

RECENT DEVELOPMENT

CUMULATIVE ENVIRONMENTAL IMPACTS WHEN TIERED UPON AN ENVIRONMENTAL IMPACT STATEMENT

I. INTRODUCTION

The National Environmental Policy Act (“NEPA”) requires all federal agencies to submit an environmental impact statement for each project proposal which may affect the environment.¹ In *Ark. Wildlife Fed’n v. United States Army Corps of Eng’rs*, the Arkansas Wildlife Federation (“AWF”)² claimed that the Corps did not follow the proper NEPA procedures when developing its Grand Prairie Project, a project which affected the Alluvial and Sparta Aquifers as well as the irrigation system for the rice produced in this region.³ The Grand Prairie Project was of utmost importance in this part of the country because the project’s goal was to protect the main sources of water upon which commerce in the region relied. Without enacting protective and remedial measures to preserve the Alluvial and Sparta Aquifers, the region would suffer a devastating blow by losing the great majority of its agricultural water supply.

II. BACKGROUND

The Grand Prairie Region is a major rice producing area that spans 500,000 acres between Mississippi and Arkansas. The

1. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(c) (2000).

2. This Article will refer to plaintiffs collectively as AWF. The plaintiffs included the National Wildlife Federation, Arkansas Nature Alliance, the Hampton Landing Property Owners’ Association, the White River Conservancy, the Augusta Improvement Club, Kenneth L. Rose, E.W. Ray, Charles Bowerman, Tommy M. Castleberry, Sr., Greg Rawn, Oliver M. Eichelmann, Everett G. Oates, and David Carruth. *Ark. Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 431 F.3d 1096, 1099 n.2 (8th Cir. 2005).

3. *Ark. Wildlife Fed’n*, 431 F.3d at 1098.

Alluvial and Sparta Aquifers are the most important groundwater producers in this region.⁴ The Corps created the Grand Prairie Project⁵ to preserve the Alluvial Aquifer while allowing the area to continue irrigation practices because the Alluvial Aquifer provides ninety percent of the agricultural water in the Grand Prairie Region and was in dire threat of depletion.⁶ The exhaustion of the Alluvial Aquifer would dampen economic prosperity in this area. Thus, its preservation was essential.⁷ The Sparta Aquifer was also crucial to the project because it provided local drinking water.⁸ In the event of the depletion of the Alluvial Aquifer, the Sparta Aquifer would compensate for such a loss. Therefore, the area would likely lack sufficient resources for drinking water.

The Corps issued a Draft Environmental Impact Statement (“DEIS”) allowing for public comment in the beginning of 1998 in accordance with NEPA requirements.⁹ After considering public comments, the Corps issued a draft General Reevaluation in July 1998.¹⁰ In 1999, the Final Environmental Impact Statement (“FEIS”) was issued, followed by the Signed Record of Decision (“ROD”) in 2000.¹¹ AWF filed suit in February 2004, just one month before the Corps issued a Draft Environmental Assessment (“DEA”) and a Finding of No Significant Impact (“FONSI”).¹² The DEA allowed for public comment and laid out the proposed changes to the original project plan.¹³ In July 2004, the Corps issued a FONSI in addition to a Final Environmental Assessment (“FEA”) in which the Corps opined that the proposed changes in the DEA were trivial and, therefore, would not

4. *Id.*

5. “Alternative 7B” was selected as the best alternative out of the proposed plans to save the region and became known as The Grand Prairie Project. *Id.* at 1099. The Grand Prairie Project consisted of five elements: “(1) conservation of water by increasing agricultural efficiency of water usage, (2) reduction of water withdrawals from the Alluvial Aquifer so that there is no net loss of water and an end to drawing on the Sparta Aquifer for irrigation, (3) additional on farm reservoirs, (4) construction of a system that would pump excess water from the White River into the Grand Prairie Region, and (5) various environmental improvement features.” *Id.*

6. *Ark. Wildlife Fed’n*, 431 F.3d at 1098–99.

7. If the Alluvial Aquifer were to be depleted, the region would experience a loss of seventy-seven percent of its irrigated crop as well as a twenty-three percent decrease in rice production. *Id.*

8. *Id.* at 1099.

9. 42 U.S.C. § 4332(c). *See also Ark. Wildlife Fed’n*, 431 F.3d at 1099.

10. *Ark. Wildlife Fed’n*, 431 F.3d at 1099.

11. *Id.*

12. *Id.*

13. *Id.*

significantly impact the environment.¹⁴ The AWF claimed that this was not enough and that the Corps failed to adequately consider other feasible alternatives as well as the direct and indirect project impacts on the White River Basin.¹⁵ Additionally, they believed that the FEIS and ROD failed to thoroughly address the impacts of the proposed project. Finally, AWF asserted that the Corps had improperly tiered¹⁶ the Arkansas State Water Plan's minimum flow requirements to the FEIS.¹⁷ The Eighth Circuit affirmed the district court's grant of summary judgment for the Corps.¹⁸

III. THE ADEQUACY DISCUSSION

AWF stated that the FEIS and FEA lacked completeness in their discussions of the proposed project impacts on the environment and, more specifically, on the White River Basin. The organization also claimed that the Corps did not sufficiently consider other feasible alternatives to Alternative 7B.¹⁹ The Act requires that a federal agency must take a "hard look" at cumulative environmental impacts of a project in order for a FEIS to be proper.²⁰ Cumulative impacts are "the impacts on the environment which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such action."²¹ For example, the agency must consider "the environmental impacts of the proposed action, any unavoidable adverse environmental impacts, and the relationship between local short-term uses of the environment and long-term productivity."²² The Council on Environmental Quality requires that environmental impact statements should only be as long as necessary to comply with NEPA.²³ Further, impacts should be considered proportionately to their significance to a project.²⁴ Generally, a court will use the "rule of reason" test when determining whether the agency has compiled enough information

14. *Ark. Wildlife Fed'n*, 431 F.3d at 1100.

15. *Id.* at 1099.

16. *See infra* Part III.

17. *Id.* at 1100.

18. *Id.*

19. *Ark. Wildlife Fed'n*, 431 F.3d at 1099.

20. *City of Richfield, Minn. v. F.A.A.*, 152 F.3d 905, 906 (8th Cir. 1998).

21. 40 C.F.R. § 1508.28 (2007).

22. *Ark. Wildlife Fed'n*, 431 F.3d at 1101 (citing 42 U.S.C. § 4332(c) (2000)).

23. 40 C.F.R. § 1502.2(c) (2007).

24. 40 C.F.R. § 1502.2(b) (2007).

to make a reasonably enlightened decision.²⁵

In *Arkansas Wildlife*, AWF believed that the FEA did not detail the past or present environmental impacts on the White River.²⁶ However, the court found that the FEA's analysis was updated to account for possible new environmental impacts of the project.²⁷ As discussed below, the FEIS sufficiently addressed AWF's concerns, and thereby validated the lesser detailed FEA.

IV. TIERING

AWF also claimed that the Corps improperly tiered²⁸ the FEA upon the FEIS.²⁹ Tiering may be used when the analysis is from an environmental impact statement at an early stage to a subsequent statement at a later stage so that the agency focuses its efforts on the most relevant issues at hand.³⁰ The NEPA process is a long and expensive one; thus, the Act encourages tiering in order to save both time and money by avoiding redundant analysis.³¹ Tiering also helps agencies narrow the issues to the areas that are most crucial to the current project.³² Tiering does not create a *per se* valid FEA. However, a FEA will not be upheld if it is not tiered to an EIS or does not contain a sufficient cumulative impact analysis.³³

In *Arkansas Wildlife*, the Corps analyzed in great detail how the Grand Prairie Project would affect four existing, two pending, three unauthorized and unfunded, and other future projects correlated with the White River in the FEIS.³⁴ In addition, the

25. DAVID MANDELKER, NEPA LAW & LITIG. § 10:42.2 (2d ed. 1992 & Supp. 2006) (citing *Westside Prop. Owners v. Schlesinger*, 597 F.2d 1214 (9th Cir. 1979)); *see also* *Town of Huntington v. Marsh*, 859 F.2d 1134 (2d Cir. 1988); *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170 (5th Cir. 2000); *Utahns for Better Transp. v. United States Dep't of Transp.*, 305 F.3d 1152 (10th Cir. 2002); *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980).

26. *Ark. Wildlife Fed'n*, 431 F.3d at 1101.

27. *Id.* at 1102 (explaining that the FEA was adequate because it was a proper supplement to the more detailed FEIS).

28. Tiering refers to "the coverage of general matters in broader environmental impact statements with subsequent narrower statements or environmental analyses incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. § 1508.28 (2005).

29. *Ark. Wildlife Fed'n*, 431 F.3d at 1099.

30. 40 C.F.R. § 1508.28 (2007).

31. 40 C.F.R. § 1502.2 (2007).

32. 40 C.F.R. § 1508.28 (2007).

33. *Ark. Wildlife Fed'n*, 431 F.3d at 1101 (citing *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895–96 (9th Cir. 2000); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 997–98 (9th Cir. 2004)).

34. *Id.*

Corps considered potential projects that were not even considered to be reasonably foreseeable.³⁵ The Corp's FEA was tiered to a FEIS which contained a sufficient cumulative environmental impacts analysis. Thus, the court held that the Corps was in compliance with the Act in the way in which it considered such impacts.³⁶

V. SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

A Supplemental Environmental Impact Statement ("SEIS") is required if the agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or if "there are significant new circumstances or information relevant to environmental concerns."³⁷ AWF argued that the FEA contained six substantial changes that were not previously analyzed.³⁸ According to *Marsh*, an agency must examine any environmental consequences that have not yet been analyzed when deciding whether a change is considered substantial enough to require a SEIS.³⁹

There is evidence in this case that the Corps considered the changes earlier in the process when allowing for public comment and when performing studies on fishery benefits.⁴⁰ In fact, the six changes that were made actually reduced the environmental impact.⁴¹ The Corps showed that the changes did not significantly affect either the costs or purposes of the project.⁴² Thus, the court held that the Corps properly considered the environmental impacts of the additional changes in the FEA and that they were sufficiently minor as to not require a SEIS to be prepared.⁴³

35. *Id.*

36. *Id.*

37. 40 C.F.R. § 1502.9(c) (2007).

38. The proposed changes were: (1) decreasing the miles of canals used by eighty-two miles; (2) increasing the miles of pipeline used by 113 miles; (3) reducing the use of natural streams in favor of pipelines; (4) doubling the number of acres of permanent upland hardwood impacts; (5) constructing borrow pits to store machinery; and (6) creating a 100 acre reservoir by widening Canal 1000. *Ark. Wildlife Fed'n*, 431 F.3d at 1102.

39. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989).

40. *Ark. Wildlife Fed'n*, 431 F.3d at 1103.

41. *Id.* (clarifying that "a reduction in the environmental impact is less likely to be considered a substantial change relevant to environmental concerns than would be an increase in the environmental impact").

42. *Id.* at 1102.

43. *Id.*

VI. NEW INFORMATION

Finally, AWF contended that new information discovered about water removal from the White River was significant enough to require a SEIS.⁴⁴ Although the Corps did not argue the fact that the FEA contained new information, it justified this by explaining that this information was a simple update and did not significantly change any environmental impact of the Grand Prairie Project.⁴⁵ The new information in the FEA was too new and irresolute to be considered significant.⁴⁶

Any federal agency is required to take new information into consideration and analyze whether a potential action will affect the environment significantly and in a way that has not previously been researched.⁴⁷ In *Marsh*, nonprofit organizations argued that the Corps violated NEPA based on the failure to prepare a SEIS to examine new information.⁴⁸ The court held that just because new information develops does not by itself mean that the agency must prepare the SEIS.⁴⁹ Agency action would forever be impeded by insignificant, and quite possibly incorrect, new information if required to do so.⁵⁰ Again, the Act encourages the agency to save money and time when the changes to environmental impacts are so minute.⁵¹

VII. COMMENTS

A. Agency Control Under NEPA

This case is interesting because it demonstrates how much discretion NEPA affords to federal agencies. In order to have prevailed, AWF had to have shown that the Corps acted in an arbitrary and capricious manner.⁵² This standard is broad and very much in favor of the agency in question. Taken literally, NEPA makes it incredibly difficult for a plaintiff to meet such a huge burden. It appears that the agency need only prove that it followed

44. *Ark. Wildlife Fed'n*, 431 F.3d at 1103.

45. *Id.* The FEA contained new irrigation projects that are merely “speculative” and therefore were not relevant at the time. *Id.*

46. *Id.* at 1104.

47. *Marsh*, 490 U.S. at 374.

48. *Id.* at 360.

49. *Id.* at 374.

50. *Id.*

51. 40 C.F.R. § 1502.2 (1978).

52. 5 U.S.C.A. § 706(2)(A) (1996).

its own steps and procedures in a reasonable manner. For example, most courts will only deem an impact analysis to be deficient when the agency acts contrary to its own scientists' recommendations.⁵³ This is problematic because, under this line of reasoning, agency scientists, rather than the judicial system, are deciding the outcomes of litigation. Although giving deference to agencies with greater technical expertise than the judiciary decreases the strain on the judiciary, it is the court's duty to rule on cases and controversies and not that of a scientist who just happens to possess more technical expertise than a particular judge.⁵⁴

The amount of control over projects impacting the environment that NEPA grants to federal agencies is important to fully realize because of the great cost and time involved in litigating such projects. Unless an agency is clearly and unequivocally wrong when proceeding with a project, the agency will most likely prevail. Plaintiffs must have the proof and the resources to combat an agency's decision. If any part of these requisites is missing, both the agency and the plaintiffs will go to a great deal of expense for no other reason than to delay the inevitable project. Although some may argue that NEPA grants federal agencies excessive authority, the benefits of both the time and cost efficiencies seem to outweigh plaintiff concerns.

B. Other Circuit Courts

Arkansas Wildlife would have probably been decided in the same manner regardless of jurisdiction. As bogged down as our justice system is, the courts are hesitant to take on the responsibility and technical know-how required to implement these huge projects while properly conserving the environment. In *Chevron*, the United States Supreme Court stated that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."⁵⁵ Thus, if Congress has not spoken on an issue involving a statute such as NEPA, it is mainly left to the federal agency to determine the proper course of action. Therefore, a reviewing court will afford administrative agency decisions deference and will rarely second

53. See generally *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002) (holding that when an agency failed to follow its experts' recommendations, the cumulative impact analysis was deficient).

54. U.S. CONST. art. III, § 2, cl. 1.

55. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

guess such decisions.⁵⁶ Judges sit on the bench to interpret the law, not to manage irrigation projects, protect the environment, or determine which method is the most efficient and safe out of a list of feasible alternatives.

The courts have been quick to uphold any agency action as long as there is evidence that the agency reached a decision through reasonable means. For instance, the Fifth Circuit held that an agency action was proper when the Forest Service simply analyzed herbicide effects from multiple sources.⁵⁷ The Tenth Circuit has also upheld a cumulative impact statement when an agency considered other resource projects in the surrounding region.⁵⁸

The common thread among all the courts seems to be that proposed, present, and future effects should all be thoroughly considered by the federal agency. In *Arkansas Wildlife*, the court properly held that the Corps had explored all necessary impacts of the Grand Prairie Project including existing, pending, unauthorized, unfunded, and not even reasonably foreseeable other projects.⁵⁹

C. Eighth Circuit Stance

The entire NEPA process takes a very long time and is extremely expensive.⁶⁰ Under NEPA's intentionally broad governance, the Eighth Circuit made a sound decision when holding that the Corps did not act arbitrarily and capriciously in tiering the FEA on the FEIS, not preparing a SEIS, and finding that new information obtained was insignificant to the project. These decisions made the process more efficient and cost-effective without sacrificing the necessary emphasis on environmental protection.

There is plenty of evidence that the Corps thoroughly considered all cumulative impacts that the Grand Prairie Project had on the environment during each phase of the process. Specifically, the Corps took into consideration four existing projects, two pending projects, three unauthorized and unfunded projects, and five other actions affecting the White River area.⁶¹

56. *Id.*; see also *United States v. Mead Corp.*, 533 U.S. 218 (2001).

57. *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346 (9th Cir. 1994).

58. *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977).

59. *Ark. Wildlife Fed'n*, 431 F.3d at 1101.

60. The Environmental Protection Agency's Office of Federal Activities estimates that environmental impact statements typically cost up to \$150,000 to conduct, and the optional, preliminary environmental assessments typically cost \$20,000 to \$80,000. Kimberley DePaul, Deputy Director, U.S. Env'tl. Prot. Agency: Office of Fed. Activities, *NEPA, Construction Grants, and Categorical Exclusions*, <http://www.ofee.gov/ems/training/hhs04/NEPA.ppt> (last visited Apr. 14, 2007).

61. *Ark. Wildlife Fed'n*, 431 F.3d at 1101.

The statute also mandates that reasonably foreseeable future actions must be analyzed.⁶² In this case, the Corps actually researched possible projects that were not even considered reasonably foreseeable by the law.⁶³ Further, when the six additional changes came out in the FEA, the Corps was able to show facts that a mere 99 out of 8,560 fish habitats would be destroyed, the amount of soil required would not change, the new canal would not harm the area, and that it had considered input from the public.⁶⁴ These facts show that the Corps acted in a thorough, logical way when considering the environmental impacts the project would have.

The Corps performed each step of the NEPA process, and there is sufficient documentation to show that each action was carefully considered and researched. AWF failed to demonstrate that the Corps acted arbitrarily and capriciously. As such, the Eighth Circuit was correct in granting summary judgment de novo.

VIII. CONCLUSION

In sum, the Arkansas Wildlife Federation did not show that the Corps acted in an arbitrary and capricious manner in tiering the FEA on the FEIS, not preparing a SEIS, and not analyzing in greater detail the new information in the FEA. Nothing in the record shows that the Corps erred in any line of decision-making. In fact, the evidence clearly demonstrates that the Corps went beyond its reasonable duty to consider the cumulative impacts of the Grand Prairie Project. The Eighth Circuit, along with its sister courts, continue to support the notion that NEPA requirements are to be interpreted broadly, leaving most of the decision-making to the federal agencies who are more knowledgeable and better equipped to perform the necessary cumulative analysis in a project that affects the environment.

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62. 40 C.F.R. § 1508.7 (2007).

63. *Ark. Wildlife Fed'n*, 431 F.3d at 1101.

64. *Id.*

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