SELECTED NEPA CASES IN 2001

What is a federal action under NEPA?

The D.C. Circuit Court in *Citizens Against Rails-To-Trails v. Surface Transportation Board*, 267 F.3d 1144 (D.C. Cir. 2001) denied Citizens Against Rails-To-Trails' (CART) petition for review of the Surface Transportation Board's (Board) holding that it was not required to perform an Environmental Assessment (EA) under NEPA prior to issuing a certificate for interim trail use (CITU).

CART contended that NEPA applied to a CITU issuance under the National Trails System Act (Trials Act). CART claimed that the Board erred in failing to disallow trail use because the unused Union Pacific railroad right-of-way was contaminated and an EA was needed before the Board could issue a CITU permitting interim trail use of the right-of-way. The Board asserted that it was not required to decide "questions relating to how and whether the right-of-way should be used as a trail."

In its analysis, the court noted that the Board's interpretation of the Trails Act was a question of law, subject to de novo review (as compared to the Board's interpretation to its governing statute which would be entitled to more deference). The court relied on *Goos v. Interstate Commerce Commission*, 911 F.2d 1283 (8th Cir. 1990) in determining that NEPA does not apply unless the Board had significant discretion when issuing a CITU. Under the Trails Act, the Board must issue a CITU when: (1) a trail sponsor submits all the required statements of willingness; (2) the railroad is willing to negotiate a trail use agreement; and, (3) the Board has already approved an abandonment of the rail line. The Board had no say in the outcome of two private parties' voluntary negotiations over trail conversion, nor did it have the statutory discretion to not issue a CITU once an agreement had been reached under the Trails Act. The court explained that because the decision was merely ministerial and not discretionary (i.e. decision occurred after certain events so the agency could not affect the outcome of a decision), NEPA requirements were not triggered.

The Second Circuit in *City of New York v. Minetta*, 262 F.3d 169 (2nd Cir. 2001) denied the City of New York's petition for review of the Department of Transportation's (DOT) holding that an Environmental Impact Statement (EIS) under NEPA was not required, prior to DOT's granting of four take-off and landing slots to airlines servicing New York's LaGuardia and Kennedy Airports.

The granting of slots was made under the statutory authority of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), which regulates LaGuardia, Kennedy, O'Hare International, and Reagan National airports. The DOT Secretary argued, and the court agreed, that two exceptions to NEPA applied in the present case: (1) where the agency's decision does not "entail the exercise of discretion;" and, (2) when a statute at issue imposes short, mandatory deadlines on an agency, thereby rendering compliance with NEPA's EIS requirement impossible.

First, the court found that Section 41716 of AIR21, which applies to New York airports, provided the Secretary no discretion when granting take-off and landing slots if the requesting carrier met certain objective criteria. The court explained language similar to Section 41718

which explicitly granted discretion to the Secretary when ordering take-off and landing slots at D.C.'s Reagan National was absent from Section 41716 which further indicated that the Secretary lacked discretion.

The court also found NEPA to be inapplicable under the statute since the Secretary had only 60 days to approve or deny a request. The court explained that the parties did not argue that completion of an EIS within 60-day period was possible and that tolling the time period under a provision that enabled the Secretary to request more information did not imply that the suspended time period could be used to prepare an EIS.

Categorical Exclusion

The Eighth Circuit in *Friends of Richards-Gebaur Airport v. Federal Aviation Administration*, 251 F.3d 1178 (8th Cir. 2001) denied the petition for review and affirmed the Federal Aviation Administration's (FAA) order to categorically exclude the closure of a small commuter airport in Kansas City, Missouri from the requirement of preparing an Environmental Assessment (EA) or an Environmental Impact Statement (EIS).

In accordance with the Council on Environmental Quality's (CEQ) NEPA regulations that provide guidance when agencies can categorically exclude actions from preparing an EA or EIS, the FAA promulgated a list of categorical exclusion exemptions. As required under NEPA, the FAA also promulgated "exceptions" to its list of Categorical Exclusions where a normally excluded action may have a significant environmental impact (N.B. The CEQ regulations require agencies to "provide for extraordinary circumstances.") The plaintiffs claimed that some of the FAA's exceptions applied, arguing that the proposed action would: (1) have an effect on property protected under the Historic Preservation Act; (2) be highly controversial on environmental grounds; (3) be highly controversial with respect to housing availability; (4) cause a significant increase in surface congestion; or, (5) have a significant impact on noise or air pollution levels.

The court found that the FAA did not act arbitrarily or capriciously when using its own conclusions, studies, and scientists in deciding that none of the Categorical Exclusions exceptions applied. The court also permitted the FAA to rely on the opinion of another governmental agency (Kansas City) which had conducted various scientific studies. In addition, the court found it to be particularly relevant that the only opposition on environmental grounds to the airport closure were from 20 citizen letters in a population of 40,000 and that the only governmental opposition came from the Mayor of the town on the day the FAA issued its decision, despite the fact that the closure negotiations were two years in the making and the FAA had held 35 public meetings.

Cumulative Effects

In *Hall v. Norton*, 266 F.3d 969 (9th Cir. 2001) the Ninth Circuit overturned the lower court's summary judgment ruling that the plaintiff did not have standing to bring a NEPA claim and remanded the case for further evaluation of the cumulative effects of land development in Las Vegas Valley. Hall brought suit against the Department of Interior (DOI) for, among other things, failing to consider the cumulative effects in an Environmental Assessment (EA).

Hall argued that DOI failed to consider the cumulative effects when it issued an EA and subsequent Finding of No Significant Impact (FONSI) for the Del Webb Exchange (an exchange of 4,975 acres of federal land located in Las Vegas Valley with Del Webb for privately owned lands in Nevada that the Bureau of Land Management (BLM) deemed environmentally sensitive). The EA for the land exchange estimated that there would be additional emissions of carbon monoxide and particulate matter in the Las Vegas Valley from the Del Web exchange based on a planned community of about 11,200 homes. However, the EA did not consider the additional 57,000 acres of land in the Las Vegas Valley that BLM had also been identified for a potential future land exchange.

After determining that Hall had the requisite standing to bring suit, the court found that the EA did not attempt to quantify the cumulative emissions from the potential development of the additional 57,000 acres that might be exchanged. In remanding back to the district court, the court stated that, "There is no discussion by the district court of the potential emissions from the other 57,000 acres of land 'identified for disposal' or the adequacy of the BLM's analysis of those emissions."

Standing – Lack of controversy/Mootness

In *Cantrell v. City of Long Beach*, 241 F.3d 674 (9th Cir. 2001) the Ninth Circuit held that birdwatchers had standing to challenge the adequacy of the Navy's Environmental Impact Statement (EIS) under NEPA and remanded the case to the district court for further proceedings.

Birdwatchers alleged that that an inadequate EIS was prepared for the future proposed use/disposal of the Long Beach Naval Station which served as a habitat for several bird species. The district court dismissed for lack of standing and mootness, as the habitats had already been destroyed. The Ninth Circuit rejected the mootness decision because the fact that an alleged violation had ceased was not sufficient to render a case moot. "When evaluating the issue of mootness in NEPA cases, we have repeatedly emphasized that if the completion of the action challenged under NEPA is sufficient to render the case nonjusticiable, entities 'could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable.'"

The Ninth Circuit then found that the birdwatchers had standing under NEPA. The birdwatchers satisfied the prudential requirement under the APA of showing that the injury fell within the "zone of interests" that NEPA was designed to protect. The "plaintiffs *have* alleged a concrete aesthetic injury because they assert that their ability to view the birds and their habitat from the publicly accessible areas surrounding the station will be drastically limited, if not destroyed, by the Navy's actions…The relevant showing for purposes of Article III standing is not injury to the environment but injury to the plaintiff."

The court concluded by explaining that once a procedural injury has been established, the other two requirements (causation and redressability) are relaxed. Because the birdwatchers "are seeking to enforce a procedural right under NEPA to protect their concrete interests, they have standing to challenge the adequacy of the Navy's EIS even thought they cannot establish that a revised EIS would result in a different reuse plan for the Naval Station."

In *Wyoming Sawmills v. US Forest Service*, 179 F. Supp. 2d 1279 (10th Cir. 2001) the USFS adopted a historic preservation plan (HPP) for the land around an Indian archeological site that ultimately limited timber sales in the area. The Wyoming Sawmills brought an action against the US Forest Service (USFS) and an Indian sacred sites coalition alleging claims under the National Environmental Policy Act (NEPA), the Establishment Clause, the National Forest Management Act, and the Federal Advisory Committee Act.

With regard to the NEPA claim, the district court concluded that the plaintiff lacked standing. The court held that the Sawmill's claimed injury, the increased risk of forest fire, was too speculative. The court stated that a showing of merely economic injury does provide standing to challenge an agency action under NEPA. The court went on to explain that even if the chance of forest fire constituted injury in fact, striking down the HPP would not necessarily decrease the risk of forest fire.

Standing / Adequacy of the Environmental Assessment (EA)

In *Central South Dakota Cooperative Grazing District v. Secretary of the United States Dep't Agric.*, 266 F.3d 889 (8th Cir. 2001) the Eighth Circuit held that the Grazing District lacked standing to challenge the Forest Service's (FS) decision which reduced the total maximum stocking level for the Fort Pierre National Grasslands (Grasslands) and the finding of no significant impact for the selected level.

The court concluded that the Grazing District lacked both prudential as well as Article III standing. As to prudential standing, the court explained that since the Grazing District's only interests were economic, they were not within the "zone of interests" of the provision to which they asserted their claim (42 U.S.C. § 4332(2)(E)). Furthermore, the Grazing District lacked Article III standing since its interests at stake (which were only economic) were not germane to the organization's purpose of operating and managing grazing lands. The court stated, "The Grazing District is a corporation of individual ranchers organized to cooperatively operate and manage grazing lands. We find no indication that the Grazing District has any interest in protecting the wildlife habitat within the Grasslands."

Despite the fact that the Grazing District lacked standing, the court went on to find that the Grazing District's NEPA claim that the FS did not consider or evaluate reasonable alternatives failed. "When an agency has concluded through an Environmental Assessment that a proposed project will have a minimal environmental effect, the range of alternatives it must consider to satisfy NEPA is diminished." The court explained that the FS was permitted to revoke a standard since it explained the available evidence and offered a rational connection between that evidence and its choice. Finally, the court found that the methodology upon which the FS relied in making its decision was legally sufficient, even though it may have not been perfect.

Adequacy of the Environmental Impact Statement (EIS)

In *Churchill County v. Norton*, 276 F.3d 1060 (9th Cir. 2001) plaintiffs contended that the Fish and Wildlife Service (FWS) violated NEPA by approving land and water rights purchases pursuant to Section 206 of the Truckee-Carson Pyramid Lake Rights Settlement Act

(Settlement Act) without first preparing a Programmatic EIS (PEIS) analyzing the cumulative and synergistic impacts of the Act's interrelated provisions. The court held that the actions were not connected or related actions that had cumulative or synergistic impacts and did not need to be addressed in a single comprehensive PEIS. The court analyzed this claim under the arbitrary-and-capricious standard explaining that a party challenging an agency's refusal to prepare a comprehensive PEIS must show that the agency acted arbitrarily in making that determination.

Plaintiffs further argued that the Final Environmental Impact Statement, "Water Rights Acquisition for Lahontan Valley Wetlands, Churchill County, Nevada" (WEIS), prepared in conjunction with Section 206, failed to comply with NEPA because the FWS did not adequately assess the cumulative impacts of actions other than wetlands acquisitions, failed to study impacts to groundwater, and failed to define and study a reasonable range of alternatives. After extensive analysis, the court held that the WEIS sufficiently analyzed the potential adverse environmental impacts of implementing Section 206(a) of the Settlement Act and considered a wide range of reasonable, feasible alternatives.

> "In each of the fifteen subsections identified in the WEIS, the Service discussed the predicted impacts and provided how its best assessment of what might happen and how the Service and other agencies would likely respond. In addition, the Service summarized the potential cumulative impacts of the above actions and activities if the 'preferred alternative' were not selected and then summarized the potential impacts of the actions and activities if the Service adopted the preferred alternative. Under the preferred alternative, the Service predicated that the agricultural production would be significantly adversely affected. The Service stated unequivocally in the 'Unavoidable Adverse Effects' section that the preferred alternative expected to cause unavoidable adverse impacts so the agricultural economy, agricultural dependent wildlife, and the 'farm preservation values' of the community members, ultimately changing the vary character of the community with the completion of the water rights acquisition program."

The court noted that while additional studies might help in future decisions regarding groundwater resources, the FWS relied on current information and took the requisite "hard look" cumulative environmental impacts of the action alternatives.

In *Custer County Action Association v. Garvey*, 256 F.3d 1024 (10th Cir. 2001) the court affirmed the Federal Aviation's (FAA) and Air National Guard's (ANG) orders approving the Colorado Airspace Initiative (Initiative) and found the Final EIS (FEIS) prepared for the Initiative to be adequate.

The Initiative was proposed special use airspace changes to the National Airspace System designed to provide the necessary airspace for the 140th Tactical Fighter Wing of the Colorado ANG to be able to train with the F-16 fighter jet under realistic conditions and respond to changes in commercial aircraft arrival and departure corridors for Denver International Airport. Plaintiffs attacked the adequacy of the FEIS prepared by the ANG and adopted by the FAA arguing that the ANG and FAA violated NEPA for a variety of reasons. In its analysis, the court addressed plaintiff's claims and found that the FEIS was adequate.

The court found that the Initiative did not trigger the need for a programmatic or nation-wide environmental impact analysis. "The record gives no indication, and Petitioners cite no evidence, of a clear nexus between the Initiative and other military airspace proposals across the Nation. In the absence of such evidence, it is neither unwise nor irrational to allow the Initiative to go forward independent of other special use airspace designations or low-level military flight training programs." Furthermore, the court found that the impact analysis as it pertains to wilderness areas, national monuments and national parks was adequate. The court noted that the agencies "considered the concerns expressed by the public and other agencies regarding potential impacts on wilderness and other sensitive areas prior to concluding any such impacts would be negligible." In addition, the agencies made a reasonable, good faith effort to analyze impacts. "The record in this case verifies that the agencies identified possible noise impacts on sensitive areas, including wilderness areas, parks and monuments, and reasonably determined, after considering public and agency comment alike, that any impact on these areas would be insignificant…"

The court also found that the alternative analysis in the FEIS was adequate. First, the court explained that the FEIS contained a satisfactory no-action alternative. "The Final Environmental Impact Statement demonstrates the ANG and FAA compared the impacts of the original proposal and preferred alternative to the impacts of continuing to fly in the existing (special use airspace)." Second, the court found that the FEIS adequately considered other reasonable alternatives. The court explained that the agencies defined the objectives of the Initiative, identified three reasonable alternatives that would accomplish those objectives, and took a hard, comparative look at the environmental impacts associated with each reasonable alternative.

In *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722 (9th Cir. 2001) the Ninth Circuit reversed and remanded with instructions that the district court enjoin the granting of vessel permits until the National Parks Service completed an EIS. The court held that the Parks Service's Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) were clearly flawed.

At issue was the Parks Service's implementation of a plan that increased the number of times cruise ships could enter Glacier Bay each summer season immediately by 30% overall and 72% if certain conditions were met. After conducting an EA, the Parks Service declared that its plan would have no significant impact on the environment, issued a FONSI and began to put its plan in effect. The Ninth Circuit reversed the district court and held that both the high degree of uncertainty and the substantial controversy regarding the effects on the quality of the environment necessitate preparation of an EIS.

The court explained that preparation of an EIS is mandated where the uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential effects. The court stated that, "Here, scientific evidence presented in the Parks Service's own studies revealed very definite environmental effects. The uncertainty was over the intensity of those effects." Furthermore, the court explained that "The Parks Service's EA does, however establish both that such information may be obtainable and that it would be of substantial assistance in the evaluation of the environmental impact of the planned vessel increase…That is precisely the information and understanding that is required before a decision

that may have a significant adverse impact on the environment is made, and precisely why and EIS must be prepared in this case."

The court further held that the Parks Service acted backwards because it had already implemented part of its plan before it began environmental research. "The point is, however, that the 'hard look' must be taken before, not after, the environmentally-threatening actions are put into effect." In addition, the court explained that preparation of an EIS is mandated by the surrounding controversy of the proposal. The court noted that 85% of public comments on the proposal were in opposition. "More important, to the extent the comments urged that the EA's analysis was incomplete, and the mitigation uncertain, they cast substantial doubt on the adequacy of the Parks Service's methodology and data."