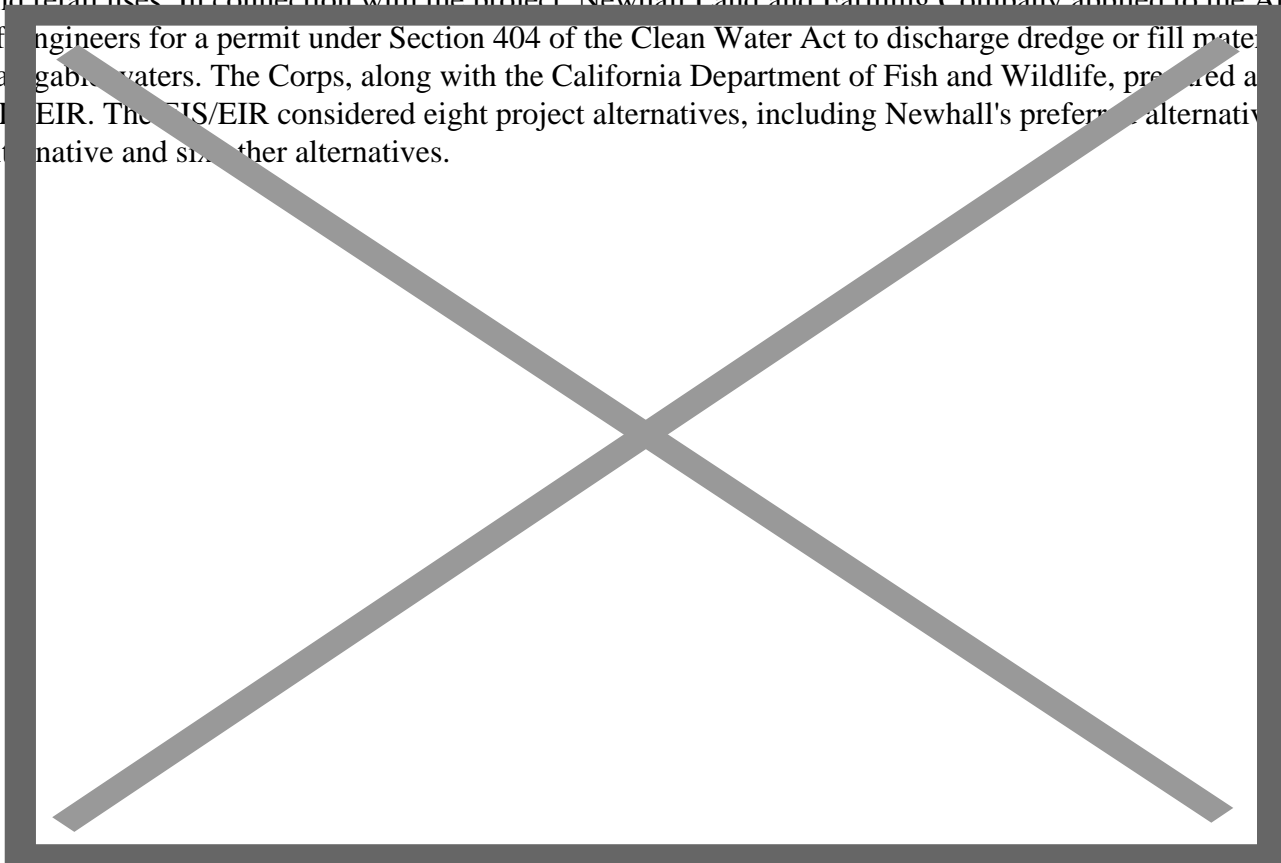


Federal Appeals Court Rejects Challenges to Newhall Ranch EIS and Section 404 Permit

In the latest decision in the long-running legal saga over the proposed Newhall Ranch development in Los Angeles County, the U.S. Court of Appeals for the Ninth Circuit upheld the Army Corps of Engineers' EIS and Section 404 permit, giving substantial deference to the Corps' decisionmaking. *Friends of the Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906 (9th Cir. 2018). **Background** Newhall Ranch is a proposed large-scale master-planned community in Los Angeles County. The County approved a specific plan for the project that provided for more than 21,000 residential units and 4.4 million square feet of commercial, office, and retail uses. In connection with the project, Newhall Land and Farming Company applied to the Army Corps of Engineers for a permit under Section 404 of the Clean Water Act to discharge dredge or fill material into navigable waters. The Corps, along with the California Department of Fish and Wildlife, prepared a combined EIS/EIR. The EIS/EIR considered eight project alternatives, including Newhall's preferred alternative, a no-build alternative and six other alternatives.



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Corps issued a Record of Decision that adopted one of the studied alternatives ("Modified Alternative 3") as the least environmentally damaging practicable alternative. Modified Alternative 3 involved developing less acreage than Newhall's preferred alternative, at a higher cost per developable acre. The Corps also determined that wastewater and stormwater discharges from the project would not affect endangered steelhead in the Santa Clara River downstream from the project. Based on this "no effect" determination, the Corps did not consult with the National Marine Fisheries Service on impacts to endangered steelhead. The plaintiffs claimed that the Corps'

decisions violated the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act. First, the plaintiffs challenged the Corps' selection of Modified Alternative 3 as the least environmentally damaging practicable alternative. Second, the plaintiffs challenged the Corps' failure to consult with NMFS. Third, the plaintiffs argued that the EIS did not adequately analyze cumulative impacts on steelhead. **Standing** The court first considered whether the plaintiffs had standing. To have standing to bring claims of procedural violations, a plaintiff must demonstrate that (1) the agency violated procedural rules, (2) those rules protect the plaintiff's concrete interests, and (3) it is reasonably probable that the challenged action will threaten the plaintiff's concrete interests. Newhall argued that the plaintiffs could not satisfy the third prong of this test because their interests were limited to recreation and natural resources within the project area, where there were no steelhead. Rejecting this argument, the court explained that the plaintiffs only needed to show that they would be harmed by the challenged agency action, not that the alleged procedural deficiency would threaten their interests. Thus, the court concluded, the plaintiffs had standing because they were harmed by the Corps' issuance of the Section 404 permit; it did not matter whether the plaintiffs had an interest in steelhead. The court also held that the plaintiffs showed causation and redressability because there was a reasonable probability that additional analysis could have influenced the Corps' decision. **Selection of Least Environmentally Damaging Practicable Alternative** Prior to issuing a Section 404 permit, the Corps must analyze project alternatives and select the least environmentally damaging practicable alternative in light of the overall project purpose. The plaintiffs raised several arguments challenging the Corps' selection of Modified Alternative 3 under this standard. First, the plaintiffs argued that the Corps used an overly specific project purpose that narrowed the range of available alternatives. The court disagreed. In its environmental analysis, the Corps defined the project purpose as the development of a master planned community that would achieve the basic objectives of the Newhall Ranch Specific Plan and would provide approximately the same range and size of land uses described in the Specific Plan. The court explained that regulations required the Corps to consider, and normally to accept, local land use plans and decisions when determining the overall project purpose. Further, the court held, it was reasonable for the Corps to have rejected alternatives because (1) reductions in available developable areas would prevent the alternatives from meeting elements of the specific plan and (2) cost increases would make the alternatives impracticable. Next, the plaintiffs argued that Modified Alternative 3 was not the least environmentally damaging practicable alternative because additional measures to minimize environmental impacts were theoretically possible. The court observed that regulations required the Corps to consider costs when determining that an alternative is not practicable. The court concluded that it was reasonable for the Corps to have determined that Modified Alternative 3 was at the outer limit of cost practicability for the project, and that further avoidance measures would not be practicable even if theoretically possible. Finally, the plaintiffs challenged three aspects of the Corps' cost methodology: (1) consideration of costs on a per-acre basis rather than per-residential unit or per-commercial floor space, (2) not considering the project's revenues, and (3) including land acquisition costs. The court held that the Corps' cost methodology was reasonable and entitled to deference. First, the court determined that it was reasonable for the Corps to evaluate costs per acre given the uncertainty of the type and density of units that would ultimately be developed. Second, the court found that although not required to do so, the Corps had considered revenues in its analysis by evaluating each alternative's developable acreage, which was the source of revenue for the project. Third, the court held that it was reasonable for the Corps to include land acquisition costs in the costs of each alternative. **ESA and NEPA** Section 7 of the ESA requires a federal agency to consult with NMFS or the Fish and Wildlife Service if its action may affect endangered or threatened species or their critical habitat. The Santa Clara River downstream from the Newhall Ranch site is critical habitat for the Southern California steelhead, an endangered species. The Corps determined that wastewater and stormwater discharges from the project were not likely to adversely affect steelhead, because the concentration of dissolved copper in the project's discharges would be less than the existing dissolved copper concentration in the Santa Clara River and would be less than the dissolved copper limit for the Santa Clara River set by EPA's water quality standards. The plaintiffs challenged the Corps' "no effect" determination under both the ESA and NEPA. The plaintiffs alleged that the Corps should have consulted with NMFS on impacts to endangered steelhead, and that the EIS did not adequately analyze the cumulative effects of

dissolved copper on steelhead. In particular, the plaintiffs argued that a technical memorandum published by NMFS established that dissolved copper concentrations during storm events would cause sublethal impacts to juvenile steelhead smolt. The court rejected the plaintiffs' arguments, noting that the agency's scientific judgment is entitled to substantial deference. The court concluded that the Corps had reasonably determined that the NMFS technical memorandum did not contain the best available scientific information regarding the project's impacts on steelhead. In addition, the court held that it was reasonable for the Corps to rely on EPA's water quality standard as a threshold for assessing whether the project would adversely affect endangered species.

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