

SELECTED NEPA CASES IN 2000

Standard of Review/Deference

In *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000), the 10th Circuit Court held that the Department of the Interior's (DOI) rules providing for the reintroduction of experimental wolf populations into designated areas in Yellowstone National Park and central Idaho, did not violate provisions of the Endangered Species Act (ESA). Further, NEPA was not violated because DOI took a "hard look" at the environmental consequences of the reintroduction program and deference should be given to the Department's decision on a technically complex issue.

Although the appellees cited evidence in the administrative record that supported their position regarding the existence of naturally occurring wolf populations, the existence of an alleged subspecies of wolf unique to Yellowstone, and the significance of any impact the wolf reintroduction program would have on naturally occurring wolves, the court stated that "the mere presence of contradictory evidence does not invalidate the Agencies' actions or decisions." *Trimmer v. U.S. Department of Labor*, 174 F.3d 1098 at 1102.

The court explained that it was apparent in the administrative record that DOI based its conclusions under the ESA and NEPA on the reasoned opinions of and data gathered by Fish and Wildlife Service and National Park Service experts. "[A]gencies are entitled to rely on their own experts so long as their decisions are not arbitrary and capricious." *Colorado Env'tl. Coalition*, 185 F.3d at 1173 n.12 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989)). Further, the appellees failed to show a lack of substantial evidence in the administrative record to support DOI's conclusions, or that the Final Environmental Impact Statement was otherwise inadequate to foster informed public participation or informed decision-making. NEPA "prohibits uninformed - rather than unwise - agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351. Accordingly, because the record demonstrated that DOI took a "hard look" at the environmental consequences of the wolf reintroduction program, DOI's ultimate decision or conclusion was entitled to deference.

Consistency with Local Plan

In *Martin v. Federal Energy Regulatory Commission*, 199 F.3d 1370 (D.C. Cir. 2000), the court held that FERC's decision authorizing the construction of a new pipeline (the Certificate Order) that would traverse part of the petitioner's property, was not arbitrary and capricious.

The petitioner alleged that the FERC's Final Environmental Impact Statement failed to comply with NEPA and the National Gas Act regulations to protect scenic and historic places. Although the petitioner's property was designated by the State of New Hampshire as a "river corridor" and a "historic" site, it was not listed in the National Register of Historic Places

until one year after FERC authorized Portland Natural Gas Transmission System (Portland) to construct the pipeline.

Under NEPA, FERC was required to prepare an EIS in which it discussed any inconsistency between the proposed project and a state or local environmental plan or law. 40 C.F.R. § 1506.2(d) (2006). The petitioner complained that FERC failed to discuss whether Portland's proposed pipeline was consistent with the "river corridor management plan" adopted by the State of New Hampshire. FERC pointed out, dispositively, that inconsistency with any state or local plans was not raised at the time of the proceedings, nor in the rehearing request, and that the cited regulation did not require it to affirmatively address consistency with such plans. Further, FERC considered the "visual impact" of the pipeline on the petitioner's property and the practicality of the petitioner's proposed alternative route. FERC properly approved Portland's use of the existing right-of-way on the petitioner's property.

No-Action Alternative

The D.C. Circuit in *Conservation Law Foundation v. Federal Energy Regulatory Commission*, 216 F.3d 41 (D.C. Cir. 2000) denied petitions to review and upheld FERC relicensing of a hydroelectric project in north-central Maine. Petitioners argued that FERC rejection of minimum flow requirements in Back Channel (a branch of the Penobscot River that is blocked from receiving water due to a dam located in the project area) violated the Federal Power Act (FPA) and NEPA and alleged that the baseline "no action" option caused FERC to ignore enduring environmental impacts directly attributable to the new license.

As a baseline for comparison among three different proposals regarding the new license, FERC adopted the existing conditions at the Back Channel as the baseline "no action" option. A baseline is not an independent legal requirement, but rather, a practical requirement in an environmental analysis often used to identify the environmental consequences of a proposed agency action. *American Rivers v. Federal Energy Regulatory Commission*, 201 F.3d 1186 (9th Cir. 2000). The court explained that FPA gives FERC leeway to conduct its comparative assessment using existing conditions as a baseline and that FERC properly considered and rejected the alternative of a brook trout fishery in the Back Channel. Given the plentiful brook trout fisheries in the area, FERC reasonably determined that adding an additional 4.5-mile stretch would have little benefit. Moreover, FERC gave equal consideration to environmental and recreational (non-power) values, even though it did not assess recreational benefits in economic terms. The fact that FERC assigned dollar figures to some costs does not require it to do the same for recreational benefits.

Additionally, FERC did not inflate the economic costs the project would incur from increased Back Channel flows. Contrary to petitioners' complaint, FERC considered the alternative of energy conservation. Moreover, FERC did not rely on unsupported claims that the increased cost of Back Channel flows would result in job losses at the project mills-- FERC relied only on the risk of economic harm, which was supported by ample evidence.

In *American Rivers v. Federal Energy Regulatory Commission*, 187 F.3d 1007 (9th Cir. 1999), *amended and superseded*, 201 F.3d 1186 (9th Cir. 2000), the Ninth Circuit denied review of FERC's re-issuance of a hydropower license in Oregon. Petitioners argued that FERC granted the license without conducting an environmental analysis required under FPA

and NEPA. Specifically, petitioners claimed that FERC incorrectly used a “no-action” alternative to establish baseline environmental conditions for comparison with other alternatives.

The court found FERC’s use of existing conditions at the project site amounted to the appropriate “no-action” alternative in compliance with the FPA and NEPA. The use of existing conditions as a baseline was found reasonable pursuant to FPA legislative history. Further, the court found that FERC’s decision to use the existing license requirements as the “no-action” alternative was appropriate because denying the license was not a reasonable alternative. The use of existing conditions satisfied FPA requirements to take some action on the application for a new license. [16 U.S.C.A. § 808\(a\)\(1\)](#) (2006).

Categorical Exclusions (CE)

The Seventh Circuit in *Heartwood, Inc. v. United States Forest Service*, 230 F.3d 947 (7th Cir. 2000) affirmed the district court decision that the U.S. Forest Service did not need to prepare an EA or an EIS before adopting the Categorical Exclusion (CE) that excluded certain types of timber harvests from NEPA-related requirements. The court held that the Forest Service action creating the CEs was an implementing procedure, and not an action that requires completion of an EA or an EIS. The Council on Environmental Quality (CEQ), which implements NEPA, promulgated a rule requiring agencies to establish agency procedures for CEs and the CEQ does not require agencies to complete an EA or an EIS to establish these procedures.

The Ninth Circuit in *West v. Secretary of the Department of Transportation*, 206 F.3d 920 (9th Cir. 2000), held that the Federal Highway Administration (FHWA) arbitrarily and capriciously decided to categorically exclude from NEPA review a two-stage highway interchange project in Washington state. The FHWA concluded that the entire project fit under the "approvals for changes in access controls" categorical exclusion (CE) because the FHWA was required to approve new interchanges in advance of construction. The fact that the FHWA was to approve a state's plans to add access and exit points to an interstate highway, however, was not synonymous with the "approvals for changes in access control" for which a categorical exclusion may apply. The court noted that none of the other examples listed in the CE regulations approach the magnitude of the interchange project in this case.

Moreover, because FHWA regulations forbid using CEs for projects that will significantly impact travel patterns, the project did not satisfy the criteria for general CEs and, thus, failed the first prong of NEPA regulations for determining whether a CE is appropriate. 40 C.F.R. § 1508.4. The court found that some type of environmental review was required for both stages of the project. Nevertheless, despite the NEPA violation, the FHWA was not required to tear down stage one of the project, because it was already constructed and fully operational.

The court held that the two stages are independent projects and therefore, necessitate individual review. The fact that the first stage of the project was complete did not render the action moot, but the CE may not apply to satisfy the FHWA's NEPA obligations for stage two. The court stated that since stage two is insufficiently defined, the type of environmental

review that will be required (either an EA or an EIS) for stage two, will depend on its scope when it clearly takes shape.

Indirect and Cumulative Effects

The D.C. district court in *Friends of the Earth, Inc. v. United States Army Corps of Engineers*, 109 F.Supp.2d 30 (D.D.C. 2000), held that the U.S. Army Corps of Engineers (Corps) violated NEPA when it failed to conduct an EIS prior to permitting three casinos on the Mississippi coast. Under Mississippi law, casinos must be located on floating vessels. MISS. CODE ANN. § 97-33-1 (2006). Because the casinos at issue would have an impact on navigable waters, they were required to apply to the Corps for a Clean Water Act §404 permit. The Corps completed an EA for each of the casinos, concluded that the casinos would have no significant impact, and issued the necessary permits.

The court held that the Corps failed to consider a range of direct environmental impacts, indirect impacts, and cumulative impacts of the projects when the Corps found that the three casino projects would have no significant impacts on the environment that would require evaluation through an EIS. The Corps failed to take a “hard look” at the direct impacts that the casinos would have on wetlands, non-vegetated water bottoms, and the intake of larvae and eggs of aquatic species into casino sump pumps. Further, the Corps failed to analyze an upland development adjacent to one of the casinos, which resulted from and was entirely conditional on the adjacent casino.

The Corps also failed to consider the indirect impact of the growth-inducing effects of the casinos, especially since the economic development of the region is the proposed goal of casino projects.

On the issue of cumulative effects, the court found that the Corps' EAs failed to adequately analyze the cumulative impacts of the casino development along the Mississippi coast. In this case, the Environmental Protection Agency (EPA); Department of Interior, Fish and Wildlife Service (DOI); and Department of Commerce, National Marine Fisheries Service, as well as, the Mississippi Department of Marine Resources disputed the Corps evaluation of the environmental impacts of the casinos and had pleaded with the Corps to prepare an EIS. The record was also replete with similar pleas from the public. Further, the Corps' own leadership recognized that “casino permits along the Mississippi Gulf coast has engendered considerable controversy and resulted in concerns from the leadership of both the [EPA] and [DOI].” *Friends of the Earth*, 109 F.Supp.2d at 43. Due to the controversy surrounding the development of the casinos and the significant cumulative impacts of casino development, the court vacated the permits granted by the Corps for the casino projects under § 404 of the Clean Water Act and ordered the Corps to prepare an EIS.

Segmentation

The Ninth Circuit in *Wetlands Action Network v. United States Army Corps of Engineers*, 222 F.3d 1105 (9th Cir. 2000) held that the Corps did not violate NEPA when it granted a permit to a developer to fill wetlands for a mixed-use development project in Los Angeles County, California, and, consequently, vacated a district court's injunction

prohibiting the developer from further construction. The developer proposed to divide the overall project into three separate permit applications to correspond to the three separate phases of the project. The first phase was for authorization to fill scattered wetland patches in certain areas of the wetland for mixed-use development. The second phase was to restore and create a salt marsh that would occur in a specific area of the wetland. The third phase was to develop a marina and ecologically enhance a flood control channel that will dredge and fill a separate section of the wetlands.

The Corps did not improperly limit the scope of its NEPA analysis by considering only environmental impacts resulting from the developer's application to fill 16.1 acres of wetlands as a part of phase one of the project. The developer was not required to analyze all three phases in a single EA or EIS because when the developer applied for a permit for the first phase, many of the details and planning decisions regarding the second and third phases had not yet been completed. Because the Corps did not have jurisdiction over the upland development, the Corps was not required to evaluate the impacts attributable to the entire 600-acre development.

Similarly, the Corps was not required to consider the environmental impacts attributable to each of the three development phases in a single NEPA analysis because the three phases, having independent utility, are not connected actions.

In addition, the Corps' decision to issue a FONSI was not arbitrary or capricious. The Corps took a "hard look" at the environmental consequences of allowing the developer to construct a freshwater wetlands system to mitigate the loss of the filled wetlands because it reasonably evaluated the effectiveness of the mitigation measures.

Supplemental Analyses

The Ninth Circuit in *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000) held that although the U.S. Forest Service violated NEPA when it failed to prepare a Supplemental Environmental Impact Statement (SEIS) necessary for certain timber sales in the Nez Perce National Forest in Idaho, the Forest Service's subsequent preparation of a new supplemental information report (SIR) and other documents eliminated the need to enjoin the timber sales.

Regarding the sales at issue, the court determined that the Forest Service violated NEPA by failing to timely prepare, or sufficiently consider and evaluate the need for a SEIS for the timber sales in light of new information that arose during the eleven years since the original 1987 EIS for the forest plan. The new information that arose included the Forest Service's listing of seven new species as sensitive and its published recognition of the inadequacy of the old growth and snag standards for the forest. There was no evidence in the record that prior to this litigation the Forest Service ever considered the seven new sensitive species designations or the inadequacy of the snag and old growth standards. As such, it was incumbent on the Forest Service to evaluate the existing EIS and determine if it required supplementation.

However, after litigation commenced, the Forest Service conducted and completed an additional SIR and several other studies that specifically addressed the significance of the listing of the seven species and the inadequacy of the snag and old growth standards. These new analyses supported the Forest Service assertion that an SEIS was not necessary because

the timber sales would not significantly affect the sensitive species and that after the sales, the old growth and snag standards would be satisfied.

In *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562 (9th Cir. 2000), an environmental group, Idaho Sporting Congress (ISC), challenged a Forest Service's proposed timber sale. In *Idaho*, the Ninth Circuit reversed and remanded a district court denial of (ISC's) motion for a preliminary injunction to prevent the U.S. Forest Service from proceeding with certain timber sales in the Payette National Forest in Idaho.

Nevertheless, ISC and the Forest Service agreed to a settlement obligating the Forest Service to complete additional environmental documentation of the sales in the form of SIRs examining the need for further environmental review and documentation. The group reserved the right to re-sue, and after publication of the SIRs, the group challenged the timber sales alleging violations of NEPA and the National Forest Management Act. The district court denied the group's motion for a preliminary injunction of the sales.

However, the Ninth Circuit held that the district court's denial of the preliminary injunction was based on the erroneous interpretation that the Forest Service could use SIRs, instead of a supplemental EIS or EA, to reevaluate an existing EIS or EA. SIRs can be used to determine if new information or changed circumstances require preparation of a supplemental EA or EIS. SIRs cannot substitute for a supplemental EA or EIS when an agency determines that new information is significant.

The Court explained that the Forest Service became aware of new information that it should have addressed in supplements to the original EAs and EISs for the sales at issue, not in a subsequent SIR. Further, NEPA required that EAs and EISs be prepared early enough so that they can contribute to the decision-making process. Here, the Forest Service did not complete the SIRs at the earliest possible time. The SIRs were prepared in response to litigation, and the public was not given an opportunity to comment. The SIRs failed to remedy the fact that at the time the Forest Service originally approved the timber sales, it did not have all the necessary information that it was required to consider. In addition, the groups demonstrated the possibility of irreparable harm necessary for an injunction because logging activities for the sales at issue had already begun.

Idaho differs from *Friends of the Clearwater*, above, because here the Forest Service was aware of significant new information that needed to be added to the EIS. This new information or changed circumstances necessitated the preparation of a SEIS, not a SIR, since the changes were already determined to be significant. A SIR can only be used to determine if new information or changed circumstances are significant, requiring a SEIS. In *Friends of the Clearwater*, the SIR indicated that although there was new information or changed circumstances, these changes would not significantly affect the environment. For this reason, preparation of a SEIS or enjoinder of the timber sales was not required. The practical effect of the decision is that the "the public comment process . . . is not essential every time new information comes to light after an EIS is prepared. Were we to hold otherwise, the threshold decision not to supplement an EIS would become as burdensome as preparing the supplemental EIS itself, and the continuing duty to gather and evaluate new information . . . could prolong NEPA review beyond reasonable limits." *Id.* (internal citation omitted).

EIS/EA/FONSI

The Ninth Circuit in *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) reversed the district court's decision and held that the National Oceanic and Atmospheric Administration (NOAA), the National Marine Fisheries Service, and other federal defendants violated NEPA by preparing an untimely and inadequate environmental assessment (EA) and failing to prepare an environmental impact statement (EIS) when they granted the Makah Indian Tribe of Washington State authorization to resume whaling. Prior to finalizing the EA and issuing a FONSI, NOAA entered into an agreement with the Makah to support a proposal to the International Whaling Commission for a quota of gray whales for subsistence and ceremonial use by the Makah Tribe.

The court first held that by making such a firm commitment to the tribe before preparing an EA, the federal defendants were predisposed to finding that the proposal had no significant environmental effects. The defendants violated NEPA since they failed to take a hard look at the environmental consequences of their actions before making their decisions.

Furthermore, defendants did not engage in the NEPA process at the earliest possible time. Instead, the record clearly indicated that defendants did not even consider the potential environmental effects of the proposed action until long after they had already committed in writing to support the Makah whaling proposal. The court noted that it was highly likely that because of the defendants' prior written commitment to the Makah and the concrete efforts on their behalf, the EA was slanted in favor of finding that the Makah whaling proposal would not significantly affect the environment.

The court instructed the district court to direct the federal defendants to set aside the FONSI, suspend implementation of the agreement with the tribe, and prepare a new EA.

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