Mining/National Environmental Policy Act: Federal Appellate Court Addresses U.S. Forest Services Use of Categorical Exclusions

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Court of Appeals for the 9th Circuit ("9th Circuit") addressed in a May 21st Opinion whether the United States Forest Service ("Service") violated the National Environmental Policy Act ("NEPA"). *See Friends of the Inyo; Western Watersheds Projects, et al. v. United States Forest Service*, No. 23-15492.

The Sierra Club and other organizations challenged Service's use of multiple NEPA Categorical Exclusions ("CEs") to forgo preparing an Environmental Impact States ("EIS") or an Environmental Assessment ("EA") in approving the Long Valley Exploration Drilling Project ("Project") in California.

The Service approved the Project in 2021. It is described as a mineral exploration project on land in the Inyo National Forest.

Plaintiffs, Friends of the Inyo, Western Watersheds Projects, Center for Biological Diversity, and Sierra Club (collectively, "Sierra Club") filed a judicial action under NEPA arguing that it was unlawful for the Service to combine two CEs. They argued neither one alone could justify approval of the Project.

The United States District Court granted Summary Judgment in favor of the Service.

Neither an EIS nor an EA need be prepared if a particular federal action falls within the scope of a NEPA CE. CEs are promulgated by the federal agencies and are described actions which have been determined to not involve significant environmental impacts. Regulations implementing NEPA define a CE as a:

…category of actions which do not individually or cumulatively have a significant effect on the human environment… and for which, therefore, neither an Environmental Assessment nor an Environmental Impact Statement is required. See 40 C.F.R. § 1508.4.

The 9th Circuit reversed the decision of the United States District Court.

The Service used 2 CEs in lieu of an EIS or EA which included:

- CE-6 (allowing timber stand or wildlife habitat improvement activities that do not use herbicides or do not require one mile of low standard road construction)
- CE-8 (allows certain short-term mineral, energy, or geophysical investigations and their incidental support activities)

A key issue considered by the 9th Circuit was whether the Service regulation addressing CEs allows it to combine two in approving a proposed action – where no single CE could cover the proposed action. The Service regulations addressing CES are found at *36 C.F.R. § 220.6.*

The 9th Circuit noted that a proposed action may only be excluded from further analysis (i.e., EIS or EA) if there are no extraordinary circumstances related to the proposed action and if it is within one of the CE categories.

The Service had divided the Project into 2 phases. However, the 9th Circuit determined Service considered the entire Project as the proposed action by conducting a single analysis of the potential extraordinary circumstances related to the Project. Therefore, the 9th Circuit held that it must accept the Service's treatment of the entire Project as the proposed action.

The 9th Circuit then determined that neither CE-6 nor CE-8 alone could encompass the proposed action. The relevant Service regulation was interpreted through a review of its plain language, history, structure, and purpose. Based on this review it concluded that combining CEs was prohibited where no single CE could cover a proposed action by itself.

The 9th Circuit remanded to the United States District Court to issue Summary Judgment on behalf of Sierra Club.

A copy of the Decision can be downloaded here.