Environmental Law & Property Rights

NEPA Scope of Analysis in the Federal Permitting Context: The Federal Tail that Risks Wagging the Non-Federal Dog

*By Deidre G. Duncan & Brent A. Fewell**

The National Environmental Policy Act (NEPA) requires federal agencies to consider the environmental impacts of "Federal actions," not state or private actions.[1] The proper scope of an agency's NEPA analysis is determined by the extent of the "federal" action in question. For example, when the federal action at issue is wholly a federal undertaking, such as a federally constructed highway, it is clear that the scope of the NEPA analysis extends to the entire federal project. Yet, when the federal action is the issuance of a federal permit for a small component of an otherwise private or non-federal project, questions often arise regarding the proper scope of the federal action and the appropriate scope of the NEPA review. This situation is often referred to as the "small federal handle" problem.

Nowhere has the small federal handle problem been more vexing than in the case of non-federal projects that must receive Clean Water Act (CWA) section 404 permits from the Army Corps of Engineers ("Corps"). Environmental activists and others have increasingly used the NEPA process in the section 404 context as a way to expand the reach of the federal government over private activities, and as a means to thwart development.[2] The practical implications of expanding NEPA jurisdiction to a non-federal project can be significant, in many cases requiring years of costly environmental impact studies and lengthy delays from third party challenges.[3]

Indeed, the issue of how broadly NEPA should apply to a federal permitting decision over a wholly private project is particularly poignant as Congress contemplates legislative action to expand federal jurisdiction over the nation's waters in the wake of last year's Supreme Court decision in *Rapanos v. United States*.[4] Any increase in federal power and subsequent federalization of private activities is a serious encroachment on matters of traditional state and local powers, not to mention a continued erosion of rights and liberties entrusted to private landowners. As James Madison once remarked on the significance of separation of powers:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce…. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[5]

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What Constitutes Federal Action Subject to NEPA?

The Council of Environmental Quality (CEQ) regulations define federal actions to include those actions "subject to Federal control and responsibility."[6] The Corps' NEPA regulations for the section 404 program are set forth at 33 C.F.R. Part 325 Appendix B §7(b), and were promulgated in 1988. The regulations state that the Corps' NEPA review for the regulatory program will cover "the specific activity requiring a [Department of Army] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review."[7] The Corps explained the rationale as necessary "to prevent the unwarranted situation where 'the Federal tail wags the non-Federal dog'."[8]

Under the regulations, the Corps is considered to have "sufficient control and responsibility" over non-federal portions of a project only where "[f]ederal involvement is sufficient to turn an essentially private action into a Federal action" and where the "cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project." Thus, federal control and responsibility can only be found where the "environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation or approval."[9]

While the Corps' regulations have consistently been upheld by courts as a reasonable interpretation of NEPA's mandates,[10] the Ninth Circuit's decision in *Save Our Sonoran* has raised questions about the Corps' scope of analysis in the 404 program.[11]

In *Save Our Sonoran*, one environmental group, Save Our Sonoran (SOS), opposed the construction of a 608-acre residential community on undeveloped desert property. Approximately thirty-one acres of the property (or about 5 percent of the project) consisted of arroyos and dry washes deemed by the Corps to be jurisdictional waters of the U.S.[12] The developer sought a CWA section 404 permit from the Corps. After assessing the impacts related to the activities affecting the washes, the Corps issued an environmental assessment and finding of no significant impact, concluding that filling the washes would not significantly affect the environment. SOS filed suit, alleging violations of NEPA and CWA, and challenged the Corps' decision not to analyze the impacts of the entire project. Siding with SOS, the district court granted a temporary restraining order, holding that the Corps should have assessed the impacts from the entire project, rather than limiting its review to the jurisdictional portions of the project. The court, in reaching this conclusion, likened the washes to human capillaries running through tissue or "lines through graph paper" and concluded that the water-related portions of the project were part and parcel to and inseparable from the upland portions.[13] The Ninth Circuit Court of Appeals

upheld the district court's decision, emphasizing the fact that because of the unique configuration of the Corps' jurisdiction, "no development of the property could occur without affecting the washes."[14] In other words, no project of any kind, including the applicant's proposed project, could have been constructed on the property without receiving Corps authorization.

The Impact of *Save Our Sonoran*

Save Our Sonoran has fallen hardest on the nation's arid Southwest (Arizona, New Mexico, Nevada, and parts of California). As with many regions around the country, the Southwest is witnessing substantial population growth, increasing the demand for more housing and supporting schools, commercial and retail establishments, and roads. Consequently, large development projects or master-planned communities, some of which are hundreds of thousands of acres in size, are becoming increasingly popular. And, while many environmental benefits result from such developments, they have become the *bête noire* of many environmental groups opposed to growth.[15]

Although *Save Our Sonoran* involved unique facts and did not signal a change in the Corps' approach to scope of analysis, environmental groups and others have consistently cited it as the basis for expanding NEPA review over non-federal projects. Importantly, in *White Tanks Concerned Citizens, Inc. v. Strock* (also known as the Festival Ranch case),[16] the district court helped to put *Save Our Sonoran* into proper perspective and provided greater clarity on the Corps' regulations and general role in local land use decisions.

White Tanks involved the construction of a 10,000-acre community near Phoenix, Arizona. The project proponent sought a permit from the Corps to fill 26.6 acres (or 0.3 percent of the entire project) associated with building houses, two golf courses, retail and commercial facilities, and utility and storm water management facilities. However, EPA objected to the Corps' issuance of the permit on the grounds that the project would result in substantial and unacceptable impacts to aquatic resources of national importance.[17] In declining to expand its scope of analysis to the entire Festival Ranch project, the Corps concluded in pertinent part:

> *Land use decisions are the responsibility of the local jurisdictions, not federal government*. Moreover, the Corps' permit action does not cause projects such as Festival Ranch to be developed. Numerous other authorizations, permits, and factors completely outside of Corps control are necessary and required by a myriad of entities to construct all the components of land development projects such as Festival Ranch that may result in many of the indirect and cumulative impacts of concern to commentors…[18]

The district court upheld the Corps' decision, concluding that the Corps had properly determined its scope of analysis under NEPA. The decision is now on appeal at the Ninth Circuit Court of Appeals.

Future Implications

The issue of NEPA scope of analysis is of increasing importance, particularly as the Congress contemplates expanding the scope of federal jurisdiction over the nation's waters in response to recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[19] and *Rapanos*,[20] both of which limited federal jurisdiction. The greater the extent of federal CWA jurisdiction, the greater the Corps' control over non-federal projects and, consequently, the broader the Corps' NEPA review. Members of Congress intend to introduce legislation this year that would redefine the term "waters of the United States" by removing any reference to the term "navigable."[21] Much of the controversy has focused on the reach of federal jurisdiction over isolated wetlands and intermittent and ephemeral streams which are characteristically small with only periodic flows of rain water. Any proposal that would remove the term "navigable" will invariably expand the scope of federal jurisdiction over many waters over which the federal government currently lacks jurisdiction. If Congress is successful in redefining "water of the United States" by stripping the term "navigable" from the Clean Water Act, many more private actions will likely be federalized through the NEPA process.

Endnotes

1 42 U.S.C. § 4332(2)(C) (2000).

2 *See, e.g.,* Save Our Sonoran, Inc. v. Flowers, 227 F. Supp. 2d 1111 (D. Ariz. 2002), aff'd, 408 F.3d 1113 (9th Cir. 2005).

3 If NEPA scope of analysis is extended to entire non-federal projects, the Corps will likely be required to prepare environmental impact statements on many more projects. This is contrary to the Corps' regulations that state that section 404 permits "normally require only an EA." 33 C.F.R. § 230.7(a) (2006).

4 126 S. Ct. 2208 (2006).

5 The Federalist No. 45 (James Madison) 298 (Modern Library ed., 2000).

6 40 C.F.R. § 1508.18 (2006).

7 33 C.F.R. pt. 325 app. B ¶ 7b (2006).

8 53 Fed. Reg. 3120, 3122 (Feb. 3, 1988).

9 *Id.* at 3135.

10 *See, e.g.,* Sylvester v. United States Army Corps of Engineers, 884 F.2d 394 (9th Cir. 1989) (upholding the Corps' regulations as a reasonable interpretation of NEPA obligations).

11 *Save Our Sonoran*, 227 F. Supp. 2d at 1111.

12 Following the recent Supreme Court decision in *Rapanos*, such washes might fall outside federal jurisdiction.

13 *Save Our Sonoran*, 227 F. Supp. 2d at 1114.

14 Save Our Sonoran, Inc. v. Flowers, 408 F.3d at 1123 (quoting district court at 1113).

15 Generally, one of the central features of a master planned community is common control and/or ownership which can lead to better upfront planning and coordination and result in more environmental benefits than ad hoc, piecemeal development. Large master planned developments offer the ability to reduce urban sprawl, eliminate redundant facilities and services, avoid and minimize impacts to sensitive environmental resources, protect and preserve green space, and install more energy and water efficient services.

16 No. 06703 (D. Ariz. Feb. 21, 2007).

17 The term "ARNI" was first established in 1992 by the Corps of Engineers and EPA in a Memorandum of Agreement that governed perceived disputes between the agencies in the 404 program. The term has never been defined under the Corps' or EPA's regulations or guidance, and consequently, EPA has broad asserted discretion in designating any resource as an ARNI. Until recently, the ARNI designation had been used sparingly by EPA for truly unique and significant aquatic resources where unacceptable adverse effects would occur; however, EPA in recent years has attempted to extend the ARNI designation to resources of limited value, entire watersheds, and upland areas.

18 *White Tanks*, slip op. at 12 (quoting Corps, emphasis added).

19 531 U.S. 159 (2001) (rejected the federal government's authority to regulate isolated, nonnavigable, intrastate waters and wetlands based solely on presence of migratory birds).

20 126 S.Ct. 2208 (plurality held that the definitional term "waters of the United States" can refer to only "relatively permanent, standing or flowing bodies of water," not "occasional," "intermittent," or "ephemeral" flows).

21 Lucy Kafanov, *Wetlands: Industry Girds to Fight House Bill Restoring U.S. Regulatory Power*, Greenwire (May 22, 2007). On May 22, 2007, Representative James Oberstar, Chairman of the House Committee on Transportation and Infrastructure, introduced H.R. 2421, entitled "Clean Water Authority Restoration Act of 2007," which has 158 co-sponsors. This legislative proposal, if enacted, would have broadly regulated "all interstate and intrastate waters" and all "activities affecting those waters" "to the fullest extent" of Congress's authority under the Constitution. Chairman Oberstar is expected to reintroduce similar legislation this year. Senator Feingold is expected to introduce a companion bill in the Senate.