment."

Yellowstone National Park's efforts to control its bison herd survived court challenge in Intertribal Bison Cooperative v. Babbitt, 25 F. Supp. 2d 1135 (D. Mont. 1998), decided Nov. 5, 1998. This action resulted from federal programs designed to control the winter migration of bison from their home range in Yellowstone National Park to surrounding public lands and private ranches. The State of Montana and the National Park Service engaged in various programs over the years to return or kill stray bison in order to prevent the spread of *brucellosis* to area cattle herds. The State, NPS and USDA's Animal and Plant Inspection Service (APHIS) agreed to new bison control measures in a 1996 Interim Management Plan.

Plaintiffs sought to enjoin implementation of this plan by challenging the NPS's determination that its implementation did not require an EIS. Since an EIS was then being prepared in connection with a long-term management plan, plaintiffs argued that, until this study was complete, 40 C.F.R. § 1506.1(c) barred the implementation of the Interim Plan. The court held that this claim failed because the EA associated with the Interim Plan had reached a FONSI determination. Thus, the Interim Plan was not a major federal action significantly affecting the quality of the human environment, and 1506.1(c) was not applicable.

A court has again found that a settlement to a legal claim cannot be considered as a "major federal action" as defined by NEPA. In Miccosukee Tribe of Indians of Florida v. U.S., 6 F. Supp. 2d 1346 (S.D. Fla. 1998), decided March 11, 1998, the U.S. Department of Justice had entered into a settlement agreement with a Florida corporation whereby DOJ agreed not to sue the corporation. In return, the corporation promised to comply with the Everglades phosphorus removal program and to pay its negotiated share of clean up costs. Subsequently, plaintiffs sued the United States, the Dept. of Interior, and various officials to enjoin the agreement, alleging that DOI had failed to conduct an EIS and violated APA notice and comment provisions.

The court cited the well established rule that negotiated settlements to litigation did not constitute a major federal action, found that no specific federal actions had been proposed, and dismissed the Tribe's complaint.

The principle of ripeness determined the outcome of Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455 (DC Cir.1998), decided Sept. 4, 1998. In this case, the plaintiff alleged that the FAA violated NEPA by concluding in an EA that a final rule concerning sightseeing overflights would have no significant environmental impacts. The Court of Appeals for the D.C. Circuit held that the NEPA claim was not ripe for review

because the FAA had not yet adopted a final list of available airways for such overflights; therefore it had no way to evaluate the effects of such a decision.

### *Cumulative Impacts*

Judicial scrutiny of agency cumulative impacts analyses continued in Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372 (9th Cir.1998), decided March 4, 1998. Local environmental groups challenged a Forest Service logging sale in the area of an old growth forest. Plaintiffs argued that the EIS prepared for the sale failed to give adequate consideration to the cumulative impacts created by three other sales in the same roadless area.

The court agreed, finding that the agency "provided no detail regarding the extent to which the proposed sales would cumulatively impact and reduce old growth habitat," id. at 1379. The Forest Service was obliged to "consider" cumulative impacts, and it had a duty to provide quantified or detailed information about these impacts. The agency's failure to do so deprived decision-makers of analyses needed to judge the logging program's effect on management indicator species' populations and habitat.

The court also found fault with the Forest Service's strategies for mitigating adverse impacts to water quality in area streams. Noting that "(the agency's) perfunctory description of mitigating measures is inconsistent with the 'hard look' it is required to render under NEPA," id. at 1381, the court enjoined further logging on the sale until the Forest Service satisfactorily complied with its NEPA duties.

Society Hill Towers Owner's Assoc. v. Rendell, 20 F. Supp.2d 855 (E.D. Pa. 1998), decided September 16, 1998.

Plaintiffs sought to enjoin construction of a HUD funded hotel and garage by claiming that the City of Philadelphia's EA had failed to consider cumulative impacts of redevelopment scheme and alternative sites for project. The court dismissed their claim, holding that the other projects were not inseparable from the hotel's "functionality" and that record did not show that these projects were ever expected to materialize. In making this ruling, the court held that where future development is unlikely, there was no need to analyze cumulative impacts. The court also found that the alternatives analysis was adequate.

### *Alternatives*

Alaska Center for the Environment v. West, 31 F. Supp.2d 714 (D. Al. 1998), decided April 30, 1998.

A coalition of environmental organizations challenged the decision by the Army Corps of Engineers to issue Clean Water Act Nationwide Permit for Single Housing 29. Plaintiffs alleged that promulgation of the Permit would violate CWA, NEPA, and ESA. Permit 29 applied to the construction or enlarging of single family homes. It would allow people to deposit fill into wetlands, without a § 404 permit, if the fill did not cause the loss of more than ½ acre of non-tidal wetlands.

In making their challenge, plaintiffs argued that the Corps violated NEPA by not considering a "no action" alternative; in this case, the alternative of not issuing a nationwide permit for single-family housing. The court rejected this argument, reasoning that the Corps Decision Document reasonably explained that deciding not to issue the permit would not achieve the purpose of reducing the regulatory burden on applicants, would leave the Corps without a consistent nationwide regulatory framework for single family home

construction, and would discourage applicants from designing projects to minimize wetlands impacts.

Plaintiffs further alleged that the Corps neglected to consider alternatives which would have raised the ½ acre ceiling or excluded high-value waters. Curiously, the Corps had discussed acreage ceilings when it issued the original version of NWP 29 in 1995. However, none of this discussion was included in the EA for the revised permit. Since the EA lacked any discussion of these alternatives, the court held that the EA was inadequate and issued an injunction on the employment of NWP 29.

Kuff v. United States Forest Service, 22 F. Supp. 2d 987 (W.D. Ar.), decided Sept. 28, 1998.

An individual sought to enjoin timber sales in two areas of the Ozark National Forest, alleging that the Forest Service failed to consider "no action" and "recreation only alternatives." Plaintiff argued that the alternative labeled as "no action" in the EA actually represented an agency action because the timber sale area would be designated for "old growth management". The court found that old growth management did not constitute an action because it was merely the continuation of the existing management plan. As such, the Forest Service had properly considered a "no action" alternative as mandated by NEPA regulations.

As for the failure to examine a recreation-only alternative, existing case law held that the Forest Service was not bound to consider alternatives that did not accord with the general goals for the proposed action. Since the goals proposed for the management of the area in question included a provision for sustainable timber supply, USFS was not obliged to consider a recreation only alternative. Defendants' motion for summary judgement was granted.

### *Categorical Exclusions*

Rhodes v. Johnson, 153 F.3d 785 (7th Cir. 1998), decided Aug. 27, 1998.

Prior to conducting controlled burn and shrub removal in a National Forest, the Forest Service conducted an in-house "environmental analysis" which concluded that actions would not significantly impact the environment. The Service did not conduct an EA because under its Environmental Handbook, such activities qualified for "categorical exclusion" from an EIS requirement, as per 40 C.F.R. § 1508.4. Plaintiffs alleged that the same regulations required an EA because the presence of endangered species in the burn area fell under the "extraordinary circumstances in which a normally excluded action may have a significant environmental effect."

The court agreed, and held that USFS must abide by the plain language of their own Forest Service Environmental Policy and Procedures Handbook. This Handbook mandated an EA whenever "extraordinary circumstances" are found within an area affected by a proposal. Therefore, the agency erred in applying a categorical exclusion. The court recognized that it must give substantial deference to an agency's interpretation of its regulations; however, an agency's authority does not extend to interpretations that conflict with the plain language of the regulations.

In each of three references to extraordinary circumstances, the focus was on the mere existence of the circumstances (e.g., the presence of protected species or areas) and there was no mention of any link between the circumstance and significant impacts on the human environment. Consequently, the court rejected the Forest Service's interpretation that an environmental assessment was not required,

and the forestry actions were enjoined pending completion of an EA.

A West Virginia district court reached a different conclusion regarding categorical exclusions in Krichbaum v. U.S. Forest Service, 17 F. Supp. 2d 549 (W.D. Va. 1998), decided August 27, 1998.

Here the Forest Service proposed to conduct a timber sale and relied on a categorical exclusion in deciding not to conduct an EA for the project. As in Rhodes, the plaintiff argued that the presence of the timber sale area within a municipal watershed constituted an "extraordinary circumstance" that barred reliance on the CE. His argument relied on the fact that the Forest Service's own regulations include municipal watersheds in an illustrative list of extraordinary circumstances.

However, this court determined that the list was not intended to be definitive. It looked to additional sections of the Forest Service Handbook and found that the Service required more than the presence alone of an extraordinary circumstance to preclude the use of a CE. Rather, a CE would be barred only when the proposed project would have some negative impact on the features that made up the extraordinary circumstance. In this case, the agency's specialists had concluded that the proposed logging would have no adverse effect on the municipal watershed.

There is some considerable divergence between these two opinions. The district court was willing to treat the Forest Service's decision with a much greater degree of deference. Its review of the agency's findings concerning watershed impacts was relatively uncritical; in some measure this may be due to an apparent absence of contradictory findings by the plaintiff.

## *Tiering*

Friends of Southeast's Future v. Morrison, 153 F.3d 1059 (9th Cir. 1998), decided Sept. 3, 1998.

Plaintiffs in this case claimed that the Forest Service committed several NEPA and NFMA violations related to a proposed timber sale in the Tongass National Forest. Specifically, they alleged that: (1) the Forest Service failed to conduct an EIS for a 1991 Tentative Operating Schedule for the sale area, (2) the final EIS failed to adequately consider a no-action alternative, and (3) the Forest Service violated NFMA when it failed to conduct an Area Analysis as required by the Tongass Land Management Plan.

The court found that the Tentative Operating Schedule did not require an EIS since it failed to qualify as an "irreversible and irretrievable commitment" of resources, because it "makes no commitment of any part of the national forests". The court also struck down the plaintiffs' second claim, holding that the Forest Service's decision to reject the no action alternative was reasonable in light of at least one goal of the Management Plan.

Finally, the court addressed the plaintiffs' claim that the Forest Service had violated NFMA by not conducting an "area analysis" for the proposed project. The plaintiffs argued that the Forest Supervisor never conducted the area analysis as required by the Management Plan. The Forest Service claimed that the area analysis was conducted within the confines of the EIS. The court held that, per the Forest Service's own guidance requiring project-related environmental analyses to be tiered to the area analysis documentation and the definition of "tiering" contained in 40 C.F.R. § 1508.28, the decision to eliminate alternative sites without the area analysis and before the EIS thus was made without the opportunity for public comment. This

fact violated the Management Plan's requirement for public involvement. Finding that the Forest Service failed to comply with the standards for tiering and public involvement contained within NFMA, the court upheld an existing injunction pending satisfactory analysis by the Forest Service.

### *Scientific Evidence (***Daubert** *principle)*

This year, courts hearing NEPA claims encountered an emergent area of law – the application of scientific evidence tests to agency decisionmaking. Plaintiffs have sought to challenge the adequacy of the science used by agencies in conducting environmental analyses. These challenges were based on the standards for the admission of scientific evidence set forth by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

However, courts as yet are reluctant to disturb established principles of deference for agency decisionmaking by holding agencies to the heightened evidentiary standards of Daubert. In Hells Canyon Preservation Council v. Jacoby, 9 F. Supp. 2d 1216 (D. Or. 1998), decided May 8, 1998, plaintiffs brought a claim to challenge a decision by the Federal Highway Administration to reconstruct a Forest Service road without first conducting an EIS. As part of their case, plaintiffs introduced affidavits which cast doubt on the adequacy of the FHWA's biological assessment. In denying defendant's motion for summary judgement, the court rejected the motion to bar these affidavits, relying on the test announced in Daubert to find that the affidavits were admissible as scientific evidence.

However, the court allowed this evidence for a very carefully constrained purpose. Under the arbitrary and capricious standard, the court entertained the plaintiffs' evidence solely to determine whether the agency had acted "reasonably" when it made its scientific determination. The court found that the FHWA had, in fact, based its decision on "a reasoned evaluation of all the relevant factors" (9 F. Supp. 2d at 1241), and that there was no clear error in judgment. Allowing for the discretion traditionally granted to an agency's reliance on its own expert advice, the court dismissed the claims brought by the plaintiff.

The decision in this case conflicted with that in Stewart v. Potts, 996 F. Supp. 2d 668 (S.D. Tex. 1998), decided March 6, 1998. Here, plaintiffs brought a claim under the APA against the Army Corps of Engineers for violating Section 404 of the Clean Water Act. Among other things, they alleged that the Corps failed to give adequate analysis to the potential detrimental impacts of filling wetlands as part of a golf course construction project. As part of their claim on this issue, the plaintiffs sought to have the court review the Corps' scientific analysis under the standards set forth in Daubert.

The court refused to apply the Daubert standard to the review of scientific evidence relied upon by the Corps, holding that Daubert applied only to evidentiary matters, not to the review of scientific information used internally by an agency in making a decision. Accordingly, the agency's expertise in making scientific determinations was entitled to a high degree of deference, and the plaintiffs' claim was dismissed.