EIS Must Evaluate Impacts As Soon As It Is "Reasonably Possible" To Do So

In *Pacific Rivers Council v. United States Forest Service*, the Ninth Circuit struck down an Environmental Impact Statement prepared for a logging plan in the Sierra Nevada Mountains. The court ruled that the EIS did not adequately evaluate the project's impacts on fish species. In 2001, the Forest Service prepared a Final EIS, which contained an extensive analysis of the impacts of logging on fish and wildlife. But the Service subsequently amended the plan to allow for the harvesting of substantially more timber. The Service prepared another EIS on the revised plan in 2004, which incorporated by reference the previous environmental analysis. But according to the court, the 2004 EIS contained "no analysis whatsoever" of the additional or different environmental impacts on fish species that would result from increased logging. The Service argued that an evaluation of these additional or different impacts was not required at this stage, since this was a "programmatic" EIS, which evaluates impacts only at a broad level. According to the Service, impacts on individual fish species would be assessed when specific logging projects were proposed to implement the overall plan. The court did not agree and announced the following rule: "Regardless of whether a programmatic or site-specific plan is at issue, NEPA requires that an EIS analyze environmental consequences of a proposed plan *as soon as it is reasonably possible to do so.*" The court concluded that the detailed species-by-species evaluation in the 2001 EIS showed that such an analysis was "reasonably possible" for the 2004 EIS. The Service also argued that its 2004 EIS complied with NEPA by incorporating by reference two biological assessments that evaluated the impacts on listed fish species. But the court emphasized that the 2004 EIS neither summarized the findings of these reports nor included them as an appendix. The court explained that this issue was not "a mere formality," since the purpose of the EIS is to provide adequate information to the decision-makers and the public – and here the EIS' cursory description of the biological assessments did not suffice. As with several other environmental decisions by the Ninth Circuit in recent months, there was a vigorous dissent. The dissenting judge lamented that the decision "reinvents" the "arbitrary and capricious" standard of judicial review, "transforming it from an appropriately deferential standard to one freely allowing courts to substitute their judgments for that of the agency." The dissent also objected to the substantive rule articulated by the majority, which "disregards our circuit's long-standing precedent holding that an agency's timing of analysis required by the National Environmental Policy Act is not arbitrary and capricious if it is performed before a critical commitment of resources occurs." The dissent called the decision "an inappropriate and substantial shift in our NEPA jurisprudence." It's debatable whether the decision is as dramatic a shift as the dissent makes it seem. But the dissent reflects the deep divisions within the Ninth Circuit about how environmental laws such as NEPA and the Endangered Species Act should be interpreted and applied. ***Update****: The dissent apparently resonated with enough Justices of the U.S. Supreme Court, which granted certiorari on March 18, 2013. So, the final outcome remains to be seen.*

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