

RECENT NEPA CASES (2003)

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ABSTRACT

This paper will review NEPA cases issued by federal courts in 2003. The implications of the decisions and relevance to NEPA practitioners will be explained.

Introduction

In 2003, federal courts issued at least 16 decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. These cases involved the U.S. Forest Service (6 cases), U.S. Department of the Interior (4 cases), National Marine Fisheries Service (1 case), U.S. Department of Transportation (4 cases), and U.S. Navy (1 case). Of these, plaintiffs were successful in 11 cases and the federal agencies prevailed in 5. Table 1 provides the case citation for and a brief synopsis of each case.

Themes

- Agencies prevailed when they could demonstrate that they had given a “hard look” at the potential environmental consequences of the proposed action and alternatives.
 - *Selkirk Conservation Alliance v. Forsgren*: (9th Cir.): U.S. Forest Service used the best scientific evidence available and made reasonable judgments of activities to include in a cumulative impact analysis.
 - *Friends of Yosemite v. Norton* (9th Cir.): NEPA document contained sufficient data and information.
 - *Defenders of Wildlife v. Hogarth* (Fed. Cir.): National Marine Fisheries Service took a hard look at the dolphin mortality problem and the effects of the proposed rule on the environment.
 - *Highway J Citizens Group v. Mineta* (7th Cir.): Agency adequately considered and addressed the project effects on contamination and the environment and made an informed and reasoned decision that no EIS was required.
 - *Spiller v. White*: (5th Cir.): Agencies complied with NEPA procedures, did not conduct the assessment in bad faith, and followed relevant guidance.
- Agencies lost when they skirted NEPA procedures, ignored (or failed to demonstrate that they considered) opposing evidence, demonstrated bad faith, or changed the proposal without complying with NEPA. For example,
 - *Wyoming v. Department of Agriculture* (D. Wyo.): U.S. Forest Service violated NEPA by denying requests to extend the scoping period, failing to explore alternatives, and failing to prepare a supplemental EIS after making “substantial” changes to the proposed action.
 - *Center for Biological Diversity v. U.S. Forest Service* (9th Cir.): Agency failed to respond to 7 scientific studies that cast doubt on the agency’s conclusions.

- *Fund for Animals v. Norton* (D.D.C.): Reasoning relied on in a supplemental EIS had been considered and rejected in the original EIS, but the agency did not supply a “reasoned explanation” for the reversal of its views.
- *League of Wilderness Defenders/Blue Mountains Diversity Project v. Marquis-Brong* (D. Ore.): EA was inadequate because it failed to discuss a report critical of post-fire logging and disregarded scientific evidence that post-fire salvaging likely results in adverse environmental impacts.
- *Natural Resources Defense Council v. Evans* (N.D. Cal.): Agency failed to engage in a reasoned analysis of two studies on the impact of low frequency active sonar on fish and failed to make evidence available to the public.

Particular Cases

A few of the 2003 cases are worthy of additional discussion:

Mid States Coalition for Progress v. Surface Transportation Board

Facts: Plaintiffs challenged the decision of the Surface Transportation Board giving final approval to the Dakota, Minnesota & Eastern Railroad Corporation’s proposal to construct 280 miles of new rail line to reach the coal mines of Wyoming’s Powder River Basin and to upgrade 600 miles of existing rail line. After making a preliminary determination that the proposal was merited (there was public demand, it would benefit existing shippers, and the applicant had demonstrated financial fitness), the Board proceeded to prepare an EIS to examine the potential environmental effects resulting from the construction and continuing operation of the proposed project. After a 4-year process and 8,600 comments (and a 5,000 page draft EIS), the Surface Transportation Board (Section of Environmental Analysis) produced a final EIS that examined the effects of constructing the rail line extension and rehabilitating existing lines and made recommendations regarding environmentally preferable routing alternatives and mitigation measures. Plaintiffs argued that the EIS was inadequate and thus that the Board’s decision was invalid.

Decision: Although finding for the board on almost all of the NEPA issues raised by plaintiffs, the U.S. Court of Appeals for the 8th Circuit vacated the Board’s decision, finding that it failed to take a hard look at the effects and mitigation of horn noise, and it failed to consider the combined impact of noise and vibration. In addition, the court held that the Board ignored the effects of increased coal consumption, and made no attempt to fulfill the requirements laid out in the NEPA-implementing regulations for addressing incomplete and unavailable information. Although the effect of increased coal consumption might be speculative and not capable of being analyzed, the court stated that the nature of the effect was “far from speculative” and in fact was reasonably foreseeable. “[W]hen the *nature* of the effect is reasonably foreseeable but its *extent* is not, we think that the agency may not simply ignore the effect (emphasis supplied).” “We believe it would be irresponsible for the Board to approve a project of this scope without first examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption.”

Citizens for Better Forestry v. U.S. Department of Agriculture

Facts: A coalition of environmental groups challenged 2000 revisions to the 1982 National Forest System and Resource Management Planning rule (plan development rule), which set guidelines on how the U.S. Forest Service was to oversee plant and animal species, timber management, and water management. The plan development rule set national guidelines to be followed by regional land resource agencies and local site-specific plans. The 2000 revision changed requirements by relaxing threatened and endangered species viability requirements, eliminated minimum specific management requirements, and eliminated the post-decisional appeal process. The 2000 rule revisions were not accompanied by a NEPA analysis or an endangered species analysis (an EA and FONSI were prepared, but the Forest Service did not entertain comments on the environmental impact of the rule revisions). Plaintiffs challenged the substantive changes to the rule and alleged procedural violations of NEPA and the Endangered Species Act. The district court dismissed the plaintiffs’ claims, holding that the plaintiffs lacked standing and that its claims were not ripe for review.

Decision: The U.S. Court of Appeals for the 9th Circuit reversed the lower court. The Court of Appeals found that the environmental groups suffered an injury when they were deprived of the NEPA opportunity to comment on the rule's EA and FONSI and when the agency failed to conduct Endangered Species Act procedural consultation and biological assessment. The groups also established that the rule threatened their concrete interests by eliminating previous species viability requirements, specific management requirements, and the post-decision appeal process. The groups also showed causation and redressability since citizen participation in the rulemaking probably would have influenced rule development, and they met the requirements for associational and constitutional standing. In addition, the groups' challenge was ripe for review because judicial action would not interfere with rulemaking, no further factual development was necessary, and delayed review would cause hardship to the groups by allowing the agency to implement the rule.

Laub v. U.S. Department of the Interior

Facts: The CALFED Bay-Delta program is a cooperative interagency effort of 18 state and federal agencies with management or regulatory responsibilities for California's San Francisco Bay/Sacramento-San Joaquin Delta, the largest estuary on the West Coast. CALFED was formed to establish a comprehensive program for coordination and communication in order to advance environmental protection and water supply dependability in the Bay-Delta estuary. The parties involved agreed to prepare a single environmental document that would satisfy both NEPA and the California Environmental Quality Act. In July 2000, CALFED issued a programmatic EIS that identified a Preferred Program Alternative that would, among other things, convert agricultural lands to other uses, including habitat, levee improvements, and water storage.

Plaintiffs (individual farmers and a farm organization) filed suit alleging that CALFED failed to follow procedures mandated by NEPA, specifically that the agency failed to consider any reasonable alternatives to the proposed conversion of agricultural resources to environmental uses; failed to consider the direct, indirect, and cumulative impacts of projects that will cause significant effects on agricultural resources; and that their analysis of mitigation options was inadequate. The lower court granted CALFED's motion to dismiss, holding that the issuance of the programmatic EIS was not final agency action and thus was not ripe for review. The lower court concluded that because the programmatic EIS and ROD "simply outline a program by which state and federal officials and agencies commit to work together to achieve strategies in order to implement a long-term plan to solve environmental problems," the issuance of the EIS and ROD was not the culmination of the decisionmaking process and did not constitute final agency action reviewable under the Administrative Procedure Act.

Decision: The U.S. Court of Appeals for the 9th Circuit reversed the lower court decision, first finding that the plaintiffs had adequately alleged an injury in fact sufficient to confer standing and then holding that plaintiffs' NEPA action was ripe for judicial review even before any site-specific action is taken. The EIS' preferred program alternative would influence subsequent site-specific actions and would determine the scope of future site-specific proposals. Likewise, because the ROD pre-determines the future through the selection of a long-term plan, it is ripe for review. If agency action could be challenged only at the site-specific development stage, the underlying programmatic authorization would forever escape review.

Natural Resources Defense Council v. Evans

Facts: Plaintiff environmental organizations sought a permanent injunction against the peacetime use of a low frequency active (LFA) sonar system for training, testing, and routine operations. The technology – Surveillance Towed Array Sensor System Low Frequency Active Sonar – sends out intense sonar pulses at low frequencies that travel hundreds of miles in order to timely detect increasingly quiet enemy submarines. Plaintiffs claimed that the National Marine Fisheries Service (NMFS) improperly approved the use of LFA sonar in violation of the Marine Mammal Protection Act, Endangered Species Act, and Administrative Procedure Act; plaintiffs also claimed that the Navy participated in the Endangered Species Act violation and prepared an inadequate EIS in violation of NEPA. Plaintiffs argued that these violations will cause irreparable injury by harassing, injuring, and killing marine mammals and other sea creatures with sensitive hearing. Defendants argued that they complied with applicable laws and that enjoining the peacetime use of LFA sonar would hard national security because training and testing is necessary for military readiness.

Decision: The U.S. District Court for the Northern District of California found that the efforts of NMFS and the Navy did not comply in certain important respects with respect to the various statutes and, balancing the competing

interests of the parties, issued an injunction authorizing U.S. Navy use of LFA sonar for training and testing in open ocean waters, while restricting LFA use in areas where marine mammals are abundant.

With respect to the plaintiffs' NEPA claim, the court held that the alternative analysis set forth in the Navy's EIS was arbitrary and capricious because one alternative (full deployment with no mitigation or monitoring) was a "phantom option" and because the Navy did not consider all reasonable alternatives such as reduced operations. The court also found that the Navy failed to engage in a reasoned analysis of two studies on the impact of LFA sonar on fish and failed to make that evidence available to the public. The court did find in favor of the Navy on other aspects of plaintiffs' NEPA claims, stating that "when qualified experts on both sides reach carefully reasoned but different conclusions, the Court must defer to the agency's experts...." With respect to whether the Navy had a duty to supplement its EIS to consider new information, the court stated that "NEPA requires consideration of 'reasonably foreseeable' impacts, and not resolution of all unresolved scientific issues."

Turning to whether to issue a permanent injunction, the court noted the traditional test: actual success on the merits, irreparable injury, and inadequacy of legal remedies. However, a court must also balance the competing claims of injury. In this case, the court found that the plaintiffs showed a likelihood of success on the merits of some of their claims, irreparable harm to the environment and to the NEPA decisionmaking process ("the harm under NEPA is uninformed decisionmaking which increases the risk to the environment"), and environmental injury that could not be adequately remedied by monetary damages. Recognizing the plaintiffs' and interest in the survival of marine mammals and endangered species and a healthy marine environment, the court also noted that the public also has a compelling interest in protecting national security by ensuring military preparedness and the safety of those serving in the military from attacks by hostile submarines. After balancing the harms to the environment with the harm to the public interest in national defense, the court issued a permanent injunction restricting LFA sonar use in areas particularly rich in marine life, while allowing the Navy to use LFA sonar for testing and training in a variety of oceanic conditions.

Supreme Court Review

The U.S. Supreme Court has granted certiorari in two NEPA cases: *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002), and *U.S. Department of Transportation v. Public Citizen*, 316 F. 3d 1002, (9th Cir. 2003). Each of these cases is described below, along with the question presented for review by the U.S. Supreme Court.

Southern Utah Wilderness Alliance v. Norton

The Southern Utah Wilderness Alliance (SUWA) sued the U.S. Bureau of Land Management for violating the Federal Land Policy and Management Act (FLPMA) and NEPA by not properly managing off-road vehicle use on federal lands that had been classified as Wilderness Study Areas or as having wilderness qualities. SUWA sought relief under the Administrative Procedure Act (APA) claiming that BLM should be compelled to carry out mandatory, non-discretionary duties required by FLPMA and NEPA.

SUWA claimed that current levels of ORV use were impairing the suitability of the wilderness areas so that they will no longer be appropriate for wilderness designation, and that BLM's failure to ensure non-impairment violates a statutory duty, constituting the violation of a mandatory, non-discretionary duty actionable under the APA, which gives courts authority to compel "agency action unlawfully withheld or unreasonably delayed." SUWA acknowledged that it cannot compel BLM to act in any specific way – BLM has discretion to comply with the non-impairment requirement in a variety of ways – but argued that it can sue to compel BLM to act in some way of its choosing that will meet BLM's non-impairment obligation.

BLM argued that all judicial review under the APA is limited to final agency action, or to compel final agency action that has been withheld, and that the day-to-day operations of BLM land management that SUWA is attempting to challenge are outside the concept of final agency action.

Although the U.S. District Court dismissed SUWA's claims, the U.S. Court of Appeals for the 10th Circuit reversed the lower court, holding that "[w]here, as here, an agency has an obligation to carry out a mandatory, non-discretionary duty and either fails to meet an established deadline or unreasonably delays in carrying out the action, the failure to carry out that duty is itself 'final agency action.'"

Before the 10th Circuit, SUWA also argued that BLM's failure to take a "hard look" at information suggesting that ORV use has substantially increased since NEPA studies for the wilderness areas were issued violated NEPA. SUWA argued that BLM should be compelled to take a hard look at this information and decide whether supplemental NEPA documents should be prepared. The Court of Appeals agreed that BLM could be compelled, dismissing BLM's arguments that it should not be compelled to take a hard look at new information because (1) the agency would be undertaking NEPA analysis in the near future and (2) the agency faced budget constraints.

The U.S. Supreme Court granted certiorari to address whether the authority of the federal courts under the APA to "compel agency action unlawfully withheld or unreasonably delayed" extends to review of the adequacy of an agency's ongoing management of public lands under general statutory standards and its own land use plans. Although only the APA claim will be addressed by the U.S. Supreme Court, the potential exists for some language relating to NEPA requirements to be included in any decision reached by the Court in this case. This case is scheduled to be heard on March 29, 2004.

U.S. Department of Transportation v. Public Citizen

In 2001, an international arbitration panel determined that a moratorium on the entry of Mexican motor carriers into the U.S. violated the North American Free Trade Agreement (NAFTA). President Bush subsequently announced that he would lift the moratorium after the Department of Transportation (DOT) issued regulations governing Mexican-domiciled motor carriers seeking to operate within the U.S. Congress then prohibited the Department from expending any funds for licensing or permitting of Mexican-based motor carriers in the U.S. until the Department had issued safety and inspection rules to cover those carriers.

DOT promulgated three regulations governing Mexican motor carriers and, for two of them, prepared EAs that concluded that the regulations would have no significant impact on the environment. DOT did not prepare an EA for the third regulation because it concluded the regulation fell within its categorical exclusion regulations. DOT also did not make conformity determinations under the Clean Air Act for any of the three regulations because it concluded that the regulations fell within exceptions to Clean Air Act requirements.

Following the issuance of the regulations, the President lifted the moratorium, permitting Mexico-domiciled motor carriers to offer cross-border service.

Plaintiff public interest and environmental organizations and trucking unions filed suit in the U.S. Court of Appeals for the 9th Circuit, arguing that the regulations were invalid because DOT failed to comply with NEPA and the Clean Air Act. Specifically, they argued that allowing Mexican trucks to operate in the U.S. would increase air pollution in violation of state standards and would harm residents of border states.

DOT argued that additional Mexican truck and bus traffic and any incidental increases in air pollution would be the result of the President's action in lifting the moratorium rather than as a result of the agency's safety and licensing regulations. Thus, the effects of the traffic would be attributable to the President's exercise of his foreign policy power, not agency rulemaking. Because NEPA and Clean Air Act requirements do not apply to actions of the President, DOT argued that the link between the regulations and any environmental impacts of increased traffic from Mexican vehicles were too attenuated to trigger NEPA or Clean Air Act requirements.

The Court of Appeals rejected that argument, stating that the "distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry" to be "illusory." Because the court limited its review to the question of whether DOT had authority to promulgate its regulations without complying with NEPA and Clean Air Act requirements, it found that its decision did not implicate the President's "unreviewable discretionary authority to modify the moratorium" or affect the U.S.' ability to comply with NAFTA. The court found that DOT had acted arbitrarily and capriciously by failing to prepare EISs and Clean Air Act analyses before issuing the regulations.

The U.S. Supreme Court granted certiorari to address whether a presidential foreign affairs action that is otherwise exempt from environmental review requirements under NEPA and the Clean Air Act become subject to those requirements because an executive agency (DOT) promulgated administrative rules concerning implementation of the President's action.

Table 1. NEPA Cases Decided in 2003

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
U.S. Forest Service			
<i>Wyoming v. Department of Agriculture</i>	33 ELR 20250 (D. Wyo. 2003)	lost	Scoping, alternatives, mitigation, cumulative impacts, duty to supplement: Forest Service violated NEPA by denying requests to extend the scoping period, by failing to explore alternatives to and include mitigation in the roadless rule (prohibiting road construction in inventoried roadless areas), and by not providing an adequate discussion of cumulative impacts of the roadless rule and Forest Service planning regulations, road management rule, and transportation policy. Also violated NEPA by failing to prepare a supplemental EIS after making “substantial” changes to the rules procedural aspects, scope, acreage covered, and allowable timber harvesting. Forest Service was not required to conduct a site-specific analysis of each forest affected by the rule.
<i>Oregon Natural Defense Council v. Forsgren</i>	33 ELR 20184 (D. Ore. 2003)	lost	Failure to prepare EA: Forest Service made a programmatic change in the applicable forest management plan when it created a revised mapping direction that eliminated thousands of acres of previously recognized lynx habitat, without notice and comment. NEPA requires the Forest Service to prepare an EA to determine whether the new mapping direction might significantly affect lynx in the forest and whether an EIS should be prepared.
<i>Selkirk Conservation Alliance v. Forsgren</i>	336 F.3d 944 (9 th Cir. 2003)	won	Cumulative impacts, use of best scientific evidence available: Forest Service took a hard look at nearby activities and made reasonable judgment that the cumulative impact analysis should not include those activities; also reasonably limited its EIS to the bear management unit where project would occur
<i>Citizens for Better Forestry v. Department of Agriculture</i>	341 F.3d 961 (9 th Cir. 2003)	lost	Standing: environmental groups had standing to pursue procedural claims because they suffered an injury when they were deprived of the opportunity to comment on the rule’s EA and FONSI. Although the rule results in indirect effects, plaintiffs have standing to challenge higher-level, programmatic rules that impose or remove requirements on site-specific plans.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
<i>Center for Biological Diversity v. U.S. Forest Service</i>	___ F.3d ___, 34 ELR 20004 (9th Cir. 2003)	lost	Use of scientific data: Forest Service EIS failed to discuss and respond to 7 scientific studies casting doubt on Forest Service conclusion that northern goshawks are habitat generalists. The Forest Service received comments during scoping challenging its conclusion. The Draft EIS contained summaries of the comments, but did not specifically mention or discuss the scientific opposition.
<i>Northwoods Wilderness Recovery, Inc. v. U.S. Forest Service</i>	323 F.3d 405 (6 th Cir. 2003)	lost	Adequacy of EIS: USFS did not demonstrate that the Forest Plan or the EIS included an analysis of the proposed level of selection logging or the unlimited selection cutting of sugar maples.
Department of the Interior			
<i>Fund for Animals v. Norton</i>	Civil Action No. 02-2367 (D.D.C. 2003)	lost	Adequacy of supplemental EIS: NPS ROD, supplemental EIS, and 2003 final rule allowing snowmobiling in Yellowstone, Grand Teton, and Rockefeller Memorial Parkway were remanded to the agency for consideration. Reasoning used in supplement was considered and rejected in underlying EIS, but NPS did not supply a reasoned explanation for the reversal of the agency's views.
<i>League of Wilderness Defenders/Blue Mountains Diversity Project v. Marquis-Brong</i>	33 ELR 20187 (D. Ore. 2003)	lost	Inadequate EA, mootness: BLM violated NEPA when it relied on an inadequate EA when an d EIS should have been prepared, failing to discuss a report critical of post-fire logging in the EA, and disregarding scientific evidence that post-fire salvaging likely results in adverse environmental impacts. Plaintiffs raised serious concerns about soil compaction, erosion, and cumulative effects that warrant an EIS. Although much of the logging has been completed, effective relief can still be granted.
<i>Laub v. U.S. Department of the Interior</i>	___ F.3d ___, 33 ELR 20267 (9th Cir. 2003)	lost	Ripeness, programmatic EIS: NEPA action challenging a proposed federal-state plan for managing San Francisco Bay/Sacramento-San Joaquin Delta water resources is ripe before any site-specific action is taken because the question of whether an agency complied with NEPA's procedural provisions in preparing a programmatic EIS is immediately ripe for review before site-specific action is taken. The EIS's preferred program alternative will influence subsequent site-specific actions.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
<i>Friends of Yosemite v. Norton</i>	___ F.3d ___, Case No. 02-16037 (9th Cir. 2003)	won	Adequacy: Merced River Wild and Scenic River Comprehensive Management Plan contained sufficient data and information to satisfy the requirements of NEPA.
National Marine Fisheries Service			
<i>Defenders of Wildlife v. Hogarth</i>	330 F.3d 1358 (Fed. Cir. 2003)	won	International: Court affirmed a Court of International Trade decision that NMFS' failure to prepare an EIS for an interim final rule on taking of dolphins from depleted stocks in the Eastern Tropical Pacific Ocean during commercial purse seine fishing operations did not violate NEPA. NMFS did take a hard look at the dolphin mortality problem and the effects of the rule on the environment, and considered the relevant areas affected by its regulation.
Department of Transportation			
<i>Public Citizen v. Department of Transportation</i> (on certiorari to the U.S. Supreme Court)	316 F. 3d 1002, (9 th Cir. 2003)	lost	Presidential decisionmaking: DOT regulations governing Mexican motor carriers operating in the U.S. require the preparation of an EIS, although the direct cause of potential adverse impacts would be the result of the President lifting a moratorium rather than implementation of the agency regulations.
<i>Highway J Citizens Group v. Mineta</i>	34 ELR 2513 (7 th Cir. 2003)	won	Hard look/adequacy, alternatives, segmentation: Agency adequately considered and addressed the project effects on contamination and the environment and made an informed and reasoned determination that no EIS was required. Agency considered a sufficient number of reasonable alternatives and the highway project was not improperly segmented from the bridge project..
<i>Spiller v. White</i>	Civil Action No. 02-50956 (5 th Cir. 2003)	won	Adequacy of an EA: EPA and DOT decision not to prepare an EIS of the environmental effects of a proposed use of an existing pipeline to transport gasoline and other petroleum products across Texas was upheld. Agencies fully complied with NEPA procedures, did not conduct the assessment in bad faith, and followed relevant guidance.
<i>Mid States Coalition for Progress v. Surface Transportation Board</i>	345 F.3d 520 (8 th Cir. 2003)	lost	Noise: Surface Transportation Board failed to take a hard look at the effects and mitigation of horn noise and failed to consider the combined impact of noise and vibration. Agency also ignored effects of increased coal consumption made possible by the construction of new rail line to reach coal mines.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Navy			
<i>Natural Resources Defense Council v. Evans</i>	33 ELR 20153 (N.D. Cal. 2003)	lost	Alternatives: Alternatives analysis in joint Navy/NMFS EIS was arbitrary and capricious; failed to engage in a reasoned analysis of 2 studies on the impact of low frequency active (LFA) sonar on fish and failed to make evidence available to the public. After balancing harms to the environment with harm to public interest in national defense, court issued a permanent injunction restricting LFA sonar use in areas particular rich in marine life, while allowing its use for testing and training in a variety of oceanic conditions.