

NEPA Case Law Update

Presentation to Law Seminars International MEPA & NEPA Workshop

June 10, 2009

Boston, Massachusetts

Mark C. Kalpin

mark.kalpin@wilmerhale.com

H. David Gold

david.gold@wilmerhale.com





NEPA Cases: June 2008 to Present

- All United States Courts – 211 cases
- Supreme Court (US) – 1 case
- First Circuit – 3 cases
- New England states – 7 cases



Hot Topics and Procedural Issues

- Greenhouse Gases / Climate Change
- American Recovery and Reinvestment Act
- Standing
- Injunctive Relief
- “Controversy”



U.S. Supreme Court



Winter v. NRDC, 129 S. Ct. 365 (2008)

- Ninth Circuit issued injunction against Navy's use of sonar in training exercises because Navy didn't prepare full EIS
- Supreme Court (5-4) reverses Ninth Circuit
- Roberts, Scalia, Kennedy, Thomas, Alito: Training exercises have been taking place for the last 40 years; environmental effects aren't "completely unknown"
- Breyer, Stevens: "The absence of an injunction . . . threatens to cause the very environmental harm that a full preaction EIS might have led the Navy to avoid."
- Ginsburg, Souter: CEQ may play an important consultative role in emergency circumstances, but only Congress -- not CEQ -- can offer relief from NEPA requirements
- Ninth Circuit remands to District Court (March 2009)



Recent First Circuit NEPA Cases

- Sierra Club v. Wagner, 555 F.3d 21 (1st Cir. 2009)
- Town of Marshfield v. FAA, 552 F.3d 1 (1st Cir. 2008)
- Town of Winthrop v. FAA, 535 F.3d 1 (1st Cir. 2008)



Sierra Club v. Wagner 555 F.3d 21 (1st Cir. 2009)



- Environmental groups challenged Forest Service approval of two timber harvesting projects
- Court rejected substantive attack on FONSI, holding plaintiffs failed to explain why mitigation wouldn't be adequate
- Claim that project was “controversial” was too general
- Plaintiffs failed to identify specific “Roadless Rule” concerns not address in EAs
- Regulatory requirement to look at “context” of approvals refers only to “effects in the locale” not “the world as a whole”
- Although Forest Service did not make FONSI available for 30 days for public comment, draft EAs were circulated and comments were solicited before FONSI were finally adopted



Town of Marshfield v. FAA 552 F.3d 1 (1st Cir. 2008)



- Town sought review of categorical exclusion for FAA proposal to increase Logan Airport's approaches and departures
- FAA found that Town's projected noise levels were below threshold triggering requirement to prepare EA or EIS (under FAA Order)
- Court held FAA's findings were not implausible
- Court found cumulative impacts analysis adequate, because later phases were speculative
- Court said no EA or EIS was required because "controversy is not decisive but is merely to be weighed in deciding what documents to prepare"



Town of Winthrop v. FAA 535 F.3d 1 (1st Cir. 2008)



- Town claimed Supplemental EIS was required for FAA decision to construct new taxiway at Logan Airport
- Court finds that:
 - Supplemental EIS is needed only when there is *significant* new information (a factual question requiring technical expertise)
 - Town’s claim that data were outdated was too general and conclusory
 - Supplemental EIS not needed to study health effects of fine and ultra-fine particulate matter – a “still developing” area of research
 - “It is not unreasonable for an agency to decline to study in an SEIS a pollutant for which there are not yet standard methods of measurement or analysis. An SEIS is not, after all, a research document.”



Recent New England NEPA Cases

- Nulankeyutmonen Nkihtaqmikon v. Impson, 573 F. Supp. 2d 311 (D. Me. 2008)
- Food and Water Watch, Inc. v. U.S. Army Corps of Engineers, 570 F. Supp. 2d 177 (D. Mass. 2008)



Nulankeyutmonen
Nkihtaqmikon v. Impson
573 F. Supp. 2d 311 (D. Me. 2008)



- Passamaquoddy Tribe opposed BIA-approved lease agreement for private company to construct LNG terminal on tribal land
- Tribe did not appeal BIA approval to the Interior Board of Indian Appeals (IBIA)
- Instead, Tribe claimed BIA failed to comply with NEPA, the Indian Long-Term Leasing Act of 1955 ("Leasing Act"), and other statutes
- Court found Tribe failed to exhaust administrative remedies
- “If the IBIA determines that the BIA violated the [Leasing] Act in approving the lease, the NEPA [and other] causes of action will be rendered moot unless and until the BIA conforms with the Leasing Act requirements”



Food and Water Watch, Inc. v.
U.S. Army Corps of Engineers
570 F. Supp. 2d 177 (D. Mass. 2008)



- Plaintiff sought injunction against permit allowing Marine Biological Laboratory (MBL) to install fish cage on seafloor
- Plaintiff argued permit required EIS
- Court denied injunction, finding
 - EA (drafted by MBL) contained appropriate analysis of public comments
 - Failure to circulate draft FONSI was permissible because Plaintiff did not show “unprecedented” impact to the environment
 - Corps evaluated appropriate alternatives given scope of project
 - Plaintiff did not demonstrate significant impacts to ecological sensitive areas, high degree of controversy, uncertain effects, or potentially irreparable harm



Greenhouse Gases / Climate Change

- Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172 (9th Cir. 2008)

Standing

- Appalachian Voices v. Bodman, 587 F. Supp. 2d 79 (D.D.C. 2008)



Center for Biological Diversity
v. Nat'l Highway Traffic Safety
Administration, 538 F.3d 1172 (9th Cir. 2008)



- New decision replaces 508 F.3d 508 (9th Cir. 2007), following petition for rehearing
- Plaintiffs challenged EA for NHTSA rule setting CAFE standards for light trucks for model years 2008-2011
- Court finds EA deficient because
 - Cumulative impacts analysis is inadequate regarding GHG emissions, climate change and the environment
 - Alternatives analysis is too narrow – NHTSA could impose more stringent requirements
 - Energy Policy and Conservation Act of 1975 does not limit NHTSA's NEPA obligations
- Court remands to NHTSA for preparation of a revised EA or, as necessary, a full EIS



Appalachian Voices v. Bodman 587 F. Supp. 2d 79 (D.D.C. 2008)

- Environmental organizations sought injunction against tax credit programs, established under the Energy Policy Act of 2005, for companies that use clean coal technology
- Plaintiffs brought claims under NEPA, APA, and ESA, alleging failure to consider environmental consequences of the tax credit programs
- Court found that plaintiffs lacked Article III standing for energy projects where they failed to (1) state an injury-in-fact, or (2) show that tax credits were substantial factor in energy company's decision to construct project



Recovery Act (ARRA)



- ARRA does not limit or exempt NEPA review
- Section 1609(b) of ARRA:

“Adequate resources within this bill must be devoted to ensuring that applicable environmental reviews under the National Environmental Policy Act are completed on an expeditious basis and that the shortest existing applicable process under the National Environmental Policy Act shall be utilized.”



Recovery Act (ARRA)



- CEQ guidance (April 3, 2009) lists how NEPA compliance can be accelerated for ARRA projects:
 - Ensure proposals that can be categorically excluded have been or are being reviewed for extraordinary circumstances (40 CFR 1508.4)
 - Use concise and focused EAs (40 CFR 1508.9(b))
 - Prepare programmatic analyses in cases where consolidated analysis of similar, connected, or cumulative proposals will facilitate efficient compliance with NEPA (40 CFR 1502.4(c), 1502.20, and 1508.28)
 - Review other federal agencies' NEPA analyses and documentation for the project or activity for potential adoption (40 CFR 1506.3) or incorporation by reference (40 CFR 1502.21)
 - Engage CEQ to address compliance concerns and issues



Recovery Act (ARRA)



- Projects relying on tax incentives (as well as direct funding) may trigger NEPA review
- Some commentators believe grants for specified energy property in lieu of tax credits (authorized under Section 1603 of ARRA) should not trigger NEPA review due to a lack of agency discretion in awarding the grants
- Project proponents need to weigh risks of losing funding opportunities vs. risks of NEPA-based appeals



Questions?

Mark C. Kalpin
Co-Chair, Energy and Clean Technology Group
WilmerHale
60 State Street
Boston, MA 02109
Phone: 617-526-6176
Email: mark.kalpin@wilmerhale.com

H. David Gold
WilmerHale
60 State Street
Boston, MA 02109
Phone: 617-526-6176
Email: david.gold@wilmerhale.com