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Environmental Law - Violation of NEPA Environmental Impact Statement Requirement Excused by Subsequent Agency Consideration of Alternatives - Friends of the River v. Federal Energy Regulatory Commission

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Environmental Law—Violation of NEPA Environmental Impact Statement Requirement Excused by Subsequent Agency Consideration of Alternatives. *Friends of the River v. Federal Energy Regulatory Commission,* 720 F.2d 93 (D.C. Cir. 1983).

The Calaveras County, California, Water District applied to the Federal Energy Regulatory Commission (FERC) in 1978 for a license to construct a hydroelectric plant. Friends of the River, a group opposing the licensing, argued that FERC should consider, as one alternative, purchasing power from other utilities to meet the area's need for electricity. FERC's draft environmental impact statement (EIS) did not address purchasing power from other utilities, and the group suggested the alternative in its comments to the draft. The final EIS contained only two sentences in reference to this alternative. Friends of the River petitioned the commission for a rehearing, and in the order denying a rehearing, FERC did address power purchasing in greater detail. Friends of the River then contended that FERC "neglected its duties" under the National Environmental Policy Act (NEPA) by failing adequately to consider and present the alternative in the EIS itself.[1]

The United States Court of Appeals, District of Columbia Circuit, held that FERC did violate NEPA requirements. The court refused to order a remand, however, stating that FERC's order denying rehearing satisfied the Act's basic policies and made a remand pointless.[2]

NEPA has strict procedural requirements for considering alternatives in the EIS process so that the decision-makers, other agencies, and the public are fully informed. The court's holding in *Friends of the River* clearly conflicts with NEPA's procedural commands and the policies underlying these procedures.

Background

The National Environmental Policy Act of 1969[3] outlines procedural measures to meet the Act's goals.[4] Congress directed all federal agencies to meet the Act's requirements "to the fullest extent possible."[5] The House Conference Committee explained that Congress intended agencies to comply with the Act "unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible."[6] The House and Senate conferees intended that "no

1. Friends of the River v. Federal Energy Regulatory Commission, 720 F.2d 93, 97 (D.C. Cir. 1983).
2. *Id.* at 106.
3. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976).
4. *Id.* § 4332(2)(E). The environmental goals established by NEPA are contained in section 4331, and include a directive that the federal government work with state and local governments and public and private organizations to foster productive harmony between man and nature. The goals emphasize meeting the needs of both present and future generations.
5. *Id.* § 4332.
6. Conference Rep. No. 765, 91st Cong., 1st Sess., *reprinted in* 1969 U.S. Code Cong. & Ad. News 2767, 2770.

agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."[7]

The Act requires agencies to prepare a detailed statement on every recommendation or report on proposals for legislation and federal actions affecting the quality of the human environment.[8] This statement, the EIS, must include a section on alternatives to the proposed action.[9]

The EIS section on alternatives, "the heart of the environmental impact statement," defines issues and provides a clear basis for the agency and the public to choose among options.[10] The regulations also direct federal agencies to "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment."[11] The purpose of these requirements is "to assure that alternatives are explored in the initial decision making process and to provide an opportunity to those removed from the process also to evaluate the alternatives."[12]

The United States Supreme Court, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[13] addressed the range of alternatives which must be considered in an EIS, and developed a "rule of reason" to guide a decision on how many alternatives are to be considered.[14] The Court explained that in order to make an impact statement something more than "an exercise in frivolous boilerplate, the concept of alternatives must be bounded by some notion of feasibility."[15]

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7. *Id.*
8. 42 U.S.C. § 4332(2)(C) (1976).
9. *Id.* § 4332(2)(C)(iii).
10. 40 C.F.R. § 1502.14 (1983). The section on alternatives:
should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:
(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
(c) Include reasonable alternatives not within the jurisdiction of the lead agency.
(d) Include the alternative of no action.
(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.
11. 40 C.F.R. § 1500.2(e) (1983).
12. Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974).
13. 435 U.S. 519 (1978). *See also* Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).
14. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 551 (1978).
15. *Id.*

While the court recognized that an EIS cannot include every alternative "conceivable by the mind of man,"[16] it did state that NEPA's goal is to insure a fully informed and well considered decision.[17] The agency must consider enough alternatives in enough detail to meet that goal. The same reasoning is found in the earlier Ninth Circuit Court of Appeals holding in *Lathan v. Brinegar.*[18]

The Supreme Court addressed the scope of judicial review of NEPA compliance in *Strycker's Bay Neighborhood v. Karlen.*[19] The Court held that the Department of Housing and Urban Development had considered environmental consequences of its decision to designate a site for low income housing, and NEPA required no more.[20] Once an agency had made a decision subject to NEPA's requirements, the Court saw its major role as insuring that the agency had procedurally considered the environmental consequences.[21]

In *Grazing Fields Farms v. Goldschmidt,*[22] the Court of Appeals for the First Circuit discussed the location and timing of the discussion of alternatives within an EIS. That case involved alternatives which were contained in an appendix to an EIS and in the administrative record.[23] The court held that this did not satisfy NEPA's procedural requirements,[24] and outlined a two-step approach to judicial review of agency decisions under NEPA. The first step, a narrow substantive review of the agency's actions, is limited to determining if the agency has acted arbitrarily or capriciously. In the second step, the court conducts a procedural review, focusing on the EIS and its consideration of alternatives.[25]

In *Grazing Fields,* the agency argued that despite any formal errors in the EIS, it had achieved NEPA's goals because the alternatives had been considered outside of the EIS. The court rejected this argument, saying it overlooked the preeminent fact that Congress had explicitly specified the procedural means to meet NEPA's substantive goals of informing the public and other agencies of the decision-making process that the agency followed.[26] The court said the EIS is not "a pointless technicality" even when the agency has in fact considered environmental factors in good faith.[27] Full disclosure in the EIS of the basis for agency action is

16. *Id.*
17. *Id.* at 558.
18. 506 F.2d 677 (9th Cir. 1974).
19. 444 U.S. 223 (1980).
20. *Id.* at 228.
21. *Id.* at 227.
22. 626 F.2d 1068 (1st Cir. 1980).
23. *Id.* at 1070.
24. *Id.* at 1071.
25. *Id.* at 1072 (citations omitted).
26. *Id.*
27. *Id.* at 1073.

required.[28] This requirement was also identified in such cases as *National Wildlife Federation v. Andrus.*[29]

The Court of Appeals for the District of Columbia outlined the scope of judicial review of NEPA compliance in *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission.* Although this was a very early NEPA case, it still illustrates the judicial approach to review of an EIS. The court said:

> We conclude then, that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the court to reverse. As one District Court has said of Section 102 requirements, "It is hard to imagine a clearer or stronger mandate to the courts."[30]

PRINCIPAL CASE

In the *Friends of the River v. Federal Energy Regulatory Commission* case, a consortium of twelve small California power utilities that had previously purchased all of their power from other utilities planned to purchase power from the Calaveras County Water District hydroelectric plant. Friends of the River argued that continued power purchasing from Pacific Gas and Electric and potential expansion to the Pacific Northwest region was an attractive alternative to the proposed hydroelectric project, which would flood 1,780 acres.[31]

The license application was filed in 1978. Late in 1979, FERC issued a draft EIS that did not address the power purchasing alternative. In the final EIS, issued in 1980, FERC noted that power purchase contracts with Pacific Gas and Electric could be terminated on six to twenty-four months notice and could not be considered a firm source. It also stated that power purchasing would consume non-renewable fossil fuel resources.[32] As Judge Bazelon commented in his dissenting opinion, "FERC devoted a total of two scattered and misleading sentences to the issue in its Environmental

28. *Id.* at 1072. The court added: "We find no indication in the statute that Congress contemplated that studies or memoranda contained in the administrative record, but not incorporated in any way into an EIS, can bring into compliance with NEPA an EIS that by itself is inadequate."

29. 440 F. Supp. 1245 (D.D.C. 1977).

30. 449 F.2d 1109, 1115 (D.C. Cir. 1971). Section 101 of NEPA is codified at 42 U.S.C. § 4331 (1976). Section 102 is codified at 42 U.S.C. § 4332 (1976).

31. *Friends of the River,* 720 F.2d at 96.

32. *Id.* at 97.

Impact Statement (EIS). Regardless of adamant public criticism of its draft EIS, the agency made no revisions."[33]

After Friends of the River petitioned for a rehearing, FERC did give the alternative additional consideration. It issued an order denying rehearing in 1982 which contained a discussion of the alternative. The group petitioned the court of appeals for review, contending that FERC did not adequately present its analysis in the EIS itself, in violation of NEPA requirements.[34]

The court held that FERC had violated NEPA's commands, but declined to order a remand because FERC had considered the power purchasing alternative in its order denying a rehearing. A remand would be pointless, the court reasoned, because FERC had adequately advised other agencies and the public through the order denying rehearing. Remands in such cases were seen by the court as inevitably breeding cynicism about court commands to redo under the proper heading what has already been done.[35] The court did acknowledge the need for caution in cases where an agency fails to meet NEPA requirements and added, "A reviewing court must be certain that the basic policies of NEPA are satisfied, and that a remand would indeed be pointless."[36]

In his dissenting opinion, Judge Bazelon argued that the order denying rehearing lacked sufficient discussion of the alternative to satisfy NEPA's policy of requiring agencies to consider alternatives raised through the EIS process. Even if the consideration had been adequate, Judge Bazelon contended, NEPA's procedural requirements would not have been met. He concluded:

> This court is faced with an instance in which FERC has palpably failed to carry out its statutorily mandated investigation. It is the function of a reviewing court to determine whether an agency has complied with its congressional mandate, not to decide when a non-complying agency is "close enough." Failure

33. *Id.* at 110 (Bazelon, J., dissenting). Agency response to comments is guided by Council on Environmental Quality regulations contained in 40 C.F.R. § 1503.4 (1983). In this instance FERC failed to follow the regulations.

34. *Friends of the River*, 720 F.2d at 97. Friends of the River also contested FERC's consideration of alternatives under the Federal Power Act, charging that the Commission failed to look beyond the Pacific Gas and Electric area as a source of power. The court held that FERC's investigation had been sufficient and the Commission did not abuse its discretion. In addressing issues under the Federal Power Act, the court relied heavily on Udall v. Federal Power Commission, 387 U.S. 248 (1967). That case was decided before NEPA was enacted and to that extent involves considerations separate from those raised under NEPA. *Friends of the River*, 720 F.2d at 99-103.

Friends of the River also raised concerns relating to a requirement under NEPA to consider a larger geographical area for sources of purchased power. This challenge was rejected, as was a request to supplement the EIS to include new information Friends of the River had presented. The court said the new information appeared to be of questionable value and the delay would risk immobilizing the agency. *Id.* at 109.

35. *Friends of the River*, 720 F.2d at 107.

36. *Id.* at 108.

to order a remand, in light of blatant statutory violations, can only breed a far greater cynicism towards law.[37]

ANALYSIS

The court cited three cases in support of its decision that, even when an agency violates NEPA procedural requirements a subsequently prepared document can be used to cure the procedural defect.[38] None of these cases justified the court's holding.

One of the cited cases, *Scenic Hudson Preservation Conference v. Federal Power Commission*,[39] involved a hydroelectric plant which had been licensed by the commission without an EIS. The commission's comprehensive opinion was held to suffice as compliance with NEPA,[40] because NEPA had been passed after the commission's hearing.[41] In *Friends of the River*, the Act had been fully implemented prior to any action by FERC regarding the water project at issue.

In the second case relied on as precedent, *Swinomish Tribal Community v. FERC*,[42] the agency had not discussed an alternative in the EIS, but later considered it in an order denying rehearing. The alternative had not been raised in comments to the EIS, but was only presented in a brief to the commission after the record was closed.[43] In *Friends of the River*, however, the alternative had been raised in comments to the draft EIS, at a time when the agency clearly had an opportunity and a duty to consider the alternative. The primary difference between the two cases is that the court in *Swinomish* found no violation of NEPA's commands,[44] while in *Friends of the River*, the court found a procedural violation but excused it because of subsequent consideration of the alternatives in the order denying rehearing.

The third case cited in *Friends of the River* was *Warm Springs Dam Task Force v. Gribble*.[45] In that case, the district court judged that the Corps of Engineers had violated NEPA requirements to investigate new information, but the circuit court refused to send the case back to the Corps because the Corps had completed adequate studies after the district court's judgment.[46] The circuit court stated that although the Corps was correct in studying the new information, the information was not significant enough to justify a new EIS.[47] The district court had been correct in its judgment, the circuit court said, but the later studies of this new

37. *Id.* at 123 (Bazelon, J., dissenting).
38. *Id.* at 107.
39. 453 F.2d 463 (2d Cir. 1971).
40. *Id.* at 481.
41. Also, the case had previously been remanded for environmental investigation and the court's decision in 1971 followed five years of additional study.
42. 627 F.2d 499 (D.C. Cir. 1980).
43. *Id.* at 512.
44. *Id.* at 515.
45. 621 F.2d 1017 (9th Cir. 1980).
46. *Id.* at 1025.
47. *Id.* at 1026.

information satisfied NEPA's requirements.[48] Because the fact situations were so different, *Warm Springs* does not support the court's holding in *Friends of the River*. *Warm Springs* involved insignificant new information gathered after the EIS process had been completed, while *Friends of the River* involved a disputed alternative which was raised very early in the EIS process.

In *Friends of the River,* therefore, the cases cited did not really support the court's holding. The court allowed an agency to avoid a remand by showing that an order denying rehearing contained the consideration of alternatives lacking in the EIS.

This result contrasts with cases like *National Wildlife Federation v. Andrus,*[49] where the court held that the reasons for accepting or rejecting alternatives must be set out in the EIS, and not in papers filed with the court. The court observed that an important purpose of NEPA is not served if the reasons underlying a decision are not disclosed in the EIS.[50] The holding in *Friends of the River* also contrasts with the clear and strong procedural mandate the court in *Calvert Cliffs* saw flowing from NEPA.[51] Most importantly, it conflicts with congressional intent that procedural requirements be complied with by federal agencies "to the fullest extent possible."[52]

The court based its holding on the conclusion that, although NEPA's procedural commands had been violated, NEPA'S basic policies had substantively been met. The danger with relying so extensively on compliance with NEPA's policies is that courts have limited review of such substantive compliance, as noted in *Grazing Fields.*[53] As the Ninth Circuit Court of Appeals explained in *Lathan v. Brinegar:*

> NEPA is essentially a procedural statute. Its purpose is to assure that by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them. The procedures required by NEPA, 42 U.S.C. § 4332(2)(C), are designed to secure accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed; grudging, *pro forma* compliance will not do.[54]

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48. *Id.*

49. 440 F. Supp. 1245 (D.D.C. 1977).

50. *Id.* at 1254.

51. Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d at 1115 (D.C. Cir. 1971).

52. National Environmental Policy Act of 1969, § 102, 42 U.S.C. § 4332 (1976). Referring to the term "to the fullest extent possible" contained in NEPA, the circuit court in *Calvert Cliffs'* said:

> [I]t does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.

449 F.2d at 1114.

53. *See supra* text accompanying note 25.

54. 506 F.2d 677, 693 (9th Cir. 1974).

This approach parallels the Supreme Court's statement in *Vermont Yankee* that NEPA's mandates are essentially procedural.[55] By relying on substantive compliance, the court in *Friends of the River* slighted NEPA's procedural mandates, and based its decision on the limited review of an agency's substantive decision.

The court adopted a practical approach which avoids pointless remands. Unfortunately, this approach allows an agency to override NEPA's procedural mandates if it is clear that the agency will not change its decision on remand. This approach lets an agency ignore the NEPA decision-making process and replace it with after-the-fact rationalizations. It allows agencies to by-pass the strict procedural requirements enacted to implement the nation's environmental policies, significantly decreasing both judicial and public review of the decision-making process. Most importantly, it thwarts the two primary purposes of an EIS: to provide decision-makers with a document sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences, and to provide the public and other agencies with information on the environmental impact of a proposed project and encourage public participation in the development of that information.[56]

CONCLUSION

It is understandable to attempt to avoid remands when insignificant violations of NEPA's procedural requirements are at issue. The court in this case, however, concluded that the violations would require a remand—except for the fact that a subsequent order had been issued by the agency containing information that would remedy defects in the EIS. This is contrary to the intent of Congress in adopting NEPA and is not supported by precedent. It indicates that an EIS can be a *pro forma* rationalization, not an important tool in an agency's decision-making process. If used as precedent itself, this case will undermine NEPA's procedural mandates and NEPA's policies.

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55. *See supra* text accompanying note 17.
56. Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974).