Recent NEPA Cases
2001 - 2002

Lucinda Low Swartz, Esq.

Statistics

Approximately 35 NEPA cases (decided on the merits or injunctions issued based on the probability of success on the merits) were issued since October, 2001. Of these,

- 12 involved the U.S. Forest Service (won 4, lost 8)
- 4 involved the U.S. Bureau of Land Management (lost all)
- 4 involved the Department of Transportation (won 2, lost 2)
- 3 involved U.S. Fish and Wildlife Service (won 2, lost 1)
- 3 involved Department of the Interior (won 2, lost 1)
- 3 involved the Federal Aviation Administration (won 2, lost 1)
- 3 involved the U.S. Army Corps of Engineers (won 2, lost 1)
- 1 involved the U.S. Navy (won)
- 1 involved the Department of Energy (won)
- 1 involved National Marine Fisheries Service (lost)

Of the 35 cases, the government won 16. Generally, when the government won the court was able to conclude that the agency had given a "hard look" to the potential environmental consequences.

Of the 19 cases lost, 13 involved approvals of logging, grazing, oil and gas exploration, or whaling. Reasons included no NEPA review conducted, no supplement prepared when the proposed action changed, or there was an inadequate cumulative effects analysis. Of the 19 cases lost, the courts in 6 of them said that the agency should have prepared an EIS.

Cumulative Impacts

Several cases addressed cumulative impacts:

Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957 (9th Cir. 2002) (use of a home range scale, rather than a landscape scale as recommended by USFS scientists, rendered the cumulative impact analysis inadequate)

Native Ecosystems Council v. Dombeck, 304 F. 3d 886 (9th Cir. 2002) (although individual projects had independent utility and were not required to be considered together in the same NEPA document, the EAs for each did not adequately consider the cumulative impacts of the other projects as reasonably foreseeable actions)

Grand Canyon Trust v. Federal Aviation Administration, 290 F.3d 339 (D.C. Cir. 2002) (FAA addressed only the incremental increase in noise that would occur as a result of its approval of a

replacement airport near the Zion National Park, and not the cumulative impact on the park. There was no way to determine whether the FAA's estimated 2 percent increase, in addition to other noise impacts on the park, will significantly affect the quality of the human environment. The FAA analysis does not aggregate the noise impacts on the park.)

Kern v. U.S. Bureau of Land Management, 284 F.3d 1062 (9th Cir. 2002) (failed to adequately analyze cumulative impacts of proposed timber project)

Texas Committee on Natural Resources v. Van Winkle, 197 F. Supp. 2d 586 (N.D. Tex. 2002) (Army Corps was required to consider the cumulative impacts of reasonably foreseeable future actions in the same geographical area, although those actions were not actual proposals and precise information about them was not available. There was a reasonable basis to assume some or all of the projects would be implemented. The cumulative impacts analysis was cursory and the agency did not take a "hard look" at the proposed action's environmental consequences, including cumulative impacts).

Sierra Club v. Bosworth, 199 F. Supp 2d 971 (N.D. Cal. 2002) (EIS for post-fire logging project fails to adequately disclose or analyze cumulative impacts on management indicator species, fuel break maintenance, or fire-fighting tactics. Although the project is not connected to other post-fire logging projects in the forest, the EIS fails to adequately disclose and consider those actions in the EIS. Given their similarities with respect to timing, geography, and purpose, these actions may result in significant impacts and such impacts must be addressed in a single EIS.)

Categorical Exclusions

State of California v. Norton, 311 F.3d 1162 (9th Cir. 2002) (Agency did not adequately document its reliance on a claimed categorical exclusion. There was not documentation in the record that the agency made the categorical exclusion determination at the time the action was approved.)

Riverhawks v. Zepeda, unpublished (D. Ore. 2002) (Categorical exclusion is only appropriate when the proposed action will have no effect on the environment; the record reflects that the proposal to increase motorized boat traffic on a wild and scenic river has the potential to impact turtles and salmon and to cause conflicts between user groups.)

Save Our Heritage, Inc. v. Federal Aviation Administration, 269 F.3d 49 (1st Cir. 2001) (FAA decided to allow an airline to provide scheduled passenger service to LaGuardia from a general aviation airport located in the vicinity of numerous historic parks. FAA concluded that the additional 10 RT flights per day would have a *de minimus* environmental impact and that a CX was appropriate. FAA's failure to prepare an EA or consult with historic preservation agencies was "harmless error.")

Extraterritorial Application of NEPA

Natural Resources Defense Council v. U.S. Department of the Navy, unpublished (C.D. Cal. 2002)

The Navy's Littoral Warfare Advanced Development Program (LWAD program) oversees and supports the sea testing of experimental anti-submarine technologies, including active sonar. There is agreement among scientists that high intensity underwater sounds, such as those generated by active sonar, can induce a range of adverse effects in whales, dolphins, and other marine life.

Most of the LWAD sea tests have been conducted on the high seas or in the United States Exclusive Economic Zone (EEZ). The EEZ is a zone extending seaward from the boundary of the territorial sea out to 200 miles. The Navy completed an "Overseas Environmental Assessment" for every sea test, and in each case concluded that an EIS was not required because the sea test was unlikely to affect any endangered or threatened species or their critical habitat.

The Natural Resources Defense Council (NRDC) filed suit seeking to enjoin the Navy from conducting further sea tests under the LWAD program until the Navy completed a programmatic NEPA document. The Navy argued, among other things, that the LWAD Program was not a "program" but rather an inter-office support function and that the sea test projects existed independently of LWAD. The Navy also argued that its activities in the Exclusive Economic Zone are not subject to environmental review under NEPA.

Earlier courts have found that there is a presumption against the extraterritorial application of laws. That is, in general, United States laws do not apply outside U.S. borders absent an express Congressional mandate. The Navy argued that because some of the tests take place in international waters, NEPA does not apply to its activities under the LWAD program.

In this case, however, the court found that the presumption against the extraterritorial application of U.S. laws does not apply, because the *planning* for the LWAD Program occurs entirely within the boundaries of the U.S. (following the holding in *Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1994). According to the court, the federal activity regulated by NEPA is the decision-making process of the agencies, not the underlying project. Because, the decision-making process surrounding the approval of sea tests occurred within the U.S., the application of NEPA to the LWAD sea tests is not extraterritorial. The court distinguished other cases with different holdings as to the extraterritorial application of NEPA by concluding that "the court's rationale for finding that NEPA did not apply to particular actions was that its application would implicate important foreign policy concerns or demonstrate a lack of respect for another nation's sovereignty."

Here, the court found that NEPA applies to the LWAD program because LWAD sea test have an effect in U.S. territorial waters and in the U.S. EEZ. The EEZ, unlike the territorial sea, is not strictly considered part of the territory of the United States, but the United States does have certain "sovereign rights" within the area "for the purposes of exploring, exploiting, conserving and managing natural resources." Furthermore, regarding natural resource conservation and

management, "the United States does have substantial, if not exclusive, legislative control of the EEZ." As a result, the court held "that NEPA applies to federal actions which may affect the environment in the EEZ."

Having found that NEPA is applicable to federal agency actions in the EEZ, the court then analyzed whether the LWAD program was a federal action subject to NEPA review. Under NEPA implementing regulations, "proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." The court found that the LWAD program, standing alone, was not subject to NEPA review. Apart from planning and conducting the individual sea tests, the LWAD program is only engaged in general planning and does not create activities with an impact on the environment. The court held that environmental reviews are not required until the LWAD program begins to engage in specific planning and commits resources for an actual sea test. Therefore, the Navy could continue to conduct its environmental analysis on a sea test by sea test basis.

Other Findings of Note

- Plaintiff groups are not necessarily required to make the exact argument to the agency that is later made to the court. It is sufficient if the plaintiffs raised the general issue with the agency during the NEPA process. *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002).

- A case was not moot even though the timber sale complained of was complete. A case is moot only where no effective relief for the alleged violation can be given. In this case, the court could order mitigation. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886 (9th Cir. 2002).

- A NEPA document that fails to disclose and analyze differing scientific opinions is defective. *Sierra Club v. Bosworth*, 199 F.Supp. 2d 971 (N.D.Cal. 2002); *League of Wilderness Defenders-Blue Mountains Diversity Project v. Marquis-Brong*, not reported, (D.Ore. 2003); and *League of Wilderness Defenders v. Zielinski*, 187 F. Supp. 2d 1263 (D. Ore. 2002).

- An alternatives analysis that exhibits "unquestioning acceptance" of the project applicant's statements regarding their objectives is defective. The agency must conduct or commission an independent analysis of alternatives offered by an applicant. *Southern Utah Wilderness Alliance v. Norton*, not reported (D.D.C. 2002).

- An EIS improperly eliminated a project alternative based on an inadequate estimate of the alternative's cost. EIS also failed to consider alternatives to the sequencing of construction of 3 related transportation projects – delaying construction of a highway until completion of a public transit expansion was a reasonable alternative. Also, EIS only considered impact of the highway on wildlife within 1,000 feet of the highway, despite evidence that the project could adversely affect wildlife as far as 1.2 miles. *Utahns for Better Transportation v. U.S. Department of Transportation*, 305 F.3d. 1152 (10th Cir. 2002).

- Agency not required to release a draft EA and FONSI for a 30-day review because it did not meet the special circumstances set out in the agency regulations for such reviews [ignoring other provisions that require public involvement for EAs to the fullest extent possible]. *Pogliani v. US Army Corps of Engineers*, 306 F. 3d 1235 (2d Cir. 2002).

- NEPA does not apply to those actions in which an agency "lacks significant discretion." *Citizens Against Rails-to-Trails v. Surface Transportation Board*, 267 F.3d 1144 (D.C. Cir. 2001). NEPA does not apply to nondiscretionary statutory mandates. *City of New York v. Mineta*, 262 F.3d 169 (2d Cir. 2001).

- The agency should have prepared an EIS where there are substantial questions on whether the project may have a significant effect on the environment. *Anderson v. Evans*, not reported (9th Cir. 2002) and *Public Citizen v. U.S. Department of Transportation*, not reported (9th Cir. 2003).

- Agency did not violate NEPA in promulgating a development and production plan for oil and gas development. The EIS adequately examined direct and indirect impacts. In using data from a previous lease agreement instead of collecting new data for the specific site, the agency made a reasoned judgment that the data was relevant and yielded a useful analysis of the cumulative impacts. *Edwardsen v. US Department of the Interior*, 268 F.3d 781 (9th Cir. 2001).

- Designation of critical habitat requires an EIS. FWS prepared an EA for designation of critical habitat for Rio Grande Silvery Minnow. There was overwhelming evidence that the designation will significantly affect the quality of the human environment: designation will require pervasive changes in distribution of river water resulting in reduction of irrigated agricultural acreage and may require curtailment of river maintenance activities leading to decreased water transport efficiency and an increase risk of flooding. *Middle Rio Grande Conservancy District v. Norton*, 294 F.3d 1220 (10th Cir. 2002).

- A court found that the plaintiff environmental group was taking "an extremely broad view of the kinds of individualized consideration" they felt that FWS was required to undertake in evaluating impacts on non-target species. "While individuals may agree or disagree about the merits of such a thorough and precautionary approach to actions that may harm the environment, the requirements of NEPA create the relevant baseline for the court's review. Under NEPA, an agency must take a 'hard look' at environmental consequences, however, an EIS 'need not be exhaustive to the point of discussing all possible details bearing on the proposed action.'" *Vermont Public Interest Research Group v. U.S. Fish and Wildlife Service*, 33 ELR 20062 (D. Vt. 2002), *citing County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977).