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NEPA CHALLENGES TO TRANSPORTATION INFRASTRUCTURE

Judicial Review of State, Local Government, and
other Non-Federal Actions

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National Environmental Policy Act and Non-Federal Action

- Overview of Statutory and Regulatory Text
- Key Precedents
- Two Recent Cases
- Lessons Learned



Legal Background – NEPA

- Applies to “major Federal actions.” 42 U.S.C. § 4332(C).



- “Major federal actions” are “potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18



Legal Background – NEPA

To determine the scope of an environmental impact statement, agencies shall consider:

- Three types of “actions”
 1. Connected Actions
 2. Cumulative Actions
 3. Similar Actions
- Three types of “impacts”
 1. Direct Impacts
 2. Indirect Impacts
 3. Cumulative Impacts

40 C.F.R. § 1508.25(a), (c)



Legal Background – NEPA

Connected, cumulative, similar “actions”:

1. Actions taken by the federal agency
2. Non-federal activity subject to federal control and responsibility

All part of the “major Federal action” at issue



Legal Background – NEPA

“Cumulative impacts” 40 C.F.R. § 1508.7

Impact that results from the incremental impact of the action when added to other actions **regardless of what agency (Federal or non-Federal) or person** undertakes such other actions.



Key Precedent

- *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004)
 - Agency promulgated safety rules for Mexican trucks
 - Did the agency have to include as part of the “major federal action” President’s lifting of moratorium?
 - No. Agency “lacked the power” to deny trucks entry. But ...
 - Under cumulative “impacts” analysis, agency did have to consider incremental impact of safety rules in context of President’s lifting of moratorium.



Key Precedent

- *Sierra Club v. Army Corps*, 803 F.3d 31 (D.C. Cir. 2015)
- Sierra Club argued Corps had to analyze whole pipeline because private sections were “connected actions.”
- D.C. Circuit held connected-actions reg inapplicable.

Regulation prevents agency from “segmenting ***its own*** federal actions,” it does not add a “multitude of private pieces to the puzzle and so require review of a much larger picture.”



Key Precedent

Ninth

Are the projects “sufficiently interrelated” to constitute a single federal action?

Laub v. Dep’t of Interior, 342 F.3d 1080 (9th Cir. 2003)

Tenth

Does the federal agency have “actual power to control” the nonfederal activity?

Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988)

Sixth

Would nonfederal activity “restrict or limit” the federal agency’s choice of reasonable alternatives?

Sw. Williamson Cty. Cmty. Ass’n v. Slater, 243 F.3d 270 (6th Cir. 2001)



Recent Case

Kaufmann v. FAA, 2018 WL 497529 (6th Cir. 2018)

- Trees made instrument-guided nighttime landings unsafe.
- Authority decided to trim trees; received FAA planning funds.
- Declined federal funding for project.
- FAA issued ROD.



Kaufmann v. FAA

Case Dismissed!

1. Lack of jurisdiction: Court could not provide any effective relief to plaintiffs.
2. No cause of action: Authority's actions did not constrain any federal decision.



Recent Case

Zeppelin v. FHWA, 2018 WL 496840 (D. Colo. 2018)

- CDOT used some fed. funds to rebuild I-70 below grade.
- City of Denver used some CDOT funds to regrade City Park.
- NEPA documents analyze impacts of highway, but not impact on City Park.



Zeppelin v. FHWA

- Plaintiffs sue CDOT & FHWA, but not City.
 1. City’s project is connected or similar “action.”
 2. Agency insufficiently analyzed cumulative impacts of I-70 and City Park projects.
- CDOT moves to dismiss Claim 1 only.



Zeppelin v. FHWA

- Court found that City would move forward regardless of I-70.
- Dismisses connected and similar “actions” claims for lack of jurisdiction.
- What about the cumulative impacts claim?

Voluntarily Dismissed!



Lessons Learned

- Federal Project Sponsor:
 - Justify elements that serve nonfederal interests
 - Include a memo on “independent utility”
 - Beware the point of no return
- Nonfederal Project Sponsor:
 - Document that project will occur regardless
 - Both substance and timing matter
 - Avoid foreclosing federal options



Lessons Learned

- Know your circuit's precedent.
- Distinguish “actions” from “impacts.”
- Jurisdictional defense: Is there any remedy against the nonfederal project/actor?
- Be prepared to prove up.
- Consider your opponent's goals.





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THANK YOU!

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