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Good Faith Compliance Held to Satisfy NEPA

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GOOD FAITH COMPLIANCE HELD TO SATISFY NEPA

ENVIRONMENTAL LAW—Good faith compliance with National Environmental Policy Act in establishing a reasonable basis for concluding that a supplement to an environmental impact statement (S-EIS) need not be further revised remedied Army Corps of Engineer's violations of NEPA. *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017 (9th Cir. 1980).

INTRODUCTION

A frequently quoted statement concerning the scope of a court's review in environmental questions postulates that "[w]here NEPA [National Environmental Policy Act][1] is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors."[2] Conversely, other authorities have viewed NEPA as imposing "a procedural straitjacket"[3] and have argued that the good faith test "is simply a reaffirmation of the view that courts will enforce the procedural requirements of NEPA with telling effect."[4] The Ninth Circuit Court of Appeals recently loosened NEPA's procedural constraints in a manner that belies an understanding of the good faith test as a "procedural straitjacket." In *Warm Springs Dam Task Force v. Gribble,*[5] the Ninth Circuit held that an agency's actions, while violating the specific procedural mandates of NEPA, may indicate good faith compliance with the Act. The court declined to reverse the denial of an injunction because no prejudice resulted from the agency's action.

FACTS

The Warm Springs Dam project has spawned a long history of litigation.[6] The only dispute remaining by 1980, however, was the issue

1. 42 U.S.C. § § 4321-4361 (1976).
2. Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972), *see also* W. Rodgers, Handbook on Environmental Law, 741 (1977).
3. W. Rodgers, Handbook on Environmental Law, 741 (1977).
4. *Id.*
5. 621 F.2d 1017 (9th Cir. 1980).
6. *See Id.* at 1019; Warm Springs Dam Task Force v. Gribble, 565 n.1 (9th Cir. 1977).

of the seismic safety of the project.[7] In *Warm Springs Dam Task Force v. Gribble*,[8] the Court of Appeals for the Ninth Circuit addressed the adequacy of an environmental impact statement, in its already supplemented form (S-EIS), prepared by the Army Corps of Engineers for the Warm Springs Dam.[9] The Task Force sought to enjoin the further construction of the dam, arguing that the final S-EIS prepared for the project failed to reflect pertinent studies conducted by the U.S. Geological Survey (USGS).

In 1974, the Corps hired an engineering firm to conduct tests for determining the seismic durability of the dam's structure. The tests involved subjecting a model of the dam to simulated earthquakes of a maximum credible magnitude, that is, of a force equalling the most destructive seismic disturbance which could possibly occur in the area surrounding the dam. The engineering firm carried out its testing on the assumption that the San Andreas Fault, which could generate an earthquake of a magnitude of 8.3 on the Richter Scale, was the controlling fault for the project (i.e., the San Andres Fault posed the greatest potential earthquake threat to the dam). The tests accordingly indicated that the dam must be engineered to withstand an earthquake having a force of 8.3 on the Richter Scale originating from the San Andreas Fault.

The Corps included the findings of its seismic safety tests in a draft of the S-EIS. The draft was circulated among interested parties and agencies, including the USGS, in May of 1976. The Corps formally solicited comments on the project and incorporated all comments received into its final draft of the S-EIS. USGS did not file a written response to the S-EIS, even though mapping studies completed by USGS prior to the circulation of the draft S-EIS showed that the Maacama Fault, rather than the San Andreas Fault, might be the controlling fault for the dam project. The study, though inconclusive, contained evidence that the Maacama Fault extended farther north than earlier believed, and thus might be capable of generating earthquakes of greater desctructive force than the dam was designed to withstand.

Despite the USGS's failure to comment, the Corps learned of the USGS study. In order to ascertain the actual length of the Maacama Fault, the Corps launched an extensive 10 month study in February of 1977 of the fault and its potential threat to the Warm Springs Dam. The study revealed that the Maacama Fault was capable of

7. *Id.* at 1019.

8. *Id.* at 1017.

9. "The Warm Springs Dam is designed to be a 319-foot earth-fill dam across Dry Creek, a major tributary of the Russian River in Sonoma County, California." *Id.* at 1019.

causing a maximum credible earthquake of 7.5 on the Richter Scale. The San Andres Fault, with a maximum disturbance potential of 8.3 on the Richter Scale, remained, therefore, the controlling fault for the project. Review by independent experts confirmed the accuracy of the Corps study. The Corps consequently did not revise its final S-EIS to reflect the Maacama Fault study.

The Task Force challenged the adequacy of the S-EIS on several grounds. The most important issues raised by the Force's challenge, however, were whether the Corps had a duty to obtain the USGS's written comments prior to filing the final S-EIS and whether the S-EIS should have been revised in light of the new evidence concerning the Maacama Fault. The Task Force sought a permanent injunction against further construction of the project on the basis of these alleged infirmities in the Corps' final S-EIS. The Ninth Circuit denied the Task Force injunctive relief, affirming the decision reached by the United States District Court for the Northern District of California.[10]

HOLDINGS

The resolution of the questions raised by the Task Force's suit entailed application and interpretation of the National Environmental Policy Act of 1969.[11] Congress enacted NEPA for the purpose of establishing federal environmental policy goals.[12] To insure the incorporation of the broad purposes and policies of NEPA into the workings of the federal government, Congress included "action-forcing provisions intended as a directive to all agencies to assure consideration of the environmental impact of their actions in decisionmaking."[13] Section 102(2)(c)[14] of the Act is such an "action-forcing" provision.[15] The court's reading of NEPA's mandates and the requirements of regulations and guidelines promulgated pursuant to NEPA thus shaped the outcome of the dispute.

Two key facts weighed against the issuance of the injunction

10. *See* Warm Springs Dam Task Force v. Gribble, 431 F. Supp. 320 (N.D. Cal. 1977).

11. 42 U.S.C. § § 4321-4361 (1976).

12. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. 42 U.S.C. § 4321 (1976).

13. Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976). *See also* 40 C.F.R. § 1500.1 (1980).

14. 42 U.S.C. § 4332(2)(c) (1976).

15. *Id.*

sought by the Task Force. The Corps' submission of its draft S-EIS in May, 1976 to interested parties and agencies (including USGS) with requests for comments, and the study conducted by the Corps itself of the Maacama Fault in February, 1977, compelled the court to rule for the Corps. The court concluded that the Corps' actions, while not in strict compliance with the language of NEPA, were consistent with the underlying purposes of the Act.

First, the court considered whether the Corps had violated section 102(2)(c)[16] of NEPA by failing to obtain a written comment (even an official "no comment" response) from USGS, and whether such a violation warranted injunctive relief for the Task Force. Second, the court determined whether the information concerning Maacama Fault, which came to the attention of the Corps after the publication of its S-EIS, necessitated further revisions of the statement.

In resolving the first issue, the court concluded that section 102(2)(c)[17] of NEPA imposed a duty on the Corps "to consult with and obtain the comments of . . ."[18] the USGS. Further, language[19] included in section 102(2)(c)[20] indicated that Congress specifically intended that agencies such as the Corps obtain the views of other expert agencies in writing.

The Corps argued that, by consulting informally with USGS and specifically soliciting USGS comments on the draft S-EIS, the Corps had fulfilled its statutory duty. The court rejected this argument and concluded that the Corps' failure to obtain a written response from USGS constituted a violation of NEPA. The Corps, however, had made a good faith effort to comply with NEPA, and the failure to obtain USGS's written comments had no prejudicial effects. The court, in declining to issue an injunction on the basis of the Corps' violation of NEPA, pointed out that "[r]elief under NEPA should be remedial rather than punitive."[21]

Next, the court determined that the Corps' failure to revise the S-EIS to reflect the possible threat posed by Maacama Fault also did not justify injunctive relief. The Council on Environmental Quality (CEQ) guidelines[22] require that agencies prepare supplements to statements if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed

16. *Id.*
17. *Id.*
18. *Id.*
19. "Copies of such statement and the comments and views of the appropriate . . . agencies . . . shall be made available . . ." (emphasis added). 42 U.S.C. § 4332(2)(c) (1976).
20. 42 U.S.C. § 4332(2)(c) (1976).
21. Warm Springs Dam Task Force v. Gribble, 621 F.2d at 1022.
22. 40 C.F.R. § § 1500-1508 (1980).

action or its impacts."[23] The CEQ regulations alone, however, did not provide the court with a suitable standard for reviewing the Corps' decision not to supplement the statement. The court determined that the decision not to supplement would be upheld if the decision was reasonable. "Reasonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data."[24]

Using these standards for reasonableness, the court held that the Corps' response to the new information prior to the commencement of the Corps' own study of the Maacama Fault in February, 1977, was unreasonable. The Corps action prior to February, 1977, were therefore found to conflict with the mandates of NEPA. The Corps' study cured the deficiency, however. The court decided that, on the basis of the Corps' studies, "the Corps could reasonably conclude . . . that the potentially adverse effects disclosed by the [USGS] report were not significant and therefore did not require the preparation and circulation of a formal supplement to the S-EIS."[25] The Corps' failure to revise its statement could not serve, therefore, as grounds for an injunction.

COMPATABILITY WITH EARLIER NEPA RULINGS

The Ninth Circuit's decision, though seemingly at odds with the dictates of NEPA, comports with the rationales for granting injunctions articulated in other cases brought under the Act. In *Jones v. District of Columbia Redevelopment Land Agency,*[26] the Court of Appeals for the District of Columbia reasoned that "[i] n most cases, perhaps, it is possible and reasonable for the courts to insist on strict compliance with NEPA, and actions can, consistently with the public interest, be enjoined until such compliance is forthcoming."[27] The court concluded that, although the timing of the defendants' issuance of impact statements did not comply with NEPA, "defendants' remedial actions [belated issuance of impact statement] achieved the substance of NEPA's requirements and purposes."[28] The court observed that "NEPA was intended to ensure that decisions about federal ac-

23. 40 C.F.R. § 1502.9(c)(1)(ii) (1980).
24. Warm Springs Dam Task Force v. Gribble, 621 F.2d at 1024.
25. *Id.* at 1026.
26. 499 F.2d 502 (D.C. Cir. 1974).
27. *Id.* at 513.
28. *Id.* at 514.

tions would be made only after responsible decisionmakers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs."[29]

In *Cady v. Morton,*[30] the Ninth Circuit stated that "[a]lthough failure to comply with NEPA will ordinarily call for an injunction halting the challenged action until the Act's requirements are met, in unusual circumstances an application of traditional equitable principles may justify denial or limitation of injunctive relief."[31] Interestingly, the Ninth Circuit did not cite the *Cady* decision in ruling on the *Warm Springs Dam* case.

Finally, in *Realty Income Trust v. Eckerd,*[32] the District of Columbia Court of Appeals considered the rationales for granting injunctions in NEPA cases. First, "a project should not proceed . . . until the possible adverse consequences are known. . . . [C]ourts will not hesitate to stop projects that are in the process of affecting the environment when the agency is in illegal ignorance of the consequences. . . ."[33] Second, courts may enjoin ongoing projects "to preserve for the agency the widest freedom of choice when it reconsiders its actions after . . . finding out about the possible adverse environmental effects of its actions."[34] Further investment in ongoing projects tend to prejudice agency reappraisal. "[T]he more time and resources [the agency is] allowed to invest in [a] project, the greater becomes the likelihood that compliance with . . . NEPA, and the reconsideration of the project . . . will prove to be merely an empty gesture."[35]

CONCLUSION

The *Warm Springs Dam* case did not present an instance in which "illegal ignorance" pervaded the Corps' decisions. The Corps acquired the information necessary to make enlightened decisions concerning the seismic safety of the project. The statement of purposes[36] included in the regulations supporting NEPA[37] adds authority to the court's decision.

> Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even ex-

29. *Id.* at 512.
30. 527 F.2d 786 (9th Cir. 1975).
31. *Id.* at 798, n. 12.
32. 564 F.2d 447 (D.C. Cir. 1977).
33. *Id.* at 456.
34. *Id.*
35. *Id.*
36. 40 C.F.R. § 1500.1 (1980).
37. Warm Springs Dam Task Force v. Gribble, 621 F.2d at 1022.

> cellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment.[38]

The Ninth Circuit's decision does not signal a weakening of NEPA standards. The opinion in *Warm Springs Dam* only illustrates the extent of judicial discretion in injunction suits based on NEPA. In short, courts seem to regard the broad purposes of NEPA to be of greater significance than the procedural mandates of the Act. Accordingly, where an agency's actions are consistent with NEPA's purposes, courts seem to tolerate violations of the Act's proscribed procedure.

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38. 40 C.F.R. § 1500.1(c) (1980).