

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2010

PHILADELPHIA, THURSDAY, JULY 15, 2010

VOL 242 • NO. 10 An **ALM** Publication

## ENVIRONMENTAL LAW

### Judicial Review Under NEPA: A Look at Two Recent Decisions

BY KENNETH J. WARREN

*Special to the Legal*

When the framers of the Constitution divided authority among the executive, judicial and legislative branches of government, they did not establish administrative agencies as a fourth branch. Nevertheless, today many governmental functions are performed by federal administrative agencies, which have an unclear relationship with the three traditional branches of government. Even executive branch administrative agencies at times have an uncertain relationship with the legislative and judicial branches.

Two recent cases under the National Environmental Policy Act, or NEPA, illustrate the current role of the judiciary in reviewing federal agency action.

Congress enacted NEPA in 1969 to minimize environmental impacts from federal agency actions. Federal agency decisions made without consideration of environmental effects at times produced environmental harms that the agency could have and would have avoided had it considered the environmental consequences of its action. Through NEPA, Congress imposed procedural mandates requiring federal agencies to examine the environmental impacts of their proposed actions before engaging in those actions.

The Environmental Impact Statement, or EIS, is the principal NEPA vehicle through which federal agency decision makers evaluate environmental impacts. An EIS explains the purpose and need for a proposed action, describes the affected environment, identifies and examines alternatives to the proposed action, analyzes the environmental impacts and consequences of each alternative and describes appropriate mitigation measures. The EIS process includes notice to the public and an opportunity for public comment. The outcome of the process is memorialized in a final EIS and a public record of decision.

NEPA requires a federal agency to prepare an EIS for each major federal action



**KENNETH J. WARREN**

*is a shareholder in the environmental practice group at Hangley Aronchick Segal & Pudlin. He is a former chair of the American Bar Association section of environment, energy and resources.*

significantly affecting the quality of the human environment. The Council on Environmental Quality, or CEQ, has promulgated regulations establishing criteria for determining whether potential impacts are significant enough to compel the federal agency to prepare an EIS. (See 40 C.F.R. § 1508.27.) These criteria focus on the context of the agency action and the intensity of the impacts. For example, the characteristics of the geographic area, such as proximity to environmentally sensitive features, the degree of scientific dispute or unknown risk regarding environmental effects and the cumulative impact of multiple actions, are among the factors that may cause an agency action to be classified as significant.

NEPA imposes procedural requirements, but does not mandate any substantive outcomes. Thus, an agency may choose to implement its preferred action even if it has significant environmental impacts. Holding federal agencies to their obligation to follow NEPA procedural rules without interfering with the substantive decision-making authority of the agencies poses a challenge for federal courts.

In *Sierra Club v. Van Antwerp*, a June 30 case in the U.S. District Court for the District of Columbia, environmental groups contended that the U.S. Army Corps of Engineers violated NEPA by failing to perform an EIS before issuing a fill permit under §404 of the Clean Water Act. The permit related to the development of a 500 acre multi-use project in a suburb of Tampa, Fla. The Clean Water Act prohibited the developer from filling about 155 acres of wetlands on

the site without first obtaining a §404 permit from the corps.

To evaluate whether the potential environmental effects of issuing a permit were significant and thereby triggered the requirement to perform an EIS, the corps conducted an environmental assessment. (See 40 C.F.R. §1508.9.) Taking a “hard look” at the environmental consequences of its action, the corps found that the project site sits on top of wetlands that retain storm water and flood waters and perform water purification functions. Even though the record showed that the retention ponds to be constructed as part of the project would remove buffer areas that control sediment, erosion and storm water runoff, the corps issued a Finding of No Significant Impact, or FONSI, and declined to perform an EIS.

In reviewing the corps’ decision not to perform an EIS, the district court examined whether the corps had identified the relevant environmental concerns, taken a hard look at the environmental consequences of its action, and made a convincing case that the potential impact is not significant enough to trigger EIS requirements.

The court concluded that multiple factors required the corps to perform an EIS before issuing a fill permit for the Tampa development project. The potential impact to wetlands and buffer areas would and indeed had resulted in increased sedimentation. In addition, the site provided critical wildlife linkage that may be disturbed by filling wetlands. The project might also contribute to potential cumulative impacts, a possibility that the corps had ignored on the mistaken ground that the project purportedly had no impact on the environment. Threats from the project to the habitat of protected species also constituted significant impacts.

The court concluded that the corps’ decision not to perform an EIS was arbitrary and capricious and violated NEPA. The court also concluded that the corps violated the Clean Water Act requirement that a wetlands permit be issued only if the applicant had shown

that no practicable alternative exists. (See 40 C.F.R. §230.10(a).)

The district court then turned to the question of remedy. It remanded the case to the corps, but also sought further briefing on appropriate additional relief. The court mentioned possible vacatur of the §404 permit as a potential remedy. The decision to require further briefing on remedy signifies that even where a NEPA violation is clear, the degree to which a court may or should restrict further agency activities presents complex issues. The district court's choice of remedy will no doubt be guided by the Supreme Court's discussion of NEPA remedies in a case decided only a few weeks ago.

In *Monsanto v. Geertson Seed Farms*, the U.S. Supreme Court on June 21 addressed the standard for granting injunctive relief under NEPA. The case involved a decision by the Animal and Plant Health Inspection Service, or APHIS, to exempt Roundup ready alfalfa, or RRA, from regulations applying to plant pests.

Under APHIS regulations, genetically engineered plants are presumed to be plant pests and regulated under the Plant Protection Act unless APHIS determines that a plant does not pose a risk and should be exempt from regulation. APHIS granted an exemption for RRA, a kind of alfalfa crop genetically engineered to be tolerant of the herbicide Roundup.

In the course of considering whether to deregulate RRA, APHIS prepared and published a draft environmental assessment, considered public comments, and issued a FONSI. Environmental groups and a conventional seed producer challenged the decision. They contended that the agency failed to consider that the gene conferring tolerance might be transmitted to organic and conventional alfalfa causing significant environmental and economic harm. The gene might also contribute to the development of Roundup-resistant weeds. In light of these and other risks, the district court determined that the failure to perform an EIS violated NEPA.

To remedy the NEPA violation, the district court vacated that exemption decision. It also refused to grant APHIS's request to streamline the regulatory process by allowing a limited exemption through court order. Instead, the district court issued an injunction prohibiting the future planting of RRA, pending completion of an EIS. The court grandfathered those farmers who had already purchased RRA.

Appeals followed seeking to narrow the scope of injunction. No party challenged the district court's finding that APHIS had violated NEPA by deregulating RRA without performing an EIS nor that portion of the

district court's order vacating the deregulation decision. The 9th U.S. Circuit Court of Appeals rejected the challenges to the scope of the injunction and affirmed the district court's judgment.

On review, the Supreme Court accepted the parties' conclusion that the district court properly found a violation of NEPA and that vacating APHIS's decision to deregulate RRA constituted an appropriate remedy. Nonetheless, the court held that the injunctive relief granted by the district court exceeded its authority.

The court reiterated its holding in *Winter v. Natural Resources Defense Council*, stating: "The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation." This test requires plaintiff to show that it has suffered an irreparable injury that remedies at law are inadequate, that considering the balance of the hardships an equitable remedy is warranted and that the public interest would not

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be disserved by a permanent injunction. The court emphasized that when applying this test, a NEPA case did not carry a presumption of irreparable injury nor warrant placing a "thumb on the scales" in favor of issuing an injunction. Similarly, NEPA does not allow a district court to reverse the ordinary burden of proof and ask why an injunction should not issue. Rather, as in other types of injunctive actions, a NEPA plaintiff bears the burden of demonstrating under the four-factor test that an injunction should issue.

The court noted that the APHIS order completely deregulated RRA. The district court's conclusion that complete deregulation triggered the NEPA requirement to perform an EIS should not have led it to mandate that an EIS be performed before any future partial deregulation decision. Unless and until APHIS invoked the procedures necessary to create a limited deregulation, the district court could not properly conclude whether

the particular form of partial deregulation to be proposed by APHIS might cause substantial impacts triggering the EIS requirement.

The court also emphasized that the plaintiff could protect its rights without an injunction. The district court's vacatur of APHIS's decision in effect required RRA to be treated as a regulated plant pest until an EIS is complete. Opening the door to some use of RRA through partial deregulation, depending on the scope of use and conditions to limit environmental harms, might not pose a risk of substantial environmental impacts. If risks do occur, another suit may be instituted to require an EIS. Consequently, plaintiffs had not shown the irreparable harm necessary to support a prohibition on limited deregulation.

In dissent, Justice John Paul Stevens suggested that the record supported the injunction. Evidence that substantial harms may occur from deregulation, combined with evidence that APHIS was ill-equipped to monitor even limited use of RRA, warranted an injunction to preserve the status quo. In Steven's view, affording the district court broad discretion to issue an injunction would also be consistent with NEPA's policies as it would leave open future regulatory options that may be limited by partial agency action taken before completion of an EIS.

The *Van Antwerp* and *Geertson Seed Farms* cases illustrate the willingness of district courts to find NEPA violations where federal agencies have disregarded known environmental risks and declined to perform an EIS in their haste to implement actions. These cases also reflect judicial caution in employing injunctions to limit an agency's authority and flexibility. Violations of NEPA's procedures do not necessarily warrant injunctive relief; instead plaintiffs must satisfy the ordinary four-factor test to secure injunctive relief.

These decisions show that courts will pull an administrative agency back to the decisional starting gate where it is heading down a track that is procedurally infirm. It is also likely, however, that courts will not freeze an agency at the starting gate until the NEPA process is finalized. Instead, they will give the agency an additional chance to move forward with the expectation that this time the agency will comply with its procedural obligations. At least for now, this give and take relationship reflects important roles for both federal agencies and the courts. •