Oil Spill Response Plan/Clean Water Act: Federal Appellate Court Addresses Endangered Species Act/National Environmental Policy Act Based Challenges

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The United States Court of Appeals, Sixth Circuit ("Court"), in a June 5th opinion addressed a challenge to the Pipeline and Hazardous Materials Safety Administration's approval of an oil pipeline response plan. See *National Wildlife Federation v. Secretary of the United States Department of Transportation*, 2020 WL 3026541.

The challenge was based on alleged violations of the Endangered Species Act ("ESA") and National environmental Policy Act ("NEPA").

The Department of Transportation approved a response plan for a pipeline that has transported oil for over sixty years.

The pipeline (denominated "Line 5") is stated to have:

. . . carried oil across the Great Lakes region. Beginning in northwestern Wisconsin, the pipeline stretches into the Upper Peninsula of Michigan, takes a right turn at the Straits of Mackinac, and cuts down through the Lower Peninsula before ending in southwestern Ontario.

The National Wildlife Federation filed suit in the United States District Court for the Eastern District of Michigan. The organization alleged that the agency had violated the Clean Water Act ("CWA"), the ESA and the NEPA.

The CWA requires operators of oil pipelines to submit response plans that address the risk of a potential spill. 33 U.S.C. § 1321(j)(5)(A); 49 C.F.R. § 194.101(a). The plan requires operators to satisfy six specific criteria before an agency can approve the plan.

Once the operator satisfies those six criteria, the agency shall approve the plan. *Id.* § 1321(j)(5)(E)(iii). The question addressed is whether the Department of Transportation was required to consider the ESA or NEPA before approving the plan submitted by the operator.

The ESA requires federal agencies to consult with the appropriate environmental authorities to ensure that its actions are not likely to jeopardize the continued existence of endangered or threatened species.

16 U.S.C. § 1536(a)(2). However, this requirement only applies to discretionary agency actions. 50 C.F.R. §402.03.

NEPA requires agencies to create an Environmental Impact Statement ("EIS") for major federal agency actions. 42 U.S.C. § 4332(C). Nevertheless, like the ESA, the agency is only required to undertake a requirement (i.e., prepare an EIS) for discretionary actions. See *Dep't of Transp. V. Pub. Citizen*, 541 U.S. 752, 770 (2004).

The CWA mandates that agencies approve the response plan when the six enumerated criteria are satisfied. In other words, approval of a response plan satisfying all six criteria is not discretionary. Therefore, such agency approval is not subject to the ESA or NEPA. Specifically, the Court found that:

"the consultation requirement [under the ESA]" and the impact statement requirement under NEPA, "[do] not apply because the action [is] something that the agency [is] required by statute to do once the [six enumerated criteria] had occurred." *Nat'l Wildlife Federation v. Sec'y of the United States Dep't of Transportation,* No. 19-1609, 2020 WL 3026541, at *2, 5–6 (6th Cir. June 5, 2020).

The Court concluded that an agency cannot delay approval or refuse to approve the plan if it satisfies the six criteria. This is the case regardless of the potential application of the ESA or NEPA.

A copy of the decision can be downloaded here.