

MEMORANDUM

THE “SMALL HANDLE” ESCAPE FROM NEPA REVIEW

For more than two decades the Corps of Engineers, with the support of the judiciary, has been engaged in an effort to escape from the full-scale environmental review demanded by NEPA and CEQ’s NEPA-implementing regulations, wherever the Corps can claim that its involvement in the entire project concerns only a small portion of the project. Two early examples illustrate this effort. Here in the Eighth Circuit, in *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980), cert den., 449 U.S. 836, the Corps became involved in a 67-mile transmission line, only 1.25 miles of which were going to cross the river. The Court upheld the Corps ruling that it was required to consider only the environmental impact resulting from the segment crossing the river, and could ignore the impact of the rest of the transmission line.

In the same year the Fifth Circuit, in *Save the Bay, Inc. v. United States Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980), cert den., 449 U.S. 900, was confronted with a proposal to construct a manufacturing plant, which would require a Corps permit for one outfall pipeline. The Fifth Circuit upheld the Corps ruling that only the environmental impact of the outfall need be considered under NEPA, and the impact of the entire manufacturing plant could be ignored.

Environmentalists were distressed by these rulings. The CEQ NEPA-implementing regulations (40 C.F.R. Part 1500) explicitly require consideration of the impact of indirect effects of the proposed project (§ 1508.8), connected actions (§ 1508.25(a)(1)), cumulative actions (§ 1508.25(a)(2)), and cumulative impacts (§ 1508.7),¹

¹The EPA Guidelines also require evaluation of both “individual and cumulative impacts.” 40 C.F.R. § 230.6(c).

which result from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions. Clearly the 1.25 mile segment of the transmission line was connected to the rest of the transmission line, and the outfall was connected to the manufacturing plant; that was its purpose.

The Corps, however, was pleased with these rulings, and set out to build on them. Beginning in 1984, culminating in a new regulation in 1988, the Corps developed a regulation which codified its exemption from the environmental review requirements of NEPA where the Corps' role in the entire project is relatively small. In 1987 the CEQ approved the draft regulation, with some modifications. 52 Fed. Reg. 22518 (June 12, 1987). The final regulation was published in 1988, and is codified as ¶ 7(b) of Appendix B to Part 325 of 33 C.F.R. That regulation announced that, in issuing permits under the 1899 Act or under § 404 of the Federal Water Pollution Control Act, the District Engineer should, under NEPA, address the impacts of the specific activity which requires a permit, and those portions (but only those portions) of the entire project "over which the district engineer has sufficient control and responsibility to warrant Federal review." The remainder of the regulation was devoted to an effort to explain how one determines that "control and responsibility."

The Corps listed four "[t]ypical factors to be considered" in determining whether sufficient "control and responsibility" exists:

1. Whether the regulated activity comprises "merely a link" in a corridor type project;
2. Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity;
3. The extent to which the entire project will be within Corps jurisdiction;
4. The extent of cumulative Federal control and responsibility.

The regulation proceeds to offer some examples, based upon the fact situations of the

Winnebago and *Save the Bay* cases.

The regulation brought howls of protest from the environmental community, but was nevertheless approved, as modified, by CEQ. Two years after its adoption, it was reviewed and analyzed in an excellent article by Patrick A. Parenteau, “Small handles, big impacts: when do Corps permits federalize private development?,” 20 *Environmental Law* 747 (1990). In 1996, another review of the new regulation was published. “Rippling Puddles, Small Handles and Links of Chain: The Scope of Environmental Review for Army Corps of Engineers Permit Decisions,” 10 *Tulane Env. L.J.* 31 (1996). Sufficient time has now elapsed to justify further review of the treatment of this “small handle” exemption by the courts.

Those who follow the general treatment of NEPA by the courts will not be surprised. Almost uniformly, the courts enthusiastically support the Corps’ refusal to evaluate the impacts of the entire project. However, the courts have made limited use of the four factors set forth in the regulation itself, preferring to develop their own analysis.

The most common justification employed by the courts to support the Corps’ refusal to review the environmental impacts of the entire proposed project is found in the “independent utility” test. In *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989), the developer sought to build a resort complex with a golf course, the golf course to be placed in a meadow that contained wetlands. The Corps was willing to consider the environmental impacts of the golf course, but not of the resort complex. The Ninth Circuit upheld the Corps, on the ground that the resort complex “could exist” without the golf course, and vice versa, although each would benefit from the other’s presence. The Ninth Circuit cited no portion of NEPA or the CEQ regulations which would support that analysis, presenting only an image of “scattered bits of a broken chain, some segments of which contain numerous links,

while others have only one or two.” 884 F.2d at 400.

In *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569 (9th Cir. 1998), the court was not concerned with the Corps of Engineers and wetlands, but drew upon that line of cases to support its ruling upholding the Federal Aviation Administration. The project before the court was a project to enhance the East arrival facilities of the Los Angeles International Airport. That project was clearly related to a larger expansion project for the Los Angeles Airport. However, the court ruled that both of the projects had “independent utility,” and therefore the Federal Aviation Administration was not required by NEPA to consider the cumulative impact of the two projects. The court derived this test from the *Sylvester* case.

In *Wetlands Action Network v. United States Army Corps of Engineers*, 222 F.3d 1105 (9th Cir. 2000), the proposed development was expected to cover over 1,000 acres, and include residential areas, a marina, and numerous commercial developments including hotels, retail establishments, and an entertainment media and technology district. A part of the project involved 21.4 acres of wetlands. The Corps declined to give substantial consideration to the development in the uplands area on the ground that such development “was outside its jurisdiction.” Citing *Sylvester*, the court upheld the Corps on the ground that the upland portion of the project “could proceed without the permit,” and indeed was proceeding without the permit.

An Eighth Circuit case which briefly refers to NEPA is *National Wildlife Federation v. Whistler*, 27 F.3d 1341 (8th Cir. 1994). In that case the developer proposed a planned housing development adjacent to an old river channel which had more or less dried up, leaving some wetlands. The developer also wanted to dredge and widen the river channel, to provide the residential lots with boat access to the Missouri River, and sought a permit for dredging 14.5 acres of wetlands. The Corps

declined to consider the impact of the housing development, and the Eighth Circuit affirmed, pointing out that the housing development “would proceed” even without the creation of water access.

However, when the courts have been unable to divide the project into two parts, each (or one, at least) allegedly having an independent utility, the courts have sought, and found, other justification for narrowing the environmental review required by NEPA. For example, in *Water Works & Sewer Board of the City of Birmingham v. United States Department of Army Corps of Engineers*, 983 F. Supp. 1052 (N.D. Ala. 1997), a municipality applied for a permit to construct a water intake structure on the local river, with associated pipeline crossings, to supply water to a proposed water treatment plant. The Corps limited its environmental review to the impacts of the construction and maintenance of the intake facility and the pipeline, excluding from the review the consequences of the entire project, including construction and maintenance of the proposed water treatment plant. There was no contention that the intake facility and pipeline had a utility independent of the treatment plant, or vice versa. Nevertheless, the court upheld the Corps, noting that the 1988 regulation was intended to codify *Save the Bay* and *Winnebago*, and that the “water treatment plant is far upland from the intake structure.” 983 F. Supp. at 1072.

In another case where the “independent utility” test was not available, *California Trout v. Schaefer*, 58 F.3d 469 (9th Cir. 1995), the Court developed an alternative justification for limiting the environmental review, a theory which appears inconsistent with the fourth factor set forth by the Corps in its 1988 regulation. In this case the local water district sought a permit to fill 4.1 acres of wetlands, in constructing a project to divert water from the Stanislaus River to Stockton, California, to supply a water treatment plant there. The Corps limited its environmental review to the impact of the filling of the 4.1 acres of wetland, refusing

to consider the impact on downstream fisheries in the Stanislaus River, which would be deprived of their water supply. Clearly the filling of the wetlands had no utility independent of the entire diversion project. However, the Court observed that the Bureau of Reclamation had the responsibility to insure that adequate quantities of water reached the downstream fisheries to insure the preservation and propagation of the fish. Although this fact would appear to increase substantially the “extent of cumulative Federal control and responsibility” identified as the fourth factor in the Corps’ 1988 regulation, the Court ruled that the Corps need not consider the environmental impacts on the downstream fisheries. It should be noted, however, that the Court pointed out that the Bureau had already prepared an EIS, and the effects on the downstream fisheries had been a subject of four governmental studies; the Court asserted that requiring the Corps to duplicate these efforts “would be nonsensical.” Perhaps if those studies had not been made, the result would have been different.

Since 1988 a few district judges have shown some willingness to support NEPA. In *Stewart v. Potts*, 996 F. Supp. 668 (S.D. Tex. 1998), the developer sought a 404 permit to construct a golf course on a 200-acre tract of forest and wetlands, filling 2 acres of jurisdictional wetlands. The wetlands were scattered throughout the 200-acre parcel of forest land. The Corps refused to address what the Court described as the cumulative effects of the clearing of the forest on migrating neotropical song birds, arguing that the Corps had no jurisdiction over the “upland” area. Emphasizing that the wetlands were scattered throughout the forest, the Court observed that “the Corps’ characterization of the project as a filling of the wetlands separate and distinct from the clearing of forest located on those wetlands is irrational.” 996 F. Supp. at 682. The refusal of the Corps to consider the environmental impacts of the fragmentation of the forest was described by the Court

as “asinine on its face, and an impermissible abdication of a federal agency’s duties under NEPA.” 996 F. Supp. at 682-83. This judge, however, is not typical of the federal judges appointed in recent years.

In *Morgan v. Walter*, 728 F. Supp. 1483 (D. Ida. 1989), the Corps issued a 404 permit for diversion of a creek to an adjacent watershed to support a fish hatchery there. The Corps confined its environmental review to the water diversion, declining to consider the hatchery. Following the leading case of *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), the court ruled that the diversion and the hatchery are “connected actions,” and must be evaluated together, pursuant to 40 C.F.R. § 1508.25(a)(1). The court distinguished *Sylvester* on the ground that the hatchery “could not exist” without the diversion.

Similarly, in another case not involving the Corps, the court followed *Thomas v. Peterson* when the developer sought a permit for an access road to enable the conduct of “timber management activities.” *Alpine Lakes Protection Soc’y v. U.S. Forest Service*, 838 F. Supp. 478 (W.D. Wash. 1993). The court noted that *Sylvester* turned on “the functional interdependence” of the actions in question. Indeed, the court went on to require evaluation of the cumulative impact of seven proposed access roads in the same area, without further discussion of *Sylvester*.

The Corps is continuing its effort to narrow its responsibilities under NEPA. The courts, by and large, are upholding the Corps in this effort. There is no evidence of a general inclination on the part of the courts to halt this narrowing of NEPA responsibilities.

April 1, 2002

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