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IN FOCUS

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National Environmental Policy Act: Judicial Review and Remedies

According to the U.S. Department of Justice, the National Environmental Policy Act of 1969 (NEPA) is the most frequently litigated federal environmental statute. A 2020 study estimated that, between 2001 and 2013, plaintiffs challenged 1 in 450 agency actions taken to comply with NEPA, with an average of 115 NEPA cases annually. Although NEPA does not provide for judicial review, courts allow challenges under the Administrative Procedure Act (APA). This In Focus describes how the federal courts have interpreted and limited the availability of judicial review for claims against federal agencies and established remedies for successful claims.

Background

NEPA requires federal agencies to analyze the impacts of proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). This requirement serves the dual purpose of informing the agency decisionmaking process, although not demanding agencies to change their proposed actions, and informing the public of a proposed action's effects. The level of analysis required depends on the environmental impacts' significance. Agencies prepare environmental impact statements (EISs) if there are significant impacts. An agency may also draft an environmental assessment (EA) to determine whether to prepare an EIS. Based on an EA, an agency will prepare an EIS or issue a "Finding of No Significant Impacts" (FONSI). NEPA also established the Council on Environmental Quality (CEQ), which issues regulations and guidance detailing how federal agencies must implement NEPA. For more details, see CRS In Focus IF11549, *The Legal Framework of the National Environmental Policy Act*.

Basis for Judicial Review

NEPA does not provide for judicial review of federal agency compliance with the act. Instead, the federal courts allow challenges to NEPA compliance under the APA. Generally, plaintiffs claim that an agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because of an agency's failure to meet NEPA's requirements. For more information, see CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*.

A number of factors constrain judicial review. First, the disputed action must be "final," and the legal challenge to that action brought within six years, as set out by the APA. Second, Congress may limit the scope of NEPA claims, either directly by addressing the availability of judicial review or indirectly by limiting NEPA's applicability to a particular federal action. Third, the plaintiff must have the right to challenge an action in court, including by having standing.

Common NEPA Claims

In general, NEPA claims challenge an agency's level of NEPA analysis or the sufficiency of its documented review.

Failure to Prepare an EIS. Federal actions not resulting in significant environmental impacts do not require an EIS. When an agency approves a proposed action without preparing an EIS, plaintiffs often challenge the agency's decision, asserting that the action will result in significant impacts and therefore requires preparation of an EIS. For example, if an agency prepares an EA and then issues a FONSI, a court may examine whether agencies took the requisite "hard look" at the environmental effects to decide whether the agency should have prepared an EIS. In one such case, the U.S. Court of Appeals for the Ninth Circuit concluded that a single sentence analysis of a proposed whale hunt quota's effects on the overall whale population did not justify issuance of a FONSI and ordered the agency to prepare an EIS. *Anderson v. Evans*, 314 F.3d 1006 (9th Cir. 2002).

Improper Reliance on Categorical Exclusions. An agency may determine that a proposed action falls into a "categorical exclusion" (CE or CX). CXs are actions that generally do not have significant impacts and therefore do not require an EIS absent extraordinary circumstances. Some disputes involve an agency's decision to rely on a CX rather than prepare an EA or EIS. Courts may scrutinize whether the type of project at issue falls within the scope of a CX. For example, the Ninth Circuit held that the Federal Highway Administration improperly relied on a CX to approve a highway interchange, as the magnitude of the project went beyond the scope of projects eligible for a CX. *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920 (9th Cir. 2000). In addition, when an agency fails to explain the decision to rely on a CX or why "extraordinary circumstances" that would trigger further review do not exist, courts have found an APA violation. *See, e.g.*, *United States v. Coal. for Buzzards Bay*, 644 F.3d 26 (1st Cir. 2011); *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851 (9th Cir. 1999).

Inadequate Analysis in an EIS. After an agency issues a decision based on an EIS or EA, stakeholders have challenged the adequacy of the environmental review supporting the decision. Such parties often argue that the agency failed to consider certain impacts or failed to fully consider the weight of the impacts reviewed. In these cases, courts review the agency's NEPA analysis to determine whether the agency's decision was arbitrary or capricious

under the APA. For example, the Ninth Circuit ruled that the Bureau of Ocean Energy Management violated the APA by failing to quantify in its EIS the indirect greenhouse gas emissions that would result from offshore oil exploration and production along the coast of Alaska. *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020). *See also Am. Rivers & Ala. Rivers Alliance v. FERC*, 895 F.3d 32 (D.C. Cir. 2018) (holding that FERC's NEPA analysis failed to consider the cumulative impact of previous power plant operations when considering licensing a hydroelectric project).

Failure to Prepare a Supplemental EIS. CEQ's regulations require agencies to prepare an SEIS when the agency makes substantial changes to a proposal or learns of "significant new circumstances or information relevant to environmental concerns" after completion of a draft or final EIS. 40 C.F.R. § 1502.9. Plaintiffs sometimes allege that an agency's failure to draft a supplemental EIS (SEIS) violates the APA. Not all new pieces of information or changes require an SEIS. Rather, the Supreme Court instructs agencies to apply the "rule of reason" to decide whether to prepare an SEIS. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 370-71 (1989).

Some lower courts interpreting CEQ's regulations hold that an agency must prepare an SEIS when a new proposal "present[s] a seriously different picture of the environmental impact." *See, e.g.*, *Ark. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096, 1102 (8th Cir. 2005). Applying this test, the First Circuit ordered an SEIS when an agency adopted an alternative proposal not considered in earlier documents or distributed for public comment. *DuBois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996). By contrast, some courts have declined to order an SEIS when the documentation showed that the agencies sufficiently consulted with experts about potentially new effects or concluded no new significant effects existed. *See, e.g.*, *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517 (9th Cir. 1994).

Remedies in NEPA Litigation

Plaintiffs may not seek damages under NEPA. Instead, plaintiffs generally seek declaratory relief, which is a court determination that an agency's actions taken to comply with NEPA violated the APA. As a remedy for such violations, a court generally remands the case to the agency for further proceedings, and it may specify what those further proceedings must include. The broader effect of a remand on the affected project, however, varies depending on whether a court orders equitable relief—i.e., vacates the agency action or issues an injunction. Neither of these remedies is granted automatically in NEPA cases. These equitable remedies can be significant, as absent such relief, agencies may be able to implement projects before the additional NEPA procedures are complete.

While vacating the federal action may be the "ordinary" remedy, courts consider the "seriousness" of the NEPA deficiencies and the "disruptive consequences" of vacating the order. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271 (11th Cir. 2015) (describing federal court practice). In general, courts are less likely to vacate the agency action if they find that the agency will likely cure the violation or that vacatur would result in substantially disruptive effects on the project. *Compare Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 2021 WL 3354747 (D.C. Cir. 2021) (remanding without vacatur), *with Standing Rock Sioux Tribe v. USACE*, 985 F.3d 1032 (D.C. Cir. 2021) (upholding district court decision to vacate based on prior failures to cure NEPA violations).

In some cases, vacating an agency decision does not grant full relief to plaintiffs. In these cases, courts may grant injunctions to stay part or all of a project while an agency completes the requisite NEPA analysis. Before issuing an injunction, courts generally consider whether a plaintiff has demonstrated (1) irreparable injury; (2) other remedies are inadequate to compensate for the injury; (3) the balance of the hardships demonstrate that equitable relief is warranted; and (4) the public interest would not be disserved by an injunction. *See, e.g.*, *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013) (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010)); *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1272 (10th Cir. 2011). Courts sometimes grant narrow injunctions when an agency can address site-specific issues within a project independently of other aspects or when a project has already received approval or is near completion when a lawsuit is filed. *See, e.g.*, *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007).

Preliminary Injunctions. Courts may grant preliminary injunctions during litigation, which may bar all or part of a proposed action during the litigation. In a NEPA case involving the Navy's sonar training exercises, the Supreme Court stated that plaintiffs must demonstrate (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of the equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The Court also clarified that plaintiffs must show that irreparable harm is "*likely* in the absence of an injunction," not just a "possibility."

Remedies Under NEPA Regulations

In 2020, CEQ finalized revisions to its 1978 NEPA regulations. 85 Fed. Reg. 43,304 (July 16, 2020). The 2020 rules added a judicial remedies section, stating that CEQ does not intend for a violation of NEPA to be presumed to be "a basis for injunctive relief or for a finding of irreparable harm" and that "minor, non-substantive errors" that have no effect an agency's decision are "considered harmless and shall not invalidate an agency action." 40 C.F.R. § 1500.3(d). It is unlikely that these statements of intent would have any legal effect on judicial authority to issue injunctive relief for NEPA violations. The courts have stayed litigation challenging the 2020 rules pending CEQ's review and revision of them.

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