

50th Anniversary of NEPA: Summary of influential U.S. court decisions

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Congress enacted the National Environmental Policy Act (NEPA) of 1969 over fifty years ago. NEPA represented groundbreaking legislation at the time. We will examine the seven cases listed below, which represent the fundamental decisions where the United States federal judiciary interpreted the laws and regulations that have defined and influenced environmental impact assessment in the United States. Let's take this journey together through these notable decisions, and in doing so, make discoveries for the next stage in the United States' environmental impact assessment process.

Case One. *Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972)²

Decision: This was one of the first cases interpreting NEPA and set the tone for all subsequent NEPA cases. The court made several important points regarding NEPA and federal agency compliance with the statute:

- (1) The general *substantive* policy in Section 101 of NEPA is flexible.
- (2) The *procedural* provisions in NEPA Section 102 are not as flexible and indeed are designed to see that all federal agencies do in fact exercise the substantive discretion given them.
- (3) NEPA makes environmental protection a part of the mandate of every federal agency and department.
- (4) To insure that an agency balances environmental issues with its other mandates, NEPA Section 102 requires agencies to prepare a "detailed statement."

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Note: Any views attributable to co-author P.E. Hudson are her personal views and not necessarily the views of the Navy, Department of Defense, or the federal government.

² For the first four cases, the a majority of discussion is taken from the Council of Environmental Quality's outstanding summary of the key cases involving NEPA (which cannot be improved substantially by the author), titled Major Cases Interpreting the National Environmental Policy Act, and *available at* https://ceq.doe.gov/docs/laws-regulations/Major_NEPA_Cases.pdf

(5) The procedural duties imposed by NEPA are to be carried out by the federal agencies "to the fullest extent possible."

(6) Section 102 of NEPA mandates a careful and informed decision-making process and creates judicially enforceable duties.

(7) The AEC's interpretation of its NEPA responsibilities was "crabbed" and made "a mockery of the Act." Section 102's requirement that the "detailed statement" 'accompany' a proposal through agency review means more than physical proximity and the physical act of passing papers to reviewing officials.

(8) The AEC improperly abdicated its NEPA authority by relying on certifications by federal, state, and regional agencies that the applicant complied with specific environmental quality standards.

(9) NEPA requires that an agency--to the fullest extent possible--consider alternatives to its actions that would reduce environmental damage.

(10) Delay in the final operation of the facility may occur but is not a sufficient reason to reduce or eliminate consideration of environmental factors under NEPA.

Case 2. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct 1835 (1989)

Decision:

(1) NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in an EIS a fully developed mitigation plan. Although the EIS requirement and NEPA's other 'action-forcing' procedures implement the statute's sweeping policy goals by ensuring that agencies will take a "hard look" at environmental consequences and by guaranteeing broad public dissemination of relevant information, it is well-settled that NEPA itself does not impose substantive duties mandating particular results. "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed--rather than unwise--agency action."

(2) One important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental effects. The requirement that an EIS contain a detailed discussion of possible mitigation measures flows from the language of NEPA and the CEQ regulations.

(3) CEQ's amendment of its regulations to delete the requirement for a "worst case analysis" was valid.

Case 3. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S.Ct. 1851 (1989)

Decision: The Court, noting the Corps' formal and documented review of the two reports, held that a supplemental EIS was unnecessary.

(1) An agency has a duty to continue reviewing environmental effects of a proposed action even after its initial approval.

(2) New information does not always compel an agency to prepare a supplemental EIS.

(3) An agency must take a hard look at possible new environmental effects and apply a rule of reason when it makes a decision regarding EIS supplementation. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains major Federal action to occur, and if the new information will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

(4) Agencies may rely on their own experts in the face of conflicting views.

(5) Reviewing courts must apply the arbitrary and capricious standard of the Administrative Procedure Act.

(6) Although reviewing courts grant a degree of deference to any agency's decision, they should carefully review the record.

Case 4. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S. Ct. 3177 (1990)

Decision: Reversing the Court of Appeals in a 5-4 decision authored by Justice Scalia, the Supreme Court acknowledged that neither NEPA nor FLPMA provides a private right of action for violations of its provisions. Rather an injured party must seek relief under the Administrative Procedure Act (APA). To demonstrate standing under APA, a plaintiff must identify some final agency action that affects him or her and must show he or she has suffered a legal wrong because of the agency action or is adversely affected by that action within the meaning of a relevant statute. To be "adversely affected within the meaning of a statute," a plaintiff must be within the "zone of interests" sought to be protected by the statutory provision that forms the basis of the complaint.

Using this test of standing, the Court found that plaintiffs' interest in recreational use and aesthetic enjoyment of the federal lands were within the "zone of interests" protected by NEPA and FLPMA. However, the Court concluded that plaintiffs, by simply claiming use "in the vicinity" of immense tracts of land managed by BLM, had not shown they would be "adversely affected" by the BLM actions. Moreover, the Court found that plaintiffs were attempting to challenge BLM operation of its land management program generally, not a final agency action in particular. Given these findings, the Court ruled that plaintiffs had not set forth "specific facts" in their affidavits sufficient to survive defendants' motion for summary judgment.

Case 5. Winter v. Natural Resources Defense Council, 555 U.S. 7, 129 S. Ct. 364 (2008)

Decision:

Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined. The Court's holding focused on the standard to be applied in determining whether plaintiffs' motion for a preliminary injunction should be granted (the U.S. District Court had issued a preliminary injunction and it had been upheld, with modifications, by the U.S. Court of Appeals for the 9th Circuit). A plaintiff seeking a preliminary injunction must establish that: (1) it is likely to have success on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in plaintiff's favor, and (4) an injunction is in the public interest. The Court found that the balance of equities tipped strongly in favor of the Navy and vacated the preliminary injunction to the extent sought by the Navy.

First, the Court found that the lower courts had allowed the plaintiffs to show only the "possibility" of irreparable harm, which is too lenient. Even if plaintiffs had been able to demonstrate irreparable injury, such injury is outweighed by the public interest and the Navy's interest in effective and realistic training. [Note that the Court examined whether there would be irreparable injury to marine mammals, not whether plaintiffs would suffer irreparable injury to their informational interests, which are the interests protected by NEPA. Also, while the district court had said the plaintiffs only needed to show the possibility of irreparable harm, it also concluded that the plaintiffs had presented evidence that established "to a near certainty" that the Navy's exercises would cause irreparable harm to the environment.]

Second, although military interests do not trump other consideration, the courts must give deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. The court did not question the importance of the plaintiffs' ecological, scientific, and recreational interests, but concluded that the balance of the equities and consideration of overall public interest tip strongly in favor of the Navy. [Note that, by not questioning the importance of plaintiffs' interests, the Court did allow military interests to trump other considerations.]

Third, the Court held that the lower courts' justifications for entering the preliminary injunction were not persuasive. The district court did not consider the balance of the equities and the public interest, and the court of appeals concluded that the Navy's concerns were speculative, failing to properly defer to senior Navy officers' specific predictive judgments of how the preliminary injunction would reduce the effectiveness of the training exercises. In addition, the district court abused its discretion in imposing two mitigation measures challenged by the Navy.

The Court did not address the underlying merits of the plaintiffs' claims but stated that its analysis makes it clear that issuing a permanent injunction along the same lines as the preliminary injunction would be an abuse of discretion. Plaintiffs' ultimate legal challenge is that the Navy must prepare an EIS, not that the Navy must cease sonar training. Thus, there is

no basis for enjoining such training pending the preparation of an EIS (if one is determined to be required) when doing so is credibly alleged to pose a serious threat to national security.

Case 6. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204 (2004)

Decision:

In a unanimous opinion authored by Justice Thomas, the U.S. Supreme Court reversed the Court of Appeals, finding that DOT lacked discretion to prevent cross-border operations of Mexican motor carriers and thus was not required to evaluate the environmental effects of such operations. The Court rejected the plaintiffs' argument that DOT was required to examine releases of air emissions as an indirect effect of the issuance of the regulations because, according to the Court, DOT was unable to countermand the President's lifting of the moratorium or otherwise exclude Mexican trucks from operating in the United States. DOT was required by law to register any motor carrier willing and able to comply with various safety and financial responsibility rules, and only the moratorium prevented it from doing so for Mexican trucks. The causal connection between the proposed regulations and the entry of Mexican trucks was insufficient to make DOT responsible under NEPA to consider the environmental effects of entry, *citing Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). "It would not, therefore, satisfy NEPA's 'rule of reason' to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform." Slip opinion at 15.

The Court also held that DOT did not act improperly by not performing a full conformity analysis pursuant to the Clean Air Act, stating that emissions attributable to an increase in Mexican trucks across the border were not indirect emissions because DOT could not control the emissions.

Case 7. *Center for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288 (11th Cir. 2019)

Decision: The Eleventh Circuit examined the *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204 (2004), where the Supreme Court stated that indirect environment effects must be proximate, and do not include effects that are insufficiently related to an agency's action. "In assessing the proximate cause limitation, the Corps may reasonably take into account the fact that distantly caused effects in question are subject to independent regulatory schemes." In granting the CWA § 404 discharge permit without addressing the environmental effects of phosphogypsum, the Corps relied on part of on the fact that the other agencies directly regulate these effects.

The Eleventh Circuit affirmed the lower court's grant of summary judgment for the Corps, holding that it was reasonable for the Corps to conclude that environmental effects of phosphogypsum production and storage fell outside the scope of its NEPA review (it discussed they were not proximately caused by the action). The court held that the Corps otherwise

complied with NEPA by issuing an area-wide EIS, which served as the mine-specific impact statement for each of the four proposed mine sites, and following that up with a supplemental EA of the South Pasture Mine Extension, before issuing the Section 404 permit related to that mine in a record of decision.

The court discussed that phosphogypsum-related effects are, at most, tenuously caused by the discharge of dredge and fill materials allowed by the Corps' permit. That phosphogypsum is a byproduct not of phosphate mining but of fertilizer production, takes place far and long after the discharges related to the mining. Mosaic's fertilizer production will add to existing gypstacks, as they are called, but will not result in any new stacks. Even the nearest fertilizer plants and gypstacks to the South Pasture Mine Extension receive phosphate rock from many different sources outside of the Corps' jurisdiction. CBD contended that "but for" caused the CWA § 404 permit phosphogypsum's environmental effects would be diminished because Mosaic would not be able to obtain as much phosphate, thereby reducing its fertilizer (and phosphogypsum byproduct) production, if it could not discharge dredged and fill material into U.S. waters, which necessarily accompanies Mosaic's phosphate mining.

Circuit Judge Martin issued a robust dissent (concurring in part), attacking the majority's opinion, focusing on the controversy of whether the Corps should have considered the environmental effects of phosphogypsum in issuing the CWA § 404 permit. The dissent believed the record made it clear that it was more than reasonably foreseeable that granting a permit under § 404 of the CWA to Mosaic would result in the creation of more phosphogypsum.