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Environmental Defense Center v. Bureau of Ocean Energy Management

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Environmental Defense Center v. Bureau of Ocean Energy Management, 36 F.4th 850 (9th Cir. 2022)

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The United States Court of Appeals for the Ninth Circuit upheld the district court's grants of summary judgment and injunctive relief against BOEM for violating the ESA and CZMA. The Ninth Circuit found BOEM violated NEPA, CZMA, and the APA by failing to adequately consider the environmental impacts of well stimulation treatments. The Ninth Circuit also reversed the lower court's grant of summary judgment against the Environmental Defense Center for their NEPA claims.

I. INTRODUCTION

In *Environmental Defense Center v. Bureau of Ocean Energy Management*,[1] the Ninth Circuit of the United States Court of Appeals held the federal government's authorization of "well stimulation treatments" for offshore oil and gas development off the coast of California violated the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), and the Coastal Zone Management Act ("CZMA").[2] This ruling grants a permanent injunction against the Bureau of Ocean Energy Management ("BOEM") from approving permits allowing offshore oil well stimulation treatments in the Pacific Outer Continental Shelf pending the completion of an environmental impact statement ("EIS") under NEPA. This decision affirms the district court's permanent injunction against BOEM pending consultation with the Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") under the ESA and a consistency review with California under the CZMA.[3]

Plaintiffs includes environmental groups that filed suit under the ESA, NEPA, and the Administrative Procedures Act ("APA"), as well as the State of California and the California Coastal Commission, which sued under the APA and CZMA.[4] Defendants include BOEM, Bureau of Safety and Environmental Enforcement ("BSEE"), and oil companies that joined as intervenors.[5] The Ninth Circuit found the programmatic reviews' conclusion, that well stimulation treatments ("WST") would not have a significant environmental impact, constituted a final agency action authorizing WST.[6] This was found even though the agencies will have to approve

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1. 36 F.4th 850 (9th Cir. 2022).
2. *Id.* at 864.
3. *Id.*
4. *Id.* at 863, 865–66.
5. *Id.* at 863.
6. *Id.* at 865–66.

future individual permits.[7] The Ninth Circuit further found BOEM and BSEE's environmental assessment ("EA") violated NEPA because it failed to take a "hard look" and consider reasonable alternatives.[8] The Court also found the ESA consultation requirement had been triggered and a consistency review under CZMA was required.[9] This article does not focus on the ESA claims because the agencies only argued those claims on the grounds the proposed action in the EA and finding of no significant impact ("FONSI") did not constitute an "agency action" in the ESA, mirroring the discussion in the jurisdictional analysis portion below.

II. FACTUAL AND PROCEDURAL BACKGROUND

There are 23 oil and gas platforms in federal waters in the Pacific Outer Continental Shelf off the California coast that were established between 1967 and 1989 that continue relying on their initial development and production plan approvals.[10] The Pacific Outer Continental Shelf includes all submerged land, including subsoil and seabed, belonging to the United States that lie seaward and outside the jurisdiction of Washington, Oregon, and California.[11] To make certain operational changes in these federal waters, oil companies need to revise an approved development and production plan.[12] BOEM and BSEE are the agencies tasked with overseeing these oil and gas activities.[13]

WST include extraction techniques used to extend the life of oil wells.[14] WST primarily consist of hydraulic fracturing, which involves injecting a mixture of water, sand, and chemicals into a well at high pressures to fracture rock formations.[15] Hydraulic fracturing can cause environmental damage because the chemicals used include carcinogens, mutagens, toxins, and endocrine disruptors that can harm wildlife.[16] Hydraulic fracturing also increases the risk of oil spills due to the high pressures involved.[17]

This case began in 2012 after plaintiff Environmental Defense Center ("EDC") requested documents though the Freedom of Information Act that revealed BOEM and BSEE granted 51 permits authorizing WST off the California coast without environmental reviews.[18] EDC and the Center for Biological Diversity filed lawsuits alleging federal

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7. *Id.* at 868–69.
8. *Id.* at 882.
9. *Id.* at 883, 885.
10. *Id.* at 865.
11. 43 U.S.C. § 1331(a).
12. *Env't. Def. Ctr.*, 36 F.4th at 865.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

agencies violated NEPA.[19] As part of a settlement agreement, the federal agencies agreed to conduct a programmatic EA pursuant to NEPA to study the environmental impact of broadly authorizing the use of WST in the Pacific Outer Continental Shelf.[20]

NEPA is a procedural statute designed to force federal agencies to take a "hard look" at the environmental consequences of federal agency actions.[21] NEPA requires agencies prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment."[22] When an agency is unsure whether an EIS is necessary, it may first prepare an EA, a "concise, public document" providing "sufficient evidence and analysis" for the agency to determine "whether to prepare an [EIS]."[23]

Because NEPA does not expressly provide for judicial review, courts review agency compliance with NEPA pursuant to the APA, which limits review to a "final agency action."[24] An agency action is final and reviewable under the APA when the action "mark[s] the consummation of the agency's decision-making process" and when the action determines "rights or obligations" or is an action "from which legal consequences will flow."[25]

If a court has jurisdiction under the APA, they may set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[26] An agency action is considered arbitrary and capricious

> only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[27]

In 2016, the agencies released a final EA and a Finding of No Significant Impact ("FONSI") for the proposed action of "allow[ing] the use of selected WST on the 43 current active leases and 23 operating platforms" in the Pacific Outer Continental Shelf without restrictions.[28]

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19. *Id.* at 865–66.
20. *Id.* at 866.
21. *Id.* at 872.
22. *Id.* (quoting 42 U.S.C. § 4332(C)).
23. *Id.* (quoting 40 C.F.R § 1508.9(a)(1)).
24. *Id.* at 867 (quoting 5 U.S.C. § 704 (2022).
25. *Id.* at 867–68 (citing Bennett v. Spear, 520 U.S. 154, 177–78 (1997)).
26. 5 U.S.C. § 706(2)(A) (2022).
27. Env't. Def. Ctr., 36 F.4th 850, 871–72 (quoting Def. of Wildlife v. Zinke, 856 F.3d 1248, 1257 (9th Cir. 2017)).
28. *Id.* at 866.

Because the agencies found WST "would not cause any significant impacts," those agencies chose not to consult with FWS or the NMFS pursuant to the ESA and to not review the proposed action for consistency with California's coastal management program pursuant to the CZMA.[29]

Plaintiffs then filed suits alleging violations of NEPA for failing to take a "hard look" at the potential environmental impacts and for not preparing an EIS.[30] Environmental groups also alleged violations of the ESA because BOEM failed to consult with FWS and the NMFS.[31] California alleged a violation of the CZMA for failing to consult with the state consistent with California's coastal zone management program.[32]

Defendants filed motions to dismiss the NEPA and CZMA claims on the grounds the court lacked jurisdiction since the EA and FONSI did not constitute "final agency actions" under the APA.[33] Defendants also argued the ESA claims were not ripe and were moot.[34] The district court denied the motions.[35] Parties made cross-motions for summary judgment.[36] The district court granted summary judgment to Defendants on the NEPA claims; granted summary judgment to the environmental groups on the ESA consultation claim with FWS but held the ESA claim involving NMFS was moot; and granted summary judgment to California for the CZMA claim.[37] The court granted injunctive relief on the ESA and CZMA claims, enjoining the agencies from approving permits for WST until the ESA consultation and CZMA consistency review were completed; all parties appealed.[38]

III. ANALYSIS

The Ninth Circuit resolved four issues on appeal, three of which will be discussed here. First, the court found it had subject matter jurisdiction to hear this case because the agency program was a final agency action and was ripe for review.[39] Second, the agencies failed to take the hard look required by NEPA in issuing their EA and should have prepared an EIS

29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 866–67.
33. *Id.* at 867.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 868, 870.

for their proposed action.[40] Third, the court upheld the lower court's grant of summary judgment to plaintiffs on the CZMA claim.[41]

A. Jurisdictional Analysis

The Ninth Circuit first determined it had subject matter jurisdiction for the NEPA and CZMA claims.[42] Then the Court held those claims were ripe for review.[43]

Like NEPA, the CZMA does not expressly provide for judicial review, and a court must determine whether an agency action is final and reviewable pursuant to the APA.[44] Therefore, the jurisdictional analysis for both laws is the same, and a court will have jurisdiction if the action "mark[s] the consummation of the agency's decision-making process" and determines "rights or obligations" or is an action "from which legal consequences will flow."[45]

Defendants claimed the EA and FONSI were not final agency actions because those documents were only "preliminary steps toward making a decision about the use of [WST] in the federal waters off the California coast," noting individual WST still required individual permits.[46] Defendants also argued there needed to be a decision document containing a binding plan that is separate from final NEPA documents for an agency action to be "final."[47]

The Ninth Circuit rejected these arguments.[48] The Court noted the agencies approved 51 permits authorizing WST without environmental review and that defendants provided no evidence those permits would ever be reevaluated.[49] Furthermore, the Court found the agencies' return to the pre-settlement status quo allowing unrestricted WST strongly affected oil companies' rights and determined plaintiffs' rights to further environmental review.[50] Additionally, oil companies' ability to resume WST without limitation constituted legal consequences flowing from the EA and

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40. *Id.* at 882.
41. *Id.* at 886.
42. *Id.* at 868.
43. *Id.* at 870.
44. *Id.* at 867 (quoting 5 U.S.C. § 704 (2022).
45. *Id.* at 867–68 (quoting Bennett v. Spear, 520 U.S. 154, 177–78, 1997)).
46. *Id.* at 868–69.
47. *Id.* at 869.
48. *Id.* at 868–69.
49. *Id.*
50. *Id.* at 869

FONSI.[51] The Court concluded the EA and FONSI were final agency actions because no further programmatic environmental review of WST would be conducted.[52]

The Ninth Circuit then turned to the question of ripeness. The test for determining ripeness in the agency context requires evaluating "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."[53]

Here, the Court found delaying judicial review would cause the plaintiffs hardship because negative environmental consequences at the programmatic level might be overlooked, resulting in compounding and extending harms to plaintiffs until agencies reviewed site-specific WST.[54] Moreover, judicial intervention was appropriate at this juncture because the FONSI constituted a finalized NEPA document and therefore an administrative resting place for addressing procedural injuries.[55] Lastly, the court saw no need for additional factual development for a procedural injury because the alleged administrative violations were complete.[56]

B. NEPA

The Ninth Circuit focused its analysis on plaintiffs' allegations that defendants violated NEPA by preparing an inadequate EA that failed to take a "hard look" at the environmental impacts of allowing WST and by not preparing an EIS.[57] Because judicial review in this case is governed by the APA, these agency actions are reviewed using the arbitrary and capricious standard pursuant to the APA.[58] When reviewing whether this EA was arbitrary and capricious, a court examines "whether [the EA] has adequately considered and elaborated the possible consequences of the proposed agency action when concluding that it will have no significant impact on the environment, and whether its determination that no EIS is required is a reasonable conclusion."[59]

1. Agencies Prepared an Inadequate EA

The Ninth Circuit found the agencies' EA inadequate and in violation of NEPA because the agencies relied on erroneous assumptions in-

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51. *Id.*
52. *Id.* at 868–69.
53. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).
54. *Env't. Def. Ctr.*, 36 F.4th at 870.
55. *Id.*
56. *Id.* at 871.
57. *Id.* at 872.
58. *Id.* at 871.
59. *Id.* at 872 (quoting Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1215 (9th Cir. 2008).

stead of taking the requisite "hard look" at the potential environmental effects of authorizing offshore WST.[60] Whether an agency took a "hard look" under NEPA is determined by examining whether an agency relied on "incorrect assumptions and data" to arrive at its conclusion of no significant impacts.[61]

The agencies' conclusion of no significant impact relied on the assumption that WST would occur infrequently, rendering any subsequent adverse environmental impacts insignificant.[62] The agencies evaluated the data for the historical usage of WST and the expected industry future needs for WST to predict a maximum of five WST per year.[63]

However, the Ninth Circuit found the agencies' data collection was incomplete, and the agencies did not know the actual number of WST in operation in the Pacific Outer Continental Shelf.[64] Additionally, the EA provided conflicting information regarding its analysis of future industry needs.[65] The EA stated the nature of the offshore oil reservoirs decreased the need for WST while the EA's no action alternative warned offshore wells may need to close in the absence of WST.[66] Therefore, the Court concluded the agencies acted arbitrarily and capriciously by offering an EA that ran "counter to the evidence before the agency" and that the agencies failed to take a hard look by "rely[ing] on incorrect assumptions [and] data" in arriving at their conclusions.[67]

Additionally, the agencies' EA assumed maintaining compliance with permits issued by the Environmental Protection Agency ("EPA") under the Clean Water Act would prevent the WST from having significant environmental impacts.[68] Under the Clean Water Act, the EPA issued National Pollution Discharge Elimination System General Permits ("NPDES") to broadly regulate the discharge of certain, specified chemicals from a range of offshore oil and gas activities.[69] However, plaintiffs argued the NPDES permit neither requires monitoring for the most common fluids used in WST nor limits the discharge of specific WST chemicals.[70]

The Ninth Circuit reiterated that agencies could not use assessments of similar projects for NEPA environmental reviews when those

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60. *Id.*

61. *Id.* at 872–73 (quoting Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 964 (9th Cir. 2005)).

62. *Id.* at 873.

63. *Id.*

64. *Id.*

65. *Id.* at 873–74.

66. *Id.*

67. *Id.* (quoting Defs. of Wildlife v. Zinke, 856 F.3d 1248, 1257 (9th Cir. 2017) and Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 964 (9th Cir. 2005)).

68. *Id.* at 874–75.

69. *Id.*

70. *Id.*

assessments fail to examine the "impacts of the project at issue."[71] It also noted that federal agencies may not rely on state permits to satisfy review under NEPA.[72] The Court found the agencies' reliance on the NPDES permit inappropriate because the NPDES permit was issued by a different federal agency and did not specifically address the impacts of broad WST authorization.[73]

The Ninth Circuit provided three reasons why NPDES permits were inadequate for the WST at issue.[74] First, the NPDES permit does not apply to the most common chemicals used in WST and would allow for unlimited discharges of certain chemicals.[75] Second, the NPDES permit requires reoccurring whole effluent toxicity tests that may not detect chemicals used in WST.[76] This creates significant gaps in data collection that result in unknown impacts.[77] Third, BOEM and BSEE relied on a permit issued by the EPA, a distinct and separate federal agency, to evaluate environmental impacts for a NEPA analysis conducted by BOEM and BSEE.[78] For these reasons, the Court found the agencies acted arbitrarily and capriciously by relying on the flawed assumption that compliance with NPDES permits would render any environmental impacts of WST insignificant.[79]

2. Agencies Failed to Consider Reasonable Alternatives

Additionally, the Ninth Circuit found the agencies failed to consider an adequate range of alternatives to their proposed action of allowing WST.[80] NEPA requires agencies to consider a reasonable range of alternatives to proposed actions for both EAs and EISs.[81] Then, agencies must create a "detailed statement" explaining why other alternatives were not chosen.[82] The reasonableness of alternatives is also modified by the purpose and need statement, but the purpose and need cannot "unreasonably narrow[ ] the agency's consideration of alternatives so that the outcome is

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71. *Id.* (quoting South Fork Band Council of Western Shoshone v. U.S. Dep't of Interior, 588 F.3d 718, 726 (9th Cir. 2009)).

72. *Id.* (citing *S*outh Fork Band of Western Shoshone and Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 998 (9th Cir. 2004)).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 875.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 877.

81. *Id.* at 876 (citing 42 U.S.C. § 4332(C)(iii)).

82. *Id.* (citing 40C.F.R. §§ 1502.14(a), 1508.9(b)).

preordained."[83] Courts use a deferential standard of review when assessing the reasonableness of alternatives.[84]

Plaintiffs argued the agencies created an overly narrow and prescriptive purpose and need statement that identified WST as a solution rather than creating a purpose and need statement that identified an underlying need.[85] While the Court found the purpose and need statement narrowly written in response to settlement agreements, here, it held the statement was reasonably written and passed the deferential standard of review.[86]

However, the Court still found the agencies violated NEPA by failing to consider reasonable alternatives.[87] Agencies must consider all reasonable alternatives, and if there exists a "viable but unexamined alternative," the environmental review conducted under NEPA is considered inadequate.[88]

In the EA, the proposed action was allowing the use of WST without restriction.[89] The agencies examined three action alternatives in addition to the "no-action" alternative required by NEPA.[90] Plaintiffs argued the three action alternatives lacked any meaningful difference, preventing informed decision making.[91] The agencies acknowledged the similarity of their action alternatives, and noted the alternatives evaluated "the same four types of WST," which would result in similar impacts.[92]

Various commenters, including the state of California, offered a range of specific alternatives that limited or altered the use of WST.[93] While the agencies concluded the proffered alternatives did not lend themselves to meaningful analysis, the Court found the agencies failed to explain why those alternatives did not warrant meaningful analysis.[94] The Court concluded the agencies did not meet their obligations under NEPA because their analysis failed to consider those alternatives or explain their exclusion.[95] Additionally, the agencies relied on an estimate of up to five

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83. *Id.* (quoting Alaska Survival v. Surface Transp., 705 F.3d 1073, 1084–85 (9th Cir. 2013).
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 877–78.
88. *Id.* at 877 (quoting Westlands Water Dist. v. U.S. Dept. of Interior, 376 F.3d 853, 865 (9th Cir. 2004)).
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*

WST per year for determining the environmental impact, but the agencies imposed no limit on WST per year in any of their alternatives.[96]

3. An EIS is Required

The Ninth Circuit held an EIS was required.[97] Under NEPA, an EIS is required when there is a substantial question as to whether significant environmental effects might occur.[98] As noted previously, the EA relied on incomplete data that resulted in significant gaps of knowledge as to the potential environmental impacts of WST, and the Court found missing data alone adequate to require an EIS.[99]

Furthermore, the Court found an EIS was required because the agencies failed to consider "both context and intensity."[100] Context refers to the setting and circumstances of the proposed action, and intensity refers to the "severity of the impact."[101] The intensity of a proposed action requires an analysis of ten factors, any of which may trigger the need to complete a full EIS.[102]

Here, the Ninth Circuit found multiple factors indicating a failure to consider the both context and intensity WST approval.[103] Consultation with wildlife agencies found several protected species would be adversely affected by oil spills, which the court considered *prima facie* evidence of the need for an EIS.[104] The Court also found agencies failed to consider the unique characteristics of the geographic area potentially affected by WST by not considering impacts to the entire Santa Barbara Channel, a unique and globally important ecosystem.[105]

C. CZMA

The CZMA was enacted by Congress to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."[106] When a proposed "federal agency activity" affects a state's coastal zone, the CZMA requires federal agencies review the proposed activity to determine whether it is consistent with the state's coastal management program.[107] The agencies contend the proposed action in the EA and FONSI does not

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96. *Id.* at 877–78.
97. *Id.* at 879.
98. *Id.* at 878–79 (citing Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864–65 (9th Cir. 2005)).
99. *Id.* at 879.
100. *Id.* (citing 40 C.F.R. § 1508.27).
101. *Id.* (quoting 40 C.F.C. § 1508.27(a)–(b)).
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 879–80.
106. *Env't. Def. Ctr.*, 36 F.4th at 885 (quoting 16 U.S.C. § 1452(1)).
107. *Id.* (quoting 16 U.S.C. § 1456(c)(1)(A)).

constitute a "federal agency activity" because companies would still need individual permits before using WST.[108]

The primary issue before the court was whether the programmatic EA and FONSI qualify as a "federal agency activity" under the CZMA. While the CZMA does not specifically define "Federal agency activity," this term is broadly defined by subsequent regulations and includes "any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities."[109]

Here, the Ninth Circuit found deciding whether to allow WST in the Pacific Outer Continental Shelf is a function performed by the agencies pursuant to their "statutory responsibilities" under the Outer Continental Shelf Lands Act. Furthermore, the Court found the preparation of an EA and FONSI constituted an "exercise of [the agencies'] statutory responsibilities" under NEPA that also satisfied the regulatory definition of "Federal agency activity."[110] CZMA regulatory definitions also include "activities where a Federal agency makes a proposal for action initiating an activity or a series of activities when coastal effects are reasonably foreseeable," including a "plan that is used to direct future agency actions."[111] The Court reasoned the proposed action of allowing unrestricted WST in the programmatic EA is a "proposal for action" that will "direct future agency actions," firmly placing the proposed action for WST within the purview of the CZMA and subject to a consistency review.[112]

IV. CONCLUSION

This case presented an application of the APA to a programmatic EA that would have allowed for the approval of WST throughout the Outer Pacific Continental Shelf. By finding that general approval of certain oil and gas extraction methods constituted a reviewable final agency action, the Ninth Circuit has potentially created a template for further NEPA litigation based on the general, programmatic approval of resource extraction methods without the need for specific resource extraction proposals or permits. Additionally, this ruling builds on the extensive history of NEPA litigation by providing examples of clearly arbitrary and capricious agency action in the preparation of an EA and FONSI.

108. *Id.*
109. *Id.* (citing 15 C.F.R. § 930.31(a)).
110. *Id.* at 867.
111. *Id.* (citing 15 C.F.R. § 930.31(a)).
112. *Id.*